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**Human Rights First Comment on
Department of Homeland Security & Department of Justice Executive Office
for Immigration Review, “Procedures for Credible Fear Screening and
Consideration of Asylum, Withholding of Removal, and CAT Protection
Claims by Asylum Officers,” 86 FR 46906**

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46906**

Human Rights First submits these comments in response to the Department of Homeland Security (DHS) and the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (collectively the agencies) request for public comment regarding the proposed rule on the asylum process published in the Federal Register on August 20, 2021.¹ The Notice of Proposed Rule Making (NPRM or proposed rule) sets forth a new process to adjudicate asylum claims for some asylum seekers who have received positive credible fear determinations and who may be referred for asylum “hearings” before the U.S. Citizenship and Immigration Services (USCIS) Asylum Office among other changes to the asylum process.

Overview of Comment

Human Rights First welcomes many of the changes proposed in this rule but is gravely concerned about provisions that propose to deprive asylum seekers of access to immigration court removal hearings and eliminate a safeguard that has spared many asylum seekers from deportation to their country of persecution due to flawed expedited removal orders. We recommend changes to the proposed rule, outlined below, to better achieve the goals of conducting timely and fair asylum adjudications, reducing the Asylum Office and immigration court backlogs, and treating refugees humanely and in line with U.S. law and treaty obligations. Human Rights First’s recommendations are informed by its expertise on refugee law and treaties, and its years of providing pro bono legal representation to asylum seekers at all stages of the asylum process – including in expedited removal and credible fear proceedings, in Asylum Office interviews, before the immigration courts and on appeal.

Human Rights First has previously recommended that asylum adjudications be upgraded so that the USCIS Asylum Office adjudicates all (rather than just some) asylum cases initially and grants cases qualifying for refugee protection instead of referring grantable cases to the immigration courts, which would greatly reduce the numbers sent into immigration court removal hearings. Such a system would not only be more efficient and help reduce backlogs and delays, but it would also enable more asylum seekers to have their cases resolved through a non-adversarial and less intimidating interview.

The main reason to favor Asylum Office interviews over immigration court hearings as the initial method of adjudicating refugee claims is the interview’s potential for a less intimidating, more conversational format. An overarching concern of Human Rights First about this proposed rule, and in particular its attempt to limit the scope of immigration court review for cases of asylum seekers not granted at the asylum office level, is that in order to create a record that would allow

¹ U.S. Dep’t of Homeland Security & Exec. Off. for Immigr. Review, “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers,” 86 FR 46906, (Aug. 20, 2021), <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

for meaningful review by an immigration judge and for further review thereafter, the asylum interview would have to be changed in ways that would sacrifice the very qualities that make the asylum office humane.

Efforts to provide asylum seekers an opportunity to first present requests for asylum in a setting that is less adversarial than the immigration courts and provide more timely adjudications should not be embedded in the fundamentally flawed and inefficient expedited removal process. The proposed rule should accordingly be revised to implement referrals to the Asylum Office in a way that is not tied to the use of expedited removal, as explained below. In addition, the rule should include, and USCIS should implement, additional reforms to ensure that more cases that qualify for refugee protection are *actually granted* by the Asylum Office, rather than being referred for immigration court adjudications which could have been averted if an accurate decision had been rendered initially by the Asylum Office. For example, 76 percent of cases that asylum officers did not grant after interview were subsequently granted asylum by the immigration courts from Fiscal Year (FY) 2012 to 2016,² confirming what Human Rights First sees regularly in its own legal representation work – that the Asylum Office itself often fails to grant many qualifying cases, adding tremendously to inefficiencies and delays in the asylum system and needlessly traumatizing asylum seekers whose cases could have been instead granted by the Asylum Office.

As asylum officers regularly fail to grant qualifying cases initially and in order to uphold due process, the safeguard of a *de novo* immigration court hearing is crucial. Human Rights First is gravely concerned and alarmed that the proposed rule seeks to curtail asylum seekers' access to immigration court hearings (for those not granted by the asylum office). This proposal would deprive asylum seekers found to have credible fears of persecution of access to an immigration court hearing, even though members of Congress made clear they intended to preserve access to such hearings, as explained below. We urge that access to full removal hearings be preserved, rather than creating a whole new system of limited immigration court "reviews" that would restrict the evidence and testimony asylum seekers can present.

The proposed rule would attempt to turn Asylum Office interviews into "hearings," but a new label and changes to some procedures do not create a formal court hearing. Instead, the Asylum Office "hearings" would risk creating an unnecessarily confrontational interaction and losing many of the efficiencies that should otherwise allow asylum officers to handle large numbers of cases more swiftly. The "hearing" would serve as an asylum seeker's last real chance at demonstrating their asylum claim, as the proposed rule eliminates a full hearing on the asylum claim before the immigration court. The experts cited in the proposed rule's explanatory section recommending initial Asylum Office adjudications—including the bipartisan U.S. Commission on International Religious Freedom (USCIRF), the Administrative Conference of the United States, and the Migration Policy Institute—did *not* recommend curtailing access to immigration court

² U.S. Dep't of Justice, "FY 2016 Statistics Yearbook," (March 2017), <https://www.justice.gov/eoir/page/file/fysb16/download>.

hearings, and in fact indicated their continued availability,³ as the NPRM acknowledges.⁴ *De novo* immigration court consideration of asylum cases referred by the Asylum Office is a crucial due process safeguard that guards against wrongful deportations of refugees to persecution and torture.

Curtailing access to immigration court hearings and allowing only abridged or limited hearings is unjustifiable. This aspect of the proposal appears aimed more at sending a political message that some parts of the process will be made more difficult for asylum seekers, rather than making the asylum system more fair, accurate, timely and effective. Politicized attempts to speed up processing have—again and again—proven counterproductive and exacerbated backlogs and delays.⁵ Moreover, the delays and backlogs in the immigration courts were not caused by the fact that an asylum seeker can, for instance, introduce evidence or call witnesses. A number of factors contributed to the growth of these backlogs, including failures to adequately staff and promptly hire at the immigration courts to manage caseloads, logjams caused by sharp disparities between massively increasing funding for enforcement agencies and lagging funding for adjudications,⁶ and repeated attempts to pressure immigration judges to speed up adjudications,⁷ as Human Rights First has detailed repeatedly⁸ as it urged various administrations and Congress to take action.

³ U.S. Comm’n on International Religious Freedom, “Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal,” <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>, p.54 (“in cases that the asylum officer cannot grant due to complications relating to the asylum claim itself should be referred to an immigration judge”); Admin. Conference of the United States, “Adjudication Committee Meeting,” (March 12, 2012), https://www.acus.gov/sites/default/files/documents/Memo-to-Comm.-on-Adj.-re-3_5_12-Mtg-Recs.pdf (“if the Asylum Office does not grant the application for asylum or withholding, or if the respondent does not comply with Asylum Office procedures, the Asylum Office would refer the case to ICE counsel to prepare a motion to re-calendar before the immigration court”); Doris Meisner, “The U.S. Asylum System in Crisis,” Migration Policy Institute, <https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf>, p.26 (“Applicants denied asylum by the Asylum Division would still be able to raise their claims in subsequent removal proceedings before an immigration judge.”).

⁴ 86 FR 46906, 46918 (“The Departments acknowledge that the above recommendations assumed that individuals denied asylum by a USCIS asylum officer would be issued an NTA and placed into section 240 removal proceedings before an IJ, where the noncitizen would have a second, full evidentiary hearing on the asylum application with a different decisionmaker.”).

⁵ See General Accounting Office, “Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges,” (Sep. 2008), <https://www.gao.gov/assets/gao-08-940.pdf>.

⁶ Associated Press, “Thousands of Undocumented Immigrants See Court Hearings Delayed to 2019 or Later,” (Feb. 3, 2015), <https://www.homelandsecuritynewswire.com/dr20150203-thousands-of-undocumented-immigrants-see-court-hearings-delayed-to-2019-or-later>.

⁷ Julia Preston & Andrew R. Calderón, “Trump Tried to Deport People Faster. Immigration Courts Slowed Down Instead,” *The Marshall Project*, (July 16, 2019), <https://www.themarshallproject.org/2019/07/16/trump-tried-to-deport-people-faster-immigration-courts-slowed-down-instead>.

⁸ Human Rights First, “In the Balance: Backlogs Delay Protection in the U.S. Asylum System and Immigration Court Systems,” (Apr. 2016), <https://www.humanrightsfirst.org/sites/default/files/HRF-In-The-Balance.pdf>; Human Rights First, “Tilted Justice Backlogs Grow While Fairness Shrinks in U.S. Immigration Courts,” (Oct. 2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf>;

Backlogs in the immigration courts and Asylum Office hurt asylum seekers, as many of Human Rights First’s clients have explained in our reports⁹ detailing recommendations to address these challenges. Adjudication delays leave asylum seekers in legal and psychological limbo, separated from family, limited in the educational and professional opportunities they can pursue, and unable to begin to rebuild their lives in the United States. Addressing and remedying these backlogs and delays should be a top priority for both the administration and Congress. Instead of depriving asylum seekers of due process and the safeguard of immigration court removal hearings that reduce the risk that refugees will be wrongly deported to persecution, Human Rights First urges that the rule require steps that will ensure immigration court hearings are conducted more effectively, efficiently, and humanely, including requiring preliminary conferences and ensuring judges’ ability to manage their dockets.

Instead of a plan premised on curtailing access to due process hearings and entrenching due process deficient expedited removal, Human Rights First continues to urge an upgraded, fair, accurate, effective and timely asylum system with changes to ensure, among other critical reforms, that: (1) the USCIS Asylum Office adjudicates all asylum cases initially (not via expedited removal) and actually grants cases qualifying for refugee protection, rather than punting so many to the immigration courts; (2) Immigration court hearings are upgraded and made more efficient, including by requiring preliminary conferences and ensuring judges’ ability to manage their dockets; (3) increased staffing across the asylum office and immigration courts boosted to decide both incoming and backlogged cases—and improved translation at both the asylum office and immigration courts. Human Rights First has outlined its detailed recommendations in blueprints,¹⁰ an asylum office backlog paper¹¹ and a paper on the immigration courts issued earlier this year along with the Center for Gender and Refugee Studies¹²—and identifies in Section VII and throughout this comment key reforms that should be implemented, including through this rule.

Human Rights First welcomes many provisions of the proposed rule relating to the conduct of expedited removal – a fundamentally flawed process that Congress should eliminate. For instance, we support proposed rule provisions that would undo changes made by the Trump administration to attempt to alter the credible fear standard and to use expedited removal as a tool for preventing refugees from seeking asylum. These welcome changes include requiring that USCIS asylum officers conduct fear screening interviews, eliminating consideration of many of

⁹ See supra n.7; Human Rights First, “Protection Postponed: Asylum Office Backlogs Cause Suffering, Separate Families, and Undermine Integration,” (Apr. 9, 2021), <https://www.humanrightsfirst.org/resource/protection-postponed-asylum-office-backlogs-cause-suffering-separate-families-and-undermine>.

¹⁰ Human Rights First, “Walking the Talk: 2021 Blueprints for a Human Rights-Centered U.S. Foreign Policy - Chapter 3: Upholding Refugee Protection and Asylum at Home,” (Oct. 2020), https://www.humanrightsfirst.org/sites/default/files/HRF_Standalone_Ch.3_v6.pdf; Human Rights First, “Recommendations for Biden Administration: Welcoming the Persecuted, Restoring Order, and Upholding Asylum Law, Refugee Treaties and Values,” (Jan. 25, 2021), <https://www.humanrightsfirst.org/resource/recommendations-biden-administration-welcoming-persecuted-restoring-order-and-upholding>.

¹¹ Human Rights First, “Protection Postponed.”

¹² Human Rights First & Center for Gender & Refugee Studies, “Swift Action to Improve Fairness and Enable Timely Asylum Hearings in Immigration Courts,” (Apr. 6, 2021), <https://www.humanrightsfirst.org/sites/default/files/FairandTimelyAsylumHearings.pdf>.

the bars to asylum¹³ during preliminary screening interviews, allowing asylum officers to include accompanying family members within an applicant’s fear determination to promote family unity, and considering positive credible fear determinations to meet the requirements of the one-year filing deadline and to start the waiting period for employment authorization, among other positive proposals.

However, Human Rights First strongly objects to the proposal to eliminate the ability of the Asylum Office to correct a mistaken credible fear finding through requests to reconsider a determination by one of its officers. This safeguard has saved many lives by preventing the expedited removal of asylum seekers who meet the relevant standards for asylum, as explained below. Substantially improving the quality and accuracy of Asylum Office credible fear determinations and immigration court reviews of such determinations would be the most effective way to make such requests for reconsideration much less necessary.

In addition, as detailed below, Human Rights First suggests additional changes to ensure that asylum seekers are eligible for and are released on parole to avoid needless and harmful jailing of refugees seeking protection in the United States. Human Rights First also suggests additional measures that could help limit the harms of expedited removal. Even with these reforms to expedited removal, as long as this process remains in law and in use, the United States will continue to risk returning refugees to persecution in violation of its refugee treaty commitments against *refoulement*.

We applaud the administration for issuing this regulation as a proposed rule and providing the public an opportunity to comment before putting this rule into effect – a welcome change from the prior administration and its recurrent attempts to illegally circumvent the notice and comment process. We note, however, that it is difficult to comment fully on the impact of the proposed rule without the benefit of reviewing and understanding its interaction with other rulemaking in the works on the expedited removal and asylum adjudication processes.

This comment is organized as follows:

- Section I explains why preserving consideration of asylum claims through full immigration court hearings is a crucial safeguard against wrongful deportations of refugees to persecution and torture.
- Section II details why it is critical to retain the safeguard of requests for reconsideration to prevent the mistaken deportation of asylum seekers subjected to expedited removal.
- Section III describes how conducting Asylum Office “hearings” will reduce—and not improve—the efficiency and timeliness of asylum adjudications.
- Section IV explains the absurdity and cruelty of permitting immigration judges to overturn DHS’s own decisions to grant withholding of removal or protection against the Convention against Torture.

¹³ For instance, although currently enjoined by litigation, the proposed rule would not eliminate bars to asylum created by the asylum entry ban and the third-country transit asylum ban. *See* 86 FR 46906, 46914. Human Rights First urges the administration to eliminate by regulation these illegal bars to asylum.

- Section V recommends that the administration expand the availability and use of parole and bond to avoid the needless and harmful detention of asylum seekers.
- Section VI lays out the harms of expedited removal and suggests safeguards to attempt to protect against mistaken deportations under this inherently and dangerously flawed process.
- Section VII provides the recommendations of Human Rights First to create an effective, humane, and timely asylum system.

Human Rights First and Its Interest in This Issue

For over 40 years, Human Rights First has provided pro bono legal representation to refugees seeking asylum in the United States and advocated for the protection of the human rights of refugees. Human Rights First grounds its work in the legal standards of the 1951 Refugee Convention, its 1967 Protocol, and other international human rights instruments, and we advocate adherence to these standards in U.S. law and policy. Human Rights First operates one of the largest and most successful pro bono asylum representation programs in the country. Working in partnership with volunteer attorneys at many of the nation’s leading law firms, we provide legal representation, without charge, to hundreds of refugees each year through our offices in California, New York, and Washington D.C. This extensive experience dealing directly with refugees seeking protection in the United States is the foundation for our advocacy and informs the comments that follow.

I. Preserve Critical Due Process Protections of Full Immigration Court Hearings, as Congress Intended for Asylum Seekers

The asylum process proposed by the NPRM would deny asylum seekers who are not granted asylum at the Asylum Office a full immigration court hearing in which an adjudicator, who is supposed to be neutral, would assess their life-or-death requests for protection. Human Rights First is profoundly concerned by this proposal and urges the agencies to restore the crucial due process safeguard of full immigration court hearings for all asylum seekers. We also express concern that the proposed rule, which limits due process protections by eliminating full immigration court hearings, effectively penalizes asylum seekers based on their manner of entry—in violation of Article 31 of the Refugee Convention—as the rule would apply only to persons who have sought asylum at or after recently crossing the border.¹⁴

Under current regulations, when the Asylum Office does not grant asylum to an applicant who lacks immigration status, the asylum officer automatically refers the case to the immigration court for *de novo* consideration during a full removal hearing under 8 U.S.C. § 1229a.¹⁵ In these proceedings, asylum applicants are, by law and/or regulation, guaranteed an opportunity to present relevant evidence and testimony, apply for all available forms of relief, and receive a

¹⁴ See, e.g., 86 FR 46906, 46906 (rule intended to “consider the asylum claims of individuals encountered at or near the border”); 86 FR 46906, 46910 (rule would “establish . . . adjudication process for individuals encountered at or near the border”).

¹⁵ 8 C.F.R. §208.14.

decision based on the hearing that explains the reasons for the judge’s decision.¹⁶ These minimal procedural guarantees in regular removal proceedings allow asylum seekers an opportunity to present their case to an immigration judge and receive a reasoned decision from which they can appeal, if needed.

By contrast, proposed 8 C.F.R. § 1003.48 would erase critical protections of full removal hearings and limit immigration court consideration of asylum officer decisions to issue removal orders, and to grant or deny asylum, withholding of removal under the Immigration and Nationality Act (INA), and Convention against Torture (CAT) protection. For instance, the proposed immigration judge “reviews” would require an applicant to affirmatively request immigration court review, bar applications for other forms of relief, and limit the submission of evidence unless an immigration judge deems it “necessary” and “not duplicative.” As the explanatory section of the NPRM makes clear, immigration judges would be expected to rule in these “reviews” without holding an evidentiary hearing.¹⁷ The proposed regulations do not even explicitly guarantee the asylum seeker a right to receive a decision from the immigration judge that lays out the reasons for his or her decision. The due process protections stripped away by the proposed rule are discussed in further detail below and illustrated in the following table, which compares protections in regular immigration court removal proceedings under 8 U.S.C. § 1229a—the process asylum seekers are currently guaranteed—to the limited immigration court “review” envisioned by the rule.

Full consideration by the immigration court of cases initially adjudicated and not granted asylum by the Asylum Office is crucial. For one, the Asylum Office has a long history of failing to grant asylum claims that could have been granted and which were ultimately granted by the immigration court. DOJ data shows that 76 percent of cases that asylum officers did not grant after interview were subsequently granted asylum by the immigration courts from Fiscal Year (FY) 2012 to 2016 (the last year with available data and before Trump administration efforts to pressure immigration judges to deny asylum).¹⁸

Human Rights First has represented many refugees who were erroneously referred by the Asylum Office and subsequently granted asylum by an immigration judge in a full, *de novo* hearing upon presenting additional evidence and testimony. Had these refugees been denied a full hearing in immigration court, they could have instead been deported to persecution and torture.

This is a particular concern with respect to asylum applicants denied on grounds of credibility, as a number of asylum officers, unfortunately, approach asylum interviews as a hunt for inconsistencies rather than an opportunity for a comprehensive assessment of the refugee claim, with sometimes absurd results. Assessing whether or not their adverse credibility determinations are warranted—and if so, whether they justify denial of the claim, which should in some cases be a separate question—will normally require hearing testimony from the asylum applicant and/or

¹⁶ 8 U.S.C. §1229(a); 8 C.F.R. §1240.7; 8 C.F.R. §1240.1.

¹⁷ See 86 FR 46906, 46919 (“an [immigration judge] ordinarily would not conduct an evidentiary hearing on the noncitizen’s asylum application”); 86 FR 46906, 46920 (“the Departments expect that the [immigration judge] generally would be able to complete the *de novo* review solely on the basis of the record before the asylum officer”).

¹⁸ U.S. Dep’t of Justice, “FY 2016 Statistics Yearbook.”

the submission of additional evidence, but needing to convince an immigration judge of this as a separate requirement would tend to defeat whatever efficiency gains the proposed rule hopes to achieve here, except with respect to unrepresented or poorly represented applicants, who would be left to very uncertain fates.

For example, “Issam,” an asylum applicant from Syria who later became a Human Rights First client was denied asylum by the Asylum Office on credibility grounds. This older man had a long history of detention and torture in Syria stretching back to the early 1980’s. He was from a town that was well-known as a center of opposition to the Assad regime and that was, at the time of his interview, the target of government shelling. He had learned just a few months before his asylum interview that a missile had struck his house, killing all his younger children. At the time of his asylum interview, his older son was in detention in Syria after being shot and then tortured by the Syrian security forces for peacefully demonstrating against the government. Rather than focusing on these present reasons for his fear of return to Syria, the asylum officer spent most of the interview pressing Issam for a blow-by-blow account of a much earlier episode of detention he had suffered in the early 1980’s. While traumatic, this episode was unrelated to Issam’s decision to seek asylum in 2011, and the asylum officer’s notes show that Issam, numb from all his losses, was baffled as to what kind of detail exactly the officer wanted. The asylum officer’s adverse credibility finding faulted Issam for not providing sufficient detail of this past harm and of his political activism in Syria. Issam had in fact provided a good deal of detail on the latter topic and cited as his partners in this activism some very well-known figures in the Syrian political opposition, whose names the asylum officer (judging from the way he transliterated them) apparently did not recognize. A *de novo* hearing before the immigration court provided Issam the opportunity to present testimony from people with personal knowledge of his activities, documentation of what had happened to his son, medical evidence of his own past torture, and other evidence not presented to the Asylum Office, including a clearer declaration from Issam himself of the facts of his claim. The immigration judge granted him asylum.¹⁹

“Zeina,” an asylum seeker from Egypt, had gone to her affirmative asylum interview without a lawyer and had been referred based on some actual inconsistencies in her Form I-589 asylum application, prepared by a friend who was not as familiar with the facts of her life or as fluent in English as Zeina had assumed, and conflated some facts of her professional background. Before the immigration judge, Zeina was able to present, among other things, extremely strong medical evidence of past torture, as well as evidence relevant to her fear of future persecution that was simply not available at the time of her asylum interview. Her merits hearing was greatly abbreviated as a result of the strength of her evidence and the Immigration and Customs Enforcement (ICE) trial attorney’s recognition of the merit of the case. This both spared Zeina traumatic testimony and saved the court’s time.

While this additional evidence helped ensure the correct decisions Issam and Zeina ultimately received, it is unclear now this would work out in the case of an asylum seeker subject to the

¹⁹ It is worth noting that aside from all the details of his own activism and past persecution, Mr. S’s case should have been grantable in short order based on facts of his identity and biography that were never in dispute, namely his precise place of origin, his sectarian identity, and his departure from Syria. The Asylum Office’s intense focus on detail and consistency, quite aside from how it is experienced by asylum applicants, can lead to adjudicators missing the forest for the trees.

proposed rule. It is hard for an immigration judge to determine what is duplicative and what is necessary based on an asylum officer’s decision if the asylum officer missed the point of the asylum claim, but if the immigration judge needs to make a decision to admit new evidence or allow further testimony based on a full review of the evidence the applicant seeks to present, this adds what is in effect a motion to reopen to every asylum claim. The legal services currently available to asylum seekers, particularly those unable to pay for counsel, are finite. Demanding that asylum seekers make two showings instead of one in any case where a person was not adequately represented or assessed at the Asylum Office level does not advance the fairness of the system.

Years of representing refugees who are erroneously denied asylum by the Asylum Office have illustrated to Human Rights First that immigration court hearings are critical to ensuring accurate refugee protection decisions. The need to strengthen and improve these hearings is addressed below in Section VII.

The below table and explanatory sections describe the deficient immigration court “review” process created by the proposed rule and contrast these to the due process guarantees currently available in full immigration court proceedings.

Existing Immigration Court Proceedings vs. Proposed Immigration Court “Review”		
Due Process Protection	Immigration Court Proceedings Under 8 U.S.C. § 1229a and related regulations	Immigration Court “Review” Under Proposed 8 C.F.R. § 1003.48
Referral mechanism	If the Asylum Office does not grant asylum and the applicant does not have currently valid immigration status, the Asylum Office automatically refers applicants to proceedings before the immigration court. 8 C.F.R. § 208.14.	Where the Asylum Office denies asylum and issues a removal order, applicants are denied an immigration court hearing unless they affirmatively request review. Proposed 8 C.F.R. § 1003.48(a).
Right to present testimony and other evidence	Applicants have a right to present relevant testimony or documentation on their behalf to an immigration court judge. 8 U.S.C. § 1229a(b)(4); 8 C.F.R. § 1240.7.	Applicants are barred from submitting testimony and written evidence not presented previously to the Asylum Office unless the immigration judge grants permission, if the applicant can establish that the evidence is “not duplicative” and is “necessary to ensure a sufficient factual record.” Proposed 8 C.F.R. § 1003.48(e).
Basis of decision	The immigration court bases its decision on evidence and testimony presented in a <i>de novo</i> hearing before the immigration court judge. 8 C.F.R. § 1240.7-12.	The immigration court bases its decision on the same potentially erroneous record and decision created by the Asylum Office as well as evidence the court permits to be entered into the record. Proposed 8 C.F.R. § 1003.48(e).
Available relief	Applicants may apply for all forms of relief enumerated in 8 C.F.R. § 1240.1, including adjustment of status.	Applicants may not apply for any relief other than asylum, withholding of removal, or protection under the

		Convention against Torture. Proposed 8 C.F.R. § 1003.48(a).
Format of decision	The immigration court must produce a written or oral decision explaining the reasons underlying the grant or denial. A written decision must be served on the applicant; an oral decision must be stated in the presence of the applicant and a summary written order provided at the applicant's request. 8 C.F.R. §§ 1240.12-13.	There is no regulatory requirement for the immigration court to produce a decision explaining the reasons for a grant or denial, nor is there a requirement to provide the decision to the applicant. Proposed 8 C.F.R. § 1003.48.

Requiring asylum seekers to affirmatively request “review” is inefficient and will disproportionately harm unrepresented asylum seekers

Requiring asylum seekers to affirmatively request review of negative Asylum Office decisions creates an additional hurdle for applicants, especially those who are unrepresented, while they navigate an already convoluted legal process that carries potentially deadly consequences should they be ordered removed. The agencies propose at 8 C.F.R. § 208.14(c)(5) to require asylum seekers to request review “as directed on the decision notice” within 30 days of a negative Asylum Office decision or permanently lose the right to immigration court review. Strict and arbitrary deadlines in life-or-death adjudications increase the risk of returning refugees to persecution and torture, especially where asylum seekers shoulder the burden to meet them.

Because the vast majority of, if not every, asylum seeker denied protection will wish to seek review of a negative decision by the Asylum Office, this provision creates an unnecessary and inefficient step which is likely to block asylum seekers who desire immigration court review of denied requests for protection. This may also spark litigation and diversion of resources to correcting injustices that would otherwise lead the United States to refool refugees to persecution.

Unrepresented asylum seekers²⁰ and those who do not read or understand English fluently are most likely to be negatively impacted by the requirement to affirmatively request review of negative Asylum Office decisions. The proposed rule, for instance, does not require that the Asylum Office provide written notice of the decision (which is to contain instructions on requesting review) in a language the asylum seeker reads and understands. Nor do the proposed regulations require the Asylum Office to provide an advisal directly to the asylum applicant of the requirements to appeal the asylum officer’s decision, the deadlines for filing appeal or the consequences for failing to do so, as immigration judges are required to do when issuing a removal order (*see* 8 C.F.R. §§ 1240.13(d), 1240.15). Asylum seekers without counsel and those who do not read English will struggle to comprehend the decision of the Asylum Office let alone understand and comply with requirements (which the proposed regulations leave entirely

²⁰ While representation rates in Asylum Office are not regularly published, many asylum seekers are without legal representation even before the immigration court. For example, of asylum decisions made in FY 2019 (the last fiscal year not impacted by pandemic-related immigration court closures), many asylum seekers were unrepresented, including 40 percent of Nicaraguan asylum seekers, 32 percent of Russian asylum seekers, 29 percent of Cuban asylum seekers, 23 percent of Eritrean asylum seekers, and 22 percent of Cameroonian asylum seekers, among other nationalities. *See* Syracuse University Transaction Records Access Clearinghouse (TRAC), “Asylum Decisions,” <https://trac.syr.edu/phptools/immigration/asylum/> (last accessed Oct. 11, 2021).

undescribed) to request review of the decision within 30 days. Even those asylum seekers with counsel may fall through the cracks as overwhelmed attorneys inadvertently or negligently fail to appeal requests. In addition, although the administration has stated its intent to increase legal representation in the immigration system, there is no guarantee that such representation will be forthcoming or would continue in the future. Finally, the proposed rule on “review” of Asylum Office “hearings” does not even provide the minimal safeguard included in proposed 8 C.F.R. § 208.30(g) that the refusal of an asylum seeker who receives a negative credible fear determination to indicate a desire to request or refuse immigration judge review “shall be considered a request for review.”²¹

Rather than create yet another new process to request review of negative decisions by the asylum office, asylum claims initially adjudicated by the Asylum Office should be automatically referred for full immigration court proceedings, as the current regulations provide. Creating additional barriers ultimately will be more costly both for asylum seekers and for the adjudication system.

Limiting the right to present evidence violates due process, is inefficient, and will result in additional appeals

While asylum seekers who are referred to immigration court for proceedings under 8 U.S.C. § 1229a may present all relevant evidence, the agencies propose at 8 C.F.R. § 1003.48(e) to prohibit applicants covered by the proposed rule from submitting additional testimony or documentation in immigration court unless *the applicant establishes* it is “not duplicative of testimony or documentation already presented to the asylum officer” and that is “necessary to ensure a sufficient factual record.” Barring asylum seekers from presenting critical evidence in their immigration court hearings, unless they persuade the immigration judge to permit it, is unjust and inefficient. This provision violates the right to a fair hearing and will lead to the need for immigration court judges to adjudicate potentially multiple requests to present evidence and additional rounds of federal court appeals, as asylum seekers challenge limitations on the evidence they were permitted to present to the immigration court. It is evident that this provision will unfairly penalize asylum seekers who are unrepresented during Asylum Office “hearings.” Limiting evidence permitted to be filed in immigration court is an outrageous barrier to due process that we urge the agencies to abandon.

Attempting to limit the testimony and evidence asylum seekers present in immigration court violates their due process rights. For example, the Ninth Circuit held that limiting asylum seeker testimony on the record violates due process.²² Moreover, asylum adjudications often hinge on considering evidence in the aggregate—such as whether a series of incidents rises to the level of persecution—and the proposed rule creates the risk that immigration judges may erroneously reject evidence as “duplicative” when it is in fact critical to a cumulative analysis.

²¹ To the extent that expedited removal remains a part of U.S. law and regulations, Human Rights First welcomes this proposed change to reviews of negative credible fear determinations to ensure that asylum seekers who do not affirmatively decline or refuse immigration judge review are provided such review.

²² *Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013) (finding that asylum seekers testimony on the record in immigration court is not duplicative because it impacts credibility determinations and that limiting such testimony violates due process); *see also Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020) (demonstrating the importance of a single sentence utterance in immigration court supporting an asylum seeker’s political opinion claim, testimony that might have been considered duplicative and rejected under the proposed rule).

This limitation is also inefficient. Because immigration court hearings may be scheduled months after the initial Asylum Office adjudication and have been, particularly during the pandemic, subject to multiple hearing cancellations and delays, many asylum seekers are likely to seek to attempt to submit new testimony and documentary evidence. Such evidence is likely to include recent news articles and updated country conditions evidence, medical, police or other official records from an asylum seeker's home country that were not previously possible to obtain, as well as expert evaluations and reports secured through legal counsel obtained after the initial Asylum Office adjudication. Requiring a separate adjudication to determine if evidence is "necessary" wastes immigration court resources. Similarly, denials of requests to present additional evidence may lead to additional rounds of federal circuit court appeals as asylum seekers challenge the sufficiency of the immigration court record and courts remand these cases for the admission and consideration of rejected evidence.

To avoid this unjust and unnecessary limitation on the submission of evidence, the proposed rule should simply refer asylum seekers not granted by the Asylum Office to regular, full removal proceedings.

Immigration court decisions based on potentially erroneous Asylum Office decisions will create a high risk of wrongful denials

Because the immigration court "review" proposed at 8 C.F.R. § 1003.48 is extremely limited and premised on the sufficiency of the "hearing" conducted by the Asylum Office, it is likely to result in the wrongful deportation of refugees to harm. Proposed 8 C.F.R. § 1003.48(e) provides that during the review, the immigration judge will decide whether the asylum seeker qualifies for protection based on the record created by the asylum officer thereby limiting the immigration court judge to a record that may be incomplete or inaccurate because of the errors or omissions by the asylum officer. Such mistakes will not be immediately apparent to immigration courts "reviewing" Asylum Office decisions, including because the proposed rule authorizes the immigration court to reject additional evidence or testimony supporting the protection claim. Flawed immigration court review of negative credible fear determinations functions more as a "rubber stamp,"²³ highlighting the dangers of denying full, independent, and comprehensive immigration court hearings in life-or-death adjudications. For instance, a Honduran asylum seeker deported through the expedited removal process after a negative credible fear determination was affirmed following a cursory immigration judge "review" was murdered in 2020 just weeks after being deported to Honduras.²⁴

Preserving access to full immigration court review provides an important safeguard against wrongful and deadly mistakes that can result from cursory "review" procedures.

²³ Lauren Schusterman, "A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions," 118 Mich. L. Rev. 655 (2020), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=4987&context=mlr>; Human Rights First, "Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture," (Oct. 1, 2021), <https://www.humanrightsfirst.org/resource/biden-administration-move-eliminate-requests-reconsideration-would-endanger-asylum-seekers>.

²⁴ Kate Morrissey, "A legitimate fear of death doesn't always matter in the U.S. asylum system," San Diego Tribune (Oct. 11, 2020), <https://www.sandiegouniontribune.com/news/immigration/story/2020-10-11/us-asylum-system-gang-violence-honduras>.

Limitations on available relief will endanger asylum seekers and waste resources

The agencies' proposal at 8 C.F.R. § 1003.48(a) to prevent asylum seekers from applying for other forms of relief during their immigration court review will waste government resources and harm asylum seekers who qualify for other lawful status or relief from removal but may nonetheless be ordered removed under the rule.

The Trump administration published a final rule that attempted to rewrite asylum law and eviscerate virtually all protection claims (often referred to as the “death to asylum rule”), which is currently enjoined in its entirety because a federal district court held it was likely unlawful.²⁵ That rule similarly barred asylum seekers who received positive credible fear determinations from applying for other forms of relief in their immigration court hearings, which Human Rights First and other organizations strongly opposed because it was inefficient and harmful.²⁶

That approach should be firmly rejected, not embraced and adopted.

Proposed 8 C.F.R. § 1003.48(d) permits an asylum applicant to move the immigration court to vacate the asylum officer's order of removal and transfer the case from the “review” process to regular removal proceedings by establishing prima facie eligibility for another form of relief. While this is a slightly less bad version of the Trump administration's rule, this process adds yet another motion for immigration judges to rule on and is likely to generate additional rounds of appeals as asylum seekers challenge wrongful denials. It also prejudices people who are not represented in immigration proceedings and/or do not speak and write English, and thus would not realistically be able to file such motions, let alone know about this option.

Human Rights First urges the agencies to avoid this unnecessary and inefficient limitation on the relief asylum applicants may pursue – and reject rather than embrace the approach of the prior administration – by referring asylum cases not granted by the Asylum Office to regular removal proceedings under 8 U.S.C. § 1229a.

Lack of requirement for immigration court to produce a decision enumerating reasons for the denial will jeopardize right to appellate review

Human Rights First is also concerned that proposed 8 C.F.R. § 1003.48 does not require an immigration judge to produce a reasoned opinion with clear and complete findings of fact during the “review” of an Asylum Office hearing. By contrast, 8 C.F.R. § 1240.12—the regulation governing an immigration judge's decision in proceedings under 8 U.S.C. § 1229a—requires the judge to explain the reasoning underlying the court's decision. These decisions are critical for

²⁵ *Pangea Legal Services v. U.S. Dep't of Homeland Security*, 20-cv-09253 (N.D. Cal. 2021); U.S. Dep't of Homeland Security & U.S. Dep't of Justice, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” 85 FR 80274 (Dec. 11, 2020), <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>.

²⁶ Human Rights First, “EOIR Docket No. 18-0002, Human Rights First's Comment in Response to Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” (July 15, 2020), <https://www.humanrightsfirst.org/sites/default/files/HRFAsylumRegulationComment07.15.2020.pdf>.

BIA and judicial review and required under current case law governing regular immigration court removal proceedings.²⁷ At a minimum, the proposed regulations should include the same requirement for decisions rendered by immigration judges during regular removal proceedings – an asylum officer’s decision is not an adequate substitute for a ruling by an immigration judge.

Judicial review is a crucial protection for asylum seekers that should not be jeopardized

Judicial review of immigration court and BIA decisions is a fundamental and crucial protection to prevent the deportation of refugees to persecution and torture. The Trump administration’s politicization of the BIA—including bypassing regular hiring procedures to appoint partisan judges—also highlights the need for judicial review to protect against administrations intent on manipulating and politicizing EOIR.²⁸ Judicial review protects refugees from politicized policies, rushed administrative decision making, or discriminatory factual and legal interpretations, and provides judicial oversight of administrative adjudications with life-and-death consequences. It has also ensured adherence to proper legal standards and recognition of claims for marginalized groups, such as women, LGBTQ individuals, and religious minorities, in line with UNHCR guidance.²⁹

Many refugees were saved from deportation to danger through federal court review of erroneous immigration judge and BIA decisions, including in recent circuit court decisions:

- In August 2021, the Ninth Circuit held that an immigration judge erred in denying asylum to a Cameroonian woman who had been brutally beaten, detained, and raped by multiple police officers because her persecutors believed that she belonged to an anglophone political opposition group. The immigration judge had interrogated her about why she did not cry while testifying about being raped and found that she was not credible, a decision the BIA affirmed. The Ninth Circuit vacated the decision, finding that the immigration judge had “discounted probative evidence on flimsy grounds and displayed a dubious understanding of how rape survivors ought to act.”³⁰
- In February 2020, the Third Circuit vacated an erroneous decision by an immigration court and the BIA that a Nicaraguan asylum seeker who had her home burned down, received death threats from members of the ruling party in Nicaragua, and was attacked at gunpoint during a political meeting that she organized, did not suffer past persecution.³¹
- In July 2020, the Sixth Circuit vacated a decision by an immigration judge denying asylum to a Russian asylum seeker who had been arrested, detained, prosecuted, assaulted, and

²⁷ *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002).

²⁸ Sheldon Whitehouse, “Senators Press Barr on Politicization of Justice Department Administration of Immigration Courts,” (Feb. 13, 2020), <https://www.whitehouse.senate.gov/news/release/senators-press-barr-on-politicization-of-justice-department-administration-of-immigration-courts>.

²⁹ *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341 (11th Cir. 2009).

³⁰ *Munyuh v. Garland*, 2021 U.S. App. LEXIS 25540 (9th Cir. 2021).

³¹ *Herrera-Reyes v. Att’y Gen.*, 952 F.3d 101 (3d Cir. 2020).

threatened by government authorities for his political opposition work and anti-corruption activism including denouncing government corruption.³²

- In February 2021, the Fourth Circuit remanded a BIA decision denying asylum to a Guatemalan asylum seeker who received death threats from a gang after she had her family witnessed a mass killing by gang members, noting that “[a]s in many recent cases, the Board’s contrary conclusion is an ‘excessively narrow reading’ . . . that is not supported by our precedent.”³³

We strongly urge the agencies not to implement regulatory changes that could undermine judicial review for asylum claims. Asylum seekers who are not granted asylum through initial adjudication by the Asylum Office should be referred to full immigration court proceedings under 8 U.S.C. § 1229a, which is the surest way to ensure access to judicial review of these life-or-death decisions on whether people seeking protection will be returned to persecution or torture and prevent spurious or misguided attempts to undermine judicial review.

Congress intended for asylum seekers placed in the expedited removal process, like other asylum seekers, to receive the safeguard of a hearing before an immigration court judge

To the extent that the administration chooses to subject asylum seekers to expedited removal, U.S. law requires that asylum seekers who receive positive credible fear determinations are not subject to deportation without, at a minimum, the safeguard of a hearing on their asylum claim before an immigration court judge.

In its title, 8 U.S.C. § 1225, the statute governing expedited removal, makes clear that asylum seekers who receive positive credible fear determinations are entitled to a “referral for hearing.” The statute does not specify the agency or officer to conduct this hearing, but in debating the creation of the expedited removal process, members of the U.S. Senate and House of Representatives repeatedly indicated their understanding that asylum seekers would be entitled to a full removal hearing³⁴ by an immigration court judge before an asylum seeker would be deported from the United States.³⁵ For example, U.S. Senator Alan Simpson (R-Wyoming) noted

³² *Srkipkov v. Barr*, 966 F.3d 480 (6th Cir. 2020).

³³ *De Gomez v. Wilkinson*, 987 F.3d 359 (4th Cir. 2021) (*emphasis added*).

³⁴ See 104 Cong. Rec. H11081, <https://www.congress.gov/104/crec/1996/09/25/CREC-1996-09-25-pt1-PgH11071-2.pdf> (“Specially trained asylum officers will screen cases to determine whether aliens have a ‘credible fear of persecution’--and thus qualify for more elaborate procedures.”) (Statement of Representative Hyde); 104 Cong. Rec. S4457, <https://www.congress.gov/104/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf> (describing the purpose of amendment No. 3780 adopted by Senate 51-49 as “[t]o provide minimum safeguards in expedited exclusion procedure to prevent returning bona fide refugees to their persecutors”) (Statement of Senator Leahy); 104 Cong. Rec. S4461, <https://www.congress.gov/104/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf> (“A specially trained asylum officer will hear his or her case, and if the alien is found to have a ‘credible fear of persecution,’ he or she will be provided a full--full--asylum hearing.”) (Statement of Senator Simpson); 104 Cong. Rec. S4608, <https://www.congress.gov/104/crec/1996/05/02/CREC-1996-05-02-pt1-PgS4592.pdf> (“If they [establish a credible fear], then they can go through the normal process of establishing their claim”) (Statement of Representative Smith).

³⁵ The House and Senate Conference report on the expedited removal statute explains that noncitizens who pass a CFI should be referred “for further consideration of the application for asylum under normal non-expedited removal proceedings.” H.R. Rep. No. 104-828, at 209 (1996), <https://www.congress.gov/104/crec/1996/09/24/CREC-1996-09-24-pt1-PgH10841-2.pdf>.

in discussion of expedited removal that asylum applicants who receive a positive credible fear determination would “get a full hearing without any question.”³⁶ U.S. Senator Orin Hatch (R-Utah) described the credible fear interview (CFI) as a means to screen asylum seekers for “admission into the usual full asylum process.”³⁷ Thus, in creating the expedited removal process and credible fear screenings, Congress intended that asylum seekers found to have a credible fear of persecution would be removed from the expedited removal procedure and provided the safeguard of a full hearing of their asylum claim before an immigration judge, just as all other asylum seekers are guaranteed.³⁸ The plain intent of Congress was to ensure that all asylum seekers received the same safeguards in the adjudication of their request for protection—a “full,” “normal” hearing—*i.e.* a removal hearing under Section 1229a before an immigration court judge.

To be clear, providing these asylum seekers with initial Asylum Office interviews would be consistent with this intent, so long as they may access full immigration court hearings. Dressing up an interview with the Asylum Office conducted by a DHS officer as a “hearing”³⁹ is not equivalent to a full removal hearing before an immigration judge within the DOJ and subject to the same rules as other immigration removal proceedings, as discussed above.

Human Rights First urges DHS and DOJ to revise the proposed rule to restore full immigration court hearings—in non-expedited removal proceedings—for all asylum seekers. Congress intended these immigration court hearings to prevent wrongful deportations of refugees to persecution and torture and to ensure that asylum seekers, including those subjected to expedited removal who demonstrate a credible fear of persecution, receive the same due process protections in consideration of their asylum claims.

II. Retain the Critical Safeguard of Requests for Reconsideration of Erroneous Asylum Office Fear Determinations

Human Rights First strongly opposes the proposed provision at 8 C.F.R. § 208.30(g)(2)(i) to eliminate requests to the Asylum Office to reconsider negative credible fear determinations made by asylum officers.

The current regulations allow, but do not require, DHS to reconsider a negative credible fear finding even after it has been reviewed by an IJ. The proposed change would undo regulations issued by the former Immigration and Naturalization Service (INS) in 2000 to clarify this

³⁶ 104 Cong. Rec. S4492, <https://www.congress.gov/104/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf> (Statement of Senator Simpson).

³⁷ H.R. Rep. No. 104-469, at 158 (1996) (Statement of Senator Hatch).

³⁸ Senator Leahy introduced an article into the record lauding the “American tradition of courts as the arbiters of law and guarantors of freedom.” The article described an asylum seeker’s successful effort to plead her case to an immigration judge after satisfying the credible fear standard. 104 Cong. Rec. S4460-61, <https://www.congress.gov/104/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf>.

³⁹ For instance, the proposed rule fails to lay out due process protections asylum seekers placed in Asylum Office “hearings” are entitled to such as objections to lines of questioning that are irrelevant or inappropriate, or to the consideration of evidence not entered into the record, as an asylum seeker or their counsel could do in immigration court to preserve the rights of the applicant. Nor does the proposed rule lay out a process for the asylum seeker’s legal representative to discuss questions of law, which is even more crucial where asylum officers are deciding complex asylum bar issues and eligibility for withholding of removal and CAT protection.

authority.⁴⁰ The INS issued these regulations in the wake of widespread reports of asylum seekers being wrongly deported under expedited removal and shortly after U.S. Senator Patrick Leahy drew attention to the critical importance of review mechanisms in expedited removal including the ability of the Asylum Office to reverse erroneous decisions not detected during the often-cursory immigration judge review.⁴¹ The risk of unjust deportation of an asylum seeker—and the benefit to the agency of learning about mistaken decisions in this life and death process—vastly outweighs the minimal burden placed on the Asylum Office by the current regulation. Requests for reconsideration remain a critical safeguard, particularly given the highly limited, rubber stamp nature of immigration judge review, that has saved many asylum seekers from wrongful deportation to persecution and torture under the flawed expedited removal process. These considerations far outweigh the agencies’ baseless determination that eliminating this crucial safeguard “ensures that the necessary efficiencies implemented in this proposed rule are not undermined.”⁴²

Human Rights First vehemently objects to the agencies’ attempt to revive an identical Trump administration proposal to eradicate Asylum Office requests for reconsideration, which DHS and EOIR included in a June 15, 2020 notice of proposed rulemaking but ultimately excluded from the final regulation claiming that the change had been made inadvertently.⁴³ We are deeply concerned that this harmful proposal—which even the Trump administration admitted was a mistake and declined to implement—will further magnify the risks of expedited removal, obliterate a crucial safeguard in an already dangerous system of fast-track deportations, and result in the return of refugees to harm in violation of the Refugee Convention and Protocol.

Human Rights First has documented a small fraction of the lives that have been saved from deportation through requests for reconsideration in the past two decades, including at least ten asylum seekers under the Biden administration.⁴⁴ Asylum seekers protected from deportation through this safeguard (some of whom have already been granted asylum) include:

- A Nicaraguan asylum seeker who had been detained, beaten, stabbed, and tortured by police officers for participating in anti-government marches;

⁴⁰ U.S. Dep’t of Justice & Immigr. and Naturalization Service, “Asylum Procedures,” RIN 1115-AE93 (De. 6, 2020), <https://www.govinfo.gov/content/pkg/FR-2000-12-06/pdf/00-30601.pdf>.

⁴¹ 146 Cong. Record S8752-S8753(daily ed. Sep. 19, 2000) (statement of Sen. Leahy) <https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>; American Bar Ass’n, Comm’n on Immigr., “American Justice Through Immigrants’ Eyes,” (2004), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/american_justice_through_immigrants_eyes.pdf.

⁴² See 86 FR 46906, 46915.

⁴³ U.S. Dep’t of Homeland Security and Exec. Off. for Immigr. Review, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” 85 FR 36264, (June 15, 2020), <https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>; U.S. Dep’t of Homeland Security and Exec. Off. for Immigr. Review, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” 85 FR 80274.

⁴⁴ Human Rights First, “Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture.”

- a Haitian refugee who has since been granted asylum;
- an asylum seeker from Burkina Faso who had suffered attacks and threats after converting to Christianity; and
- an asylum seeker from the Ivory Coast who had been violently attacked with a machete for his political views.⁴⁵

Human Rights First’s has documented egregious due process violations in the expedited removal process under the Biden administration, underscoring the fact that requests for reconsideration remain an indispensable safeguard against erroneous deportations of refugees. Asylum seekers harmed by these due process violations under the Biden administration include:

- A 13-year-old unaccompanied child illegally subjected to a CFI;
- dozens of detained African asylum seekers and many others forced to have CFIs in a language in which they are not fully fluent; and
- at least a dozen asylum seekers pressured to proceed with CFIs without counsel present – in at least one instance resulting in the wrongful deportation of a Nicaraguan asylum seeker who had been jailed for her political opposition to the current regime.⁴⁶

Immigration court review of negative credible fear determinations is not an adequate safeguard against the serious and unfixable defects in the expedited removal process. Immigration court review of negative credible fear determinations is, in many cases, a “rubber stamp.”⁴⁷ For instance, from June 2017 to June 2018, immigration judges affirmed negative credible fear determinations in 76 percent of cases, according to the most recent available analysis of EOIR.⁴⁸ Moreover, there is enormous, unfair variation in outcomes depending on the immigration judge assigned to review the credible fear determination, with some judges affirming negative determinations in nearly every case.⁴⁹

Judges often schedule CFI reviews within 24 hours of the initial determination—leaving asylum seekers with virtually no time to prepare or consult with counsel, bar attorneys from participating in reviews (the government contends there is no right to counsel in these reviews), reject additional evidence or testimony, and interpret additional information the asylum seeker did not have time or ability to present at the CFI as impugning the credibility of the asylum seeker.⁵⁰ Attorneys and asylum seekers report that immigration judges sometimes limit their review to a few questions and prevent asylum seekers from sharing any additional information. Even in the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Lauren Schusterman, “A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions,” 118 Mich. L. Rev. 655 (2020), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=4987&context=mlr>.

⁴⁸ TRAC, “Findings of Credible Fear Plummet Amid Widely Disparate Outcomes,” (Jul. 30, 2018), <https://trac.syr.edu/immigration/reports/523/>.

⁴⁹ Brief for Amici Curiae Immigr. and Human Rights Organizations In Support of Respondent, *U.S. Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (Jan. 22, 2020) https://www.supremecourt.gov/DocketPDF/19/19-161/129461/20200122130104258_19-161%20bsac%20Immigration%20and%20Human%20Rights%20Organizations.pdf.

⁵⁰ Lauren Schusterman, “A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions”; Brief for Amici Curiae Immigr. and Human Rights Organizations in Support of Respondent, *U.S. Dep’t of Homeland Security v. Thuraissigiam*.

rare instance where an asylum seeker does manage to secure counsel, attorneys are frequently not notified of an immigration judge review until the night before or not at all.⁵¹ Attorneys have reported that asylum seekers sometimes do not receive the credible fear decision (which DHS is already required to provide under existing 8 C.F.R. § 208.30(g)(1)) and notes taken by the asylum officer prior to the immigration judge review, leaving them unable to identify or challenge errors in the record. They are at a major disadvantage even if they do receive these documents because the notes are in English, and a translation is not provided.

In a recent decision, the U.S. Supreme Court relied, in part, on the fact that the Asylum Office may reconsider and correct its erroneous decisions in concluding that denying judicial review in some expedited removal proceedings does not violate due process.⁵² While Human Rights First disagrees with the outcome of that decision, removing the crucial safeguard of requests for reconsideration would call into question the basis for this Supreme Court decision and cast further doubt on the constitutionality of expedited removal.

We urge the agencies to avoid expedited removal but, to the extent it is used, to shore up safeguards against wrongful deportation rather than stripping them away. For instance, we welcome the agencies' proposal to amend Section 208.30(g)(1)(i) to provide immigration judge review where an asylum seeker declines to request it (reversing a Trump administration rule treating this as a decision to waive review),⁵³ but we believe that the proposal to eliminate requests for reconsideration would make expedited removal even more of a due process farce. Not only must the reconsideration process be maintained, but it must also be improved and provided stronger quality control. Multiple requests for reconsideration are sometimes necessary to obtain a fair decision from the asylum office when it has declined valid and compelling requests for reconsideration. This was particularly the case under the Trump administration when the asylum office was under extreme political pressure to deny asylum in violation of U.S. laws and treaty obligations. Additional recommendations on the credible fear process are in Section VII.

III. Proposed Asylum Office “Hearings” Will Exacerbate Inaccurate Decision-Making and Reduce—Not Increase—Asylum Office Efficiency

The proposed rule would create what the agencies refer to as asylum “hearings” (proposed 8 C.F.R. § 208.9) for asylum seekers placed in the new adjudication process at the Asylum Office. Subjecting asylum seekers to such “hearings” will completely alter the non-adversarial nature of Asylum Office adjudications, which was the primary benefit of referring asylum seekers for initial consideration by an asylum officer. Non-adversarial interviews are less traumatizing for asylum seekers, can be completed in a timelier manner, and are less resource-intensive than immigration court hearings. The agencies claim that the proposed process would “ensure greater efficiency.”⁵⁴ In fact, the added administrative complexities of the proposed “hearing” process

⁵¹ Brief for Amici Curiae Immigr. and Human Rights Organizations in Support of Respondent, *U.S. Dep’t of Homeland Security v. Thuraissigiam*.

⁵² *U.S. Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1983, footnote 28 (2020).

⁵³ See U.S. Dep’t of Homeland Security and Exec. Off. for Immigr. Review, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” 85 FR 80274.

⁵⁴ See 86 FR 46906, 46909.

will greatly increase the time it takes to adjudicate cases, likely exacerbating backlogs and increasing wait times for asylum seekers to have their cases decided. These “hearings” will also result in more erroneous failures to grant asylum as asylum seekers, most of whom proceed without attorneys at the Asylum Office, must navigate a more complex procedure under the added stress of being denied the safeguard of a full immigration court hearing.

As discussed more fully below in Section VII, Human Rights First and other experts have recommended that DHS refer asylum seekers for initial, non-adversarial asylum interviews, like those that USCIS currently conducts for affirmative asylum applicants. Conducting *interviews* as opposed to holding “hearings” at the Asylum Office, along with the recommendations made below, would create a more timely, fair, and efficient initial adjudication process and reduce the number of cases referred to the immigration courts.

Having asylum officers conduct “hearings” will make Asylum Office adjudication less—not more—timely and efficient

The proposed Asylum Office “hearings” will prolong asylum adjudications—adding significantly to the time it takes asylum officers to take testimony and render decisions—and compound the existing Asylum Office backlogs and delays rather than improving the efficiency and timeliness of asylum processing. The proposed rule would further exacerbate the complexity of Asylum Office adjudications, which have become increasingly and needlessly complicated and cumbersome for reasons relating, in part, to the imposition of additional requirements and hurdles imposed by statute, rule, or other directives. The escalating complication of U.S. statutes and caselaw in this area already results, in some instances, in interviews so long as to be exhausting for applicants.

Asylum officers will complete far fewer of proposed asylum “hearings” than the number of interviews they can generally adjudicate. Under the current affirmative asylum system, officers conduct eight interviews per week (two per day) with a day to work on pending decisions with an expectation to deliver a decision within two weeks.⁵⁵ In reality, since the beginning of the pandemic decisions in affirmative cases have routinely been delayed two months or more after the interview. It will be impossible for asylum officers to conduct a similar number of the proposed asylum “hearings.” Taking formal testimony—as opposed to conducting an interview—will take longer than during current Asylum Office adjudications. Not only will asylum seekers provide testimony, but they will certainly seek to present fact witnesses, medical and psychological evaluators, and country conditions experts will also be called to testify at the Asylum Office “hearing.”⁵⁶ Because they may not be permitted to call such witnesses during the immigration judge “review,” asylum seekers and their attorneys are likely to call available fact and expert witnesses to testify at the Asylum Office “hearing.” In addition, the asylum officer will have to elicit testimony that goes not just to the asylum claim but also to applications for withholding of removal and CAT protection. Eligibility for these forms of relief is distinct in

⁵⁵ USCIS, “Annual Report 2020” (June 30, 2020), https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf; Human Rights First, “In the Balance.”

⁵⁶ See Proposed 8 C.F.R. § 208.9(b) (“The applicant . . . may present witnesses . . .”); Proposed 8 C.F.R. § 208.9(c) (“The asylum officer shall . . . question the applicant and any witnesses”).

many aspects from asylum. In the experience of Human Rights First, some Asylum Office interviews already take many hours to complete. Under the proposed system, Asylum Office “hearings” would take even longer.

Rendering a decision in these Asylum Office “hearing” procedures is also likely to take longer than the current interview process. For one, asylum officers must review the written evidentiary submission and legal brief of the asylum applicant, which will be far lengthier and more complex than current submissions. Review of these filings will also necessarily increase the amount of time needed to consider each case. Making determinations not just on asylum, but with respect to withholding of removal and CAT protection, will also necessarily take additional time. Further, to provide the immigration court a basis to review the Asylum Office “hearing,” the asylum officer is required to issue a written decision (proposed 8 C.F.R. § 208.14(c)(5)), which is not currently a requirement of Asylum Office interview decisions referred to the immigration court (*see* current 8 C.F.R. § 208.14(c)(1)) since immigration judges provide *de novo* review of the asylum claim. This would be a departure from current practice—in which the asylum officer’s analysis of an asylum claim is not released to anyone external to the Asylum Office—and would pose significant staffing and training challenges. The added complexity of decisions rendered in Asylum Office “hearings” will greatly increase the time needed to complete each case and reduce the number of cases each officer can resolve.

Supervisory review of “hearing” decisions will also take longer than review of current Asylum Office interviews. Meaningful supervisory review, which has been absent from many asylum officers for years, is crucial to ensure that individuals who fear persecution are not ordered removed. Although not contained in the proposed rules themselves, the NPRM explanatory section indicates that supervisory asylum officers will continue to review decisions rendered by frontline asylum officers (*see* 86 FR 46932). The record these officers will review, as noted above, is likely be far lengthier and more complex than that created during adjudications through current Asylum Office interviews. The proposed rule does not indicate whether the supervisory asylum officer would listen to the recording of the hearing before concurring in or rejecting the decision of the asylum officer.⁵⁷ Thorough supervisory review, particularly in a process that eliminates the safeguard of full immigration court hearings, is crucial not only to confirm the factual basis of the claim—or lack thereof—but also to determine whether the conduct of the “hearing” prevented the asylum seeker from providing relevant testimony. This too will require some shifts in staffing and training: while the Asylum Office has long touted the fact that all affirmative cases receive supervisory review, Human Rights First regularly sees decisions from local Asylum Offices that make no sense on their own terms, raising serious questions as to the extent and quality of the review affirmative cases are receiving currently.

Finally, the process of referring denied cases to immigration court will also create substantial delays in moving cases through the Asylum Office “hearing” process. For cases that are “appealed” to the immigration court for review, production of the “hearing” transcript (proposed 8 C.F.R. § 208.9(f)(2)) will likely delay referral, and review, of these cases by months. In matters

⁵⁷ The NPRM indicates that transcripts will not be produced for review by the supervisory Asylum Office before rendering a decision. *See* 86 FR 46919 (“a transcript of that recording would be made part of the record whenever a noncitizen denied protection seeks review of a denial”).

appealed to the BIA from immigration courts, Human Rights First's clients regularly face six or more months of waiting before the immigration court hearing transcript is produced.

Rather than improving the efficiency of asylum adjudications, the proposed Asylum Office "hearing" procedure will further complicate and slow these adjudications, reducing the number of cases that can be resolved by asylum officers in a timely manner. Using Asylum Office interviews with de novo review in full immigration court hearings would avoid further complicating Asylum Office adjudication. As discussed below in Section VII, the agencies should take steps that would improve the efficiency of Asylum Office adjudications such as clarifying the definitions of particular social group and nexus requirements.

Asylum Office "hearings" will subvert the non-adversarial nature of Asylum Office adjudications and lead to erroneous asylum denials, particularly for unrepresented asylum seekers

By converting Asylum Office interviews into high stakes, life-or-death "hearings" while simultaneously eliminating the safeguard of full immigration court hearings to correct erroneous decisions, the proposed process undermines the non-adversarial nature of current asylum officer adjudication and is likely to lead to even more erroneous decisions because of the inherently stressful and intimidating nature of these "hearings."

Under the proposed rules, asylum officers would be granted the power not only to decide asylum claims but to enter removal orders and determine whether to grant withholding of removal or protection under CAT (proposed 8 C.F.R. § 214(c)(5)). In addition, officers can issue *in absentia* removal orders for asylum seekers who miss a "hearing" (proposed 8 C.F.R. § 208.10).⁵⁸ In contrast, individuals who apply for asylum directly with USCIS undergo non-adversarial interviews at the Asylum Office and are evaluated only for asylum eligibility. If the officer does not grant asylum, the Asylum Office refers the case for full immigration court proceedings to adjudicate eligibility for asylum, withholding of removal, CAT protection and other potential relief. Though the proposed regulation purports to preserve the "non-adversarial" nature of Asylum Office adjudications,⁵⁹ a "hearing" to decide removability would be an inquisition without the procedural protections of a court hearing and will not be a non-adversarial proceeding even in the absence of an attorney for the government questioning the applicant. For instance, while the proposed rule is silent on procedures for raising objections, asylum seekers and/or their legal representatives will likely attempt to object to impermissible questions or reliance by the asylum officer on extra-record information to preserve the applicant's due process rights. Human Rights First urges the agencies to channel asylum seekers into these non-adversarial interviews instead of the high stakes "hearings" contemplated by the proposed rule.

By drastically raising the stakes of Asylum Office adjudications and undermining what is supposed to be the non-adversarial nature of Asylum Office interviews, the stressful environment

⁵⁸ There is no proposed procedure to reopen proceedings with the Asylum Office once the removal order has been issued. The proposed rule grants asylum officers the discretion to determine whether to issue an *in absentia* order or reschedule the hearing, which raises additional concerns about disparate treatment by different asylum officers and disproportionate harm to unrepresented asylum seekers who may not be able to request that the officer reschedule their interview or provide evidence documenting the reasons they were unable to attend.

⁵⁹ See 86 FR 46906, 46909.

of these “hearings” will make it even more difficult for asylum seekers to share information crucial to establishing their eligibility for asylum. In its training materials for asylum officers, USCIS notes that “[i]t is well established that a non-adversarial approach in which the interviewer builds rapport is the most effective interview style for eliciting credible information” and emphasizes that whether an interview is non-adversarial depends on the manner of questioning as well as the tone and atmosphere in which interviews are conducted.⁶⁰

However, in practice, the sometimes harsh and inquisitorial manner of some asylum officers has prompted Human Rights First’s refugee clients to remark that the supposedly non-adversarial approach of the Asylum Office reminded them of interrogations they experienced in their home countries. Even where asylum officers are behaving consistently with their training, and are not being deliberately adversarial, the exhausting length of these interviews and the frequent focus on irrelevant detail prevents asylum applicants from feeling at ease to describe their experiences. The whole process, even at its best, always has the potential to trigger unwelcome associations in the minds of refugees: as one Human Rights First client, reviewing his Form I-589 application for asylum, once put it, “You Americans and your attachment to these massive questionnaires, it’s strange—in my life in Syria the only context in which I was made to respond in writing to all these detailed questions about my background and activities was interrogation by the *mukhabarat* [intelligence service].”

This inappropriate approach will only worsen under a system of asylum officer “hearings.” Requiring asylum seekers to present their claims to asylum officers who have the power to order them removed and whose decisions to deny protection are not subject to the safeguard of full immigration court hearings under 8 U.S.C. § 1229a is not a setting conducive to eliciting information from an asylum seeker.

The rules set out for these “hearings” are also likely to contribute to erroneous decisions. Proposed 8 C.F.R. § 208.9(e) requires asylum seekers to submit evidence at least 14 days before their Asylum Office hearing without a further opportunity to submit evidence in immigration court—unless they convince the judge it is “necessary” and “not duplicative.” Proposed 8 C.F.R. § 208.3(a)(2) would require applicants to amend, correct, or supplement information provided during the CFI, which the Asylum Office will use as the basis of the asylum application, at least seven days prior to their USCIS asylum hearing, or ten days prior if mailed. While the proposed rule provides that asylum seekers can request permission to amend or supplement the record after the deadline, asylum officers have discretion to reject the request. Setting arbitrary deadlines increases the risk of mistaken denials by the Asylum Office and will particularly harm asylum seekers who have limited access to legal or translation services to submit evidence or review and correct mistakes.

⁶⁰ USCIS, “RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-adversarial Interview,” (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf.

These provisions will disproportionately harm detained⁶¹ and unrepresented asylum seekers who will struggle to navigate traumatic and stressful Asylum Office hearings that may be their final opportunity to present evidence or testimony in support of their claim. Historically, representation rates of asylum seekers appearing before the Asylum Office have been lower than the immigration courts.⁶² Many detained applicants are unable to prepare their case, collect evidence, secure witnesses, and access legal and translation services while detained; despite these enormous barriers, under the proposed rule, they might nonetheless be barred from presenting additional evidence and testimony in immigration court if they are denied asylum by the Asylum Office. Nor does the proposed rule provide protections or safeguards for asylum seekers who struggle with cognitive impairments or mental illness, some of which are available to respondents in immigration court proceedings.⁶³

As discussed in Section VII below, Human Rights First recommends that the agencies instead provide for less traumatizing, non-adversarial initial interviews at the Asylum Office maintaining the safeguard of full immigration court proceedings for all asylum seekers.

Welcome changes to Asylum Office interviews

While Human Rights First opposes the creation of the proposed Asylum Office “hearings,” the NPRM includes important changes to Asylum Office interviews with respect to the role of legal representatives and provision of interpretation services that could enhance the accuracy and fairness of these Asylum Office interviews. Human Rights First welcomes these proposals and suggests additional improvements.

Proposed 8 C.F.R. § 208.9(d) would formalize the role of an applicant’s representative to ask questions and make statements during asylum interviews and “hearings,” which aid asylum officers, who are necessarily less familiar with the case than the asylum seeker or her legal representative, in understanding the crux of the case. However, representatives should not be limited to offering a statement or asking questions of their client only at the end of the interview or “hearing,” as the proposed rule puts forward. Allowing the asylum applicant’s representative to intervene to offer clarifying questions during an interview/“hearing” can help to avoid needless confusion and ensure interviews are timely completed.

Proposed 8 C.F.R. § 208.9(g) would also not require asylum seekers appearing before the Asylum Office for asylum “hearings” under the new proposed process to provide their own interpreters, as is typically required in Asylum Office interviews. Human Rights First welcomes the intent behind this provision, as asylum seekers may not speak English fluently for purposes

⁶¹ Ingrid Eagly & Steven Shafer, “Access to Counsel in Immigration Court,” Am. Immigr. Council (September 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

⁶² Andrew I. Schoenholtz & Jonathan Jacobs, “The State of Asylum Representation: Ideas for Change,” 16 Geo. Immigr. L.J. 739, 741 n.28 (2002) (finding “only one in three applicants is aided by representation” during affirmative Asylum Office interviews).

⁶³ *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011); *Franco-Gonzalez v. Holder*, CV 10-02211 (C.D. Cal. 2013); U.S. Dep’t of Justice, “National Qualified Representative Program (NQRP)” (updated Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

of the interview and many, particularly those who are unrepresented, struggle to locate competent interpreters.

We suggest that the provision be extended to all asylum officer interviews with additional safeguards. In the experience of Human Rights First the contract interpreters used by the Asylum Office are often deficient. COVID-19 protocols that have for over a year forced all asylum applicants to rely on these interpreters for affirmative asylum interviews as well as credible fear interviews have highlighted the ways in which they are inadequate mediums for a full asylum adjudication. One Human Rights First client's affirmative asylum interview, for example, cycled through three successive telephonic interpreters, as one became too tired to continue and the second inexplicably dropped off the line, leaving a third interpreter to try to pick up the interview in midstream, without any of the background and context provided by the earlier parts. (That client, a survivor of torture with an abundantly documented case, was referred based on a very few alleged inconsistencies, two of which stemmed from points of vocabulary.) Another client was likewise subjected to a change of interpreter midstream, as the first (and better) interpreter dropped off after about an hour and a half, claiming a conflicting appointment. One of these same contractors also supplies interpreters to the immigration courts, where they are more likely to be present in person—which facilitates communication—but results remain very uneven. A minority are excellent, but a significant proportion are simply not competent to do this kind of work even in person, much less over the telephone, because they are not fluent in English and/or are not skilled at interpreting between two languages. One interpreter, for example, assigned to interpret for an asylum applicant whose case was based on political opinion, did not know the English words for “traitor” or “treason.” Another—in Spanish, hardly a rare language in the United States—persisted in translating *registrar* (as in *registraron mi casa*) as “to register.” *Registrar* in this context means “to search” as in “they searched my house.”

As such, the regulations should specify that interpreters are qualified to interpret, preferably certified to interpret in Article III courts, and are competent in the language and/or dialect that asylum applicants indicate is their best language. Applicants who are forced to decline to proceed with an interpreter because they cannot properly understand or hear the interpreter (whether due to interpreter competence, technical difficulties, or other justifiable grounds) should not be considered to have failed to appear for the interview (8 C.F.R. § 208.10) or penalized for causing a delay in the interview process. At the same time, government-provided interpretation services must remain optional to preserve flexibility for asylum seekers who wish to supply their own interpreter. Human Rights First recommends, in Section VII below, that applicant-provided interpreters be permitted to interpret telephonically, as government-provided interpreters do. This would enhance the availability of competent interpretation, particularly for rarer languages and dialects and increase the number of interviews the Asylum Office can complete, particularly while COVID-19 public health measures reduce the physical capacity of some Asylum Office facilities.

IV. Overturning grants of withholding and CAT protection by DHS would be unjust and inappropriate

The proposed rule would allow immigration judges to review and reverse mandatory forms of humanitarian protection (withholding of removal and CAT protection) that DHS had adjudicated

and granted, if an asylum seeker attempts to appeal a negative asylum determination. (Proposed 8 C.F.R. § 1003.48(a)).

Human Rights First opposes Asylum Office adjudication of applications for withholding of removal and requests for CAT protection. Given asylum officers' extensive pattern of "punting" asylum cases to the immigration courts, we are concerned that such an authority would continue to be used resulting in refugees being improperly denied asylum and instead granted only withholding of removal. However, to the extent that DHS—through the Asylum Office or another DHS component—has determined that an asylum applicant qualifies for withholding or CAT protection, it is not appropriate for the agency to seek review of its own finding that the applicant is more likely than not to face persecution or torture if returned to his or her country of origin. Deporting asylum seekers to danger where an asylum officer has already found that the individual qualifies for protection under U.S. law and treaty commitments is perverse and inexcusable.

The possibility that an asylum applicant who has been denied asylum but granted withholding could subsequently be denied all relief and deported will prevent genuine refugees who should have been granted asylum from even seeking review. For example, an asylum applicant granted withholding of removal but denied asylum by the Asylum Office under the one-year filing deadline who believes she qualifies for an exception to the deadline bar will be forced to weigh the potential risk of being denied all relief by a randomly assigned immigration judge—some of whom deny asylum more than 95 percent of the time⁶⁴—with the severe limitations imposed by a removal order and potential permanent separation from the spouse and children she was forced to leave behind in her home country.

In addition, the Trump administration repeatedly attempted to use "withholding of removal," including through the third-country transit asylum ban, to illegally foreclose asylum for refugees and leave them in legal limbo, unable to pursue educational and professional opportunities, become permanent legal residents or citizens, or reunite their families.⁶⁵ Under the approach of the proposed rule, an asylum seeker who appealed the decision of the Asylum Office to deny asylum under one of these illegal rules could find themselves without any protection from deportation. The agencies should not adopt this provision, which could be so easily weaponized by an anti-asylum administration.

Human Rights First urges the agencies to abandon Asylum Office adjudication of withholding of removal applications and CAT protection requests as well as the provision for review of those decisions.

V. Release Asylum Seekers on Parole or Bond to Avoid Arbitrary and Inhumane Detention of Asylum Seekers

⁶⁴ TRAC, "Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015-2020," <https://trac.syr.edu/immigration/reports/judge2020/denialrates.html>.

⁶⁵ Human Rights First, "Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban," (July 15, 2020), <https://www.humanrightsfirst.org/resource/asylum-denied-families-divided-trump-administration-s-illegal-third-country-transit-ban>.

While the proposed rule attempts to expand the regulatory grounds on which DHS may release asylum seekers placed in expedited removal from detention prior to a credible fear determination, Human Rights First urges the administration to adjust this language, in light of U.S. refugee law and treaties, and to reject the use of unnecessary and inhumane detention of asylum seekers.⁶⁶ Detention of asylum seekers flouts U.S. legal obligations under the Refugee Convention and Protocol.⁶⁷ In its guidelines on the use of detention, the U.N. Refugee agency (UNHCR) has confirmed the general principle that “asylum-seekers should not be detained” and that “the use of detention is, in many instances, contrary to the norms and principles of international law.”⁶⁸ DHS’s long and well-documented history of arbitrary parole denials and failure to follow the parole directive⁶⁹ make clear that the current and proposed parole provisions are not sufficient to protect against arbitrary detention of asylum seekers.⁷⁰ Indeed, government data on parole determinations obtained by Human Rights First demonstrates that the agency systematically denies parole to asylum seekers, often citing pretextual and arbitrary justifications.⁷¹

Under 8 U.S.C. § 1182(d)(5), DHS may parole individuals based on “urgent humanitarian reasons” or “significant public benefit,” including people subjected to expedited removal.⁷² Proposed 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii) attempts to provide a new regulatory basis for DHS to grant parole to asylum seekers prior to a credible fear determination. Under the proposed rule, DHS could release asylum seekers placed into expedited removal if “detention is unavailable or impracticable,” including where “continued detention would unduly impact the health or safety

⁶⁶ Human Rights First, “Prisons and Punishment: Immigration Detention in California” (Jan. 15, 2019), <https://www.humanrightsfirst.org/resource/prisons-and-punishment-immigration-detention-california>; Human Rights First, “Ailing Justice—New Jersey: Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention,” (Feb. 2018), <https://www.humanrightsfirst.org/resource/ailing-justice-new-jersey-inadequate-healthcare-indifference-and-indefinite-confinement>; Human Rights First, “Ailing Justice: Texas. Soaring Immigration Detention, Shrinking Due Process,” (June 14, 2018), <https://www.humanrightsfirst.org/resource/ailing-justice-texas-soaring-immigration-detention-shrinking-due-process>.

⁶⁷ Convention Relating to the Status of Refugees, (July 18, 1951), 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, (Jan. 31, 1967), 606 U.N.T.S. 267.

⁶⁸ U.N. High Comm’r for Refugees, “UNHCR’s Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers,” (Feb. 1999), <https://www.refworld.org/pdfid/3c2b3f844.pdf>.

⁶⁹ https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.

⁷⁰ U.S. Immigr. and Customs Enforcement, “Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture,” (Dec. 8, 2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf; Class Complaint for Injunctive and Declaratory Relief, *Damus v. Nielson*, No. 1:18-cv-00578 (D.D.C. filed Mar. 15, 2018) (available at <https://www.aclu.org/legal-document/damus-v-nielson-complaint>); Class Complaint for Injunctive and Declaratory Relief, *Heredia Mons v. McAleenan*, No. 1:19-cv-01593 (D.D.C. filed May 30, 2019) (available at https://www.splcenter.org/sites/default/files/2019.05.30_-_002_-_class_complaint_for_injunctive_and_declaratory_relief.pdf).

⁷¹ Human Rights First, “Immigration and Customs Enforcement Records Received Through FOIA Confirm Need for Increased Oversight of Agency’s Arbitrary and Unfair Parole Decisions for Asylum Seekers,” (Sep. 2021), <https://www.humanrightsfirst.org/sites/default/files/FOIARecordsParole.pdf>; Am. Immigr. Council, “Immigrants and Families Appear in Court: Setting the Record Straight,” (July 2019) https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf; Ingrid V. Eagly & Steven Shafer, “Measuring In Absentia Removal in Immigration Court,” 168 *University of Pennsylvania Law Review* 817 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633267.

⁷² *Jennings v. Rodriguez*, 583 U.S. ___, 138 S. Ct. 830 (2018).

of individuals with special vulnerabilities.” While Human Rights First welcomes efforts to amend regulatory language to clarify that DHS should parole people if detention would impact their health or safety, the proposed provision is excessively narrow, will not sufficiently protect against inhumane, punitive, and unnecessary use of detention against asylum seekers, and does not reflect the broad authority conferred on DHS by statute to parole people when their detention is not in the public interest. DHS should make available the same parole provisions under 8 C.F.R. § 212.5(b) to provide parole uniformly, as Congress intended under the INA.

To limit arbitrary and unnecessary detention, the agencies should amend proposed 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii) to clarify that DHS should parole people if continued detention is not in the public interest (8 C.F.R. § 212.5(b)). Under the Biden administration’s expanded use of expedited removal, many asylum seekers have languished in detention for months waiting for CFIs while suffering from serious medical conditions, Post-Traumatic Stress Disorder and other mental health issues, as well as trauma resulting from ongoing family separation.⁷³ At the same time, the government continues to expand the capacity of existing ICE detention facilities and pursue contracts with new facilities.⁷⁴ Moreover, most detained asylum seekers awaiting CFIs are unrepresented and would likely face difficulty requesting parole based on the nebulous standard of detention being “unavailable or impracticable.”

As noted in detail in Section VII below, Human Rights First also recommends that the agencies amend 8 C.F.R. § 235.3(c), which currently provides the framework for release on parole of arriving asylum seekers placed in immigration court proceedings. To address the frequent and arbitrary denials of parole to asylum seekers despite their apparent eligibility, the agencies should amend the regulation to provide for a presumption of release unless DHS establishes by clear and convincing evidence that the individual is a flight risk or poses a danger to the community and no less restrictive alternative would mitigate the risk. In addition, the agencies should ensure that parole under Section 235.3(c) covers asylum seekers who enter the United States without inspection.⁷⁵ Asylum seekers who enter without inspection should also be eligible for bond hearings before the immigration court. The Refugee Convention makes clear that people seeking refuge should not be penalized on account of unauthorized entry or presence.⁷⁶ Excluding people who enter without inspection from parole under Section 235.3(c) is particularly perverse to propose at this juncture when U.S. government policies have been and

⁷³ Coalition letter on Detained Asylum Seekers Deprived of Due Process in Expedited Removal Process (June 30, 2021), https://www.splcenter.org/sites/default/files/detained_asylum_seeker_grievance_letter_30_june_2021.pdf; Human Rights First, “Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture.”

⁷⁴ MyWabashValley.com, “A Proposed Plan Would Expand Clay County’s Jail to House Both Inmates and Immigrant Detainees,” (Sep. 23, 2021), <https://www.mywabashvalley.com/news/local-news/town-hall-in-brazil-calls-on-pres-biden-to-shut-down-all-ice-detention-centers/>; Eunice Cho, “More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration,” Am. Civil Liberties Union (Oct. 5, 2021), <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration/>.

⁷⁵ Asylum seekers who enter without inspection are currently unable to request bond hearings before an immigration judge under *Matter of M-S-*, a Trump administration Attorney General ruling that that Biden administration has not reversed. *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019).

⁷⁶ Convention Relating to the Status of Refugees (July 28, 1951), 189 U.N.T.S. 137, Art. 31.

continue to be used to illegally block asylum seekers from requesting protection at ports of entry forcing them to attempt dangerous crossings to reach safety in the United States.⁷⁷

We further urge that the agencies amend the proposed regulations to provide for parole-based employment authorization document (EAD) eligibility for all people whom DHS paroles from detention, to respect the dignity of asylum seekers and ensure they can support themselves and their families. While we welcome efforts to designate additional events that trigger the waiting period for asylum seeker-based EAD eligibility (such as the CFI), a one-year wait⁷⁸ is excessive and inhumane.⁷⁹ Ensuring parole-based EAD eligibility for asylum seekers released from detention will help them secure housing, food, health care, and other necessities. Accordingly, the agencies should also reverse the Trump administration's rule at 8 C.F.R. § 274a.12(c)(11) barring parole-based EAD eligibility for asylum seekers with positive credible fear determinations as well as other work authorization deprivations. DHS should also require by regulation that parole-based EADs be adjudicated within 30 days of receipt, as delays in USCIS adjudication are forcing individuals to wait for months for parole-based work authorization.

Finally, to the extent that the agencies choose to adjudicate asylum claims within the expedited removal process, it will be important to clarify that all asylum seekers who received a positive credible fear determination are eligible for parole under 8 C.F.R. § 212.5, regardless of whether or not they are referred to proceedings under 8 U.S.C. § 1229a (*see* 8 C.F.R. § 235.3(c) (limiting Section 212.5(b)(5) parole provisions to arriving noncitizens “placed in proceedings under [8 U.S.C. § 1229a]”)).

VI. Avoid Use of Expedited Removal for Asylum Seekers and Increase Safeguards While Expedited Removal Remains in U.S. Law

Human Rights First is deeply concerned that the proposed asylum process in the NPRM is premised on the use of the dangerously flawed expedited removal process. The proposed rule not only embraces expedited removal but eliminates the safeguard of full immigration court

⁷⁷ Human Rights First, “Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc,” (Aug. 2021), <https://www.humanrightsfirst.org/resource/human-rights-travesty-biden-administration-embrace-trump-asylum-expulsion-policy-endangers>; Human Rights First, “Failure to Protect: Biden Administration Continues Illegal Trump Policy to Block and Expel Asylum Seekers to Danger,” (April 2021), <https://www.humanrightsfirst.org/resource/failure-protect-biden-administration-continues-illegal-trump-policy-block-and-expel-asylum>; Off. of Inspector General, U.S. Dep’t of Homeland Security, “CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry,” (Oct. 27, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf> (finding that “creating barriers to entry at ports of entry may incentivize undocumented [noncitizens] to attempt to cross into the United States illegally, between ports of entry”).

⁷⁸ The Trump Administration lengthened the wait period for employment authorization from the statutory minimum of 180 days to one year under the “Asylum Application, Interview, and Employment Authorization for Applicants,” 85 FR 38532, (June 26, 2020), <https://www.federalregister.gov/documents/2020/06/26/2020-13544/asylum-application-interview-and-employment-authorization-for-applicants>. Human Rights First urges DHS to rescind this rule.

⁷⁹ Human Rights First, “Callous and Calculated: Longer Work Authorization Bar Endangers Lives of Asylum Seekers and Their Families,” (Apr. 2019), https://www.humanrightsfirst.org/sites/default/files/Work_Authorization.pdf.

hearings, as discussed above. The creation of an affirmative asylum adjudication system within the structure of expedited removal could be exploited and abused by future administrations to wrongly, impermissibly, and inhumanely jail asylum seekers during these asylum adjudications – a move that would violate US human rights and treaty commitments, and be inconsistent with the US commitment, through its refugee laws, to provide refuge to people seeking protection.

While the proposed rule makes some welcome changes to the expedited removal and credible fear process, Human Rights First urges that the administration avoid the use of expedited removal and instead, as recommended below in Section VII, refer individuals for initial Asylum Office adjudication outside of expedited removal. Additionally, to the extent that expedited removal remains in U.S. law, Human Rights First provides some recommendations on safeguards in the conduct of CFIs that the agencies should adopt.

The expedited removal process should not be wielded against asylum seekers

Human Rights First is extremely concerned that the proposed rule operates in the framework of expedited removal against asylum seekers. Expedited removal is a deficient process that has failed for decades to respect due process rights or comply with U.S. and international obligations to refugees.⁸⁰

Under expedited removal, asylum seekers must pass a CFI conducted by an asylum officer to avoid rapid deportation.⁸¹ CFI interviews, which typically occur in ICE detention where asylum seekers have limited access to counsel and suffer traumatic conditions of confinement, are riddled with egregious due process violations that have led to the mistreatment and unlawful deportation of refugees, including under the Biden administration.⁸² Importantly, DHS is not required to use expedited removal.⁸³ It has legal authority to place asylum seekers directly into full immigration court removal proceedings, parole or release them on recognizance, and provide an opportunity to apply for asylum through the Asylum Office without first subjecting them to an inadequate and flawed CFI.⁸⁴ As discussed above and explained in detail below in Section VII, the agencies should amend the proposed rule to provide for initial USCIS adjudications of claims in a process that is not dependent upon subjecting asylum seekers to expedited removal.

At the time of its creation in 1996, the expedited removal process was already viewed by many in Congress as “an abandonment of our historical commitment to refugees.”⁸⁵ Only a few years later, U.S. Senator Patrick Leahy and others proposed the bipartisan Refugee Protection Act of 1999 to restrict expedited removal due to its apparent flaws and numerous reports of asylum seekers “thrown out of the country without the opportunity to convince an immigration judge

⁸⁰ Human Rights First, “NGO Letter Urging DHS to Reject Use of Expedited Removal,” (Feb. 16, 2021), <https://www.humanrightsfirst.org/resource/ngo-letter-urging-dhs-reject-use-expedited-removal>; Human Rights First, “Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture.”

⁸¹ 8 U.S.C. § 1225(b).

⁸² Human Rights First, “Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture.”

⁸³ *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011).

⁸⁴ 8 U.S.C. § 1182(d)(5)(A); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011).

⁸⁵ Congressional Record Volume 146, Number 111 (Sep. 19, 2000), <https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>.

that they faced persecution in their native lands,” but the Senate failed to adopt these minimal procedural safeguards.⁸⁶ As Senator Leahy explained on the floor of the Senate in 2000, “people who flee their countries to escape serious danger should be able to have asylum hearings in the United States without having to navigate the procedural roadblocks established by expedited removal.”⁸⁷

Over the past two decades, organizations including the bipartisan USCIRF and non-governmental groups have repeatedly documented the dangerous flaws of expedited removal, including failures by Customs and Border Protection (CBP) officers and Border Patrol agents to appropriately, professionally, and accurately identify and document individuals who must be referred for CFIs; use of intimidation and coercion by border officers; failures by asylum officers to properly screen individuals, elicit relevant information, and apply the correct legal standards; lack of access to counsel; detention in abysmal conditions; due process issues arising from telephonic interviews; traumatic and ongoing family separation; impact of medical and mental health conditions on ability to testify; inadequate interpretation services; frequent interruptions and truncated, rushed, and deficient interviews; and limited judicial review.⁸⁸ USCIRF found that CBP officers failed in more than half of cases where monitors were present during interviews to take steps required under U.S. law to screen asylum seekers.⁸⁹

Successive administrations have failed to address the long-documented flaws of expedited removal and limited statutory/regulatory protections for asylum seekers that are “often

⁸⁶ Refugee Protection Act, S. 1940, 106th Cong. (1999) (introduced Nov. 17 1999), <https://www.congress.gov/bill/106th-congress/senate-bill/1940/text>; 146 Cong. Rec. S8752-53, (daily ed. Sept. 19, 2000) (statement of Sen. Leahy) <https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>.

⁸⁷ 146 Cong. Rec. S8752-53 (daily ed. Sept. 19, 2000) (statement of Sen. Leahy), <https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>.

⁸⁸ Am. Immigr. Council, “Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants,” (Sep. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/deportations_in_the_dark.pdf; Borderland Immigr. Council, “Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border,” (Feb. 2017), https://docs.wixstatic.com/ugd/e07ba9_72743e60ea6d4c3aa796becc71c3b0fe.pdf; Amnesty Int’l, “Facing Walls: USA and Mexico’s Violations of the Rights of Asylum-Seekers,” (2017), <https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENG.pdf>; John Washington, “Bad Information: Border Patrol Arrest Reports are Full of Lies That Can Sabotage Asylum Claims,” *The Intercept* (Aug. 11, 2019), <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/>; Am. Immigr. Council, “The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers,” (May 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf; Human Rights First, “NGO Letter to Biden Administration Expressing Profound Disappointment in Continued Violations of Refugee Law” <https://www.humanrightsfirst.org/resource/ngo-letter-biden-administration-expressing-profound-disappointment-continued-violations>; ; Brief for Amici Curiae Immigration and Human Rights Organizations In Support of Respondent, *U.S. Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959; Am. Immigration Council, Catholic Legal Immigration Network, Inc., Am. Immigration Law. Ass’n, Refugee and Immigrant Ctr. for Educ. and Legal Services, “Letter to Director of U.S. Citizenship and Immigration Services and Director of Immigration and Customs Enforcement,” (Dec. 24, 2015), <https://www.aila.org/File/DownloadEmbeddedFile/66734>.

⁸⁹ Elizabeth Cassidy & Tiffany Lynch, , “Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal,” U.S. Comm’n on International Religious Freedom, (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

misapplied or flouted altogether.”⁹⁰ A recent Supreme Court decision further narrowed judicial review, limiting the availability of habeas corpus to challenge wrongful negative fear determinations.⁹¹ The Trump administration’s weaponization of the credible fear process, which caused grant rates to plummet as countless asylum seekers were wrongly denied access to the U.S. asylum system, only further confirms that expedited removal is dangerous and subject to manipulation.⁹²

The consequences of this flawed and inhumane process are deadly. Families and adults blocked from access to the U.S. asylum system due to expedited removal have been deported to life-threatening dangers, where some have subsequently been murdered.⁹³ The Biden administration has already detained thousands of asylum seekers and subjected many to expedited removal proceedings riddled with due process violations and unlawful and abusive conduct by government agents.⁹⁴ Experience has shown that no safeguards will cure expedited removal of its fatal flaws and it should not be wielded against asylum seekers.

Welcome changes to expedited removal

To the extent that expedited removal remains a part of U.S. law, Human Rights First recognizes some positive changes proposed in the NPRM.

Credible Fear Standard

The proposed rule correctly confirms that the credible fear standard is a “significant possibility” that the asylum seeker could establish eligibility for asylum and applies this standard uniformly for purposes of asylum, withholding of removal, and CAT protection (*see* proposed 8 C.F.R. § 208.30(e)). The Trump administration had illegally attempted to heighten this standard in clear violation of U.S. law.⁹⁵ Human Rights First welcomes the correction made by the agencies to the credible fear standard.

Consideration of Bars to Asylum During CFIs

The proposed rule removes some of the harmful regulatory changes created by the Death to Asylum rule that was challenged by Human Rights First and others in federal court and is

⁹⁰ Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent, *U.S. Dep’t of Homeland Security v. Thuraissigiam*.

⁹¹ *U.S. Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

⁹² Human Rights First, “Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Depots Refugees,” (June 2020),

<https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAAsylumSystem.pdf>.

⁹³ Kate Morrissey, “A Legitimate Fear of Death Doesn’t Always Matter in the U.S. Asylum System”; Human Rights Watch, “Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse,” (Feb. 5, 2020), <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and>; Am. Civil Liberties Union, “American Exile: Rapid Deportations That Bypass the Courtroom,” (Dec. 2014), https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf.

⁹⁴ Human Rights First, “Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture.”

⁹⁵ 8 U.S.C. § 1225(b)(1)(B)(v) (requiring noncitizens to demonstrate a “significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum”); *see also* Complaint for Declaratory and Injunctive Relief at 27-30, *Human Rights First v. Mayorkas*, No. 20-cv-3764 (D.D.C. filed Dec. 21, 2020).

currently the subject of a nationwide preliminary injunction.⁹⁶ The proposed rule would no longer require asylum officers to adjudicate many of the bars to asylum during the CFI.⁹⁷ This is a step in the right direction, but the proposed regulatory language should be expanded to eliminate consideration of the bars to asylum resulting from the asylum entry ban and third-country transit ban and should be strengthened, as detailed below, to prevent future attempts to use credible fear screenings improperly to deny refugees access to the asylum system.

U.S. law relating to bars to asylum is so complex and frequently dependent on factual detail that it is simply not possible to make fair and accurate legal determinations on these issues in the context of credible fear screenings, which do not allow sufficient time to identify the factual information and legal arguments that may need to be raised on these points. Since many of the officers who conduct CFIs are not lawyers, and these are often highly complicated areas of law, the risks of mistaken conclusions are even greater. The Trump administration's use of these bars to weaponize the credible fear process into a system for blocking refugees from applying for asylum confirmed that allowing negative CFI decisions based on bars leads to refoolment of refugees. Under the prior rule—still currently in force thanks to the injunction of the Trump administration's modifications—where asylum officers were only required to flag the existence of possible bars, Human Rights First in its work with detained asylum seekers saw a good many whose cases the Asylum Office had identified as raising concerns under the persecutor bar, the various terrorism-related inadmissibility grounds, and the serious non-political crime bar, where those bars did not in fact apply and were subsequently found not to apply by an immigration judge following a full hearing. Moreover, the Asylum Office has proved to be somewhat trigger-happy with these bars even in the context of full affirmative asylum interviews, holding up some cases for years, issuing notices of intent to deny, and/or referring others into removal proceedings based on bars whose application was not justified by the law and the facts of the case.⁹⁸

Asylum seekers, who are generally interviewed soon after arriving in the United States, often after difficult journeys and having survived persecution, are, in the vast majority of instances, unrepresented and unlikely to be able to adequately address these complex issues during the CFI. These interviews are typically conducted while asylum seekers are held in immigration jails, sometimes far from areas where they might secure legal representation. Without this change

⁹⁶ U.S. Dep't of Homeland Security & U.S. Dep't of Justice, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 FR 80274 (Dec. 11, 2020), <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>; *Human Rights First v. Mayorkas*, No. 20-cv-3764 (D.D.C. filed Dec. 21, 2020).

⁹⁷ U.S. Dep't of Homeland Security & U.S. Dep't of Justice, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 FR 80274.

⁹⁸ The affirmative asylum interviews of applicants from certain nationalities—primarily from particular countries in the Middle East and North Africa—have for years now been marked by an obsessive focus on the possible presence of bars, even where there is nothing about the applicant's biography to suggest this. (Or, in cases where there are a few areas of the applicant's life that do give rise to legitimate questions about possible bars, one sees invasive questioning also on things that are entirely innocuous and irrelevant.) This intense focus, which is discriminatory, also results in abusively long interviews that are exhausting and confusing for applicants who do not understand where the asylum officer is coming from and disillusioning for those who do. The Asylum Office should give thought to reforming these practices in the context of full asylum adjudications and should take steps to keep them out of the CFI screening.

many refugees with genuine and meritorious claims would be deported to persecution and torture. As noted below, we recommend that DHS affirmatively prohibit by regulation the assessment of asylum bars during the credible fear process.

Use of CFI to satisfy one-year filing deadline ban and to start work authorization clock

The proposed rule also permits a positive credible fear determination to satisfy the one-year filing deadline and to start the clock on work authorization.⁹⁹ Congress should eliminate the one-year filing ban entirely. The deadline acts as a bar to asylum and has arbitrarily blocked tens of thousands of refugees with meritorious claims from asylum.¹⁰⁰ To the extent the administration chooses to subject asylum seekers to the expedited removal process and CFIs and to the extent that the one-year filing ban remains in place, Human Rights First welcomes the proposed rule's recognition that a positive credible fear determination would be considered to meet the filing deadline and begin the work authorization clock. Though small, procedural protection buffers against negative effects of the one-year filing ban. Human Rights First anticipates that this will help asylum seekers access critical work authorization.

CFIs only to be conducted by USCIS asylum officers

The proposed rule includes an important provision specifying that USCIS asylum officers are to conduct CFIs.¹⁰¹ The Trump administration deputized Border Patrol agents, who are not asylum adjudicators and who generally carry out apprehensions, detention, and other enforcement actions, to conduct these sensitive interviews. A federal court hearing a challenge to the use of Border Patrol agents to conduct these sensitive interviews found it “unlikely” that a CBP enforcement officer could act as a “neutral decision-maker” in a “nonadversarial proceeding.”¹⁰² In addition, the Border Patrol and CBP have a long and troubled history of discriminatory and abusive treatment of migrants.¹⁰³ Unsurprisingly, interviews conducted by CBP personnel were far more likely to result in negative credible fear determinations creating an arbitrary disparity in outcomes depending on the officer conducting the interview.¹⁰⁴ To the extent that the administration continues to use expedited removal and that it remains in U.S. law, Human Rights First hails this improvement, to ensure that CFIs are conducted by USCIS asylum officers who

⁹⁹ Proposed 8 C.F.R. § 208.3(a)(2).

¹⁰⁰ Human Rights First, “Draconian Deadline: Asylum Filing Ban Denies Protection, Separates Families,” (Sept. 2021), <https://www.humanrightsfirst.org/sites/default/files/DraconianDeadlineFINAL.pdf>, p.1 (discussing that the ban “is inefficient, counterproductive, inhumane, and unlawful” as well as providing additional examples of *bona fide* asylum seekers harmed by the requirement).

¹⁰¹ Proposed 8 C.F.R. § 208.30(b), (d).

¹⁰² *A.B.-B v. Morgan*, 20-cv-846, Doc. No. 32 (D.D.C., Aug 31, 2020), p. 18.

¹⁰³ Garrett M. Graff, “The Border Patrol Hits a Breaking Point,” *Politico* (July 15, 2019), <https://www.politico.com/magazine/story/2019/07/15/border-patrol-trump-administration-227357/>.

¹⁰⁴ See Human Rights First, “Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees,” (in FY 2020, CBP officers have found asylum seekers established a credible fear in just 30 percent of cases – 20 percent lower than the already reduced positive credible fear rate for interviews conducted by USCIS officers); Human Rights First, “Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguards to Protect Refugees,” (Apr. 29, 2019), <https://www.humanrightsfirst.org/resource/allowing-cbp-conduct-credible-fear-interviews-undermines-safeguards-protect-refugees>, pp.2-3 (reporting that in CFIs “[s]ome CBP officers have openly expressed skepticism of asylum claims . . . essentially pre-judging whether cases would be legally eligible for asylum or not. Some officers were hostile and confrontational when questioning individuals placed in expedited removal”).

have been trained and experienced in making asylum and fear determinations.¹⁰⁵ As discussed below in Section VI, Human Rights First also recommends that the regulations prohibit fear screening interviews from being conducted in CBP custody because CBP officers lack the training and experience of asylum officers.¹⁰⁶ CBP agents have repeatedly used excessive force, pressured refugees not to file for asylum, and expressed skepticism at asylum claims.¹⁰⁷

CFI determinations

The proposed rule also requires asylum officers to provide a summary of material facts and other materials the asylum officer relied on in making the credible fear determination.¹⁰⁸ While, as noted above, asylum officers often fail in practice to make negative credible fear determination notices and notes available to asylum seekers before immigration judge reviews, Human Rights First welcomes this proposed change and encourages the Asylum Office to adopt measures to ensure compliance with this and existing requirements to provide asylum seekers copies of credible fear documents.

Recommendations of Human Rights First on expedited removal

As discussed in detail below, Human Rights First strongly urges the administration to avoid the use of expedited removal, which in addition to unjustly blocking some refugees from accessing the U.S. asylum system, redeploys and diverts Asylum Office staff, triggering and exacerbating Asylum Office backlogs. However, to the extent that expedited removal remains a part of U.S. immigration law and to prevent its further weaponization in the hands of an administration intent on using the credible fear process to block and deport asylum seekers instead of determining whether their requests for protection should be assessed through the full asylum process, Human Rights First urges the administration to propose regulatory changes to reduce the likelihood that refugees are deported to persecution or torture. These recommendations include, but are not limited to:

- **Affirmatively prohibit the consideration of bars to asylum during fear interviews**, as these complex factual and legal questions are better addressed during a full review of the asylum claim and could again be weaponized by future administrations to deport broad categories of asylum seekers rapidly and unlawfully. Bars to asylum typically require complex legal analysis and case-by-case factual determinations that rely on evidence such as testimony, country conditions, foreign law, medical and psychological evaluations, and other expert reports or testimony. The Trump administration wielded expedited removal to automatically deny people an opportunity to seek asylum by creating the illegal third-

¹⁰⁵ See Human Rights First, “Protection Postponed,” p.14 (“between May 2019 and May 2020, CBP officers determined that asylum seekers had a credible fear of persecution at half the rate compared to screenings carried out by trained USCIS asylum officers – meaning that they acted to deny these asylum seekers the ability to even have a full asylum hearing”); see also Yael Schacher, “Addressing the Legacy of Expedited Removal: Border Procedures and Alternatives for Reform,” Refugees International, (May 13, 2021), <https://www.refugeesinternational.org/reports/2021/5/11/addressing-the-legacy-of-expedited-removal-border-procedures-and-alternatives-for-reform> (“CBP officers did not accurately record accounts of asylum seekers they inspected on official forms which later were relied upon by asylum officers and immigration judges.”).

¹⁰⁶ Human Rights First, “Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguards to Protect Refugees.”

¹⁰⁷ *Id.*

¹⁰⁸ Proposed 8 C.F.R. § 208.14(c)(5); Proposed 8 C.F.R. § 208.30(g)(1).

country transit bar and other additional bars to block people in expedited removal from protection based on specious public health grounds that labeled asylum seekers as threats to national security.¹⁰⁹ To avoid future manipulation and weaponization of expedited removal, Human Rights First urges the agencies to strengthen the provision of the proposed rule at 8 C.F.R. §208.30(e)(5)(i)(A) to affirmatively prohibit consideration of bars to asylum in CFIs.

- **Ban fear screenings from taking place in CBP detention facilities**, where asylum seekers are often held in substandard conditions, have only just arrived after difficult and sometimes traumatizing journeys, and spaces used for interviews do not protect the privacy or confidentiality of these sensitive interviews. This safeguard is crucial to guard against weaponization of expedited removal by subsequent administrations. The Trump administration implemented two fast-track deportation programs (Prompt Asylum Case Review and Humanitarian Asylum Review Program)¹¹⁰ to conduct CFIs in CBP facilities, cut off access to counsel, and attempt to accelerate unlawful deportations, which the Biden administration terminated through an executive order.¹¹¹ Asylum seekers held in CBP custody suffer terrible conditions, including freezing temperatures, inadequate food, medical neglect, and unsanitary conditions.¹¹²
- **Require a minimum 72-hour rest period before conducting fear screenings**, if these are to occur in detention or detention-like settings, to provide asylum seekers an opportunity to rest, recuperate and access legal services. CBP often detains asylum seekers who have suffered traumatic journeys to reach safety in the United States (including attacks, kidnappings, and other violence), some of whom require urgent medical attention. Immediately conducting screenings that will determine whether they are deported to danger is cruel and will result in the illegal return of refugees to persecution and torture.

¹⁰⁹ Human Rights First, “Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban”; Human Rights First, “Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger,” (May 13, 2020), <https://www.humanrightsfirst.org/resource/pandemic-pretext-trump-administration-exploits-covid-19-expels-asylum-seekers-and-children>.

¹¹⁰ Am. Immigration Council, “Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact,” (Jan. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf, pp.7-8.

¹¹¹ Exec. Order No. 14010, 86 FR 8267 (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>.

¹¹² See e.g., Findings of Fact and Conclusions of Law at 1, 9-10, 12, 23, 32, *Unknown Parties et al. v. Nielsen*, No. 4:15-cv-00250 (D. Ariz. Feb. 19, 2020) <https://www.nilc.org/wp-content/uploads/2020/05/Doe-v-Wolf-Findings-of-Fact-Conclusions-of-Law-2020-02-19.pdf> (finding “overcrowding, with concrete hard and cold floors and bench surfaces, cold temperatures, no blankets or mats, precluding sleeping; unsanitary cell conditions, with lack of waste receptacles and insufficient housekeeping, lack of personal hygiene products and showers, insufficient food and lack of potable water”); see also First Amended Complaint for Declaratory and Injunctive Relief at 5, 18, 24-25, 37, *Las Americas Immigrant Advocacy Center et al. v. Wolf*, No. 1:19-cv-3640 (D.D.C. Dec. 5, 2019), https://www.acludc.org/sites/default/files/field_documents/12-5-2019_lasamericas-complaint.pdf (“CBP’s facilities are commonly called hieleras for their freezing temperatures and are notoriously inhumane”).

- **Ensure access to counsel and legal orientation programs**, which can be crucial in ensuring that asylum seekers are able to understand the process and share information relevant to their asylum claims, for all detained asylum seekers. Represented asylum seekers are exponentially more likely to secure the relief they are entitled to and avoid deportation to harm than unrepresented asylum seekers.¹¹³ It is critical for asylum seekers to have access to legal counsel and orientation programs during the credible fear process, in which they have an extremely limited opportunity to describe their fear of persecution and face the risk of imminent deportation. To ensure access to counsel, the agencies should:
 - **Require DHS to provide at least three days of notice to asylum seekers and their attorneys in advance of scheduled CFIs**, so asylum seekers with an opportunity can prepare for their interviews and access legal services, and if they are represented, allow their attorneys to attend the interview. Human Rights First has received reports that the Asylum Office sometimes schedules CFIs with no notice to asylum seekers or their attorneys, which in some instances has resulted in represented asylum seekers proceeding without counsel in their CFIs due to threats and intimidation by ICE officers.¹¹⁴ There is currently no regulatory requirement that DHS provide advance notice of scheduled credible fear interviews.
 - **Prohibit asylum officers from conducting CFIs of represented asylum seekers, if the attorney is not present**, especially as DHS has forced and intimidated asylum seekers to proceed without their attorneys of record under this administration, including by threatening them with prolonged detention.¹¹⁵ In July 2021, for instance, a Nicaraguan asylum seeker who had been jailed for supporting an opposition presidential candidate received a negative credible fear determination and was deported to danger after proceeding without her attorney in her CFI because an ICE officer told her she did not need her attorney.¹¹⁶ The current regulatory language at 8 C.F.R. 208.30 (d)(4) providing that “any person or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview” is inadequate to guarantee right to counsel in credible fear interviews. The agencies should amend the regulation to prohibit conducting CFIs of represented asylum seekers if the attorney is not present.
 - **Prohibit asylum officers from conducting CFIs outside of regular business hours** to ensure that attorneys can attend client interviews. Human Rights First has received

¹¹³ Ingrid Eagly & Steven Shafer, “Access to Counsel in Immigration Court,” pp.20-22 (“[D]uring the six-year period from 2007 to 2012, a total of 272,352 immigrants in removal proceedings applied fo-r relief from removal. Among these immigrants seeking relief, just over half (144,544 total) were granted the relief they sought by the immigration judge. Yet only 6,597 of these respondents, or two percent of those who applied for relief, succeeded without an attorney. This dismal statistic reveals just how rare it is for immigrants without counsel to present and win their claims in immigration court.”); Karen Berberich and Nina Siulc, “Why Does Representation Matter? The Impact of Legal Representation in Immigration Court,” Vera Institute of Justice, (Nov, 2018), <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf>, pp.1-2 (“It is nearly impossible to win deportation cases without the assistance of counsel. Only 5 percent of cases that won between 2007 and 2012 did so without an attorney; 95 percent of successful cases were represented.”).

¹¹⁴ Human Rights First, “Biden Administration to Move to Eliminate Requests for Reconsideration Would endanger Asylum Seekers, Deport Them to Persecution and Torture,” p.4.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 8.

reports of the Asylum Office calling attorneys early in the morning or late at night including on weekends without notice to conduct the CFI at these odd hours. An attorney reported to Human Rights First that around summer 2021, an asylum officer stated that the Asylum Office was conducting credible fear interviews during the weekends regardless of whether they could reach asylum seekers' attorneys.

- **Undertake CFIs only after clearly asking asylum seekers their primary or best language and providing interpretation in that language**, as interpretation mistakes often lead to mistaken negative determinations, the need for additional interviews and review, and prolonged detention. Where an interpreter in the applicant's best language cannot be located within a reasonable amount of time, the Asylum Office should be consistent in foregoing the credible fear interview and placing the applicant directly into full immigration court proceedings, which will allow for more time to arrange for suitable interpretation. The Asylum Office routinely fails to conduct CFIs in the asylum seeker's best language, resulting in erroneous negative determinations.¹¹⁷ In the past few months alone, for instance, dozens of detained African asylum seekers were forced to conduct their CFIs in a language (typically French) that is not their native or best language and received negative determinations.¹¹⁸
- **Apply the most favorable circuit law**, which would help ensure that people have a fair opportunity to seek asylum and minimize disparate treatment based on arbitrary factors such as which Asylum Office is assigned to conduct CFIs, as was long the practice of the Asylum Office until the Trump administration attempted to eliminate it.¹¹⁹ Immigration law varies widely based on circuit court interpretations of statutes, regulations, and BIA case law. Often neither the location of the Asylum Office conducting the interview, nor the physical location of the asylum seeker corresponds to their destination location. To help ensure uniform and fair application of asylum law in expedited removal, the agencies should establish through regulation the Asylum Office's longstanding practice of applying the most favorable circuit law in credible fear determinations.
- **Clarify procedures for negative credible fear reviews by immigration judges** to ensure that asylum seekers are guaranteed a right to counsel in credible fear reviews, informed of their right to be represented by an attorney, provided a continuance to seek counsel, if desired, permitted to present evidence and facts not in the record that must be considered by the immigration judge, and guaranteed meaningful participation by their attorney at the review, including submitting written or oral statements, raising objections, and questioning their client at the hearing. Currently, some immigration judges bar attorneys from attending their clients' credible fear reviews, severely limit their participation in these reviews—including prohibiting them from speaking on the record—or refuse to consider additional

¹¹⁷ *Id.* at 6.

¹¹⁸ *Id.* at 6.

¹¹⁹ USCIS, "Refugee, Asylum and International Operations Directorate, Officer Training Asylum Division Officer Training Course-Reasonable Fear of Persecution and Torture Determinations," (Feb. 13, 2017), https://www.uscis.gov/sites/default/files/document/lesson-plans/Reasonable_Fear_Asylum_Lesson_Plan.pdf; *Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020) (finding Trump administration's attempt to eliminate the "choice-of-law policy . . . arbitrary and capricious due to USCIS's failure to acknowledge and explain its departure from past practice").

evidence.¹²⁰ Clarifying procedures for credible fear reviews through regulation would protect due process rights of asylum seekers, help prevent wrongful deportations to persecution and torture, and ensure greater uniformity and more meaningful consideration of asylum eligibility in credible fear reviews.

VII. Human Rights First Recommendations for an Effective, Humane, and Timely Asylum System that Preserves and Enhances Due Process

Human Rights First urges the Biden administration to take steps that will create a fair, accurate, and timely asylum process that enhances crucial due process protections. An asylum system that attempts to rush adjudications and to undermine due process will result in mistaken denials of protection, requiring otherwise unnecessary appeals and risks returning refugees to persecution and torture in violation of U.S. law and treaty obligations. Instead, as we and many other groups have previously outlined,¹²¹ DHS and DOJ should undertake steps to strengthen the U.S. asylum system to make it more effective, humane, and timely.

Establish an Asylum Office initial adjudication referral process

We support efforts to expand the use of initial Asylum Office interviews with USCIS asylum officers for all asylum seekers, including individuals who have recently arrived at, or entered through, a U.S. border. These Asylum Office adjudications should not, however, be conducted within the fundamentally flawed and due process deficient expedited removal process, which would lead to duplicative interviews by asylum officers¹²² and limit due process for asylum seekers who receive wrongful negative fear determinations. The decision to use expedited removal against populations seeking refugee protection contributed to the growth of backlogs and delays at the Asylum Office under the Obama administration by diverting officers from conducting full asylum interviews to instead conduct preliminary credible fear screenings.¹²³

Instead, Asylum Office interviews can be scheduled for asylum seekers who are referred directly to full removal proceedings (avoiding expedited removal), or already in, immigration court removal proceedings under 8 U.S.C. § 1229a after those proceedings are terminated or adjourned with the consent of the applicant, as Human Rights First and other experts have suggested.¹²⁴ These asylum interviews should not be conducted in detained settings but after the individual is released and in their destination locations so that asylum seekers can receive advice and representation from legal counsel as well as adequate time to prepare and present their claims in a less traumatizing setting than an immigration detention center. This system would result in

¹²⁰ Human Rights First, “Biden Administration to Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture,” p.3.

¹²¹ Human Rights First, “Letter to Attorney General and DHS Secretary on Asylum System Reforms,” (Apr. 15, 2021), <https://www.humanrightsfirst.org/sites/default/files/LetterDHSDOJAsylumSystemReformsFINAL.pdf>.

¹²² Requiring asylum officers to conduct both CFIs and asylum adjudications is inefficient and redundant and will only exacerbate the Asylum Office backlog of more than 400,000 pending applications. USCIS, “Number of Service wide Forms By Quarter, Form Status, and Processing Time Fiscal Year 2021, Quarter 3,” (2021), https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q3.pdf.

¹²³ Human Rights First, “In the Balance.”

¹²⁴ Human Rights First & Center for Gender & Refugee Studies, “Swift Action to Improve Fairness and Enable Timely Asylum Hearings in Immigration Courts.”

quicker initial asylum decisions and reduce the number of individuals ultimately referred to immigration court hearings.

Address delays and backlogs in the Asylum Office adjudication process

To produce timely, accurate and efficient decisions, Asylum Office capacity to provide initial adjudication for all asylum seekers should be enhanced by reducing or eliminating the diversion of Asylum Office staff to conduct credible fear screenings by ending or reducing the use of expedited removal and instead referring asylum seekers for full Asylum Office interviews in the manner recommended above,¹²⁵ ramping up hiring of Asylum Office staffing for adjudication of full asylum requests, and addressing other systemic adjudication bottlenecks at the asylum office. The Asylum Office must urgently address its failure to grant asylum cases that are overwhelmingly later granted by the immigration court. Existing Asylum Office backlogs should also be addressed by modernizing interview scheduling and filing systems and the creation of an application route for cancellation of removal cases, as Human Rights First and other experts have suggested.¹²⁶ People seeking protection in the United States should be able to schedule interviews without delays caused by a lack of available interview dates or slots.

DHS should also address the Asylum Office's apparent policy of punting certain classes of asylum claims to immigration court for adjudication instead of determining whether they are eligible for asylum protection. Human Rights First's attorneys and pro bono partners have long observed that asylum seekers with a well-founded fear of *future* persecution appear often to be referred to immigration court for adjudication of their claims instead of granted asylum in the first instance by the Asylum Office. Similarly, the Asylum Office also seems to refer, instead of grant, cases involving imputed political opinions in which a persecutor has harmed or threatens to harm an applicant based on the imputed political opinion associated with their actions or statements. In addition, each year, thousands of asylum claims are referred from the Asylum Office to the immigration courts on the basis of the one-year filing deadline, even though many of these applicants meet the "refugee" definition under U.S. law, qualify for exceptions to this asylum ban and should have been granted asylum by the Asylum Office.¹²⁷ According to USCIS data, in Fiscal Year 2018 alone, 18,050 cases were referred from the Asylum Office to immigration court due solely to the filing ban – 39.2 percent of referrals in cases adjudicated that year.¹²⁸ Additional measures, outlined below, should be instituted to ensure that asylum officers fully consider and grant meritorious asylum claims rather than needlessly referring them to immigration court—adding to backlogs and prolonging delays for asylum seekers. DHS must also

¹²⁵ For instance, government data shows that during the Obama and Trump administrations (FY 2016 to FY 2019), an astounding 89 percent of the asylum officers in the Asylum Division were temporarily diverted from adjudicating asylum cases to other duties, including screenings for asylum seekers placed in expedited removal as well as those subjected to Trump administration policies to block refugees at the southern border. *Compare* Human Rights First, "Protection Postponed"; *with* U.S. Dep't of Homeland Security, "Annual Report 2020: Citizenship and Immigration Services Ombudsman," (June 30, 2020), https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf.

¹²⁶ Human Rights First, "Protection Postponed"; Doris Meissner, Faye Hipsman, & T. Alexander Aleinikoff, "The U.S. Asylum System in Crisis: Charting a Way Forward," Migration Policy Institute, (Sept. 2018), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf>.

¹²⁷ Human Rights First, "Draconian Deadline."

¹²⁸ USCIS, "Immigration and Citizenship Data," <https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data> (last accessed Oct. 14, 2021).

take steps to address the interrogation-like approach of some asylum officers and the unnecessarily lengthy multi-hour interviews that officers conduct in some cases, as well as any discriminatory policies or practices targeting asylum seekers of certain races or religions for excessive questioning.

Enable timely, effective, and fair immigration court decisions

Asylum seekers whose requests for asylum are not granted by the Asylum Office should be referred to the immigration court for a full hearing, as detailed in Section I above. Depriving asylum seekers of immigration court hearings in such situations would diminish the efficiency and non-adversarial nature of Asylum Office interviews and risk erroneous decisions that return refugees to persecution and torture.¹²⁹

As Human Rights First and other organizations have recommended,¹³⁰ changes to the asylum process should also address inefficiencies and bottlenecks in the immigration court process that add to, or fail to alleviate, delays and backlogs. We commend the administration for vacating a Trump administration Attorney General ruling that prohibited immigration judges from managing their own dockets through administrative closure, an important step that Human Rights First and other organizations recommended to address delays and make immigration court adjudications fairer and more humane.¹³¹ Additionally, the administration should swiftly fill existing positions, surge staffing and asylum support to the courts and request funding from Congress to increase immigration court interpreters, support staff, BIA legal and administrative staff—and, with reforms to eliminate politicized hiring—immigration judges and BIA members fairly and objectively selected. In addition, requiring pre-hearing conferences, which could be held telephonically or via videoconferencing, to narrow issues for trial and where DHS attorneys could enter into stipulations on uncontested issues would if properly implemented greatly reduce the number of hearings conducted and length of those proceedings that are needed. DHS trial attorneys should also be instructed to reach such stipulations, agree to grants of asylum without trials where eligibility for relief is apparent on the written submissions, and to quickly terminate immigration court cases that can be resolved through pending USCIS petitions. To ensure that immigration judges can efficiently manage their dockets, the administration should promulgate clear and uniform rules on administrative closure, which the Trump administration attempted to eliminate. A process to advance cases stuck in the backlog, including for asylum seekers facing humanitarian and other challenges, should also be created. This mechanism would help to ensure that open hearing slots do not go unused.

Ensure refugees are not denied asylum

To ensure cases move effectively through the Asylum Office and immigration court adjudication systems without triggering otherwise unnecessary delays and appeals, DHS and DOJ should

¹²⁹ Human Rights First, “Immigration Court Asylum Hearings Versus ‘Review’ of Asylum Officers’ Decisions,” (June 2021),

https://www.humanrightsfirst.org/sites/default/files/De_Novo_Imm_Court_Hearings_vs_IJ_Review_06.21.pdf.

¹³⁰ Human Rights First & Center for Gender & Refugee Studies, “Swift Action to Improve Fairness and Enable Timely Asylum Hearings in Immigration Courts.”

¹³¹ *Matter of Cruz-Valdez*, 28 I&N Dec. 327 (A.G. 2021) (vacating *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018)).

reverse remaining Trump-era rules, rulings, and policies¹³² that prevent refugees from obtaining protection and create additional administrative inefficiencies. These include the third-country transit asylum ban,¹³³ asylum entry ban,¹³⁴ “death to asylum” rule,¹³⁵ and public health bars,¹³⁶ as well as work authorization deprivations¹³⁷ that prevent asylum seekers from supporting themselves and their families while they await adjudication of their cases. The agencies should also, by regulation, clarify the “particular social group” definition and “nexus” requirements to ensure that U.S. asylum adjudications are consistent with U.S. and international law.¹³⁸

Release asylum seekers from detention

Detention of asylum seekers flouts U.S. legal obligations under the Refugee Convention and Protocol.¹³⁹ To bring the United States into compliance with these international obligations and to treat asylum seekers humanely, the administration should ensure that asylum seekers are not subject to arbitrary detention and that they have access to mechanisms to secure their release from detention, including parole and bond. As noted above, Human Rights First recommends that the agencies ensure that regulations clarify that DHS should grant parole to all asylum seekers whose continued detention is not in the public interest, in line with the INA and, given the continued failure of DHS officers to release eligible asylum seekers from detention on parole, to create a presumption of release of asylum seekers who have received a credible positive fear determination unless DHS establishes by clear and convincing evidence that the individual poses a flight risk or danger to the community and no less restrictive alternative would mitigate the risk. The administration should also ensure that detained asylum seekers have access to bond determinations hearings as well as regular opportunities to challenge continued detention.

¹³² Human Rights First & Center for Gender & Refugee Studies, “Swift Action to Improve Fairness and Enable Timely Asylum Hearings in Immigration Courts.”

¹³³ U.S. Dep’t of Homeland Security & Exec. Off. for Immigration Review, “Asylum Eligibility and Procedural Modifications,” 85 FR 82260, (Jan. 19, 2021), <https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications>.

¹³⁴ U.S. Dep’t of Homeland Security & Exec. Off. for Immigration Review, “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims,” 83 FR 55934, (Nov. 9, 2018), <https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection>.

¹³⁵ U.S. Dep’t of Homeland Security & Exec. Off. for Immigration Review, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” 85 FR 80274.

¹³⁶ U.S. Dep’t of Homeland Security & Exec. Off. for Immigration Review, “Security Bars and Processing; Delay of Effective Date,” 86 FR 6847, (Mar. 22, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01683/security-bars-and-processing-delay-of-effective-date>.

¹³⁷ U.S. Dep’t of Homeland Security, “Asylum Application, Interview, and Employment Authorization for Applicants,” 85 FR 38532; U.S. Dep’t of Homeland Security, “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,” 85 FR 37502, (Aug. 21, 2020), <https://www.federalregister.gov/documents/2020/06/22/2020-13391/removal-of-30-day-processing-provision-for-asylum-applicant-related-form-i-765-employment>.

¹³⁸ Human Rights First & Center for Gender & Refugee Studies, “Swift Action to Improve Fairness and Enable Timely Asylum Hearings in Immigration Courts.”

¹³⁹ Human Rights First, “Assessment: U.S. Compliance with the Refugee Convention at its 70th Anniversary,” (July 27, 2021), <https://www.humanrightsfirst.org/resource/assessment-us-compliance-refugee-convention-its-70th-anniversary>, pp.6-7.

Preserve federal court review of asylum cases

We welcome the commitment of the agencies to preserve federal court review in asylum cases and urge that this fundamental protection be maintained in any asylum process.¹⁴⁰ As discussed above, judicial review of immigration court and BIA decisions is a fundamental and crucial protection to prevent the deportation of refugees to persecution and torture. Judicial review protects refugees from politicized policies, rushed administrative decision making, or discriminatory factual and legal interpretations, and provides judicial oversight of administrative adjudications with life-and-death consequences. It also ensures adherence to proper legal standards and recognition of claims for marginalized groups, such as women, LGBTQ individuals, and religious minorities, in line with UNHCR guidance.¹⁴¹

Regulatory and other changes recommended by Human Rights First to the asylum process

To make the asylum adjudication process more timely, accurate, fair, and efficient, Human Rights First recommends that DHS and DOJ amend the proposed rule to do the following:

Establish an Asylum Office Initial Adjudication Referral Process

- To help reduce the immigration court backlog and resolve more cases at the Asylum Office, provide for termination or adjournment (with the consent of the asylum applicant) of immigration court removal proceedings of individuals who have filed an asylum application with the immigration court (which had not already been referred from the Asylum Office) or those who indicate an intent to file an application for asylum and refer those cases to the Asylum Office for initial adjudication of the request for asylum. This process can be implemented as staffing at the asylum office increases.
- Create a streamlined process—outside of expedited removal—to refer new requests for asylum originating at the U.S. border, including at land and airport ports of entry, to immigration court for referral (with the consent of the applicant) to the Asylum Office for initial adjudication of the request for asylum.
- Refer all cases not granted by the Asylum Office to immigration court for full removal proceedings under 8 U.S.C. § 1229a including a *de novo* hearing on the asylum claim as well as consideration of applications for withholding of removal, protection under the Convention against Torture, and other available forms of relief from deportation.

Address Delays and Backlogs in the Asylum Office Adjudication Process

- Clarify that the Asylum Office may grant any asylum claim supported by the facts in the individual case and applicable law—whether statutory, federal court precedent, Board of Immigration Appeals (BIA) decision, or regulation—and that the Asylum Office may not, by policy or in practice, deny or refer to immigration court particular classes or categories of asylum claims (including in cases involving the potential application of one or more bars to asylum).

¹⁴⁰ 86 FR 46906, 46921 (making clear that “as with BIA decisions in removal proceedings, the noncitizen may seek judicial review before the appropriate circuit court of appeals”).

¹⁴¹ See e.g., *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341 (11th Cir. 2009).

- Create a formal process to advance from the backlog pending asylum interviews for applicants with medical, humanitarian, or other pressing concerns, including family members in danger abroad.
- Amend proposed 8 C.F.R. § 208.9(d) to remove temporal restrictions (“[u]pon completion of the interview or hearing”) on when an asylum applicant’s counsel or representative may ask follow-up questions to the applicant or offer a statement or comment on the case.
- Amend proposed 8 C.F.R. § 208.9(g)(1), (2) to: (1) provide competent, qualified interpreters for any Asylum Office interview where an applicant is unable to proceed in English and has not supplied their own interpreter; (2) exempt an applicant who is unable to proceed with a government-provided interpreter because the interpreter is not competent in the applicant’s best language, the applicant cannot hear or understand the interpreter or for other good cause from being considered to have not appeared for (*see* 8 C.F.R. § 208.10) or caused a delay in the interview; and (3) permit an interpreter supplied by the applicant to interpret by telephone.
- Establish a process for individuals to apply directly to USCIS for cancellation of removal so that applicants for this humanitarian relief can be referred for assessment and these cases do not add to Asylum Office and immigration court backlogs.

Enable Timely, Effective, and Fair Immigration Court Decisions

- Pursuant to the Attorney General’s decision in *Matter of Cruz-Valdez*, 28 I&N Dec. 327 (2021), formalize via regulation immigration judge authority to use administrative closure of immigration court cases to manage their dockets.
- Establish formal pre-hearing conferences for DHS attorneys and respondents’ counsel to confer and identify issues in dispute prior to trial, stipulate to issues where the respondent has met his or her burden and there is no dispute, or agree that relief is grantable based on the written submissions.
- Clarify that immigration judges have authority to terminate removal proceedings to allow the respondent to pursue applications for permanent status before USCIS, if the respondent establishes prima facie eligibility for such status.
- Create a formal mechanism for asylum seekers and other immigrants to advance immigration court hearing dates to ensure that their cases are timely heard and that hearing slots do not go unused.

Release Detained Asylum Seekers on Parole or Bond

- Amend proposed 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii) to clarify that DHS should grant parole under the provisions of 8 C.F.R. § 212.5(b), including where continued detention would not be in the public interest.
- Amend 8 C.F.R. § 235.3(c) to clarify that any asylum seeker who is placed in removal proceedings may be released on parole in the public interest, regardless of their manner of entry, by deleting the phrase “arriving alien(s)” and replacing it with “noncitizen(s),” and create a presumption that detention of asylum seekers is not in the public interest unless DHS affirmatively establishes by clear and convincing evidence that the individual poses a

flight risk or danger to public safety and no less restrictive alternative would mitigate the risk.

- Revise regulatory language to ensure that all asylum seekers who pass CFIs are eligible for parole under 8 C.F.R. § 212.5(b)(5), regardless of the proceedings into which they are placed (*see* 8 C.F.R. § 235.3(c) (limiting Section 212.5(b)(5) parole provisions to arriving noncitizens “placed in proceedings under [8 U.S.C. § 1229a]”)).
- Provide timely and periodic bond hearings before an immigration judge for individuals seeking protection in the United States who have passed a credible or reasonable fear interview to ensure that they are not subjected to arbitrary detention without an opportunity to request review of their detention at regular intervals.

Attachments

- Human Rights First, “Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture” (Oct 1, 2021), <https://www.humanrightsfirst.org/resource/biden-administration-move-eliminate-requests-reconsideration-would-endanger-asylum-seekers>
- Human Rights First, “Draconian Deadline: Asylum Filing Ban Denies Protection, Separates Families” (Sep. 30, 2021), <https://www.humanrightsfirst.org/resource/draconian-deadline-asylum-filing-ban-denies-protection-separates-families>
- Human Rights First, “Immigration and Customs Enforcement Records Received Through FOIA Confirm Need for Increased Oversight of Agency’s Arbitrary and Unfair Parole Decisions for Asylum Seekers” (Sep. 23, 2021), <https://www.humanrightsfirst.org/resource/immigration-and-customs-enforcement-records-received-through-foia-confirm-need-increased>
- Human Rights First, “Assessment: U.S. Compliance with the Refugee Convention at its 70th Anniversary” (July 27, 2021), <https://www.humanrightsfirst.org/resource/assessment-us-compliance-refugee-convention-its-70th-anniversary>
- Human Rights First, “Immigration Court Asylum Hearings Versus “Review” of Asylum Officers’ Decisions” (June 2021), https://www.humanrightsfirst.org/sites/default/files/De_Novo_Imm_Court_Hearings_vs_IJ_Review_06.21.pdf
- Joint NGO letter to AG Garland and DHS Secretary Mayorkas on Asylum System Reforms (Apr. 15, 2021), <https://www.humanrightsfirst.org/sites/default/files/LetterDHSDOJAsylumSystemReformsFINAL.pdf>
- Human Rights First, “Protection Postponed: Asylum Office Backlogs Cause Suffering, Separate Families, and Undermine Integration” (Apr. 9, 2021), <https://www.humanrightsfirst.org/resource/protection-postponed-asylum-office-backlogs-cause-suffering-separate-families-and-undermine>

Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture

On August 20, 2021, the Biden administration [published](#) a Notice of Proposed Rulemaking (NPRM) on asylum processes that would eliminate the life-saving protection of asylum office requests for reconsideration of negative credible fear determinations, among other proposed changes. The proposed rule would eliminate a crucial asylum office safeguard to reconsider mistaken decisions regarding whether asylum seekers placed in expedited removal have a credible fear of persecution. At the same time that the rule could lead to a dramatic expansion in the use of expedited removal – a deeply [flawed process](#) that risks returning refugees to persecution and torture and whose deficiencies have been documented for [decades](#). These changes would further increase the likelihood of wrongful deportations of refugees to harm.

Shortly after the U.S. government began implementing expedited removal in 1997, the former Immigration and Naturalization Service (INS) [clarified](#) that it had authority to conduct a second credible fear interview and reverse a negative credible fear determination even if it had been affirmed by an immigration judge. After widespread [reports](#) of asylum seekers wrongly deported under expedited removal, and [concerns](#) about mistaken credible fear denials expressed by U.S. Senator [Patrick Leahy](#) on the floor of the Senate in September 2000, the INS [published](#) final regulations in December 2000 to make clear that the INS (later the Department of Homeland Security (DHS)) could reconsider a negative determination including after it had been affirmed by an immigration judge.

Like the Biden administration, the Trump administration also proposed to eradicate requests for reconsideration in a June 15, 2020 proposed rule that attempted to unlawfully rewrite asylum law and eviscerate virtually all protection claims (often referred to as the “death to asylum rule”), but ultimately [excluded](#) the change from the final regulation explaining that it had been made inadvertently. The Biden administration’s attempt to resurrect this harmful change – that even the Trump administration admitted was a mistake and declined to implement – will further magnify the risks of expedited removal, obliterate a crucial safeguard in an already dangerous system of fast-track deportations, and result in the return of refugees to harm in violation of the Refugee Convention and Protocol.

The Biden administration has detained thousands of asylum seekers and subjected many to expedited removal proceedings riddled with due process violations and unlawful and abusive conduct by government agents, highlighting the critical need for safeguards against erroneous credible fear decisions other than immigration judge review, which often serves as a rubber stamp. Asylum seekers harmed by egregious due process violations in expedited removal under the Biden administration include: a 13-year-old unaccompanied child illegally subjected to a credible fear interview; dozens of detained African asylum seekers and many others forced to have credible fear interviews (CFIs) in a language in which they are not fully fluent; and at least a dozen asylum seekers pressured to proceed with their credible fear interviews without counsel present – in at least one instance resulting in the wrongful deportation of a Nicaraguan asylum seeker who had been jailed for her political opposition to the current regime.

This factsheet documents a small fraction of the lives that have been saved through the critical safeguard of a request for reconsideration, including: an 18-year-old Venezuelan asylum seeker whose negative credible fear determination was reversed through a request for reconsideration filed the day before DHS

was scheduled to deport him; a Nicaraguan asylum seeker who had been detained, beaten, stabbed, and tortured by police officers for participating in anti-government marches; a Haitian refugee who has since been granted asylum; an asylum seeker from Burkina Faso who had suffered attacks and threats after converting to Christianity; and an asylum seeker from the Ivory Coast who had been violently attacked for his political views.

Requests for Reconsideration Are a Minimal Safeguard in Dangerous Expedited Removal Process

The Biden administration's August 2021 asylum [NPRM](#) hinges on subjecting asylum seekers at the border to expedited removal while at the same time eliminating requests for reconsideration of negative credible fear interviews that have been reviewed by an immigration judge. These requests are a critical safeguard that can and has stopped the wrongful removal of refugees who would have been returned to persecution without access to the U.S. asylum system. The Biden administration cites "[efficiency](#)" to attempt to justify sacrificing the ability of asylum offices to review and reverse wrongful decisions, but efficiency cannot be used as an excuse for circumventing U.S. legal obligations to refugees. Eliminating requests for reconsideration is inexcusable and would further amplify the mistakes of the broken expedited removal process, under which individuals are rapidly deported without a hearing and opportunity to apply for asylum before an immigration judge unless they are referred for and receive a positive credible fear determination.

As the bipartisan U.S. Commission on International Religious Freedom and non-governmental [organizations](#) have long [confirmed](#), the dangerous flaws of expedited removal include [failures](#) by asylum officers to properly screen individuals, elicit relevant information, and apply the correct legal standards; lack of access to counsel; detention in abysmal conditions; due process issues arising from telephonic interviews; traumatic and ongoing [family separation](#); impact of medical and mental health conditions on ability to testify; and limited judicial review. DHS routinely fails to provide adequate interpretation services to asylum seekers while they are in detention and often [subjects](#) them to CFIs in a language they do not speak fluently or with an interpreter they have trouble communicating with due to differences in dialect, frequent interruptions, and poor phone call quality with intrusive background noise. Asylum offices and interpreters frequently [interrupt](#) people and require them to reply with "yes" or "no" answers, further truncating an already rushed and deficient proceeding. Successive administrations have failed to address the long-documented flaws of expedited removal and limited statutory/regulatory protections for asylum seekers that are "[often misapplied or flouted altogether](#)." A recent Supreme Court [decision](#) further narrowed judicial review, limiting the availability of habeas corpus to challenge wrongful negative fear determinations. The Trump administration's weaponization of the credible fear process, which caused grant rates to [plummet](#) as countless asylum seekers were wrongly denied access to the U.S. asylum system, only further confirms that requests for reconsideration are a critical safeguard.

Under existing regulations, an asylum seeker who receives a negative credible fear determination (a finding that the individual has not established a "[significant possibility](#)" of eligibility for asylum) is entitled to review by an immigration judge. In addition, asylum seekers can [request](#) that the asylum office reconsider a negative decision that has been affirmed by the immigration judge to provide an opportunity for the asylum office to rectify erroneous determinations that were not detected during the often cursory immigration judge review. The asylum office may reverse the decision based on the asylum seeker's written request or conduct another interview. Asylum seekers are typically only able to submit requests for reconsideration with the assistance of counsel, as many unrepresented people do not know about the process let alone can write a request for reconsideration in English and submit it to the asylum office

while detained. If the immigration judge or asylum office vacates the negative credible fear determination, the asylum seeker is permitted to apply for asylum and receive a full hearing before an immigration judge.

The former INS [clarified](#) in 1997 that it had authority to reverse negative credible fear determinations. In 2000, Senator Leahy [drew](#) attention to numerous reports of people being deported to persecution under the expedited removal process and the critical importance of review mechanisms including the ability of the asylum office to reverse its decisions. Due to the egregious flaws of expedited removal, Senator Leahy and others proposed the bipartisan [Refugee Protection Act of 1999](#) to limit the use of expedited removal to emergency situations and ensure review. In December 2000 the INS published final [regulations](#) to include a provision reiterating that it could reconsider a negative determination, including after it had been affirmed by the immigration judge.

The Biden administration falsely [claims](#) in the August 2021 asylum NPRM that review by an immigration judge of negative credible fear determinations is an adequate safeguard against the serious and unfixable defects in the expedited removal process. But immigration judge review of negative credible fear determinations is, in many cases, a “[rubber stamp](#).” From June 2017 to June 2018, immigration judges affirmed negative CFIs in [76 percent](#) of cases, according to the most recent available analysis of Executive Office of Immigration Review (EOIR) data by the Syracuse University’s Transactional Records Access Clearinghouse. Moreover, there is [enormous, unfair variation](#) in outcomes depending on the immigration judge assigned to review the credible fear determination, with some judges affirming negative determinations in nearly every case.

Judges often schedule CFI reviews within [24 hours](#) of the initial determination – leaving asylum seekers with virtually no time to prepare or consult with counsel, bar attorneys from participating in reviews (the government [contends](#) there is no right to counsel in these reviews), reject additional evidence or testimony, and interpret additional information the asylum seeker did not have time or ability to present at the CFI as impugning the credibility of the asylum seeker. Attorneys and asylum seekers report that immigration judges sometimes limit their review to a few questions and prevent asylum seekers from sharing any additional information. Even in the rare instance where an asylum seeker does manage to secure counsel, attorneys are frequently [not notified](#) of an immigration judge review until the night before or not at all. Attorneys have reported that asylum seekers sometimes do not receive the credible fear decision and notes taken by the asylum officer prior to the immigration judge review, leaving them unable to identify or challenge errors in the record. They are at a major disadvantage even if they do receive these documents because the notes are in English, and a translation is not provided.

Due to the [well-documented](#) flaws of expedited removal and the inadequacy of immigration judge review of negative credible fear determinations, it is critical that the asylum office retain the ability to review and reverse erroneous decisions to prevent the wrongful deportation of refugees.

Asylum Seekers’ Lives Saved Through Requests for Reconsideration, Including Under Biden Administration

Many asylum seekers whose negative CFIs were wrongly affirmed after cursory review by an immigration judge have avoided imminent deportation to persecution and torture through requests for reconsideration or reinterview. These include refugees whose initial negative fear determinations were reversed through reconsideration mechanisms and who were subsequently granted asylum, such as:

- **A negative credible fear determination for a refugee who fled severe domestic violence was reversed by the Newark asylum officer in June 2009 after an attorney at Human Rights First**

requested reconsideration, and she was later granted asylum. The woman had been brutally beaten, raped, stalked, and threatened with death and the death of her children by her ex-partner in the Dominican Republic. The asylum officer did not permit the woman's attorney to attend the interview in person and did not provide the woman advance notice of the interview, depriving her of an opportunity to call her attorney to attend the interview telephonically. The asylum officer found her not credible due to interpretation problems and engaged in a hostile and adversarial questioning style, including blaming the woman for staying with her abusive partner.

- **After Human Rights First requested reconsideration in August 2000 for a rape survivor from the Dominican Republic, the former INS reversed a negative credible fear finding, and the woman was ultimately granted asylum.** She had fled after being abused for years by her partner, raped—including at knifepoint—violently beaten with weapons, forbidden to leave the house, and threatened with a gun to her head. The asylum officer found she lacked a credible fear after interviewing her while she was unrepresented and relying on a BIA case that at the time was under review by the Attorney General and pending appeal in the Ninth Circuit. After Senator Patrick Leahy and Congresswoman Carolyn Maloney advocated for reconsideration, the INS reversed its determination.
- **In 2017, a Haitian refugee fleeing gender-based violence and death threats was found to have a credible fear of persecution upon a request for reconsideration to the San Francisco asylum office and later granted asylum.** After surviving a difficult journey to the United States, she received a negative credible fear determination while detained, as she did not have access to counsel or resources in Haitian Creole. The woman tried to explain her claim but was interrupted by the interpreter, whom the woman had trouble understanding. After an attorney at the Center for Gender and Refugee Studies submitted a request for reconsideration, the asylum office determined that she had a credible fear of persecution and, in December 2019, the woman was granted asylum by an immigration judge.

Recent requests for reconsideration have also reversed erroneous decisions by the asylum office that resulted from erroneous interpretations, inappropriate questioning, or abusive conduct by asylum officers during CFIs that prevented asylum seekers from disclosing important aspects of their claims, including:

- **In September 2021, the negative credible fear finding for a torture survivor from the Democratic Republic of Congo (DRC) was vacated by the asylum office through a request for reconsideration.** According to his attorney from the Southeast Immigrant Freedom Initiative (SIFI), the man had fled the DRC after members of a rebel group broke into his home, attacked him with machetes, and slit his father's throat. After conducting further interviews and reviewing a psychological evaluation and physical examination documenting the extent of his scars, injuries, and mental trauma, the asylum office vacated the original negative CFI.
- **In July 2021, an erroneous negative credible fear determination for an unrepresented eighteen-year-old Venezuelan asylum seeker was vacated through a request for reconsideration.** The day before his removal flight was scheduled to depart, attorneys at SIFI filed a request for reconsideration noting numerous errors with the CFI, including the interviewing asylum officer's failure to adequately analyze the seriousness of the persecution the young man had experienced.
- **In September 2021, the asylum office vacated a negative credible fear determination in the case of an asylum seeker from Ghana after his attorney at SIFI filed a request for**

reconsideration that highlighted multiple errors in the initial CFI, including inappropriate questioning and offensive language by the interviewing asylum officer. For instance, in the summary of the interview, the asylum officer referred to the man as the “girlfriend of a wealthy man” misgendering the applicant and misdescribing the nature of the relationship.

- **In April 2021, the Houston asylum office reconsidered its initial determination that a Mexican asylum seeker who had fled years of physical abuse, imprisonment, and threats of incest by her family did not have a credible fear of persecution.** Traumatized and unrepresented at her CFI after being detained for four months, the woman was unprepared to fully describe her abuse, and the asylum officer failed to ask about any form of abuse other than physical violence. The officer found that she lacked credible fear based on an overbroad application of former Attorney General Sessions’ ruling in *Matter of A-B-*, an unlawful case that has since been vacated. Her attorney, Thera McAvoy with the Innovation Law Lab, filed a request for reconsideration with evidence of the long history and extent of abuse the woman had suffered, prompting the asylum office to reverse its earlier determination.
- **In June 2020, the asylum office reversed a negative credible fear determination for a 21-year-old Honduran asylum seeker who had witnessed the murder of his guardian and fled after the same gang murdered all the other witnesses to the killing.** The gang killed the man’s guardian because the guardian had previously helped the asylum seeker’s mother leave the country after the gang sexually abused and threatened her. At the time of his CFI, the young man was unrepresented and did not know why his mother had fled or why his guardian had been killed, as his mother had tried to protect him from this trauma. After speaking with his mother, the man’s attorneys at Florence Immigrant & Refugees Rights Project (FIRRP) were able to submit a fuller explanation of his claim.
- **A young Salvadoran asylum seeker who fled death threats resulting from his refusal to submit to voter intimidation by gang members was found to have a credible fear of persecution after the Los Angeles asylum office re-interviewed him pursuant to a request for reconsideration by his attorney.** At the man’s initial telephonic CFI in 2014, the asylum officer refused to review his corroborating evidence, as did the immigration judge before affirming the negative determination. His application for asylum remains pending before the immigration court.

DHS typically subjects asylum seekers to CFIs while they are detained in abysmal and retraumatizing conditions that threaten their physical and mental health and where they lack access to adequate medical care. As a result of its ability to reconsider negative CFIs, the asylum office has vacated decisions or conducted additional interviews in cases where asylum seekers were forced to undergo CFIs while suffering from serious medical conditions impacting their ability to speak about their fear of return, including:

- **An asylum seeker who suffered a miscarriage the night before her CFI in August 2014 successfully requested review of the negative fear determination that she received from the Los Angeles asylum office.** The woman was rushed to the hospital the night before her CFI due to intolerable abdominal pain and returned to the detention facility in the middle of the night without knowing if she had lost the pregnancy. During the CFI the following morning, she could not concentrate on the interview, worried that she had suffered a miscarriage. With the assistance of FIRRP, the woman, who had experienced significant gender-based violence, filed a request for reconsideration, was interviewed a second time by the asylum office, and found to have a credible fear of persecution.

- **The negative credible fear determination for a Nicaraguan asylum seeker was reversed in May 2021 after his attorney submitted repeated requests for reconsideration detailing the effects of his brain injury, including memory loss, speech impediments, severe migraines, and difficulty concentrating.** The Houston asylum office initially determined the man, who had fled Nicaragua after being detained, beaten, stabbed, and tortured by police officers for participating in anti-government political marches, did not have a credible fear of persecution. The man had suffered the brain injury during a brutal attack by a Nicaraguan police officer who hit him on the head, according to his attorney at the Refugee and Immigrant Center for Education and Legal Services (RAICES).

Asylum seekers are often unable to communicate effectively during CFIs due to inadequate interpretation services. Countless people have likely been deported due to defective translation, as they did not have access to legal counsel to file requests for reconsideration. Asylum seekers whose lives have been saved through requests for reconsideration after they received negative credible fear determinations due to translation problems include:

- **In June 2021, the Houston asylum office vacated a negative credible fear finding for an Angolan asylum seeker fleeing persecution due to his sexual orientation after a request for reconsideration filed by SIFI.** Unrepresented during his CFI, the man was afraid to disclose that he was gay and had difficulty understanding the Brazilian Portuguese interpreter, a different dialect from the Angolan Portuguese he speaks. The man, who suffered abuse and medical neglect while detained, tried to inform the officer that he was sick at the beginning of the interview but was forced to proceed while experiencing symptoms of COVID-19 and post-traumatic stress disorder.
- **In August 2020, an Angolan political activist, who was threatened and assaulted by members of an opposing political party, and his family were erroneously found to not have a credible fear of persecution.** After failing to conduct the CFI in the family's best language, the asylum office erroneously found that they did not have a well-founded fear of persecution even though the man tried to explain the death threats he had received, that his wife was raped by members of the opposing party, and that the police refused to protect him after he filed reports against his persecutors. After his attorney at RAICES submitted multiple requests for reconsideration, the Houston asylum office reversed its determination.
- **In October 2020, an asylum seeker who fled the Ivory Coast after being violently attacked for his political views received a negative credible fear determination by the Houston asylum office.** He had to go ahead with the CFI in French despite stating that his best language is Jula. As a result, the asylum officer made egregious errors in concluding that the man did not have a credible fear of persecution, including mischaracterizing his past persecution as having been "beaten by sticks" when the man had been repeatedly sliced with a machete. After the immigration judge affirmed the decision, his attorney at RAICES filed multiple requests for reconsideration, ultimately prompting the Houston asylum office to reverse its decision.
- **In August 2021, the Newark asylum office determined that a Brazilian asylum seeker who had been threatened and attacked by a police officer who fired a gun at him and continued to search for him had a credible fear of persecution after his attorney submitted a request for reconsideration.** The request, filed by Alyssa Kane at the Aldea - People's Justice Center, explained that the man had had difficulty understanding the European Portuguese translator at his CFI—during which he was unrepresented—and highlighting the translation errors in the transcript.

Not only must the reconsideration process be maintained, but it must also be improved and provided stronger quality control. Multiple requests for reconsideration are sometimes necessary to obtain a fair decision from the asylum office when it has declined valid and compelling requests for reconsideration. This was particularly the case under the Trump administration when the asylum office was under extreme political pressure to deny asylum in violation of U.S. laws and treaty obligations. Recent examples of asylum seekers where multiple reconsideration requests were required to reverse wrongful negative fear determinations underscore the continued need to avoid strict numerical limits on requests for reconsideration. For example:

- **In summer 2021, a negative credible fear determination for a Nicaraguan asylum seeker was reversed after his attorney submitted multiple requests for reconsideration to the Houston asylum office documenting a traumatic head injury that caused significant amnesia.** Nicaraguan paramilitary groups threatened to rape and kill the man for his political opposition views, according to his attorney at RAICES.
- **In June 2021, the Houston asylum office reversed a negative fear determination for an asylum seeker from Burkina Faso fleeing religious persecution who had been interviewed in French despite stating that his best language was Mossi.** The man had suffered attacks and death threats because he converted from Islam to Christianity. After his attorney at RAICES submitted multiple requests for reconsideration documenting interpretation problems during the CFI and clarifying the man's asylum claim, the asylum office vacated its negative CFI determination.
- **An asylum seeker from Burkina Faso who suffered attacks and death threats after converting to Christianity received a negative credible fear determination in March 2021, which was subsequently reversed through a request for reconsideration.** He was unrepresented during his CFI and forced to answer questions in French despite stating that Mossi was his best language. After the immigration judge affirmed the determination and the man secured legal representation, his attorney at RAICES submitted requests for reconsideration. The Houston asylum office vacated the negative fear determination in June 2021.

Egregious Errors and Due Process Violations under Biden Administration's Use of Expedited Removal Confirms Dangers of Eliminating Requests for Reconsideration

Major due process violations have persisted as the Biden administration embraces the use of expedited removal, resulting in wrongful outcomes that endanger asylum seekers' lives and highlighting the critical need for safeguards such as requests for reconsideration. [Guidance](#) issued by the Biden administration in September 2021 categorically designates recently arriving asylum seekers as an enforcement priority for apprehension and deportation. Pursuant to interim [guidance](#) issued in February 2021, the Biden administration has detained thousands of asylum seekers, transferred them between different detention centers across the country, rather than paroling them to family or community groups—including to facilities in Colorado, Virginia, Minnesota, Florida, Louisiana, Mississippi, and Washington, and separated asylum-seeking families by detaining them in different facilities. While inflicting this additional harm and trauma on asylum seekers, the administration has persisted in administering deeply flawed CFIs despite escalating reports of due process violations. From February 1, 2021 to September 15, 2021, the Biden administration [conducted](#) 36,540 CFIs, with the number of CFIs administered more than quadrupling from February to September 2021.

Under the Biden administration, abusive and improper conduct by Immigration and Customs Enforcement (ICE) and asylum officers at CFIs continues to condemn asylum seekers to deportation in violation of U.S. law and international obligations. In the past months, DHS has forced over a dozen asylum seekers to conduct a CFI without their lawyer present, according to their attorney Sally Santiago, using disturbing tactics such as threatening to throw them into an *hielera* (a cold cell used by Customs and Border Protection to migrants and asylum seekers near the border), telling them they do not need their attorney for the interview, and threatening to detain them indefinitely if they refuse to proceed. Recent abusive actions during CFIs include:

- **Around July 2021, a Nicaraguan asylum seeker received a negative credible fear determination at the Stewart Detention Center and was deported after proceeding without an attorney because an ICE officer told her she did not need her attorney for the interview.** A teacher in Nicaragua, the woman had been arrested and jailed for supporting an opposition presidential candidate and refusing to intimidate people into voting for the ruling party. She was confused by the highly technical legal questions the asylum officer asked such as “what particular social group are you in?” The officer also instructed her to limit her answers and only respond with “yes” or “no.” During the IJ review, the immigration judge did not permit her attorney to be present and affirmed the negative CFI. She is now in hiding in Nicaragua and fears for her life, according to attorney Sally Santiago.
- **In August 2021, a Nicaraguan asylum seeker received a negative determination at the Stewart Detention Center after an ICE officer threatened her in the presence of the asylum officer that she would never get a CFI if she did not proceed without her attorney.** The woman had been stalked, threatened, and fired for her political opinion in Nicaragua. Attorney Sally Santiago reported that the woman was desperate to complete a CFI after having been detained for several months already in the United States, since April 2021, with gynecological problems including heavy bleeding and unable to obtain treatment for it.
- **In Spring 2021, the Houston asylum office subjected an unrepresented 13-year-old Guinean child to a CFI in violation of U.S. [law](#) requiring the child to be designated as an unaccompanied minor, exempted from expedited removal, transferred to Office of Refugee Resettlement custody, and allowed to apply for asylum.** Despite finding the child’s statements about his age to be credible, the asylum office proceeded with the interview and issued a negative credible fear determination, leaving the traumatized child illegally detained in an adult detention facility for an additional two months, according to his attorney at SIFI.

On June 30, 2021, a coalition of advocates and organizations [wrote](#) to USCIS, ICE, and EOIR documenting the many systemic due process violations suffered by asylum seekers in expedited removal but to date have not received a response from the agencies. Grievances outlined in this letter include months-long delays in providing CFIs—leading to months of traumatic detention and in some cases family separation—failure by ICE to provide an appropriate interpreter when issuing initial documentation about the credible fear process, lack of adequate interpretation during CFIs, broad use of telephonic interviews, CFIs where asylum seekers are only permitted to respond with one-to-two sentence answers, little or no notice of a scheduled IJ review, and failure to provide CFI determinations and interview notes prior to the review.

An advocate reported to Human Rights First that in the past few months alone she has spoken with dozens of detained African asylum seekers who were forced to conduct their CFIs in a language (typically French) that is not their native or best language and received negative determinations. Some of them

reported that when they stated that they were not comfortable speaking in French, they were required to proceed with the French interpreter and told, "This is what we have." Lack of adequate interpretation during the expedited removal process violates the due process rights of asylum seekers and increases the risk that they will be wrongly deported to harm:

- **In Spring 2021, two asylum seekers from Burkina Faso were left with little choice but to proceed with their CFIs in French, a language they are not fluent in, despite the fact that they both requested Bissa interpreters.** One of the asylum seekers was forced to reschedule his CFI twice, prolonging his detention after already waiting for a month for his CFI to be scheduled, only to relent and proceed in French. This caused the asylum officer to record glaring misstatements of facts in his CFI notes, ultimately resulting in a negative determination. The asylum office's actions expressly violated USCIS [guidance](#) requiring that a Notice to Appear be issued if a rare language interpreter is not available within 48 hours.
- **An immigration court judge refused to provide an unrepresented 19-year-old asylum seeker from the Ivory Coast an interpreter in his best language on 17 separate occasions for his immigration judge review after the asylum office wrongly interviewed him in French and entered a negative CFI determination.** Determined to receive a fair opportunity to be heard at his CFI review, the man stated each of the 17 times that he could not proceed without a Maouka interpreter, leading to prolonged months-long detention. He is terrified that he will be deported to the Ivory Coast, where his parents were murdered a local government official where they lived, according to an advocate who spoke with Human Rights First.
- **In May 2021, the asylum office entered a negative credible fear determination for an Angolan torture survivor who was forced to undergo the CFI and immigration judge review in French even though his native and best language is Lingala.** The man had trouble understanding the French interpreter and felt extremely ill, suffering from high blood pressure, during both the CFI and review. In Angola, he had been attacked and tortured by a political group. Two years ago, when his wife and daughters fled to the United States to seek asylum, an asylum officer determined that they had a credible fear of persecution based on the harm and threats to the man, but he was mistakenly determined to not meet the credible fear standard, and as a result would be ordered removed without a chance to seek asylum.

[Policies](#), [regulations](#), and [rulings](#) implemented by the Trump administration to illegally block people from protection have further increased the risk of wrongful deportation of asylum seekers in expedited removal. For instance, the Trump administration unlawfully [elevated](#) the burden of proof for CFIs by changing the lesson plans provided to asylum officers, a policy change that has been [enjoined](#) by a federal court since October 2020. Nonetheless, reports from asylum seekers and advocates suggest that some asylum officers fail to comply with the injunction and apply a higher threshold burden of proof, according to the coalition letter. Requests for reconsideration are a crucial safeguard against these misapplications of law, which may have deadly consequences if not reversed.

Other frequent problems during CFIs, including interpretation issues, deficiencies in telephonic interviews, and lack of access to legal counsel, prevent asylum officers from fully and accurately assessing the persecution asylum seekers would face. For instance, attorneys report that notes produced by asylum officers during CFIs often reflect only a tiny fraction of the harm asylum seekers have disclosed during interviews and often contain blatant errors including basic biographical information. Serious privacy violations have occurred during CFIs that undermine asylum seekers' ability to explain the basis for their asylum claim. For example, an attorney noted that in the summer of 2021, her asylum-seeking client, who

was unrepresented at the time, was instructed to complete her CFI on the phone in her dormitory, where detained individuals and detention center staff would be able to listen to the call.

While the vast majority of detained asylum seekers do not have access to legal representation during the CFI process, those few with attorneys are often not able to be represented during immigration judge reviews of CFIs. The regulations governing CFI reviews do not prohibit participation by counsel, but some immigration judges continue to forbid attorneys from speaking at or even attending CFI reviews. This egregious and arbitrary conduct results in wrongful affirmances of erroneous CFIs, some of which have been later reversed through requests for reconsideration.

While Requests for Reconsideration are a Critical Safeguard, the Dangerous Expedited Removal Process Is Fundamentally Flawed

Since Congress created expedited removal in 1996, the United States has chosen to subject many asylum seekers to this flawed process. However, DHS is [not required](#) to use expedited removal on asylum seekers. Rather, it has [legal authority](#) to parole asylum seekers or release them on recognizance and place them in regular [removal proceedings](#) to provide an opportunity to apply for asylum and have a hearing before an immigration judge.

At the time of its creation, the expedited removal process was viewed by many in Congress as “an [abandonment](#) of our historical commitment to refugees.” In recognition of this reality, the Senate – in a bipartisan vote – amended the proposed law to [restrict](#) expedited removal to emergency situations, but this amendment was removed in a partisan conference committee. Only a few years later, Senator Patrick Leahy and others proposed the bipartisan [Refugee Protection Act of 1999](#) to restrict expedited removal due to its apparent flaws and numerous reports of asylum seekers “[thrown](#) out of the country without the opportunity to convince an immigration judge that they faced persecution in their native lands.” As Senator Leahy [explained](#) in the Congressional record in 2000, “people who flee their countries to escape serious danger should be able to have asylum hearings in the United States without having to navigate the procedural roadblocks established by expedited removal.”

The consequences of this flawed and inhumane process are deadly. Families and adults blocked from access to the U.S. asylum system due to expedited removal have been deported to life-threatening dangers. A [Honduran asylum seeker](#) deported through expedited removal after receiving a negative credible fear determination despite his attempts to request refugee protection was murdered just weeks after being sent back to Honduras. A former [Salvadoran police officer](#), who had attempted to request asylum in the United States, was deported through expedited removal after receiving a negative credible fear determination and shot to death in El Salvador, after she was determined not to have a credible fear of persecution or torture. A [Guatemalan asylum seeker](#) was gang-raped and shot nine times in Guatemala after she was deported through the expedited removal process.

While requests for reconsideration are a critical safeguard, expedited removal is a fundamentally flawed process. The Biden administration should end the use of expedited removal to protect refugees from return to persecution and torture and to comply with U.S. law and treaty obligations.

Draconian Deadline: Asylum Filing Ban Denies Protection, Separates Families

The one-year-filing deadline bar on asylum claims is a refugee ban. Enacted into law in 1996, the filing deadline bans asylum for any individual who did not apply for protection within one year of arriving in the United States, with very limited exceptions. The ban is inefficient, counterproductive, inhumane, and unlawful. It returns refugees to persecution and torture in violation of U.S. law and treaty obligations, leaves refugees in permanent limbo with inadequate forms of humanitarian protection, indefinitely separates families, and undermines integration. The U.N. Refugee Agency (UNHCR) has [confirmed](#) that denial of legitimate asylum claims based solely on failure to file before a deadline violates international law.

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. Refugees denied asylum solely due to the filing deadline ban include, for instance: a Guinean man who was imprisoned and tortured by military police officers for being a suspected dissident; an LGBT Salvadoran man who was abducted by government agents and physically, sexually, and verbally assaulted for his sexual orientation; and a Tanzanian woman who was detained by her country's government and raped, burned, and beaten. The ban is especially draconian because it is often impossible for refugees to apply for asylum within one year, as many are unable to secure legal counsel, do not speak English, do not know that they are eligible for asylum or that they are required to apply within one year, or are traumatized by the persecution or torture they suffered.

Barred from asylum by the filing deadline, the only option for many refugees is to seek withholding of removal or protection under the Convention Against Torture (CAT), extremely [limited](#) forms of relief that do not confer permanent legal status, force refugees to live under constant threat of deportation, and do not allow them to reunify with their families. These deficient forms of protection are often impossible to secure because they require applicants to meet a heightened standard of proof. Refugees denied asylum solely due to the filing ban who are deemed not to meet the high burden for withholding of removal or protection under CAT are ordered deported to danger.

The U.S. Citizenship Act of 2021, which was [introduced](#) in [Congress](#) in February 2021, proposes to eliminate the asylum filing deadline ban, among other provisions. A provision to eliminate the filing deadline ban was also included in the bi-partisan Senate immigration reform [bill](#) of 2013, as well as in successive versions of the [Refugee Protection Act](#). Human Rights First welcomes efforts to repeal the filing deadline ban and has [opposed](#) its [use](#) for [decades](#). The elimination of the filing deadline ban would:

- Prevent the return of refugees to persecution and torture based on a technical filing deadline in violation of U.S. obligations under the 1951 Refugee Convention, 1967 Refugee Protocol, CAT, and the [International Covenant on Civil and Political Rights](#);
- Permit refugees with well-founded fears of persecution to secure stable legal status with a path to citizenship and live in safety in the United States, rather than leaving them only with deficient protection from removal that is difficult to obtain and leaves refugees in permanent limbo, unable to rebuild their lives;

- ☑ Prevent the separation of refugee families, which is the direct result of a ban that deprives refugees of asylum and its process for bringing family members to safety, and instead ensure refugees can reunite with their spouses and children, who are often stranded in danger in their home countries; and
- ☑ Reduce the immigration court backlog, which has skyrocketed to over [1.3 million cases](#), by stopping the wasteful and needless referral of cases from the Asylum Office to the immigration courts solely because of the filing deadline ban.

Counterproductive as a Purported Anti-Fraud Measure

The former Immigration and Naturalization Service [opposed](#) the ban, explaining that it would “frustrate and hamper efforts” to reform and was unnecessary because other measures had already successfully addressed abuse in the asylum system. Indeed, the U.S. asylum system already has many tools that are designed to identify fraud, including mandatory security checks across multiple federal databases, supervisory review, interpreter monitors, required signatures under penalty of perjury, and legal penalties and permanent bars on immigration benefits for applicants who file fraudulent applications. The one-year deadline, however, [fails](#) to effectively identify fraud and instead bans or delays protection for many refugees.

Applicants who file for asylum after one year are not less likely to have a valid asylum claim. In fact, a 2010 [study](#) that analyzed the outcome of affirmative asylum applications since the ban took effect found that the grant rate for timely applicants was exactly the same as the grant rate for late applicants who overcame the filing ban, which eviscerates any argument that late applicants lack valid asylum claims. The study found that but for the ban, the asylum office would likely have granted asylum to more than 21,000 additional refugees.

Violates International Law, Inflicts Serious Harm, and Wastes Government Resources

The asylum filing ban has long been discredited as an inhumane measure that is inconsistent with principles of international law. When the ban was enacted in 1996, then President Clinton said that he would “seek to correct provisions in this bill that are inconsistent with international principles of refugee protection, including the imposition of rigid deadlines for asylum applications.” UNHCR has [repeatedly warned](#) that denying asylum claims based on a filing deadline would violate international law. Before Congress enacted the filing ban, a UNHCR Representative [wrote](#) to then Senator Orrin Hatch, warning that the ban would violate international law because the “United States is obliged to protect refugees from return to danger regardless of whether a filing deadline has been met.” By implementing the one-year filing deadline, the United States violates its obligations under the Refugee Convention as well as its duty to interpret treaties in good faith.

The filing ban punishes refugees who are unable to file for asylum within one year of arriving in the United States because of the countless and insurmountable barriers they face, including severe trauma, lack of legal counsel, inability to speak English, financial and housing insecurity, separation from family, physical and mental health needs, and lack of familiarity with the U.S. immigration system. Women are [13 percent](#) more likely to file untimely asylum applications than men. According to [Physicians for Human Rights](#), many women asylum seekers are fleeing gender-based and domestic violence, female genital mutilation, and other forms of persecution that can leave them severely traumatized and carrying profound stigma which prevents them from recounting their stories to government officials. This draconian

ban returns people to life-threatening dangers regardless of why they were unable to file within one year of arriving, in contravention of UNHCR [guidance](#) cautioning that “an applicant for refugee status is normally in a particularly vulnerable situation . . . and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country . . . [h]is application should therefore be examined . . . with an understanding of an applicant’s particular difficulties and needs.”

Moreover, the ban is wasteful and inefficient, adding thousands of cases per year to the immigration court backlog. When individuals apply for asylum affirmatively, the U.S. Citizenship and Immigration Services (USCIS) Asylum Office typically conducts an interview and adjudicates their case. Asylum seekers barred by the filing ban are then referred from the Asylum Office into immigration court removal proceedings, where an immigration judge considers their case anew. The referral into immigration court proceedings of cases of refugees who would have been granted asylum but for the deadline is a waste of government resources because it expends the resources of the immigration court, including those of judges, clerks, and ICE attorneys—to litigate a technicality. Those resources could instead be allocated to evaluating the actual merits of asylum cases or could simply be saved or re-allocated to other matters. According to USCIS [data](#), in Fiscal Year 2018 alone, **18,050 cases were referred from the Asylum Office to immigration court due solely to the filing ban – 39.2 percent of referrals in cases adjudicated that year.** The filing ban adds a high volume of cases per year to the enormous immigration court backlog and forces immigration judges to re-adjudicate asylum applications that often would have already been granted but for the filing ban.

Deported to Danger, Left in Limbo, and Separated from Family

The filing deadline returns refugees to persecution and torture in violation of U.S. law and treaty obligations, permanently leaves refugees in limbo with inadequate forms of protection, and indefinitely separates families. Because the ban only allows for extremely limited exceptions, it punishes refugees who were unable to file for asylum because of severe trauma, lack of representation, and other barriers.

Over the years that the filing deadline ban has been in effect, refugees denied asylum solely due to the filing ban and ordered deported to persecution and danger in their home countries include:

- **A [Chinese woman](#) who feared persecution and torture in China for her assistance to North Korean refugees** was determined by the immigration judge to face a clear probability of torture but was denied asylum by the immigration judge based on the filing deadline and ordered deported to China by the Board of Immigration Appeals.
- **A [Colombian woman](#) who was persecuted and whose son was murdered by the FARC** for her peaceful political activities and assistance to the victims of the FARC was denied asylum based on the filing ban and ordered deported. The immigration judge denied all protection because she did not meet the high standard for withholding of removal and protection under CAT and ordered her deported to Colombia.
- **An immigration judge denied protection due to the filing ban to a [Senegalese woman](#) who had fled her country after refusing to undergo female genital cutting (FGC) and a forced marriage.** She applied for asylum after learning that her sister was forced to undergo FGC. The immigration judge erroneously concluded that this event did not qualify as a “changed circumstance” exception to the filing deadline and denied all protection despite finding that she faced a “reasonable possibility” of persecution if returned to Senegal.

- A [10-year-old Pakistani girl](#) who fled with her parents after the family received death threats and suffered assassination attempts due to their Shi'a Muslim faith was ordered deported due to the filing deadline ban. Her father had applied for asylum within one year of entering and included his wife and child as derivative applicants based on his lawyer's advice. When he was granted withholding of removal, he could not petition for his wife and daughter, who subsequently filed their own applications for asylum. While the girl's mother was granted withholding, the child was denied all relief and ordered deported.

Refugees denied asylum under the filing ban who manage to secure deficient forms of protection such as withholding of removal or protection under CAT have no pathway to legal status or citizenship and no way to reunify with family members who remain in danger abroad. They are forced to live with a deportation order, are required to regularly apply for renewal of their employment authorization, are ineligible for most government benefits, and are routinely subject to invasive monitoring requirements by Immigration and Customs Enforcement. These limitations prevent refugees from integrating into their U.S. communities and leave them in permanent limbo. For example:

- A Salvadoran refugee denied asylum because of the filing deadline has been separated from his three young children for 11 years. While the immigration court recognized him as a refugee, he was granted only the limited protection of withholding of removal, meaning he cannot petition to reunite with his children nor travel abroad to visit them in a third country. The man, who is currently represented by the Human Rights Initiative of North Texas, told Human Rights First: **"I have all these memories of my kids, and I want them here by my side. It's hard to sleep at night thinking of them."** He also lives with the uncertainty that he could be deported to danger: "I don't have a permanent immigration status. I am worried they will send me back to El Salvador."
- A [Tanzanian woman](#) who was detained by the Tanzanian government and raped, burned, beaten, and starved for refusing to marry a local policeman and undergo female genital cutting was permanently separated from her children in Tanzania due to the filing deadline ban. She was denied asylum because she filed for asylum 18 months after her arrival in the United States. She was granted protection under CAT, but without asylum status she is unable to petition for her family.

Other refugees denied asylum due to the filing ban and forced to live under the permanent threat of deportation with deficient forms of U.S. protection include:

- A [woman from Jordan](#) who had been beaten and held prisoner by her brothers for marrying without their permission was denied asylum along with her husband due to the filing deadline ban even though they had received ineffective legal assistance when a lawyer incorrectly told the couple they were ineligible for asylum when they consulted him within the one-year filing period.
- An LGBT Salvadoran refugee who fled after being abducted by government agents and physically, sexually, and verbally assaulted for three days because of his sexual orientation was denied asylum due to the filing deadline ban and granted the deficient protection of withholding of removal. Unrepresented before the immigration court and unfamiliar with U.S. asylum law, he believed that he only had to comply with the deadline for the asylum application set by the immigration judge, which was more than one year after his arrival, according to the Human Rights Initiative of North Texas.
- An immigration judge denied asylum on the basis of the filing deadline ban to a [Kenyan refugee](#) from the Kikuyu tribe who had been raped, imprisoned, and tortured. The woman,

who was granted the deficient protection of withholding of removal, had been raped for refusing to undergo female genital cutting and tortured for helping another woman escape a forced marriage.

- **A Brazilian refugee who was a child when he, his mother, and his sister were granted withholding of removal due to domestic violence in the early 2000s due to the filing deadline ban has faced major barriers to education and work in the United States.** The man, now in his thirties, could not attend college because he did not qualify for financial aid and was rejected from serving in the U.S. Coast Guard due to his withholding status. He has lost employment because of difficulties renewing his work permit. In his current job as a commercial truck driver, he has repeatedly faced problems renewing his driver's license because his work permit is only valid for one year. Reflecting on how the filing deadline ban has impacted their lives, his mother who missed the one-year filing deadline because she was unaware that asylum existed said: **"it derailed his entire career . . . a person's life can be turned completely upside down because of one small detail."**

The filing deadline ban has condemned countless refugees to deportation to their home countries or permanent limbo in the United States due to a technicality. Immigration judges have even used the filing deadline ban to deny asylum to refugees who *did* apply for asylum within one year, concluding that they had not presented sufficient proof of the exact date that they entered the United States. For instance:

- **An immigration judge denied asylum to a [Congolese human rights advocate and nurse](#) who was tortured and raped by the Congolese government because of her human rights advocacy and Catholic faith.** Even though she applied within a year of arriving in the United States, the immigration judge found that she was ineligible under the filing ban because she could not prove the exact date that she entered the country.
- **An [Eritrean refugee](#) who fled after being tortured for her Christian beliefs and forcibly conscripted into military service was denied asylum due to the filing deadline ban despite applying for asylum four months after entering the United States.** The immigration judge determined that she was nonetheless barred by the filing deadline ban because she did not have a passport with a date of entry.
- **An immigration judge denied asylum to an [Ethiopian refugee](#) who fled female genital cutting and other persecution and applied for asylum within six months of entry,** finding that the woman did not establish by clear and convincing evidence that she had applied within a year.

The [exceptions](#) to the asylum filing deadline are extremely limited, unfairly applied, and fail to protect refugees. While there is an exception to the asylum filing deadline for "changed circumstances" in the conditions of the applicant's country of origin or changes in the applicant's circumstances materially affecting eligibility for asylum, adjudicators frequently refuse to apply this exception even where asylum seekers have suffered egregious subsequent harm or new circumstances have drastically increased their risk of persecution, denying asylum in violation of the statute and regulation. Refugees denied asylum protection despite putting forth credible evidence to establish that they qualify for a changed circumstances exception to the filing deadline ban include:

- **An immigration judge denied asylum to a [Guinean man](#) because of the filing deadline even though the man applied shortly after he learned that the Guinean military searched his former home, his children went missing, and two of his friends were imprisoned.** He had fled Guinea after being imprisoned and tortured by military police officers and blacklisted for being a

suspected dissident. The judge determined that his missing children and the military's continued pursuit of him were not a change of circumstances under the exceptions to the filing ban.

- **An immigration judge denied asylum to a K'iche' Mayan woman from Guatemala under the filing deadline ban even though she applied for asylum after learning that her persecutors had tracked down and threatened her minor daughters in Guatemala.** The woman, who is represented by Human Rights First, had been beaten, stalked, and threatened for nearly ten years because she was an indigenous woman and community leader who had publicly testified against her persecutors in a criminal trial. The judge found that the death threats against her daughters did not meet the changed circumstances exception, denied asylum, and granted withholding of removal, forcing each of her five children to pursue separate forms of immigration relief.
- **A [lesbian refugee](#) from Russia was denied asylum under the filing deadline ban despite submitting her application shortly after learning that her partner in Russia had been raped and beaten to the point of mental incapacitation, which should have qualified the woman for the "changed circumstances" exception.** Before fleeing Russia, the woman had been sexually assaulted, expelled from school, and subjected to treatment to "cure" her sexual orientation.
- **A Christian woman who survived brutal religious persecution was denied asylum due to the one-year-filing ban despite presenting expert testimony and other evidence that the persecution of Christians in her country had worsened significantly, including through targeted laws, and that she had begun practicing her faith more publicly and proselytizing in the United States.** In determining the woman had not met the "changed circumstances" exception, the immigration judge disregarded expert testimony regarding worsening persecution and relied on a Department of State report that had not been entered into evidence. As a result, the woman, who is represented by the Bronx Defenders, remains separated from her child, likely for years, while her case is on appeal.
- **A [woman from Mali](#) who was subjected to female genital cutting at the age of 12 and forced to marry an abusive man was denied asylum due to the filing deadline ban despite having applied shortly after her abusive ex-partner threatened to return her baby to Mali to undergo female genital cutting.** Unaware of the protections for people fleeing their home countries, the woman had not applied for asylum within one year of arriving in the United States. The immigration judge held that she did not qualify for the "change circumstances" exception.
- **A U.S. Court of Appeals upheld an asylum denial to a 63-year-old [Ethiopian woman](#) under the filing deadline ban even though she had filed for asylum after her husband's terrifying disappearance in Ethiopia,** which should have qualified as a change in circumstances. She had fled Ethiopia after being detained and persecuted by the government because of her involvement in a local women's group and her husband's work as a political dissident. The immigration judge found that she was ineligible for asylum because her husband's disappearance was not a change in circumstances. In upholding the denial, the Eighth Circuit dismissed her husband's disappearance as "just another incident in a pattern of events that had already caused her to fear persecution."

There is also an exception to the filing deadline ban for "extraordinary circumstances," which, according to USCIS [training materials](#), may "include, but are not limited to, severe family or spousal opposition, extreme isolation within a community, profound language barriers, or profound difficulties in cultural

acclimatization.” Refugees denied asylum or referred into removal proceedings based on the one-year filing deadline who should have qualified for the “extraordinary circumstances” exception include:

- **A [Kenyan woman](#) was barred from asylum under the filing deadline ban even though she presented evidence that she had been unable to timely file because of Post-Traumatic Stress Disorder she suffers as a result of severe persecution.** The woman had been forced to marry against her will, raped for failing to conceive, attempted suicide after her husband and tribal elders tried to subject her to female genital cutting, and beaten and raped again after she recovered. The immigration judge unfairly determined that the woman did not qualify for the extraordinary circumstances exception to the filing deadline ban, despite her diagnosis of Post-Traumatic Stress Disorder (PTSD), because she had managed to find work to survive while homeless and isolated in the United States – describing her as having “entrepreneurial skills.”
- **A lesbian woman from South America was denied asylum and granted only withholding of removal because of the filing ban, despite presenting evidence that her PTSD and severe depression, fear of coming out to her family, and abusive intimate relationships constituted “extraordinary circumstances.”** After fleeing to the United States, the woman was forced to hide her sexual orientation from her siblings, on whom she depended financially and emotionally, for fear they would ostracize her. Because she could not come out to her siblings, she also could not seek their support in escaping multiple abusive relationships with other women. The woman was diagnosed with PTSD and severe depression from the decades of harm she suffered in her home country and the United States, according to the New York University Immigrant Rights Clinic.
- **A [Central American woman](#) suffering from depression, intrusive memories, nightmares, and suicidal tendencies after fleeing 11 years of abuse** was denied asylum under the filing deadline ban. The woman had been repeatedly raped by her partner – a policeman – who also banged her head into cinder blocks, whipped her with cables and wires, and dragged her through the streets by her hair. The immigration judge disregarded a psychologist’s findings about her trauma and mental state and held that her situation did not constitute “extraordinary circumstances.”
- **The asylum office referred a Mexican man who provided information to the U.S. Drug Enforcement Administration (DEA) to immigration court on the basis of the filing deadline.** The man, who is represented by Human Rights First, risked his life in Mexico to help the DEA investigate the murder of a Special Agent by Mexican drug traffickers, in exchange for which the DEA promised him permanent status in the United States. He spent over two decades trying to contact the DEA but did not receive a response. When the drug trafficker who had ordered the Special Agent’s murder re-emerged from hiding and formed an alliance with a major Mexican cartel, the man sought asylum — just three months after his last attempt to contact the DEA. Cartels exercise extensive [control](#) across Mexico, often with the complicity of government officials. Despite these circumstances, the asylum office referred the man to the immigration judge based on the filing deadline ban.
- **An immigration court judge denied asylum to a [Nepalese refugee](#) fleeing domestic violence despite her diagnosis of PTSD, which had prevented her from filing for asylum within one year.** The judge incorrectly reasoned that because she continued to suffer PTSD at the time that she submitted her asylum application, the diagnosis could not have been the cause for the delay.
- **A [Guatemalan refugee](#) who suffered from PTSD after fleeing domestic violence was denied asylum because she had not filed her application within one year.** The immigration judge

wrongly claimed that because she had worked and paid bills since arriving in the United States, PTSD could not have prevented the woman from applying for asylum.

Refugees are unable to apply for asylum within one year because of countless barriers not taken into account by the limited exceptions to the deadline, including severe trauma, lack of legal counsel, inability to speak English, financial and housing insecurity, separation from family, physical and mental health challenges, and lack of familiarity with the U.S. immigration system. Asylum seekers who could not meet the filing deadline due to difficult circumstances or lack of understanding of the asylum process include:

- **A bisexual Honduran man who fled years of violence for his sexual orientation and perceived femininity missed the one-year-filing deadline after he and his partner were kidnapped and assaulted in the United States and received deficient legal representation.** After crossing the border into the United States, the man and his then-partner, a trans woman, were kidnapped, held hostage, and threatened with death by a couple who claimed to have ties to a gang. The couple spent a year in homeless shelters and other insecure living situations after escaping the kidnapping. They managed to secure legal representation, but their attorneys stopped communicating with them and failed to ensure that he filed for asylum before the deadline. They are now represented by Human Rights First.
- **During his first year in the United States, an unrepresented man from the Central African Republic who fled religious persecution was unable to timely file an asylum application because he was suffering further trauma while living in a homeless shelter and coping with isolation from his family.** The man suffered daily flashbacks and nightmares about the severe beating and hand grenade attack he had survived in his country of origin and worried constantly about his wife and children, whom he had been forced to leave in danger. He struggled to sleep in the shelter because his roommates often fought violently, one of whom overdosed on drugs and died in their room. The man is currently represented by Human Rights First.
- **An LGBT Salvadoran refugee did not file his application within a year of arriving because he was unrepresented and mistakenly believed he had already applied for asylum after an asylum officer found he had a credible fear of persecution.** When he was released on bond, he believed he had been granted asylum. His unfamiliarity with U.S. immigration law and inability to secure representation, limited formal education beyond the fourth grade, and lack of English prevented him from understanding that he still needed to formally apply for asylum. When an immigration judge later scheduled a deadline for the man to file an asylum application more than one year after his arrival in the United States, the man did not understand the significance of the form he was instructed to file, believing he had already been granted asylum, according to the Human Rights Initiative of North Texas. He was subsequently denied asylum due to the filing deadline and only granted withholding by the immigration judge.

ON HUMAN RIGHTS, the United States must be a beacon. Activists fighting for freedom around the globe continue to look to us for inspiration and count on us for support. Upholding human rights is not only a moral obligation; it's a vital national interest. America is strongest when our policies and actions match our values.

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability, and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 40 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

Human Rights First is a nonprofit, nonpartisan international human rights organization based in Los Angeles, New York, and Washington D.C.

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Immigration and Customs Enforcement Records Received Through FOIA Confirm Need for Increased Oversight of Agency's Arbitrary and Unfair Parole Decisions for Asylum Seekers

Records received by Human Rights First from Immigration and Customs Enforcement (ICE) through a Freedom of Information Act (FOIA) [request](#) show that the agency systematically and arbitrarily failed to release detained asylum seekers on parole and set other outrageous conditions for release. The Biden administration should act swiftly to create independent oversight of ICE parole decisions nationally to ensure that eligible asylum seekers are released from detention on parole without unfair requirements that are not necessary to secure their appearance in court for asylum hearings.

Table 1: Parole Grant Rate for Single Adult Asylum Seekers with Positive CFI		
	2017	2018
All	47.7%	59.9%
<i>ICE Field Office</i>		
El Paso	0.8%	33.3%
Philadelphia	1.4%	17.2%
Detroit	3.1%	25.4%
Newark	3.6%	38.2%
Los Angeles	10.0%	18.0%
Salt Lake City	11.1%	8.7%
New Orleans	16.9%	1.6%
Atlanta	19.8%	68.5%
Chicago	27.3%	11.6%
Phoenix	28.9%	43.6%
San Diego	29.2%	55.4%
Seattle	40.0%	49.5%
Buffalo	41.3%	82.1%
Washington	46.6%	31.3%
New York City	57.8%	*
San Antonio	60.3%	86.4%
San Francisco	66.7%	76.3%
Denver	69.3%	83.6%
Houston	78.3%	95.4%
Miami	81.8%	54.8%
St. Paul	*	28.6%
Boston	*	93.0%
Dallas	*	98.1%
Baltimore	*	*
*Fewer than 10 parole decisions.		

Under the 2009 [Parole Directive](#), detained asylum seekers who have passed a credible fear interview (CFI) (meaning an asylum officer has determined their fear of persecution is credible and that they have a significant possibility of receiving full asylum) should be granted parole in the “public interest” and released from detention during the pendency of their asylum claims, if they establish their identity and demonstrate they are not a flight or security risk.

Thousands of Asylum Seekers Denied Release from Detention on Parole

However, the government records received by Human Rights First through FOIA show that between **2017¹ and 2018 ICE denied parole to over 6,000 asylum seekers who had passed a CFI**. The parole grant rate in 2017 was just 47.7 percent and rose only slightly in 2018 to 60 percent. By way of contrast, the parole grant rate nationally was 80.6 percent in early 2011 – based on records ICE accidentally included in its disclosure of the 2017 and 2018 parole logs. Similarly, between 2011 and 2013, the Detroit, El Paso, Los Angeles, Newark, and Philadelphia ICE Field Offices (which have jurisdiction over multiple ICE detention centers) granted parole to more than [92 percent](#) of arriving asylum seekers who passed a CFI.

Whether an asylum seeker is released on parole depends heavily on where in the country the person is detained - with some ICE field offices denying parole in

¹ Records provided by ICE included summary statistics for October 2017 but did not include data by field office for that month. Therefore, information disaggregated by field office reported here do not include the month of October 2017.

nearly all cases (see Table 1). For instance, **in 2017, the El Paso Field Office granted parole to just 0.3 percent of adult asylum seekers who had passed a CFI and the New Orleans Field Office found only 1.6 percent of asylum seekers eligible for parole in 2018.** Asylum seekers detained under the authority of the Dallas Field Office were far more likely to be released on parole with more than 98 percent of requests approved in 2018.

Unjustified, Arbitrary, and Pretextual Parole Denials

The records received by Human Rights First confirm that ICE officers routinely fail to comply with the 2009 Parole Directive, which requires ICE to parole arriving asylum seekers if they (1) establish their identity, (2) are not a flight risk, and (3) do not pose a security threat. In many cases, ICE officers failed to state any basis for denial, simply noting that the asylum seeker was an “enforcement priority,” that there was “no urgent humanitarian need” or “medical necessity” for release, or that there were “limited equities and lack of urgent humanitarian factors.”

The New Orleans Field Office, for instance, indicated that asylum seekers were an “enforcement priority” in 100 percent of its parole denials in 2017 and 2018, often without providing any additional basis for the decision. These denials clearly violate the Parole Directive, which requires parole in the public interest in the absence of the three factors described above.

Even when ICE officers do record a basis for denial of parole, the stated reason is often a pretext to continue detaining the individual. For instance, at least 60 percent of total parole denials nationwide in 2018 were based exclusively on “flight risk.” Some field offices cited flight risk for nearly every parole denial, which strongly indicates that ICE officers are not considering the individual circumstances of each asylum seeker as required by the Parole Directive. The Los Angeles Field Office, for instance, cited flight risk as one of the bases for denial in 92 percent of its parole denials in 2018. The Newark Field Office cited flight risk in 98.9 percent of its parole denials in 2017 and 2018.

Denying parole to asylum seekers because of a perceived flight risk is unnecessary and wasteful, in addition to inhumane: studies have [repeatedly confirmed](#) that the vast majority of non-detained asylum seekers appear for their court hearings. For instance, [96 percent](#) of non-detained immigrants represented by a lawyer attended all their hearings from 2008 to 2018.

In addition, in denying parole based on flight risk, officers frequently used arbitrary and pretextual reasons including that the asylum seeker’s sponsor was a friend, “non-biological relative,” or not “immediate family;” that the sponsor did not have permanent legal status or meet arbitrary income requirements; or that the case was pending before an immigration judge (the posture of virtually all asylum seekers who have passed a credible fear interview and not yet had their case decided). Other arbitrary justifications for denying parole include claims that an asylum seeker is a flight risk due to “issues with the utility bill” and vague conclusions that the “sponsor is questionable.” The Los Angeles Field Office denied parole to multiple asylum seekers in 2017 and 2018 citing attempted entry without inspection as a reason for denying parole. This reasoning effectively penalizes asylum seekers for the manner in which they entered the United States to seek protection, such penalties are prohibited under the 1951 Refugee Convention and its 1967 Protocol and is particularly cruel given that at the time the Trump administration was [limiting](#) the number of asylum seekers permitted to request protection at ports of entry under the [metering](#) policy.

By manufacturing these rigid and inhumane rules for release, field offices disregard the Parole Directive’s requirement that each parole request be considered on a case-by-case basis and that officers determine whether alternatives to detention would eliminate flight risk. In one instance, ICE denied parole to an asylum seeker and noted that “he is diagnosed with schizophrenic,” a highly concerning decision given

the inadequate mental health care in ICE detention centers and likely a violation of federal [protections](#) for persons with disabilities. Additionally, ICE wrongfully denied parole to an asylum seeker who “refused to apply for a new Indian passport.” Requiring asylum seekers to obtain passports from the country where they fear persecution could be used by the government to undermine those individuals’ asylum claims as government attorneys often argue that asylum seekers who obtain passports have and can avail themselves of the protection of that country’s government.

Outrageous, Unaffordable Bonds

The records received by Human Rights First from ICE also reveal that some ICE field offices impose additional and unnecessary requirements on asylum seekers granted parole, including the payment of prohibitively high monetary bonds to be released. Asylum seekers in immigration detention are often indigent and unable to pay even a low bond to be released from detention. Importantly, the 2009 Parole Directive does not require that additional conditions be placed on the asylum seeker beyond establishing their identity and that they pose no flight or security risk for them to be released on parole and requires ICE to consider an individual’s ability to pay monetary bond. ICE’s demands for payment of bond as condition of release on parole often result in asylum seekers being denied release.

The San Diego Field Office imposed astronomically high bond amounts on asylum seekers granted parole including multiple forced to pay \$50,000, \$65,000, and \$75,000 bonds to be released. The total bond amount imposed by the San Diego Field Office on asylum seekers over 2017 and 2018 equaled \$9.7 million. In 2017, 96 percent of asylum seekers granted parole under the San Diego Field Office’s authority were required to post bond with an average bond of nearly \$13,000. In 2018, 95 percent were required to pay bond to be released on parole with an average bond of more than \$16,000. Many of the asylum seekers granted parole were also subjected to intrusive electronic monitoring, such as ankle shackles, according to the parole logs ICE released via FOIA.

Similarly, the San Francisco Field Office nearly always imposed bond on asylum seekers granted parole. All asylum seekers granted parole by the San Francisco Field Office in 2017 were required to pay a monetary bond with an average bond of \$6,700. In 2018, 93 percent of asylum seekers granted parole by the San Francisco Field Office had to pay bond to secure their release with an average bond of \$4,700.

Other ICE field offices also regularly impose bond on asylum seekers granted parole but did not record this information in the parole logs released through the FOIA request.

Suing ICE for Parole Denials

In March 2018, Human Rights First, the American Civil Liberties Union (ACLU), Center for Gender and Refugee Studies, and Covington & Burling LLP filed [litigation](#) to challenge ICE’s extremely high parole denial rates in the Detroit, El Paso, Los Angeles, Newark, and Philadelphia Field Offices. At the beginning of 2017, the parole grant-rate [dropped](#) to zero or near-zero in those field offices. In July 2018, a federal district court [ordered](#) the covered ICE field offices in the *Damus* litigation to conduct case-by-case review of whether asylum seekers should be released on parole. In May 2019, the Southern Poverty Law Center and ACLU of Louisiana filed a separate [suit](#) challenging ICE’s policy of denying nearly all parole requests in the New Orleans Field Office.

	Jan – Dec 2017	Jan – June 2018	July – Dec 2018	Jan to Nov 2019³	Jan to Dec 2020	Jan to July 2021
Detroit	3.1%	23.1%	28.1%	26.9%	27.1%	28.0%
El Paso	0.8%	2.4%	48.0%	80.6%	80.8%	80.7%
Los Angeles	10.0%	15.0%	20.3%	17.5%	16.5%	16.5%
Newark	3.6%	34.5%	40.1%	59.0%	56.8%	57.7%
Philadelphia	1.4%	10.2%	22.7%	37.8%	39.0%	40.0%

Following the *Damus* decision, parole rates generally rose in the covered field offices but ICE compliance with the court’s order varied widely (see Table 2) and parole grant rates remain well below the 92 percent grant rate for those offices between 2011 and 2013. As of July 2021, the grant rate across the five covered ICE field offices is 56.1 percent. The Los Angeles Field Office continued to deny asylum seekers parole at high rates with a grant rate that is virtually unchanged from the first half of 2018 before the *Damus* suit was filed.

Oversight and Reform

The extremely low and disparate parole grant rates across the country, pretextual justifications for parole denials, and imposition of unpayable monetary bonds and invasive electronic monitoring underscore the need for the Biden administration to ensure uniform compliance with and application of the existing Parole Directive. The administration should also initiate crucial reforms to the asylum seeker parole system, including by requiring consistent record keeping on parole determinations, publicly posting parole denial rates by ICE Field Office (and disaggregating the reasons for denials and nationalities of asylum seekers denied parole), and establishing independent monitoring mechanisms.

To view the ICE parole logs Human Rights First received via FOIA, please contact: hrf@westendstrategy.com.

² 2017 and 2018 data drawn from FOIA records; 2019, 2020, 2021 data drawn from government status reports in *Damus* litigation.

³ The government’s December 2019 status update did not provide complete information on all field offices.

Assessment: U.S. Compliance with the Refugee Convention at its 70th Anniversary

As the world marks the 70th Anniversary of the [1951 Refugee Convention](#) on July 28, 2021, the United States continues to flout its legal obligations under the Convention, endangering lives, failing to lead by example in upholding human rights and undermining refugee law globally. While the Biden administration has taken steps towards ending some Trump administration policies that endangered people seeking refuge, over six months after President Biden took office, his administration has failed to overturn – and in some cases chosen to use – other harmful policies that blatantly violate the Refugee Convention, its Protocol and refugee law enacted by Congress. Gravely concerning, the Biden administration continues to block refugees from seeking asylum at ports of entry and expels refugees to danger at the southern border, while the [President](#) and other [officials](#) have made public statements that undermine the right to seek asylum. Overall, this assessment concludes that the Biden administration is using or maintaining policies that flagrantly violate the Refugee Convention and, despite steps towards ending some policies, has made insufficient progress to comply with U.S. legal requirements to protect refugees.

The Biden administration has taken some important steps in the past six months towards bringing the United States into compliance with the Refugee Convention and other treaty obligations, including:

- Officially [terminating](#) the “Remain in Mexico” program or Migrant Protection Protocols (MPP) and processing into safety over [12,000](#) people subjected to MPP to await their court proceedings in the United States, but [further steps](#) are necessary to bring to safety all individuals subjected to this horrific policy;
- [Vacating](#) flawed and illegal rulings of former Attorney General Jeff Sessions, including [Matter of A-B-](#), [Matter of A-C-A-A-](#), and [Matter of L-E-A-](#), in an important step to restore protections for countless refugees, including those persecuted by deadly gangs and perpetrators of gender-based violence;
- [Suspending and initiating the process](#) to terminate the Asylum Cooperative Agreements, which the Trump administration used to summarily deport nearly a thousand asylum seekers to Guatemala without access to U.S. protections, though further steps are needed to rescind the [regulation](#) authorizing these agreements and to [bring to safety](#) asylum seekers sent to danger under this policy; and
- [Issuing](#) Executive Order 14013 to rebuild the U.S. resettlement program, rescinding the anti-refugee orders of the previous administration, taking steps to improve equities and efficiencies in processing refugees and Afghan allies, [increasing](#) the fiscal year (FY) 2021 refugee admissions goal to [62,500](#) (after widespread criticism), restoring [regional allocations](#) and resettlement based on vulnerability, and exploring opportunities to respond to climate-induced migration.

Despite these important steps, the Biden administration continues to endanger refugees and violate core requirements of the Refugee Convention and Protocol, including:

- The administration continues to wield the [Trump administration's Title 42 policy](#) to block and expel asylum seekers to life-threatening dangers in violation of U.S. refugee law and Articles 3, 31 and 33 of the Convention, failing to restart asylum processing at ports of entry over six months after taking office. Human Rights First has tracked over [3,276](#) kidnappings and attacks against

asylum seekers and migrants expelled or stranded at the border since the Biden administration took office. Rather than restoring asylum processing in compliance with U.S. and international law, President Biden and other administration officials continue to make public [statements](#) that undermine asylum and [discourage](#) refugees from exercising their legal right to seek protection in the United States.

- The Department of Homeland Security (DHS) and the Department of Justice (DOJ) have not rescinded regulations authorizing the [asylum entry ban](#) and [third country transit ban](#), which violate Articles 31, 33 and 34 of the Refugee Convention. While President Biden's [Executive Order](#) directed agencies to review these regulations and the Spring 2021 Unified Regulatory Agenda [confirmed](#) U.S. agencies will take action to modify or rescind these rules in November, these illegal and dangerous bans – which endanger refugee lives, separate their families and undermine integration – remain on the books at this time.
- Since President Biden took office, DHS has nearly [doubled](#) the number of immigrants jailed in ICE custody, drastically increased the detention of adult asylum seekers, and essentially [designated](#) asylum seekers as a detention and deportation priority, flouting Article 31 of the [Refugee Convention](#) and Article 9 of the [International Covenant on Civil and Political Rights](#). Though the administration has made efforts to reduce prolonged detention of families, its jailing of adults, including asylum seekers, is inhumane and violates international law.
- DHS has not yet launched effective and proven community-based case support [initiatives](#) for asylum seekers awaiting court hearings, instead subjecting them to detention and invasive [ankle shackles](#).
- The administration has made insufficient progress in improving the significant operational, vetting, and processing reforms that [merit urgent attention](#) to enable the administration to resettle as many refugees as possible this year and next. In particular, family reunification cases, including Priority 3 and I-730 (follow-to-join) caseloads, face years-long delays.

On May 19, 2021, the U.N. Refugee Agency's (UNHCR) Assistant High Commissioner for Protection [warned](#) that attempts to deny asylum seekers access to territory at a country's borders ... jeopardize the safety of those in need of international protection and "threaten the long-respected refugee protection regime," noting that: "It is ironic, that, as we celebrate the 70th anniversary of the Refugee Convention, attempts are being made to weaken its principles and spirit." The very next day, in a rare public statement explicitly directed at the United States, the U.N. High Commissioner for Refugees [urged](#) the United States to "swiftly lift the public health-related asylum restrictions that remain in effect at the border and to restore access to asylum for the people whose lives depend on it, in line with international legal and human rights obligations."

The Biden administration must swiftly restore U.S. adherence to the Convention and its Protocol. Compliance with refugee law is not an option that can be evaded in the face of political fears of xenophobic, racist rhetoric. Instead, the administration should ensure the United States welcomes people seeking refuge with dignity, upholding both U.S. refugee law and humanitarian values. In addition, the Biden administration must sharply step up its efforts to restore the U.S. refugee resettlement program by welcoming as many refugees as possible this fiscal year under the new refugee admissions goal and honoring President Biden's promise to rebuild the program. In prior [blueprints](#), [papers](#), and public [letters](#), Human Rights First and other organizations have detailed [recommendations](#) for a humane, fair and effective asylum system.

Background

In the wake of World War II, the United States played a lead role in drafting the Refugee Convention, which specifies key protections for people forced to flee persecution. By later acceding to the [Refugee Protocol](#), the United States promised to abide by the Convention's legal requirements, including its *non-refoulement* prohibition against returning refugees to places where their lives or freedom are at risk.

The U.S. Congress subsequently enacted the [Refugee Act of 1980](#), incorporating the Convention's definition of a refugee and creating asylum and resettlement in U.S. law to protect refugees. But beginning in 2017, the Trump administration launched a [barrage](#) of policies that blatantly violated U.S. legal obligations under both the Refugee Convention and U.S. refugee law. As a candidate, President Biden promised to [uphold](#) the right to seek asylum and end the Trump administration's detrimental asylum policies within his first 100 days in office. In a February 2, 2021 [executive order](#), President Biden affirmed that his administration would "restore and strengthen" the U.S. asylum system. However, the Biden administration has continued to use, and failed to rescind, Trump-era policies that eviscerate protections for refugees and violate the Refugee Convention.

Metrics to Measure Compliance with Refugee Convention

As Human Rights First outlined in its May 2021 [paper](#), in order to report on the Biden administration's progress or failure to uphold US legal commitments under the Convention, the organization has been monitoring key metrics including whether the Biden administration has taken steps to:

- Restart U.S. asylum protections at the southern border consistent with refugee law and end the use of Title 42 public health authority to block and expel asylum seekers;
- Fully end the Remain in Mexico program, implementing additional wind-down steps and bringing asylum seekers – including those denied protection under the flawed policy – into the United States;
- Rescind the asylum transit and entry bans which will, if not ended, return refugees to persecution and life-threatening dangers, separate families, and undermine integration;
- Restore protections the Trump administration sought to end for refugees persecuted by deadly gangs and perpetrators of domestic violence, vacating Trump administration Attorney General rulings and making progress towards issuing new regulations;
- Launch legal representation, case support initiatives, and improvements that ensure fair and accurate asylum adjudication, rejecting use of rights-violating detention and barriers to asylum;
- Rescind regulations that [curtail](#) access of asylum seekers to [work authorization](#), which prevents asylum seekers from supporting themselves and their families; and
- Increase the number of refugees resettled, expand processing, address backlogs and logjams delaying family reunification and other refugee resettlement, and formally propose a goal of resettling 125,000 refugees for fiscal year 2022.

Outlined below is our assessment of the Biden administration's progress and lack of progress in upholding U.S. commitments under the Refugee Convention and its key provisions. We have measured the administration's progress with the following metric:



Steps taken toward upholding Refugee Convention



Insufficient improvement to comply with Refugee Convention



Continuing serious violations of Refugee Convention

In addition to policies addressed in this assessment, there are additional Trump administration [policies](#) that violate or undermine U.S. compliance with the Refugee Convention, its Protocol and U.S. refugee law, and Human Rights First has urged the Biden administration to end all of these policies.

Refugee Convention Article 3: Non-Discrimination

The Refugee Convention, like other human rights treaties, contains a provision prohibiting discrimination, specifying that “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.” Promptly after taking office, the Biden administration [rescinded](#) the Trump administration’s ban on entry into the United States from certain African and Muslim-majority countries and, after some delay, ended discriminatory regional allocations that had been imposed by the Trump administration’s presidential determination. Following significant public outcry, the Biden administration subsequently raised the annual allocation of refugee admissions from 15,000 to [62,500](#) for fiscal year 2021, though the administration will need to significantly step up its efforts to build back the resettlement system.

The Biden administration has still, however, not undone other discriminatory policies. It continues to use the Trump administration’s racist and xenophobic [public health ban](#) to expel [Haitian](#) and other asylum seekers to [danger in Mexico](#) – despite the administration’s designation of Haiti for Temporary Protected Status – while also using the policy to block asylum seekers requesting protection at ports of entry. A recently created [process](#) that exempts a limited number of individuals on a case-by-case basis from Title 42 expulsions and permits them to request U.S. protection does not comply with U.S. asylum law or treaty obligations, as [confirmed](#) by UNHCR.

To assess compliance with Article 3 of the Refugee Convention, Human Rights First committed in a May 2021 [paper](#) to report on the Biden administration’s progress – and lack of progress – to end the three discriminatory policies outlined directly below.



End expulsions of asylum seekers and misuse of Title 42 “public health” authority to block and expel asylum seekers. The Biden administration’s decision to continue to block and expel asylum seekers, discussed below, has disproportionately [affected](#) Black asylum seekers, as Human Rights First and other organizations have explained in [letters](#) and [reports](#). Reported plans to continue Title 42 expulsions for single adults would also have a disparate impact on LGBTQ and Black asylum seekers, including those from [Haiti](#).



End migration detention policies and practices that [lock up](#) Black and other asylum seekers of color and deny them parole or other release, which also violates Article 31 of the Convention. As discussed below, the Biden administration has nearly [doubled](#) the number of people detained in ICE custody, sharply [escalated](#) the detention of adult asylum seekers, and designated asylum seekers as [enforcement priorities](#). Black immigrants in detention are six times more likely to be sent to [solitary confinement](#) than other detainees and are forced to pay higher [bond](#) amounts to be released.



End or limit criminal prosecutions for entry and re-entry, under criminal statutes with a [long racist history](#) that are overwhelmingly used to prosecute people of color. While the number of entry prosecutions sharply declined during the pandemic, as discussed below, the

Biden administration has [continued](#) re-entry prosecutions and not issued directives to end prosecutions of asylum seekers and other migrants (aside from some parents). These prosecutions have “a [discriminatory](#) impact on Black and Latinx communities.”

Refugee Convention Article 31(1): Non-Penalization

Article 31(1) of the Refugee Convention forbids States from [penalizing refugees](#) for illegal entry or presence in most cases. This protection applies to asylum seekers who are present after crossing a border without authorization, including those who are detained or apprehended before they are reasonably able to make a claim for asylum.

But despite this legal prohibition, the United States has imposed punitive policies on asylum seekers who crossed into the United States seeking asylum. These impermissible penalties included the notorious Trump administration zero tolerance policy – the criminal prosecution of asylum seekers for improper entry or re-entry and the separation of children from parents subjected to these prosecutions – and a ban to deny asylum to refugees who had crossed into the country between ports of entry. This asylum entry ban would, if implemented, deliver refugees back to their country of persecution, separate them from their families, and prevent refugees from integrating. Its implementation was temporarily averted due to [court orders](#).

While some of these policies have been suspended or ended in part, many remain on the books and require additional action to ensure they are firmly ended. The Biden campaign pledged to end the separation of families, the [prosecution](#) of parents for minor immigration violations, and the systematic [prosecution](#) of adult asylum seekers for “misdemeanor illegal entry.”

The Biden administration has made the reunification of families separated by the Trump administration zero tolerance prosecutions a top priority and begun to reunite some of the many families still separated, though many still [remain separated](#).

To assess compliance with Article 31(1) of the Refugee Convention, Human Rights First committed to report on the Biden administration’s progress – and lack of progress - to end the three punitive policies outlined directly below.



Firmly end the Trump administration’s asylum [entry ban](#), which would, if implemented, **punish asylum seekers** with return to persecution, family separation, and other deprivations by barring access to asylum for those who seek protection between ports of entry, in [violation](#) of Article 31 of the Convention. President Biden’s February 2021 [executive order](#) rescinded the proclamation barring asylum seekers crossing the southern border and directed the Attorney General and Secretary of Homeland Security to “promptly review and determine whether to rescind” the underlying asylum entry ban. While the entry ban (codified at 8 C.F.R. §§ 208.13(c)(3), 208.30(e)(5), 1208.13(c)(3), 1208.13(e)(5), and 1003.42(d)) is currently [vacated](#) and [enjoined](#), the regulation authorizing it is still in effect. In the Spring 2021 Unified Regulatory Agenda, DHS and DOJ [confirmed](#) they would take action on this rule in November 2021, but have not indicated whether they will rescind the policy.



End referrals and prosecutions for improper entry and re-entry and support legislation to eliminate or limit such prosecutions so there can be no repeat of the Trump administration’s zero tolerance family separation policy. While the [Attorney General](#) rescinded the memorandum that authorized the Zero Tolerance policy and Customs and Border Protection (CBP) [issued](#) a memorandum “banning the referral of parents for prosecution exclusively on the grounds of illegal entry,” during his campaign, President Biden [promised](#) to end prosecutions for minor immigration

violations. While entry prosecutions drastically declined in 2020 during the [pandemic](#), the Biden administration has [continued](#) re-entry prosecutions. These entry and re-entry prosecutions [punish](#) asylum seekers and [violate](#) Article 31(1) of the Refugee Convention, [divert](#) prosecutorial resources, and thwart due process. Neither the administration nor U.S. agencies appear to have issued directives to end or limit such prosecutions against asylum seekers and/or other migrants (aside from parents).



Continue to reunite families separated under these punitive policies. The administration's Reunification Task Force has already [identified](#) over 5,600 family-child separations under the Trump administration, with over 3,900 children falling under the task force's scope, but only 36 parents had been granted parole to be reunified with their children as of June 2021. [Thousands](#) of children remain separated from their parents.

Refugee Convention Article 31(2): Prohibitions on Restrictions on Movement

Article 31(2) of the Refugee Convention prohibits unnecessary restrictions on the movement of refugees, and Article 9 of the International Covenant on Civil and Political Rights [prohibits](#) detention that is unnecessary, disproportionate or otherwise arbitrary. The UNHCR Executive Committee, of which the United States is a member, has [concluded](#) that the detention of asylum seekers should normally be avoided. As UNHCR Guidelines [explain](#), detention is not necessary when other measures can be employed to achieve the government's objective – for instance, when the provision of legal representation, case management or other alternative measures can support the asylum seeker's appearance for immigration appointments.

During his campaign, President Biden [pledged](#) to end for-profit and prolonged detention and invest in non-profit case management as the best way to ensure migrants attend required immigration appointments while also enabling them to live in dignity and safety while awaiting court hearings. In May 2021, the President signed an [executive order](#) directing the Attorney General to take steps to expand access to legal representation and creating a White House initiative to increase access to justice "regardless of wealth or status" across agencies.

To track compliance with Article 31(2) of the Refugee Convention, Human Rights First committed to report on the steps the Biden administration has taken to end and shift the policies identified below.



End and reduce use of migration detention, including releasing asylum seekers from detention and quickly transferring new asylum seekers out of Customs and Border Protection custody to shelters or other humanitarian reception locations operated by non-profit organizations with humanitarian expertise. The administration has sharply [escalated](#) its detention of adult asylum seekers and essentially [designated](#) asylum seekers as a detention and enforcement priority, in violation of its obligations under the Convention, even as it has reduced its detention of families. As Human Rights First and other organizations detailed in a July 2021 [letter](#) to DHS Sec Mayorkas, immigration detention numbers have skyrocketed since President Biden took office, with most of the people detained being recent arrivals and likely asylum seekers. ICE has increased the number of people in its facilities by nearly 90 percent, from 14,195 individuals at the start of the Biden administration to 26,771 as of July 22, 2021. The vast majority of individuals – approximately [83 percent](#) – detained by ICE in July 2021 were transferred from CBP custody, which means that the administration continues to target asylum

seekers and migrants at the border for detention and removal based on flawed enforcement priorities.



Invest in alternative measures – such as case support services and legal counsel – to support court appearance. The administration’s continued use of mass detention and invasive ankle shackles limits freedom of movement in violation of Article 31(2) and impedes access to counsel.

Refugee Convention Article 33: “*Non-Refoulement*” Prohibition on Return to Persecution

Pursuant to Article 33 of the Refugee Convention, the United States and other countries are prohibited from returning refugees “in any manner whatsoever” to places where their lives or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. The requirement to protect refugees from such returns is considered the cornerstone of the Refugee Convention and is also recognized as a requirement of [customary](#) international law. The U.S. Congress has enacted [laws](#) so that refugees can apply for asylum, be formally recognized as refugees, and be protected from improper return to persecution.

Despite these legal protections, the Trump administration initiated and implemented a series of policies that returned refugees to danger in violation of the Refugee Convention’s prohibition on *refoulement*. The Biden campaign [committed](#) to “restore our asylum laws so that they do what they should be designed to do – protect people fleeing persecution and who cannot return home safely.” As outlined below, the Biden administration has taken meaningful steps to end or wind down several of these policies, but continues to use other policies that return people seeking refuge to danger.

To assess whether the United States is complying with its legal obligations under Article 33 of the Refugee Convention, Human Rights First committed to report on whether the Biden administration has taken steps to restart asylum and end the policies listed below.



Restart the asylum system consistent with U.S. refugee laws and the Refugee Convention and end [use](#) of public health authority under Title 42 to block and expel asylum seekers. In his February 2, 2021 [executive order](#), President Biden directed prompt review of the use of Title 42 public health authority to expel asylum seekers. Despite [3,276](#) documented attacks and kidnappings against migrants stranded at the border under the Biden administration and the U.N. High Commissioner for Refugees’ public [appeal](#) to the U.S. government in May to “swiftly lift the [Title 42] public health-related asylum restrictions that remain in effect at the border,” the Biden administration has continued expelling many adults and families under the policy and is [reportedly](#) planning to expel and block single adult asylum seekers even after it exempts families from the policy. While unaccompanied children have been exempted from these expulsions, the continued use of Title 42 is [driving family separations](#) by forcing desperate families to make the impossible choice between sending their children alone across the border for their safety or risking harm to their children in dangerous Mexican border regions. The Biden administration has not yet restarted asylum processing at U.S. ports of entry, continuing to maintain policies and practices that largely prevent people from seeking asylum at these ports of entry despite refugee law. Only a small fraction of asylum seekers are allowed to approach the port to seek asylum, but these cases are processed under an exception to the illegal Title 42 policy, rather than under, and in compliance with, U.S. refugee law and the Refugee Convention.

-  **End “[metering](#)” [policies](#)**, which block asylum seekers in their country of persecution or risk refoulement to their country of persecution. The Biden campaign [committed](#) to end the policy of “metering” which limits the number of asylum seekers who can seek protection each day. However, more than six months into the administration, it has not terminated this policy, has not taken steps to ensure asylum seekers subjected to this policy can cross into the United States at ports of entry to seek asylum, and appears poised to launch new policies akin to metering – including through use of an [online application](#) that raises security and due process concerns and may force asylum seekers to wait in danger.
-  **End the [currently-enjoyed third-country transit ban](#)** which, as Human Rights First has [detailed](#) led the United States to deny refugees asylum, return people to persecution and torture, and separate refugee families. In his February 2, 2021 [executive order](#), President Biden directed prompt review of the transit ban, which is codified at 8 C.F.R. §§ 208.13(c)(4) and 1208.13(c)(4). In the Spring 2021 Unified Regulatory Agenda, DHS and DOJ [confirmed](#) they would take action on this rule in November, but have not indicated whether they will rescind the policy.
-  **Rescind the asylum entry [ban](#) rule**, discussed above under Article 31(1), which would, like other bans, return refugees to persecution and life-threatening dangers;
-  **Rescind the [rule](#) that authorized illegal agreements to send refugees to unsafe countries** – agreements which the Biden administration [suspended and initiated the process to terminate](#) in February 2021. In the Spring 2021 Unified Regulatory Agenda, the administration [confirmed](#) that it would rescind or modify this rule in September.
-  **Restore protections – that the Trump administration sought to end – to prevent the return to persecution of victims of deadly gangs and perpetrators of gender-based violence**, including vacating the [rulings](#) of former Attorney General Jeff Sessions in [Matter of A-B](#) and [Matter of L-E-A-](#). On June 16, 2021, Attorney General Merrick Garland [vacated](#) [Matter of A-B](#) and [Matter of L-E-A-](#), and on July 26, 2021, he [vacated](#) [Matter of A-C-A-A-](#). The Department of Justice indicated in a [memorandum](#) that, pursuant to [Executive Order 14010](#), it would issue regulations that address key asylum provisions that were eviscerated in these illegal rulings.
-  **[Bring to safety](#) additional asylum seekers subjected to MPP**, including those with *in absentia* removal orders and those whose asylum claims were denied due to the egregious due process violations inherent to MPP. The Biden administration has taken meaningful initial steps towards winding down MPP—the illegal policy that forcibly returned 70,000 asylum seekers and migrants to wait in danger in Mexico for their hearings. It has transited more than [12,000](#) people in MPP to safety in the United States and in June 2021 announced another [phase](#) of the MPP wind-down to include MPP asylum seekers with *in absentia* orders, many of whom were unable to appear for hearings due to kidnappings, dangerous travel routes, or other impediments. But the administration has not yet announced [additional steps](#) to bring to safety asylum seekers who were denied asylum under the rigged program. Moreover, the administration has not conceded the program’s illegality, [opposed](#) in filings to the Supreme Court any restriction on the scope of the contiguous-territory provision used to justify MPP, and [indicated](#) that it continues to return individuals to danger under this provision, raising serious concerns of ongoing and future violations of the Convention.
-  **Rescind the public health [rule](#) banning asylum and other protections based on specious public health grounds**. In March 2021, the Biden administration [delayed](#) implementation of this policy – which puts refugees at risk of return to persecution and has been [de-bunked](#) by public

health experts as “xenophobia masquerading as a public health measure – to examine whether it should be revised or rescinded. The administration should instead adopt science-based public health measures [recommended](#) by public health experts to process asylum seekers and migrants to safety.



Rescind the [currently-enjoined](#) “monster” asylum [regulation](#) that sought to override and undo U.S. asylum law, block refugees from protection, and create insurmountable procedural hurdles in the asylum process. The administration [confirmed](#) in the Spring 2021 Unified Regulatory Agenda that it would propose to modify or rescind this regulation in November. Although currently enjoined, this dangerous and unlawful rule remains on the books and must be rescinded.



End use of the flawed [expedited](#) removal process, which leads to the return of asylum seekers to [persecution](#) without access to asylum hearings. The administration has [continued](#) to detain and subject many adult asylum seekers to expedited removal and announced on July 26, 2021 that it would use [expedited removal](#) against “certain” families not subject to expulsion under Title 42. The language used in the DHS [announcement](#) makes clear that DHS is using expedited removal to penalize people who cross into the United States between ports of entry, a violation of Article 31 of the Refugee Convention with respect to asylum seekers. The Biden administration also reportedly [plans](#) to create new asylum processes at the border which will continue to use expedited removal despite its many deficiencies.

Refugee Convention Article 34: Naturalization and Integration

Article 34 of the Refugee Convention requires that the United States “shall as far as possible facilitate the assimilation and naturalization of refugees.” The U.S. Congress created an asylum system so that people determined to be “refugees” would be granted asylum, with very limited exceptions – and as a result, be able to reunite with their immediate families, apply in one year to become legal permanent residents, and subsequently apply to naturalize.

But the Trump administration tried to prevent refugees from integrating, blocking the path to naturalization for many by issuing bans and bars aimed at denying them asylum so that they would either be returned to their country of persecution or left only with “withholding of removal,” a [deficient](#) form of protection from deportation that leaves them permanently separated from families and barred from stable status and a path to naturalization. The Trump administration also issued multiple policies aimed at depriving asylum seekers of legal permission to work – essential to the very survival of refugees and their families as well as their ability to integrate.

The Biden administration [promised](#) to stop “tearing apart families” and has taken [steps](#) to begin reunifying families ripped apart by the Trump administration’s zero tolerance policy. The administration has also included in its [legislative proposal](#) a provision that would eliminate another unjust ban – the bar on asylum due to the filing deadline – that both risks *refoulement* and thwarts integration.

To track whether the Biden administration has taken critical steps towards upholding the objectives of Article 34, we will report on its steps to:



Rescind the [transit ban](#), discussed above under Article 33, that was used by the Trump administration to deny refugees asylum, prevent refugee families from reuniting, and block them from legal residence and naturalization.



Reverse other Trump administration bans and policies, discussed above, that similarly prevent refugees from integrating and naturalizing including the asylum entry [ban](#) and the public health [rule](#) banning asylum and other protections based on specious public health grounds.



Rescind regulations that [curtail](#) access of asylum seekers to [work authorization](#), which prevents asylum seekers from supporting themselves and their families. DHS has [ratified](#) one of these regulations, which eliminates required processing times for work authorization applications. While the regulations are [partially enjoined](#) for members of certain asylum advocacy organizations, the administration continues to implement both regulations, depriving many asylum seekers of the ability to work and more than doubling the already extremely long wait times – from five months to a year – before they can apply for work authorization. The administration [does not plan](#) to propose to rescind or modify these regulations until December, leaving many asylum seekers without the ability to feed, house, and support themselves and their families.

Refugee Convention Preamble: Cooperation & Resettlement

The Preamble to the Refugee Convention specifically recognizes the importance of international cooperation in addressing refugee situations. International cooperation through resettlement can help support front-line countries that often host large numbers of refugees, encourage their continued respect for *non-refoulement* or other refugee rights, and demonstrate support for the Refugee Convention itself. Under its statute, UNHCR is required to facilitate the resettlement of refugees as one of the three permanent solutions to refugee situations.

To undo the damage wrought by the Trump administration and again lead on refugee resettlement, the Biden administration must sharply step up its efforts to restore the U.S. refugee resettlement program by welcoming as many refugees as possible this fiscal year under the new refugee admissions goal and honoring President Biden's promise to rebuild the program to resettle 125,000 refugees in fiscal year 2022. At the same time, the Biden administration must also take steps to protect and evacuate Afghans at risk due to their work with the United States and prepare to step up support for protection and resettlement to address any additional displacement from Afghanistan.

To assess U.S. progress in facilitating international cooperation relating to resettlement, Human Rights First indicated that it would report on steps the Biden administration takes to:



Improve and expand overseas refugee resettlement processing and invest in rebuilding the infrastructure to enable a swift increase in refugee resettlement. The administration has made insufficient progress in improving the significant operational, vetting, and processing [reforms](#) that [merit urgent attention](#) to enable the administration to resettle as many refugees as possible this year and next. NGOs have also [recommended](#) that DHS restart the Cuban Haitian Entrant Program (CHEP) and [restore and expand](#) it for other nationalities, but the administration has not yet done so.



Address [various backlogs and logjams](#) delaying refugee family reunification. Unfortunately, family reunification cases, including the Priority 3 and I-730 (follow-to-join) caseloads, continue to face years-long delays. In addition, although the administration resumed the Central American Minors (CAM) program, there are [key improvements](#) that should be made to resource U.S. resettlement sites to serve families, remedy prior harms, strengthen processing efficiencies, further expand eligibility, and increase access to safety for children waiting for reunification.



Formally propose an FY 2022 refugee admissions goal of 125,000. President Biden [promised](#) to rebuild the resettlement program and reconfirmed in his May 2021 [statement](#) his intent to set

the stage for a refugee admissions goal of 125,000 in FY 2022, although the formal presidential determination has not yet been issued. The administration's failure to address the delays, backlogs and impediments outlined above also undermine the ability of U.S. agencies to ultimately achieve this goal.



Appoint a senior-level White House coordinator for refugee resettlement.



Address delays in security checks that have operated to restrict entire nationalities with a disproportionate impact on Muslim refugees and that have particularly vulnerable cases in need of meaningful resettlement consideration.



Resettle as many refugees to the United States as possible, ensuring we redress harm caused by the delay in formally revising the FY 2021 refugee admissions goal. While the United States set the FY 2021 refugee admissions goal to [62,500](#) and resettled [1,530](#) refugees in June—more than in the previous three months combined—this number is woefully inadequate, and the administration must significantly ramp up resettlement to come close to meeting its goal for FY 2021.

Immigration Court Asylum Hearings Versus “Review” of Asylum Officers’ Decisions

Recent [media reports](#) and [government documents](#) indicate that the Biden administration may publish an Interim Final Rule (IFR) to create a new process for asylum cases originating at the southern border, raising concerns that the public will not have an opportunity to weigh in through the notice and comment process prior to implementation. Non-governmental organizations have [recommended](#) that the Biden administration take steps to make asylum adjudications more humane, fair, effective, and timely, including referring asylum seekers for full asylum interviews with U.S. Citizenship and Immigration Services (USCIS) asylum officers in their destination locations. These full asylum office adjudications should not be conducted within the expedited removal process, which [undermines](#) due process.

While some of the potential changes described in the media may have positive impacts, other aspects of the new procedure may raise significant due process concerns, including the use of expedited removal and language in media reports indicating that, if an asylum officer decides not to grant asylum, an immigration court could “[review an asylum officer’s decision](#)”— rather than referring to an immigration court hearing.

An effective and fair asylum adjudication system must provide an opportunity for a de novo immigration court hearing after an asylum seeker’s case is not granted by a USCIS asylum officer, rather than an immigration court “review” of the asylum officer’s decision. Depriving asylum seekers of immigration court hearings in such situations would diminish the efficiency and non-adversarial nature of asylum office interviews and risk erroneous decisions that return refugees to persecution and torture. Years of representing refugees who are erroneously denied asylum by the asylum office have illustrated to Human Rights First that immigration court hearings are critical to ensuring accurate refugee protection decisions. Human Rights First’s concerns about limiting immigration courts to “review” of asylum officer interviews include:

- **Asylum officers often fail to grant asylum to refugees who qualify for protection and who subsequently receive asylum in de novo immigration court proceedings.** At Human Rights First, we have represented many refugees whose cases were erroneously referred to immigration court by the asylum office and later granted asylum by an immigration judge. In fiscal year 2016—before the Trump administration implemented a slew of policies to rig adjudications against asylum seekers—immigration courts granted asylum to [83 percent](#) of asylum seekers whose cases had been referred by the asylum office. Human Rights First has seen many cases referred by the asylum office because the applicant did not suffer past persecution, even though past persecution is not required for an applicant to qualify as a refugee. While the asylum office has long prided itself on the fact that all cases undergo supervisory review, Human Rights First has worked on cases where that review was clearly deficient, as well as cases where the asylum office’s failure to grant the case was based on a failure to develop the factual record. That individual inexperienced or unskilled officers would make wildly incorrect decisions is to be expected in any large bureaucracy, but that these would slide through what is supposed to be an active supervisory review process is troubling and would have far worse consequences in a system where such decisions were not subject to de novo review in immigration court.
- **Asylum officer decisions do not constitute a sufficient basis for review by an immigration judge.** Any “review” of the asylum seeker’s claim will be based on the same errors and omissions

made by the asylum officer in creating their informal interview notes. There is no transcript or recording of the interview nor generally a detailed decision with citations to applicable law or supporting case law explaining the basis for referring the case to immigration court. The “decision” referring an asylum seeker’s case to the immigration court is typically a one-line sentence with little explanation. As a result, any misunderstanding or omission in notetaking by the asylum officer creates an inaccurate record of the interview. A limited review process would provide an insufficient opportunity for asylum seekers to correct errors or omissions. Additionally, asylum officers generally do not accept oral testimony from additional witnesses, experts, and other external sources necessary for comprehensive review on appeal.

- **A “review” process of asylum officer decisions by the immigration courts would unfairly convert asylum office interviews into adversarial proceedings, undermine the advantages of asylum officer interviews, and protract an interview process that already takes excessively long periods of time to complete.** The changes required to make these adjudications amenable to judicial review would transform the asylum interview from a non-adversarial interview effectively into an adversarial hearing. An asylum seeker would, for example, need to formally object to impermissible questions or reliance by the asylum officer on extra-record information to preserve the applicant’s rights on “review.” The resulting adversarial interview would be contrary to the purpose and nature of asylum office interviews and, in addition, add significantly to the time each asylum officer would take to render and write a formal decision. [Non-adversarial](#) asylum office interviews are less [traumatizing](#) for asylum seekers, can be conducted more quickly and efficiently, and are less burdensome on the government, since cases can be adjudicated by a single fact finder instead of during an adversarial hearing with an immigration judge, DHS trial attorneys, and other court staff.

Over the years, however, the affirmative interview process has become more complicated and cumbersome, for reasons relating in part to the imposition of additional requirements and hurdles that have been imposed by statute, rule or other directives and the escalating complication of U.S. statutes and caselaw in this area, with the result that some asylum interviews are *currently* running so long as to be exhausting for applicants, and decisions are frequently delayed by months thereafter. Rather than creating additional requirements that lengthen the time of asylum office interviews, reduce their ability to resolve significant numbers of cases more quickly, and/or otherwise undermine their advantages to the system and to traumatized asylum seekers, steps should be taken to enable officers to resolve more cases humanely through such interviews.

- **If the administration eliminates de novo immigration court hearings for cases referred from the asylum office, life-or-death asylum adjudications will lack necessary quality assurances and independent review.** Currently, immigration judges conduct “review” hearings of negative credible fear determinations by asylum officers. While this review is supposed to be de novo, the fact that the credible fear interview does not result in a fully developed record (along with other challenges, including the fact that the asylum applicant is typically detained and unrepresented at this stage of the process) has meant that such reviews are frequently cursory, inadequate, and function more as a [rubber stamp](#) of an asylum officer’s decision than as a comprehensive and independent review. As of June 2018, immigration judges conducting these “reviews” affirmed negative credible fear determinations in [85 percent](#) of cases. The consequences of cursory immigration court review of asylum office decisions are illustrated by the case of a [Honduran](#) asylum seeker who was deported through the expedited removal process after his denial of credible fear interview was affirmed following a cursory “review” by an immigration judge. This asylum applicant was murdered just weeks after being deported to Honduras last year.

- **Providing de novo immigration court hearings for cases referred from the asylum office is also crucial to protect the right of asylum seekers to be effectively represented by a lawyer in their proceedings.** Because legal counsel has [limited](#) ability to intervene in asylum office interviews, failure to provide a de novo immigration court hearing where legal counsel may take an active role in arguing the case raises due process concerns and would result in the erroneous and dangerous deportation of refugees to persecution, torture, or death.
- **In addition, as [detailed](#) elsewhere, conducting full asylum interviews within or after the expedited removal process is redundant and inefficient.** Diverting asylum officers away from conducting affirmative asylum adjudications to administer credible fear screenings, has already contributed to inefficiencies and backlogs. So too would a system that requires the conduct of such interviews, only to then have officers consider the same individual's complete asylum claim. Instead, asylum eligibility interviews should be conducted without and outside of expedited removal.
- **Without implementing funding for hiring additional asylum officers, requiring the fewer than 1,000 individuals currently serving as asylum officers, would exacerbate the asylum backlog and overwhelm asylum officers.** More than 394,000 asylum seekers already residing in the United States have waited years for their asylum interviews due to the extensive USCIS adjudication backlog. Without additional hires, the proposed rule would exacerbate this ongoing crisis.

Recommendations:

- **Improve the fairness of asylum office interviews and refer asylum seekers for full asylum interviews at their destination locations out of the expedited removal process.**
- **Continue to provide de novo immigration court hearings for cases that are referred** from the asylum office and ensure that asylum seekers have the opportunity to retain legal counsel, present evidence and legal arguments, call witnesses, and testify before the immigration judge.
- **Avoid creating an asylum process that treats asylum seekers requesting protection at the border differently,** as many asylum seekers do not have the resources or ability to fly to the United States and should not be deprived of a fair hearing on that basis.
- **Hire and train additional asylum officers** to conduct full adjudications, of asylum cases in order to ensure efficient resolution of cases and reduce the growing affirmative asylum [backlog](#), which delays protection, separates families, and undermines integration.
- **Issue guidance encouraging asylum officers to grant cases that meet the refugee definition under U.S. law** to avoid unnecessary referrals to immigration court.
- **Eliminate the use of [expedited removal](#),** which redeploys and diverts asylum office staff, triggering and exacerbating asylum office backlogs. The bipartisan [U.S. Commission on International Religious Freedom](#) and other [organizations](#) have long noted the serious deficiencies and due process concerns of the expedited removal process, which risks returning refugees to persecution and torture. U.S. immigration authorities are not required to use expedited removal on asylum seekers and other migrants at the border.
- **[Improve fairness](#) and enable timely adjudications in immigration court hearings,** including expanding and providing legal representation and legal orientation programs, rescinding rules, rulings, and policies that deny refugees asylum, and improving hearing efficiencies through the use of pre-hearing conferences and stipulations.

April 15, 2021

Hon. Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Hon. Alejandro N. Mayorkas
Secretary
U.S. Department of Homeland Security
301 7th Street, SW
Washington, DC 20528

Dear Attorney General Garland and Secretary Mayorkas:

In the wake of recent reports that the Biden administration is considering systemic asylum reforms, we write to urge steps to create a welcoming, effective, and timely asylum system that enhances – and does not sacrifice – due process and compliance with U.S. refugee law and treaty obligations. Many of our undersigned non-profit organizations and legal clinics have extensive experience in the provision of legal representation and other assistance to asylum seekers with pending cases.

We reiterate our [urgent recommendations](#) to end the misuse of Title 42, on the basis of which the U.S. government is expelling asylum seekers to danger in violation of U.S. refugee law. Leading public health experts have repeatedly explained that the policy “[has no scientific basis as a public health measure](#).” Its continued implementation prevents those waiting at ports of entry from seeking asylum, precipitates needless family separations, and particularly harms African and [Haitian](#) asylum seekers who are disparately impacted by this illegal policy.

We urge the U.S. government to immediately restore meaningful access to asylum and that U.S. agencies take steps to create a fairer, trauma-informed asylum system that treats people seeking protection in the United States humanely. This strengthened system should, at a minimum:

- **Boost legal representation and legal orientation presentation capacities**, injecting them as early as possible into the process. The Biden administration should call for and support the dramatic expansion of government-funded [legal representation](#) programs with the goal of guaranteeing counsel to all people facing removal who cannot afford it – and take immediate steps to encourage expanded legal representation for vulnerable populations, including asylum seekers whose cases originate at the border. Recent studies have confirmed that legal representation also leads to near [universal](#) immigration court attendance.
- **Expand the use of initial asylum office interviews**. The administration should refer asylum seekers for full asylum interviews with U.S. Citizenship and Immigration Services (USCIS) asylum officers in their destination locations, ramping up asylum office staffing to fully adjudicate asylum requests, which will result in quicker initial decisions and reduce the number of individuals ultimately referred to immigration court hearings. These full asylum office adjudications should not be conducted within the expedited removal process, which would limit due process. Instead, asylum office interviews can be scheduled for asylum seekers who are referred from the border to immigration court proceedings after those proceedings are terminated. Asylum office capacity to conduct these interviews must be enhanced by modernizing interview scheduling and filing systems and reducing asylum

office backlogs, including through elimination of the use of expedited removal and creation of an application route for cancellation of removal cases.

- **Eliminate the use of [expedited removal](#)**, which redeploys and diverts asylum office staff, triggering and exacerbating asylum office backlogs – practices that accelerated under the Trump administration. Expedited processing hinges on unfair expectations that asylum seekers, who are often detained, unrepresented, separated from loved ones, physically and mentally exhausted from their journeys to the United States, and suffering [memory loss](#) due to trauma, can immediately and fully articulate their requests for protection. Its use raises serious due process [concerns](#) and risks return of refugees to persecution and torture.
- **Reverse Trump administration rules, rulings, and policies.** To ensure cases move effectively through the adjudication system (whether a USCIS asylum officer interview or immigration court proceedings), without triggering otherwise unnecessary delays and appeals, the Departments of Homeland Security and Justice should take swift action to reverse Trump-era [rules, rulings and policies](#) that prevent refugees from obtaining asylum, separate families, and undermine integration while creating additional administrative inefficiencies. These include the [third-country transit asylum ban](#), [asylum entry ban](#), [“death to asylum” rule](#), [public health bars](#), and [work authorization deprivations](#) that are preventing asylum seekers from supporting themselves and their families. Asylum seekers subjected to these and other policies, including the Migrant Protection Protocols, asylum cooperative agreements, Prompt Asylum Claim Review, and Humanitarian Asylum Review Process, must be provided access to parole and other [redress processes](#). In addition, the Attorney General should vacate [rulings](#), including *Matter of A-B-*, *Matter of A-C-A-A-*, and *Matter of L-E-A-*, that undermine protections for refugees.¹
- **Ensure asylum protections are consistent with U.S. law and treaty commitments.** We welcome the administration’s proposal to [eliminate](#) the filing deadline ban that bars refugees from U.S. asylum protection. The administration and executive agencies should also move ahead swiftly to conduct the reviews directed under the President’s February 2, 2021 [executive order](#) and issue regulations ensuring protection for refugees, including on particular social group, domestic-violence, and gang-violence claims, consistent with U.S. and international law. The Attorney General should take steps to issue new asylum rulings under the correct legal standards.
- **Provide prompt adjudications without sacrificing due process.** Instead of counterproductive [“rocket-dockets”](#) or other [rushed](#) proceedings that prevent asylum seekers and [unaccompanied children](#) from securing counsel or gathering evidence to support their cases, we urge timely adjudications but that ensure sufficient time to prepare. People seeking protection in the United States should be able to schedule hearings and interviews without delays caused by a lack of available hearing dates or interview slots.
- **Upgrade the immigration courts.** While simultaneously working with Congress to enact legislation making the courts [independent](#), the administration should implement [safeguards](#)

¹ Please note that signatory Center for Gender and Refugee Studies is counsel of record in *Matter of A-B-* and *Matter of A-C-A-A-*; signatory Catholic Legal Immigration Network Inc. is counsel of record in *Matter of L-E-A-*.

against [politicized](#) hiring and interference, terminate policies that pressure judges to rush cases and deny asylum, restore immigration judge authority to manage dockets, [improve](#) hearing [efficiencies](#) through use of pre-hearing conferences and stipulations, and reduce court backlogs – including by restoring judicial discretion through the use of administrative closure and termination of cases that can be better resolved through USCIS petitions, grants of Temporary Protected Status, or referral to the asylum office.

- **Launch an innovative humanitarian reception system**, including (1) reorient border processing to swiftly and humanely transit asylum seekers and children from Customs and Border Protection custody to shelters or reception locations while permitting access for members of Congress, attorneys, UNHCR, NGOs, and human rights monitors; (2) avoid use of costly, inhumane, and [unnecessary](#) immigration detention by using legal authority, including parole, to release asylum seekers to live with family and community while their cases are pending; and (3) invest in appropriate, community-based support along the U.S. border and in cities around the United States to ensure that adults and families in the immigration process are received with dignity, able to transit to their destination locations, and can successfully navigate their immigration cases. It is essential that the reception process and other services are available in the language asylum seekers speak best, including Indigenous languages. Training in cross-cultural communication and trauma-informed interviewing are key.

The government should end the use of inappropriate Immigration and Customs Enforcement “alternatives to detention” programs that rely heavily on electronic surveillance, particularly harmful and expensive ankle bracelet monitors, and explore Office of Refugee Resettlement pilot programs to ensure experienced community-based organizations are contracted to provide services, including connection to legal counsel.

The reception system should ensure that asylum seekers receive prompt work authorization so that they can support themselves and their families while their cases are being decided and that [children](#) are protected, guaranteed fair opportunities to seek relief, and that relevant agency policies and procedures consider the best interests of the child in every decision.

The steps outlined above - and more detailed recommendations which we will be happy to share - will lead to increased efficiencies and more accurate decisions. While we strongly urge steps to enable prompt decisions, we would be greatly concerned about any efforts to restrict adjudications to asylum office interviews or otherwise sacrifice due process – such as access to immigration court hearings following referral from the asylum office or judicial review by federal courts of appeal – to send a deterrent message or speed cases through the system. It is time to reject the failed paradigms of the past and the notion that punitive policies aimed at blocking asylum seekers from the country or from fair hearings are the answer.

We firmly believe the asylum system can – and must – be timely, effective, and fair. As the administration considers changes to the U.S. asylum system, it is critical that our organizations – many with decades of experience working with asylum seekers and ensuring U.S. compliance with U.S. refugee law and treaty commitments – are consulted. We would appreciate the opportunity to meet with your agencies to discuss our suggestions.

Sincerely,

Groups

Adelante Pro Bono Project
Aldea - The People's Justice Center
Al Otro Lado
American Friends Service Committee
American Immigration Lawyers Association
Amnesty International USA
Asian Americans Advancing Justice - Atlanta
Asian Pacific Institute on Gender-Based Violence
AsylumWorks
Asylum Seeker Advocacy Project (ASAP)
Bellevue Program for Survivors of Torture
Boston College Legal Services LAB Immigration Clinic
Boston University School of Law, Immigrants' Rights and Human Trafficking Program
Bridges Faith Initiative
Capital Area Immigrants' Rights (CAIR) Coalition
Casa del Migrante en Tijuana A.C.
Casa Ruby
Catholic Charities of Southern New Mexico
Center for Gender & Refugee Studies
Center for Victims of Torture
Church World Service
Catholic Legal Immigration Network, Inc.
Comunidad Maya Pixan Ixim
Connecticut Institute for Refugees and Immigrants
Detention Watch Network
Disciples Refugee & Immigration Ministries
El Refugio
Emory Global Health Institute
First Focus on Children
Florence Immigrant & Refugee Rights Project
Freedom Network USA
Georgia Asylum and Immigration Network (GAIN)
Haitian Bridge Alliance
Harvard Immigration and Refugee Clinical Program
HIAS
Human Rights First
Human Rights Initiative of North Texas
Immigrant Defenders Law Center
Immigration Equality
Innovation Law Lab
Inspiritus
Instituto para las Mujeres en la Migración, AC (IMUMI)
International Rescue Committee
Jesuit Refugee Service/USA

Kids In Need of Defense (KIND)
Latin America Working Group (LAWG)
Migrant Center for Human Rights
Mississippi Center for Justice
National Council of Jewish Women
National Immigrant Justice Center
National Immigration Law Center
National Network for Immigrant & Refugee Rights
National Network of Arab American Communities (NNAAC)
NETWORK Lobby for Catholic Social Justice
New Sanctuary Movement of Atlanta
Physicians for Human Rights
Project Blueprint
Project Lifeline
Raksha, Inc
RAICES
Refugees International
Rocky Mountain Immigrant Advocacy Network
Safe Passage Project
Southern Border Communities Coalition
Southern Center for Human Rights
Southwest Good Samaritan Ministries
SPLC Action Fund
Sur Legal Collaborative
Tahirih Justice Center
The Advocates for Human Rights
The Right to Immigration Institute
UndocuBlack Network
Union for Reform Judaism
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U.S. Committee for Refugees and Immigrants (USCRI)
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Protection Postponed: Asylum Office Backlogs Cause Suffering, Separate Families, and Undermine Integration

The Biden Administration has inherited a large and growing backlog of asylum claims. As of September 2020, more than 386,000 applications were awaiting adjudication by the Asylum Division of U.S. Citizenship and Immigration Services (USCIS). This backlog exploded under the Obama Administration, which increased the use of expedited removal and redirected asylum officers from adjudicating asylum cases to instead conduct fear screenings. Over the past four years, the backlog continued to grow as the Trump Administration diverted Asylum Division resources to block and turn back refugees seeking U.S. asylum protection – in violation of U.S. laws and treaty obligations.

As a result, refugees face catastrophic, years-long delays to receive an asylum interview. Although U.S. law requires the government to conduct asylum interviews within 45 days of filing, many asylum seekers – including those who filed applications during the Obama Administration – have waited years. They are trapped in legal limbo without permanent status and are often subjected to prolonged separation from their families, including many who are living in danger abroad. While waiting, asylum seekers are often unable to pursue educational opportunities or secure employment, all the while living in fear that they could be deported to persecution or torture.

The backlog coincides with record levels of global refugee displacement. At the end of 2020, the U.N. Refugee Agency (UNHCR) reported that more than 26 million refugees were displaced worldwide, including refugees from Cameroon, Central African Republic, China, El Salvador, Eritrea, Guatemala, Honduras, Nicaragua, Russia, Syria, South Sudan, Venezuela, and Yemen, as political repression, civil conflicts, and other violence forced people to flee their homes in search of protection. For instance, since 2014, political violence in Venezuela has led to an 8,000 percent increase in the number of Venezuelans seeking refugee protection worldwide, with over 100,000 Venezuelans seeking refuge in the United States. Since September 2016, Venezuelans have filed more affirmative asylum applications each month with USCIS than asylum seekers of any other nationality.

Despite these acute needs, U.S. policies and practices are forcing more asylum seekers to wait even longer to receive protection as Asylum Division resources are diverted to implement harsh and flawed border policies, including the expansive use of expedited removal. In fiscal years (FY) 2016 and 2019, an astounding 89 percent of asylum officers were temporarily reassigned from adjudicating affirmative asylum to other duties, including screenings for asylum seekers placed in expedited removal as well as those subjected to the Trump Administration's illegal policies to block refugees at the southern border, such as the Migrant Protection Protocols (MPP) and Asylum Cooperative Agreements (ACA).

At the same time, USCIS's decision to prioritize more recent applicants – the so-called "last in, first out" (LIFO) policy – has failed to reduce the backlog, essentially freezing those already waiting for interviews while adding new asylum seekers to the backlog each year. During the COVID-19 pandemic, the backlog has continued to expand and wait times have grown even longer.

This report, which builds on Human Rights First's prior research, examines the human impact of the backlog through interviews with our asylum clients who have been waiting years for asylum office interviews. It also

analyzes government policies and data to explain underlying causes of the backlog, challenges it poses, and opportunities to resolve it.

Key findings:

- ☑ **The affirmative asylum backlog grew under the Trump Administration, reaching a historic high of more than 386,000** pending applications at the end of FY 2020. Among the asylum seekers stuck in the backlog are thousands from Venezuela, who since September 2016 have filed more affirmative asylum applications than people of any other nationality, with many seeking protection from persecution by the repressive Venezuelan government.
- ☑ **Asylum seekers wait for years in the backlog for their claims to be adjudicated.** Without a change in the Asylum Division’s interview scheduling priorities, USCIS’s plan to eliminate the backlog in six years would leave many asylum seekers waiting years – some waiting potentially more than a decade. Asylum seekers who filed applications during the Obama Administration – and who are now at the end of the line due to the adoption of the “last in, first out” scheduling policy in January 2018 – continue to wait for asylum officer interviews. The large majority of interviews currently scheduled are for applications submitted in the last three months; for example, only four percent of asylum interviews scheduled in April/May 2020 were from cases pending more than 100 days. The Bellevue Program for Survivors of Torture (PSOT) reported that only 18 percent of its clients whose cases were pending in the affirmative asylum backlog prior to January 2018 had received interviews as of 2020. Of the more than 300 Human Rights First clients stranded in the affirmative backlog, 80 percent have been waiting for more than two years for an interview, with average wait time of more than four years, as of April 2021. In addition, years-long, post-interview delays have become increasingly common for refugees from Iran, Iraq, Syria, Yemen and other nationalities who are eventually granted asylum, as USCIS takes extreme amounts of time to conclude security and background vetting and additional reviews.
- ☑ **Harsh and flawed border policies, including the expansive use of expedited removal, worsen the backlog by diverting Asylum Division resources away from resolving affirmative asylum claims.** During the Obama and Trump Administrations (FY 2016 to FY 2019), an astounding 89 percent of the 535 asylum officers in the Asylum Division were temporarily diverted from adjudicating affirmative asylum cases to other duties, including screenings for asylum seekers placed in expedited removal as well as those subjected to illegal Trump Administration policies – MPP and ACA – to block refugees at the southern border.
- ☑ **Despite efforts to hire new staff, the Asylum Division continues to lack sufficient asylum officers.** USCIS was authorized to employ up to 1,296 asylum officers in FY 2020, but as of April 2020 it had only 866 on staff. In addition, low retention of experienced asylum officers is a problem. Many retired, transferred to other USCIS divisions, or quit to avoid implementing, or being complicit in, the Trump Administration’s illegal asylum policies.
- ☑ **The human consequences of the backlog are devastating.** The backlog prolongs family separation, leaving many children and spouses in danger for years. Delays also undercut pro bono legal representation and harm asylum seekers’ mental health, leaving them in limbo and potentially compounding their trauma from persecution and torture experienced in their home countries. Meanwhile employment and education are often placed on hold while asylum seekers are forced to wait for years without permanent legal status. Those caught in the backlog include: A father, who has been separated from his children for six years and had his request to expedite his asylum case denied despite his brother's political imprisonment in Yemen and efforts by a local militia to target his teenage son; an asylum seeker from the Central African Republic who has not seen his three daughters or wife in more than four years; and an Iranian asylum seeker, who has suffered homelessness during a more than five-year wait for an asylum interview.

- ☑ **Fraud and security screenings have grown unchecked and surpassed their necessary roles as fraud and security checks.** USCIS components tasked with implementing the Trump Administration’s rhetoric of “extreme vetting” have drained substantial agency resources to pre-screen asylum applications that could, and should, be more effectively devoted to conducting interviews with asylum seekers. The post-interview vetting and background check process has also ballooned in a discriminatory fashion that affects some nationalities, including asylum applicants from Iran, Iraq, Syria, and Yemen, more than others.

Human Rights First urges the Biden Administration to:

U.S. Citizenship and Immigration Services and its Asylum Division

- ☑ Address the backlog of pending asylum applications.
 - Prioritize applications pending the longest for interview, while the Asylum Division also schedules interviews for child applicants and other recently filed applications, and consider authorizing overtime for asylum officers who volunteer to help clear the backlog of affirmative cases.
 - Create an effective process to advance asylum interviews for applicants with medical, humanitarian or other pressing concerns, including family members in danger abroad, and ensure access to advance parole for applicants with emergent reasons to travel abroad temporarily.
- ☑ Modernize and improve asylum office processes to promote efficiency.
 - Ramp up hiring and establish initiatives to boost retention of asylum officers, including encouraging experienced asylum officers who quit or transferred out of the Asylum Division to return.
 - Ensure cases are accurately resolved and unnecessary referrals to immigration court minimized through hiring of qualified asylum officers, appropriate and accurate training and oversight, and review of all referrals and denials while Trump administration policies and rulings remain under review.
 - Establish a process for individuals to apply directly to USCIS for cancellation of removal, such as through a separate USCIS application and adjudication unit, so that applicants for this humanitarian relief can be referred for assessment and these cases do not add to asylum backlogs.
 - Allow electronic filings, establish online interview scheduling and rescheduling, create a uniform short notice list, and provide longer interview notice periods to reduce rescheduling.
 - Assess application processing and vetting efforts, such as the Asylum Vetting Center (AVC) and Fraud Detection and National Security (FDNS) Directorate, to identify ways to improve efficiency and effectiveness of USCIS resources.
- ☑ Revoke illegal Trump Administration policies, including unprecedented asylum application fees, new and increased fees for initial and renewed work authorization, and other rules that prevent, limit, or delay refugees from supporting themselves and their families while waiting for asylum decisions.
- ☑ Promote transparency by providing regular, public updates on asylum officer interview schedules, as recommended by the USCIS Ombudsman and agreed to by USCIS, reinstating quarterly national stakeholder meetings, and releasing quarterly data fully disaggregated by nationality and other characteristics.

Department of Homeland Security (DHS)

- ☑ Withdraw expansions of expedited removal to the interior of the United States and between ports of entry, and exercise DHS’s discretion at and between ports of entry to reject the use of expedited removal to avoid diverting substantial asylum office staffing and resources to screen people likely to be entitled to apply for

asylum. USCIS has noted that high volumes of expedited removal screenings “place[] great strain on the resources of the USCIS Asylum Division.”

- ☑ End the Migrant Protection Protocols and the misuse of Title 42 public health authority to summarily expel asylum seekers and fully rescind the asylum cooperative agreements, entry and third-country transit asylum bans, and other illegal policies that block refugees from requesting U.S. asylum protection, weaponize expedited removal, and divert asylum officers from adjudicating affirmative asylum claims.

United States Attorney General

- ☑ Vacate Attorney General and Board of Immigration Appeals rulings that rig asylum adjudications against refugees, including *Matter of A-B-*, *Matter of A-C-A-A-*, and *Matter of L-E-A-*, which purport to limit asylum for survivors of domestic violence, people persecuted on account of their family relationships and other particular social groups.

United States Congress

- ☑ Provide appropriations to hire additional asylum officers to clear the backlog of affirmative asylum applications and ensure that new applications are timely adjudicated.

USCIS’s Role in Asylum Adjudication

Seeking asylum in the United States is a complex process. Individuals present in the United States who are not in immigration removal proceedings can apply for asylum with the USCIS Asylum Division by voluntarily filing an “affirmative” asylum application. Generally, asylum seekers can be barred from asylum if they do not apply within one year of their arrival unless they meet certain limited exceptions – a harsh ban that denies asylum to refugees and separates refugee families. Asylum seekers who apply affirmatively are usually not detained while they wait to present their claim.

Affirmative asylum applicants receive a non-adversarial interview with an Asylum Division officer to determine whether they meet the legal definition of a “refugee”—a person unable or unwilling to return to her country of origin because of persecution or a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. Applicants must present evidence to support their case and convince the asylum officer of their credibility, a process that may be made difficult by the lingering effects of persecution, torture, or other trauma. Although U.S. law requires that asylum interviews generally be conducted within 45 days of filing, wait times for the scheduling of asylum interviews, as discussed below, may extend for years.

If the officer does not grant the asylum application and the applicant does not otherwise have valid immigration status, the case will be “referred” to the immigration court, where an attorney from U.S. Immigration and Customs Enforcement (ICE) will argue for the person’s removal from the United States and an immigration judge will consider the asylum case or other available forms of relief from removal. Between FY 2013 and 2017, **most affirmative asylum claims referred from the asylum office and decided by immigration judges were ultimately granted**, according to DOJ data. Thus, referrals to court do not necessarily indicate that an asylum claim lacks merit.

In addition, the Asylum Division considers asylum applications of unaccompanied children who are subject to immigration court removal proceedings. While an unaccompanied child’s asylum claim is being considered, the immigration judge may adjourn the hearing to allow time for the Asylum Division to issue a decision. The judge will consider the merits of an unaccompanied child’s case only if it is not granted by the asylum officer and is “referred” to the court.

Although affirmative asylum applicants and unaccompanied children may present their cases directly to an asylum officer, asylum seekers who seek protection upon arrival at a port of entry without valid travel documents or enter without inspection are currently unable to apply for affirmative asylum if they are placed in expedited removal. DHS has discretion in many cases to parole these asylum seekers into the United States and to refer them to regular immigration court removal proceedings. However, DHS tends to place these asylum seekers in expedited removal or, for those who have a prior removal order, in reinstatement of removal proceedings.

When DHS uses expedited removal, [Section 235](#) of the Immigration and Nationality Act (INA) requires asylum officers to conduct protection screening interviews—known as credible fear interviews (CFI) and reasonable fear interviews (RFI)—with people subject to expedited removal or reinstatement of removal, respectively. These screenings determine whether the United States can immediately deport them to their country of origin or whether they must be referred to the immigration court for a hearing. While the Trump Administration has repeatedly attempted to unlawfully raise [the standards](#) applied during these interviews, the INA requires that during a credible fear interview, an asylum officer must determine whether there is a “[significant possibility](#)” that a person could establish an asylum, [withholding of removal](#), or [torture protection](#) claim before an immigration judge. In a reasonable fear interview the officer [determines if there is a “reasonable possibility”](#) of future persecution based on one of the five protected grounds under the refugee definition and for potential eligibility for protection under the [Convention Against Torture](#).

The Human Impact of the Asylum Backlog

Long wait times for adjudication of asylum claims have devastating effects on refugees and their families. Delays prolong the separation of families—by years—leaving children and spouses of many refugees stranded in danger abroad. [Mental health experts](#) warn that extended anxiety due to delays and temporary status hinders asylum seekers’ ability to recover from past trauma. Limited access to employment and educational opportunities impede asylum seekers’ ability to support themselves and their families and to rebuild their lives in the United States. **Of the more than 300 Human Rights First clients stranded in the affirmative backlog, 80 percent have been waiting for more than two years for an interview, with average wait time of more than four years, as of April 2021.**

Prolonged Family Separation

Many asylum seekers stuck in the backlog are separated from spouses, children, and other family members, many of whom are stuck in danger abroad. Once individuals are granted asylum, they may petition for their children and spouse to join them in the United States. But asylum seekers awaiting adjudication cannot sponsor qualifying family members under a pending application. While it is possible to request expedited scheduling of an asylum interview based on urgent humanitarian concerns, including danger to family abroad, the process for doing so is opaque to unrepresented asylum applicants, and the Asylum Office has in recent years been unreliable in responding to such requests even when made by lawyers.

Long waits are often destructive to asylum seekers’ mental health and relationships with family members left behind. As Dr. Asher Aladjem, Chief Psychiatrist at the Bellevue Program for Survivors of Torture, [told](#) Human Rights First, asylum seekers struggle with “the sense that their own lives aren’t only in limbo, but the whole family and the children and the whole [familial] system that they’re part of is impacted.” The [Center for Victims of Torture](#) recently noted that “prolonged uncertainty” for asylum seekers in the backlog separated from family members in danger “can cause such acute feelings of hopelessness and depression that it can result in suicidality.” In addition, [researchers](#) find that lengthy family separations caused by asylum adjudication backlogs often leave asylum seekers in “a state of fear and guilt due to their sense of having made family members targets of persecution.” Asylum seekers in the backlog whose families remain stranded abroad include:

- **Ibrahim¹, a Pakistani human rights activist, has waited for his asylum interview since 2015 while his wife and children remain in danger in Pakistan due to his work on behalf of marginalized groups.** USCIS denied his request to expedite his asylum interview despite credible threats against his family. Ibrahim's youngest daughter was just three years old when he fled Pakistan. As Ibrahim's wait continues to grow, he laments the time separated from his children as they grow up without him. "I have lost my children – even if I see them again, I will never have those years back."
- **Jean, an opposition party activist from the Central African Republic, has not seen his wife and three daughters for more than four years.** He fled in 2016 after government authorities arrested, imprisoned, and tortured him for his political views. Because Jean was unable to bring his family with him as he fled, his wife and children are stranded alone in Cameroon. "I miss my family every day. Whenever I feel hopeless or tired, I think of my children. When I think of them, it gives me the courage to continue."
- **Aaron, an Ethiopian refugee waiting in the backlog for over five years, saw his relationship with his fiancée break down due to their separation.** "I met someone who I fell in love with. I thought we would be able to get married, and she could come from Ethiopia to live with me." But without asylum Aaron lacked the immigration status to bring his fiancée to the United States. "After more than a year of waiting, she had to move on with her life and married someone else. It crushed me."
- **Ali, who fled political persecution in Yemen, has been separated from his wife and children for nearly six years as he waits for an interview.** His wife, children, and other family in Yemen are in grave danger due to Ali's former business dealings with the U.S. government. Since Ali fled Yemen, the authorities detained his brother after they discovered WhatsApp messages from Ali on his phone. "They took him because of me. No one in my family knows where he is or when he will be released, or even if he is alive. . . . If they do that to him, what could happen to me or other members of my family?"

Refugees reunited with their families after receiving asylum continue to deal with the trauma of long-term family separation caused by the asylum backlog, including:

- **Syed, a Bangladeshi journalist who received asylum in 2018, was separated from his family for three years while in the asylum backlog.** His wife and three children finally joined him in the United States in late 2019 after USCIS approved their derivative asylee petitions. "My daughter was an infant when I was imprisoned, and when I was released, she didn't remember me. I was forced to leave the country to save my life while my wife was pregnant. My two youngest children had no memories of me ever living with them in Bangladesh." Now Syed and his family are working to build relationships and recover the years they lost. "Our separation is something we are still trying to heal together."
- **Maya, a Pakistani asylum seeker, was separated from her two children for three years while waiting in the asylum backlog.** Her children recently escaped from their abusive father and rejoined their mother in the United States. "I still feel shaky and weak when I think about those years apart. It was traumatizing for all of us."

Mental Health Consequences

Many asylum seekers have endured severe persecution and faced further trauma during dangerous journeys to the United States. After arriving in the United States, they may experience even more suffering resulting from family separation, the inability to work, discrimination, and the anxiety of waiting for the outcome of their asylum case.

¹ All names are pseudonyms to ensure the confidentiality and safety of asylum seekers and their families.

Case delays impede asylum seekers' ability to overcome trauma and may compound it. As Dr. Melba Sullivan, a staff psychologist at the Bellevue Program for Survivors of Torture (PSOT), explained to Human Rights First, prolonged delays in the adjudication of asylum claims is an “ongoing stressor,” causing asylum seekers to experience prolonged exposure to the trauma trigger of uncertainty of future protection. These delays also increase “clinical service backlogs” for mental health providers, such as PSOT, and “diminish[their] ability to take in new cases.” Asylum seekers who have experienced significant mental health consequences as a result of their prolonged wait in the backlog include:

- **Rita, an asylum seeker from Kosovo, has been waiting more than two years to learn whether she has received asylum.** An award-winning journalist, Rita is suffering from post-traumatic stress disorder (PTSD) exacerbated by her wait for a decision in her case and the lack of support for asylum seekers. “I cannot describe the feeling of uncertainty when I came here. I had many dark moments during the first six months here when I didn’t have permission to work.”
- **Farah, an asylum seeker from Bahrain, has been struggling since applying for asylum in April 2015.** When Farah began experiencing depression, she was unable to receive psychological treatment because, without permanent legal status, she did not qualify for medical insurance and could not afford treatment.
- **Paul, an LGBT asylum seeker from Cameroon, suffers from depression, which he attributes to persecution he endured due to his sexual orientation and trauma he continues to experience while separated from his family.** “My last romantic partner was arrested and killed. I was so afraid that I would be next, or my family would be hurt. So, I had to flee. But now I feel sad when I am not able to speak to my children or see their faces.”
- **Ali, a Yemeni asylum seeker, has felt suicidal and despondent.** “I think about killing myself. I see my kids grow up so far from me. My son only knows his father on the phone – he doesn’t remember me.” For Ali, the delay in receiving an asylum interview feels as difficult as leaving his family behind. “Applying for asylum means you’ve already lost everything. My family, security, community, country. And now you just keep waiting. Waiting, waiting, waiting. This is almost the hardest part because there is absolutely nothing you can do.”
- **Yusuf, a gay man seeking asylum from Tajikistan, faced a mental health crisis when his asylum case went from the front of the line to the back in 2018.** “It was catastrophic for me. I felt overwhelmed and depressed. The hardest part was that my whole life was upended . . . I felt that I had no control over my life at all.” Yusuf still finds it difficult to cope as he sees more recent applicants have their cases resolved. “I haven’t even had my interview. It has been so hard.”
- **Sophie, an asylum seeker from Burkina Faso who was subjected to female genital mutilation and years of domestic violence, has struggled to maintain her mental health after her asylum interview was cancelled and subsequently pushed to the back of the backlog line following the switch to “last in, first out” in 2018.** Sophie’s depression, PTSD, anxiety, and insomnia have at times been so severe that she has been unable to work. “Today, I’m not sure if I am distressed because of my abuse or because I have been waiting for an answer in my case for so long. It is difficult for me to know whether my panic attacks are due to bad memories from the past or due to anxieties I have about my current situation.”
- **Teresa, who fled severe domestic violence in Honduras, wants to move on with her life but remains in limbo waiting for a decision.** Unaware of the arbitrary requirement to file an asylum application within a year of her arrival in the United States and suffering the effects of the trauma she experienced in Honduras, Teresa filed her asylum application outside of the one-year-filing deadline. In the backlog for

three years before finally receiving an interview in 2020, Teresa has been experiencing severe anxiety as she has waited months for the asylum office to decide whether she qualifies for asylum protection.

Asylum Seekers Left Vulnerable, Integration Delayed by Barriers to Economic Stability

Under U.S. law, refugees who are granted asylum are automatically authorized to work, but asylum seekers must apply for and may only receive work authorization after their case has been pending for at least 180 days. Asylum seekers may be required to renew work permits each year, at a cost of \$495, while their cases are pending. Frequent delays in processing initial and renewal applications by USCIS mean that work permits often take many months to arrive, placing asylum seekers in perilous financial situations while they wait.

The Trump Administration, through a series of administrative rules, sought to increase the period asylum seekers must wait to apply for work authorization to 365 days, bar asylum seekers from authorization who apply more than one year after last arriving in the country, and charge a prohibitive \$580 fee for initial employment authorization as well as similarly high fees for work authorization renewals. The rules also eliminated fee waivers for indigent asylum seekers. Federal courts have partially enjoined the changes to work authorization eligibility and preliminarily enjoined the USCIS fee changes. In June 2020, USCIS eliminated a requirement that initial work authorization for asylum seekers be processed within 30 days.

Even without these new restrictions, the inability to work for at least six months after applying for asylum leaves many asylum seekers, already vulnerable and traumatized, in precarious situations. Those without means to survive must rely on friends, family, or local communities for support. But many lack support networks and face further difficulties in informal or illicit labor markets and tenuous housing. With no support from the federal government for housing or basic necessities, many asylum seekers experience homelessness, including:

- **Leila, a 56-year-old Iranian asylum seeker, has struggled to find secure housing, at times sleeping in subway cars.** For a period, Leila was forced to live at a homeless shelter. “There was a time when I no longer felt safe at the shelter, so I went to stay with friends, then a church acquaintance, then with other people in my community.” But when COVID-19 hit, Leila’s friends could no longer take her in. **“I was sleeping on the subway because no one could house me.** These are the moments when you realize you truly are an immigrant – you don’t have family, resources, or belongings.”
- **Mary, who fled Kenya to protect herself from being forcibly subjected to female circumcision, has repeatedly experienced homelessness.** Mary has resided in the United States for nearly two years and has not yet received her work authorization. She has at times had to resort to sleeping in homeless shelters. Mary is now living with a family who informally employs her as a nanny, but she is afraid that she could once again be on the streets without a job before she receives permission to work.
- **Alexander, Nadia, and their two sons, who fled race-based attacks in Russia, were evicted from their apartment and are now facing homelessness as they struggle to find support services.** The homeless shelter where the family stays is closing, and they have only weeks to find new housing. But very limited support is available to asylum seekers. As Alexander noted, some “programs require an interview date or a green card to be eligible for assistance – **but the reason I need assistance is because I don’t have an interview date or a green card.** The system is set up for me to fail, and to never be able to access the basic programs I need to be able to keep my family fed, housed, and healthy on my own.”
- **Yusuf was homeless for a year after applying for asylum in 2016.** He often went days without eating and sometimes slept in airport waiting areas. Harassed in homeless shelters because of his sexuality, Yusuf said that he “would sometimes sleep in the subway for safety.”

Asylum seekers without work authorization or who experience delays in renewing work permits often face difficulty in obtaining or maintaining employment. Those who do secure employment can find themselves working under exploitative circumstances and dangerous conditions, such as:

- **Maria and Jorge, who fled government persecution in Venezuela in 2014, have encountered significant barriers to housing, work, and health care in the United States without permanent status.** When the couple first arrived, they depleted their savings and Jorge took dangerous informal work to survive. When Jorge was injured on the job, the family could not afford the \$1,500 treatment he needed. Maria told Human Rights First: “I had to convince the doctor to teach me how to care for him at home instead of receiving care in the office.” Even now, as they remain in limbo without asylum status, Maria reported, “we cannot buy a home, return to school, or get a credit card because of our status.”

Asylum seekers who were professionals in their home countries can often find only lower-skilled jobs with employers who are willing to hire asylum seekers with temporary work authorization. They include:

- **Latif worked as a software engineer in Libya but has been unable to find work in his profession while he waits for his asylum interview.** Instead, he has been teaching software engineering at a nonprofit. “Many of my students come into my classes without any expertise, then they receive full-time jobs that I also have applied for. It is very frustrating.” **Latif’s wife, Melissa, is a doctor, but she cannot return to school to obtain U.S. medical credentials because she is ineligible for federal financial aid as an asylum seeker.** She has also been unable to find full-time work in the medical field despite multiple unpaid internships and stints as a volunteer.
- **In the Central African Republic, Jean worked as a computer programmer but is now struggling to earn enough to survive and support his wife and daughters who were forced to flee to Cameroon.** Jean now works as a rideshare driver, but COVID-19 has dramatically reduced his earnings. “I am lucky if I earn \$100 each day. I have to pay my car lease, rent, electricity, internet, insurance – and I have to eat and send money to my wife. It isn’t working at all.”

Without permanent legal status, many asylum seekers struggle to continue their education, as do their children who are with them in the United States and included in their claims. Thirty-one states do not provide in-state tuition rates to certain categories of immigrants, including asylum seekers. As a result, few asylum seekers qualify for in-state tuition or financial aid for higher education. Indeed, some states will not offer in-state tuition rates even after a person is granted asylum, either delaying in-state consideration until one year after the asylum grant or until the person is granted permanent residence, depending on the state. The lack of permanent status also impedes access to basic services that require official identification, including opening a bank account, renting a vehicle, or establishing a credit history to rent an apartment. Asylum seekers struggling to pursue educational opportunities in the United States include:

- **Usman, a Yemeni medical student, has not been able continue his medical studies while waiting nearly five years for an interview.** He fled Yemen in his fifth year of medical school and cannot afford to continue his education because he is not eligible for loans or other financial support. “I was doing really well in school. But you do what you have to do.” Usman now works as a driver for a ride-sharing service and has struggled even to open a checking account. Banks refuse to accept the temporary state ID card he was issued because its period of validity is tied to his temporary work permit.
- **Amal, an activist in Yemen, has not been able to return to school to continue her work as a community organizer and human rights activist.** “I can’t go because I am working so much [and] because it is so expensive.” Without permanent status, Amal does not qualify for financial aid. She was also

recently rejected from leasing a car because of her immigration status. “These small things could make our lives easier, but asylum seekers waiting for their interview can’t access them. I am in limbo.”

- **Amir, who applied for asylum in 2016 after fleeing Egypt, may be suspended from his dentistry program if he does not soon receive renewal of his work authorization.** The human resources office at his dental residency program notified him that if he does not receive an extension of his work authorization before April 2021, he will be placed on leave from his dental residency.
- **Maya’s son, Isaac, was unable to attend the university where he was accepted because he does not qualify for financial aid.** “We could not find a scholarship to provide funding for tuition. We tried our best but couldn’t afford it. I know my son will work hard and be professionally successful, but I sometimes worry that he has lost out on opportunities and experiences because of our status.”
- **By the time Samer and his family, asylum seekers from Syria, were finally granted asylum in 2021, after a nearly seven-year wait, their older child had been forced to miss a year of college due to her lack of eligibility for financial aid.** After filing for asylum, the family waited three years for an asylum interview and a further three and a half years for a decision after the case disappeared into USCIS’s security and background checks and centralized review peculiar to the cases of Syrians and certain other nationalities. This delay created many hardships for the family. They had to put plans of home ownership on hold due to their lack of permanent status. After the family’s oldest child graduated high school, she could not qualify for financial aid to attend college. Samer has now been granted asylum, but his daughter will still have to wait an additional year to qualify for in-state tuition rates, as the state where the family resides does not consider non-citizens to be residents for tuition purposes until a year after they are granted asylum or permanent residency.

The COVID-19 pandemic has left asylum seekers, who already struggle to build economic stability while forced to wait months for work authorization and have limited access to education and training opportunities, even more vulnerable. Asylum seekers are rarely able to access state and local safety net programs and are not eligible for Medicaid in nearly all states. Because many asylum seekers work part-time or in positions where they are not treated as employees, they may not qualify for protections awarded to full-time employees. Asylum seekers in the backlog who have suffered the economic and health consequences of the pandemic include:

- **Isabelle, a Salvadoran asylum seeker, lost her job as a housekeeper and went two months without pay when she fell sick with COVID-19.** In El Salvador, Isabelle faced death threats by the MS-13 gang that controls large parts of the country as well as severe domestic violence. She has been waiting for an asylum office interview since applying in 2016. Because of her status as an asylum seeker, Isabelle was ineligible for unemployment benefits when she was fired.
- **Mahmoud, an asylum seeker from Bahrain, went without pay for weeks when he contracted COVID-19 while working for a major online retailer.** Even though Mahmoud was working full-time when he fell ill, he was not provided health insurance and could not afford to pay for a COVID-19 test. Because he could not officially confirm that he had COVID-19, his employer refused to give him paid leave. Instead, he was forced to take time off without pay. “I was sick for three weeks, twenty-four hours a day. I was terrified.”
- **Luis, a Venezuelan asylum seeker, contracted COVID-19 likely while working as ride-share driver.** Hospitalized in intensive care for sixteen days, Luis convalesced at home for another three months. Luckily, Luis and his wife, Manuela, had purchased health insurance through an exchange. But Luis was out of work for nearly six months. Without permanent legal status, Luis and Manuela were ineligible for federal government relief and they are still reeling financially from Luis’ time out of work. “It sometimes feels more difficult to survive in the United States than in Venezuela.”

Impaired Access to Counsel

Legal representation can vastly improve asylum seekers’ chances of receiving protection. In 2020, asylum seekers with legal representation were nearly twice as likely to receive asylum protection in immigration court compared to asylum seekers without an attorney. Access to counsel also improves system efficiency. The U.S. Commission on International Religious Freedom noted that “lack of counsel not only disadvantaged detainees but also burdens the system, since unrepresented cases are more difficult and time consuming for adjudicators to decide.” Despite the undisputed importance of legal counsel, the government does not generally fund legal representation in asylum proceedings. Indigent asylum seekers must rely on the limited resources of nonprofit organizations, law school clinics, and law firm pro bono programs.

Long delays at the Asylum Division impair the ability of pro bono legal providers to accept cases for representation and create obstacles for private immigration attorneys. A survey of 24 pro bono coordinators at major law firms conducted by Human Rights First in 2016 found that over 60 percent of pro bono professionals view delays at the asylum office as a negative factor in their firm’s ability to take an affirmative asylum cases. Because associates at major law firms generally do not remain at the firm for more than a few years, years-long case delays mean cases must be reassigned – sometimes repeatedly. Moreover, many attorneys who take on a pro bono case will not take on other pro bono matters until the pending case is resolved. Similarly, law school clinics, whose students generally rotate each year, waste resources and worry about putting clients through retraumatizing interviews as wait times become prolonged. For private attorneys, managing cases in the backlog often without taking concrete steps on the asylum application for many years can create both logistical and financial difficulties. Years-long delays in adjudicating the asylum application also increase the sheer volume of work required of advocates over the life of the asylum case, due to the need to update asylum applications to deal with evolving conditions in the home country or changes in applicants’ personal circumstances, and the need to apply to renew work permits—several times, in many cases—for the principal applicant and all included family members, and to deal with the many challenges the lack of lasting status poses for asylum applicants.

The Backlog Stagnates

As of September 2020, the number of asylum applications pending before the ten USCIS asylum offices was more than 386,000. According to the USCIS Ombudsman the affirmative asylum backlog has continued to grow even as the number of applications received has fallen. USCIS has noted that high volumes of expedited removal screenings “place[] great strain on the resources of the USCIS Asylum Division.” The current backlog began to grow under the Obama Administration, which increased the use of expedited removal and diverted asylum officers from adjudicating full asylum claims to conducting expedited removal fear screenings. Using expedited removal against refugee populations diverts asylum office resources toward screening individuals who are overwhelmingly entitled to full assessments of their eligibility for humanitarian protection. In 2015, for instance, 88 percent of asylum-seeking families who were placed in expedited removal passed credible fear interviews, demonstrating the redundancy and wastefulness of channeling limited asylum office resources to screen

Fiscal Year	Affirmative Asylum Applications Filed	New Reasonable Fear Requests	New Credible Fear Requests	Total Affirmative Applications Pending at End of Fiscal Year
2012	46,659	5,053	13,880	20,143
2013	45,403	7,733	36,035	38,345
2014	57,840	9,084	51,101	71,152
2015	84,182	8,015	48,052	116,774
2016	115,926	9,632	94,048	209,806
2017	142,818	10,273	78,564	303,513
2018	107,803	11,048	99,035	319,563
2019	84,312	13,197	105,439	339,836
2020	93,134	8,721	30,839	386,014

Sources: 2018, 2019 & 2020 USCIS Ombudsman reports and USCIS statistics.

asylum seekers. Even with variations in grant rates at different times, the vast majority of asylum seekers subjected to these screenings qualify for full asylum hearings. Positive credible fear rates during the Obama and George W. Bush administrations averaged nearly 80 percent.

The backlog's rate of growth slowed after the last-in, first-out policy was implemented in January 2018, but the LIFO policy has failed to reduce the size of the backlog, and most newly filed asylum applications continue to be placed into the growing backlog. In its response to the 2020 USCIS Ombudsman report, USCIS acknowledged in December 2020 that LIFO and other restrictive Trump Administration policies aimed at limiting access to the U.S. asylum system have not reduced "the number of pending [affirmative] cases."² The temporary closure of asylum offices on March 18, 2020 due to the COVID-10 pandemic and resulting reductions in interview volume since offices began to re-open on June 4, 2020 has caused the backlog to expand further; nearly 50,000 cases were added to the affirmative asylum backlog in FY 2020. According to the Trump Administration's proposed USCIS budget for FY 2021, "[u]nder current assumptions . . . USCIS is aiming to eliminate the [affirmative asylum] backlog within six years." Without a change in the Asylum Division's priorities, **USCIS' six-year timeline would leave many asylum seekers waiting for substantial periods – some potentially for as many as ten years – just to receive an interview with an asylum officer.**

The volume of asylum applications received by USCIS corresponds with high levels of global refugee displacement. Targeted violence by transnational criminal organizations and human rights abuses by government forces in El Salvador, Guatemala, and Honduras has led to a significant increase in asylum requests in the United States, as well as in other countries in the region. Since 2014, political repression in Venezuela has led to an 8,000 percent increase in the number of Venezuelans seeking refugee protection worldwide, with over 100,000 Venezuelans seeking refuge in the United States. Since September 2016, Venezuelans have filed more asylum applications each month with USCIS than any other nationality and, as of March 2019, account for nearly one-third of all new USCIS asylum applications. A continuing authoritarian crackdown in Egypt and a deepening human rights crisis in Turkey have led thousands to seek asylum in the United States. In FY 2019, refugees from Egypt and Turkey were the third and fourth largest recipients of asylum by nationality at the asylum office, respectively. Widespread human rights abuses by government forces and armed groups in Cameroon have led to the displacement of nearly one million people, roughly 10,000 of whom have sought asylum at the southern U.S. border. The Chinese government's crackdown on political dissent in Hong Kong, repression of ethnic Uighurs, and other state violence has driven thousands of Chinese citizens to seek refuge abroad. Many refugees have also sought protection from violence in Yemen, where political dissidents have fled atrocities committed by U.S.-backed Saudi forces.

The Trump Administration's diversion of significant Asylum Division resources away from conducting asylum interviews and toward expedited removal was a major impediment to addressing the affirmative asylum backlog. The expansive use of expedited removal and reinstatement of removal and the corresponding increases in credible and reasonable fear interviews, which peaked in FY 2019 with nearly 120,000 fear interview requests, prevented asylum officers from addressing backlogged cases. In addition, deploying asylum officers to weaponize screening interviews to deny refugees access to U.S. asylum hearings undercuts the Asylum Division's ability to adjudicate pending claims. Asylum officers have, for instance, carried out nearly 20,000 screening interviews for individuals subject to MPP who fear being returned to Mexico and over 1,000 interviews for asylum seekers transferred to Guatemala under an asylum cooperative agreement between the United States and Guatemala.

² USCIS also acknowledged that Trump Administration policies aimed at increasing asylum fees, delaying and limiting work authorization, regulations to severely limit asylum eligibility, the third-country transit asylum ban, and the ACAs are intended to disincentivize refugees from applying for asylum in the United States with the effect of "significantly chang[ing] the inflow of affirmative applications."

Even as the number of asylum officers has increased in recent years, the diversion of resources to carry out border enforcement policies meant to block refugees from the U.S. asylum system has prevented the Asylum Division from effectively addressing the backlog of asylum seekers awaiting interviews. According to the USCIS Ombudsman's 2020 [report](#), "between FY 2016 and FY 2019, the Asylum Division . . . temporarily assign[ed] on average 475 asylum officers each year in response to other program needs within USCIS" including "to conduct fear screenings at the border" – meaning that **an astounding 89 percent of the 535 asylum officers employed on average each year were temporarily diverted from adjudicating affirmative asylum applications.**

As the backlog continues to grow, thousands of asylum seekers have been made to wait for years to have their applications for protection adjudicated. Since January 2018, USCIS has not made public the average wait time for backlogged cases, but the 2018 USCIS Ombudsman [report](#) indicated that, **as of March 2018, the average waiting time from application to interview was well over two years at several asylum offices and nearly three years for some applications pending before the Newark asylum office.** Many asylum seekers caught in the backlog at that time are still waiting for an interview with an asylum officer. The hundreds of asylum seekers represented by Human Rights First with backlogged affirmative asylum claims have been waiting, on average, more than four years for an interview. The Bellevue Program for Survivors of Torture (PSOT) similarly [reported](#) that only 18 percent of its clients whose were pending in the affirmative asylum backlog prior to January 2018 had been scheduled for interview as of 2020.

Asylum Backlog: Causes and Challenges

Several factors are responsible for the continued growth of the asylum backlog. Chief among these are decisions to use expedited removal expansively and the Trump Administration's illegal border policies that imposed a substantial burden on the asylum office to screen individuals under policies intended to block asylum seekers from accessing the U.S. asylum system. In addition, staffing challenges, shifting scheduling priorities, and the impacts of the COVID-19 pandemic have undercut USCIS's ability to adjudicate new cases and begin to address the still growing backlog, leaving thousands of asylum seekers waiting many years for an interview.

Expansive Use of Expedited Removal

As the USCIS [Ombudsman](#) has noted, expedited removal and attendant fear screenings for asylum seekers placed into these proceedings "impact USCIS' available resources and inhibit the agency's ability to reduce the affirmative asylum backlog."

In its 2015 Report, the USCIS [Ombudsman](#) wrote, "[s]pikes in requests for reasonable and credible fear determinations, which have required the agency to redirect resources away from affirmative asylum adjudications, along with an uptick in new affirmative asylum filings, are largely responsible for the backlog and processing delays." This increase in the use of expedited removal originated under the Obama Administration. Through FY 2019, the number of credible and reasonable fear screenings continued to grow under the Trump Administration's use of expedited removal, as escalating violence and persecution in Cameroon, El Salvador, Guatemala, Honduras, Nicaragua, Venezuela and elsewhere led increasing numbers of refugees to seek protection at the southern border.

The Trump Administration [hailed](#) expanded expedited removal as an important tool to improve efficiency in asylum processing and "reduce the significant costs to the government associated with full removal proceeding before an immigration judge." However, it has had the opposite effect, contributing to an overwhelming backlog of asylum cases and redirecting hundreds of asylum officers to the border to conduct screening interviews of people whose cases overwhelmingly warranted a full asylum assessment.

Successive administrations have expanded the geographic and temporal implementation of expedited removal. Originally, expedited removal was applied only at ports of entry,³ but in 2004, DHS expanded its use to areas within a 100-mile border zone and within two weeks of an individual's entry to the United States. In July 2019, the Trump Administration announced a vast expansion of expedited removal to apply to non-citizens apprehended anywhere in the United States up to two years after they arrived. Although this expansion of expedited removal was temporarily enjoined, the preliminary injunction was lifted in June 2020, and expanded expedited removal remains in place as of March 2021.

In addition to the geographic and temporal expansion of expedited removal, the Trump Administration's "Humanitarian Asylum Review Process" (HARP) and "Prompt Asylum Case Review" (PACR) programs also diverted significant asylum office resources to conduct fear screenings. Under these programs, first introduced in October 2019, asylum seekers were forced to undergo credible fear screenings while detained in notoriously cold and inhumane Customs and Border Patrol (CBP) facilities at the border where they are unable to meet with attorneys. This "streamlined" process not only made it extremely difficult for asylum seekers to consult with a lawyer or prepare for their interviews, but also required additional asylum office staffing to conduct fear interviews on very short notice. Through mid-March 2020, when the Trump Administration paused the use of PACR and HARP, approximately 5,290 individuals had been placed into these removal programs. In a February 2021 executive order, the Biden Administration directed DHS to "cease implementing" PACR and HARP.

The Trump Administration's repeated attempts to change the credible fear screening standard established by Congress and impose additional requirements have made screening interviews increasingly complex and time consuming. The administration's third-country transit asylum ban, which USCIS asylum officers applied in more than 43,000⁴ screening interviews between July 2019 and June 2020, required officers to determine whether asylum seekers qualified for an exception to the transit ban before then conducting the fear screening interview at the heightened reasonable fear standard. The policy, which was vacated by a federal court in June 2020 but was re-issued by the Trump administration as a final rule in December 2020, was subsequently enjoined again in February 2021. The Trump administration also finalized rules to apply criminal and public health bars at fear screening stage that would further complicate these preliminary interviews. In addition, USCIS has repeatedly attempted to heighten the credible and reasonable fear screening standards, including 2019 alterations that were vacated by a federal court in November 2020.

In May 2019, Border Patrol agents began conducting credible fear interviews after receiving a two-week limited training on asylum. Efforts to deputize CBP staff to conduct fear screenings, a task historically conducted by specialized asylum officers, have resulted in major discrepancies in the rate of positive determinations compared to interviews conducted by trained USCIS asylum officers. Analysis by the Migration Policy Institute of USCIS data shows that between May 2019 and May 2020, **CBP officers determined that asylum seekers had a credible fear of persecution at half the rate compared to screenings carried out by trained USCIS asylum officers – meaning that they acted to deny these asylum seekers the ability to even have a full asylum hearings.** In August 2020, a federal court blocked the use of CBP officers to conduct fear screenings, finding that the two-to-five-week training CBP officers received was "in no way comparable" to the formal training for USCIS asylum officers and that the government's contention the trainings were equivalent was "poppycock." The USCIS Ombudsman noted in June 2020 that "CBP officers' competing law enforcement duties" limited their

³ Immigration officers however retain discretion to apply expedited removal or place an individual in full immigration court removal proceedings. See *Matter of E-R-M & L-R-M*, 25 I&N Dec. 520 (BIA 2011). Finding that "Congress' use of the term 'shall' in section 235(b)(1)(A)(i) of the Act does not carry its ordinary meaning, namely, that an act is mandatory. It is common for the term 'shall' to mean 'may' when it relates to decisions made by the Executive Branch of Government on whether to charge an individual and on what charges to bring."

⁴ According to USCIS data, 25,096 people were subjected to the third-country transit ban during screenings between July and September 2019, and 18,124 between October 2019 and June 2020.

ability to conduct temporary assignments as asylum officers, but did not consider whether law enforcement officers were well-positioned to fairly and impartially protect the rights of asylum seekers.

Overall, the number of credible and reasonable fear screenings declined by 65 percent in FY 2020 compared to 2019, as new Trump Administration policies including MPP, ACA transfers to Guatemala, and expulsions under a Centers for Disease Control and Prevention (CDC) order effectively eliminated humanitarian protections at the border and blocked the vast majority of refugees from requesting U.S. protection at ports of entry. At the same time, significant asylum office resources were diverted to “screen” asylum seekers who were ultimately returned, transferred, or expelled under these new illegal policies.

Border Policies to Block Refugees

Trump Administration border policies diverted asylum officers from conducting affirmative asylum interviews to conduct screenings not established by Congress, but instead designed to deny asylum seekers access to the U.S. asylum system. In February 2021, the Biden Administration issued an executive order instructing DHS and other agencies to promptly review several of these policies which had worsened the asylum backlog as Asylum Office resources were syphoned off to conduct screening interviews. In late January 2021, the Biden Administration suspended placing new individuals into MPP and has now begun to parole asylum seekers returned to Mexico to the United States to continue their asylum proceedings. Following the executive order, the U.S. Department of State also announced that it had “suspended and initiated the process to terminate” the asylum cooperative agreements.

- **“Migrant Protection Protocols”**: Significant asylum office resources were devoted to implementing MPP, which was used by the Trump Administration beginning in January 2019 to forcibly return tens of thousands of asylum seekers and migrants to dangerous border regions of Mexico to await U.S. immigration court hearings. People placed in the MPP program who fear return to Mexico are entitled to a fear screening interview conducted by a USCIS asylum officer. Although many individuals have been blocked by CBP officers and Border Patrol agents from even requesting such interviews, nearly 20,000 MPP fear screening interviews were conducted by USCIS asylum officers, as of December 2020. DHS has imposed an impermissibly high burden on asylum seekers to establish that they fear return to Mexico. Asylum seekers must prove that it is “more likely than not” that they would face persecution or torture in Mexico. This standard is equivalent to that required to receive withholding of removal protection in immigration court, i.e. a standard higher than for asylum and far higher than the standard to establish a reasonable or credible fear of persecution, the standard asylum officers normally apply in screenings.

As of February 2021, when the Biden Administration’s wind down of MPP began, there had been at least 1,544 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against individuals DHS sent to Mexico under MPP. Yet very few of those placed in MPP have been determined to have a fear of Mexico. According to DHS, only 13 percent of individuals who received screenings were found to have sufficient fear of being returned to Mexico to be removed from MPP, as of October 2019. Vox reported that in some cases asylum officers’ positive MPP fear determinations were overruled by DHS officials. Asylum officers wrote in an amicus brief in support of a case challenging the MPP policy that “MPP diverts the limited resources of asylum officers to carry out a task they did not perform before,” and “exacerbates the backlog.”

- **Asylum Cooperative Agreements**: Asylum officers were also diverted from adjudicating affirmative asylum applications to screen asylum seekers transferred to Guatemala under the ACA the United States signed with Guatemala in July 2019. Under the agreement, the Trump Administration sent asylum seekers from El Salvador and Honduras to Guatemala even though the country lacks the asylum infrastructure to accommodate them as a “safe third country,” often resulting in the forced abandonment of asylum claims

and the return of asylum seekers who have a well-founded fear of persecution to their home countries. The rule implementing the ACA requires asylum officers to determine whether an asylum seeker is subject to transfer to Guatemala under the ACA. Officers are only required to screen for a fear of persecution in Guatemala if the asylum seeker affirmatively states a fear of being sent there. Acting CBP Commissioner Mark Morgan testified that approximately 1,000 individuals had been sent to Guatemala under the ACA, as of February 2020. In mid-March 2020, Guatemala suspended ACA transfers from the United States in order to curb the spread of COVID-19 to the country after deportees from the United States repeatedly tested positive on arrival. As noted above, the Biden Administration has suspended the ACAs.

Staffing Challenges

The Asylum Division continues to face hiring and staff turnover challenges that contribute to the backlog. In FY 2020, USCIS was authorized to employ 1,296 asylum officers, but only 866 asylum officers were on board as of April 2020 – meaning that hundreds of authorized positions were vacant. Despite a significant increase in asylum officers from the 528 employed by the Asylum Division in early January 2017, USCIS continues to identify staffing shortages as one of the primary causes of the affirmative asylum backlog.

Retaining experienced asylum officers, which has long been an issue, became an even greater problem as the Trump Administration implemented a series of illegal policies that returned refugees to harm including the transit ban, MPP, and the ACA with Guatemala. As the union for USCIS asylum officers wrote in an amicus brief opposing MPP, that policy “places [asylum officers] at risk of participation in the widespread violation of international treaty and domestic legal obligations—something that they did not sign up to do when they decided to become asylum and refugee officers for the United States government.”

The Los Angeles Times reported that in response to MPP and other Trump Administration asylum policies, asylum officers were “retiring earlier than planned and quitting.” One asylum officer noted that while the “stresses of the job” often lead asylum officers to leave after two to three years, working under “an agency head who routinely bashes the program and a president who bashes the program” has resulted in even higher turnover.⁵ Replacing experienced staff requires substantial training resources and time. USCIS estimates that it takes “a minimum of 6 months on the job for an asylum officer to be proficient enough to adjudicate asylum applications” at the pace of an experienced officer. Trump Administration policies that completely diverged from the fear screening and affirmative asylum process enacted by Congress, such as MPP and the third-country transit asylum ban, not only diverted asylum staff but also pulled training officers preparing new asylum officers to adjudicate affirmative adjudications.

The turnover in asylum officer staff during the Trump Administration is likely to have continued consequences for asylum adjudications. For instance, a former asylum officer, who quit in protest of the MPP policy, has raised concerns about the hiring of asylum office staff “who tend to favor the [Trump] administration’s policies,” and whose continued tenure, “even in a new administration . . . will affect institutional norms and capacity at the Asylum Office,”⁶ which already needlessly referred many cases to immigration court that should have decided by the asylum office.

Scheduling and Interview Policies

Modifications to asylum interview scheduling priorities have significantly impacted asylum seekers’ wait times.

⁵ Asylum officer attrition rates are difficult to quantify, since the numbers reported by USCIS do not include asylum officers who transfer from the Asylum Division to other divisions within the agency.

⁶ Comments by Douglas Stevens, 17th Annual Immigration Law and Policy Conference, Migration Policy Institute, “Protection in Disarray: The Dismantling of the U.S. Asylum System” (Sept. 22, 2020).

In January 2018, USCIS began processing the most recently filed affirmative asylum applications – a reversion to an earlier policy known as “last in, first out” (LIFO). Prior to LIFO, USCIS processed asylum cases in the order in which they were filed. In instituting the LIFO policy, USCIS stated that its “aim [was] to deter individuals from using asylum backlogs solely to obtain employment authorization by filing frivolous, fraudulent or otherwise non-meritorious asylum applications” and that LIFO would “allow[] USCIS to decide qualified applications in a more efficient manner.” However, the change in policy has left many refugees with bona fide asylum claims languishing in a years-long limbo waiting for an asylum interview.

When LIFO was adopted in 2018, USCIS announced that it would schedule asylum interviews under a tiered priority system. **First Priority** cases include applicants whose interview had to be rescheduled; **Second Priority** is made up of new applications pending for 21 days or less; and the catch-all **Third Priority** category covers “all other pending affirmative asylum applications . . . starting with newer filings and working back towards older filings.” As a result, overnight, USCIS shifted the longest pending applications from the front of the backlog line to the very end.

The 2020 USCIS Ombudsman report indicates that, since at least April 2020, USCIS has created a **Fourth Priority** area that encompasses “[a]ll pending affirmative asylum applications that are over 100 days old.” USCIS has not, however, publicly announced the creation of a fourth priority category nor included it in its description of the affirmative asylum process on its website. It is unclear whether the creation of this category has had much impact on the scheduling of backlogged cases, as “most interview slots are taken by the first and second priorities, giving little movement to the Third Priority and older cases,” according to the USCIS Ombudsman report. Only four percent of asylum interviews scheduled in April/May 2020 were from the fourth priority.

USCIS’ asylum scheduling creates needless rescheduling requests and slows adjudication of asylum claims. Asylum offices often provide only two or three weeks’ notice when scheduling interviews. With worsening delays in mail delivery, asylum seekers and their attorneys may receive notice of an interview just days before it is scheduled. Given this lack of notice, many applicants or their attorneys will be compelled to request to reschedule the date of their interview, leaving affirmative asylum interview slots unused. In addition, the automatic USCIS scheduling system does not allow for prior coordination of interview dates with applicants’ lawyers, who in many cases are forced to reschedule due to conflicts with other client matters. In the past, before the asylum office had any backlogged cases, interviews “were consistently filed a set number of days following the receipt date, so legal representatives and their clients could reliably anticipate the interview date based on the date of filing. Now, even in the case of interviews that are timely scheduled, the timing is unpredictable, leading to the need to reschedule interviews. While some asylum offices have so-called “short notice” lists to fill last-minute interview openings, the Asylum Division has not, to date, adopted a more formal or uniform policy for all asylum offices. Some asylum offices previously overbooked asylum interviews to fill interview slots of applicants who missed their interviews. However, to enforce social distancing at asylum offices and in waiting rooms, USCIS reduced the number of scheduled in-person interviews, leading to longer wait times.

The Asylum Division’s efforts to address pending affirmative applications filed more than 10 years after the individual’s last entry to the United States have removed some cases from the backlog but also created additional inefficiencies. Currently, the only way to receive the form of humanitarian relief known as cancellation of removal is during removal proceedings before an immigration judge. However, there is no application route for individuals who may be eligible for this relief, and some individuals (or their attorneys) are believed to have filed applications for asylum anticipating that the case could then be referred into removal proceedings to seek this relief. The Asylum Division identified 50,000 cases where individuals had filed for asylum more than 10 years after arriving in the country (though of course, many of these persons may just have been late-filing asylum seekers), and began a pilot project to notify these applicants of an option to waive their asylum interviews and proceed directly to immigration court. As of May 2019, approximately 26 percent of the 6,500 individuals who

received notices for the pilot waived an asylum interview. As a result, these cases were simply forwarded into removal proceedings, without the need to waste asylum office time. However, with respect to the remaining applicants, rather than conducting full asylum interviews, the Asylum Division scheduled these asylum seekers for interviews solely to determine whether the individual qualified for an exception to the one-year-filing deadline. Those found to qualify for an exception were often required to then attend a second interview scheduled weeks later, creating additional inefficiencies in scheduling. As of May 2019, 30,000 cases in which the applicant filed an asylum application more than 10 years after arrival in United States remain in the backlog. Establishing an alternative mechanism to allow individuals to apply for cancellation affirmatively with USCIS, as recommended above, would help to avoid these cases needlessly adding to the asylum office and immigration court backlogs.

COVID-19 Impacts on the Backlog

During the COVID-19 pandemic, both the size of backlog and the wait that asylum seekers face has continued to grow. On March 18, 2020, asylum processing came to a standstill as USCIS temporarily closed its offices. Although asylum offices began a staggered reopening on June 4, 2020, the number of daily appointments has been reduced to ensure social distancing. USCIS estimates that at least 4,000 and as many as 12,000 asylum interview slots were lost during the closure, and that affirmative asylum completions may be reduced by as much as 50 percent until offices reopen at normal capacity. Indeed, the asylum office backlog expanded by over 15,000 cases during the third quarter of FY 2020 during the asylum office closure, compared to an increase of fewer than 5,000 cases during the second quarter of FY 2020 when the asylum office received a similar number of new affirmative applications. Given the limited number of asylum interviews conducted since asylum offices began to reopen, the backlog is likely to continue to increase.

Misuse of Limited Resources in Additional Screenings

The U.S. asylum system is rigorous, requiring detailed interviews, as well as extensive background vetting. Screening asylum applications to detect the small number of cases that raise security and fraud concerns during asylum adjudications is an important safeguard for the integrity of the U.S. asylum system. However, in recent years, the Fraud Detection and National Security (FDNS) Directorate and other USCIS components tasked with implementing the Trump Administration's rhetoric of "extreme vetting" – part of a broader effort to falsely portray immigration and asylum cases as lacking in merit – have drained substantial agency resources to pre-screen asylum applications that could, and should, be more effectively devoted to conducting interviews with asylum seekers. While some fraud issues may be identifiable on review of the application itself, DHS has long acknowledged that the credibility determination made by the interviewing asylum officer is the "determining factor" in fraud detection. The post-interview vetting and background check process has also ballooned in a discriminatory fashion that affects some nationalities, including asylum applicants from Iran, Iraq, Syria, and Yemen, more than others. It poses a major challenge to securing protection for asylum seekers and their families within a reasonable timeframe.

The expansion of pre-interview screening and vetting mechanisms predates the Trump Administration. A 2015 Government Accountability Office (GAO) report concluded that while USCIS has "mechanisms to investigate fraud in individual applications," the agency had not "assessed fraud risks across the asylum process, in accordance with leading practices of managing fraud risks" and recommended that USCIS take several targeted steps to assess fraud risks and detect fraud in individual cases, including developing and implementing additional trainings, mechanisms to collect reliable data on FDNS's efforts to combat fraud, asylum-specific guidance for FDNS officers, and pre-screening of asylum applications for indicators of fraud, to the extent that these fraud detection tools are "relevant or cost-effective." In response, USCIS began planning in 2017 for a substantial centralized pre-screening center for asylum applications through the Asylum Vetting Center (AVC), currently under construction in Atlanta, GA. While USCIS has stated that it anticipates the AVC will enhance its

ability to address “systemic” fraud concerns and, through pre-screening, free up regional asylum office resources to reduce the asylum backlog, given the agency’s substantial budgetary and personnel investment, the AVC raises questions about whether it meets the GAO report’s recommendation to implement only “relevant or cost-effective” fraud detection tools. It remains unclear whether the AVC is the most efficient and cost-effective method for addressing fraud, as it substantially diverts resources from asylum adjudications, which are themselves an important tool in assessing credibility and identifying potential fraud. The AVC will ultimately be staffed by some 300 personnel, including asylum officers who could otherwise be deciding backlogged asylum cases.

The data made public by USCIS on FDNS’s effectiveness reveals that the vast sums spent on FDNS have resulted in very limited improvements to USCIS’s fraud analysis and detection processes. In FY 2018, for instance, USCIS budgeted 67 million dollars for FDNS activities and that year used its ATLAS tool to screen 15.5 million immigration filings and biometrics enrollments, but detected fraud or security concerns in just 0.03 percent of cases. Of the 1,400 credible and reasonable fear cases referred to FDNS for review in FY 2017 and FY 2018, FDNS made a formal finding of a fraud or safety concern in less than one percent of referred cases. Despite the GAO’s recommendations that USCIS collect data on and assess FDNS’s progress, since the 2015 GAO report, no public reports have been released on the effectiveness of FDNS screening of affirmative asylum applications. The union for USCIS asylum officers has called for an audit of FDNS and a “re-examination” of its role, saying it “has grown beyond its original designation as a support service to adjudicators.”

In addition, last year USCIS implemented other unnecessary interviews that divert asylum office resources away from adjudicating pending cases. In November 2020, USCIS announced that it would begin to systematically interview all resettled refugees and asylees (individuals granted asylum in the United States) who are applying to bring a qualifying spouse or child to the United States through an I-730 petition. These interviews are not required by law or regulation and are generally not needed to resolve I-730 petitions since the petitioning refugee/asylee has already been interviewed in connection with their resettlement case or asylum application and undergone security and fraud screenings. USCIS has acknowledged that the additional interview requirement “may lengthen the overall adjudicative process” for I-730 relative petitions. Requiring such interviews may also contribute to the affirmative asylum backlog as the agency diverts asylum officers to conduct them, which Human Rights First attorneys in Los Angeles have already reported occurring for some asylee clients. As of September 2020, nearly 26,000 I-730 petitions were pending adjudication – a steep increase from June 2016 when fewer than 9,000 were awaiting decision. Further delays in the I-730 process are particularly devastating since USCIS was already taking close to two years to adjudicate these petitions, which are then subject to additional, often lengthy wait times before spouses and children receive appointments for interviews with U.S. consulates abroad.

Attorney General Rulings Rig Adjudications Against Refugees

Any effort to resolve the asylum backlog must address the Trump Administration’s weaponization of the U.S. asylum adjudication system, including the Asylum Division, to deny refugees protection. Asylum grant rates plummeted in the wake of Trump Administration policies and Attorney General asylum rulings that attempt to limit asylum eligibility for survivors of domestic violence and individuals persecuted because of their family relationships, including Matter of A-B- and Matter of L-E-A. As a result, the asylum office has referred increasing numbers of affirmative cases to the immigration court, where judges determine the asylum seeker’s claim. The asylum referral rate grew by 35 percent from FY 2015, when about 50 percent of asylum claims were referred by asylum officers to the immigration court, compared to FY 2019, when nearly 70 percent were sent to the courts. These referrals needlessly subject asylum seekers to additional years-long delays for adjudication of their requests for protection in immigration court, where judges ultimately grant most asylum claims referred from the asylum office. The Biden Administration announced in its February executive order that it would issue

new regulations on particular social group claims within 270 days and conduct a comprehensive review to evaluate whether U.S. protections “for those fleeing domestic or gang violence” are consistent with international law.

Hope Beyond the Interview

Despite the hardships and trauma inflicted by years in the asylum backlog, many of the asylum seekers interviewed remain hopeful that the United States will welcome and protect refugees and reunite their families.

- **Manuela, a Venezuelan asylum seeker who has been in the backlog since 2016, sought refugee protection in the United States to safeguard her family.** “We felt that our rights would be valued here. . . . If we receive asylum, our lives would change completely. We would have calm. We would be secure knowing we would not be thrown out of the United States and returned to Venezuela. It would change everything for us.”
- **Mahmoud, a Bahraini journalist who has waited for his asylum interview since April 2015 is hopeful that receiving asylum will help him feel in control of his life again and build a new life.** “I know it is not going to be a magical event where everything improves in a single moment. But at least I could move forward – at least I could put all of this behind me.”
- **Alexander, a Russian asylum seeker who has faith that the United States will protect him and his family, despite waiting more than five years for his asylum interview.** “I still believe the United States is a country of laws, and the laws will work for the good of the people. I hope that politicians will prioritize the needs of asylum seekers. . . . I hope no other families will have to endure what we have experienced.”
- **Paul, a Cameroonian asylum seeker, expressed thanks to the organizations and individuals that have helped him survive during his wait in the backlog.** “[A]lthough I was surprised by the lack of aid from the [U.S.] government, I was impressed by the generosity of people. I was very afraid when I first came. I felt hopeless. But people made me feel welcome when I needed it most. I received free clothes and meals from churches and shelters. Those necessities allowed me to get to where I am today.”

ON HUMAN RIGHTS, the United States must be a beacon. Activists fighting for freedom around the globe continue to look to us for inspiration and count on us for support. Upholding human rights is not only a moral obligation; it's a vital national interest. America is strongest when our policies and actions match our values.

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability, and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 40 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

Human Rights First is a nonprofit, nonpartisan international human rights organization based in Los Angeles, New York, and Washington D.C.

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