

**Human Rights First Comment on  
Department of Homeland Security & Executive Office for Immigration Review,  
“Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of  
Removal, and CAT Protection Claims by Asylum Officers,” 87 FR 18078**

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 Interim Final Rule (IFR) on the asylum process published in the Federal Register on March 29, 2022.<sup>1</sup> The IFR amends the process first proposed by the agencies’ Notice of Proposed Rulemaking (NPRM) published on August 20, 2021<sup>2</sup> to adjudicate asylum claims for some asylum seekers who have received positive credible fear determinations and who may be referred for asylum merits interviews before the U.S. Citizenship and Immigration Services (USCIS) Asylum Office among other changes to the asylum process.

### **Overview of Comment**

The IFR provides that asylum seekers who are placed in the expedited removal process and who establish a credible fear of persecution may be assessed in an initial, full asylum interview (“Asylum Merits Interview,” or AMI) by an asylum officer from USCIS. Cases not granted by the Asylum Office are referred to immigration court removal proceedings, as are other asylum cases that are not granted by the Asylum Office.

The agencies state that “[t]he principal purpose of this IFR is to simultaneously increase the promptness, efficiency, and fairness of the process by which noncitizens who cross the border without appropriate documentation are either removed or, if eligible, granted protection.” 87 FR 18089. **However, concerning provisions in the IFR including the imposition of unreasonably fast deadlines would not only sacrifice fairness but would also thwart efficiency and exacerbate backlogs.** These deadlines would discourage legal representation and likely spur inaccurate decisions, which will in turn lead to additional adjudications that would not have been necessary if the individual had had adequate time to prepare and obtain counsel and an accurate decision had been reached initially. Under the timelines imposed by the IFR, asylum seekers who establish a credible fear of persecution could be rushed through the new asylum process at the Asylum Office and denied protection by an immigration judge in as few as

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<sup>1</sup> Dep’t of Homeland Security & Executive Office for Immigration Review, “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers,” 87 FR 18078 (Mar. 29, 2022), <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

<sup>2</sup> Dep’t of Homeland Security & 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 (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>.

four months, leaving asylum seekers with inadequate time to find legal counsel, prepare their cases, and submit evidence.

Human Rights First welcomes improvements to aspects of the NPRM and strongly agrees that providing initial asylum merits interviews is critical to reducing immigration court backlogs, but is deeply concerned about—and urges revisions to—provisions in the IFR that raise serious due process concerns and would risk returning refugees to persecution and torture. The IFR imposes new unreasonable, unrealistic and unworkable deadlines for the Asylum Office interview process that were not included in the initial proposed rule, creates new immigration court rocket dockets and directs immigration court judges to order some asylum seekers removed without a full and fair hearing. The rule provides that the new asylum process will be conducted after subjecting asylum seekers to the fundamentally flawed expedited removal process, which has been shown time and again to return refugees to persecution and death, while also effectively gutting a crucial safeguard in the credible fear process.

Unless these concerning provisions are removed, asylum seekers will be rushed through adjudication without adequate time to secure legal representation, gather necessary evidence, and take other steps to prepare their cases given the complexity and requirements imposed by U.S. law and the adjudicating agencies—**resulting in needless referrals to immigration court and administrative and judicial appeals required to correct erroneous decisions by the immigration court, whereas the case could have been resolved in the first instance by USCIS if provided with adequate time to prepare and obtain legal representation.**

Subsequent administrations might attempt to abuse this process to accelerate the wrongful deportation of asylum seekers without fair and meaningful asylum assessments. **U.S. agencies should make it a top priority to work with Congress to provide funding for legal representation during this process,** but such efforts will not remedy these unrealistic deadlines or lead to results in time to safeguard against the many resulting mistaken asylum decisions. The IFR also threatens asylum seekers’ statutory and constitutional right to a full and fair hearing by directing immigration judges to order some asylum seekers removed after a rushed status conference without conducting a full hearing on their request for asylum.

Human Rights First is also concerned that the adjudication process created by the IFR will be conducted after subjecting asylum seekers to the flawed expedited removal process. The agencies have indicated that they intend to conduct credible fear interviews of asylum seekers placed in expedited removal while the individual is detained, which drastically exacerbates the inherent flaws of this process.<sup>3</sup> The agencies also indicate in the IFR that they intend to expand the use of expedited removal. 87 FR 18089. However, DHS is not required to use expedited removal, an unfixable process that has resulted in the return of refugees to persecution, torture, and murder, and should instead directly exercise discretion to refer asylum seekers to Asylum Office interviews without first subjecting them to credible fear interviews. The IFR further exacerbates the flaws in expedited removal by imposing severe limitations on the longstanding authority of the Asylum Office to reconsider a mistaken negative credible fear determination, setting an unworkable seven-day deadline for individuals to submit a request for reconsideration to USCIS and limiting asylum seekers to a single request, which will render this vital safeguard

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<sup>3</sup> Dep’t of Homeland Security, “Factsheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule” (May 26, 2022), <https://www.dhs.gov/news/2022/05/26/fact-sheet-implementation-credible-fear-and-asylum-processing-interim-final-rule>.

virtually meaningless for many asylum seekers who receive incorrect negative fear determinations. Conducting any portion of the asylum adjudication process while the individual is detained would further exacerbate the IFR's unreasonable timeframes and increase the barriers to counsel for individuals moving through this expedited process.

Human Rights First's specific recommendations for revisions to the IFR are detailed below.

### **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. Maintain Sufficient Time for Asylum Seekers to Find and Consult with Legal Counsel—as Congress Intended—by Eliminating Arbitrary, Unreasonable Deadlines Newly Imposed by the IFR**

DHS and EOIR should eliminate unreasonable deadlines and rushed timelines in the IFR that would prevent asylum seekers from obtaining legal counsel and preparing their cases. Under the timelines imposed by the IFR, asylum seekers who establish a credible fear of persecution could be rushed through the new asylum process at the Asylum Office within a few weeks and denied protection by an immigration judge in as few as four months (125 days), leaving asylum seekers with inadequate time to find legal counsel, prepare their cases, and submit evidence. Important evidence that asylum seekers present to the Asylum Office and immigration court in support of their claims often takes some time to collect and prepare for submission. Such evidence can often include documents from their home country—such as marriage, birth, and death certificates; police reports and court documents; photographs; and news articles—declarations from witnesses; medical evaluations; and reports, articles, and expert affidavits that describe conditions in the asylum seeker's country of persecution. All foreign language documents must also be translated into English to be considered in support of an asylum claim. More time to prepare asylum claims is essential to allow for the collection of such important evidence.

**The unreasonable timelines imposed by the IFR will likely lead to the unnecessary referral of cases to the immigration court that could have efficiently been resolved in the initial instance by USCIS, as well as likely administrative and judicial appeals, in order to correct erroneous immigration court decisions resulting from the rushed process at both the Asylum Office and immigration court stage.**

Access to counsel before the Asylum Office will help ensure that asylum seekers obtain the relief they are entitled to in initial adjudications, reducing inefficiencies that would result from erroneous referrals to immigration court. Similarly, it is crucial for asylum seekers to have access to counsel before the immigration court to reduce mistaken orders of removal that must be

rectified through administrative and judicial appeals so that the government does not wrongfully deport asylum seekers to persecution and torture. The agencies recognize in the IFR the “immense value of legal representation in immigration proceedings, both to the individuals that come before [EOIR] and to the efficiency of [its] hearings.” 87 FR 18161. They also note that due process requirements are met where asylum seekers have, among other protections, a “full and fair opportunity to be represented by counsel.” 87 FR 18173. Studies have long shown that legal representation ensures that more individuals receive asylum and other immigration relief that they are eligible for under U.S. law.<sup>4</sup> A 2016 study found that non-detained immigrants who were represented were five times more likely to obtain immigration relief than unrepresented non-detained individuals.<sup>5</sup> The study also found that detained represented immigrants were twice as likely to secure relief than detained unrepresented immigrants.<sup>6</sup>

The IFR conflicts with Congress’ intent to provide asylum seekers with adequate time to secure legal representation and prepare their cases. In fact, in 1996, Congress considered and rejected efforts to impose a 30-day asylum application filing deadline, instead setting a one-year deadline.<sup>7</sup> Senator Ted Kennedy explained in rejecting the 30-day deadline: “Many [asylum seekers] are so traumatized by the kinds of persecution and torture that they have undergone [that] they are psychologically unprepared to [participate in any legal process].”<sup>8</sup> Even the longer deadline of one year is deeply flawed and leads to mistaken asylum denials,<sup>9</sup> exacerbating backlogs and contributing to delays, which led the Senate in a bipartisan bill and the Biden administration to call for the elimination of the filing deadline ban.<sup>10</sup>

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<sup>4</sup> Ingrid Eagly & Steven Shafer, “Access to Counsel in Immigration Court,” American Immigration Council (Sep. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>; Karen Berberich & 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>; Stacy Caplow et al, “Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report,” 33 Cardozo L. Rev. 257 (2011-2012), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1551&context=faculty>; Vera Institute of Justice, “Evaluation of the New York Immigrant Family Unity Project” (Nov. 2017), <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation>.

<sup>5</sup> Eagly & Shafer, “Access to Counsel in Immigration Court.”

<sup>6</sup> Id.

<sup>7</sup> Philip G. Schrag et al, “Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum,” 52 Wm. & Mary L. Rev. 651 (2010), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3369&context=wmlr>.

<sup>8</sup> Id.

<sup>9</sup> Human Rights First, “Draconian Deadline: Asylum Filing Ban Denies Protection, Separates Families” (Sep. 2021), <https://www.humanrightsfirst.org/resource/draconian-deadline-asylum-filing-ban-denies-protection-separates-families>; Human Rights First, “The Asylum Filing Deadline” (Sep. 2010), <https://www.humanrightsfirst.org/resource/asylum-filing-deadline>; Human Rights First, “The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Government Efficiency” (Feb. 2013), <https://www.humanrightsfirst.org/resource/asylum-filing-deadline-denying-protection-persecuted-and-undermining-government-efficiency>; Schrag et al, “Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum.”

<sup>10</sup> The White House, “Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System” (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to->

Despite recognizing that access to legal representation is critical and stating that asylum seekers “found to have a credible fear of persecution generally should be afforded the additional time, procedural protections, and opportunity to further consult with counsel,” 87 FR 18094, the IFR creates arbitrary and unreasonable deadlines that would deprive many asylum seekers of the opportunity to do so. Subsequent administrations could further accelerate this unfair process because the IFR does not guarantee sufficient time prior to the AMI nor immigration court hearings to secure counsel and prepare an asylum case nor does it specify a required period to allow asylum seekers to prepare their cases and obtain counsel prior to their credible fear interviews.

Asylum seekers often arrive in the United States after suffering persecution and torture in their home countries and additional harm during the difficult journey to the United States, which significantly impacts their ability to prepare and present their asylum claims.<sup>11</sup> As discussed above, members of Congress involved in the drafting of U.S. immigration statutes acknowledged that many asylum seekers are “psychologically unprepared” to participate in their immigration cases immediately after fleeing persecution and torture. For many asylum seekers, completing the entire adjudication process within months of their arrival to safety in the United States will prevent them from fairly presenting requests for asylum, undoubtedly inflict additional, unnecessary traumas, and result in refugees ordered removed to persecution and torture.<sup>12</sup>

In Human Rights First’s experience providing pro bono representation to asylum seekers for over 40 years, many asylum seekers want prompt adjudication and will prefer to move ahead quickly with their interview once they have secured legal counsel and the necessary evidence. Indeed, to receive legal recognition as refugees and begin the process to bring their spouse and children to safety in the United States, they must complete these interviews. Some, however, may require additional months to secure legal representation and gather necessary evidence. To ensure accurate, efficient decision-making at the earliest part of the process and avoid violating Congress’s intent to provide asylum seekers sufficient time to search for counsel and prepare their case before filing an asylum application, the agencies should eliminate the unreasonable deadlines in the IFR.

***A. Scheduling Asylum Office Interviews Mere Weeks After Credible Fear Determinations Does Not Provide Sufficient Time to Find and Consult with Legal Counsel or Prepare an Asylum Seeker’s Legal Case***

The IFR mandates at 8 C.F.R. § 208.9(a)(1) that USCIS must conduct an AMI within 21 to 45 days after a positive credible fear determination. Asylum seekers are required to submit evidence at least 14 days prior to this interview and to amend the credible fear determination—which serves as an asylum application—at least seven days prior to the interview (or postmarked 10 days in advance), with limited exceptions for extensions. 8 C.F.R. § 208.9(e)(2); 8 C.F.R. § 208.4(b). Credible fear interviews often take place within days or weeks of asylum seekers’

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[modernize-our-immigration-system/](#); S. 744 Border Security, Economic Opportunity, and Immigration Modernization Act, 113<sup>th</sup> Congress (2013-2014), <https://www.congress.gov/bill/113th-congress/senate-bill/744>.

<sup>11</sup> The Center for Victims of Torture, “Designing a Trauma-Informed Asylum System in the United States” (2021), [https://www.cvt.org/sites/default/files/attachments/u101/downloads/2.4.designing\\_a\\_trauma\\_informed\\_asylum\\_report\\_feb42021.pdf](https://www.cvt.org/sites/default/files/attachments/u101/downloads/2.4.designing_a_trauma_informed_asylum_report_feb42021.pdf)

<sup>12</sup> Id.; Katrin Schock et al, “Impact of asylum interviews on the mental health of traumatized asylum seekers,” Eur. Journal of Psychotraumatology (Sep. 1, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4558273/>.

arrival to the United States, typically in harsh conditions in detention where asylum seekers endure physical and psychological harm and cannot access legal representation, resulting in inadequate or inaccurate credible fear records that require correction. **Under the IFR’s newly imposed timelines, asylum seekers would have as few as seven days after a credible fear decision to submit evidence to the Asylum Office.** The rule allows for postponement of the AMI only in “exigent circumstances” and does not provide a general exception for asylum seekers who need additional time to seek counsel or prepare evidence. 8 C.F.R. § 208.9(a)(1).

The IFR’s rushed timeline deprives asylum seekers of a fair opportunity to obtain legal counsel prior to the AMI, which could take place only a few weeks after asylum seekers arrive in the United States to request protection.

Given the dearth of governmental and other funding for asylum legal representation, many legal service providers have weeks or months-long waits for an initial legal intake or consultation and will not be able to assist asylum seekers forced into this rushed process. For example, Human Rights First’s interview and case acceptance referral process—which relies on recruiting volunteer attorneys at law firms—generally takes two months or longer. Human Rights First has a two-step case acceptance process for asylum cases, which involves a preliminary screening and a more detailed, hours-long intake interview. The availability of “intake” interview slots is very limited, as it is at many legal services organizations, by the small number of staff members. Once Human Rights First accepts a case for *pro bono* representation, it places the case with a law firm, legal clinic, or volunteer attorney and provides mentorship for the duration of the case. Law firms, clinics, and volunteers require additional time to review case materials and check for conflicts before accepting a case. Each of these steps—the screening, intake, and case placement—may take weeks or longer to complete, and the entire process takes a minimum of two months. Providing *pro bono* representation is critical because many asylum seekers cannot afford to pay an attorney to represent them and are often unable to obtain or are not eligible for work authorization when they first arrive in the United States.

It may also take asylum seekers months or longer to gather evidence in support of their asylum claim, including documents from their home country, declarations from witnesses, and medical evaluations. Additional time is required to translate some documents from home countries and declarations from witnesses, as the Asylum Office and immigration court require that all foreign language documents be accompanied by certified English translations.

Forensic medical or psychological evaluations that document the harms asylum seekers have suffered or may face if deported are often crucial corroborative evidence in asylum cases. A study conducted by the Physicians for Human Rights (PHR) and City University of New York found that asylum seekers and other immigrants who obtained forensic medical evaluations facilitated by PHR between 2008 and 2018 **were nearly twice as likely to be granted protection** compared to all asylum seekers and immigrants during the same period.<sup>13</sup> However, it is unlikely that asylum seekers could obtain *pro bono* forensic medical or mental health evaluations within the short time frame provided by the IFR, as volunteer medical and mental health professionals providing *pro bono* evaluations to asylum seekers often have long wait

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<sup>13</sup> Holly G. Atkinson et al, “Impact of forensic medical evaluation on immigration relief grant rates and correlates of outcomes in the United States,” 84 *Journal of Forensic and Legal Medicine* (Nov. 2021), <https://www.sciencedirect.com/science/article/pii/S1752928X21001578>.

times and require adequate time to conduct an evaluation and write a declaration. For instance, PHR reported that it requires attorneys to submit requests for forensic evaluations at least twelve weeks before the evaluation submission deadline, due to the high volume of requests and limited *pro bono* clinician availability. From January 2020 to May 2022, PHR has taken on average 53 days to assign a clinician to conduct a forensic evaluation after the request was submitted, with some cases taking much longer to be placed with a clinician due to limited availability in the state and other factors.<sup>14</sup> After a case has been placed with a clinician, additional time is required to conduct the evaluation and write a declaration. Given that evidence for the AMI will be due in as little as a week after a positive credible fear determination, it is extremely unlikely that asylum seekers could obtain a *pro bono* forensic evaluation, which may increase twofold their likelihood of securing asylum, in time.

Under the IFR the credible fear determination record is considered the asylum application, yet the deadline for AMI does not provide asylum seekers with adequate time to consult with counsel, ensure the accuracy of these records, and, if necessary, amend the credible fear screening determination and notes. Under this process, asylum seekers would need to submit amendments in as few as 14 days after receiving the credible fear decision. Credible fear records, which do not include a transcript and are composed of notes taken by the asylum officer, are often incomplete or include inaccuracies given the preliminary nature of these interviews which typically occur while the individual is detained, lack of adequate interpretation, and general absence of counsel to raise information left unaddressed by the officer or address complex legal questions such as setting forth the particular social group to which an asylum seeker belongs. The agencies recognize that “the initial credible fear screening determination may potentially include errors or misunderstandings and may not necessarily capture every detail an applicant would like to provide.” 87 FR 18144. Asylum seekers are likely to need to make substantive corrections and additions to the credible fear record, including specifying additional grounds on which the individual qualifies for asylum that were not elicited by the asylum officer during the initial fear screening. Many of these corrections—especially those relating to technical legal matters such as grounds for asylum eligibility—will require the assistance of legal counsel.

Asylum seekers who are not granted asylum during these rushed AMIs are then referred to immigration court. The IFR provides that the immigration judge may use the “rationale of the USCIS determination” to order the asylum seeker removed after a hearing before the immigration court. 87 FR 18085. Inability to access legal counsel and inadequate time to submit evidence, amend the credible fear determination, and prepare the case at the AMI stage will very likely fuel wrongful decisions by USCIS that may then serve as the basis for mistaken removal orders at the immigration court hearing—risking the return of refugees to persecution and torture in contravention of U.S. law and treaty obligations.

As Human Rights First recently documented, government records from the USCIS Asylum Office received by Human Rights First through a Freedom of Information Act (FOIA) request underscore concerns that the Asylum Office already routinely and unnecessarily refers cases to immigration court that it should grant, exacerbating backlogs and subjecting asylum seekers to

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<sup>14</sup> Email communication by Brittney Bringuez, Physicians for Human Rights Asylum Program Associate, to Human Rights First, May 25, 2022. This data reflects cases where all requests for evaluation were fulfilled and does not include direct requests to specific PHR clinics, which typically take on average the same amount of time or longer to place.

needless trauma.<sup>15</sup> For instance, immigration judges granted asylum in two-thirds of cases referred from the Asylum Office that were decided in FY 2021, and immigration court asylum grant rates remain higher for many countries than before the asylum office.<sup>16</sup>

The data received through FOIA also shows years-long, systemic disparities in asylum adjudications based on the nationality of the asylum seeker and the Asylum Office handling the case.<sup>17</sup> By the end of the Trump administration, Asylum Office grant rates had fallen from 44 percent in FY 2016 to 28 percent in FY 2020 with even more significant declines in grant rates for people fleeing persecution from Africa, the Americas, the Caribbean, and South Asia—underscoring longstanding concerns about disparate treatment of people of color who seek asylum in the United States.<sup>18</sup> Existing disparities in grant rates between asylum offices also raise significant concerns that certain asylum offices unnecessarily refer cases to immigration court that they should grant. Between FY 2017 and 2020, the New York Asylum Office’s average grant rate was six times lower than the San Francisco Asylum Office—which is deeply concerning alone but is also double the grant rate discrepancy between these two offices as compared to FY 2010 to 2014.<sup>19</sup> Some asylum offices recorded shockingly low asylum grant rates: the New York Asylum Office grant rate dropped to five percent in FY 2020, and the Boston Asylum Office grant rate declined to eight percent in the first part of FY 2021.<sup>20</sup>

The rushed timelines for Asylum Office adjudication imposed by the IFR and inadequate time for asylum seekers to obtain legal counsel raise further concerns about already flawed Asylum Office adjudications and will likely fuel the unnecessary referral of additional cases to immigration court, further exacerbating the immigration court backlog.

***B. Forcing Asylum Seekers into Counterproductive Rocket Dockets in Immigration Court Will Result in Erroneous Removal Orders and Raise Due Process Concerns***

Immigration court hearings conducted under the rule must also be completed within an unreasonably short time frame, with little opportunity for asylum seekers to secure legal counsel. **The IFR provides only two months for asylum seekers referred to immigration court, including those who do not have legal representation, to gather and submit all evidence and determine who will provide testimony during their final hearing** and directs immigration courts to conduct the final asylum hearing within 90 to 100 days (and no more than 135 days) after the asylum seeker is notified of referral to immigration court.

The IFR provides that the immigration court must schedule an initial master calendar hearing within 30 to 35 days after the asylum seeker is notified of the referral of their case to the immigration court, 8 C.F.R. § 1240.17(b); conduct a status conference 30 to 35 days after the master calendar hearing (60 to 70 days after the asylum seeker is notified of referral) by which the asylum seeker must submit evidence, provide a list of witnesses, and admit or contest the allegations in the Notice to Appear, 8 C.F.R. § 1240.17(f); and conduct a final merits hearing 60

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<sup>15</sup> Human Rights First, “USCIS Records Reveal Systemic Disparities in Asylum Decisions” (May 2022), <https://www.humanrightsfirst.org/sites/default/files/AsylumOfficeFOIASystemicDisparities.pdf>.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

to 65 days after the master calendar hearing and no more than 135 days after the asylum seeker is notified of referral to immigration court, 8 C.F.R. § 1240.17(f)(2), (h)(2)(ii). While Human Rights First welcomes the creation of status conferences and urges the efficient resolution of cases through pre-hearing stipulations, the unreasonable deadline for submission of evidence and witness lists at the status conference raises serious concerns. Asylum seekers who did not have an attorney during the Asylum Office process are unlikely to be able to find pro bono representation and to prepare evidence to submit to the court within only two months. Many unrepresented asylum seekers will not understand which additional witnesses, such as country conditions and medical experts, should testify before the immigration court or be able to identify, secure, and name these witnesses with such minimal time to prepare.

The IFR significantly curtails immigration judges' ability to schedule hearings to provide asylum seekers reasonable time to find counsel and prepare their cases while permitting wide latitude to grant continuances at the government's request. Initially, the immigration judges may only grant asylum seekers continuances in 10-day increments unless the court determines there is "good cause" for a longer continuance but may *not* grant a continuance for good cause if it would result in the final hearing occurring more than 90 days after the master calendar hearing. 8 C.F.R. § 1240.17(h)(2)(i). These provisions would make it extremely difficult for asylum seekers, particularly those without legal representation, to request extensions to seek legal counsel, gather crucial evidence, and prepare their cases. Meanwhile, the court may grant the government a continuance at any time and for any length of time based on "significant Government need." 8 C.F.R. § 1240.17(h)(3). This appears on its face an unfair restriction for asylum seekers and formally provides an additional advantage to the government party in the legal proceedings.

By imposing these rushed timelines, the rule creates "rocket dockets" in immigration court, which have proven again and again to be counterproductive, exacerbate backlogs, and deprive asylum seekers of their due process rights.<sup>21</sup> A May 2022 report on the Biden administration's "Dedicated Docket," which places certain cases on an accelerated track and requires immigration judges to complete adjudication within 300 days of the initial master calendar hearing, clearly illustrates the dire consequences of accelerated dockets in immigration court.<sup>22</sup> According to the report, only 29.9 percent of people on the Dedicated Docket in Los Angeles were able to secure counsel, compared with a representation rate of 68.7 percent for individuals released from detention who have pending immigration cases.<sup>23</sup> 99.1 percent of cases completed in Los Angeles Immigration Court by February 2022 resulted in removal orders, over two thirds of

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<sup>21</sup> Sarah Pierce, "As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound," Migration Policy Institute (July 2019), <https://www.migrationpolicy.org/news/due-process-questions-rocket-dockets-family-migrants>; Transactional Records Access Clearinghouse, "With the Immigration Court's Rocket Docket Many Unrepresented Families Quickly Ordered Deported" (Oct. 18, 2016), <https://trac.syr.edu/immigration/reports/441/>; Julia Preston, "Is it Time to Remove Immigration Courts from Presidential Control?", The Marshall Project (Aug. 28, 2019), <https://www.themarshallproject.org/2019/08/28/is-it-time-to-remove-immigration-courts-from-presidential-control>.

<sup>22</sup> University of California Los Angeles Center for Immigration Law and Policy, "The Biden Administration's Dedicated Docket: Inside Los Angeles' Accelerated Court Hearings for Families Seeking Asylum" (May 2022), [https://law.ucla.edu/sites/default/files/PDFs/Center\\_for\\_Immigration\\_Law\\_and\\_Policy/Dedicated\\_Docket\\_in\\_LA\\_Report\\_FINAL\\_05.22.pdf](https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf).

<sup>23</sup> Id.; Transactional Records Access Clearinghouse, "State and County Details on Deportation Proceedings in Immigration Court," <https://trac.syr.edu/phptools/immigration/nta/>.

which were issued in absentia—meaning the individuals never had their day in court.<sup>24</sup> The report’s authors found that the Dedicated Docket’s accelerated timelines and focus on families exacerbates the challenges to ensuring due process for those in immigration court proceedings, a key factor being the low rates of legal counsel. By contrast, 83 percent of all non-detained immigrants in regular immigration court proceedings attended all their court hearings from 2008 to 2018, and 96 percent of those who were represented attended all of their hearings during this same period.<sup>25</sup>

The highly accelerated timeline imposed by the IFR, which is significantly shorter than the Dedicated Docket, will make it nearly impossible for asylum seekers to adequately prepare and fairly present their requests for asylum to the immigration court.

### ***Recommendations***

Human Rights First recommends that the agencies eliminate these unreasonable and unworkable deadlines to ensure that asylum seekers have adequate time to obtain legal representation and prepare their asylum cases, as intended by Congress.

- The IFR’s rushed deadlines for the AMI, which were not included in the Notice of Proposed Rulemaking, should be removed. These interviews should not be scheduled for at least 90 days after the credible fear screening, and USCIS should modernize scheduling by adopting an electronic scheduling system that allows asylum seekers, or their legal counsel, to set and request to reschedule, if needed, these interviews.
- To ensure accurate, efficient decision-making at the earliest part of the process and avoid violating Congress’s intent to provide asylum seekers sufficient time to search for counsel and prepare their case before filing an asylum application, the Asylum Office must accept all requests for rescheduling and evidentiary filing extensions within the first year of the individual’s most recent date of entry. Continuances thereafter should be decided under the “good cause” and “exceptional circumstances” standards—in line with U.S. law and existing USCIS policy.
- In recognition of the inherent limitations of relying on the credible fear record as the asylum application and the limited time provided to amend the record, the rules should provide that asylum officers and immigration judges may not enter a negative credibility finding based on asylum seekers correcting the credible fear record and/or offering additional information following the credible fear interview in order to fully explain the reasons they are seeking asylum, or enter factual findings based on information in the credible fear record that was subsequently corrected.
- The agencies should eliminate arbitrary timelines for immigration court hearings to avoid due process deficient rocket dockets, but, at a minimum, formally provide at least two extension/rescheduling requests by respondents (of the merits hearing and/or submission of

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<sup>24</sup> University of California Los Angeles Center for Immigration Law and Policy, “The Biden Administration’s Dedicated Docket: Inside Los Angeles’ Accelerated Court Hearings for Families Seeking Asylum,” 1-2.

<sup>25</sup> Ingrid Eagly & Steven Shafer, “Measuring *In Absentia* Removal in Immigration Court,” American Immigration Council (Jan. 28, 2021), <https://www.americanimmigrationcouncil.org/research/measuring-absentia-removal-immigration-court>.

evidence, witness lists, responses to DHS filings) of 60 to 90 days each for “good cause” (including to secure an attorney or prepare with newly retained counsel).

In line with these recommendations, **Human Rights First recommends the following changes to the IFR:**

- **8 C.F.R. 208.9(a)(1): *Timing of interview.*** For interviews on asylum applications within the jurisdiction of USCIS pursuant to § 208.2(a)(1)(ii), USCIS shall not schedule the interview to take place fewer than ~~21 days~~ **90 days** after the applicant has been served with a record of the positive credible fear determination pursuant to § 208.30(f), unless the applicant requests in writing that an interview be scheduled sooner. The asylum officer shall ~~conduct the interview within 45 days~~ **reschedule the interview at the request of the applicant or due to circumstances necessitating rescheduling, if rescheduling would not result in the interview taking place more than one year after the applicant’s most recent arrival in the United States, and may in an exercise of USCIS’s discretion reschedule the interview, including at the request of the applicant, where rescheduling would result in the interview taking place more than one year after the applicant’s most recent arrival in the United States.** ~~of the applicant being served with a positive credible fear determination made by an asylum officer pursuant to § 208.30(f) or made by an immigration judge pursuant to [8 CFR 1208.30](#), subject to the need to reschedule an interview due to exigent circumstances, such as the unavailability of an asylum officer to conduct the interview, the inability of the applicant to attend the interview due to illness, the inability to timely secure an appropriate interpreter pursuant to paragraph (g)(2) of this section, or the closure of the asylum office.~~
- **8 C.F.R. § 208.4(b)(2):** For applications being considered by USCIS pursuant to § 208.2(a)(1)(ii), the asylum applicant may subsequently amend or correct the biographic or credible fear information in the Form I-870, Record of Determination/Credible Fear Worksheet, or supplement the information collected during the process that concluded with a positive credible fear determination, provided the information is submitted directly to the asylum office no later than 7 calendar days prior to the scheduled asylum interview, or for documents submitted by mail, postmarked no later than 10 calendar days prior to the scheduled asylum interview. The asylum officer, finding good cause in an exercise of USCIS's discretion, may consider amendments or supplements submitted after the 7- or 10-day (depending on the method of submission) deadline or may grant the applicant an extension of time during which the applicant may submit additional evidence, subject to the limitation on extensions described at § 208.9(e)(2). Any amendment, correction, or supplement shall be included in the record. **The asylum officer may not enter a negative credibility finding based on inconsistencies between the Form I-870 and amendments submitted by the applicant or make factual findings that are based on information in the Form I-870 that has subsequently been amended by the applicant.**
- **8 C.F.R. § 208.9(e)(2):** For applications being considered under § 208.2(a)(1)(i), the **asylum officer shall grant, at the applicant’s request, extensions for submission of evidence within the first year of the applicant’s most recent arrival in the United States. Thereafter, the asylum office may grant additional extensions of time during which the applicant may submit evidence pursuant to 8 CFR § 208.9(e)(1).** ~~applicant must submit any documentary evidence at least 14 calendar days in advance of the interview date. As a matter of~~

discretion, the asylum officer may consider evidence submitted within the 14-day period prior to the interview date or may grant the applicant a brief extension of time during which the applicant may submit additional evidence. Any such extension granted within the first year of the applicant's arrival in the United States will not be treated as a delay caused by the applicant for purposes of § 208.7.

- **8 C.F.R. § 1240.17(b): *Commencement of proceedings.*** Removal proceedings conducted under this section shall commence when DHS files a Notice to Appear (NTA) pursuant to [8 CFR part 1239](#) and schedules the master calendar hearing. ~~to take place 30 days after the date the NTA is served or, if a hearing cannot be held on that date, on the next available date no later than 35 days after the date of service.~~ Where the NTA is served by mail, the date of service shall be construed as the date the NTA is mailed. The DHS component issuing the NTA shall also identify for the respondent and the immigration court that the case is subject to the provisions of this section. DHS shall personally serve the NTA on the respondent whenever practicable and by mail when personal service is not effectuated, and shall inform the respondent of the right to be represented by counsel.
- **8 C.F.R. § 1240.17(e) *Form of application.*** In removal proceedings under this section, the written record of the positive credible fear determination issued in accordance with [8 CFR 208.30\(f\)](#) satisfies the respondent's filing requirement for the application for asylum, withholding of removal under the Act, and withholding or deferral of removal under the Convention Against Torture. The record of the proceedings for the hearing before the asylum officer, as outlined in [8 CFR 208.9\(f\)](#), and the asylum officer's decision, together with any amendment, correction, or supplementation made before the immigration judge as described in § 1208.3(a)(2) of this chapter, shall be admitted as evidence and considered by the immigration judge, in addition to any further documentation and testimony provided by the parties under the procedures in this section. **The immigration judge may not enter a negative credibility finding based on inconsistencies between the Form I-870 and amendments submitted by the applicant or make factual findings that are based on information in the Form I-870 that has subsequently been amended by the applicant.**
- **8 C.F.R. § 1240.17(f)(1): *Master calendar hearing.*** At the master calendar hearing, the immigration judge shall perform the functions required by § 1240.10(a), including advising the respondent of the right to be represented, at no expense to the Government, by counsel of the respondent's own choice. In addition, the immigration judge shall advise the respondent as to the nature of removal proceedings under this section, including: That the respondent has pending applications for asylum, withholding of removal under the Act and withholding or deferral of removal under the Convention Against Torture, as appropriate; that the respondent has the right to present evidence in support of the applications; that the respondent has the right to call witnesses and to testify at any merits hearing; and that the respondent must comply with the deadlines that govern the submission of evidence. Except where the respondent is ordered removed in absentia, at the conclusion of the master calendar hearing, the immigration judge shall schedule a status conference. ~~30 days after the master calendar hearing or, if a status conference cannot be held on that date, on the next available date no later than 35 days after the master calendar hearing.~~ The immigration judge shall inform the respondent of the requirements for the status conference. The adjournment of the case until the status conference shall not constitute a continuance for the purposes of paragraph (h)(2) of this section.

- **8 C.F.R. § 1240.17(f)(2): *Status conference.*** The purpose of the status conference shall be to take pleadings, identify and narrow the issues, determine whether the case can be decided on the documentary record, and, if necessary, ready the case for a merits hearing. At the status conference, the immigration judge shall advise the respondent that: The respondent has the right to present evidence in support of the applications; the respondent has the right to call witnesses and to testify at any merits hearing; and the respondent must comply with the deadlines that govern the submission of evidence. Based on the parties' representations at the status conference and an independent evaluation of the record, the immigration judge shall decide whether further proceedings are warranted or whether the case will be decided on the documentary record in accordance with paragraph (f)(4) of this section. If the immigration judge determines that further proceedings are warranted, the immigration judge shall schedule the merits hearing. ~~to take place 60 days after the master calendar hearing or, if the merits hearing cannot be held on that date, on the next available date no later than 65 days after the master calendar hearing.~~ The immigration judge may schedule additional status conferences prior to the merits hearing if the immigration judge determines that such conferences are warranted and would contribute to the efficient resolution of the case...
- **8 C.F.R. § 1240.17(h)(2)(i):** The immigration judge may, for good cause shown, grant the respondent continuances and extend the respondent's filing deadlines. ~~Each such continuance or extension shall not exceed 10 calendar days, unless the immigration judge determines that a longer period is more efficient. The immigration judge may not grant the respondent continuances or extensions for good cause that cause a merits hearing to occur more than 90 days after the master calendar hearing.~~
- **8 C.F.R. § 1240.17(h)(2)(ii):** ~~The immigration judge may grant the respondent continuances or extensions that cause a merits hearing to occur more than 90 days after the master calendar hearing only if the respondent demonstrates that the continuance or extension is necessary to ensure a fair proceeding and the need for the continuance or extension exists despite the respondent's exercise of due diligence. The length of any such continuance or extension shall be limited to the time necessary to ensure a fair proceeding. The immigration judge may not grant the respondent continuances or extensions pursuant to this paragraph (h)(2)(ii) that cause a merits hearing to occur more than 135 days after the master calendar hearing.~~

## II. Ensure Asylum Seekers Are Guaranteed a Hearing on Their Asylum Claims, as Congress Intended

The agencies should amend the IFR to ensure that asylum seekers are not ordered removed without an opportunity for an immigration court hearing on the substance of their asylum claim. The IFR threatens this critical right by directing immigration judges to order some asylum seekers removed without conducting a full hearing on their request for asylum.

The IFR prohibits the immigration court from conducting a merits hearing where an asylum seeker does not contest the Asylum Office's decision and permits the court to forego a merits hearing where neither the asylum seeker nor the government indicates an intention at the status conference to present additional evidence. 8 C.F.R. § 1240.17(f)(2)(i)(B), (f)(4)(i). Ordering

asylum seekers deported without an opportunity for a full hearing on their claim for asylum would disproportionately harm unrepresented asylum seekers, infringe on asylum seekers' rights to a full and fair hearing, contravene immigration judges' legal duty to develop the record, and violate Congress's clearly stated intent to guarantee asylum seekers who have established a credible fear of persecution an immigration court hearing as other asylum seekers receive.

Requiring the immigration court to order the removal of an asylum seeker who does not contest the Asylum Office's decision at the status conference will particularly harm unrepresented asylum seekers. Given the highly rushed timeline for the status conference, which occurs within two months of the asylum seeker learning that the Asylum Office did not grant asylum, unrepresented asylum seekers who have not had an opportunity to consult with a lawyer may unknowingly decline to contest the Asylum Office's decision without fully understanding the legal implications of doing so or their right to request a full hearing before the immigration court.

The IFR does not require the immigration court to explain the requirements for and legal consequences of being granted asylum, withholding or deferral of removal under the INA or the Convention against Torture. Nor is the immigration judge required to explain to the asylum seekers that contesting asylum eligibility will not—unless otherwise contested by DHS—affect the Asylum Office's determination that the individual is eligible for withholding or deferral of removal. As a result, asylum seekers who have been determined ineligible for asylum but eligible for withholding of removal or protection under the Convention Against Torture may decline to contest the decision because they do not understand the distinctions between these forms of protection or fear that they will risk losing these other forms of protection should they contest the asylum decision.

In Human Rights First's experience, DHS's Immigration and Customs Enforcement (ICE) attorneys sometimes pressure asylum seekers to accept lesser forms of protection, such as withholding of removal or protection under the Convention Against Torture, rather than pursue asylum even if they are eligible for asylum, threaten to rescind an offer to stipulate to withholding/Convention against Torture if not accepted on a short time frame, and threaten to oppose all forms of relief if the asylum seeker does not accept the offer. Such pressure exerted by ICE attorneys combined with the rushed nature of the IFR status conference, which will prevent many asylum seekers from obtaining counsel and learning about their rights, could force some asylum seekers to unknowingly abandon requests for asylum without fully understanding the consequences of doing so. Conducting this process in detention will further exacerbate these concerns because asylum seekers may feel coerced into abandoning requests for asylum for fear that they will remain detained indefinitely should they contest the determination.

Similarly, permitting immigration judges to order the deportation of an asylum seeker who does not indicate an intention to present additional evidence at the status conference (just 60 days after being referred from the Asylum Office) will unfairly deprive many asylum seekers—particularly those who are unrepresented—of a full hearing on their asylum claim. Many unrepresented asylum seekers may not understand the basis for the Asylum Office's determination that they are ineligible for asylum—a decision that is often rooted in a misunderstanding of the facts of the

case or legal error<sup>26</sup>—and will not know at the early stage of the status conference what types of additional evidence and testimony to present. Many mistaken Asylum Office determinations based on factual or legal error will likely go undetected without a full merits hearing where the asylum seeker has an opportunity to testify and present their case.

Ordering the removal of asylum seekers without a merits hearing violates the right to a “full and fair removal hearing,” guaranteed under 8 U.S.C. § 1229a and the Due Process Clause of the Fifth Amendment.<sup>27</sup> The agencies recognize in the IFR that “noncitizens in removal proceedings have the ‘right to a full and fair hearing’”<sup>28</sup> but fail to acknowledge that ordering the deportation of asylum seekers without a meaningful opportunity for a merits hearing is incompatible with the right to a full and fair hearing. Section 1229a provides that people in removal proceedings must have a reasonable opportunity to present evidence on their own behalf and courts have noted that due process is violated where people facing deportation are “prevented from reasonably presenting” their case.<sup>29</sup>

In addition, ordering asylum seekers removed without an opportunity for a hearing is inconsistent with immigration judges’ legal duty to develop the record, particularly where asylum seekers are unrepresented.<sup>30</sup> Relying on flawed and rushed Asylum Office adjudications to order asylum seekers removed rather than developing the record in a merits hearing is an abdication of this duty and will result in flawed decisions denying refugees the asylum protections they qualify for.

These provisions also violate Congress’s intent to guarantee asylum seekers full hearings on their claims for protection. In bringing U.S. refugee law in line with U.S. treaty obligations, Congress made clear that the government should provide asylum seekers—including those subjected to the expedited removal process who have established a credible fear of persecution—the safeguard of a hearing on their request for asylum before an immigration judge. 8 U.S.C. § 1225, the statute

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<sup>26</sup> Human Rights First, “USCIS Records Reveal Systemic Disparities in Asylum Decisions”; 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](https://www.humanrightsfirst.org/sites/default/files/De_Novo_Imm_Court_Hearings_vs_IJ_Review_06.21.pdf); Cora Wright, “Erroneous Asylum Office Referrals Delay Refugee Protection, Add to Backlogs,” Human Rights First (April 19, 2022), <https://www.humanrightsfirst.org/blog/erroneous-asylum-office-referrals-delay-refugee-protection-add-backlogs>; Human Rights First, “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” (Oct. 18, 2021), <https://www.humanrightsfirst.org/sites/default/files/HRFCommentAsylumNPRM10.2021.pdf>; Refugee and Human Rights Clinic at the University of Maine School of Law, Immigrant Legal Advocacy Project, American Civil Liberties Union of Maine, and Basileus Zeno, Ph.D., “Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers” (2022), <https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf>.

<sup>27</sup> *Matter of R-C-R*, 28 I&N Dec. 74 (BIA 2020); *Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019).

<sup>28</sup> 87 FR 18104.

<sup>29</sup> *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011).

<sup>30</sup> *Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021); *Agyeman v. INS*, 296 F.3d 871, 877, 883–84 (9th Cir. 2002); *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504–05 (6th Cir. 2019); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464–65 (8th Cir. 2004); *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 129–30 & n.14 (1st Cir. 2004); *Toure v. Att’y Gen. of U.S.*, 443 F.3d 310, 325 (3d Cir. 2006); *Solis Romero v. Barr*, 769 F. App’x 126, 127 (5th Cir. 2019); *Zheng v. Holder*, 507 F. App’x 755, 762 (10th Cir. 2013).

governing expedited removal, makes clear that asylum seekers who receive positive credible fear determinations are entitled to a “referral for hearing.” 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 hearing<sup>31</sup> by an immigration court judge before an asylum seeker would be deported from the United States.<sup>32</sup> For example, U.S. Senator Alan Simpson (R-Wyoming) noted in discussion of expedited removal that asylum applicants who receive a positive credible fear determination would “get a full hearing without any question.”<sup>33</sup> U.S. Senator Orrin Hatch (R-Utah) described the credible fear interview as a means to screen asylum seekers for “admission into the usual full asylum process.”<sup>34</sup> 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 provided the safeguard of a full hearing of their asylum claim before an immigration judge. A rushed status conference where an asylum seeker is pressured to give up an opportunity—possibly unknowingly—to present their case to the immigration judge and is subsequently ordered deported does not fulfill this requirement.

### ***Recommendations***

- Ensure that asylum seekers referred to immigration court make an informed decision about whether to contest the Asylum Office’s determination regarding their eligibility for asylum and other protections and provide that immigration judges decide cases based on the evidentiary record where asylum seekers do not contest the determination.
- Amend the rules to ensure that immigration judges fulfill their duty to develop the record by conducting a merits hearing before denying asylum or other protection to an individual where neither party has requested to present testimony, in line with Congress’s intent to provide full immigration court hearings to asylum seekers including those who previously established a credible fear of persecution through the expedited removal process.

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<sup>31</sup> 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).

<sup>32</sup> The House and Senate Conference report on the expedited removal statute explains that noncitizens who receive a positive credible fear determination 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>.

<sup>33</sup> 104 Cong. Rec. S4492, <https://www.congress.gov/104/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf> (Statement of Senator Simpson).

<sup>34</sup> H.R. Rep. No. 104-469, at 158 (1996) (Statement of Senator Hatch).

In line with this recommendation, **Human Rights First recommends the following changes to the IFR:**

- **8 C.F.R. § 1240.17(f)(2)(i)(B):** The immigration judge shall explain to the respondent the requirements for and legal consequence of being granted asylum, withholding or deferral of removal under the Act and the Convention Against Torture, including, but not limited to, whether the applicant would be eligible to adjust status to a permanent resident, 8 U.S.C. § 1159(b), 8 C.F.R. § 209.2 whether the applicant's spouse or child would be granted the same status or entitled to join the applicant in the United States, 8 U.S.C. § 1158(b)(3), 8 C.F.R. § 1208.21, whether the applicant would be permitted to travel outside the United States, 8 U.S.C. § 1158(c)(1), 8 C.F.R. § 223.2, and whether employment authorization would be automatic incident to status or whether the individual would be required to submit an application for employment authorization, with the validity period determined by USCIS, 8 U.S.C. § 1158(c), 8 U.S.C. § 1231(a)(7), 8 C.F.R. § 274a.12. The immigration judge shall also explain that if the respondent does not contest the asylum office's determination that the respondent is not eligible for asylum or other protection(s), the immigration judge will decide the case without additional evidence or testimony and may order the respondent removed. The immigration judge shall further explain that the respondent may contest the asylum office's determination regarding asylum eligibility and if the immigration court does not grant asylum it will grant other forms of protection that the respondent has been deemed eligible for by the asylum office unless evidence presented by DHS that specifically pertains to the respondent and was not in the record of proceedings for the asylum merits interview indicates that the respondent is not eligible for such protection. If the respondent indicates that the respondent does not intend to contest removal or seek any protection(s) for which the asylum officer did not find the respondent eligible, the immigration judge shall enter a finding regarding whether the respondent understands the consequences of declining to contest the determination and shall decide the case on the documentary record, without holding a merits hearing. The immigration judge shall grant a continuance if the respondent indicates that the respondent requires additional time to decide whether to contest the determination. ~~shall order the respondent removed, and no further proceedings shall be held by the immigration judge.~~ If the respondent declines to contest the determination and the asylum officer determined the respondent eligible for withholding of removal under the Act or withholding or deferral of removal under the Convention Against Torture, the immigration judge shall give effect to the protection(s) for which the asylum officer determined the respondent eligible, unless DHS makes a prima facie showing, through evidence that specifically pertains to the respondent and was not in the record of proceedings for the USCIS asylum merits interview **because it was not previously available**, that the respondent is not eligible for such protection(s).
- **8 C.F.R. § 1240.17(f)(4)(i):** If DHS has indicated that it waives cross examination and neither the respondent nor DHS has requested to present testimony under the pre-hearing procedures in paragraph (f)(2) and (3) of this section, **and the immigration judge concludes, consistent with the immigration judge's duty to fully develop the record, that the respondent's application can be granted without further testimony, the immigration judge shall grant the application without holding a merits hearing.** ~~The immigration judge shall decide the case on the documentary record, without holding a merits hearing, unless the immigration judge, after consideration of the record, determines that a merits hearing is~~

necessary to fulfill the immigration judge's duty to fully develop the record. Otherwise, the immigration judge shall hold a merits hearing to adjudicate the application.

### **III. Do Not Hollow Out the Critical Safeguard of Requests for Reconsideration, Which Prevent the Wrongful Deportation of Refugees to Persecution**

DHS and EOIR should fully restore a critical, life-saving protection in the expedited removal process that was significantly undermined by the IFR. The agencies previously proposed in the NPRM to eliminate entirely the Asylum Office's authority to reconsider erroneous negative fear determinations but reversed course in the IFR, citing Human Rights First and other organizations that documented the importance of this safeguard. 87 FR 18131. Human Rights First welcomes the agencies' decision to retain this authority, but newly imposed limitations in the IFR hollow out this critical safeguard.

The IFR imposes severe limitations on the longstanding ability of the Asylum Office to reconsider a mistaken negative credible fear determination, setting an unworkable seven-day deadline for submitting a request for reconsideration (following immigration judge review, which must happen within seven days of the fear determination) and limiting asylum seekers to a single request. 8 C.F.R. § 208.30(g)(1)(i). These restrictions will render this vital safeguard virtually meaningless for many asylum seekers who receive wrongful negative fear determinations, resulting in the deportation of refugees to life-threatening dangers. In its comment to the NPRM, the U.N. Refugee Agency (UNHCR) warned that the "risk of refoulement may rise" if the administration eliminates the Asylum Office's ability to reconsider negative credible fear decisions, including in situations "where an asylum-seeker may have new evidence to present."<sup>35</sup>

The Asylum Office's ability to reconsider its own mistaken negative credible fear determinations has existed since the inception of the expedited removal process. Shortly after the U.S. government began implementing expedited removal in 1997, the former Immigration and Naturalization Service (INS) clarified<sup>36</sup> that it had authority to reverse a negative credible fear determination even if it had been affirmed by an immigration judge, an authority it codified in regulations in 2000.<sup>37</sup>

As Human Rights First has previously explained, this safeguard has shielded many refugees from deportation to persecution and torture, including 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; an asylum seeker from the Ivory Coast who had been violently attacked for his political views; and countless others.<sup>38</sup>

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<sup>35</sup> Comment Submitted by United Nations High Commissioner for Refugees (UNHCR), USCIS-2021-0012-0001 (Oct. 21, 2021), <https://www.regulations.gov/comment/USCIS-2021-0012-5192>.

<sup>36</sup> "INS Memo with Expedited Removal Guidance," AILA Doc. No. 98021090, <https://www.aila.org/infonet/ins-expedited-removal-guidance>.

<sup>37</sup> Department of Justice, "Asylum Procedures," 65 FR 235 (Dec. 6, 2000), <https://www.govinfo.gov/content/pkg/FR-2000-12-06/pdf/00-30601.pdf>.

<sup>38</sup> Human Rights First, "Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture" (Sept. 2021),

In the IFR, the agencies recognize the terrible consequences of the government’s failure to reverse wrongful credible fear determinations, including “potentially violating the United States’ non-refoulement obligations and returning the individual to a country where there is a significant possibility that the individual could be persecuted or tortured.” 87 FR 18133. The agencies also acknowledge that there have been cases, including those documented by Human Rights First, where “the negative credible fear determination is overturned and, absent such individuals requesting reconsideration and USCIS exercising its discretion to reconsider, these individuals may have been removed to a country where they were in fact ultimately able to demonstrate a credible fear of persecution and torture.” 87 FR 18133.

The data cited by the agencies makes clear that the Asylum Office’s credible fear determinations have a high rate of error and that it would be unacceptable to eliminate its authority to reverse its own mistakes. Across seven asylum offices in FY 2021, 15 percent of all requests for reconsideration later resulted in a positive credible fear determination. 87 FR 18132. That such a significant percentage of requests for reconsideration were successful—which does not even account for the many unrepresented asylum seekers who wrongly received negative credible fear determinations and were unable to file requests for reconsideration without an attorney—demonstrates the importance of this safeguard. **In just three years, between FY 2019 to FY 2021, the ability of the Asylum Office to reconsider erroneous negative credible fear determinations saved at least 569 asylum seekers from deportation to persecution or torture without an opportunity to apply for asylum**, according to the data provided in the IFR, and likely far more as the data does not include some asylum offices. Id.

*A. Unworkable Seven-Day Deadline Deprives Asylum Seekers of a Meaningful Opportunity to Request Reconsideration*

The seven-day deadline imposed by the IFR will make it impossible for many asylum seekers to seek reversal of wrongful negative fear determinations. Asylum seekers, particularly those in detention and/or without representation, are unlikely to be able to prepare and submit a substantive request for reconsideration (including providing critical evidence, medical evaluations, or even obtaining the credible fear interview notes to review errors) on this timeline. The majority of asylum seekers are unrepresented during their credible fear interviews and immigration court reviews, which are required by statute to occur within seven days of the negative fear determination, and would not be able to secure legal counsel to assist them in submitting a request for reconsideration within a single week. This would also impose an enormous burden on legal service providers, who would have virtually no time to gather relevant information and documents from the asylum seeker and submit a request for reconsideration. This limitation also does not take into account that asylum seekers may obtain additional, previously unavailable evidence that establishes their credible fear of persecution more than seven days after the immigration court affirms the negative fear determination.

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<https://www.humanrightsfirst.org/resource/biden-administration-move-eliminate-requests-reconsideration-would-endanger-asylum-seekers>; Human Rights First, “Biden Administration Poised to Eliminate Critical Safeguard Amid Escalating Reports of Erroneous Credible Fear Decisions” (Dec. 2021), <https://www.humanrightsfirst.org/resource/biden-administration-poised-eliminate-critical-safeguard-amid-escalating-reports-erroneous>.

### ***B. Unreasonable Numerical Restriction on Requests for Reconsideration Severely Limits Access to Critical Safeguard***

The restriction barring the Asylum Office from considering requests for reconsideration, if one has previously been filed, will endanger asylum seekers and result in the return of refugees to persecution and torture. In some instances, multiple requests for reconsideration are necessary to obtain an accurate decision from the Asylum Office when it has declined to fairly consider valid and compelling requests for reconsideration. The Asylum Office routinely issues rote denials without providing reasons for the denial or any individualized analysis of the case, necessitating additional requests for reconsideration in cases that merit a reversal of the determination. Attorneys also report submitting additional requests for reconsideration where they obtain new evidence, such as a medical or psychological evaluation, that clearly establish that the credible fear interview had an erroneous result or that the individual was not able to meaningfully participate.

The IFR's provision severely limiting requests for reconsideration by the Asylum Office of erroneous negative credible fear determinations will especially harm asylum seekers who file a request for reconsideration while unrepresented. They may be forced to file requests while unrepresented without fully understanding why they received a negative credible fear determination or how to explain to the Asylum Office its errors. When previously unrepresented asylum seekers who received erroneous negative credible fear determinations secure an attorney to assist them in gathering relevant evidence and filing a more detailed request, the IFR would bar the Asylum Office from considering such a request filed by an attorney even where the first was filed *pro se*.

Recent cases that necessitated multiple requests for reconsideration to protect asylum seekers from deportation to danger include:

- **After issuing a negative credible fear determination to an Angolan political activist and his family in August 2020, the Asylum Office reversed its determination after the family's attorney at the Refugee and Immigrant Center for Education and Legal Services filed multiple requests for reconsideration.** The man had fled Angola with his family after being threatened and assaulted by members of an opposing political party. After failing to conduct the credible fear interview 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.<sup>39</sup>
- **In September 2021, a gay Togolese asylum seeker was wrongly denied reconsideration by the Houston Asylum Office but obtained a positive decision on his request for reconsideration after he was released from detention and filed another request.** He had fled Togo after a mob violently attacked him and his boyfriend because of their sexuality. His boyfriend was later murdered in Togo. Togolese police also added the man to a list of people being monitored as suspected homosexuals, which is criminalized and

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<sup>39</sup> Human Rights First, "Biden Administration Poised to Eliminate Critical Safeguard Amid Escalating Reports of Erroneous Credible Fear Decisions."

punishable with imprisonment in Togo.<sup>40</sup> After the asylum seeker spent months in detention, an attorney at the Southeast Immigrant Freedom Initiative filed a request for reconsideration to the Asylum Office, which conducted an additional interview. But the asylum officer barred the man from speaking about the homophobic attack that led him to flee Togo and denied his request to reconsider the erroneous negative credible fear decision.<sup>41</sup>

- **In May 2021, the Asylum Office reversed a negative credible fear determination for a Nicaraguan asylum seeker after receiving a second request for reconsideration that included additional evidence about the asylum seeker’s severe brain injury that resulted in memory loss, speech impediments, severe migraines, and difficulty concentrating.** The man had fled Nicaragua after being detained, beaten, stabbed, and tortured by police officers for participating in anti-government political marches. The Asylum Office ultimately reversed the negative credible fear determination after his attorney at the Refugee and Immigrant Center for Education and Legal Services submitted multiple requests for reconsideration detailing the effects of his brain injury, which had resulted from a brutal attack by a Nicaraguan police officer.<sup>42</sup>
- **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 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 the Refugee and Immigrant Center for Education and Legal Services.<sup>43</sup>

### *C. Agencies Fail to Reasonably Justify Gutting Requests for Reconsideration Safeguard*

The agencies do not provide a reasonable justification for curtailing this life-saving protection that for decades has shielded refugees from wrongful deportation without an opportunity to apply for asylum. The agencies claim that “procedural limitations” on requests for reconsideration are “necessary to ensure that reconsideration requests to USCIS do not obstruct the streamlined process that Congress intended in creating expedited removal.” 87 FR 18094. However, the agencies do not provide evidence that the Asylum Office’s authority to reconsider its own mistaken decisions is incompatible with Congressional intent. Rather, Congress’s concerns about the deficiencies of the expedited removal process pushed the government to adopt this safeguard in federal regulations. After widespread reports of asylum seekers wrongly deported under

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<sup>40</sup> United Nations Office of the High Commissioner, “Human Rights Committee Raises Concerns about Torture, Transitional Justice and Sexual Minorities in Dialogue with Togo” (July 1, 2021), <https://www.ohchr.org/en/press-releases/2021/07/human-rights-committee-raises-concerns-about-torture-transitional-justice?LangID=E&NewsID=27250>.

<sup>41</sup> Alexandra Martinez, “Asylum-seekers will be in danger if the Biden administration doesn’t reconsider credible fear determinations,” Prism (Dec. 30, 2021), <https://prismreports.org/2021/12/30/asylum-seekers-will-be-in-danger-if-the-biden-administration-doesnt-reconsider-credible-fear-determinations/>.

<sup>42</sup> Human Rights First, “Biden Administration Poised to Eliminate Critical Safeguard Amid Escalating Reports of Erroneous Credible Fear Decisions.”

<sup>43</sup> Id.

expedited removal,<sup>44</sup> and concerns about mistaken credible fear findings<sup>45</sup> including those expressed by U.S. Senator Patrick Leahy on the floor of the Senate in September 2000,<sup>46</sup> the then-INS published final regulations in December 2000 to make clear that the INS (and later DHS) could reconsider a negative determination including after it had been affirmed by an immigration judge.<sup>47</sup>

The agencies claim that evaluating requests for reconsideration takes “significant USCIS resources” that could “more efficiently be used on initial credible fear and reasonable fear determinations.” 87 FR 18132. However, administrative efficiency is not an excuse for violating U.S. obligations to avoid the return of refugees to persecution and torture. Moreover, the agencies’ argument is specious because the government is not required to use expedited removal<sup>48</sup> and could instead refer asylum seekers for a full adjudication of their claims rather than a preliminary screening that wastes Asylum Office resource.<sup>49</sup>

Additionally, the data cited by the agencies indicates that requests for reconsideration make up a small fraction of the Asylum Office’s workload adjudicating credible fear interviews. From FY 2019 to FY 2021, asylum offices that tracked requests for reconsideration (all but three in each fiscal year) received a total of 5,408 requests for reconsideration, a small amount compared to the number of credible fear interviews conducted by the agency. For instance, the government conducted 102,204<sup>50</sup> credible fear interviews in FY 2019, 33,566<sup>51</sup> credible fear interviews in FY 2020, and 43,969<sup>52</sup> credible fear interviews in FY 2021. This means that **recorded requests for reconsideration during this period were filed in only three percent of all credible fear interviews conducted by USCIS.**

The agencies also claim that the numerical limitation is warranted because some asylum seekers have requested reconsideration multiple times but fail to provide any data indicating the frequency of multiple requests. 87 FR 18133. The IFR also does not disclose the number of cases where multiple requests were necessary before the Asylum Office recognized its failure to

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<sup>44</sup> American Bar Association Commission on Immigration, “American Justice Through Immigrants’ Eyes” (2004), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/american\\_justice\\_through\\_immigrants\\_eyes.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/american_justice_through_immigrants_eyes.pdf).

<sup>45</sup> Karen Musalo, Lauren Gibson, & J. Edward Taylor, “Report on the Second Year of Implementation of Expedited Removal,” Center for Human Rights and International Justice, University of California, Hastings School of Law (1999), <http://libraryweb.uchastings.edu/cgrs/Expedited%20removal%201999.pdf>.

<sup>46</sup> Congressional Record Volume 146, Number 111 (Tuesday, September 19, 2000), <https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>.

<sup>47</sup> Department of Justice, “Asylum Procedures.”

<sup>48</sup> *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011).

<sup>49</sup> Center for Gender and Refugee Studies & Human Rights First, “Swift Action to Improve Fairness and Enable Timely Asylum Hearings in Immigration Courts” (April 2021), <https://www.humanrightsfirst.org/sites/default/files/FairandTimelyAsylumHearings.pdf>; Human Rights First, “Recommendations for the Biden Administration: Upholding U.S. Refugee Law and Restoring Asylum” (Oct. 2021), <https://www.humanrightsfirst.org/resource/recommendations-biden-administration-upholding-us-refugee-law-and-restoring-asylum>.

<sup>50</sup> USCIS, “Credible Fear Workload Report Summary: FY 2019 Total Caseload,” [https://www.uscis.gov/sites/default/files/document/data/Credible\\_Fear\\_Stats\\_FY19.pdf](https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf).

<sup>51</sup> This data was previously posted by USCIS and is on file with Human Rights First.

<sup>52</sup> This data was previously posted by USCIS and is on file with Human Rights First.

overturn its wrongful negative fear determination, as the examples above confirm has occurred in multiple instances.

The agencies further assert that immigration judge review of the negative credible fear determination should “serve[] as the check to ensure that noncitizens who have a credible fear of persecution or torture are not returned based on an erroneous screening determination by USCIS.” However, the agencies acknowledge the inadequacy of immigration court review in this context, noting that immigration court review “has sometimes failed to address allegations of error or newly available evidence that may compel a positive credible fear determination, and individuals would otherwise have no other recourse.” 87 FR 18132. As noted above, the 569 asylum seekers with a credible fear of persecution who narrowly avoided wrongful deportation without an opportunity to apply for asylum as a result of the Asylum Office’s ability to reconsider erroneous decisions contradicts the agencies’ assertion that immigration court review is an adequate safeguard for the expedited removal process.

Human Rights First and other organizations have repeatedly documented the flaws and due process violations of the immigration court review process in this context, which is, in many cases, a “rubber stamp.”<sup>53</sup> Gutting the Asylum Office’s authority to consider requests for reconsideration is a terrible mistake in light of the defective credible fear process and wholly inadequate safeguard of immigration court review.

### ***Recommendations***

- The agencies should fully restore the unrestricted authority of the Asylum Office to reconsider negative fear determinations to ensure that refugees are not wrongly deported to persecution and torture in violation of U.S. law and treaty obligations.
- At a minimum, the rules should allow requests for reconsideration to the Asylum Office of an erroneous negative fear determination to be filed any time prior to removal as the current, arbitrary seven-day deadline would prevent nearly all such requests; permit at least one subsequent request as well as supplementation of an existing request with newly available evidence where a prior request was filed pro se; and require the Asylum Office to issue a reasoned explanation in writing for denials of requests to reconsider.

In line with these recommendations, **Human Rights First recommends the following changes to the IFR:**

- **8 C.F.R. § 208.30(g)(1)(i):** If the **noncitizen alien** requests such review, or refuses or fails to either request or decline such review, the asylum officer shall serve the **noncitizen alien** with a Form I-863, Notice of Referral to Immigration Judge, for review of the credible fear determination in accordance with paragraph (g)(2) of this section. USCIS may, in its discretion, reconsider a negative credible fear finding that has been concurred upon by an immigration judge. ~~provided such reconsideration is requested by the alien or initiated by USCIS no more than 7 calendar days after the concurrence by the immigration judge, or prior to the alien's removal, whichever date comes first, and further provided that no~~

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<sup>53</sup> Lauren Schusterman, “A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions,” 118 Mich. Law Rev. 4 (2020), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=4987&context=mlr>; Human Rights First, “Biden Administration Poised to Eliminate Critical Safeguard Amid Escalating Reports of Erroneous Credible Fear Decisions.”

previous request for reconsideration of that negative finding has already been made. The provisions of [8 CFR 103.5](#) shall not apply to credible fear determinations.

#### **IV. Avoid Expedited Removal and Create Process for Asylum Office Initial Adjudication Referrals**

Human Rights First continues to urge DHS to avoid the use of expedited removal and to recommend that the agencies create a process to refer asylum seekers for full initial asylum adjudications with USCIS.

Expedited removal raises serious due process concerns,<sup>54</sup> risks wrongful deportation of refugees in contravention of U.S. legal obligations,<sup>55</sup> and diverts government resources by having the Asylum Office conduct fear screenings instead of full asylum interviews.<sup>56</sup> The U.S. Commission on International Religious Freedom has repeatedly documented serious deficiencies in the expedited removal process,<sup>57</sup> the use of which has resulted in the return of refugees to persecution, torture, and murder.<sup>58</sup> Due process violations and grave errors in expedited removal credible fear determinations have continued under the Biden administration, as documented by Human Rights First and other organizations.<sup>59</sup>

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<sup>54</sup> U.S. Commission 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>; 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 (Jan. 22, 2020), [https://www.supremecourt.gov/DocketPDF/19/19-161/129461/20200122130104258\\_19-161%20bsac%20Immigration%20and%20Human%20Rights%20Organizations.pdf](https://www.supremecourt.gov/DocketPDF/19/19-161/129461/20200122130104258_19-161%20bsac%20Immigration%20and%20Human%20Rights%20Organizations.pdf).

<sup>55</sup> 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-exposesalvadorans-death-and>; American 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](https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf); Kate Morrissey, “A Legitimate Fear of Death Doesn’t Always Matter in the U.S. Asylum System,” *San Diego Union Tribune* (Oct. 11, 2020), <https://www.sandiegouniontribune.com/news/immigration/story/2020-10-11/us-asylum-system-gang-violence-honduras>.

<sup>56</sup> 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>.

<sup>57</sup> U.S. Commission on International Religious Freedom, “Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal”; U.S. Commission on International Religious Freedom, “Report on Asylum Seekers in Expedited Removal,” (Feb. 8, 2005), <https://www.uscirf.gov/publications/report-asylum-seekers-expedited-removal>.

<sup>58</sup> American Immigration 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](https://www.americanimmigrationcouncil.org/sites/default/files/research/deportations_in_the_dark.pdf); 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”; U.S. Commission on International Religious Freedom, “Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal”; Brief for Amici Curiae Immigration and Human Rights Organizations In Support of Respondent, *U.S. Dep’t of Homeland Security v. Thuraissigiam*.

<sup>59</sup> Human Rights First, “Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture”; Human Rights First, “‘I’m a Prisoner Here’: Biden Administration Policies Lock Up Asylum Seekers” (April 2022), <https://www.humanrightsfirst.org/resource/i-m-prisoner-here-biden-administration-policies-lock-asylum-seekers>.

Detention of asylum seekers further exacerbates the fundamental flaws of expedited removal by subjecting asylum seekers to horrendous conditions of confinement, pushing them to undergo credible fear interviews without adequate interpretation, and cutting them off from legal representation and information.<sup>60</sup> A June 2021 letter from attorneys and organizations serving detained asylum seekers subjected to expedited removal documented systemic due process violations including failure by ICE to provide appropriate interpreters when issuing initial credible fear process documents, lack of adequate interpretation during fear interviews, asylum seekers cut off from speaking during interviews, little or no notice to asylum seekers and legal counsel of IJ reviews, and failure to provide credible fear determinations and interview notes prior to the review.<sup>61</sup> An April 2022 complaint filed with the DHS Office of Inspector General and Office of Civil Rights and Civil Liberties documents the Houston Asylum Office's egregious mishandling of credible and reasonable fear interviews for detained asylum seekers, including denial of access to counsel, lack of legal orientation, failure to provide appropriate language interpretation, and biased and deficient individualized fear determinations.<sup>62</sup>

Some of the many asylum seekers wrongly ordered deported during the Biden administration because they were subjected to the flawed expedited removal process include:

- **Ricardo Villasmil, a 23-year-old Venezuelan asylum seeker was detained, tortured, and threatened by the Venezuelan government after DHS deported him in October 2021 because the Asylum Office had wrongly determined that he did not have a credible fear of persecution.** He had fled persecution due to his family's longstanding political opposition to the government that had resulted in the murder of his father and years of kidnappings and detentions. After being tortured, he fled to the United States a second time with his pregnant wife. DHS separated them and detained Villasmil in an ICE facility before finally releasing him in late February 2022.
- **A young Venezuelan asylum seeker, who had received death threats for participating in political protests in Venezuela, was subjected to expedited removal and received a wrongful negative credible fear determination.** The man, who was not represented by counsel during the fear screening, told Human Rights First that he had noticed errors in the asylum officer's notes and decision from the credible fear interview, including statements attributed to the asylum seeker that he did not make. As of December 2021, the young man had been incarcerated at the Winn Correctional Center for five months. Reflecting on his prolonged detention, he said: "I feel very bad. I'm a prisoner here. I would rather die in my country than be jailed here."
- **The Houston Asylum Office issued a wrongful negative credible fear determination to a Nicaraguan activist who had been beaten so brutally by paramilitaries for participating in a political opposition group and working at a polling station that he**

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<sup>60</sup> Id.

<sup>61</sup> SPLC et al, Letter to USCIS, ICE, and EOIR, "Re: 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](https://www.splcenter.org/sites/default/files/detained_asylum_seeker_grievance_letter_30_june_2021.pdf).

<sup>62</sup> SPLC and NIPNLG Complaint filed with DHS Office of Civil Rights and Civil Liberties and Office of Inspector General, "Re: Systemic Deficiencies at the Houston Asylum Office in Assessments of Credible and Reasonable Fear Cause Harm and Irreversible Damage to Asylum Seekers" (April 27, 2022), [https://nipnlg.org/PDFs/2022\\_27April-CFI-complaint.pdf](https://nipnlg.org/PDFs/2022_27April-CFI-complaint.pdf).

**had to be hospitalized.** In December 2021, after eight months in ICE detention, he told Human Rights First that he continues to suffer severe kidney pain from the attack, for which he has not received even a medical evaluation. He said: “I want our human rights to be respected. My family is anguished. My mom calls me and cries. I tell her I’m okay so she doesn’t worry, but in reality I feel very sick.”

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.”<sup>63</sup> Only a few years later, Senator Patrick Leahy and others proposed the bipartisan Refugee Protection Act of 1999<sup>64</sup> 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.”<sup>65</sup> 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.”<sup>66</sup>

Government records from the USCIS Asylum Office recently received by Human Rights First through a FOIA request confirm the arbitrary application of expedited removal and its potential for abuse. The Trump administration’s deliberate weaponization of expedited removal through a series of illegal policies,<sup>67</sup> regulations,<sup>68</sup> and rulings,<sup>69</sup> **caused positive credible fear rates to plummet by nearly 50 percent (dropping from 88.3 percent in FY 2016 to 44.3 percent in FY 2020<sup>70</sup>)** with even more drastic declines for certain countries, and resulted in growing disparities in positive credible fear determinations between asylum offices. Positive credible fear rates in FY 2020 represented a stark departure from the Obama and George W. Bush administrations, during which positive credible fear rates averaged 78 percent.<sup>71</sup> **Under the Trump administration, positive credible fear determination rates fell even more from FY 2016 to FY 2020 for asylum seekers from certain targeted countries including El Salvador (a 60.8 percent drop), Guatemala (a 68.3 percent drop), Honduras (a 62.8 percent drop),**

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<sup>63</sup> Congressional Record Volume 146, Number 111.

<sup>64</sup> S. 1940 – Refugee Protection Act of 1999, 106<sup>th</sup> Congress (1999-2000), <https://www.congress.gov/bill/106th-congress/senate-bill/1940/text>.

<sup>65</sup> Congressional Record Volume 146, Number 111.

<sup>66</sup> Id.

<sup>67</sup> *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](https://www.acludc.org/sites/default/files/field_documents/12-5-2019_lasamericas-complaint.pdf).

<sup>68</sup> Dep’t of Homeland Security & Exec. Office for Immigration Review, “Asylum Eligibility and Procedural Modifications,” 84 FR 33829 (July 16, 2019), <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

<sup>69</sup> *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

<sup>70</sup> Dep’t of State, Dep’t of Homeland Security, & Dep’t of Health and Human Services, “Proposed Refugee Admissions for Fiscal Year 2021,” <https://www.state.gov/wp-content/uploads/2020/10/FY21-USRAP-Report-to-Congress-FINAL-for-WEBSITE-102220-508.pdf>; USCIS, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions,” <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions>.

<sup>71</sup> U.S. Commission on International Religious Freedom, “Study on Asylum Seekers in Expedited Removal (Feb. 2005),” [https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/credibleFearDeterm.pdf](https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/credibleFearDeterm.pdf); USCIS credible fear records (2004–13, 2014, 2015, 2016, 2017, 2018, 2019, 2020).

**and Mexico (a 58.2 percent drop)**<sup>72</sup> in the wake of policies that targeted asylum seekers from these countries and false and racist rhetoric by the Trump administration.<sup>73</sup> **The Trump administration’s policies also created enormous disparities in positive credible fear rates between asylum offices; whereas in FY 2016, positive credible fear rates ranged by 15 percentage points, by FY 2020 positive credible fear rates ranged by 68.7 percentage points.**<sup>74</sup> Positive credible fear rates have begun to stabilize but in FY 2022 to date remain over 24 percentage points lower than the FY 2016 average.<sup>75</sup> Future administrations could similarly attempt to weaponize the flawed expedited removal process to detain and rapidly deport refugees seeking protection without access to the U.S. asylum process.

DHS is not required to use expedited removal.<sup>76</sup> However, the IFR provides that asylum seekers who establish a credible fear of persecution may be referred for AMIs with the Asylum Office, 8 C.F.R. § 208.2(a)(1)(ii), and DHS has confirmed that it intends to conduct AMIs after subjecting asylum seekers to expedited removal.<sup>77</sup> The IFR, in fact, lays out a plan to further expand the use of expedited removal, including by “facilitating the use of expedited removal for more of those who are eligible, and especially for populations whose detention presents particular challenges.” 87 FR 18089. Using expedited removal worsens Asylum Office backlogs by diverting asylum officers from adjudicating full asylum claims.<sup>78</sup> USCIS has noted that high volumes of expedited removal screenings “place[] great strain on the resources of the USCIS Asylum Division.”<sup>79</sup> It would be far more efficient to directly refer asylum seekers for full Asylum Office adjudications without first subjecting them to unnecessary and resource-intensive credible fear interviews.

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<sup>72</sup> USCIS, Credible and Reasonable Fear Interview Records, FY 2015 – FY 2021, FOIA COW-2021-001887, <https://www.humanrightsfirst.org/file/cow2021001887-cfandrfdataxlsx>.

<sup>73</sup> Laura Gottesdiener & John Washington, “They’re Refugees, Fleeing Gang Violence and Domestic Abuse. Why Won’t the Trump Administration Let Them In?,” *The Nation* (Nov. 28, 2018),

<https://www.thenation.com/article/archive/trump-asylum-gangs-domestic-violence/>; White House, “President Donald J. Trump is Upholding the Rule of Law and Ensuring Consequences for Those Who Illegally Cross the Border,” (Nov. 9, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-upholding-rule-law-ensuring-consequences-illegally-cross-border/>; Josh Dawsey, “Trump derides protections for immigrants from ‘shithole’ countries,” *Washington Post* (Jan. 12, 2018),

[https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html); Amber Phillips, “‘They’re rapists.’ President Trump’s campaign launch speech two years later, annotated,” (June 16, 2017),

<https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/>.

<sup>74</sup> USCIS, Credible and Reasonable Fear Interview Records, FY 2015 – FY 2021, FOIA COW-2021-001887, <https://www.humanrightsfirst.org/file/cow2021001887-cfandrfdataxlsx>.

<sup>75</sup> USCIS, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions,” <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions>.

<sup>76</sup> *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011).

<sup>77</sup> Dep’t of Homeland Security, “Factsheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule.”

<sup>78</sup> Human Rights First, “Protection Postponed: Asylum Office Backlogs Cause Suffering, Separate Families, and Undermine Integration.”

<sup>79</sup> USCIS, “USCIS Response to the Citizenship and Immigration Services Ombudsman’s (CISOMB) 2020 Annual Report to Congress” (Dec. 4, 2020),

<https://www.uscis.gov/sites/default/files/document/reports/Citizenship%20and%20Immigration%20Services%20Ombudsman%E2%80%99s%202020%20Annual%20Report%20to%20Congress.pdf>.

## ***Recommendations***

- DHS should create a process for asylum seekers to be referred for full initial Asylum Office adjudication of their cases. These 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 after those proceedings are terminated or adjourned with the consent of the applicant, as Human Rights First detailed in its initial comments.

### **V. Ensure That Asylum Seekers Are Not Arbitrarily Subject to Immigration Detention**

The agencies should amend the IFR to provide a presumption against the detention of asylum seekers in removal proceedings or referred for AMIs unless the government establishes by clear and convincing evidence that the asylum seeker poses a flight risk or public safety threat. The IFR does not specify whether any portion of the rule’s new asylum process will be carried out while asylum seekers are detained; however, on May 26, 2022, DHS announced its intention to conduct credible fear screenings for individuals subjected to the IFR process while those individuals are detained.<sup>80</sup> The IFR recognizes DHS’s longstanding statutory authority to release asylum seekers for humanitarian reasons or to further the public interest. 8 C.F.R. § 235.3(b)(2)(iii), 235.3(b)(4)(ii), 235.3(c), and 212.5(d). Human Rights First welcomes this step toward aligning DHS’s regulatory parole authority with its existing statutory release authority.

However, ICE’s routine denial of parole requests and failure to release asylum seekers for prolonged periods despite its authority to do so makes clear that further regulatory changes are needed to avoid arbitrary detention.<sup>81</sup> Detention of asylum seekers beyond a short period to complete biometrics and security screenings is generally prohibited under international law and can only be imposed as a measure of last resort.<sup>82</sup>

Detention impedes many asylum seekers from effectively and fairly presenting their requests for protection. Being detained limits asylum seekers’ access to legal representation and translation assistance to complete the complex and technical asylum application in English.<sup>83</sup> As of February 2022, immigrants and asylum seekers in ICE detention with pending cases are two-and-a-half times less likely to be represented by counsel compared to individuals who have been released from detention (27.2 percent versus 67.8 percent), according to government data analyzed by Syracuse University’s Transactional Records Access Clearinghouse.<sup>84</sup>

Asylum seekers are subjected to horrendous conditions of confinement in ICE jails including physical and sexual violence, medical neglect, punitive solitary confinement, and deprivation of

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<sup>80</sup> Dep’t of Homeland Security, “Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule.”

<sup>81</sup> Human Rights First, “‘I’m a Prisoner Here’: Biden Administration Policies Lock Up Asylum Seekers.”

<sup>82</sup> U.N. High Comm’r for Refugees, “Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention” (2012), <https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

<sup>83</sup> Mark Noferi, “A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers,” American Immigration Council (July 22, 2015), <https://www.americanimmigrationcouncil.org/research/humane-approach-can-work-effectiveness-alternatives-detention-asylum-seekers>.

<sup>84</sup> Transactional Records Access Clearinghouse, “State and County Details on Deportation Proceedings in Immigration Court” (2022), <https://trac.syr.edu/phptools/immigration/nta/>.

basic necessities.<sup>85</sup> These conditions often cause or exacerbate physical and mental health problems<sup>86</sup> and impede asylum seekers from meaningfully participating in asylum proceedings and fully sharing their fear of persecution. Detention also cuts off communication with important witnesses and experts as well as access to crucial documents that may serve as evidence in an asylum claim<sup>87</sup> and pushes some asylum seekers to abandon their claims rather than continue to endure the trauma of detention.<sup>88</sup>

To avoid the needless and unlawful detention of asylum seekers, erroneous orders of removal, and attempts by subsequent administrations to conduct the entire adjudication process in detention, the agencies should ensure through regulation that asylum seekers are not detained unless the government establishes that they pose a flight risk or public safety threat. Additionally, the agencies should amend 8 C.F.R. § 235.3(c) to explicitly include parole consideration under 8 C.F.R. § 212.5(b) for asylum seekers who enter the United States without inspection but are referred to removal proceedings, who appear to have been inadvertently not included for consideration under 8 C.F.R. § 212.5(b). The current language in 8 CFR § 235(c) directs the government to consider for parole under 8 C.F.R. § 212.5(b) “arriving” noncitizens who are referred to removal proceedings as well as all individuals who are referred to AMIs. Human Rights First suggests regulatory language below to resolve this error.

### ***Recommendations***

- Issue regulations that include a strong presumption against the use of detention, shifting the burden of proof to the government instead of the non-citizen in custody determinations to show by clear and convincing evidence that the non-citizen should remain detained.
- Amend the regulations to rectify an inadvertent drafting error in order to ensure that all asylum seekers referred to removal proceedings or AMIs may be considered for parole under 8 C.F.R. § 212.5(b).

In line with this recommendation, **Human Rights First recommends the following changes to the IFR:**

- **8 C.F.R. § 212.5(b): Parole from custody.** ~~The parole of~~ **Noncitizens** aliens within the following groups who have been or are detained in accordance with § 235.3(b) or (c) of this chapter **shall be considered for release. Parole** would generally be justified ~~only~~ on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit,” provided the ~~aliens~~ **noncitizens** present neither a security risk nor a risk of absconding:

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<sup>85</sup> Human Rights First, “‘I’m a Prisoner Here’: Biden Administration Policies Lock Up Asylum Seekers.”

<sup>86</sup> Altaf Saadi et al, “Understanding US Immigration Detention,” Health and Human Rights Journal (June 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7348446/>; M. von Werthern et al., “The impact of immigration detention on mental health: a systematic review,” BMC Psychiatry 18, 382 (2018), <https://bmcp psychiatry.biomedcentral.com/articles/10.1186/s12888-018-1945-y>.

<sup>87</sup> Innovation Law Lab et al, University of California, San Diego, “How ICE Detention Facilities Block Communication” (August 2021), [https://ccis.ucsd.edu/files/Publications/CutOff\\_HowICEBlocksCommunication.pdf](https://ccis.ucsd.edu/files/Publications/CutOff_HowICEBlocksCommunication.pdf).

<sup>88</sup> Laura Gottesdiener, “Die in detention or at home? U.S. pandemic forces cruel choice on asylum seekers,” Reuters (July 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-immigration-in/die-in-detention-or-at-home-u-s-pandemic-forces-cruel-choice-on-asylum-seekers-idUSKBN247145>.

(1) **Noncitizens Aliens** who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) **Noncitizens Aliens** who are defined as minors in [§ 236.3\(b\)](#) of this chapter and are in DHS custody. The Executive Assistant Director, Enforcement and Removal Operations; directors of field operations; field office directors, deputy field office directors; or chief patrol agents shall follow the guidelines set forth in [§ 236.3\(j\)](#) of this chapter and paragraphs (b)(3)(i) through (ii) of this section in determining under what conditions a minor should be paroled from detention:

(i) Minors may be released to a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, or grandparent) not in detention.

(ii) Minors may be released with an accompanying parent or legal guardian who is in detention.

(iii) If the [Service](#) cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) **Noncitizens Aliens** who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the [United States](#); or

(5) **Noncitizens Aliens** whose continued detention is not in the public interest as determined by those officials identified in [paragraph \(a\)](#) of this section. **Release of noncitizens detained in accordance with § 235.3(c) of this chapter is in the public interest unless the Department of Homeland Security establishes by clear and convincing evidence that the individual presents a security risk or a risk of absconding and that no less restrictive measure would mitigate the risk.**

- **8 C.F.R. § 235.3(c):** *Arriving aliens* **Noncitizens** placed in proceedings under section 240 of the Act or *aliens noncitizens* referred for an asylum merits interview under [§ 208.2\(a\)\(1\)\(ii\)](#) of this chapter. (1) Except as otherwise provided in this chapter, any **arriving alien noncitizen** who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act shall be **considered for release**. ~~detained in accordance with section 235(b) of the Act.~~ Parole of such **alien noncitizen** shall **only** be considered in accordance with [§ 212.5\(b\)](#) of this chapter. This paragraph (c) shall also apply to any **alien noncitizen** who arrived before April 1, 1997, and who was placed in exclusion proceedings. (2) Except as otherwise provided in this chapter, any **alien noncitizen** over whom USCIS exercises jurisdiction pursuant to [§ 208.2\(a\)\(1\)\(ii\)](#) of this chapter shall be **considered for release**. ~~after being found to have a credible fear of persecution or torture shall be detained in accordance with section 235(b) of the Act.~~ Parole of such **alien noncitizen** shall **only** be considered in accordance with [§ 212.5\(b\)](#) of this chapter.

**Attachments:**

Human Rights First, “USCIS Records Reveal Systemic Disparities in Asylum Decisions” (May 2022).

Human Rights First, “‘I’m a Prisoner Here’: Biden Administration Policies Lock Up Asylum Seekers” (April 2022).

Cora Wright, “Erroneous Asylum Office Referrals Delay Refugee Protection, Add to Backlogs,” Human Rights First (April 2022).

Human Rights First, “Biden Administration Poised to Eliminate Critical Safeguard Amid Escalating Reports of Erroneous Credible Fear Decisions” (December 2021).

## USCIS Records Reveal Systemic Disparities in Asylum Decisions

Government [records](#) received by Human Rights First from the U.S. Citizenship and Immigration Services (USCIS) asylum office through a Freedom of Information Act (FOIA) request show years-long, systemic disparities in asylum adjudications based on the nationality of the asylum seeker and the asylum office handling the case. These records, which include data for fiscal year (FY) 2016 through the end of May 2021, show:

- **By the end of the Trump administration, asylum office grant rates had fallen from 44 percent in FY 2016 to 28 percent in FY 2020 with even more significant declines in grant rates for people fleeing persecution from Africa, the Americas, the Caribbean, and South Asia** — underscoring [longstanding concerns about disparate treatment](#) of [people](#) who seek [asylum](#) in the United States.
- **By FY 2020, asylum office grant rates had plummeted for people seeking protection from countries from which many refugees are fleeing compared to FY 2016, including El Salvador (73 percent drop), Haiti (70 percent drop), and Venezuela (57 percent drop)**, resulting in the needless referral of cases to the immigration courts that could have been resolved by the asylum office. Indeed, immigration judges granted asylum in two-thirds of cases referred from the asylum office that were decided in FY 2021, and immigration court asylum grant rates remain higher for many countries than before the asylum office.
- Existing disparities in grant rates between asylum offices widened during the Trump administration. **Between FY 2017 and 2020, the New York asylum office's average grant rate was six times lower than the San Francisco asylum office — double the grant rate discrepancy compared to FY 2010 to 2014.** Some asylum offices recorded shockingly low asylum grant rates. **The New York asylum office grant rate dropped to 5 percent in FY 2020, and the Boston asylum office grant rate declined to 8 percent in the first part of FY 2021.**
- Asylum grant rates for nationals of the same country vary significantly by asylum office location, resulting in arbitrary referrals of cases to the immigration courts that could have been granted by the asylum office. In FY 2020, for example, the **Los Angeles asylum office** granted asylum to just 18 percent of Cameroonian applicants — a rate more than two-and-a-half times lower than the national asylum office average for Cameroon; the **Houston asylum office** did not grant any of the 14 asylum applications of Nicaraguans it decided that year compared to national asylum office average of 44 percent for Nicaragua; and the **New York asylum office's** 11 percent grant rate for Venezuelan applicants was nearly three times lower than the (very low) 30 percent asylum office national average for Venezuela.

The current administration must urgently act to address racial, nationality, and asylum office-based disparities in asylum adjudication. USCIS should [ensure](#) that cases qualifying for refugee protection are actually granted by the asylum office, rather than being referred for immigration court adjudications. The [over-referral](#) of [cases](#) exacerbates already years-long delays for many asylum seekers and needlessly contributes to court backlogs for cases that are overwhelmingly later [granted](#) by [immigration judges](#). These reforms are particularly crucial given new asylum process [rules](#), set to go into effect at the end of May 2022, under which more asylum seekers would undergo initial, full asylum adjudications by the asylum office.

In addition, USCIS should immediately act to upgrade its data collection practices. The records released to Human Rights First overwhelmingly fail to disclose the race or ethnicity of the applicant — a question all asylum seekers must answer on the asylum [application](#). As President Biden's January 2021 [Executive Order on](#)

[Advancing Racial Equity](#) acknowledges, the “lack of data [disaggregated by race] . . . impedes efforts to measure and advance equity.”

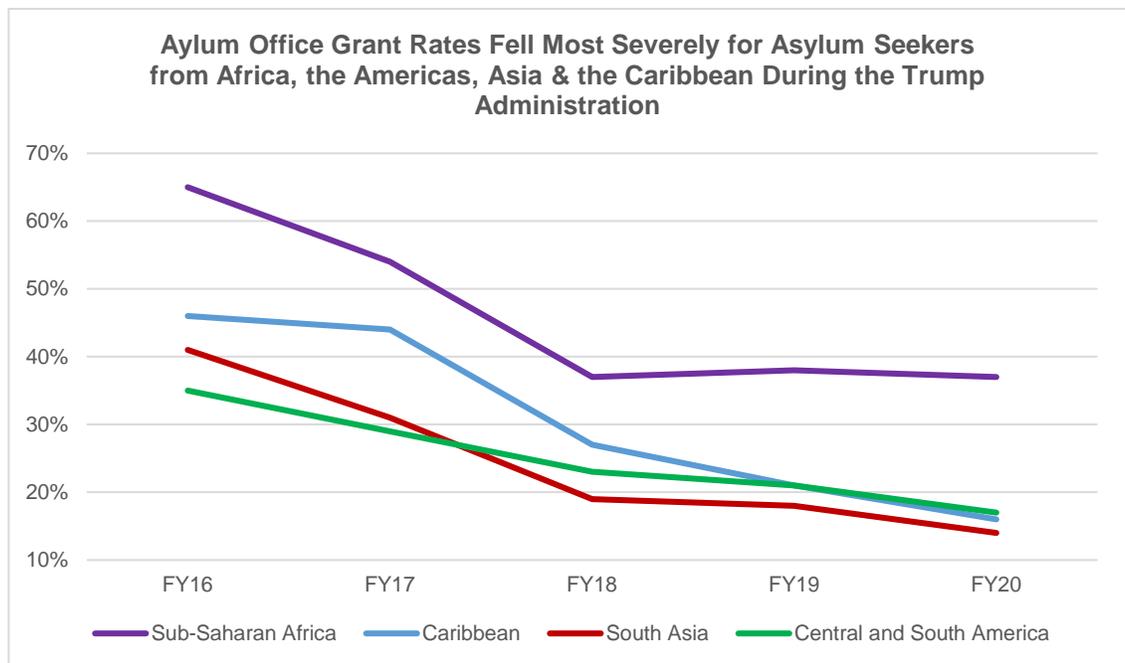
### Failure to Record Asylum Applicant Demographics Undermines Accountability

In May 2021, Human Rights First used FOIA to request USCIS data on “asylum eligibility determinations disaggregated by race” and other demographic factors. USCIS does not release asylum adjudication statistics broken down by race and publishes only limited information annually on the number of asylum grants by [nationality](#). In April 2022, USCIS provided more than 300,000 responsive [records](#) of affirmative asylum adjudications (*i.e.* filed with USCIS by individuals not in removal proceedings) covering fiscal years 2016 to 2021 (through May 27, 2021). The [Form I-589](#) asylum application requires all applicants to provide their “race, ethnic, or tribal group.” However, **95 percent of the adjudications disclosed in the FOIA results list “other” in the “race or ethnicity” category**,<sup>1</sup> making it impossible to analyze and address potential racial disparities in asylum adjudications by the asylum office. To date, USCIS has also failed to restart quarterly releases of data on asylum adjudications that included a breakdown by asylum office location, which were halted by the Trump administration in [September 2019](#). Restoring regular data releases as well as expanding the information recorded and disclosed are crucial to public oversight and accountability for the life-or-death asylum decisions made by the asylum office.

### Growing Regional Disparities in Asylum Grant Rates Under the Trump Administration

The government records obtained by Human Rights First through FOIA show that by FY 2020 (the last full fiscal year of the Trump Admin), asylum office grant rates had plummeted for asylum seekers from many regions compared to FY 2016 (the last full fiscal year of the Obama administration). Based on Human Rights First’s analysis of USCIS data, **the asylum office grant rate<sup>2</sup> fell from 44 percent in FY 2016 to 28 percent in FY 2020 – a 36 percent decline overall.**

During the Trump administration, **asylum office grant rates declined even more severely for people fleeing persecution in countries in Africa, the Americas, the Caribbean, and South Asia:**



Source: USCIS asylum adjudications FOIA [records](#)

<sup>1</sup> The responses in the race or ethnicity category were: Armenian, Azerbaijani, Basque, Chinese, Eritrean, Estonian, Georgian, Gipsy, Hungarian, Indian, Khmer, Kurd, Latvian, Lithuanian, Mong, Other, Russian, Tamil, Tibetan, Tigre, Turk, and Unknown.

<sup>2</sup> Grant rates are calculated by dividing the number of asylum grants by the total number of asylum grants, denials, and referrals.

- South Asia — **66 percent drop** (from 41 percent in FY 2016 to 14 percent in FY 2020)
- Caribbean — **65 percent drop** (from 46 percent in FY 2016 to 16 percent in FY 2020)
- Central and South America — **51 percent drop** (from 35 percent in FY 2016 to 17 percent in FY 2020)
- Sub-Saharan Africa — **43 percent drop** (from 65 percent in FY 2016 to 37 percent in 2020)

**Table 1: Wide Disparities in Asylum Office Grant Rates by Asylum Seekers’ Region of Origin**

Region of Origin	FY16	FY17	FY18	FY19	FY20	FY21*
Middle East / North Africa <sup>3</sup>	83%	77%	61%	69%	65%	61%
Sub-Saharan Africa <sup>4</sup>	65%	54%	37%	38%	37%	40%
Europe <sup>5</sup>	48%	40%	34%	37%	35%	30%
Central Asia <sup>6</sup>	46%	37%	34%	37%	36%	33%
Caribbean <sup>7</sup>	46%	44%	27%	21%	16%	14%
East Asia / Pacific <sup>8</sup>	43%	44%	35%	39%	45%	36%
South Asia <sup>9</sup>	41%	31%	19%	18%	14%	17%
Central and South America <sup>10</sup>	35%	29%	23%	21%	17%	21%
<b>Average</b>	<b>44%</b>	<b>36%</b>	<b>29%</b>	<b>29%</b>	<b>28%</b>	<b>28%</b>

Source: USCIS asylum adjudications FOIA [records](#); \* thru May 27, 2021

These regional disparities are not surprising given the [series](#) of [rulings](#), [regulations](#), and other [policies](#) issued by the Trump administration that attempted to make people fleeing persecution ineligible for asylum and targeted the largely Black, Brown and Indigenous asylum seekers requesting protection at the southern border. In addition to sharp declines in asylum office grant rates, these policies also resulted in [plummeting](#) immigration court asylum grant [rates](#) for people fleeing persecution in [Africa](#), Central America, and South America.

Throughout the Trump administration, high ranking government officials made repeated false statements about asylum seekers to delegitimize and undermine their requests for protection. For example, President Trump [falsely asserted](#) that asylum seekers from Guatemala, Honduras, and El Salvador abuse “loopholes” in the system and “lodg[e] meritless claims,” then Attorney General Sessions falsely [claimed](#) that only 20 percent of asylum applications are meritorious, and then Secretary Nielsen of the Department of Homeland Security (which includes the asylum office) falsely [claimed](#) there is a “huge problem” with fraud in the asylum system. President Trump also [reportedly](#) questioned why individuals from Haiti, El Salvador, and some African countries, which he described as “shithole[s],” come to the United States.

<sup>3</sup> Middle East / North Africa: Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, Turkey, United Arab Emirates, Yemen

<sup>4</sup> Sub-Saharan Africa: Angola, Benin, Botswana, Burkina Faso, Burundi, Cote d’Ivoire, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, The Gambia, Togo, Uganda, Zambia, Zimbabwe

<sup>5</sup> Europe: Albania, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Czechoslovakia, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Kosovo, Latvia, Lithuania, Malta, Moldova, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russia, Serbia, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, USSR, Yugoslavia

<sup>6</sup> Central Asia: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan

<sup>7</sup> Caribbean: Antigua and Barbuda, Bahamas, Barbados, Cuba, Dominica, Dominican Republic, Granada, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago

<sup>8</sup> East Asia / Pacific: Australia, Burma, Cambodia, China, Fiji, Hong Kong, Indonesia, Japan, Korea, Laos, Malaysia, Mongolia, New Zealand, North Korea, Philippines, Singapore, South Korea, Taiwan, Thailand, Tonga, Vietnam

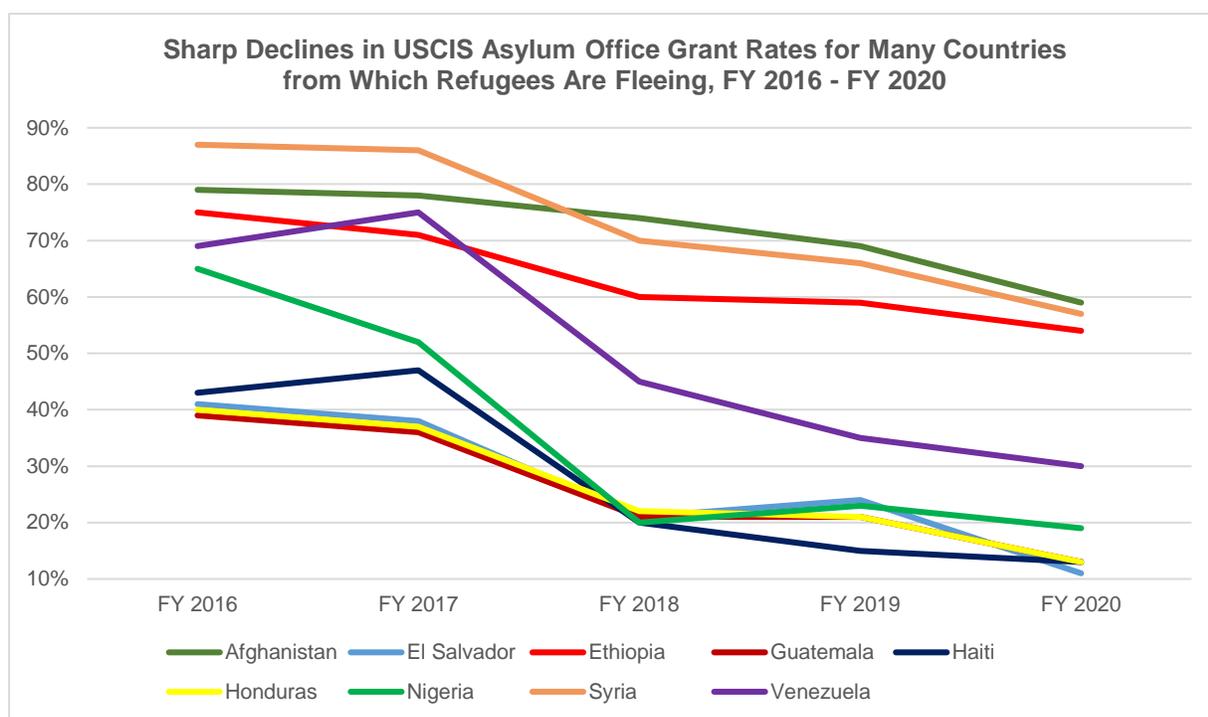
<sup>9</sup> South Asia: Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan, Sri Lanka

<sup>10</sup> Central and South America: Argentina, Belize, Bolivia, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, Venezuela

## Asylum Grant Rates for Countries from Which Many Refugees Are Fleeing Dropped Significantly Under the Trump Administration

The FOIA records obtained by Human Rights First reveal drastic drops in asylum office asylum grant rates during the Trump administration for countries from which many refugees are fleeing. As Table 2 below shows, by FY 2020, the last full fiscal year of the Trump administration, asylum office asylum grant rates had plummeted compared to FY 2016 (the last full fiscal year of the Obama administration), including:

- **El Salvador — 73 percent drop** (from 41 percent grant rate to 11 percent)
- **Nigeria — 71 percent drop** (from 65 percent grant rate to 19 percent)
- **Haiti — 70 percent drop** (from 43 percent grant rate to 13 percent)
- **Honduras — 68 percent drop** (from 40 percent grant rate to 13 percent)
- **Guatemala — 67 percent drop** (from 39 percent grant rate to 13 percent)
- **Venezuela — 57 percent drop** (from 69 percent grant rate to 13 percent)
- **Syria — 35 percent drop** (from 87 percent grant rate to 52 percent)
- **Ethiopia — 28 percent drop** (from 75 percent grant rate to 47 percent)
- **Afghanistan — 25 percent drop** (from 79 percent grant rate to 54 percent)



Source: USCIS asylum adjudications FOIA [records](#)

Some grant rates fell even further in FY 2021. For example, **only 10 percent of Haitian asylum seekers were granted asylum by the asylum office in the first eight months of FY 2021**, based on the data Human Rights First received through FOIA. The asylum office grant rate for Egyptian asylum seekers fell by ten percentage points in FY 2021 compared to the prior year. For some other countries, asylum office grant rates appeared to begin to stabilize in the first part of FY 2021.

**Table 2: During the Trump Administration Asylum Office Grant Rates Dropped Significantly for Many Countries from Which Refugees Are Fleeing**

Nationality	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021*
Afghanistan	79%	78%	74%	69%	59%	65%
Cameroon	49%	72%	48%	55%	51%	52%
China	43%	45%	38%	42%	48%	37%
Egypt	81%	85%	75%	81%	79%	69%
El Salvador	41%	38%	21%	24%	11%	18%
Eritrea	92%	84%	79%	84%	87%	69%
Ethiopia	75%	71%	60%	59%	54%	65%
Guatemala	39%	36%	21%	21%	13%	25%
Haiti	43%	47%	20%	15%	13%	10%
Honduras	40%	37%	22%	21%	13%	28%
Jamaica	84%	80%	62%	80%	70%	74%
Nicaragua	44%	41%	21%	38%	44%	38%
Nigeria	65%	52%	20%	23%	19%	26%
Syria	87%	86%	70%	66%	57%	55%
Turkey	62%	48%	65%	84%	87%	83%
Uganda	62%	60%	45%	33%	43%	69%
Venezuela	69%	75%	45%	35%	30%	32%

Source: USCIS asylum adjudications FOIA [records](#); \* thru May 27, 2021

Sharp declines in asylum office grant rates occurred even as human rights violations continued or, in many cases, significantly worsened in these countries. For example:

- **Cameroon:** Asylum office grant rates for Cameroon have hovered at fifty percent for years despite grave, widespread human rights abuses that have driven many to flee the country. The U.S. State Department’s 2021 human rights [report](#) on Cameroon documented mass killing of civilians by the Cameroonian military, abductions and disappearance of opposition activists, and widespread torture by government officials. In April 2022, the Department of Homeland Security (DHS) designated Cameroonians in the United States for Temporary Protected Status (TPS), [citing](#) “extreme violence perpetrated by government forced and armed separatists, and a rise in attacks led by Boko Haram.” In contrast to the asylum office, immigration court judges have in many cases recognized the dire human rights situation in the country, granting asylum protection to [82 percent](#) of Cameroonian asylum seekers in removal proceedings during FY 2021.
- **Haiti:** Even as the U.S. government has repeatedly acknowledged the political and other violence forcing refugees to flee Haiti, the asylum office grant rate for Haitian asylum seekers has continued to plummet, as Table 2 shows. For instance, the 2020 U.S. State Department human rights [report](#) on Haiti recorded that “sexual assault and rape continued to be a serious and pervasive societal problem” and that “police condoned violence against lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals.” The 2021 [report](#) concluded that “gangs believed to have ties to the government” attacked journalists and “issued threats against antigovernmental protestors.” In 2021, the same year that the asylum office granted only 10 percent of Haitian asylum applications, DHS designated Haitians in the United States for TPS, [acknowledging](#) that Haiti is currently “grappling with a deteriorating political crisis, violence, and a staggering increase in human rights abuses,” including “violations and abuses of international human rights, including some involving the alleged use of deadly forces against protestors and reported arbitrary arrests and detentions.” By way of comparison, in 2021, Canada’s refugee service [recognized](#) 54 percent of Haitian asylum seekers as qualifying for refugee protection.
- **Eritrea:** In the first eight months of FY 2021, asylum office grant rates for Eritreans declined drastically to 69 percent — far below the average 85 percent grant rate between FY 2016 and FY 2020. The U.S. State

Department's 2021 human rights [report](#) on Eritrea found grave human rights violations including “execution, rape, and torture of civilians” by the Eritrean Defense Forces and an “unknown number” of disappearances of “persons detained for political and religious beliefs, journalists, and individuals suspected of evading national service and militia duties.” The [report](#) additionally found that Eritreans, including children, are subjected to forced conscription into the human-rights abusing military with “forcible roundup[s] of students and young persons around the country.”

- Venezuela:** The more than 50 percent decline in asylum office grant rates for Venezuela between FY 2016 and FY 2020 stands in stark contrast to contemporaneous U.S. government reports of serious and escalating human rights abuses in the country. For example, the U.S. State Department's 2020 human rights [report](#) on Venezuela expressed grave concern over the “regime’s practice of trying civilians under the military justice system for protests” and documented at least “753 enforced disappearances of political detainees between 2018 and June 2020.” The report also found that women in Venezuela are subjected to “forced labor and sexual servitude” at the hands of criminal groups as well as sexual abuse by regime authorities. In March 2021, DHS [designated](#) Venezuelans in the United States for TPS, citing “human rights abuses and repression” and “the deterioration of democratic institutions and threats to freedom of speech.” In contrast to the low asylum office protection rates for Venezuelans seeking asylum in the United States, Canada [granted](#) refugee protection to 84 percent of Venezuelan asylum cases in 2021.

The vast majority of these cases could and should have been resolved at the asylum office. **Sixty-seven percent of cases referred from the asylum office and decided by the immigration courts in FY 2021 resulted in [grants](#) of asylum**, according to government data analyzed by the Syracuse University Transactional Records Access Clearinghouse (TRAC). Asylum seekers from some countries referred by the asylum office to immigration court and decided in FY 2021 had even higher asylum grants rates, including Cameroon (80 percent), China (82 percent), Ethiopia (85 percent), Eritrea (97 percent), and Venezuela (70 percent). These needless asylum office [referrals](#) leave refugees who are ultimately granted asylum in limbo — often left separated from their spouse and children who may remain stranded abroad in danger and waiting years for adversarial immigration court hearings that can [compound](#) trauma and anxiety. Unnecessary court proceedings waste limited immigration court resources and further strain many asylum seekers’ limited financial means, as those who are unable to find the limited pro bono legal [representation](#) that is currently available often struggle to pay for private counsel to assist them at the asylum office and again in immigration court.

### Major Disparities in Grant Rates Among Asylum Offices Persist

The USCIS asylum office data also shows that existing disparities in grant rates between asylum offices widened during the Trump administration and that grant rates in some offices dropped precipitously.

**Table 3: Asylum Office Grant Rates Have Long Varied Significantly Nationwide**

Asylum Office	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021*
San Francisco	75%	61%	48%	58%	50%	47%
Los Angeles	63%	53%	40%	40%	49%	38%
Newark	47%	25%	21%	29%	28%	34%
Arlington	46%	37%	28%	19%	19%	40%
New Orleans	40%	51%	62%	54%	34%	42%
Chicago	35%	36%	37%	44%	29%	37%
Miami	35%	28%	25%	14%	19%	14%
Houston	46%	33%	25%	32%	19%	17%
Boston	27%	20%	12%	18%	20%	8%
New York	18%	13%	10%	9%	5%	7%
<b>Average</b>	<b>44%</b>	<b>36%</b>	<b>29%</b>	<b>29%</b>	<b>28%</b>	<b>28%</b>

Source: USCIS asylum adjudications FOIA [records](#); \* thru May 27, 2021

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As noted in Table 3 (above), **the New York asylum office average grant rate for FY 2017 to FY 2020 was six times lower than the San Francisco asylum office** (9 percent versus 54 percent) based on Human Rights First's analysis of the USCIS FOIA [data](#). That inter-office grant rate discrepancy has doubled since the period of FY 2010 to FY 2014 when the New York asylum office grant rate was three times lower than San Francisco (20 percent versus 69 percent), according to [USCIS](#). Indeed, **the New York asylum office's shockingly low five percent grant rate in FY 2020 was more than five-and-a-half times lower than the national average of 28 percent that year**. In addition, in FY 2021 (through May 2021), the Boston asylum office grant rate dropped to just 8 percent — nearly four times lower than the national average. These findings confirm the results of a recent [study](#) by the Refugee and Human Rights Clinic at the University of Maine School of Law, Immigrant Legal Advocacy Project, and the ACLU of Maine that found a falling and “disproportionally low” grant rate at the Boston asylum office.

The USCIS data confirms that **grant rates for people fleeing the same country differ greatly depending on the asylum office deciding the case**, as Table 4 (below) shows. Asylum seekers whose cases could have been resolved by the asylum office are arbitrarily referred to immigration court as a result of the asylum office with jurisdiction over the individual's application. For instance, in FY 2020:

- the **Boston asylum office** granted asylum in just 4 percent of cases for Haitian asylum seekers — three times lower than the asylum office average grant rate and far below the grant rates of the Arlington (63 percent), Houston (25 percent), Los Angeles (33 percent), New Orleans (29 percent), and San Francisco (33 percent) asylum offices;
- the **Houston asylum office** did not grant ANY of the 14 asylum applications of Nicaraguans it decided in FY 2020 compared to the national asylum office average of 44 percent — which itself is low given widespread political [repression](#) by the current regime against political dissent;
- the **Los Angeles asylum office** granted asylum to just 18 percent of Cameroonian applicants — a rate more than two-and-a-half times less than what is a low 51 percent average asylum office grant rate for Cameroon given the grave human rights violations taking place in the country, as discussed above;
- the **Miami asylum office** approved only 36 percent of Syrian<sup>11</sup> asylum applications in FY 2020, nearly 40 percent lower than the national asylum office average and far below the grant rates of the Newark (81 percent, New York (86 percent) and San Francisco (92 percent) asylum offices; and
- the **New York asylum office's** 11 percent grant rate for Venezuelan applicants was nearly three times less than the absurdly low 30 percent asylum office national average for Venezuela, as discussed above, and its 6 percent asylum grant rate for Chinese applicants<sup>12</sup> in FY 2020 was eight times lower than the asylum office average for Chinese asylum seekers for the year.

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<sup>11</sup> The 2021 U.S. State Department [report](#) on Syria describes significant human rights issues including: “unlawful or arbitrary killings by the regime; forced disappearances by the regime; torture, including torture involving sexual violence, by the regime; harsh and life-threatening prison conditions, including denial of medical care; prolonged arbitrary detention; political prisoners and detainees; . . . punishment of family members for offenses allegedly committed by an individual.”

<sup>12</sup> In its 2021 [report](#) on human rights in China, the U.S. State Department concluded that “[g]enocide and crimes against humanity occurred during the year against predominantly Muslim Uyghurs and members of other ethnic and religious minority groups in Xinjiang” and noted other serious human rights violations including: “forced disappearances by the government; torture by the government; . . . arbitrary detention by the government, including the mass detention of more than one million Uyghurs and members of other predominantly Muslim minority groups in extrajudicial internment camps and an additional two million subjected to daytime-only “re-education” training; political prisoners; . . . serious restrictions on free expression and media, including physical attacks on and criminal prosecution of journalists, lawyers, writers, bloggers, dissidents, petitioners, and others as well as their family members; . . . severe restrictions and suppression of religious freedom; . . . forced sterilization and coerced abortions; . . . violence targeting members of national, racial, and ethnic minority groups.”

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**Table 4: Asylum Grant Rates by Nationality Differed Significantly Across Asylum Offices, FY 2020**

	<b>Cameroon</b>	<b>China</b>	<b>Haiti</b>	<b>Nicaragua</b>	<b>Syria</b>	<b>Venezuela</b>
Arlington	43%	41%	63%	50%	50%	44%
Boston	40%	33%	4%	100%*	53%	13%
Chicago	50%	46%	9%	36%	42%	34%
Houston	41%	21%	25%	0%	53%	16%
Los Angeles	18%	65%	33%	72%	63%	57%
Miami	100%*	18%	14%	34%	36%	23%
Newark	46%	15%	15%	50%	81%	34%
New Orleans	100%	72%	29%	61%	60%	68%
New York	50%*	6%	12%	9%	86%	11%
San Francisco	50%	62%	33%	59%	92%	74%
<b>Average</b>	<b>51%</b>	<b>48%</b>	<b>13%</b>	<b>44%</b>	<b>57%</b>	<b>30%</b>

Source: USCIS asylum adjudications FOIA [records](#); \*Two cases



**“I’m a Prisoner Here”:  
Biden Administration Policies Lock Up Asylum  
Seekers**

April 2022

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## Overview

Today, the United States operates the world’s largest immigration detention system—a system the Biden administration uses to jail people seeking refugee protection. While this administration is not currently detaining families and has [requested](#) a reduction in detention funding, its policy has led the Department of Homeland Security (DHS) to target adult asylum seekers as priorities for detention. DHS has perpetuated a punitive immigration detention system—converting former family detention centers to jail adults and expanding other existing facilities. As the administration restores compliance with U.S. refugee law at the southern U.S. border and ends Trump policy that illegally prevented people from seeking asylum, it should not substitute one rights-violating policy for another. Instead, it should set an example of global leadership by ending mass detention of asylum seekers and providing a true humanitarian welcome to people seeking refugee protection at the border.

Jailing asylum seekers is [inhumane, unnecessary, and wasteful](#). Moreover, the mass detention of asylum seekers violates U.S. legal [obligations](#) under the Refugee Convention and its Protocol. In its [guidelines](#) on the use of detention, the U.N. Refugee Agency (UNHCR) states 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.” As a candidate, President Biden [pledged](#) to eliminate prolonged detention, end the use of for-profit immigration detention centers, and uphold the legal right to seek asylum.

Yet, to date, DHS under the Biden administration has detained tens of thousands of asylum seekers, jailing many in newly opened or expanded facilities or in remote areas where they often face insurmountable barriers to fairly presenting their asylum claims. Among those detained by Immigration and Customs Enforcement (ICE) are torture survivors, political dissidents, student organizers, human rights activists, lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, and survivors of gender-based violence. A young Venezuelan man fleeing death threats for participating in political protests and held in terrible conditions in an ICE jail for five months when Human Rights First met him in December 2021, said: “I’m a prisoner here. I would rather die in my country than be jailed here.”

Since January 2021, the vast majority of asylum seekers jailed by the Biden administration have been people seeking refugee protection after crossing the southern U.S. border – trapped between the administration’s use of Title 42 to turn away most asylum seekers and its use of “[enforcement priorities](#)” against those who are not expelled. The administration has wielded the Title 42 policy, under the pretext of the health risk of COVID-19, to prevent people from requesting asylum at U.S. ports of entry and expel them without access to the U.S. asylum system if they cross the border. Asylum seekers not expelled under Title 42 face yet another gauntlet as DHS treats them as “enforcement priorities” under DHS-[issued memoranda](#) that provide no exception for those seeking asylum in the United States. DHS’s use of detention against asylum seekers has resulted in months-long detention of asylum seekers, separated families seeking refuge together at the border, illegally subjected children to detention in adult facilities, endangered many LGBTQ asylum seekers, and placed people with serious medical conditions at heightened risk during the ongoing COVID-19 pandemic.

Human Rights First and other non-governmental organizations have [repeatedly urged](#) the administration to abandon these inhumane “enforcement priorities” that punish people for requesting asylum. While the administration [announced](#) it will terminate the illegal Title 42 policy by May 23, 2022, DHS’s continued use of the flawed enforcement priorities to jail asylum seekers as more are finally able to access U.S. asylum processes threatens to further entrench and expand the mass detention of people seeking refugee protection.

U.S. law provides DHS [legal authority](#) to parole asylum seekers to pursue their cases in communities in the United States rather than continuing to jail them. But because Biden administration policy effectively labels asylum seekers as enforcement “priorities,” ICE has frequently denied or delayed their release. Asylum seekers from Black-majority countries have been subjected to discriminatory parole denials and treatment by ICE officers as well as disparate bond denials and astronomical bond amounts imposed by immigration court judges.

The Biden administration must alter course, stop jailing asylum seekers and treating them as enforcement “priorities,” use its legal authority to release them, and dismantle the unfixable U.S. immigration detention system that violates human rights law. In doing so, the administration should shift to proven case support programs run by community-based organizations and not to so-called “alternatives to detention” that rely on punitive and intrusive electronic surveillance or effectively place asylum seekers under [house arrest](#).<sup>1</sup> Human Rights First’s full recommendations can be found at the end of this report.

This report is based on information about 270 asylum seekers and immigrants held in detention, including direct interviews with 76, information received from dozens of attorneys and detention center visitation programs, DHS data, government records received through the Freedom of Information Act (FOIA), and visits to three ICE detention centers where researchers spoke with detained individuals and ICE officials. Requests to visit five additional facilities were denied by ICE. Human Rights First interviewed or received information from asylum seekers, attorneys, and other monitors related to asylum seekers and immigrants held at 49 facilities in Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Texas, Virginia, and Washington. The report is also informed by Human Rights First’s decades of experience providing pro bono representation to asylum seekers, including those held in immigration detention, and its prior research and reporting on U.S. detention and parole of asylum seekers, including reports issued in [August 2015](#), [July 2016](#), [February 2018](#), [June 2018](#), and [January 2019](#). A full description of Human Rights First’s research methodology is included at the end of this report.

## Key Findings

- **Since President Biden took office, ICE has incarcerated tens of thousands of asylum seekers in jails instead of allowing them to pursue their cases while living safely with their U.S. families and communities.** These asylum seekers likely include many of the [66,775](#) asylum seekers referred for credible fear interviews (CFIs)—the preliminary screening in the asylum process for individuals subjected to expedited removal by DHS—as well as other asylum seekers placed directly into immigration court removal proceedings without a CFI who were sent to immigration jails during this period.
- **DHS has detained asylum seekers from Angola, Benin, Burkina Faso, Burundi, Cameroon, Colombia, China, Cuba, Democratic Republic of the Congo, El Salvador, Guatemala, Guinea, Haiti, Honduras, Mauritania, Mexico, Nicaragua, Nigeria, Russia, Senegal, Somalia, Sudan, Togo, Ukraine, Uzbekistan, Venezuela, and other countries.** They include: a Sudanese asylum seeker whose family members were murdered in the Darfur genocide; a Haitian political activist who fled after receiving death threats for his political opposition work; a Venezuelan asylum seeker who was abducted and beaten

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<sup>1</sup> DHS is currently subjecting over [200,000](#) migrants and asylum seekers to intrusive electronic surveillance—including ankle shackles—rather than enrolling them in proven community-based case support programs.

by Venezuelan government agents; and a Nicaraguan political activist whose stepchildren had already been granted asylum in the United States.

- **DHS’s mass jailing of asylum seekers is the result of Biden administration policy that designates people who cross the border—a population that includes asylum seekers—as a “threat to border security” and a priority for enforcement.** The vast majority of people jailed by ICE under the Biden administration—[85.4](#) percent of the 179,054 detained in fiscal year (FY) 2022 to date—were transferred from Customs and Border Protection (CBP) custody, many of whom were seeking asylum. In December 2021, an ICE officer confirmed to Human Rights First that ICE jails people who come to the border pursuant to the enforcement priorities guidance. ICE officers have also denied asylum seekers release from detention by citing the “border security” enforcement priority. Thus, despite laws and treaties designed to protect people seeking refuge, DHS treats people seeking asylum as priorities for apprehension and deportation.
- **The Biden administration’s enforcement priorities have fueled prolonged, months-long detention of people seeking safety in the United States.** Asylum seekers tracked by Human Rights First were jailed on average for approximately 3.7 months after coming to the United States to seek asylum since President Biden took office, with 20 out of 120 (for whom researchers received information about detention length) held between 6 and 10 months. As some remained detained after Human Rights First’s interview, the average time these asylum seekers were incarcerated is even longer. Asylum seekers subjected to prolonged jailing by the Biden administration include: a Nicaraguan asylum seeker detained for three months and denied parole as a “border security” enforcement priority; a Venezuelan asylum seeker living with HIV imprisoned for nearly five months; and an Angolan human rights defender detained for eight months even though his wife and children are living in the United States pursuing their asylum claims.
- **ICE has continued to detain some asylum seekers who request asylum at U.S. ports of entry, including some [Ukrainian](#) and [Russian](#) asylum seekers who waited to be processed at the port of entry, apparently targeting them as enforcement priorities.** DHS’s arbitrary jailing of asylum seekers including those processed at ports of entry underscores the urgent need for official policy designating asylum seekers as priorities for protection to avoid their improper detention. DHS has long [failed](#) to comply with a 2009 [parole directive](#) that instructs the release from detention of asylum seekers processed at ports of entry who establish a credible fear of persecution and meet other criteria and the agency has continued to unnecessarily delay release or impose absurd release requirements on asylum seekers covered by the parole directive.
- **DHS refuses to exercise its legal authority to parole many asylum seekers including those who establish a credible fear of persecution.** They include: a Congolese asylum seeker incarcerated for six months despite a positive credible fear determination; a Yemeni asylum seeker detained for five months after establishing credible fear; and a young LGBTQ Cuban man jailed for more than two months after he was found to have a credible fear of persecution. While the total number of asylum seekers detained after receiving positive fear determinations has declined significantly in recent months, [government data reveals that asylum seekers in ICE detention who established a fear of persecution have been jailed for an average of 10.75 months \(326.8 days\)](#), as of late-March 2022. Erroneous negative determinations and months-long delays in conducting fear interviews have prolonged detention for many others.

- **Black asylum seekers have been subjected to longer periods in detention and discriminatory parole determinations.** Asylum seekers from Black-majority countries who came to the United States to seek protection since President Biden took office and for whom Human Rights First researchers were able to track detention periods were detained on average for nearly 4.3 months—27 percent longer than asylum seekers from non-Black majority countries tracked by Human Rights First. Black asylum seekers reported racist statements by ICE officers, including that Africans were not released because they are “inferior.” Asylum seekers and attorneys also reported that ICE imposed harsher release requirements on Black asylum seekers, such as demanding additional documentation from sponsors, and targeted Haitians for detention over asylum seekers of other nationalities. In one instance, ICE officers explicitly stated that they had been instructed to release Cubans, Nicaraguans, and Venezuelans to create additional detention bed space while ICE was simultaneously detaining large numbers of Haitian asylum seekers and migrants at the same facility. Black asylum seekers denied release for months include an LGBTQ Ghanaian asylum seeker living with HIV who had established a credible fear of persecution and a Congolese political activist and torture survivor who was detained for three months after establishing a credible fear of persecution.
- **Black asylum seekers and immigrants have been subjected to horrific anti-Black abuse and mistreatment in ICE detention.** ICE officers cut off Black people’s hair worn in braids or locks, an affront to dignity and physical integrity with a racially-disparate impact. Human Rights First also received reports of racist statements and attacks by ICE and detention center staff, including comparing a Black immigrant’s work folding laundry to how “[he] and [his] family got whipped back in the day,” a statement about lynching Black detained individuals, and a violent assault by a guard who said, “Fuck Black people” and shoved a Cameroonian immigrant to the ground.
- **Asylum seekers eligible to request bond in immigration court are forced to pay outrageous, unaffordable amounts, prolonging detention if they are unable to pay.** Immigration court data obtained by Human Rights First through FOIA shows that **the average bond amount set by immigration judges for asylum seekers in FY 2021 (through mid-August 2021) was \$9,711, with bonds as high as \$75,000 and \$100,000.** The bond data reflects that Black asylum seekers face discrimination. Immigration judges were over 27 percent more likely to deny bond to Haitian asylum seekers compared to others and set bond amounts for Haitian asylum seekers at nearly double the average bond for other asylum seekers.
- **DHS has separated families by jailing asylum-seeking parents and other family members.** Families separated by the administration’s detention of asylum seekers include: an asylum-seeking Cameroonian couple separated and detained in different ICE jails even though the wife was pregnant; a young Honduran asylum seeker separated from his wife and sick baby, who suffers from seizures and hydrocephalus; and a Brazilian asylum seeker separated from his wife and infant daughter when they sought protection together at the border.
- **DHS has detained many vulnerable asylum seekers in the wake of the Biden administration’s enforcement priorities policy, including children incarcerated in adult facilities in violation of U.S. law, transgender asylum seekers held in facilities where they face serious risks, and people living with HIV/AIDS and other serious health conditions.** Multiple minor children have been illegally held in adult detention facilities even though they presented documentation of their age. Detained LGBTQ asylum seekers are particularly at risk of violence and abuse in ICE detention. In some cases, LGBTQ asylum seekers have received negative fear determinations because they were afraid to disclose their sexual

orientation. For instance, a gay Angolan activist feared that such disclosure would further endanger his life after he had already been threatened and harassed in detention by people who called him homophobic slurs. Detention of asylum seekers with HIV/AIDS and other serious health conditions further endangers lives. A Venezuelan asylum seeker died of complications from AIDS and COVID-19 after five months in detention.

- **By sending people seeking asylum to immigration jails, the Biden administration unjustly forces many to undergo asylum hearings or credible fear interviews without legal representation—drastically undermining their ability to prove their cases.** ICE under the Biden administration has jailed thousands of asylum seekers in remote facilities in southern states, where the Trump administration drastically [expanded](#) ICE detention. Many facilities are located hours from major cities and have some of the [lowest](#) attorney availability rates in the country. As of April 2022, immigrants and asylum seekers in ICE detention with pending cases are [two-and-a-half times](#) less likely to be represented by counsel compared to individuals who have been released from detention. While the administration has taken [steps](#) to [close](#) and reduce immigration detention at some facilities in southern states, it has also taken steps to [expand](#) detention in the region. In FY 2022 to date, [25 percent](#) of all detained individuals have been held by ICE in Georgia, Louisiana, and Mississippi. For example, DHS has conducted thousands of credible fear interviews—including for asylum seekers from Angola, Haiti, Nicaragua, Senegal, and Venezuela—at the Adams County Detention Center in Mississippi, which is located far from legal services providers and does not even have a program to provide basic legal information. As a result, many asylum seekers undergoing CFIs at Adams have received erroneous negative credible fear determinations.
- **Immigration judges set arbitrary, accelerated deadlines that detained asylum seekers, particularly those without legal representation, cannot meet, resulting in orders of removal.** Asylum seekers jailed without access to legal or interpretation help have been ordered deported because they were unable to complete the complex and technical asylum application in English by the short deadline—sometimes just two weeks—set by an immigration judge. A Senegalese asylum seeker was ordered deported in a court decision stating that the Internet should have been used to complete the form, an assertion rendered even more absurd by the fact that the man’s native language, Wolof, is not available on Google Translate. Other asylum seekers, including a Haitian political activist, were deemed not credible and ordered removed in part because of minor inconsistencies in the asylum application, which they had struggled to complete without English fluency.
- **Some asylum seekers forced to undergo the flawed expedited removal process while jailed have been [illegally](#) deported without receiving CFIs or ordered removed through plainly erroneous negative fear determinations.** ICE officers have blatantly disregarded detained asylum seekers’ statements that they feared return to their home country. They include a young Honduran asylum seeker held in solitary confinement immediately before his deportation in an apparent attempt by ICE to bar him from obtaining legal assistance and a Nicaraguan political activist who repeatedly informed ICE orally and in writing that he feared return to Nicaragua. Detention exacerbates the fundamental flaws of expedited removal by subjecting asylum seekers to horrendous conditions of confinement, pushing them to undergo credible fear interviews without adequate interpretation, and cutting them off from legal representation and information. Many African asylum seekers, for whom DHS failed to provide proper interpretation during credible fear interviews, have received erroneous negative determinations, including a Guinean torture survivor denied interpretation in his native language, a 19-year-old Ivorian asylum seeker who was kidnapped and tortured, and an Angolan political activist forced to conduct his credible fear interview in French even though it neither his native language nor the official language of Angola.

- **Many asylum seekers held in U.S. detention centers have reported sexual, physical, and verbal abuse, punitive use of solitary confinement, denials of basic necessities, and medical neglect.** Reports of horrific abuse and mistreatment include: an asylum seeker thrown into solitary confinement, without clothing, after a suicide attempt, and denied access to a shower, toilet paper, and a toothbrush for 21 days; a Mexican transgender asylum seeker who was sexually assaulted and, for his own safety was forced to request to be held in near 24-hour lockdown in solitary confinement; and a Brazilian asylum seeker who was verbally abused by a therapist when he sought mental healthcare. Unsafe and unsanitary living conditions in a detention center in New Mexico—where ICE detains many asylum seekers—are so dire that in March 2022, the DHS Office of Inspector General (OIG) [urged](#) the immediate removal of all detained individuals from the facility. When Human Rights First toured ICE jails in Louisiana in December 2021, detained people reported that they had been forced to clean and paint just days prior to Human Rights First’s arrival and were instructed to tell the human rights researchers that conditions were “good.”
- **The COVID-19 pandemic has compounded the deadly dangers of immigration detention, which the Biden administration has exacerbated by ignoring the *Fraihat v. ICE* court [order](#) to release medically vulnerable people from immigration detention.** ICE has continued to detain many asylum seekers at severe risk should they contract COVID-19, including people with serious heart problems, high blood pressure, HIV, cancer, epilepsy, traumatic brain injury, liver disease, sickle cell disease, and severe mental illness.

## Jailing Asylum Seekers

*“We came here to a country of law, but I found my brothers in tears . . . to be locked away . . . that takes a toll on your wellbeing. I don’t know what to say. I did not expect this.”*

- Asylum seeker from Benin detained in 2021 by ICE at the Winn Correctional Center

*“I feel very bad. I’m a prisoner here. I would rather die in my country than be jailed here.”*

- Venezuelan asylum seeker, fleeing death threats for participating in political protests in Venezuela, incarcerated by ICE for at least five months in 2021, including at the Winn Correctional Center.

*“They chained me, my hands, my waist, my legs. It was the first time I got arrested. I was afraid. I didn’t know what to do . . . I would pray that God would send someone to come and help me and take me away from there.”*

- Ghanaian asylum seeker detained for over three months by ICE in the Aurora Detention Center in 2021

Since January 2021, the Biden administration has needlessly jailed tens of thousands of asylum seekers in ICE detention facilities. **Human Rights First’s research identified asylum seekers detained by DHS during the Biden administration from Afghanistan, Angola, Bangladesh, Belize, Benin, Burkina Faso, Cameroon, Colombia, China, Cuba, Democratic Republic of the Congo, El Salvador, Guatemala, Guinea, Haiti, Honduras, India, Iran, Iraq, Mali, Mauritania, Mexico, Nicaragua, Nigeria, Panama, Russia, Senegal, Sierra Leone, Somalia, Sudan, Togo, Ukraine, Uzbekistan, Venezuela, and other countries.** They include refugees fleeing political persecution and torture by repressive regimes, heinous gender-based violence, attacks by powerful non-state groups, brutal targeting because of their race, sexual orientation, or gender identity, and other persecution that puts their lives at risk should they be forced to return to their countries.

Government data confirms that **tens of thousands of asylum seekers have been incarcerated since President Biden took office.** While DHS does not regularly provide the total number of asylum seekers jailed

in ICE detention facilities, between February 1, 2021 and March 31, 2022, over 66,000 people were referred for credible fear interviews—the preliminary screening in the asylum process for individuals subjected to expedited removal by DHS. [45,168](#) asylum seekers were found to have a credible fear of persecution. [Historically](#), fear screenings have nearly always [occurred](#) in [detention](#). Many asylum seekers are also detained without being placed into expedited removal, meaning that the true number of asylum seekers jailed by ICE is likely much higher.

#### **ICE’s continued failure to release data and information on detained asylum seekers**

Despite requirements adopted by Congress decades ago, the U.S. government fails to provide information to the public on the detention of asylum seekers. The [Haitian Refugee Immigration Fairness Act](#) (HRIFA) of 1998 requires ICE to produce and provide to Congress annual reports on the detention of asylum seekers. However, the last publicly available HRIFA report covers FY 2014. In 2019, Human Rights First requested copies of the FY 2015 to FY 2018 reports under a provision of HRIFA that provides that these reports “shall be made available to members of the public upon request.” ICE claimed that “no records responsive to your request were found,” which Human Rights First successfully appealed administratively in 2020. In late February 2022, ICE produced the FY [2015](#), [2016](#), and [2017](#) HRIFA reports but did not provide the requested FY 2018 report. No other recent HRIFA reports have been publicly posted. As a result, recent data on the detention of asylum seekers in the United States remains limited.

DHS uses its flawed “[enforcement](#)” priorities (discussed below) to jail many asylum seekers, while the agency has also expelled a large percentage of people who attempt to seek asylum at the southern border under the Title 42 policy (now slated for termination by May 23, 2022) and to return some to Mexico under the Remain in Mexico policy. Recent analysis of government data by the [American Immigration Council](#) found that one in three individuals not subject to rapid expulsion/deportation at the border has been incarcerated in an ICE detention center under the Biden administration.

As the Biden administration has continued to wield immigration detention against asylum seekers, UNHCR has [repeatedly reiterated](#) that asylum seekers should generally not be detained, that detention should not be imposed in ways that violate international human rights law, and that governments should use [alternatives](#), such as [case management](#) programs, when processing asylum seekers.<sup>2</sup> In January 2022, UNHCR [recommended](#) that **“the U.S. government eliminate its reliance on detention of asylum seekers—adults, families, and children—and reduce detention of this population to the greatest extent possible by amending its detention framework to comply with international legal standards.”**

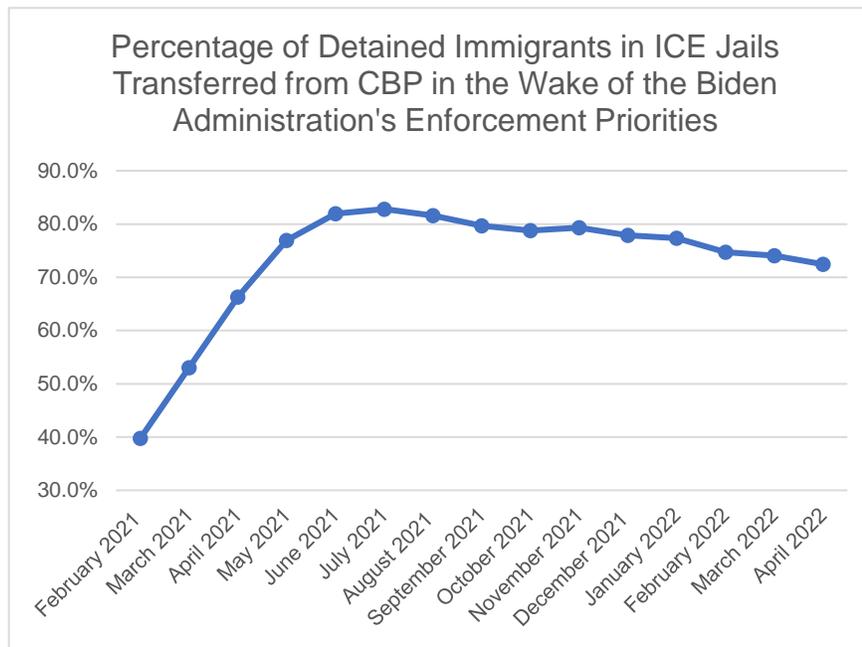
**The detention of asylum seekers is unjustifiable and financially wasteful.** Studies have [repeatedly confirmed](#) that asylum seekers overwhelmingly appear for hearings after release from DHS custody, rendering the use of costly and harmful immigration detention unnecessary to ensure future appearance. When asylum seekers are represented by counsel appearance rates are even higher. A 2021 [study](#) found that 96 percent of non-detained immigrants represented by a lawyer attended all of their hearings from FY 2008 to 2018. Detention is also fiscally wasteful. Community-based case support initiatives are far less costly, as well as more humane and effective. For instance, Lutheran Immigration and Refugee Services ran a community-based case management [program](#) for immigrants released from ICE custody from January 2012 to December 2015, which

<sup>2</sup> International refugee and human rights law limits on the imposition of detention are discussed in the Appendix to this report.

cost on average \$24 a day per individual and resulted in a 97 percent appearance rate in immigration court. Detention, on the other hand, costs approximately [\\$134](#) a day per adult. A family case management program piloted by DHS from January 2016 to June 2017 demonstrated high levels of [success](#), including a 99 percent appearance rate for hearings. This program costs about [\\$36](#) a day per family.

## I. Enforcement Priorities Targeting People Seeking Protection at the Border

The Biden administration is using flawed “enforcement” priorities that continue the failed approach of past administrations by targeting people requesting protection in the United States and lead to mass detention of asylum seekers.



Since February 2021, DHS has wielded the Biden administration’s flawed enforcement priorities to treat asylum seekers as enforcement priorities and jail them for prolonged periods. DHS’s September 2021 enforcement priorities [guidance](#), which followed similar February 2021 [interim guidance](#), targets virtually all asylum seekers who request protection after crossing or attempting to cross the southern border. It labels as a “border security” enforcement priority people who cross the U.S. border without authorization on or after November 1, 2020 or who are “apprehended at the border or port of entry while attempting to unlawfully enter the United States.”

Source: [ICE Detention Management](#), “Average Daily Population” FY 2021 & 2022

DHS also apparently treats as enforcement priorities some people who request asylum at ports of entry and are processed into the United States, subsequently jailing them in ICE facilities, including some [Russian](#) and [Ukrainian](#) asylum seekers who recently requested safety at the border. In March 2022, a legal service provider in Louisiana received reports of approximately 40 to 50 Ukrainian asylum seekers transferred from the border and detained in Louisiana. The organization spoke with multiple Ukrainian asylum-seeking women jailed there who stated that they were processed at a port of entry after requesting protection and transferred to ICE detention without explanation.

For many, crossing the border is the only way to seek asylum due to the Biden administration’s failure to fully restore [access](#) to asylum, including at U.S. ports of entry. But asylum seekers forced to undertake dangerous crossings between ports of entry to attempt to seek safety are treated as enforcement priorities for detention<sup>3</sup>

<sup>3</sup> While the DHS enforcement priorities do not explicitly reference detention, ICE uses the enforcement priorities to set *detention* priorities as well. For instance, during a tour of the Winn Correctional Center in December 2021, an ICE officer confirmed to Human Rights First that ICE detains people according to the September 2021 guidance, which the officer indicated covers “most border arrivals” as a detention priority.

and deportation. Human and immigrants’ rights groups have [repeatedly warned](#) that this punitive framework seriously harms people seeking protection in the United States and penalizes refugees for crossing a border to seek protection in violation of U.S. obligations under Article 31 of the [Refugee Convention](#).

**The enforcement priorities result in the jailing of individuals recently encountered at or near the border, many of whom are asylum seekers.** As of April 13, 2022, [85.4](#) percent of the 179,054 people booked into ICE detention centers in FY 2022 had been transferred from CBP custody, according to government data that reflects the total number of asylum seekers and migrants booked into ICE custody. Government data on the average number of people in ICE detention centers also shows that the vast majority of people held by ICE during the Biden administration were in CBP custody prior to incarceration by ICE. Between February 2021 and mid-April 2022, people transferred from CBP custody have comprised 75 percent of the average number of people jailed in ICE detention centers, based on Human Rights First analysis of U.S. government [data](#) (see graph above).

These CBP transfers have contributed to the rising number of people in immigration detention. As of mid-April 2022, [19,129](#) people were jailed in ICE prisons—30 percent higher than at the start of the Biden administration when approximately [14,715](#) immigrants were in ICE custody as of mid-January 2021.

The United States has long employed a flawed enforcement framework that has fueled the mass detention of asylum seekers. In 2014, the Obama administration issued a set of [priorities](#) for the apprehension, detention, and removal of immigrants, which targeted individuals “apprehended at the border or ports of entry while attempting to unlawfully enter the United States.” While the policy included potential exemptions from detention—at least on paper—for people with physical or mental illnesses, caretakers, people who have a disability, the elderly, pregnant or nursing persons, and individuals whose detention is not otherwise in the public interest, it [led](#) to the widespread and prolonged detention of asylum seekers requesting safety at the border. The Trump administration rescinded this guidance and issued an [Executive Order](#) in 2017 directing DHS to allocate all available resources to construct and operate detention facilities and to incarcerate immigrants for the duration of their court proceedings—leading DHS to target all categories of asylum seekers and immigrants for detention, which further [escalated](#) mass detention of asylum seekers and [led](#) to record high rates of detention.

People jailed under the Biden administration’s enforcement priorities include many who had requested asylum in the United States as the “border security” category does not include an exception for asylum seekers. It also fails to exempt other vulnerable individuals based on age, sexual orientation, gender identity, or medical and mental health issues. The Biden administration, however, did separately issue policy [guidance](#) in July 2021 directing ICE not to detain people who are pregnant, postpartum, or nursing except in exceptional circumstances—reinstating and expanding an Obama-era [presumption](#) against the detention of pregnant people that had been [rescinded](#) under the Trump administration. DHS also issued [guidance](#) in August 2021 instructing ICE not to detain and deport victims or witnesses of crimes who are collaborating with law enforcement, absent extraordinary circumstances. On April 12, 2022, the administration issued [guidance](#) regarding the detention, monitoring, identification, transfer, and release of people with serious mental disorders or conditions, which has yet to be widely implemented.

Detention and enforcement-oriented policies [do not achieve](#) their stated goal of deterrence because asylum seekers are fleeing their countries to save their lives. The Biden administration should learn from the mistakes of its predecessors and instead embrace a framework of humanitarian protection and dismantle the unfixable U.S. immigration detention system.

**A. Prolonging Detention**

ICE has subjected asylum seekers to inhumane and prolonged incarceration, including through its application and interpretation of the administration’s flawed enforcement priorities. Asylum seekers interviewed by Human Rights First were jailed up to nine months after seeking protection at the border during the Biden administration. The 120 asylum seekers who came to the United States to seek safety since President Biden took office and for whom Human Rights First researchers were able to track detention periods were detained on average for approximately 3.7 months after seeking asylum, with 20 of them held between 6 and 10 months. As some remained detained after interview, the average time jailed is even longer.

Attorneys, advocates, and asylum seekers reported that Black asylum seekers, including those who have received a positive fear determination, were detained for longer periods. Of the asylum seekers for whom Human Rights First tracked length of detention, asylum seekers from Black-majority countries who entered the United States to seek protection during the Biden administration were detained on average for nearly 4.3 months—27 percent longer than asylum seekers from non-Black majority countries tracked by Human Rights First.

Prolonged detention results from numerous factors including application of the “priorities” paradigm, enormous months-long delays in administering CFIs for asylum seekers placed in expedited removal, erroneous negative fear determinations, and long delays in releasing asylum seekers found to have a credible fear of persecution. While the number of asylum seekers who remain detained after receiving positive fear determinations has declined significantly, government [data](#) confirms that asylum seekers currently in ICE detention who established a fear of persecution have been jailed for **10.75 months (326.8 days)** on average, as of late-March 2022.

Asylum seekers who have been treated as enforcement priorities and subjected to needless, prolonged detention during the Biden administration include:

- **DHS detained a Nicaraguan asylum seeker for three-and-a-half months after he crossed the border even though his wife has a pending asylum application and two of his stepchildren have already been granted asylum.** The man’s wife and stepchildren, who are represented by Human Rights First, previously fled Nicaragua to escape political persecution by the Nicaraguan government because of their participation in public demonstrations and their provision of supplies to protesters. ICE finally released him in August 2021 without conducting a CFI.
- **For eight months, DHS detained an Angolan political activist even though his family, who managed to flee the country before him, were already pursuing asylum in the United States.** The man’s wife had earlier fled to the United States with their children after she was raped in Angola due to her husband’s protests against government human rights violations. At the time he came to the border to seek protection in spring 2021, the man’s family was living in Maine and pursuing their asylum claims. He told Human Rights First that rather than permitting him to reunite with his family, ICE kept him incarcerated until December 2021 in a Louisiana detention center, where he suffered from high blood pressure and severe headaches.
- **DHS detained a Guinean political activist for four-and-a-half months, including three-and-a-half months after he received a positive credible fear determination.** The man fled Guinea after government forces detained and beat him for mobilizing people in his neighborhood and coordinating political meetings to oppose the president’s bid for a third term in office. His father collapsed and later died shortly after witnessing his son’s arrest. While the asylum seeker was coping with this trauma, ICE incarcerated him in Louisiana and Mississippi ICE detention facilities until August 2021.

- **An asylum seeker from Burkina Faso was detained for eight months after seeking protection in April 2021, even though the leader of an organization in New Jersey had offered to sponsor<sup>4</sup> and support him.** The man told Human Rights First that he fled his country to escape attacks by Islamic militant groups and has been unable to communicate with his family to learn if they survived, which causes him constant fear and trauma. While detained, he suffered from ulcers, depression, and insomnia. Even though he had a sponsor and suffered from health conditions, ICE initially denied his parole request, claiming he was a flight risk, and did not release him until December 2021.
- **A 21-year-old Venezuelan medical student seeking asylum was detained for two months by DHS even though he had multiple U.S. citizen sponsors.** He had previously studied in the United States through an exchange program funded by the U.S. Department of State. After he sought protection at the border in November 2021, ICE detained him in the Moshannon Valley Processing Center, a new immigration detention facility opened by the Biden administration. He told Human Rights First: “I used to cry . . . there were a lot of people there [in detention], good people . . . I googled it and every day of my staying in a detention center was approximately \$140 a day. That is around \$8,000 paid for by people’s taxes.” ICE continued to jail him until an immigration judge granted bond.
- **DHS detained a Senegalese asylum seeker for nine months and denied three parole requests that he filed.** His detention was needlessly prolonged by the flawed credible fear process. In June 2021, the asylum office erroneously decided that the man, who had been beaten and threatened with death for converting to Christianity, did not have a credible fear of persecution. He told Human Rights First while imprisoned: “I left Senegal not because I wanted to. I was trying to save my life. I thought when I came here that my life would be safe . . . here, I cry at night. They call me to eat, and I cannot eat because of the stress and the pain I feel inside.”
- **DHS detained a Venezuelan asylum seeker, who had been kidnapped and beaten by Venezuelan government agents, for nearly two months even though her husband has Temporary Protected Status (TPS) in the United States.** She reported to Human Rights First that being jailed at the Stewart Detention Center exacerbated the trauma she had experienced while detained in Venezuela: “I would cry and cry and cry . . . I had a lot of fear and tried not to get close to the [immigration detention center] guards. I tried my best not to upset them.” In October 2021, ICE released the woman without a CFI after she managed to secure an attorney, Sally Santiago with Abogados Para Hispanos, to request her release.
- **A gay Senegalese asylum seeker was incarcerated for five months, including in Mississippi and Louisiana ICE detention centers.** He spent three months waiting for a CFI. Even after he established a credible fear of persecution in July 2021, ICE did not release him for another two months. He told Human Rights First: “We were just there, sitting and waiting for months, as prisoners.”
- **ICE detained a Haitian asylum seeker for three months including in Mississippi and Louisiana after he sought protection at the southern border.** He had fled Haiti after receiving death threats for campaigning to elect an opposition candidate. He told Human Rights First: “It was a very difficult situation in all the detention centers I went through. They treated us inhumanely. They told us that we were all

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<sup>4</sup> While an asylum seeker is [not required](#) to have a “sponsor”—an individual able to receive and support the asylum seeker—to be released from detention, ICE typically does not release detained individuals unless they have a sponsor. However, ICE also routinely refuses, often without explanation, to release asylum seekers who have a U.S. citizen or permanent resident sponsor ready to receive and support them.

criminals for coming here.” He reported that ICE denied him and others outdoor [recreation](#) for weeks. He was finally released in July 2021.

## **B. Separating Families**

The Biden administration rightly [condemned](#) the horrific family separations under the Trump administration and has [taken steps](#) to reunite some families separated during the prior administration. Yet, the administration’s enforcement priorities and use of immigration detention have separated other families who sought protection together at the border after President Biden took office.

DHS separates asylum-seeking families by detaining family members in different parts of the country or arbitrarily detaining some family members while allowing others to pursue asylum claims in the community. Although DHS is not currently detaining children under 18 with their parents or guardians in family detention centers, the agency has separated minor children from one parent (nearly always fathers) to detain the adult. For instance, the Refugee and Immigrant Center for Education and Legal Services (RAICES) told Human Rights First that under the Biden administration DHS has separated dozens of families seeking protection at the border and detained one of the parents in the South Texas ICE Processing Center in Pearsall, Texas, sometimes for months. DHS has also torn apart families seeking protection at the border who do not meet the agency’s narrow [definition](#) of “family,” which is limited to minor children accompanied by an adult parent or legal guardian.

The impact of family separations is often severe. In the context of the Trump administration’s family separation policy, [medical experts](#) concluded that family separation can amount to torture for children and their parents and causes long-lasting psychological harm. In January 2022, UNHCR [recommended](#) that the Biden administration implement a presumption of family unity that “contemplates allowing both parents and all children (minor and adult) to be processed together since, for example, even separation from one parent while remaining with the other can be traumatic to a child.” A federal court has [held](#) that the Trump administration’s family separation policy violated the right to family integrity as protected by the Due Process Clause of the U.S. Constitution.

Some of the asylum-seeking families—as defined by DHS—who have been separated during the Biden administration include:

- **In July 2021, DHS separated a Guatemalan asylum seeker from his wife and two young daughters when they tried to request protection together at the U.S. border.** The family fled Guatemala after receiving death threats in retaliation for working with the police to enable the arrest of a high-level leader of a powerful gang. According to RAICES, ICE detained the man, who suffers from diabetes, in a Texas detention center, where he nearly fainted because he was not provided with an appropriate diet to meet his medical needs. ICE continued to refuse to release him for months after an immigration judge determined that he has a reasonable fear of persecution.
- **In early August 2021, DHS separated a 21-year-old Honduran asylum seeker from his wife and sick baby, who suffers from hydrocephalus and seizures, and detained the man at the Northwest ICE Processing Center in Washington.** CBP released the wife and child, who relocated to Virginia to continue their asylum case. The man remained detained one-and-a-half months later, according to the Northwest Immigrant Rights Project.
- **DHS separated a Brazilian asylum seeker from his wife and infant daughter when they sought refuge at the U.S.-Mexico border in June 2021.** Even though they had arrived together, ICE sent the man to the Kandiyohi County Jail in Minnesota, where he was detained until September 2021, according

to The Advocates for Human Rights. His wife and baby received parole and were allowed to continue to pursue their asylum case in the community.

DHS has used detention to tear apart other family members, including separating children from non-parent caregivers, adult children from parents, and spouses and partners, including LGBTQ couples, who sought protection together. For instance:

- **In 2021, DHS separated a five-year-old Central American boy from his mother’s partner, who raised him and had a Power of Attorney for the child, when they entered the United States to seek protection.** DHS detained the man and transferred his terrified child to an Office of Refugee Resettlement (ORR) facility for unaccompanied children in Texas, where he remained alone for months because his mother lives in Central America, according to a legal services organization.
- **Around summer 2021, DHS separated a Cameroonian man from his pregnant wife when they sought protection at the border.** ICE detained the husband at the Aurora Detention Facility in Colorado while detaining the pregnant woman in multiple ICE facilities in Louisiana and Georgia. He was released in July after he established a credible fear of persecution, according to a legal services organization.
- **In September 2021, DHS separated an LGBTQ Russian asylum seeker from his partner and detained him for weeks at La Palma Correctional Center in Arizona.** After the pair requested protection together at a California port of entry, DHS inexplicably detained the man while granting parole to the man’s partner to continue the asylum process in the United States, according to Immigration Equality.
- **A 20-year-old asylum seeker from the Ivory Coast was separated by DHS from his 16-year-old brother when they sought protection together at the southern border and subsequently deported in September 2021.** The 20-year-old brother received a negative credible fear determination after unfairly being forced to undergo a CFI in French, which was not his best or native language. The 16-year-old brother, who has no other family in the United States, was held in ORR custody while his older brother and only caretaker was detained in Mississippi and Louisiana until his deportation, according to a detention visitation program advocate who spoke with both brothers.
- **In June 2021, DHS separated a Venezuelan asylum seeker from his wife when they entered the United States near Yuma, Arizona to seek protection.** ICE detained the man in the Kandiyohi County Jail in Minnesota, where he remained detained as of September 2021 while his wife was living in a community in Utah pursuing her asylum claim, according to The Advocates for Human Rights.
- **DHS separated a 22-year-old Cuban asylum seeker from his mother in late February 2021 when they entered the United States in California to request protection, detaining him for over three months.** Even after he established a credible fear of persecution in late March 2021, ICE continued to detain the young man in the Otay Mesa Detention Center until June 2021. He was released weeks after his attorney at Human Rights First filed a parole request.

### **C. Detaining Children for Months in Adult Facilities**

Human Rights First received multiple reports of children under 18 [illegally](#) jailed in adult ICE detention centers. These children have been subjected to hostile interrogations about their age by CBP officers who claim their birth certificates and other documents are fraudulent, according to their attorneys and media [reports](#). DHS has forced some children to undergo traumatic CFIs in violation of U.S. [law](#), which exempts unaccompanied children from expedited removal. Children have been subjected to [invasive medical testing](#) purportedly to establish their

age and to solitary confinement in ICE detention. U.S. law [requires](#) that the government transfer unaccompanied children to ORR custody and to allow them to apply for asylum. Some of the children illegally detained alone in adult facilities during the Biden administration include:

- **In April 2021, ICE illegally imprisoned for over three months a 13-year-old Guinean asylum seeker after he sought protection at the border and presented his birth certificate to CBP to confirm his age.** ICE officers forced the boy to undergo invasive dental examinations and bone age testing to confirm his age and persisted in claiming that he was an adult even after receiving a copy of the boy’s passport and a declaration from a U.S. citizen relative corroborating his age. ICE locked the child in a small isolation cell in the medical unit for at least a week, according to his attorneys at the Southeast Immigrant Freedom Initiative. During an illegal CFI in June 2021, an asylum officer found the child’s statements about his age credible but nonetheless proceeded with the interview and issued a negative determination.
- **In September 2021, DHS separated a 16-year-old [Nicaraguan child](#) from his parents when the family sought asylum at the border near Eagle Pass, Texas, and jailed him alone in adult ICE detention facilities in Mississippi and Louisiana for one-and-a-half months.** CBP officers ripped up the boy’s birth certificate, interrogated him about his age, threatened to imprison him for 10 years, and forced him to sign a document stating that he was 18. At the Pine Prairie ICE Processing Center, ICE held the boy in an isolation cell for 18 days. He told *Telemundo News*: “To spend 24 hours in there, locked up, with the doors locked, without going out. It was terrible. There was no hope of leaving that place.”
- **In July 2021, ICE wrongly transferred a Nicaraguan child to the Aurora Detention Facility from ORR custody.** DHS claimed that the boy was 21 years old and that his birth certificate, which demonstrated that he was under 18, was fraudulent. With the assistance of an attorney, the child was released from immigration detention, according to a legal services organization.

In addition, the Biden administration has detained many young adults rather than allowing them to live in safety with their families as they apply for asylum together. U.S. law permits asylum applicants to include in their asylum application children under 21. Separating and detaining children who could be included in a parent’s asylum request creates inefficiencies, as immigration courts must adjudicate cases separately, and makes it more difficult for the young person to obtain crucial information and evidence from family members who often have a better understanding of the circumstances for the family’s flight. **In addition, scientific [evidence](#) confirms that children’s brains are not fully mature at age 18 and continue to develop well into their 20s, which can further disadvantage young asylum seekers forced to proceed without their parents.**

Young asylum seekers separated from their families and/or unnecessarily detained under the Biden administration include:

- **In November 2021, DHS separated an 18-year-old Cuban teenager from his parents and younger sister when they sought protection together at the border.** While the rest of his family was paroled, DHS transferred the child to the Moshannon Valley Processing Center—a new immigration detention center opened by the Biden administration in Pennsylvania—placed him in removal proceedings and jailed him for over two months. ICE only released him in February 2022 after his attorney at Aldea PJC submitted a parole request.
- **In late February 2022, DHS separated an 18-year-old Colombian child from her parents and younger sibling when they sought protection together at the border and detained her in the Berks County Residential Center.** After nearly a month in detention, an immigration judge set a \$4,500 bond for her release, according to her attorney at Aldea PJC.

- **DHS separated a 19-year-old Venezuelan asylum seeker from her parents and younger brother in May 2021, who were paroled into the United States to apply for asylum.** ICE then detained her for nearly two months at the Imperial Regional Detention Facility. The family fled Venezuela after the young woman was kidnapped and beaten by Venezuelan government agents and her brother murdered because of the family’s political opposition work. DHS denied a request for parole filed by her attorney in June 2021, according to Adam Howard, who assisted in representing her.
- **In June 2021, DHS [separated](#) a young man who had just turned 18 from his father and detained them in different facilities for three months.** Though the father established a credible fear of persecution, DHS attempted to deport the man’s son to the country they had fled and only released the young man to reunite with his father in mid-September 2021—one day prior to his scheduled deportation—after repeated legal intervention and advocacy by attorneys at Aldea PJC.
- **Around April 2021, DHS detained for five months an 18-year-old Brazilian youth seeking asylum in the United States.** ICE denied his parole request based on flight risk due to “lack of community ties” even though his mother, who lives in Massachusetts, and a U.S. citizen uncle were ready to receive him. DHS affirmed the decision without explanation after the Southeast Immigrant Freedom Initiative requested review of the parole denial through the ICE case review process. While detained at the River Correctional Center, the child learned that his father had been murdered in Brazil. ICE finally released him after the Southeast Immigrant Freedom Initiative submitted three separate release requests.

#### **D. Jailing Lesbian, Gay, Bisexual, Transgender, and Queer Asylum Seekers**

Under its flawed enforcement priorities, which effectively treat asylum seekers as detention priorities and do not contain exemptions for sexual orientation or gender identity, the Biden administration has detained many LGBTQ asylum seekers for months in ICE detention centers where they are particularly vulnerable to violence. [Studies](#) confirm that detained LGBTQ persons are 97 times more likely to experience sexual assault and abuse than non-LGBTQ individuals. Transgender people face a high risk of [violence](#), discrimination, and medical neglect in ICE detention, which has resulted in multiple recent [deaths](#). DHS has [long recognized](#) that detained LGBTQ people have “special vulnerabilities” based on sexual orientation and gender identity and issued [guidance](#) on release of transgender individuals. Yet despite a February 2021 [memorandum](#) committing to “protect the human rights of lesbian, gay, bisexual, and transgender persons everywhere,” the Biden administration continues to detain LGBTQ people, including asylum seekers who request protection at the border.

Some LGBTQ asylum seekers detained under the Biden administration include:

- **DHS detained a Honduran transgender asylum seeker in the Otay Mesa Detention Center for two months even though he had been granted an exemption to the Title 42 policy and paroled into the United States at a port of entry in August 2021.** When he informed DHS officers that he was transgender and requested gender-affirming hormone therapy, the officers insisted—in violation of [federal regulations](#) and ICE [guidance](#)—that he was not transgender because he had not had gender-affirming surgery. Weeks after he received a positive credible fear determination, ICE set his bond at an exorbitant \$10,000, which he could not pay and was only secured through a community bond fund, according to the Transgender Law Center.
- **In spring 2021, ICE detained a Ghanaian bisexual asylum seeker, who had survived heinous anti-LGBTQ violence in Ghana, for over two months, including for two weeks after passing a CFI.** The man fled Ghana after he was brutally assaulted and survived an assassination attempt where he was

hung from a tree for his sexuality. He was detained in La Palma Correctional Center waiting for a CFI. ICE did not release him after he received a positive credible fear determination. He remained incarcerated until an immigration judge granted bond, according to the Transgender Law Center.

- **In fall 2021, ICE detained multiple Jamaican transgender women for months in La Palma Correctional Center and Eloy Detention Center after they sought protection in the United States.** The Transgender Law Center reported that the women were subjected to months of traumatic and unnecessary detention before they received CFIs, which confirmed their fear of persecution.

As of mid-April 2022, ICE [reported](#) that 12 transgender people were detained in its custody. However, attorneys told Human Right First that ICE undercounts detained transgender people, in part, because it disregards individuals’ stated gender identity and because many fear that identifying as transgender could mark them for additional violence.

#### **E. Endangering Asylum Seekers Living with HIV/AIDS and Other Serious Health Conditions**

The Biden administration has not issued guidance limiting detention of people living with HIV/AIDS or other serious physical medical conditions. This failure is particularly concerning given widespread and well-documented medical [neglect](#) in immigration detention as well as the heightened risk of serious illness and death such individuals face from COVID-19. On April 12, 2022, the administration issued [guidance](#) regarding the detention, monitoring, identification, transfer, and release of people with serious mental disorders or conditions, but concerns remain that DHS will continue to detain and refuse to release people with mental health conditions.

Since January 2021, ICE has detained people with heart conditions, high blood pressure, traumatic brain injuries, cancer, diabetes, liver diseases, respiratory conditions, autoimmune diseases, and mental illness, according to the Civil Rights Education and Enforcement Center (CREEC), which operates a hotline to monitor enforcement of the [injunction](#) in *Fraihat v. ICE*. The injunction requires ICE to identify and track all detained people with one or more risk factors for COVID-19 and to determine whether these individuals should be released, regardless of the outcome of any parole, bond, or habeas requests.

Asylum seekers living with HIV/AIDS detained under the Biden administration’s enforcement priorities include:

- **[Pablo Sánchez](#), a Venezuelan asylum seeker diagnosed with AIDS, died in October 2021 in ICE custody five months after he sought protection near Del Rio, Texas.** Despite awareness of his medical condition, ICE continued to incarcerate Sánchez in a Mississippi detention center as his health deteriorated. He died of complications from acute respiratory and kidney failure, AIDS, pneumonia, anemia, and COVID-19 after [reportedly](#) suffering medical neglect while detained.
- **ICE detained for nearly five months a Venezuelan asylum seeker living with HIV and repeatedly denied his requests for release pursuant to the *Fraihat* injunction, claiming that he is a flight risk.** ICE confiscated his HIV medication after detaining him, and the man spent around five days without access to medication before the facility replaced it, according to his attorney at Immigration Equality. ICE finally released him in February 2022 after his attorney requested review of the release request denial through the ICE Case Review Process.
- **In fall 2021, DHS detained for nearly two months a Jamaican asylum seeker living with HIV in La Palma Correctional Center in Arizona even though his partner, a U.S. citizen, was ready to sponsor him.** DHS officials confiscated his HIV medication, and detention center medical staff failed to provide him HIV medication for over a month despite him repeatedly alerting medical staff that he needed treatment and had blood in his urine. He told Human Rights First: “The doctors kept saying they would check. They

finally took a blood sample for HIV. They didn’t seem to believe me. No result came back, so I kept sending requests through the tablet asking for the status of my blood test, but nobody came to tell me.” When the facility finally provided medication, it caused serious side effects—including nose bleeds, blood in his urine and stool, dizziness, and lumps in his ear and groin—whereas the medication they had confiscated had not had these effects.

- **A Cuban asylum seeker living with HIV was detained by ICE from April to July 2021 at La Palma Correctional Center and denied access to HIV medication.** Despite sending around nine requests for treatment to medical staff, he reported to his attorney at Immigration Equality that he did not receive HIV medication for at least two-and-a-half months. Due to enormous delays in scheduling CFIs, he waited months for a CFI and was released without having received one.

Other asylum seekers with serious medical conditions detained by DHS include:

- **ICE detained, mistreated, and humiliated a Nicaraguan asylum seeker who suffered vaginal bleeding for over two months at the Stewart Detention Center in spring and summer 2021.** The woman believed she had been pregnant and suffered a miscarriage in custody, but ICE claimed that she had never been pregnant and had a psychological condition. For weeks, ICE failed to provide a medical evaluation necessary to determine the cause of the bleeding, according to a physician who examined her records, and did not provide a psychological evaluation or treatment. Attorney Sally Santiago with Abogados Para Hispanos reported that the woman, who was experiencing heavy bleeding, had to show detention center guards her used bloody pads or soiled clothing to receive new sanitary products.
- **In May 2021, ICE detained a Venezuelan asylum seeker suffering complications from a recent miscarriage that had occurred when she was eight months pregnant.** The government detained her after she sought protection at the border and held her at the Richwood Correctional Center in Louisiana, where she was detained for two-and-a-half months until her release in August 2021, according to the Southeast Immigrant Freedom Initiative.
- **In summer 2021, a Turkish asylum seeker who suffered a heart attack shortly after entering the United States near El Paso to request protection was removed from the hospital by DHS and detained for over a month.** Despite being aware of his condition, ICE incarcerated him until Casey Mangan, an attorney at Innovation Law Lab, applied for his release from ICE custody.
- **From August to November 2021, ICE detained a Nicaraguan asylum seeker suffering from heavy menstrual bleeding and green vaginal discharge without providing any specialized gynecological care.** ICE denied her attorney’s release requests on the basis that there was a “high likelihood” she would be deported in the near future. The woman’s case had not yet been heard by an immigration judge at the time, according to Sally Santiago with Abogados Para Hispanos.

## Refusing Release

*“I lost all my family. I don’t have a wife. I don’t have kids. I came here for protection and peace. It was a lot of stress to be in detention. It was very hard.”*

- Congolese asylum seeker refused release by ICE and detained at the Winn Correctional Center for six months in 2021 despite receiving a positive fear determination

*“I can’t sleep. I have nightmares. The memories of everything I went through while [detained] there remain very vivid.”*

- Venezuelan asylum seeker detained by ICE for two months in 2021 at the Imperial Regional Detention Facility, including for one-and-a-half months after receiving a positive credible fear determination

*“We are discriminated against . . . we are kept in detention and watch them release others . . . we don’t understand what’s going on. Our letters to DHS are without response . . . we cannot sleep, doors banging all the time . . . and it’s always cold.”*

- Asylum seeker from Cote d’Ivoire detained by ICE at the Winn Correctional Center for over three months in 2021

Despite its [legal authority](#) to allow people seeking protection to pursue their asylum cases while staying with family and community in the United States, DHS has chosen to detain and refused to release on parole many of the asylum seekers that it has not otherwise expelled through Title 42 or its restart of Remain in Mexico. ICE often denies release in rote or highly delayed decisions, including to asylum seekers found to have a credible fear of persecution and individuals granted protection by an immigration judge. In some instances, it has denied release to asylum seekers by stating that they are a “border security” enforcement priority. ICE’s seemingly arbitrary release practices raise significant questions of disparate treatment of Black asylum seekers and create significant confusion among asylum seekers and attorneys. The continued refusal by DHS to use existing release authority has resulted in the needless and prolonged jailing of people seeking protection in the United States—as discussed in detail above.

## **II. Parole Undermined and Denied to Asylum Seekers**

**Under U.S. law, DHS has authority to release asylum seekers and immigrants from detention.** DHS may exercise its parole authority so that people can live in U.S. communities while they wait for their immigration court hearings, regardless of whether they sought protection at an official port of entry or entered the United States between ports of entry to request safety. Under 8 U.S.C. § 1182(d)(5)(A), the government may release asylum seekers and other immigrants from its custody on “parole” for urgent humanitarian reasons or for significant public benefit, regardless of the manner that they entered the United States. Additionally, under 8 U.S.C. § 1226(a), the government may grant “conditional parole” to certain asylum seekers and immigrants if they [do not pose](#) a flight risk or danger to the community.

A 2009 DHS [directive](#) additionally instructs ICE that asylum seekers who “arrive” at a port of entry and are found to have a credible fear of persecution are to be paroled from detention in the public interest so long as the individual’s “identity is sufficiently established, the [asylum seeker] poses neither a flight risk nor a danger to the community, and no additional factors weigh against release.” The parole directive was issued in the wake of numerous [reports](#) that had documented the often lengthy, inconsistent, unnecessary, and costly detention of asylum seekers in the United States, as well as a series of reports issued by the bipartisan [U.S. Commission on International Religious Freedom](#).

### **A. Border Policies Thwart Release Under Parole Directive**

The already limited effect of the 2009 parole directive to guide release of asylum seekers has been hobbled by the illegal Trump and Biden administration Title 42 policy. Because DHS has directed U.S. ports of entry to turn away asylum seekers using the Title 42 order, people attempting to seek protection at the border are [forced](#) to

do so by crossing the border.<sup>5</sup> As a result, they are not considered “arriving” and therefore not covered by the provisions of the existing parole directive. **With Title 42 in place, a miniscule number of asylum seekers—only 95—were covered by the parole directive under the Biden administration through mid-March 2022,** according to status reports filed by the government in *Damus*. **This translates to 0.2 percent of asylum seekers who received [positive credible fear determinations](#) since February 2021.**

Even among the very few asylum seekers covered by the parole directive under the Biden administration, some have needlessly suffered in detention because of baseless ICE parole denials and absurd requirements for release, including:

- **In July 2021, the Los Angeles ICE field office initially refused parole to a prominent African human rights activist detained at the Adelanto ICE Processing Center, who was covered by the parole directive, claiming without basis that she might work in the United States without authorization or fail to attend her immigration court hearing.** ICE only released the woman after learning that she was pregnant. But after enduring the trauma of detention, the woman miscarried after release. She had previously miscarried in 2019 while detained by her country’s government because of her political activism. She told Human Rights First, which currently represents her in her asylum case: “I told ICE that I’m a leader in my country, that I’ve been in this country many times sponsored by the U.S. government, and they said they don’t have a reason to parole me out.”
- **A Panamanian asylum seeker fleeing severe domestic violence who sought protection at a U.S. airport and received a positive credible fear determination in May 2021 languished in the Broward Transitional Center for an additional two months while suffering from severe health conditions.** The woman had to be taken to a hospital while detained, where she was diagnosed with severe ovarian cysts and a lung infection. Despite knowing the condition of her health, ICE initially denied a parole request filed by her attorney in July 2021 and later set a needlessly high bond of \$15,000, as a condition of her release, after the attorney requested review of the parole denial to the ICE Case Review Process, according to Americans for Immigrant Justice. After her attorney again challenged the decision through the Case Review Process, ICE paroled her without requiring her to pay the exorbitant bond.
- **ICE imposed arbitrary and onerous conditions on a Mexican asylum seeker jailed in a Colorado detention center eligible for parole under the parole directive.** The woman fled to the United States in April 2021 to escape physical, sexual, and psychological gender-based violence and received a positive credible fear determination in June 2021. Although she had family members in the United States ready to receive her, ICE prolonged her detention by imposing nonsensical conditions for release not required by the parole directive, including demanding proof that her sponsor had paid monthly utility bills before those bills were issued for the month. ICE released her after the sponsor submitted additional documentation, but the woman spent another month in detention due to these unreasonable requirements.

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<sup>5</sup> Many asylum seekers excluded from the parole directive because they were forced to cross the border to seek protection due to Title 42—and other restrictions like metering that limit access to ports of entry—would likely have presented themselves at ports of entry, if not for these restrictions. For example, government data [shows](#) that in FY 2017, 99 percent of the total number of undocumented Cuban and Haitian migrants and asylum seekers encountered at the southern border (at ports of entry and by the U.S. Border Patrol away from ports of entry) had arrived through a port of entry. In contrast, in FY 2021, with asylum access effectively shuttered at ports of entry because of Title 42, just 2 percent of Cubans and 6 percent of Haitians arriving at the southern border were able to arrive through a port of entry.

### **Challenging ICE’s Failures to Parole Asylum Seekers**

ICE has long failed to comply with the parole directive to release qualifying asylum seekers. A July 2016 [report](#) by Human Rights First and [amicus briefs](#) submitted by Human Rights First in litigation about access to bond hearings documented systematic failures to comply with the directive, resulting in prolonged detention of asylum seekers who established a credible fear of persecution. ICE parole logs for 2017 and 2018 received by Human Rights First in 2021 through a FOIA request [confirm](#) that the agency arbitrarily denies release on parole to detained asylum seekers, often exclusively based on unsupported claims that the asylum seeker poses a “flight risk” or on other plainly pretextual or nonsensical bases. **Between mid-July 2018—when the government began providing aggregate data on parole decisions pursuant to the *Damus* litigation—and mid-March 2022, 96 percent of all release denials under the parole directive were based on flight risk**, resulting in the continued detention of over 2,600 asylum seekers.

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 high parole denials in the Detroit, El Paso, Los Angeles, Newark, and Philadelphia ICE field offices, which have jurisdiction over multiple ICE detention centers. At the beginning of 2017, the parole grant rate had dropped to [zero](#) or near-zero in those field offices. By contrast, between 2011 and 2013, the same field offices granted parole to more than [92 percent](#) of arriving asylum seekers who passed a CFI. In July 2018, a federal district court [ordered](#) these ICE field offices to conduct case-by-case review of whether asylum seekers should be released on parole. A federal court [ordered](#) the New Orleans Field Office to provide individualized parole determinations following a May 2019 [suit](#) by the Southern Poverty Law Center and ACLU of Louisiana challenging ICE’s policy of denying nearly all parole requests in that field office. Parole grant rates [rose](#) in some of the covered field offices following the *Damus* court order, but the number of asylum seekers covered by the parole directive fell drastically with the Title 42 policy in place since March 2020.

### **B. Continued Incarceration of Asylum Seekers Found to Have Fears of Persecution**

Under U.S. law, DHS has authority to release asylum seekers found to have a credible fear of persecution regardless of whether they were able to seek protection at a U.S. port of entry. While asylum seekers who enter the United States between ports of entry are not covered by the 2009 parole directive, ICE may still release them from custody under its [humanitarian](#) parole or [conditional](#) parole authority. Yet ICE has denied many of these release requests, leaving asylum seekers needlessly detained for months.

Unrepresented individuals appear especially likely to remain incarcerated after establishing credible fear. The legal services organization *Al Otro Lado* reported that some ICE officers refuse to release asylum seekers with a positive CFI unless they have an attorney who formally requests parole. Attorneys also reported weeks or months of delay in providing asylum seekers decisions following CFIs, further exacerbating prolonged detention.

In June 2021, the percentage of individuals in ICE custody who had *already* established a fear of persecution reached [17 percent](#) of the total average detained population (4,478 of 26,196). While the number and percentage of asylum seekers detained *after* being determined to have a fear of persecution has [declined](#) significantly in recent months, Human Rights First has continued to document cases where asylum seekers who established a credible fear of persecution were detained for an additional 1.5 to 2.5 months after an asylum officer or immigration judge determined that they had a credible fear of persecution. Erroneous credible fear determinations and delays in administering CFIs further prolong detention, as the subsequent sections detail.

Some asylum seekers DHS has detained for prolonged periods after receiving a positive credible fear determination include:

- **DHS repeatedly denied the parole requests of a Yemeni asylum seeker who had established a credible fear of persecution, subjecting him to five months of additional detention.** ICE claimed the man, who had sought protection at the southern border in March 2021, presented a flight risk even though he had sponsors with U.S. permanent residency ready to assist him. The man was also in need of mental health treatment not being provided in detention. After a total of six months in detention, ICE finally released the man after his attorney, Bashir Ghazialam, filed a petition for *habeas corpus*.
- **A Venezuelan asylum seeker was detained for an additional one-and-a-half months at the Imperial Regional Detention Facility after he received a positive credible fear determination in November 2021.** The man, who was unrepresented at the time, was not provided any information on requesting parole and had no contact with the ICE deportation officer assigned to his case until the day before he was finally released. He told Human Rights First: “It’s very stressful because no one gives you answers, no one gives you directions about what to do, even if you have a positive result.”
- **DHS detained a 22-year-old LGBTQ Cuban asylum seeker represented by Human Rights First for more than two months after the asylum office found in March 2021 that he had a credible fear of persecution.** ICE refused to release him from the Otay Mesa Detention Center even though his mother, whom he had been separated from while seeking protection at the border, was ready to sponsor him. The young man was detained for over three months in total.

Following the U.S. Supreme Court’s 2021 decision in [Johnson v. Guzman Chavez](#), ICE has continued to refuse to parole asylum seekers who have established a reasonable fear of persecution and are placed in limited “withholding-only” hearings.<sup>6</sup> Because the Supreme Court held that asylum seekers in withholding-only proceedings are not entitled to bond hearings, ICE’s failure to exercise its parole authority results in indefinite and arbitrary detention, which Human Rights First and other organizations [warned](#) the Biden administration, in the wake of the Supreme Court’s decision, [violates](#) U.S. treaty commitments. People seeking protection in the United States subjected to this improper detention include:

- **For two years ICE detained and refused to parole a 50-year-old Mexican asylum seeker living with AIDS, who was found to have a reasonable fear of persecution.** Under *Guzman Chavez*, because DHS did not place the man in regular removal proceedings where he would have an opportunity to apply for full asylum protection, he is ineligible to request a bond hearing before an immigration judge to challenge his continued incarceration at the Otay Mesa Detention Center. The man reported that he has not received consistent and timely access to medication while detained and remains detained as of early March 2022, according to *Al Otro Lado*.
- **Rodolfo, a Nicaraguan torture survivor who established a reasonable fear of persecution in early October 2021, remained detained as of early April 2022 after over seven months incarcerated.**

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<sup>6</sup> If asylum seekers who have previously been deported enter the United States to seek protection, the government may “reinstate” their prior removal order. However, if the asylum seeker establishes a reasonable fear of persecution, they cannot be deported without a hearing before an immigration judge. The government can choose to place them in “withholding-only” proceedings, barring them from applying for asylum and only permitting them to apply for lesser forms of protection such as withholding of removal and protection under the Convention against Torture. In June 2021, the Supreme Court held in [Johnson v. Guzman Chavez](#) that these asylum seekers could be indefinitely detained without bond hearings, in violation of [U.S. international legal obligations](#) to provide independent review of detention.

Because DHS reinstated a prior removal order against him, he was ineligible for a bond hearing. That removal order was issued when the man had previously sought asylum in the United States but withdrew his asylum application and asked to be deported because his parents had suffered a serious accident in Nicaragua. On return to Nicaragua, he suffered brutal persecution and torture—including by government officials who beat him with a machete and burned him with cigarettes for participating in opposition marches. He has a broken pelvis, spine, and testicle, and as a result has to drain his urine into a bag connected to a catheter. Despite his serious health conditions, the government refused to release him and transferred him to a different detention center in January 2022.

- **ICE detained for 10 months a Honduran asylum seeker who received a positive reasonable fear determination in April 2021 after DHS chose to reinstate removal proceedings.** The man was previously deported through the expedited removal process in 2018, after which he suffered severe persecution including being brutally beaten in Honduras, according to his attorney at Al Otro Lado. He returned to the United States to request protection, but because DHS placed the man in reinstated removal proceedings, he was unable to challenge his continued incarceration before an immigration judge. ICE denied multiple parole requests and did not release him until January 2022.

### **C. Black Asylum Seekers Denied Release**

Widespread delays and denials of parole to asylum seekers from Black-majority countries indicate continued discrimination by ICE officers in custody determinations. Asylum seekers from Black-majority countries who came to the United States to seek protection since President Biden took office and for whom Human Rights First researchers were able to track detention periods were detained on average for nearly 4.3 months—27 percent longer than asylum seekers from non-Black majority countries. A 2020 investigation by the *LA Times* based on reports by lawyers and government data found that “Black and African asylum seekers are less likely than other immigrants to be released on parole or bond.”

Human Rights First received reports of discriminatory statements and disparate treatment by ICE of parole requests for Black asylum seekers:

- **While the Biden administration was detaining large numbers of Haitians at the Torrance County Detention Facility in fall 2021, an ICE deportation officer at the facility told Casey Mangan with Innovation Law Lab that ICE officers at Torrance had been instructed to release all Cubans, Nicaraguans, and Venezuelans** who did not have a criminal history to create additional bed space—a move designed to enable the detention of Black asylum seekers and migrants from Haiti.
- **African asylum seekers detained at the Winn Correctional Center told Human Rights First in December 2021 that ICE appeared to disproportionately deny parole to African asylum seekers.** A Congolese asylum seeker, who had been detained for months, reported that an ICE deportation officer claimed that African asylum seekers were less likely to be released because they are “inferior.” He told Human Rights First that being held in Winn was “hellish.” A Senegalese asylum seeker imprisoned for five months at Winn said: “I see Africans detained eight, nine, ten months. I’ve never seen other nationalities detained that long.”
- **An African asylum seeker detained at the Adelanto ICE Processing Center in summer 2021 witnessed ICE officers imposing discriminatory requirements for release on Black asylum seekers.** She reported to Human Rights First that she observed ICE officers appear to ask non-Black asylum seekers for the phone number of a relative in the United States and release them after calling the

relative, but demand that she and other Black asylum seekers produce extensive sponsorship documentation including utility bills and proof of citizenship of their sponsor to be considered for release.

ICE under the Biden administration has denied parole, or inexplicably delayed release for months, to many asylum seekers from African countries who established a credible fear of persecution, including:

- **ICE detained a Sudanese asylum seeker for four months, including for two months after she established a credible fear of persecution in October 2021.** The woman had fled Sudan after the government imprisoned and tortured her family members, including her father and siblings. She told Human Rights First that when she sought protection at the border with her husband, ICE separated them and jailed them in different facilities.
- **ICE denied the parole request of an LGBTQ Ghanaian asylum seeker living with HIV who had established a credible fear of persecution in July 2021 and had a community sponsor ready to support him.** ICE denied his parole request without explanation, according to his attorney. The man reported that he was not receiving needed HIV medication in detention. As of late September 2021, he remained detained.
- **A Congolese political activist was detained for three months after he received a positive credible fear determination.** The man had been arrested, tortured, and forbidden from working by the Congolese government for participating in political protests. He told Human Rights First that an ICE deportation officer claimed that he would be released within a few days of the positive fear determination, but instead ICE transferred him from the Adams County Detention Center to the Winn Correctional Center, where he languished for another three months until August 2021 without explanation.
- **ICE detained a Guinean political activist for nearly three-and-a-half months after he established a credible fear of persecution in April 2021.** He told Human Rights First that after the fear screening, ICE transferred him from the Adams County Detention Center to the Winn Correctional Center and jailed him for months despite having a sponsor who is a U.S. legal permanent resident ready to receive and support him during his asylum case.
- **In summer 2021, ICE refused to consider for parole a Cameroonian torture survivor who received a positive credible fear determination.** The woman had fled Cameroon after being tortured and raped by the military, according to Americans for Immigrant Justice. Although she had a U.S. citizen sponsor to support her on release, ICE initially refused to consider her request for parole because she did not have an identity document—even though it is not uncommon for asylum seekers to lack identity documents after being forced to flee their countries. After two months detained, ICE released her in August 2021.
- **ICE denied release to a Sudanese asylum seeker for over four months after he established a credible fear of persecution in September 2021.** The man fled Sudan after seven family members were murdered in the Darfur genocide and later sought asylum at the U.S. border. ICE continued to jail him at the Winn Correctional Center despite his requests to be released and documentation submitted by a U.S. citizen relative ready to support him. The man told Human Rights First in December 2021 that he had been scheduled for a final hearing to decide his asylum application before an immigration judge but worried that he could not adequately prepare his case while detained. He said: “I asked my deportation officer if I could be released and follow up on my asylum case from outside. I said, ‘I’m not ready. I have no lawyer’ . . . the officer told me, ‘don’t ask more questions’ . . . I have no other options. They release other people who pass their CFIs.” ICE continued to deny his requests for release and the man was only able to leave detention after an immigration judge set bond at \$20,000, which was paid by a community organization.

- **ICE detained for six months an unrepresented Congolese man who had received a positive fear determination and who was ultimately granted protection under the Convention against Torture while jailed.** He had fled Congo after armed rebel groups murdered his wife and three children. He told Human Rights First: “I lost all my family. I don’t have a wife. I don’t have kids. I came here for protection and peace. It was a lot of stress to be in detention. It was very hard.” ICE refused to release him after the positive fear determination and further prolonged his detention while it decided whether to appeal the judge’s decision to grant him protection, which it ultimately did not. As a result, he was needlessly jailed from April to October 2021.

#### **D. Months-Long Delays in Credible Fear Interviews Prolong Detention**

Months-long delays in administering CFIs, as [documented](#) by a coalition of advocates and organizations, have prolonged the detention of many asylum seekers. ICE often will not release asylum seekers unless they have received a positive credible fear determination despite its [authority](#) to parole asylum seekers awaiting CFIs for humanitarian reasons or in the public interest. Other asylum seekers are detained for months awaiting a credible fear screening, only to have DHS place them into regular removal proceedings without a CFI.

Some of the asylum seekers trapped in the expedited removal process without a meaningful opportunity for release due to delays in CFI scheduling include:

- **A Nicaraguan dissident was jailed by ICE for four months waiting to receive a CFI.** The woman had been attacked at a political protest, fired from her job, stalked, and threatened with being disappeared for her opposition to the government. While detained at the Stewart Detention Center, she suffered severe vaginal bleeding lasting more than 30 days, according to her attorney Sally Santiago with Abogados Para Hispanos. ICE only released her in late August 2021 after four months in detention.
- **ICE detained a bisexual Ghanaian asylum seeker for nearly three months in the Aurora Detention Center before providing a CFI.** Even after he established a credible fear of persecution, ICE prolonged his detention for weeks by conditioning release on payment of \$2,500 in bond. The man told Human Rights First: “I had no one who could pay for me.” A community organization eventually paid the bond, and he was released in August 2021.
- **In June 2021, ICE detained a Salvadoran asylum seeker for two months waiting for a fear screening, which he passed.** The man had been separated by DHS from his wife, two children, and mother when the family sought protection together at the southern border, according to an attorney who spoke with him.
- **A Brazilian asylum seeker was jailed for nearly three months waiting for a fear interview with an asylum officer in which she ultimately established a credible fear of persecution.** The woman had fled gender-based violence in Brazil, where she was threatened with death at gunpoint in front of her daughter, according to an attorney who spoke with her.
- **A Nicaraguan political activist was incarcerated at the Otay Mesa Detention Center for three months waiting for a CFI.** The man had been persecuted by Nicaraguan paramilitaries for participating in anti-government protests. ICE delayed his release for several weeks after he established a credible fear of persecution in October 2021, according to AI Otro Lado.
- **In fall 2021, ICE detained a 52-year-old Nicaraguan asylum seeker suffering from severe chronic pain and depression and forced her to wait over a month for her CFI.** After establishing a credible

fear of persecution, she suffered weeks longer at the Stewart Detention Center before ICE released her, according to Sally Santiago with Abogados Para Hispanos.

In March 2022, the Biden administration published an [Interim Final Rule](#) that, among other changes, amends regulations to recognize DHS’s authority to release asylum seekers during the expedited removal process. Prior regulations issued by DHS purported to limit ICE’s release of asylum seekers in expedited removal to situations of medical emergency or a law enforcement objective. These narrow grounds conflicted with the broad parole authority in 8 U.S.C. § 1182(d)(5)(A) authorizing release of detained asylum seekers for humanitarian reasons or to further the public interest. The rule is a positive step toward aligning regulatory parole authority with DHS’s broad statutory release authority. But ICE’s routine failure to release asylum seekers for months despite its authority to do so makes clear that there must be a presumption of release for all asylum seekers.

#### **E. Rote Denials, Extreme Delays, and Misinformation by ICE Officers**

The government’s review of parole requests has often been inadequate, cursory, or non-existent, sometimes with no decision issued at all. Attorneys and asylum seekers report seemingly automatic denials, delays in responses, falsehoods perpetuated by ICE regarding its release authority, and failures to respond to some release requests altogether. ICE has denied release to asylum seekers based on flight risk without conducting an individualized analysis of whether the person poses any such risk, merely checking a box stating that the person is a flight risk. In some cases, ICE has denied release to asylum seekers by stating that they are a border security enforcement priority—a baseless justification as individuals who are treated as enforcement priorities under the administration’s guidance are still eligible for parole. ICE’s arbitrary denial of release to many asylum seekers, particularly those who are unrepresented, has resulted in prolonged and needless detention.

These practices reinforce the need for regulations and agency guidance that require an individualized justification for denial of release within a reasonable amount of time after receipt of the parole request and confirm the eligibility of asylum seekers and immigrants for release, in line with the statute, as well as the need to establish independent oversight of ICE parole decisions and provide immigration court bond hearings to all asylum seekers and other immigrants.

Some recent denials that exemplify ICE’s failure to provide meaningful consideration of whether an asylum seeker should be released under humanitarian or conditional parole include:

- **In fall 2021, a Senegalese asylum seeker received a conditional parole denial that included another person’s name and immigration registration number and claimed that he was a flight risk without explanation.** When the asylum seeker’s legal representative, Ian Philabaum with Innovation Law Lab, asked for clarification, ICE claimed that the man was a flight risk because there were no urgent humanitarian reasons or significant public benefit justifying release—a circular argument that also failed to address the fact that the man was suffering from kidney problems or that his uncle in the United States had agreed to sponsor him.
- **A Nicaraguan asylum seeker who sought protection after crossing the border in July 2021 was denied release by ICE as a border security enforcement priority.** ICE ignored her parole request for over a month and then denied it in September 2021 even though she had a U.S. citizen ready to sponsor her, her husband is living in the United States, and she suffers from high blood pressure, according to her attorney. In October 2021, she was released after an immigration judge granted bond.
- **An LGBTQ asylum seeker from Central America was detained at the Torrance County Detention Facility and denied parole by ICE in part because he had requested asylum at a port of entry without a visa—even though visas to seek asylum are neither granted nor required to request**

**asylum.** ICE repeatedly denied parole requests filed by his attorney, Casey Mangan with Innovation Law Lab, also claiming that he was a flight risk without any individualized analysis and denying release because he had a non-family member sponsor. He was ultimately jailed for five months.

In other instances, ICE outright disregards parole requests for months before making a decision or does not respond at all. No DHS guidance requires ICE to timely respond to release requests that are not covered by the parole directive. Whereas the parole directive generally [requires](#) ICE to conduct an interview to determine parole eligibility within seven days of the CFI, there is no formal time limit for adjudication of other parole requests. As a result, asylum seekers have languished in detention without decisions on their requests for release, such as:

- **In December 2021, asylum seekers detained at the Winn Correctional Center told Human Rights First that they had been waiting a month or longer to receive a response to parole requests.** Yet during a tour of Winn that same day, an ICE officer claimed to Human Rights First that it typically takes a *few days* to review a parole request.
- **ICE failed to respond for months to the custody redetermination request filed by an attorney in June 2021 for a Brazilian asylum seeker detained at the Plymouth County Correctional Facility.** The man’s son, who was three years old at the time and lives in the United States, has severe hemophilia. The trauma of being separated from his family, including his wife, stepdaughter, and sick son, severely affected his mental health, according to his attorney.

Failure to inform asylum seekers of release options and affirmative misinformation by ICE officers about authority to release people from detention further interferes with the ability of asylum seekers, particularly those who are unrepresented, to request release or challenge denials. Some asylum seekers are unaware that they can request release in the first place, including a Nicaraguan asylum seeker who had already been detained at the Winn Correctional Center for four months when he spoke with Human Rights First in December 2021.

ICE has an affirmative [obligation](#) to inform asylum seekers covered by the parole directive of their eligibility for parole and schedule an interview to determine whether to release them. Its failure to comply with this obligation led Human Rights First and other groups to [sue](#) in 2018 to enforce this obligation. However, there is no guidance requiring ICE to inform asylum seekers not covered by the parole directive of the ability to request parole or to provide instructions regarding submission of parole requests.

While ICE has authority to release asylum seekers under its [humanitarian](#) parole or [conditional](#) parole authority regardless of manner of entry or whether they have received a CFI, ICE officers often provide incorrect information to asylum seekers and their representatives to claim that they cannot consider asylum seekers for release, which prolongs detention, including:

- **Falsely claiming that people who seek protection between ports of entry cannot be paroled.** ICE’s El Paso field office, for example, routinely claims that only “arriving” asylum seekers processed at ports of entry are eligible for parole, according to legal representatives with El Paso Immigration Collaborative.
- **Falsely stating that asylum seekers who establish a credible fear of persecution must wait for non-existent appeals by the government before being considered for parole.** During a tour of the Winn Correctional Center in December 2021, an ICE officer with the New Orleans ICE field office stated to Human Rights First that after asylum seekers receive a positive fear determination, ICE must wait to see if the government appeals the decision before considering the asylum seeker for parole. This is incorrect, as there is no process for appealing or reversing a positive credible fear determination.

- **Falsely stating that people placed into removal proceedings without a CFI are ineligible for any type of parole.** These false statements have resulted in the prolonged incarceration of asylum seekers who have not had credible fear interviews while detained in facilities in New Mexico and El Paso, Texas, according to legal representatives with El Paso Immigration Collaborative.

#### **F. Prolonged Jailing of Asylum Seekers with Long Ties to the United States**

In addition to detaining people who recently entered the United States to seek protection, DHS also continues to incarcerate and deny release to asylum seekers with long ties to the United States and/or U.S. citizen family members. During research focused on DHS detention of adults seeking asylum at the U.S. border, Human Rights First also learned of cases of asylum seekers detained by ICE while living in the United States or after completing a sentence for a criminal conviction. The September 2021 [enforcement priorities](#) include a flawed and undefined category of people deemed by ICE to be a “threat to public safety.” The guidance allows individual ICE officers, who rely on [flawed](#) risk [assessments](#) and often [issue](#) arbitrary and blanket release denials, to make these determinations.

While the enforcement priorities guidance directs ICE officers to assess mitigating factors including lengthy presence in the United States, impact of deportation on U.S. family members, a physical or mental condition requiring care and treatment, and eligibility for humanitarian protection, Human Rights First’s researchers spoke with detained asylum seekers with strong ties to the United States and/or serious health conditions.

- **ICE detained a Mexican asylum seeker who was a baby when his family came to the United States for over three years and continued to refuse him release under the Biden administration.** His family, including his mother and siblings, all live in the United States. He suffers from Post-Traumatic Stress Disorder (PTSD), depression, and a psychotic disorder resulting in auditory hallucinations. Though required to evaluate individuals with severe mental illness for release under the *Fraiht* order, ICE failed to respond to his attorney’s repeated requests from April 2021 to January 2022, which included a declaration, psychological evaluation, and medical records, or to provide a required individualized assessment. The man told Human Rights First: “It’s really inhumane when they keep us here for so many years . . . I don’t know what kind of rulebook they’re going by but it’s really unfair.” ICE continued to ignore the *Fraiht* requests but eventually released him in January 2022.
- **ICE jailed for over six months a Mexican asylum seeker who has lived in the United States for over 20 years and has a son who is a U.S. legal permanent resident.** She told Human Rights First that she is terrified of being deported to Mexico, where her brother and father were murdered in 2021. Having survived ovarian cancer in 2020, she said that she had recently been experiencing severe pain near her ovary for months. Her medical records, which were reviewed by Human Rights First, reflect that in December 2021 she was diagnosed with an ovarian cyst and a ventral hernia and state that she should be referred to surgery, but a month later she had not received any treatment or seen a medical provider. She said: “It’s hard to be sick here . . . I feel so sad because of this pain. I feel it all day. I want to see my son.” As of March 2022, she remained detained.

#### **G. Continued Detention of People Granted Protection, Stateless Persons**

ICE has needlessly prolonged the detention of people granted protection from torture and stateless people who cannot be deported.

DHS has protracted detention by appealing the immigration court’s decision to grant protection and by refusing to release them pending the government’s appeal—in some instances even after the government’s appeal was

dismissed. ICE is [not required](#) to appeal in cases where protection is granted and has [authority](#) to release individuals pending the outcome of an appeal. Indeed, [guidance](#) issued in 2004 and [cited](#) by the Biden administration directs ICE to generally release from detention people who have received asylum, withholding of removal, or protection under the Convention Against Torture even if ICE appeals. Yet government data obtained by [Mother Jones](#) reveals that ICE appealed to the Board of Immigration Appeals (BIA) more than 50 percent of cases where protection was granted between October 2015 and June 2021. Of those, nearly 1,000 asylum seekers remained detained despite having been found to qualify for protection by an immigration judge.

Some of the individuals granted protection by an immigration judge but who have remained detained for prolonged periods under the Biden administration include:

- **[Sara Mendez-Morales](#), an indigenous Guatemalan woman who fled severe gender-based violence in Guatemala, remained incarcerated for nearly seven months after being granted protection under the Convention Against Torture by an immigration judge in early February 2021.** ICE refused to release her until the BIA dismissed the government’s appeal in late August 2021, even though she has two U.S. citizen daughters and is a cancer survivor who did not have access to required medical check-ups while detained.
- **A Salvadoran man who was granted protection under the Convention Against Torture in July 2021 was detained until late March 2022 because DHS refused to release him even after its appeal of the decision was dismissed by the BIA in December 2021.** While incarcerated, the man suffered from health issues including high cholesterol and blood in his stool—for which he was unable to obtain a colonoscopy for four months. He told Human Rights First: “I’ve been depressed and angry, especially during the holidays. I can’t be with my wife. I can’t see her. I can’t spend time with her” His wife and three young stepchildren live in Los Angeles.

The U.S. Supreme Court has [ruled](#) that the U.S. Constitution prohibits indefinite detention of a person who cannot realistically be removed from the United States and that there is no valid immigration purpose for detaining them. Yet, DHS has repeatedly refused to release at least one stateless person, subjecting him to prolonged detention:

- **ICE detained for over one-and-a-half years a stateless man of Congolese parentage who was born in a refugee camp in Rwanda even though there was no reasonable prospect he could be removed.** He spent a year in ICE detention following a September 2020 removal order despite repeated communications from the Rwandan and Congolese embassies that he was not a citizen of either country and could not be deported to either. The man’s repeated letters to ICE headquarters in 2021 went unanswered, and he eventually filed a *pro se* petition for *habeas corpus*. In September 2021, a federal court ordered his release after ICE acknowledged that he could not be deported. He told Human Rights First: “ICE wants to keep people detained. If I did not do a *habeas corpus* petition, I would still be in detention. But other people who are detained can’t file a *habeas corpus* because they don’t speak English. It’s unbelievable. It’s against the Constitution.”

### **III. Widespread Bond Denials and Unfair Determinations**

Immigration court bond hearings are an inadequate safeguard against arbitrary ICE detention—though asylum seekers who initially requested asylum at ports of entry do not even have access to this limited check on ICE detention. When ICE refuses to release an individual who is eligible for a bond hearing or sets an unaffordable bond, the detained person may ask an immigration judge to grant bond or lower the amount set by ICE.

However, bond hearings are [plagued](#) by disparities based on nationality, race, and location of immigration court. Even when bond is granted, amounts set by ICE or immigration courts are often outrageous and unaffordable.

Detained asylum seekers are denied release on bond at extremely high rates, according to [immigration court data](#) Human Rights First received through a FOIA request. Analysis by Human Rights First and a student team from the Human Rights Center Investigations Lab at U.C. Berkeley shows that **for asylum seekers with a pending asylum application<sup>7</sup> who had bond hearings in FY 2021** (through mid-August 2021, the cutoff for the data provided), immigration judges:

- **denied bond in at least 40 percent of cases;<sup>8</sup>**
- **increased the bond amount beyond that set by ICE in 8 percent of cases;**
- **left the bond amount set by ICE unchanged in 7 percent of cases; and**
- **denied reconsideration (“amelioration”) of the court’s prior bond decision in 12.8 percent of cases.**

Thus, in 68 percent of bond hearings for asylum seekers, immigration judges ruled against asylum seekers by denying bond, increasing the bond amount, or refusing to lower the bond amount set by ICE. Some immigration courts set outrageous, unaffordable amounts for asylum seekers. The government data shows that only 32 percent of immigration court bond hearings for asylum seekers with pending asylum applications resulted in bond being set or the bond amount reduced.

The immigration court data obtained by Human Rights First through FOIA shows that **the average bond amount set by immigration judges for asylum seekers in FY 2021** (through mid-August 2021) **was \$9,711, with bonds as high as \$75,000 and \$100,000.**

The immigration court data obtained by Human Rights First further confirms disparate treatment of detained Black asylum seekers.<sup>9</sup>

- **Haitian asylum seekers were 27 percent more likely than other nationalities to be denied bond** (50.6 percent versus 39.8 percent), **nearly twice as likely to have their bond increased beyond the amount ICE set** (15.3 percent versus 7.8 percent), **and 34.2 percent less likely to have bond set** (where previously denied by ICE) **or reduced** (21.2 percent versus 32.2 percent). In 78.8 percent of bond decisions for Haitian asylum seekers, immigration judges denied bond, increased bond, or refused to reduce the bond amount set by ICE.
- **In addition, the average bond set for Haitian asylum seekers by an immigration judge in FY 2021 was \$17,793—nearly double the average bond for other asylum seekers.** Haitian asylum seekers also made up a disparate proportion of asylum seekers with bonds set at \$20,000 or more. While Haitian asylum seekers comprised 3 percent of total bond decisions for people with pending asylum applications, 14.4 percent of bonds set at or over \$20,000 were imposed on Haitian asylum seekers.

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<sup>7</sup> Human Rights First requested bond determinations for all detained individuals with a positive credible fear determination. The Executive Office for Immigration Review, which houses the immigration courts, stated that it does not maintain such data.

<sup>8</sup> These figures and those that follow exclude bond decisions that did not result in an adjudication on the merits of the bond claim, such as in cases where the bond request was withdrawn, the bond decision was rendered moot, or the immigration court did not have jurisdiction.

<sup>9</sup> The figures that follow exclude bond decisions that did not result in an adjudication on the merits of the bond claim, such as in cases where the bond request was withdrawn, the bond decision was rendered moot, or the immigration court did not have jurisdiction.

- **Immigration court judges imposed excessively high bond amounts on many African asylum seekers as well.** For example, asylum seekers from Eritrea, Mauritania, Nigeria, Senegal, Somalia, South Africa, and Togo received bond amounts that were \$20,000 or greater.

The disparate treatment of Black asylum seekers parallels analysis that shows that detained Black immigrants generally are more likely to be denied bond and to receive astronomically high bonds. **According to government [data](#) analyzed by Syracuse University’s Transactional Records Access Clearinghouse (TRAC), in FY 2021, detained Haitians and Jamaicans were twice as likely to be denied bond compared to other nationalities.** Only 14.8 percent of Haitians and 15 percent of Jamaicans were granted bond by an immigration judge compared to 31.4 percent of all other nationalities. Between June 2018 and June 2020, RAICES [reported](#) that immigration bonds for Haitian immigrants were 54 percent higher than those for other immigrants. In FY 2021, immigration court judges set [bond amounts](#) in excess of \$25,000 for 16 percent of Haitian nationals – eight times the rate of other nationalities who received bonds in that range in 2 percent of cases.

## Fueling *Refoulement*

*“Detention beats you psychologically. The way you’re chained. You’re tied up—your arms, legs, and waist. You cannot walk. I was thinking, what did I do wrong? They cut off my hair because I had braids. They told me it was procedure. . . . it eats you up. It beats your mind. And then imagine, with everything you’ve been through, to have your credible fear interview within 48 hours. . . . You are totally unprepared. You’re in a new place. Your mind is not settled. I think it was only three out of 30 of us that passed our CFIs.”*

- Human rights activist from an African country jailed at the Adelanto ICE Processing Center in 2021

*“I was very ill. . . . I had memory loss and felt disoriented and retraumatized by detention, at 54 years of age I had never been detained. I was in shock from the conditions, from being shackled, I remember being in a very cold place and given plastic sheets for covers. . . . I was shell-shocked, we were being mistreated in the country of human rights, it was hard for me to accept.”*

- Angolan asylum seeker fleeing political persecution, who received a negative determination after being forced to undergo a CFI at the Adams County Detention Center in 2021 while sick with COVID-19 and experiencing mental health problems

*“Border Patrol took me to detention . . . it was the worst nightmare that had ever happened to me. They wouldn’t give me a toothbrush for 18 days. It was harsh . . . then I had my credible fear interview around a month later . . . after all that I have gone through, they just give you one interview. After that interview, you are done . . . they deported me in September 2021.”*

- Somali asylum seeker deported through the expedited removal process while detained in 2021 despite apparent eligibility for asylum and redesignation of Somalia for TPS

Incarcerating people in ICE detention centers fuels *refoulement*—illegal deportation of refugees to persecution and torture—because detention diminishes access to counsel, interferes with fundamental due process protections, and exacerbates the fundamental flaws of the expedited removal process. Yet the Biden administration has forced over [3,000](#) people to undergo immigration court hearings on their asylum applications

while in detention and has conducted more than [66,000](#) credible fear interviews, which have typically been carried out in these immigration jails.<sup>10</sup>

Forcing asylum seekers to proceed with their cases in detention creates additional barriers to finding legal counsel and results in other serious due process violations that interfere with the ability of asylum seekers to fairly request and receive refugee protection. In addition, the use of remote detention facilities to jail asylum seekers has further restricted access to legal representation. Additional barriers including the [physical](#) and [psychological harms](#) of detention, lack of access to document translation assistance, arbitrary deadlines set by immigration judges, and limited ability to remotely communicate with attorneys.

The Biden administration’s decision to subject asylum seekers to expedited removal in detention—even though DHS is [not required](#) to use expedited removal—has further exacerbated its [fundamental flaws](#), prevented people seeking protection from applying for asylum, and erroneously returned refugees to life-threatening danger.

### **I. Barriers to Fair Adjudication, Due Process for Detained Asylum Seekers**

Detention impedes many asylum seekers from effectively and fairly presenting their requests for protection. Being detained [limits](#) asylum seekers’ access to legal representation and translation assistance to complete the complex and technical asylum application in English. It inflicts [physical](#) and [psychological](#) harm that impedes asylum seekers’ ability to prepare and present their cases, can [cut off](#) communication with important witnesses and experts as well as access to crucial documents that may serve as evidence in an asylum claim, and [pushes](#) some asylum seekers to abandon their claims rather than continue to endure the trauma of detention.

Immigration judges routinely set arbitrary, accelerated deadlines that detained asylum seekers, particularly those without attorneys, cannot meet, resulting in orders of removal. **For instance, a legal service provider reported that since fall 2021 the Otero Immigration Court has ordered the deportation of at least ten unrepresented detained asylum seekers who were unable to submit their asylum applications within the mandated time.** Immigration court judges have routinely given detained asylum seekers there only two to four weeks after an initial scheduling hearing to complete the asylum application—a technical, 12-page form that is not available in any language other than English. In some instances where asylum seekers were forced to complete their asylum application on their own or with the assistance of another detained individual despite lack of English fluency, immigration judges have ordered them removed in part because of inconsistencies or errors in the asylum application. For example:

- **In July 2021, an immigration court ordered the deportation of a detained, unrepresented Senegalese asylum seeker who does not speak English because he was unable to complete the asylum application within two weeks.** The man, who speaks Wolof and fled Senegal due to religious persecution, was not able to understand or complete the application while detained in New Mexico. The immigration court stated in its decision, which was reviewed by Human Rights First, that not understanding English is “not good cause” for failure to submit the application by the deadline and that the Internet could be used to complete the form. This assertion is rendered even more absurd by the fact that Wolof is not available on Google Translate.

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<sup>10</sup> According to [records received](#) by Human Rights First in response to a FOIA request for annual reports to Congress required under HRIFA, from fiscal year 2015 to fiscal year 2017, 93.8 percent (144,364 of 153,852) of all asylum seekers who underwent credible fear interviews were subjected to ICE detention.

- **In October 2021, a detained and unrepresented Haitian political activist was ordered removed after an immigration court found him not credible in part due to minor inconsistencies in his asylum application, which the court had given him two weeks to complete in English—a language he does not speak.** DHS had detained the man and separated him from his wife when they sought safety in Del Rio, Texas. Unable to access legal services, he completed the application with the assistance of another detained individual with purported English fluency. The man’s attorney at the Las Americas Immigrant Advocacy Center, who is representing him in his appeal, told Human Rights First that the asylum application contained glaring translation errors. However, the immigration judge stated that the asylum seeker’s explanation that he did not understand the application and was forced to rely on an unprofessional translator was a “weak explanation.”

**DHS appears to have intentionally pushed Haitian asylum seekers and migrants through removal proceedings on an even more expedited and unfair timeline while other asylum seekers languished in the same detention center.** In late fall 2021, following DHS’s atrocious treatment of Haitian families and adults who had crossed into the United States near Del Rio, Texas, Haitian asylum seekers at the Torrance County Detention Facility were rushed through immigration court hearings with some [ordered](#) removed within one month. By comparison, Nicaraguan and other asylum seekers at the same facility languished for months before receiving an initial hearing, according to Innovation Law Lab, and slowed even further as the government rushed to deport Haitians detained at Torrance. According to a November 2021 [complaint](#) to the DHS OIG and Office of Civil Rights and Civil Liberties (CRCL), some Haitians [ordered removed](#) reported that they had not understood their right to seek “asylum” because the government failed to provide legal information prior to their hearings in Haitian Kreyol and blocked them from consulting with legal service providers.

[Studies](#) have repeatedly shown that legal [representation](#) ensures that more individuals receive asylum and other immigration [relief](#) that they are [eligible](#) for under U.S. law. Detained people represented by legal counsel are [twice](#) as likely to be granted relief by an immigration judge compared to people in detention without an attorney. **But as of April 2022, immigrants and asylum seekers in ICE detention with pending cases are two-and-a-half times less likely to be represented by counsel compared to individuals who have been released from detention** (27.2 percent versus 67.8 percent), according to government data analyzed by [TRAC](#).

DHS transfers of asylum seekers to remote detention facilities have further limited access to find and retain attorneys who can assist asylum seekers to apply for protection. The use of remote detention facilities—including in Georgia, Louisiana, and Mississippi—to jail asylum seekers requesting protection at the border has forced many to undergo the credible fear process and present their asylum case to an immigration judge without legal representation. Many of these facilities, which [began jailing](#) asylum seekers and immigrants under the Trump administration, are located hours away from major cities and have some of the [lowest](#) attorney availability rates in the country. In FY 2022 to date, DHS has jailed [25 percent](#) of all detained asylum seekers and immigrants in Georgia, Louisiana, and Mississippi.

**The few detained asylum seekers who do manage to secure representation have faced enormous hurdles to communicate with their attorneys.** An October 2021 [letter](#) to the Biden administration from the ACLU and American Immigration Council, which was signed by 88 legal organizations, details these barriers including ICE’s refusal to schedule legal calls, failure to provide a timely way for detained individuals to review and sign critical documents, and lack of adequate private attorney-client meeting rooms resulting in long waits. Legal access in detention became even more limited during the COVID-19 pandemic due to [restrictions on or elimination of in-person visitation](#), quarantine and isolation protocols, and limited phones and private rooms for remote meetings. In March 2022, legal service providers [wrote](#) to members of Congress to emphasize the

widespread problems with legal access during the pandemic and rebut a [report](#) that ICE had presented to Congress a month prior that claimed despite extensive evidence to the contrary that legal access in detention had “continued unabated” during the pandemic.

Human Rights First observed inadequate attorney-client meeting spaces during tours of detention facilities in Louisiana in December 2021. For instance, the Pine Prairie ICE Processing Center, which has an average detained population of [308](#) as of mid-April 2022, only has two “private” attorney-client meeting rooms. These rooms are not entirely private as they do not have separate ceilings. Moreover, ICE prohibits attorneys from using these rooms due to COVID-19 protocols, resulting in there being no private space for clients to meet in person with their attorney. The LaSalle ICE Processing Center, which has an average detained population of [411](#) as of mid-April 2022, has only three private attorney-client meeting rooms.

## **II. Illegal Deportations from Detention to Persecution**

Under U.S. [law](#), people placed in expedited removal who express a fear of persecution or indicate that they wish to seek asylum cannot be deported from the United States without being referred for an asylum hearing or, at a minimum if expedited removal

is imposed, receiving a fear screening interview. However, over the past year, DHS has used expedited removal to deport asylum seekers held in ICE detention without conducting a CFI or referring them to regular immigration court proceedings, even though they repeatedly told ICE officials that they feared return

### **“Credible Fear”**

Under U.S. law, asylum seekers have a credible fear of persecution if there is a “significant possibility” they would qualify for asylum after a full immigration court hearing. Congress intended for this standard to be “[a low screening standard](#)” to ensure that individuals with valid claims for protection have an opportunity to apply for U.S. asylum. Asylum seekers who receive a negative fear determination can be deported—without a full asylum hearing before an immigration judge—under expedited removal orders, which are typically issued by CBP officers or Border Patrol agents.

to their home countries. This egregious and illegal conduct has returned people to the persecution and torture they were fleeing in violation of U.S. law, the Refugee Convention and its Protocol, and the Convention Against Torture.

These illegal deportations without screening for protection needs are taking place because of the apparent failure or willful refusal of U.S. immigration officers to refer asylum seekers for required fear interviews. There is a long-documented history of CBP officers and Border Patrol agents intimidating and [coercing](#) asylum seekers into withdrawing requests for protection and failing to [appropriately](#), [professionally](#), and accurately identify and [document](#) individuals who must be [affirmatively](#) asked if they fear return when placed in expedited removal and referred for CFIs.

Individuals in expedited removal who are wrongly denied referral for fear screening by CBP can raise their fear of return to ICE detention officers, who are [required](#) to refer them for a CFI. However, recent [reports](#) as well as Human Rights First’s interviews with asylum seekers and attorneys confirm that **ICE officers are also failing to refer asylum seekers for required fear screenings and instead carrying out deportations to the countries these refugees have fled, including in numerous instances to Nicaragua.**

Some of the illegal and dangerous deportations and attempted deportations of asylum seekers subjected to expedited removal, but not provided with required CFIs, while held in ICE detention include:

- **In December 2021, ICE illegally deported a Nicaraguan political activist without conducting a CFI, in disregard of his repeated verbal and written assertions that he feared return to his home country and communications from a legal service organization warning ICE not to deport him without a CFI.** The man had sought protection in the United States in October 2021 after Nicaraguan government agents beat and detained him for his opposition activism. Days before his deportation to Nicaragua, the man who was being held at the Pine Prairie ICE Processing Center told Human Rights First: “I can’t sleep well. My life is in danger . . . I tried to speak with ICE officers, and they say that it’s not their problem, that the deportation orders came from ICE.”
- **In July 2021, ICE illegally deported a 20-year-old Honduran asylum seeker without conducting a fear screening even though he told ICE officers that he feared return to Honduras.** While he was detained at the Pine Prairie ICE Processing Center, ICE officers threatened to deport his father who lives in Tennessee, if the young man did not agree to be deported despite his assertions that he feared return to Honduras. ICE placed him in solitary confinement for over four days immediately before his removal in an apparent attempt to prevent him from fighting the deportation or obtaining legal assistance and then deported him without ever conducting a CFI, according to his attorney at the Southeast Immigrant Freedom Initiative. The young man had fled Honduras because the local government stole grant money for his NGO-funded work and sent people to threaten his life when he threatened to expose the government’s corruption.
- **Around August 2021, ICE nearly deported a Nicaraguan asylum seeker without a CFI until the last-minute intervention of an attorney.** The CBP officers who placed the woman in expedited removal failed to comply with their legal obligation to ask whether she feared return to Nicaragua, where she had received death threats from the Nicaraguan government for participating in protests. ICE transferred the woman to the Jackson Parish Correctional Center to initiate the deportation process even though she had informed an ICE officer of her fear of return and requested a CFI. At that facility, **she witnessed that ICE was in the process of deporting around 30 asylum seekers to Nicaragua, all of whom told her they had not received CFIs.** After the last-minute intervention of attorney Sally Santiago, ICE referred the woman for a fear screening interview, which established that she has a credible fear of persecution. She told Human Rights First: “I felt sick with anxiety and depression. I was afraid of what would happen to me if they sent me back to Nicaragua and the government took me as a prisoner or killed me.”
- **In December 2021, three asylum seekers detained at the Winn Correctional Center reported that ICE was attempting to deport them without first conducting a fear screening.** They told Human Rights First that they had already been detained for a month without receiving a CFI and that when they inquired about the status of their case, an ICE officer told them that the agency was “preparing their deportation flights.” The men had fled torture, kidnapping, and threats by their country’s government.

In addition to deportations of asylum seekers without credible fear screenings, ICE has also attempted to deport asylum seekers who have been *found to have a credible fear of persecution* by improperly pressuring them to sign documents agreeing to their deportation. For example:

- **An ICE officer at the Winn Correctional Center tried to convince a Congolese asylum seeker, who had established a credible fear of persecution, to sign a document on two separate occasions without explaining that he would be agreeing to be deported if he signed.** The man told Human Rights First that because he can read some English, he understood what the document meant and declined to sign. He reported that this was a common occurrence: “[ICE] officers would devise plans to

**get us deported. They would bring us deportation orders to sign. They didn’t explain anything. Africans did not know English and ICE would tell them to sign.”**

ICE has also deported asylum seekers whose protection claims remained under review, including where the asylum office notified ICE that it was reviewing a request for reconsideration and instructed the agency not to deport the individual:

- **In December 2021, ICE deported a Haitian [political activist](#) to Haiti—where he suffered further brutal violence upon return—even though the asylum office had agreed to review its negative fear determination.** ICE deported the man even though his attorney at the Southeast Immigrant Freedom Initiative informed ICE that the asylum office was reconsidering the negative fear determination and would imminently send a formal stay request, which ICE received hours before deporting him. The asylum seeker had been attacked and threatened at gunpoint in Haiti due to his political activities and his father’s arm had been severed with a machete after he fled. His deportation left his wife and young children—who had sought asylum a few months earlier—alone in Texas, struggling to survive. After ICE deported him to Haiti, members of a rival political party tracked him down and brutally beat him.

DHS has also detained asylum seekers from countries that DHS has designed for Temporary Protected Status—a recognition of the extremely unsafe conditions in their country—and attempted to deport them through expedited removal. The Biden administration, for instance, designated [Venezuela](#) and [Haiti](#) for TPS and renewed TPS designations for other countries, including [Somalia](#), yet has deported or attempted to deport asylum seekers from these countries after they received wrongful negative credible fear determinations:

- **ICE deported a Somali asylum seeker in September 2021 who had been tortured by a terrorist group due to his work as a government contractor.** He feared return to Somalia where Al Shabaab had tortured him and murdered his brother but received a negative fear determination after undergoing a CFI with inadequate interpretation. The man, who speaks English but requested a Somali interpreter because English is not his native language, reported to Human Rights First that the interpreter was not competent in Somali. For instance, when he stated that he was “tortured,” the interpreter translated it as “they caused me problems.” During a review of the negative fear determination, he tried to explain to the immigration judge why the determination was erroneous, but the judge accused him of contradicting himself and cut him off, stating that he only had 15 minutes for each review. Even though DHS announced in July 2021 the [redesignation](#) of Somalia for TPS, ICE deported him months later—just days before the TPS designation went into effect—and blocked him from seeking congressional intervention by barring him from mailing a signed waiver to permit a congressperson to inquire about his case.
- **Even after [designating](#) Haiti for TPS in May 2021, DHS [continued](#) to intimidate and pressure detained Haitian asylum seekers who were eligible for TPS to agree to be deported despite their TPS eligibility.** Attorneys at Haitian Bridge Alliance intervened and obtained federal court orders blocking the removal of detained Haitians eligible for TPS.

### **III. Exacerbating Risk of Erroneous Fear Decisions in Detention**

Since Congress [created](#) expedited removal in 1996 during a wave of anti-immigrant sentiment, many organizations including the bipartisan [U.S. Commission on International Religious Freedom](#) have [documented](#) the [serious deficiencies](#) and due process [concerns](#) posed by expedited removal. Detention of asylum seekers during the expedited removal process escalates the risk of wrongly deporting refugees to persecution and torture because DHS forces asylum seekers to undergo CFIs in horrendous conditions of confinement, fails to provide interpretation in asylum seekers’ native and best language—in some instances coercing them to

proceed with inadequate interpretation under threat of prolonged incarceration—and restricts access to legal representation and information about the credible fear process. Asylum seekers erroneously found not to have a credible fear of persecution have also been unfairly subjected to further prolonged detention.

Despite [escalating reports](#) of [due process violations](#) in the credible fear process, the Biden administration has persisted in using expedited removal, including against detained asylum seekers on a mass scale. **Since February 2021, DHS has conducted over 66,000 CFIs, which are typically carried out in detention, resulting in due process violations and illegal deportations.** Detained asylum seekers who suffered brutal torture by their countries’ governments, attacks because of their sexual orientation, and religious-based persecution have received wrongful negative fear determinations, including asylum seekers from Angola, Haiti, Iran, Nicaragua, Togo, and Venezuela. Recently, attorneys have reported in particular an increase in negative fear determinations for detained Nicaraguan asylum seekers, despite the fact that many are fleeing what the United States has [criticized](#) as the Nicaraguan government’s “repressive and abusive acts” and “politically motivated arrests and detentions of individuals exercising their human rights.” In addition, there have been alarming reports of many detained Black asylum seekers receiving negative fear determinations, including [Mauritanian asylum seekers](#) fleeing slavery, beatings, and incarceration despite well-documented evidence of race-based enslavement of Black Mauritians by the Arab-Berber population in the country.

In March 2022, the Biden administration published an [Interim Final Rule](#) that essentially guts the [critical authority](#) of the asylum office to reverse mistaken credible fear determinations by setting unreasonable deadlines for submitting requests for reconsideration and barring asylum seekers from submitting more than one request. This rule would further exacerbate the risk of wrongful deportation through expedited removal. It creates a new process for asylum adjudication that continues to [rely](#) on flawed expedited removal screenings for asylum seekers requesting protection at the border and could be conducted in detention.

#### **A. Horrendous Conditions of Confinement Exacerbate Flaws of Expedited Removal**

Detained asylum seekers have been forced to proceed with credible fear interviews while suffering physical and psychological harms resulting from their incarceration. As discussed below, asylum seekers experience horrendous conditions of confinement in ICE jails including physical and sexual violence, medical neglect, punitive solitary confinement, and deprivation of basic necessities. These conditions often cause or exacerbate physical and mental health problems and impede asylum seekers from meaningfully participating in CFIs and fully sharing their fear of persecution, unfairly resulting in negative fear determinations. The cursory and intimidating nature of many telephonic CFIs further exacerbates these problems and makes it difficult for asylum seekers to convey that they are suffering from a disability or health condition. However, even in instances where asylum seekers have informed DHS of their conditions, they have been forced to proceed with the interview. The government’s failure to provide reasonable accommodations for people with disabilities undergoing the credible fear process [violates](#) federal law.

Asylum seekers compelled to undergo a CFI while suffering physical or psychological distress due to horrendous conditions of confinement include:

- **In May 2021, DHS forced an unrepresented Angolan asylum seeker to proceed with a CFI at the Adams County Detention Center even though he had a severe headache and difficulty breathing due to COVID-19.** The man had fled Angola after he was beaten unconscious for refusing to join a political party. After interviewing him despite his illness and with a French interpreter, rather than his native language Kikongo, the asylum officer determined he did not have a credible fear of persecution. ICE transferred him to the Winn Correctional Center days after the CFI even though he still had COVID-

19. When Human Rights First interviewed him at Winn in December 2021, after seven additional months of detention, he said: “I don’t know why I am in this situation . . . this is supposed to be a country of laws . . . they should abide by these laws.”

- **In spring 2021, the Houston asylum office went forward with a CFI for a gay Angolan activist even though he expressed that he was suffering symptoms of COVID-19, pain from a recent physical assault, and psychological distress from conditions of confinement, resulting in a negative credible fear finding.** The man told the asylum officer that he was experiencing anxiety and felt claustrophobic in the “tight space” where the telephonic interview was being conducted. The asylum officer proceeded with the CFI during which the man was unable to disclose that he is gay because he was afraid that the officer would inform others at the detention center of his sexuality. He feared that such disclosure would further endanger his life since in detention he had been threatened and harassed by people who called him homophobic slurs, according to his attorney at the Southeast Immigrant Freedom Initiative.

#### **B. Pushed to Proceed Without Correct Interpretation**

Detention exacerbates the barriers asylum seekers face to explain their fear of return as they are forced to proceed in languages they cannot fully understand through intimidation, coercion, and fear of repercussions if they express that they are having trouble sufficiently understanding the interpreter provided to convey their fear of persecution in these life-or-death fear screening interviews.

Asylum officers and immigration judges have pushed asylum seekers to undergo the credible fear process in languages they do not fluently speak—in some instances under threat of prolonged incarceration—resulting in erroneous negative determinations. The government most often failed to provide appropriate interpretation during CFIs for asylum seekers who speak so-called “rare” languages for which interpreters are not readily available. Additional interpretation problems arise when the government provides an interpreter who speaks a [different dialect](#), causing serious miscommunications. Asylum seekers have [reported](#) that they proceeded with their CFIs without interpretation in their best and native language because they feared prolonged incarceration if the interview was postponed. Others were required to undergo their CFIs with inadequate interpretation without an option to postpone and could not exercise their rights in detention without access to legal representation.

**The failure to provide interpretation has disproportionately impacted African asylum seekers, who were frequently not provided interpretation for CFIs in the language they speak best and instead forced to proceed in their second or third language.** For instance, a detention visitation program volunteer reported to Human Rights First that since summer 2021 she has spoken with dozens of African asylum seekers detained in Louisiana who were forced to undergo CFIs in a language (typically French) that is not their native or best language and received negative determinations as a result. Some reported that when they stated that they were not comfortable speaking in French, they were required to proceed with the CFI and told, “This is what we have.” In spring and summer 2021, African asylum seekers detained at the Otay Mesa Detention Center proceeded with CFIs in English after being told that they would otherwise face long incarceration, according to a legal service organization in California.

Existing U.S. Citizenship and Immigration Services (USCIS) [guidance](#) on interpretation in CFIs for rare language speakers is inadequate and ineffective. The guidance instructs the asylum office to schedule interviews regardless of whether an interpreter who speaks their language is available to determine whether the asylum seeker is “able to communicate” in another language for which an interpreter is available. The asylum officer—

rather than the asylum seeker—has discretion to determine whether the individual can communicate in another language and to proceed with the interview.

Some detained asylum seekers from African countries who received negative credible fear determinations after the government pushed forward with CFIs without providing interpretation in their best language include:

- **A 19-year-old Ivorian asylum seeker, who received a negative fear determination after being forced to complete a CFI in French even though his native language is Maouka, was also denied appropriate interpretation during a farcical immigration judge review that affirmed the decision.** The young man had fled the Ivory Coast after being kidnapped and tortured by armed men sent by the government in retaliation for his family’s political activism. Over the course of four months, he informed the immigration court reviewing the negative determination *on 17 separate occasions* that he could not proceed without a Maouka interpreter. He reported to Human Rights First that eventually, the judge told him he would “never leave” detention if he didn’t proceed with a French interpreter and affirmed the negative determination without asking him questions about his fear of return. ICE detained the asylum seeker at the Winn Correctional Center for nearly nine months before releasing him in December 2021.
- **An unrepresented Guinean torture survivor received a negative CFI in June 2021 after he was interviewed in Portuguese despite requesting an interpreter for Mandinga, his native language.** He had been tortured in Guinea, resulting in the loss of two teeth and a head injury that continues to cause severe head pain. He told Human Rights First that he had significant trouble understanding the questions the asylum officer asked. A Portuguese interpreter who assisted Human Rights First in speaking with him noted that it was very difficult to understand him and that his attempt to speak Portuguese “is a mix of Spanish and Portuguese and his native language.” ICE detained him for a total of nine months, including at the Winn Correctional Center, before releasing him in December 2021.
- **An Angolan political activist and human rights defender who received a negative credible fear determination in May 2021 was forced to undergo a CFI in French, even though his best and native language is Lingala and Portuguese is the official language of Angola.** He told Human Rights First of his and other African asylum seekers’ attempts to convey their story in French after being denied an interpreter in their best language: “We don’t know how to say torture, persecution, we don’t know these words.” Due to his opposition to the ruling party and criticism of its human rights violations, the man was threatened by Angolan security forces, and his wife was raped. The man’s wife and daughters fled to the United States before him to also apply for asylum. In addition to the asylum office’s failure to provide appropriate interpretation, the asylum officer cut off the man’s attempt to explain that the rape of his wife was in retaliation for his political activities. He was detained for eight months, including at the Winn Correctional Center, and finally released in December 2021.

### **C. Barriers to Legal Counsel, Legal Information**

Most detained asylum seekers cannot find attorneys to assist them during CFIs, which exacerbates the due process problems inherent in expedited removal. While access to legal representation is already extremely limited in detention, particularly in remote regions where DHS has transferred asylum seekers, the pace and unpredictability with which CFIs occur in detention makes it even more difficult to obtain representation in advance of these interviews. Some detention centers do not even provide basic legal information about the asylum process. For instance, the Adams County Detention Center in Mississippi, where [thousands](#) of asylum seekers have [undergone](#) credible fear interviews during the Biden administration, [does not](#) currently have a

legal orientation program, let alone organizations able to provide legal representation to more than a small fraction of asylum seekers.

Frequent government transfers of asylum seekers between facilities in different states with little or no notice during the credible fear process make it even more difficult to find an attorney willing to provide representation. In April 2021, the ACLU [wrote](#) to the Biden administration urging it to prioritize closure of dozens of detention centers opened by the Trump administration that are located in remote locations that cut off access to counsel in addition to documented patterns of egregious treatment and conditions. Instead of closing these facilities, DHS has filled many with asylum seekers, including in extremely [remote](#) areas in Georgia, Louisiana, and Mississippi where they have little access to legal representation. While the administration has taken [steps](#) to [close](#) or reduce some immigration detention facilities in the south, it has also drastically [expanded](#) capacity in other facilities. In FY 2022 to date, [25 percent](#) of all people detained in ICE facilities were held in Georgia, Louisiana, and Mississippi in FY 2022.

With limited access to representation and legal information, detained asylum seekers undergoing the credible fear process have little to no information about what the CFI will entail, the purpose of the interview, their legal rights during the process, and the privacy protections in place to guard against disclosure or misuse of their information. Attorneys and asylum seekers have reported that some detention facilities did not provide [required](#) documentation regarding the nature and purpose of the credible fear process and their legal rights. Some facilities fail to provide legal information documents translated into French, Kreyol, or other languages. A human rights activist from an African country who was detained in the Adelanto ICE Processing Center in summer 2021, who speaks fluent English, reported that legal information on CFIs was only provided in English and Spanish even though many of the detained asylum seekers spoke only French or Kreyol. African asylum seekers who underwent the credible fear process at the Adams County Detention Center in Mississippi reported that information about CFIs was only provided in English and Spanish—whereas many only spoke other languages such as Bissa, French, Portuguese, Lingala, Mandinga, Maouka, and Wolof—or was not provided at all.

Detained asylum seekers who were prevented from fully explaining why they are seeking asylum in the United States due to lack of access to legal counsel or information about the credible fear process and who received negative credible fear determinations as a result include:

- **Multiple Nicaraguan political activists who received negative credible fear determinations reported to Aldea PJC that they had been afraid to speak at their credible fear interviews about their participation in political protests in Nicaragua because they believed they would be penalized by U.S. authorities for their political opposition work.** Their credible fear reviews with the immigration court lasted approximately two minutes. Requests for reconsideration filed by Aldea PJC in fall 2021 were denied by the asylum office.
- **A Nicaraguan torture survivor did not report details of the harm he suffered because he believed it would endanger his family in Nicaragua and received a negative fear determination as a result.** The man had been arrested and tortured for being an opposition leader and leading protests against the Ortega regime and suffered acute anxiety attacks while detained by ICE. He feared that Nicaraguan authorities would find out about the information he shared with U.S. officials, according to the University of San Francisco Immigration & Deportation Defense Clinic and Migration Studies Program. He was detained for around six months.

- **An unrepresented Haitian asylum seeker who was too afraid and ashamed to reveal during her telephonic CFI in September 2021 that she had been raped by police officers in Haiti—resulting in a negative determination—was able to share her story after consulting with legal representatives.** While detained at the T. Don Hutto Residential Center, she managed to secure legal assistance from the University of Texas School of Law Immigration Clinic after the CFI. With the clinic’s assistance, she was able to explain why she had fled Haiti at a credible fear review hearing, and the immigration judge vacated the negative credible fear determination in October 2021.

**Even in the rare instances where an asylum seeker obtains legal representation prior to a CFI, DHS has failed to contact the attorney or pressured the asylum seeker to proceed without counsel.** Multiple attorneys reported that the asylum office appeared to proceed with CFIs without pre-scheduling the interview or even attempting to contact them, as they had no record of a missed call from the asylum office. The asylum office also conducts CFIs on weekends and outside of business hours making it difficult for the attorneys to attend. For instance, in December 2021, the Arlington asylum office conducted a CFI for a Human Rights First client at 7 a.m. on a Saturday without notice, causing the asylum seeker’s attorney to miss the CFI. An asylum officer told attorney Sally Santiago around summer 2021 that the asylum office was conducting CFIs on weekends regardless of whether they could reach asylum seekers’ attorneys. Santiago said that DHS has also pressured at least a dozen clients to go forward with a CFI without her present. ICE officers used disturbing tactics to conduct CFIs without counsel present such as threatening to throw detained asylum seekers into an *hielera* (a cold cell used by CBP to detain migrants and asylum seekers near the border) and threatening to deport or indefinitely detain them if they refused to proceed. For example:

- **Around July 2021, a Nicaraguan asylum seeker was forced into hiding in Nicaragua after she was deported following an unfair CFI without her attorney.** An ICE officer at the Stewart Detention Center told the woman a teacher in Nicaragua, who had been arrested and jailed for supporting an opposition presidential candidate and refusing to intimidate people into voting for the ruling party, that attorneys were not needed for the interview. During the CFI, the asylum officer asked complex legal questions, such as “what particular social group are you in?” and limited her to replying with “yes” or “no” to some questions. The immigration judge reviewing the decision prohibited her attorney, Sally Santiago, from attending the review and affirmed the negative fear determination.
- **A Peruvian asylum seeker received a negative credible fear determination in October 2021 after the Arlington asylum office apparently failed to call his attorney, Bashir Ghazialam, when conducting the CFI.** The man had fled Peru after being violently beaten for refusing to promote a political candidate. The immigration court conducting the CFI review did not provide notice that the review had been scheduled or call Ghazialam when it took place. The man, who suffers from severe mental illness, was detained until late March 2022, five months after the erroneous CFI decision.

#### **D. Egregious Mistaken Determinations Prolong Incarceration**

Conducting CFIs in detention prolongs the needless and harmful incarceration of asylum seekers. Many asylum seekers have spent weeks or months waiting for a CFI only to languish for *months more* while challenging wrongful negative determinations. The review process for credible fear determinations is [inadequate](#) to protect against mistaken decisions, but even when it does result in a reversal, asylum seekers suffer prolonged incarceration as they challenge these decisions.

Asylum seekers forced to endure additional detention due to plainly erroneous CFI decisions that were ultimately overruled by an immigration judge or reversed by the asylum office include:

- **An erroneous negative credible fear finding, which was overturned by an immigration judge, resulted in months of additional incarceration at the Otay Mesa Detention Center for a bisexual Jamaican asylum seeker.** The man had been beaten, stabbed, threatened with death, and had shots fired at his restaurant in Jamaica because of his sexual orientation. The asylum office initially found that the Jamaican government could and would protect the man, an absurd finding given that homosexuality is outlawed in Jamaica. More than a month later, in January 2022, an immigration judge reversed the initial negative fear determination at a review where he was represented by Human Rights First. However, ICE did not release the man until late March 2022.
- **A Venezuelan student activist fleeing political persecution was subjected to an additional month of detention after a flawed credible fear determination by the Chicago asylum office that was later vacated by an immigration judge.** The man had fled persecution by the Venezuelan government for his involvement in opposition political protests. An immigration judge reversed the asylum office’s negative determination in mid-August 2021. But due to the asylum office’s initial erroneous decision the man was incarcerated an additional month, according to The Advocates for Human Rights, an organization representing immigrants in Minnesota.
- **A gay Afro-Brazilian torture survivor languished in detention for over two months waiting for the government to schedule an immigration court review that ultimately overturned the asylum office’s erroneous negative fear finding.** The man had fled Brazil after he was raped, kidnapped, and tortured for his sexual orientation. The immigration court postponed its review of the fear determination to September 2021 because of a COVID-19 quarantine at the facility where he was jailed. The man was finally released in late September 2021, weeks after the immigration court reversed the erroneous decision and over five months since he initially sought asylum protection in the United States, according to his attorney at the Southeast Immigrant Freedom Initiative.

## An Unfixable Detention System

*“I had shortness of breath, a lot of coughing, clogging of my airways . . . I kept asking for a warm shower...but I could not get the shower . . . it was horrible . . . they call it detention but I felt like I was just in another kind of prison. If someone restricts you like that, that’s a prison. When I wanted a warm shower, I had to make a request, and I was so surprised that even that was declined in the name of procedure.”*

- A political activist from an African country who was detained at the Elizabeth Detention Center in 2021, contracted COVID-19 while detained and had to be hospitalized for over a week after his release

*“I think about ending my life every day, but I can’t tell the psychologist because I will be taken back to that [solitary confinement] room . . . I feel like if I attempt suicide again, I have to be certain it will work.”*

- Roberson, a Brazilian journalist subjected to horrendous conditions in solitary confinement in the Adelanto ICE Processing Center after attempting suicide in 2021

*“It made me feel bad, like I’m not my own person. I’m not an animal. I felt singled out. What’s different about me?”*

- A transgender asylum seeker detained at the LaSalle Ice Processing Center in 2021 who was subjected to transphobic verbal abuse by guards

DHS continues to incarcerate asylum seekers and immigrants in ICE detention centers that have long histories of human rights violations including [physical violence](#), [sexual abuse](#), [medical neglect](#) resulting in [death](#), [suicide](#),

and severe illness, and racially-motivated [violence](#) and mistreatment. Jailed asylum seekers continue to report atrocious abuse and egregious conditions in ICE jails. Many are held in detention facilities contracted under the Trump administration. A February 2021 Government Accountability Office [report](#) found that 28 of 40 detention facility contracts initiated by the Trump administration between FY 2017 and FY 2020 did not comply with ICE’s own requirements. In some instances, ICE contracted with facilities despite [warnings](#) from local field offices that the proposed facilities posed safety concerns, imposed punitive conditions, and were chronically understaffed.

Instead of limiting immigration detention, the Biden administration has continued to incarcerate adult asylum seekers and other immigrants. As of mid-April 2022, the number of people in immigration detention is 30 percent higher than when President Biden took office with [19,129](#) people currently in ICE jails. In March 2022, over 100 congressional representatives [wrote](#) to the Biden administration urging it to stop the expansion of immigration detention, end the use of privately operated facilities, and conduct a review of all ICE detention centers.

While the administration importantly [asked](#) in its March 2022 budget request for a reduction in funding for detention in the next fiscal year, is not currently detaining families, and has taken [steps](#) to [close](#) or reduce detention at some facilities, it has also created new immigration jails for adults and dramatically expanded the capacity of others despite [promising](#) during the presidential campaign to end the use of for-profit immigration detention centers and invest in case support initiatives and other humane alternatives to detention. These expansions of immigration detention include:

- The administration converted three immigration detention facilities previously used to incarcerate families to jail adults, instead of simply closing the facilities. As of January 2022, the former South Texas Family Residential Center in Dilley, Texas was jailing at least 1,000 adult women, many of whom were asylum seekers according to attorneys assisting them. The former family detention center in Karnes City, Texas is being used to detain primarily asylum-seeking men, according to RAICES. The Berks County Detention Center, another former family detention center, has been converted to jail adult women including asylum seekers—a move strongly opposed by advocates and [congressional representatives](#) in Pennsylvania.
- DHS has [announced](#) that it will expand the Folkston ICE Processing Center to hold up to 3,000 asylum seekers and immigrants, which would make the Folkston the largest ICE detention center. The facility, which is operated by GEO Group, a private prison corporation, has extremely limited access to legal services, as it is located a four-and-a-half-hour drive from Atlanta.
- DHS has entered into [contracts](#) to jail immigrants in private prisons emptied out by an executive order directing the closure of private facilities for federal criminal custody, [including](#) a former prison in Moshannon Valley, Pennsylvania, where it has already detained [hundreds](#) of individuals including asylum seekers.
- Rather than release people detained in county jails that have stopped detaining immigrants due to local opposition over their use as immigration detention centers, DHS has transferred many to other facilities, cutting them off from loved ones and legal counsel. For instance, after three county immigration jails in New Jersey closed, ICE [transferred](#) detained people to Georgia, Louisiana, and upstate New York.

People seeking protection at the southern border have been detained and transferred—often multiple times—by DHS to dangerous, often remote ICE detention centers around the country that imperil their safety and cut them off from access to legal representation. Some of the states where asylum seekers have been sent to immigration detention by the Biden administration include:

- **Arizona:** A recent DHS OIG [report](#) documented the abuse, use of force, and medical neglect at La Palma Correctional Center, where many asylum seekers have been detained during the Biden administration.

- **California:** The Otay Mesa Detention Center, Imperial Regional Detention Facility, and Desert View Annex to the Adelanto ICE Processing Center, which opened after President Biden took office, have jailed many asylum seekers in [often abusive conditions](#) in remote locations that limit access to counsel. In October 2021, congressional representatives in California [wrote](#) to the administration urging it to close facilities including Otay Mesa and Adelanto due to dire conditions and mistreatment.
- **Colorado:** Since spring 2021, DHS has transferred up to hundreds of asylum seekers per month from the southern border to the Aurora Detention Center, according to the Rocky Mountain Immigrant Advocacy Network. As a result, asylum seekers transferred from the border continue to make up a large proportion of the detained population at Aurora, which has a [history](#) of medical incompetence and neglect and lack of accommodations for people with disabilities.
- **Florida:** Detention at Broward Transitional Center soared under the Biden administration. As of fall 2021, the vast majority of people detained at Broward were asylum seekers, including people crossing the land border as well as arrivals by sea, according to Americans for Immigrant Justice. Broward has a [long history](#) of medical neglect and other abuses.
- **Georgia:** The Folkston ICE Processing Center and Stewart Detention Center jail many asylum seekers. DHS [announced](#) in early 2022 that it will expand Folkston to hold up to 3,000 asylum seekers and migrants in apparent disregard of an OIG [investigation](#) into conditions that violate the rights of people detained there. Horrifying [reports](#) of medical neglect, endangerment of medically vulnerable individuals, and other human rights abuses at Stewart have soared during the COVID-19 pandemic. In 2020, guards violently [threw](#) multiple detained individuals from their wheelchairs when they asked for medical attention. Since May 2017, [eight](#) people have died while detained at Stewart. In recent years, multiple [detained individuals](#) have committed suicide after prolonged periods in solitary confinement at Stewart.
- **Louisiana:** DHS incarcerates asylum seekers—[many](#) of whom sought protection at the border—in [remote](#) Louisiana [jails](#) that first began imprisoning asylum seekers under the Trump administration. In December 2021, an ICE officer at the Winn Correctional Center said that approximately 95 percent of individuals detained there were border arrivals. Louisiana detention facilities have a long record of [human rights abuses](#) including reports of torture, physical abuse, threats of violence, and [anti-Black](#) racism. In November 2021, CRCL [warned](#) DHS to stop detaining people at Winn because of dangerous and egregious conditions. DHS continued to detain asylum seekers at Winn but [announced](#) in March 2022 that it would limit detention at the facility.
- **Minnesota:** From July to December 2021, DHS’s transfers of asylum seekers from the southern border to Minnesota detention facilities—including people who had already received positive credible fear determinations—drastically increased the jailed population, according to The Advocates for Human Rights. This caused chaos in summer 2021 and largely cut off access to attorneys because of limited phones and confidential spaces to meet with clients.
- **Mississippi:** DHS uses the Adams County Detention Center to detain asylum seekers who sought safety at the border and conduct CFIs there even though there is no legal orientation program and little access to attorneys prior to CFIs. During the Trump administration people jailed at Adams [reported](#) violence by ICE and facility staff, including the use of excessive force and threats to [coerce](#) Cameroonian asylum seekers to agree to deportation.
- **New Jersey:** DHS continues to transfer asylum seekers from the border to the Elizabeth Detention Center. A legal service provider reported that DHS has placed asylum seekers in either expedited removal

or regular removal proceedings with no clear indication of their case posture, complicating efforts of legal service providers to assist these individuals. Human Rights First previously [documented](#) horrendous conditions at Elizabeth including inadequate medical care, unsanitary conditions, and unsafe food and water.

- **New Mexico:** DHS has detained many asylum seekers requesting protection at the border at the Otero County Processing Center, Cibola County Correctional Center, and Torrance County Detention Facility, where asylum seekers have [reported](#) due process violations, [medical neglect](#), and other horrendous conditions. In March 2022, the DHS OIG published a [report urging the immediate removal of all detained individuals from Torrance in light of serious safety risks and unsanitary living conditions](#), including toilets and sinks that were inoperable, clogged, or continuously cycling water, broken sinks and water fountains, mold and water leaks, and failure by staff to comply with security protocols. Rather than taking steps to comply with these recommendations, ICE [claimed](#) that the OIG “falsified or mischaracterized evidence.”
- **Pennsylvania:** The administration detains large numbers of asylum seekers at a private ICE detention center in Moshannon Valley that was converted by DHS from a federal criminal prison. The administration also jails adult asylum-seeking women at a former family detention center in Berks County despite the facility’s long history of [human rights abuses](#) and [medical neglect](#).
- **Texas:** DHS has jailed [30 percent](#) of all detained immigrants in Texas in FY 2022 to date, including many asylum seekers who sought protection at the border. Facilities used to jail adults include former family detention centers in Dilley and Karnes. DHS under the Biden administration has continued to jail asylum-seeking women including sexual assault survivors at the T. Don Hutto Residential Facility, which has an extensive [history](#) of sexual assault and harassment by facility guards.
- **Virginia:** DHS continues to transfer asylum seekers from the southern border to the Caroline Detention Facility, where detained individuals have recently reported horrendous [conditions](#), including medical neglect, physical and verbal abuse, unsanitary conditions, and punitive use of solitary confinement.
- **Washington:** DHS has transferred asylum seekers and migrants from the southern border to the Tacoma Northwest Detention Center since spring 2021, according to the Northwest Immigrant Rights Project. ICE continues to transfer and jail many asylum seekers in the facility, which has a history of egregious conditions including [inadequate medical care](#) and the use of [solitary confinement](#) to punish people who exercise their First Amendment rights as well as those who have mental illnesses.

## **I. Sexual, Physical, and Verbal Abuse**

Prisons—including when used to hold people in immigration detention—are inherently dangerous places where incarcerated people are at risk of violence and exploitation, including by ICE officers, facility guards, and other contractors who wield enormous control over them and their ability to remain in the United States. Sexual, physical, and verbal abuse against asylum seekers and other immigrants in facilities used by ICE has been [persistent](#), [well-documented](#), and [ineffectively addressed](#).

People detained in ICE custody reported sexual assaults, including by facility guards. DHS [regulations](#) implementing the Prison Rape Elimination Act (PREA) and ICE National [Detention Standards](#) (NDS) make clear that ICE must adhere to a zero-tolerance policy for sexual abuse or assault and require staff to immediately report any knowledge, suspicion, or information regarding an incident of sexual abuse or assault. However,

Human Rights First received reports of ICE officers and facility staff failing to report sexual abuse that they were aware of and discouraging or outright prohibiting detained individuals from filing reports of assault.

Asylum seekers and immigrants in ICE custody who have suffered sexual assaults in detention during the Biden administration include:

- **A Mexican man detained in the Aurora Detention Center was sexually assaulted by a guard in July 2021.** He told Human Rights First that he woke up during the night to find the guard caressing his leg and moving his hand toward his thigh and genitals. Another detention guard advised him not to report the assault, but he persisted and was able to file a PREA complaint. A PREA investigator assigned to the case wrongly claimed the incident was not sexual assault because it did not involve penetration or touching of the genitals. [Federal regulations](#) clearly state that sexual abuse includes where a staff member “attempts to engage in . . . intentional touching” of the genitals or inner thighs. The man told Human Rights First: “My rights were violated in the most severe way . . . I felt humiliated. I felt degraded.”
- **After a Mexican transgender asylum detained in the LaSalle ICE Processing Center was sexually assaulted in October 2021, a PREA coordinator with ICE prevented him from providing his attorney a draft copy of the complaint he wished to file.** The coordinator told him that his statement “could not be used,” if an attorney reviewed it. He never received a response to his complaint.
- **A staff member at the Imperial Regional Detention Facility sexually assaulted a detained man in June 2021, after which the man contracted genital herpes.** During a medical appointment in the detention center, the facility warden entered the room without the man’s consent and listened to his discussion with a doctor, including about the assault. To the man’s knowledge, the assault was not reported by the facility staff as required, according to an advocate familiar with the case.
- **A man detained at the Bergen County Jail was sexually assaulted in March 2021 when a guard touched his private parts, according to a CRCL [complaint](#) filed in July 2021.** When the man told the guard that he could not touch him inappropriately, the guard said: “You can’t do anything about it.”

Detained asylum seekers and immigrants also reported physical and verbal abuse by facility staff and ICE officers, who insulted and ridiculed them with xenophobic, transphobic, racist, and other offensive comments. [Violence](#) against immigrants detained under the Biden administration has included the use of pepper spray in retaliation for peaceful protest, beatings, and suffocation by kneeling on immigrants’ necks. Detained women have [reported](#) sexual harassment and denial of medication by medical staff. Anti-Black discrimination, [violence](#), and [harassment](#) remain [pervasive](#) at detention facilities. Use of force against a detained person offering no resistance is [prohibited](#) by the NDS.

Incidents of reprehensible violence and verbal abuse against individuals jailed in immigration detention centers under the Biden administration include:

- **In August 2021, ICE officers used excessive force while transporting a shackled woman to an ICE jail, causing severe injuries.** According to a [complaint](#) that was submitted to DHS CRCL and the ICE Detention Ombudsman in September 2021, an ICE officer forced the woman to stand over a grated drain cover and violently tugged on the chain attached to the shackles on her wrists, hips, and ankles. The woman fell onto her face and suffered bleeding and bruising, as she could not break her fall due to the shackles. The ankle shackles also caught in the grate, causing significant swelling in one ankle. Later, she overheard another ICE officer say: “**Just tell them she fell on her own.**”

- **An officer made racist and offensive comments to a Black immigrant detained under ICE custody at the Baker County Sheriff’s Office in Florida, equating his work in the facility laundry to slavery.** The man told an advocate familiar with the case that in April 2021 an officer approached him while he was folding laundry and said that the way he was shaking out the laundry was like how “**you and your family got whipped back in the day.**”
- **An attorney reported in May 2021 that she heard a guard at the Winn Correctional Center state “Fuck Black people” and violently shove a Cameroonian man to the ground after he and another Cameroonian man asked facility guards to wear masks.** As a result of his injuries, the man needed to use a wheelchair for mobility, according to a [complaint](#) filed with DHS CRCL. The complaint also states that the attorney witnessed an ICE supervisory officer at Winn comment to the effect of “**now we can’t lynch them**” while watching detained men cut down trees.
- **Multiple transgender asylum seekers reported that guards at LaSalle ICE Processing Center subjected them to transphobic verbal abuse and other mistreatment.** A Mexican transgender man reported that in August 2021, a guard pointed at him and said, “How many of them are there? That’s not a real man.” Guards intentionally called him “ma’am” and “girl” and used incorrect pronouns despite his repeated attempts to correct them. He described his experience in detention to Human Rights First: “It made me feel bad, like I’m not my own person. I’m not an animal. I felt singled out. What’s different about me?” A Guatemalan transgender man who has been detained in LaSalle ICE Processing Center for nearly eight months as of March 2022 while seeking asylum reported that guards refused to use his preferred name and repeatedly called him “lady.” He told Human Rights First: “I identify as a man, so it’s difficult when they do that. They treat us like garbage here.”
- **A Nicaraguan asylum seeker detained at the Winn Correctional Center reported frequent and offensive comments against him and other detained asylum seekers by facility staff.** He told Human Rights First that staff told them “to return to [their] countries” and said that “*todos ustedes son unas chupas pingas*” (“you are all dick suckers”).
- **A Honduran asylum seeker detained in Massachusetts reported in March 2022 that facility staff make offensive statements such as “This is America, speak English” and “Go back to your country.”** He told Human Rights First that because only one of the guards speaks Spanish, it is extremely difficult to communicate and detained people who do not understand the guards’ instructions due to the language barrier are punished.

## **II. Solitary Confinement Used to Punish and Demean**

ICE detention centers often use solitary confinement, referred to euphemistically as “administrative segregation” or “disciplinary segregation” to punish, [threaten](#), and intimidate detained asylum seekers and immigrants. Officers have subjected detained people to solitary confinement for minor facility infractions, to punish people who [attempt](#) to speak with reporters, or [engage](#) in hunger strikes or other forms of peaceful protest. A DHS OIG [report](#) published in October 2021 found that ICE lacks effective oversight of its use of segregation and **failed to show that it considered alternatives to solitary confinement for 72 percent of solitary confinement placements** between FY 2015 and FY 2019. In addition to wielding solitary confinement to punish people, ICE [holds](#) people in solitary confinement allegedly to “protect” them from harassment and assault. Some asylum seekers, including LGBTQ people, reported to Human Rights First that they had no choice but to ask to be placed in solitary confinement because they feared for their safety in ICE detention. Asylum seekers have also reported horrendous conditions in solitary confinement cells in medical units, where they were subjected to

punitive and brutal mistreatment after attempting suicide or in some instances due to apparently arbitrary decisions by medical staff. A [study](#) that analyzed the use of solitary confinement in immigration detention from 2013 to 2017 found that Black immigrants were six times more likely to be sent to solitary confinement than other detained populations.

Asylum seekers reported inhumane conditions in solitary confinement to Human Rights First including [lack of heat](#), [limited access](#) to hygiene and potable water, refusal to turn off the lights at night, and [lack of access](#) to phones to speak with loved ones and attorneys. The [NDS](#) require facilities to provide people in solitary confinement for disciplinary reasons with at least one [hour](#) daily of outdoor recreation time, but asylum seekers reported that they were only permitted outside a couple times over the course of weeks in solitary confinement.

- **ICE subjected Roberson, a Brazilian journalist seeking asylum, to 21 days in a solitary confinement cell, without clothing, after a suicide attempt in early 2021.** He was not allowed to shower or given toilet paper, a toothbrush, sheets, or blankets. While in solitary, he attempted suicide again by slamming his head against the floor. He said: “I think about ending my life every day, but I can’t tell the psychologist because I will be taken back to that room . . . I feel like if I attempt suicide again, I have to be certain it will work.” As of March 2022, ICE continued to refuse to release him from the Adelanto ICE Processing Center, where he had been detained since July 2020, leaving him separated from his wife and teenage daughter, who live in Boston and are pursuing their asylum claims. He told Human Rights First that he tried to kill himself because “I felt like it was the end of the world. Being there took away my desire to live . . . I think that the U.S. government does not care about my life.”
- **An asylum seeker from an African country suffered abuse in solitary confinement in the medical unit at the Winn Correctional Center, including being held naked in a cold cell without a bed for five days.** He told Human Rights First that during a medical evaluation in May 2021 a facility doctor asked whether he wanted to harm himself. He answered that he did not but was transferred to solitary confinement in the medical unit, which is used for people at imminent risk of self-harm. He said that the doctor claimed that people who have high blood pressure, as he did, were more susceptible to depression and suicide. He was forced to go naked in solitary confinement and only received a medical gown to wear during limited outdoor recreation periods. He had to sleep on the floor of the solitary confinement cell for five days and only received a sheet to place on the ground on the second day.
- **A Mexican transgender asylum seeker told Human Rights First that he felt he had no choice but to request to be placed in solitary confinement in October 2021 when he was sexually assaulted while housed with cisgender women in ICE custody.** During the month that he was locked up in a tiny solitary confinement cell, ICE only permitted him outside the cell four times in total (other than to shower), in violation of the NDS, which [require](#) daily recreation time.
- **Erica Gonzalez, a Nicaraguan asylum seeker detained at the Pine Prairie ICE Processing Center, asked to be placed in solitary confinement in fall 2021 because she feared for her safety after a lieutenant at the facility publicly and without cause stated she was a “thief” in front of everyone in her dormitory.** She spent weeks in a small cell and was only allowed to leave the cell to shower. She reported to Human Rights First that the facility did not permit her to go outside for recreation time for nearly two weeks, falsely claiming that she did not have a right to outdoor time because she had requested to be placed in solitary confinement.

### III. Dehumanizing Treatment, Deprivation of Basic Necessities

Immigration jails are inherently dehumanizing. The treatment and conditions that asylum seekers and other immigrants are subjected to by ICE in these facilities compounds the misery and humiliation of incarceration.

From the moment people are transferred to ICE custody, their human dignity is stripped from them. For example, **ICE has forcibly cut off the hair of detained Black people in its custody claiming that it is standard “procedure” for hair worn in braids or locks.** An asylum seeker from an African country represented by Human Rights First reported that staff at the Adelanto ICE Processing Center chopped off her long, braided hair in July 2021 and cut off the braided hair of multiple Haitian women with whom she was detained. This unnecessary practice is an affront to the dignity and physical integrity of the individuals subjected to it and its clearly racially disparate impact on detained Black people raises significant questions about its legality under federal antidiscrimination law.

In addition, horrendous conditions continue to be reported at ICE detention facilities including: [lack](#) of edible [food](#) and potable drinking water; failure to consistently provide religious or medical diets; use of highly toxic [chemical disinfectants](#); [unsanitary living conditions](#) including infestations of [insects](#) and [mice](#); [mold](#); [toxic air](#); freezing temperatures in winter and lack of [air conditioning](#) in the summer; and lack of compensation for work performed.

When Human Rights First toured the Winn Correctional Center, LaSalle ICE Processing Center, and Pine Prairie ICE Processing Center in December 2021, asylum seekers and immigrants reported that they were forced to clean and paint the facility just days prior to the visit. One individual detained at LaSalle said: **“They made us scrape gunk off the walls, clean, and [made] one Haitian guy paint the day before yesterday because you were coming. They warned us to keep everything looking clean and neat and that if you asked us what things are like in here to say they are good.”** He also explained that facility staff force them to clean the dorms, including the bathrooms and toilets, every day without pay. An asylum seeker detained at Pine Prairie told Human Rights First that shortly before the tour of the facility, staff seemingly raised the temperature in the facility which is typically extremely cold. “They’re trying to make us forget it’s been cold,” he said.

Asylum seekers and immigrants who spoke with Human Rights First reported unlivable and inhumane conditions, including that:

- **Meals were often inadequate.** An asylum seeker in the Adelanto ICE Processing Center reported that in early 2021 he asked a guard if he could warm food that had been served cold and was told, “Ask Jesus to microwave your food.” Many detained people stated that meal portions were inadequate and had to be supplemented with commissary purchases, which some asylum seekers cannot afford.
- **Food was spoiled, rotten, or otherwise inedible.** People detained in detention facilities in California, Colorado, and Louisiana reported undercooked and bloody chicken, moldy bread, spoiled milk, old fruits and vegetables that are practically rotten, undercooked or fully frozen hamburgers, and moldy green hotdogs. One person detained at LaSalle ICE Processing Center said: “The food is so old; I would not give it to my dog.”
- **Facilities failed to provide religious accommodations.** For instance, a Ghanaian asylum seeker previously detained in the Aurora Detention Center reported that he is required to fast until the evening on certain days of the week but that guards would enter his housing unit and throw away his food before he could eat it because he had not consumed it during a designated mealtime.

- **Sleeping was difficult amid loud noises, pre-dawn breakfast, and fluorescent lights.** People detained at the Winn Correctional Center reported that breakfast is served as early as 2 or 3 a.m. An individual detained at LaSalle said that it is difficult to sleep because the fluorescent lights in the housing unit remain on throughout the night.
- **Inadequate access to hygiene products.** Detained people reported that they had insufficient access to soap, shampoo, toothpaste, and sanitary pads. Women detained at LaSalle ICE Processing Center reported that they are prohibited from using the restroom when a male guard is in the dormitory, even when the guard is present for an hour or longer. An asylum seeker detained in Massachusetts reported that because they are denied access to nail clippers, detained people are forced to have long fingernails and toenails.
- **Drinking water was not clean.** People in ICE detention centers have reported that water coming from facility taps contains sand, dirt, or grease, is yellow or dark in color, or otherwise appears unclean.
- **Maggots, ants, spiders, and lizards were inside facilities.** Multiple people reported that dormmates were bitten by spiders.
- **Facilities were dirty and covered in mold.** A man detained at LaSalle ICE Processing Center said that the showers had so much mold that he was “scared to even get close to the walls.” A man detained at the Adelanto ICE Processing Center told Human Rights First that every time mold grew in the shower area, facility staff merely painted over it.
- **People in ICE custody who work in ICE facilities received extremely little pay.** People reported being paid between \$1 and \$4 a day, in violation of state and federal minimum wage laws. In October 2021, a federal jury [determined](#) that the Northwest ICE Processing Center had violated Washington’s minimum wage law by only paying detained individuals \$1 per day.

#### **IV. Life-Threatening Medical Neglect**

Rampant medical neglect and abuse by medical staff in ICE detention centers have endangered the lives of many asylum seekers and immigrants incarcerated by DHS. ICE has [reported](#) five deaths of immigrants in ICE custody since President Biden took office. A [Venezuelan asylum seeker](#), who died of complications from AIDS, was detained in ICE custody for five months after seeking protection at the border and suffered medical neglect while incarcerated. Indeed, ICE detention facilities have a [long pattern](#) of medical neglect. For example, a July 2021 DHS OIG [report](#) confirmed that a man with a history of hypertension died at the Adams County Detention Center in December 2020 due to medical neglect after receiving inadequate care following his request for medical attention due to chest pains. A [Haitian asylum seeker](#) detained by ICE in September 2021 was unable to secure medical attention when he suspected that his eye—which he had lost in a politically-motivated stabbing in Haiti—became infected and he began to lose vision in his other eye, despite submitting at least 15 requests to see a doctor.

**ICE is required to provide adequate accommodations, support, and treatment to people with disabilities under [federal law](#), [regulations](#), and the [NDS](#). Yet it routinely fails to provide accommodations for individuals who have physical or mental disabilities.** Asylum seekers and immigrants reported to Human Rights First that they experienced extremely long wait times for medical appointments, denial of specialized care, lack of timely responses to repeated requests for medical attention, denial of needed medication by medical staff with instructions to purchase it from commissary, and failure to provide a diet that meets their medical needs.

In addition to [public complaints](#) of medical neglect by ICE [filed](#) with DHS, detained people, advocates, and attorneys reported to Human Rights First instances of egregious medical neglect in the past year, including:

- **A Colombian asylum seeker stopped pursuing his claim for U.S. protection because he was desperate to seek adequate care for severe medical conditions left untreated by ICE.** As a result, he was deported in December 2021, separating him from his wife and two children in the United States. The man suffered from a skin condition that caused painful lumps in his armpits and an abscess in his testicles that medical staff did not drain for months. He also required dental care that he was told he could not receive in detention, according to RAICES.
- **A Haitian asylum seeker detained at the Winn Correctional Center that guards refused to provide medical assistance to a Cuban man who had passed out in the housing unit in June 2021.** The Haitian man reported to Human Rights First that he and other detained people banged on the metal doors to alert the guards, who saw them but did not act. He eventually woke up after approximately thirty minutes to an hour but did not receive medical care. The Haitian asylum seeker, who also submitted ten medical requests in July for stomach pain without receiving a reply, told Human Rights First: **“When somebody gets sick, it’s so terrible because it’s clear we don’t have a right to medical attention.”**
- **A Salvadoran asylum seeker who has been detained since February 2020 has been unable to obtain medical care for lung problems and testicular pain, even though his condition has worsened and he has coughed up blood.** In October 2021, a doctor informed the man that he may have a blood clot or a tumor in his testicles, which requires further tests, but as of early March 2022 the man had not received further examination. He has also been waiting since July 2020 for an X-ray of his lungs, but Otay Mesa Detention Center medical staff still had not performed the procedure as of early March 2022, according to an attorney at Al Otro Lado.
- **A Black immigrant who suffers from asthma was repeatedly denied an inhaler from January 2021 to May 2021 while detained under ICE custody in the Baker County Sheriff’s Office in Florida, leading to frequent shortness of breath and chest pain.** Prior to being detained, he routinely used an inhaler and had been hospitalized several times for asthma. He reported to an advocate familiar with the case that medical staff at the facility stated that his request was denied because his symptoms arose from mental health issues, not a physical condition.
- **An asylum seeker detained in LaSalle ICE Processing Center reported to Human Rights First witnessing a guard deny access to medical care to a woman in the same dormitory who was anemic and had been suffering from menorrhagia for weeks.** In August 2021, the woman needed medical attention but was too weak to stand or walk to the medical unit. Despite pleas by other detained individuals, the guard on duty refused the woman a wheelchair and told her to get up. As she was too weak to move from bed, the woman had to wait for a shift change to ask another guard for assistance.
- **A Turkish man detained at the Webb County Detention Center did not receive physical therapy needed to avoid a surgery that carries high risks and could result in permanent disability.** The man reported to a legal services organization in July 2021 that a doctor had diagnosed him with a herniated disc and directed intensive physical therapy. ICE refused to provide physical therapy and denied a request for transfer to another facility, claiming that the man does not need treatment.
- **A Honduran asylum seeker detained at the Plymouth County Correctional Facility told Human Rights First that when he severely injured his hand in October 2021, his requests for a medical appointment were ignored for months.** Eventually, a doctor informed him that he likely needed surgery

for his hand but as of March 2022 the facility has not provided him with any treatment beyond a hand brace and he continues to suffer pain from the injury.

Mental healthcare is often extremely limited in ICE facilities. To the extent it is provided, the care is often horrendous and abusive, according to detained asylum seekers. Many asylum seekers suffer from PTSD, depression, anxiety, and other psychological conditions related to the persecution and torture they suffered, which may be exacerbated by prolonged detention. The failure to provide adequate mental healthcare violates federal disability law, which [requires](#) the government to provide reasonable accommodations to people with disabilities [undergoing](#) removal proceedings. Denial of adequate mental healthcare makes it even more difficult for asylum seekers to fully and fairly explain why they are seeking asylum during credible fear interviews and asylum hearings. Some of the asylum seekers who reported inadequate mental health care include:

- **A Yemeni asylum seeker detained by ICE in Arizona from March 2021 to September 2021 was denied medication for schizophrenia and depression.** Prior to being jailed by ICE, the man had been receiving medical treatment. His attorney, Bashir Ghazialam, reported to Human Rights First that the man did not receive any medication while detained for six months.
- **A therapist at the Folkston ICE Processing Center verbally abused and demeaned a Brazilian asylum seeker when he sought mental healthcare in September 2021.** At the beginning of the appointment, the therapist told him: “You don’t smell good. You need to get out of here.” The therapist and nurses forced him to return to his housing unit and shower, even though he had just showered prior to his arrival, stating “Do you want me to use another way to make you do it, the hard way?” After showering again, he returned to the medical unit but the nurses and therapist laughed at him and sent him away without treatment.
- **A man detained at the Otay Mesa Detention Center suffering from anxiety, depression, and PTSD was mistreated by a facility psychologist in April 2021.** The man reported experiencing nightmares and flashbacks from an assault he suffered years ago. The psychologist questioned whether he was feigning symptoms, asking: “Why are you just having flashbacks now, are you trying to get *Franco*?” in reference to a [settlement](#) that guarantees representation for detained people with limited capacity to represent themselves. The man, who already had an attorney, reported his distress at her accusation in a DHS CRCL complaint filed by CREEC that was reviewed by Human Rights First. On March 8, 2022, organizations filed a CRCL [complaint](#) detailing his and other detained individuals’ experiences with the unprofessional, unethical, and negligent medical treatment by this psychologist.
- **A 16-year-old asylum seeker detained by ICE for nearly a year in a juvenile detention facility who suffers from PTSD, anxiety, and depression, did not receive a mental health evaluation during the entirety of his detention, despite his and his counsel’s repeated pleas.** Although he was being administered medication for depression and anxiety, at no point was he evaluated by a doctor or psychologist to determine the efficacy of this medication, according to his attorney Sophia Gregg. In August 2021, an ICE officer interrogated the child at the detention center without his lawyer present and without any notice to his attorney, inflicting further trauma.
- **When a Salvadoran man detained at the Otay Mesa Detention Center for five years tried to seek mental healthcare in spring 2021, the psychologist at the detention facility made hostile and derogatory comments toward him.** The doctor insisted that “there was nothing wrong” with him and that the man wanted her to write “a letter for the judge so he can let you stay here.” When he asked to discuss the mental health diagnoses that he had received through an independent evaluation, the doctor claimed

that his “hired gun” (referring to his attorney) had paid someone “to say what you want them to say.” The facility rejected a grievance the man filed—which was reviewed by Human Rights First—claiming there was “not enough evidence to support [his] claims of staff misconduct.” He told Human Rights First: “I’m not being provided the proper mental health care. I feel my mental state deteriorating.”

## **V. Deadly Conditions Exacerbated by Pandemic**

While the deadly COVID-19 pandemic has raged in the United States, DHS has continued to detain and deny release to many asylum seekers and immigrants, resulting in preventable [deaths](#), severe illness, and potentially permanent health [complications](#). Since the start of the pandemic, public health experts have [warned](#) the government that it must release immigrants from detention to avoid rapid COVID-19 transmission and protect the lives of detained people, facility staff, and local communities. Both the Trump and Biden administrations ignored these warnings, causing massive COVID-19 outbreaks in ICE jails and widespread infection. The administration has [acknowledged](#) that congregate detention presents risks of COVID-19 transmission in justifying its illegal use of Title 42 to expel asylum seekers at the border but appears to largely disregard this public health concern in its dangerous detention practices.

Even as the Delta and Omicron variants ripped through the United States, the Biden administration failed to release people from detention to reduce the risk of widespread transmission, again resulting in massive spread of COVID-19 in jails. For instance, in January 23, 2022, [2,645](#) people detained by ICE were under isolation or monitoring due to confirmed COVID-19 infections, a more than 800 percent jump from January 3, 2022, when there were [285](#) active cases. Detention during the pandemic has resulted in [42,472](#) people in immigration detention contracting the disease and at least [11](#) deaths.<sup>11</sup> In January 2022, DHS physicians and detention experts Dr. Scott Allen and Dr. Josiah Rich, who have [repeatedly urged](#) the government to release immigrants from detention due to the risk of COVID-19, again [wrote](#) to the administration warning that current measures and practices in immigration detention fail to protect against the spread of COVID-19 and that the administration must urgently provide adequate vaccinations and boosters to detained people.

ICE’s frequent transfers and pattern of disregard for COVID-19 safety protocols increase the risk of transmission in ICE detention centers. People seeking protection at the southern border detained in the United States by DHS are routinely sent to and transferred among ICE facilities across the country even when ICE is aware that they have tested positive for COVID-19. For example, in May 2021, **ICE transferred approximately 11 men who had tested positive for COVID-19 from the Adams County Detention Center to the Winn Correctional Center**, according to one of the men, an asylum seeker who received a positive test result the day before he was transferred. Failure to follow facility quarantine protocols further endangers detained people and prolongs their incarceration. Asylum seekers and immigrants reported that they have spent additional weeks or months in quarantine because ICE repeatedly transferred new arrivals into the unit, forcing them to restart quarantine and resulting in repeated postponement of immigration court hearings. Many asylum seekers, attorneys, and advocates reported that during the past year they have observed ICE facility guards fail to comply with COVID-

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<sup>11</sup> This does not account for all immigrants detained by ICE who died of COVID-19, as ICE does not count deaths that occur after an individual’s release from custody. For instance, ICE detained [Martin Vargas](#) throughout the pandemic, causing him to contract COVID-19 in December 2020—at which point his health drastically deteriorated and he suffered a stroke in March 2021. ICE “released” him from its custody two days after the stroke and left him unconscious in the hospital without informing his attorney, in an apparent effort to avoid responsibility for his condition. He died a few days later, unbeknownst to his attorney who searched for him for weeks.

19 protocols including mask-wearing. A September 2021 DHS OIG [report](#) confirmed that staff at observed ICE detention facilities did not consistently follow mask-wearing guidelines.

The government has exacerbated the dangers of COVID-19 spread in ICE jails by failing to timely vaccinate detained people in its custody. CBP has not systematically [provided](#) vaccines to people detained in CBP custody prior to their transfer to ICE jails, even though many remain in CBP facilities for a week or longer. The government also fails to consistently and timely offer the vaccine in ICE custody. As of mid-January 2022, ICE had only provided booster shots to [671](#) of over 22,000 detained people despite CDC [guidance](#) recommending booster for all adults since November 2021. As of late February, ICE had only provided [1,436](#) boosters to detained individuals. Due to ICE’s continued failure to provide booster shots to many detained individuals, the ACLU filed [suit](#) on March 1, 2022 on behalf of medically vulnerable detained people who have not received a booster shot. *CBS News* reported in January 2022 that according to ICE records, [37.6 percent](#) of people in custody had declined the vaccine when offered. Many factors likely [contribute](#) to this figure, including understandable fear and distrust of ICE and facility staff as well as lack of culturally appropriate and translated explanatory materials. Asylum seekers told Human Rights First that they had been denied vaccines or experienced significant barriers to obtaining them in ICE custody, were not provided information about side effects, and were mistreated by facility staff during the post-vaccine recovery period—all of which likely contribute to vaccine refusals. For instance:

- A Congolese asylum seeker reported to Human Rights First that while he was detained at the Winn Correctional Center from April to October 2021, **he requested the COVID-19 vaccine but never received it.**
- A 16-year-old child detained at the Northwest Juvenile Detention Center in Virginia from February to late August 2021 **never received the COVID-19 vaccine** while detained despite being eligible since April, according to his attorney, Sophia Gregg.
- A Venezuelan asylum seeker detained at the Stewart Detention Center told Human Rights First that although she initially was afraid to receive the COVID-19 vaccine, **she subsequently submitted a medical request for the vaccine but never received a response.** A month later, she was released from detention in October 2021 without vaccination.
- A Nicaraguan asylum seeker detained in Louisiana informed Human Rights First that after detaining him in August 2021, **ICE did not offer him the vaccine even though he repeatedly requested it and only provided it to him over five months later** in late January 2022.
- A Nicaraguan asylum seeker told Human Rights First that facility guards **mistreated her after she received a COVID-19 vaccine** in summer 2021 while detained at the Stewart Detention Center. The morning after she was vaccinated, a guard ordered her to get out of bed. The woman explained that she was feeling sick from the vaccination, but the guard responded that she “didn’t care” and that she “didn’t want to see [the woman] in that bed.”

### ***Widespread failure to release medically vulnerable people during COVID-19 pandemic***

DHS has failed to release detained people with medical conditions that place them at elevated risk of serious illness should they become infected with COVID-19.

In April 2020, a federal district court granted a [preliminary injunction](#) in *Fraihat v. ICE* requiring ICE to identify and track all detained people with one or more risk factors for COVID-19 and to determine whether these individuals should be released, regardless of the outcome of any parole, bond, or *habeas* requests. Risks

factors include being over the age of 55, pregnancy, or chronic health conditions including cardiovascular disease, high blood pressure, chronic respiratory disease, diabetes, cancer, liver disease, kidney disease, autoimmune disease, severe psychiatric illness, history of transplantation, and HIV/AIDS. [Guidance](#) issued by ICE in April 2020 prior to the injunction also directs ICE field offices to review cases with certain medical risk factors for potential release.

Due to widespread non-compliance, the court [granted](#) a motion to enforce the *Fraihat* injunction in October 2020 clarifying that **blanket or cursory release denials do not comply with the injunction, that ICE must provide an individualized justification for decisions to detain, and that only in rare cases should a person with a risk factor be detained if they are not subject to mandatory detention.** In March 2021, after further government failures to adhere to the court’s directions, the court [appointed](#) a special master to monitor ICE’s release practices, but [widespread](#) violations of the injunction continued. Although the Ninth Circuit Court of Appeals [reversed](#) the lower court in October 2021, the preliminary injunction is in effect until at least June 12, 2022, while further appeals in the case remain pending.

ICE has failed to release many medically vulnerable asylum seekers and immigrants. During a tour of the Winn Correctional Center in December 2021, medical staff informed Human Rights First that at least 50 percent of the people arriving at Winn have a risk factor identified by the *Fraihat* injunction, including a man with an artificial heart valve transferred from another facility the prior month. The vast majority of people detained at Winn have been asylum seekers and migrants transferred from the border who are typically detained in Mississippi prior to being detained at Winn, which means that these individuals were transferred across the country to multiple facilities with medical conditions that mandate their release in all but rare circumstances.

Detained asylum seekers and immigrants with serious medical conditions that put their lives at risk should they contract COVID-19 and who should be covered by the release requirements of the *Fraihat* injunction, include:

- **In October 2021, ICE denied the release request of a Jamaican asylum seeker living with HIV with a boilerplate response claiming to have reviewed his medical records and determined that he did not qualify for release under *Fraihat*.** The decision violated the *Fraihat* order’s requirement that ICE release individuals living with HIV unless the agency concludes, after an individualized review, that continued detention is warranted. ICE finally released him a month later in mid-November 2021.
- **A Mexican asylum seeker detained at the Pine Prairie ICE Processing Center was denied *Fraihat* release in fall 2021 even though he suffers from high blood pressure, irregular heartbeat, and panic attacks.** He told Human Rights First that in November 2021, medical staff suddenly discontinued his blood pressure medication. He did not have access to his medication for another two weeks and could feel his condition deteriorating. ICE deported him in January 2022 even though his attorney had filed an appeal with the Fifth Circuit Court of Appeals.
- **For over three months, ICE ignored the *Fraihat* request of Erica Gonzalez, a Nicaraguan asylum seeker suffering from asthma, PTSD, anxiety, and depression.** Gonzalez submitted the request in November 2021 with her medical records. She told Human Rights First that in addition to posing a risk to her health, detention has prevented her from taking care of her mother in the United States who was recently diagnosed with cancer. She said: “It’s really hard not to be with my mom right now. I could be taking her to chemo. Why not let us fight our cases outside? Why waste taxpayer dollars to keep us locked up in here instead of letting us be with our families?”
- **For nearly a year, ICE under the Biden administration refused to release a Libyan asylum seeker, who has serious heart defects and relies on a pacemaker, from the Aurora Detention Center.**

*Fraihat* release requests filed by his attorney included affidavits from infectious disease experts stating that due to his heart problems he is in the highest category of risk for severe illness and death from COVID-19. ICE deported him around November 2021.

- **Since May 2021, ICE has detained and denied parole to a young Salvadoran asylum seeker with permanent cognitive deficits resulting from severe brain damage he suffered as a child.** In October 2021, DHS denied a parole request filed by his attorney, Sophia Genovese at Catholic Charities of the Archdiocese of New York. The young man remained detained in New York as of February 2022.
- **A Brazilian asylum seeker suffering from diabetes, high blood pressure, blurred vision, nausea, and severe psychiatric illness was detained in May 2021 and repeatedly denied *Fraihat* release by ICE.** While she was detained at the Stewart Detention Center, ICE claimed that she did not have any “qualifying medical conditions” under *Fraihat*. Yet when she was transferred to the Jackson Parish Correctional Center shortly afterward, medical staff found that her blood pressure was so high that she was at risk of a stroke, according to her attorney Sally Santiago with Abogados Para Hispanos. Nonetheless, ICE continued to detain her and deported her months later.
- **ICE re-detained a Tanzanian asylum seeker living with HIV in May 2021 after initially releasing him under the *Fraihat* injunction in February 2021.** Despite the dangers he faced due to his health condition, ICE re-jailed him at the Kay County Detention Center in Oklahoma, according to Jeremy Jong with Al Otro Lado, who helped secure his release after ICE re-detained him.
- **A Brazilian asylum seeker who began to suffer frequent epileptic seizures in August 2021 while detained at the Folkston ICE Processing Center was denied *Fraihat* release by ICE until December 2021.** The man told Human Rights First: “I started having seizures all the time . . . once to twice a day. . . I had to do heart exams and they said my heart was beating slow. I experienced a lot of chest pain, but the doctors kept saying it was in my head.” After his attorney, Sally Santiago, filed a *Fraihat* release request in November 2021, ICE initially claimed that the man’s medical records indicated he “only has [high] BMI [body-mass index],” but later confirmed the seizure disorder. He was finally released weeks later.
- **An asylum seeker suffering from Parkinson’s disease, which causes severe damage to the heart, was detained in Florida for five months and repeatedly denied release, including under *Fraihat*.** After ICE denied his *Fraihat* release request, his attorney appealed the decision through the ICE Case Review Process but was again denied. ICE finally released the man in September 2021 without explanation, according to his attorney at Americans for Immigrant Justice.
- **ICE detained an asylum seeker from West Africa with sickle cell disease in the Torrance County Detention Facility for months until November 2021.** While detained, the man began suffering from severe pain in his testicles as a result of the illness, according to his attorney, Casey Mangan with Innovation Lab, who filed a *Fraihat* release request on his behalf.
- **Despite a high risk of death and severe illness from COVID-19, ICE continued to incarcerate a Salvadoran man who had suffered a heart attack and has high blood pressure, a heart murmur, asthma, sciatica, and severe mental illness.** He was finally released in November 2021.

As these examples make clear, **DHS has not complied with its affirmative obligation under the injunction to identify and evaluate people eligible for *Fraihat* release and provide an individualized for continued detention.** Even where attorneys or detained individuals have filed formal requests for release under *Fraihat* and provided extensive documentation of severe qualifying medical conditions, ICE has refused to release

them. Delays in providing ICE medical records exacerbated by frequent facility transfers, according to attorneys who spoke with Human Rights First, greatly slowed the filing of release requests for some individuals. CREEC has noted major issues with compliance that threaten the lives of asylum seekers and immigrants with medical and mental health conditions. CREEC reported that:

- According to hotline callers, ICE rarely complied with the general [requirement](#) under *Fraihat* to complete custody determinations within a week. According to CREEC, many people detained in ICE custody reported waiting longer with many waiting between one and three months. One individual reported a wait time of five months in 2021 for a response to a request for release under *Fraihat*.
- Some detained individuals said that they did not know how to contact an ICE deportation officer, as these officers were rarely or infrequently present in some facilities or did not respond to written requests.
- ICE did not consistently provide individualized decisions to deny release to hotline callers, as required by *Fraihat*. In many instances, ICE officers only informally told individuals that their requests were denied, making it more difficult for the individual to provide additional information to support their request or identify errors in the decision.
- Formal denials often contained only boilerplate language and no analysis of the individual’s particular circumstances even though ICE is [required](#) to list the individual’s risk factors considered in *Fraihat* decisions. CREEC reported, for example, that ICE failed to list cancer as a risk factor for a detained individual who was denied release and listed depression as the only relevant condition for several individuals with additional psychiatric conditions.

## Recommendations

### To the Biden administration:

- ☑ **End the mass jailing of asylum seekers and shift to community-based case support programs in cases where such support is needed.** Community-based case support programs, which generate high appearance rates, should be used rather than “alternative to detention” programs that resort to punitive and intrusive ankle shackles and electronic surveillance or that amount to house arrest.
- ☑ **Do not designate or treat asylum seekers as priorities for detention, enforcement, or other punitive treatment.** The administration and DHS should rescind the 2021 enforcement priorities [memorandum](#) and replace the policy with a protection framework that designates categories of individuals, including asylum seekers, as priorities for protection.
- ☑ **Support legislation, including the [Dignity for Detained Immigrants Act](#),** limiting the use of immigration detention and mandating bond redetermination hearings before an immigration judge for anyone subjected to immigration detention.
- ☑ **Work with Congress to further reduce funding for immigration detention** and to instead fund: case support programs; the cost effective and successful Legal Orientation Program (LOP), which should be expanded to border shelter networks as well as all DHS facilities where asylum seekers are held, including CBP and Border Patrol facilities; and expanded legal representation for asylum seekers and other immigrants.

### To the Department of Homeland Security:

- ☑ **Apply all applicable parole, bond, and other criteria with a presumption that release of asylum seekers is in the public interest,** consistent with U.S. human rights and refugee treaty obligations, including the right to liberty under the ICCPR.
- ☑ **Issue parole guidance that includes a presumption that release of asylum seekers serves a significant public interest.** The guidance should: apply to all asylum seekers regardless of whether they requested asylum at ports of entry or after entering the United States away from a port of entry and regardless of whether they are subjected to expedited removal; prohibit the use of bond as a condition for release on parole; and make all individuals seeking protection, including those placed in reinstated removal proceedings (which [should not be used](#)), eligible for parole consideration under the guidance.
- ☑ **Issue regulations that include a strong presumption against the use of detention,** shifting the burden of proof to the government instead of the non-citizen in all custody determinations to show by clear and convincing evidence that the non-citizen should remain detained.
- ☑ **The Office of Inspector General and Office for Civil Rights and Civil Liberties should closely monitor and investigate allegations of abuse, improper use of force and solitary confinement, detention center conditions, medical neglect, racist treatment, disparate impact on Black asylum seekers in ICE detention facilities.** These investigations must include interviews with asylum seekers, attorneys, independent medical experts, rights monitors, and relevant non-governmental actors.
- ☑ **ICE and detention facility operators should work with communities to implement Independent Medical Oversight Boards (IMOB) to increase public transparency and accountability on the delivery of quality medical and mental health care for detained individuals.** The IMOB should have authority to review individual cases and medical files brought before it by detained individuals, attorneys,

or advocates to ensure adequate care. IMOB members could include medical and mental health professionals, representatives of advocacy or community-based groups, and attorneys familiar with detention settings.

- ☑ **Avoid the use of the flawed and inefficient expedited removal process and instead refer asylum seekers for asylum adjudication before the USCIS [Asylum Office](#).** As Human Rights First and other [NGOs](#) have [repeatedly](#) explained, these adjudications should [not](#) take place within or rely on the expedited removal process.
- ☑ **To the extent expedited removal remains in U.S. law, DHS and the Department of Justice (DOJ) should issue regulations to, at a minimum, ensure access to counsel before and during credible fear interviews;** provide appropriate interpretation, prohibit CFIs from being conducted in a language other than the asylum seeker’s native or best language, and permit asylum seekers to apply for asylum without a CFI if an interpreter in their native or best language is not readily available; and revise the March 2022 [Interim Final Rule](#) to preserve to the fullest extent a critical asylum office [mechanism](#) for review of erroneous negative credible fear determinations. DHS should not conduct these flawed interviews in CBP or ICE detention.
  - ☑ **DHS and DOJ should release asylum seekers and immigrants without setting bond, but to the extent bond is imposed ICE and immigration judges nationwide should consider ability to pay bond and consider alternative conditions of release,** as required in the Central District of California pursuant to a settlement agreement in [Hernandez v. Garland](#).

#### To the U.S. Congress:

- ☑ **Adopt legislation, including the [Dignity for Detained Immigrants Act](#),** limiting the use of immigration detention and mandating bond redetermination hearings before an immigration judge for anyone subjected to immigration detention.
- ☑ **Sharply limit funding for immigration detention to decrease its massive overuse and instead fund community-based case support programs,** which should be employed only when additional measures are determined necessary to assure appearance in an individual case.
- ☑ **Support—along with state, local, and private entities—funding for universal legal representation without any carve-outs.** Congress should also **expand funding for LOP** and improve access to counsel at immigration detention facilities, including by setting requirements for a minimum number of confidential attorney-client visitation rooms by facility capacity and guaranteeing in-person, contact visits for attorney-client meetings.
- ☑ **Conduct vigorous oversight** on the administration’s compliance with laws, rules, and other authorities that authorize release of eligible asylum seekers from detention; access to counsel in detention; abuse, conditions, racist treatment, and disparate impact of detention on Black asylum seekers; continued violence, mistreatment, and unsafe placements of LGBTQ asylum seekers; unjustified and dangerous use of solitary confinement; and ICE’s failure to comply with necessary medical and mental health care to asylum seekers and immigrants in detention, as provided for by the NDS.
  - ☑ **Ensure DHS complies with all legal requirements to provide data and information on the detention of asylum seekers,** including reporting to Congress mandated by the Haitian Refugee Immigration Fairness Act of 1998. These reports have not been released publicly since the FY 2015 to 2017 reports were obtained through FOIA and [posted](#) by Human Rights First.

## Appendix: Immigration Detention in Violation of U.S. and International Law

Asylum seekers—like all individuals—have a right to a presumption of liberty and should generally not be detained. Seeking asylum from persecution is a human right enshrined in the Universal Declaration of Human Rights. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol<sup>12</sup> prohibit governments from returning refugees to persecution. The U.S. Congress adopted the [Refugee Act of 1980](#) to bring U.S. law into line with the Refugee Convention and its Protocol. The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment, which prohibits governments from returning people to a country where they would face torture, has also been ratified by the United States and its protections incorporated into domestic law.<sup>13</sup>

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which [imposed](#) detention on certain immigrants, including asylum seekers requesting protection in the United States. While the government has authority to release asylum seekers on parole, this provision led to the automatic initial detention of many asylum seekers as well as a significant expansion of U.S. detention capacity. IIRIRA also created the flawed expedited removal process, which the Biden administration and its predecessors have wielded against asylum seekers to detain and quickly deport them without adequate due process.

**However, detention of asylum seekers is generally prohibited under international law and can only be imposed as a measure of [last resort](#).** Article 9 of the [International Covenant on Civil and Political Rights](#) (ICCPR)<sup>14</sup> [confirms](#) that every person has a right to liberty and security of person and prohibits detention that is unreasonable, unnecessary, disproportionate, or otherwise arbitrary. The Refugee Convention and its Protocol [prohibit](#) the unnecessary detention of asylum seekers and bar governments from imposing penalties based on asylum seekers’ manner of entry or unlawful presence in a country, in recognition that people fleeing persecution may not always be able to seek entry at a country’s official entry points. The ICCPR also [requires](#) the United States ensure the rights to life and humane treatment in detention.

UNHCR [guidelines](#) stress that “the use of detention is, in many instances, contrary to the norms and principles of international law” and specifically confirm the general principle that “asylum-seekers should not be detained.” Not only is the United States a member of the UNHCR Executive Committee, but it helped lead efforts to draft the Refugee Convention and regularly encourages other countries to uphold legal obligations under refugee law.

International bodies have [repeatedly concluded](#) that U.S. laws and policies imposing detention on certain broad categories of migrants and asylum seekers violate international law. The U.N. Working Group on Arbitrary Detention, following a visit to the United States in 2016, [stated](#) that “the mandatory detention of immigrants, especially asylum seekers, is contrary to international human rights standards.” The Inter-American Commission on Human Rights, following a mission to the United States, [criticized](#) the “increasing use of detention based on a presumption of its necessity, when in fact detention should be the exception” and concluded that “in many if not the majority of cases, detention is a disproportionate measure.”

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<sup>12</sup> As a party to the Refugee Protocol, the United States is bound to the substantive protections of the Refugee Convention.

<sup>13</sup> The United States ratified the Convention Against Torture and incorporated its protections into U.S. law and regulations, including through the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105-277), 8 C.F.R. §§ 208.17, 208.18.

<sup>14</sup> The ICCPR was ratified by the United States in 1992.

***Denial of bond hearings in violation of international law***

DHS has refused to release many asylum seekers on parole while also denying them access to bond hearings, subjecting them to indefinite and unreviewable detention in violation of international law. Under Article 9 of the ICCPR, the United States is required to provide all asylum seekers and immigrants prompt court review of their detention. This review must be conducted [periodically](#) to avoid arbitrary detention. The U.N. Human Rights Committee, in its [comment](#) on Article 9 of the ICCPR, stated that the government must show that “detention does not last longer than absolutely necessary” and provide “prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary.” UNHCR [guidelines](#) state that an asylum seeker subjected to detention should be brought promptly before a body that is independent of the detaining authority and has the power to order release or vary any conditions of release, in order to have the detention decision reviewed, ideally within 24 to 48 hours of the initial decision to hold the asylum seeker. The [American Declaration of the Rights and Duties of Man](#) provides that “[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court.”

However, many asylum seekers have no recourse to challenge unfair denials of parole by ICE. Some may ask an immigration judge to review whether they should continue to be detained or granted release on bond or parole (referred to as a custody redetermination or bond hearing). But many asylum seekers are ineligible for a bond hearing with the immigration court due to flawed U.S. immigration laws and the government’s unnecessarily restrictive regulations and interpretations of these laws. This detention framework violates U.S. obligations under international law to provide periodic and independent reviews of asylum seekers’ detention.

Asylum seekers who are subject to ICE’s unchecked discretion in granting and denying parole and currently ineligible to request a bond hearing before an immigration judge include:

- ❌ **Asylum seekers who sought protection at a U.S. port of entry.** Regardless of whether asylum seekers who request protection at a port of entry are placed into expedited removal or regular removal proceedings, they are [not eligible](#) for a bond hearing before an immigration judge.
- ❌ **Asylum seekers who enter without inspection and are found to have a credible fear of persecution after being placed in expedited removal.** In 2019, former Attorney General William Barr issued a [ruling](#) that blocked all asylum seekers who establish credible fear from seeking an immigration court bond hearing, regardless of manner of entry. To date, the Biden administration has failed to vacate this harmful ruling.
- ❌ **Asylum seekers not yet placed into removal proceedings.** Immigration judges do not have [jurisdiction](#) over bond hearings for individuals who have not been issued a Notice to Appear (NTA), a charging document that initiates removal proceedings. Under the Biden administration, ICE has taken months to issue an NTA to some detained asylum seekers, placing some in expedited removal for months before issuing an NTA without conducting a CFI.
- ❌ **Asylum seekers awaiting a CFI.** Asylum seekers in [expedited removal](#) who have not established a credible fear of persecution are detained unless granted parole.
- ❌ **Asylum seekers placed in reinstated removal proceedings.** The government has taken the position that it may indefinitely detain, without access to bond hearings, asylum seekers who return to the United States to seek protection where the government decides to reinstate a prior removal order against the individual—even if the person establishes a reasonable fear of persecution. The Biden administration defended this position, which the Trump administration had originally taken, to the U.S. Supreme Court. In

June 2021, the Court held in [Johnson v. Guzman Chavez](#) that these asylum seekers could be indefinitely detained without bond hearings in violation of [U.S. obligations](#) to provide independent review of detention. As [explained](#) by Human Rights First and other organizations, reinstatement of removal orders leads to indefinite and arbitrary detention and effectively ratifies the flawed legal processes that led to many of the initial removal orders.

- ❑ **Asylum seekers who have received final orders of removal.** In January 2022, the Biden administration’s Department of Justice [asked](#) the U.S. Supreme Court to overturn decisions of the Circuit Courts of Appeals holding that these individuals are entitled to a bond hearing after six months of detention.
- ❑ **Asylum seekers convicted of [certain](#) crimes**, regardless of whether they have served a criminal sentence or if there are mitigating circumstances, such as evidence of rehabilitation.

## Methodology

In gathering information for this report from February 2021 to April 2022, Human Rights First conducted the following fact-finding and research related to U.S. detention of asylum seekers, release policies and practices, and conditions of confinement:

- Visits to ICE immigration detention centers in Jena, Pine Prairie, and Winnfield, Louisiana in December 2021. Requested visits to facilities in California, New Jersey, Pennsylvania, and Virginia in early 2022 were indefinitely postponed by ICE due to the pandemic.
- Information from asylum seekers and immigrants, attorneys, and other monitors was received relating to asylum seekers and immigrants held at 49 facilities in Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Texas, Virginia, and Washington.
- Telephonic and in-person interviews with 76 asylum seekers and immigrants currently or formerly jailed under the Biden administration in ICE detention centers in Arizona (La Palma Correctional Center), California (Adelanto ICE Processing Center, Desert View Annex, Imperial Regional Detention Facility, and Otay Mesa Detention Center), Colorado (Aurora Contract Detention Facility), Georgia (Folkston ICE Processing Center, Stewart Detention Center), Louisiana (Jackson Parish Correctional Center, LaSalle ICE Processing Center, Pine Prairie ICE Processing Center, South Louisiana ICE Processing Center, and Winn Correctional Center), Massachusetts (Plymouth County Correctional Facility), Mississippi (Adams County Detention Center), and New Jersey (Elizabeth Detention Center, Essex County Correctional Facility). Interviews were conducted in English, French, Portuguese, Spanish, and Wolof—some with the assistance of an interpreter. Some asylum seekers whose cases are discussed in the report underwent credible fear interviews with asylum officers from the Arlington, Chicago, Houston, Los Angeles, and Newark asylum offices.
- Information on an additional 194 asylum seekers and immigrants was received through outreach to dozens of nonprofit and private immigration attorneys, civil rights litigators, law school clinical professors, and detention visitation program volunteers who work with people held in immigration detention.
- Records received through FOIA requests to the Department of Justice immigration courts for [data on bond determinations](#) for detained asylum seekers, which were reviewed in conjunction with the Human Rights Center Investigations Lab at U.C. Berkeley. ICE has not yet responded to a November 2021 FOIA request by Human Rights First on the detention of Afghan evacuees or a May 2021 FOIA request for data on bond and parole decisions disaggregated by nationality, race, and other demographic factors. In response to a 2019 FOIA request for annual reports to Congress on detained asylum seekers required under HRIFA, which was remanded in 2020 to the agency for response after a successful administrative appeal by Human Rights First, ICE [produced only three](#) of the four requested reports.
- Review of government data submitted in federal court as required updates in the *Damus litigation* on ICE parole denials as well as published government data on [detention](#) and [credible fear](#) determinations, including analysis by TRAC and the Human Rights Center Investigations Lab at U.C. Berkeley.
- Desk research of: media reports; publicly available complaints on civil rights violations, detention conditions, and medical neglect in ICE custody; and other human rights investigations.

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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April 19, 2022

## Erroneous Asylum Office Referrals Delay Refugee Protection, Add to Backlogs

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People seeking protection in the United States often [wait](https://www.humanrightsfirst.org/sites/default/files/AddressingBacklogsRecommendationsJanuary2021years) (<https://www.humanrightsfirst.org/sites/default/files/AddressingBacklogsRecommendationsJanuary2021years>) (<https://www.humanrightsfirst.org/resource/protection-postponed-asylum-office-backlogs-cause-suffering-separate-families-and-undermine>) for a decision on their application for asylum. For many these delays have been exacerbated by the failure of the Asylum Office to recognize as refugees people who clearly qualify for asylum after their asylum interview with an asylum officer from the U.S. Citizenship and Immigration Services. Instead, these cases are referred to immigration court for a hearing.

Needless referrals of asylum cases to immigration court contribute to growing backlogs and subject refugees ultimately granted asylum to years of additional limbo and psychological torment, sometimes separated from family who may be stranded abroad in danger.

The need to address the Asylum Office's failure to accurately resolve cases has become even more acute given a [change](https://public-inspection.federalregister.gov/2022-06148.pdf) (<https://public-inspection.federalregister.gov/2022-06148.pdf>) to the asylum process published by the Biden administration in March 2022 that would have asylum officers make decisions in cases of people arriving at the border in addition to those who file through the existing [affirmative asylum process](https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process) (<https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>).

### *Clearly Erroneous Asylum Office Referrals*

Too often the Asylum Office incorrectly refers cases to the immigration court that could and should have been resolved through an Asylum Office interview. Government data analyzed by Syracuse University's Transactional Records Clearinghouse (TRAC) shows that **68 percent** (<https://trac.syr.edu/phptools/immigration/asylum/>) **of asylum cases referred from the Asylum Office were subsequently granted protection by an immigration court judge in Fiscal Year (FY) 2021.**

For example, a Venezuelan activist couple and their son, who were ultimately granted asylum by an immigration court judge in November 2021 after Human Rights First pro bono attorneys took on their case, waited over three additional years for a decision because the Bethpage Asylum Office wrongly referred their case. Despite having identical applications, the parents were denied by the Asylum Office due to alleged inconsistencies and translation errors, while the son was granted asylum. These translation errors only occurred as the couple had filled out the complex asylum application on their own because they could not afford legal representation or adequate translation services, neither of which are guaranteed by the U.S. government to asylum applicants.

In a recent report on the Boston Asylum Office, some former asylum officers [acknowledged](https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf) (<https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf>) an incentive to rush interviews and neglect research and analysis necessary to determine a claim, instead sending cases to the immigration court because it is less work. Many attorneys [have](https://www.unhcr.org/5aa6cfac4.pdf) (<https://www.unhcr.org/5aa6cfac4.pdf>) [observed](https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf) (<https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf>) asylum officers cite minor inconsistencies that are unrelated to the basis for an applicant's claim for asylum or caused by language-barrier misunderstandings as a reason to refer a case to immigration court.

In one particularly egregious case, a Tibetan activist incorrectly referred by the Bethpage Asylum Office to immigration court suffered an entire year of additional delay before the Asylum Office acknowledged its mistake and granted her asylum in July 2021. Despite submitting clear and voluminous evidence of the persecution she suffered, including imprisonment by Chinese authorities, and evidence that the Chinese government continued to target the woman's family still in Tibet, the Asylum Office referred the case claiming a "lack of detail" in her asylum application. The decision also incorrectly referred to the woman as a native of India, in direct contradiction to multiple identity documents she submitted. After repeated requests by her Human Rights First legal representatives to reconsider the wrongful referral, inquiries by several members of Congress, and an additional year in limbo, the Asylum Office finally recognized its error, withdrew the case from immigration court, and granted the woman asylum. But this case was the exception.

Erroneous Asylum Office referrals add tens of thousands of asylum seekers to the immigration court backlog, while also wasting resources as immigration judges hear cases that could and should have been granted by USCIS asylum officers. For example, **nearly 45,000 asylum applicants from China, Russia, and Venezuela with pending immigration court cases were referred to court after Asylum Office interviews**—even though people fleeing repression in these countries overwhelmingly receive asylum. According to government data analyzed by TRAC, as of November 2021 (the most recent available):

- There were [21,082](https://trac.syr.edu/phptools/immigration/asylum/) (<https://trac.syr.edu/phptools/immigration/asylum/>) pending cases of Venezuelan asylum seekers referred by the Asylum Office to immigration court. The vast majority of Venezuelan asylum seekers, many of whom are fleeing government repression, are recognized as refugees with [73 percent](https://trac.syr.edu/phptools/immigration/asylum/) (<https://trac.syr.edu/phptools/immigration/asylum/>) granted asylum or other relief by the immigration courts in FY 2021.
- [19,644](https://trac.syr.edu/phptools/immigration/asylum/) (<https://trac.syr.edu/phptools/immigration/asylum/>) cases of Chinese asylum seekers were pending with the immigration court after referral from the Asylum Office. Many of these cases are also likely to ultimately be granted as Chinese people fleeing state persecution and other egregious harm continue to receive asylum protection at high rates. [Eighty-one percent](#)

(<https://trac.syr.edu/phptools/immigration/asylum/>) of Chinese asylum seekers were granted asylum or other relief by the immigration courts in FY 2021.

- A smaller but substantial number of Russian asylum seekers ([3,093](https://trac.syr.edu/phptools/immigration/asylum/) (<https://trac.syr.edu/phptools/immigration/asylum/>)) with pending immigration court cases were referred from the Asylum Office, and many are likely to be granted refugee protection. In FY 2021, for example, [86 percent](https://trac.syr.edu/phptools/immigration/asylum/) (<https://trac.syr.edu/phptools/immigration/asylum/>) of Russian asylum seekers received asylum or other protection from immigration court judges.

### *Contributing to Immigration Court Backlogs, Delays*

**The Asylum Office's rate of case referrals to immigration court grew by one-third** (from 51 percent in [FY 2015](#)

([https://www.uscis.gov/sites/default/files/document/data/Affirmative\\_Asylum\\_Decisions\\_FY09-FY18\\_Q2.pdf](https://www.uscis.gov/sites/default/files/document/data/Affirmative_Asylum_Decisions_FY09-FY18_Q2.pdf)) to 68 percent in [FY 2019](#)

(<https://www.uscis.gov/sites/default/files/document/data/PEDAffirmativeAsylumStatisticsFY2019.pdf>)

- the last year with available government data) in the wake of Trump-era policies that [tanked](#) ([https://www.humanrightsfirst.org/sites/default/files/Protection\\_Postponed.pdf](https://www.humanrightsfirst.org/sites/default/files/Protection_Postponed.pdf)) asylum grant rates generally. As a result, as of November 2021, nearly 30 percent of the total number of [asylum](#) (<https://trac.syr.edu/immigration/reports/672/>) cases currently pending in immigration court were referred from the Asylum Office.

Asylum seekers referred by the Asylum Office face astronomical wait times for a decision in their case. Those with currently pending immigration court cases have been **stuck in the court backlog for more than three-and-a-half years (1,356 days) on average**, according to government data [analyzed](#) (<https://trac.syr.edu/phptools/immigration/asylum/>) by TRAC. But this wait is just part of the extreme delays asylum seekers face considering that many asylum seekers with referred cases also waited [months or years](#) ([https://www.humanrightsfirst.org/sites/default/files/Protection\\_Postponed.pdf](https://www.humanrightsfirst.org/sites/default/files/Protection_Postponed.pdf)) before receiving an Asylum Office interview and will be forced to wait months or years longer for an immigration judge to hear their cases.

### *Separating Families, Multiplying Traumas*

These extraordinary delays separate many asylum seekers from their families, desperately waiting to be granted protection so that they can petition to reunite with loved ones who remain stranded in danger.

In another case, the Arlington Asylum Office's inexplicable referral of an Ethiopian torture survivor to immigration court, for example, separated him for years from his family who remained in danger in Ethiopia, including his wife who was arrested and interrogated by Ethiopian police due to his political activism. The Asylum Office's referral added years to the five-year delay the man endured before ultimately being granted asylum by an immigration judge in December 2021 with the assistance of pro bono attorneys through Human Rights First – in a case that the government's attorney recognized was so strong that the Department of Homeland Security waived their right to appeal the judge's decision.

An [asylum seeker's](#) (<https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf>) wife was murdered in their home country as he waited for an immigration court hearing after being referred there by the Boston Asylum Office. One the man's children also died under mysterious circumstances after his remaining family members fled to a neighboring country following his wife's killing. The Asylum Office's failure to resolve

the asylum seeker's case, which remains pending before the immigration court, leaves him unable to petition for his surviving children to join him in the United States or to even to visit them abroad.

Asylum seekers needlessly referred to immigration court are subjected to traumatizing, adversarial court proceedings. Forced to re-tell the details of the persecution they suffered after having already done so during their Asylum Office interview, asylum seekers often report that questioning by the immigration judges and government attorneys in court [compound](https://www.cvt.org/sites/default/files/attachments/u101/downloads/2.4.designing_a_trauma_informer) their stress and anxiety.

### *Recommendations*

As Human Rights First has repeatedly [recommended](https://www.humanrightsfirst.org/sites/default/files/AddressingBacklogsRecommendationsJanuary2020) the Asylum Office should:

- address its failure to resolve cases that can and should be granted asylum;
- curb needless referrals that lead to lengthy waits for immigration court by ensuring that asylum officers receive appropriate training and supervision;
- remedy the apparent policy of punting to immigration court certain classes of asylum claims, such as imputed political opinion claims or cases dealing with bars to asylum, including the one-year filing deadline; and
- address the [long-revealed disparities](https://www.uscis.gov/sites/default/files/document/data/PEDAffirmativeAsylumStatisticsFY2019.pdf) in referral rates by office.

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### Protecting our Allies



## Keeping the Door Closed on Torture

## Biden Administration Poised to Eliminate Critical Safeguard Amid Escalating Reports of Erroneous Credible Fear Decisions

Across the country, non-profit legal services organizations and individual attorneys have received alarming recent reports of asylum seekers from Cuba, Haiti, Nicaragua, Venezuela, and other countries – the small portion not blocked or expelled under [Title 42](#) – being denied the opportunity to even apply for asylum through the Department of Homeland Security’s use of the fundamentally [flawed](#) expedited removal [process](#). Asylum seekers who have received negative credible fear determinations, many of which have been affirmed (or upheld) after essentially “[rubber stamp](#)” review by an immigration judge, can be deported from the United States without an opportunity to submit an asylum application and go before an immigration judge for a full asylum hearing. The Biden administration is poised to make this situation even worse, [proposing](#) to eliminate a safeguard – [requests for reconsideration](#) to the U.S. Citizenship and Immigration Services (USCIS) Asylum Office of negative credible fear determinations – that can prevent the deportation of refugees to persecution and torture.

This factsheet explains – based on [publicly available](#) government data that was analyzed by a team from the [Human Rights Center Investigations Lab at U.C. Berkeley](#)<sup>1</sup> – why immigration judge reviews of negative credible fear determinations are not sufficient to guard against wrongful deportations of refugees. These findings include:

- Analysis of immigration court [data](#) confirms that **immigration judges continue to overwhelmingly affirm negative fear determinations – 72.4 percent of negative fear determinations were affirmed between Fiscal Year (FY) 2018 and FY 2021** (through August).
- In addition, **in just the first seven months of the Biden administration, immigration judges have affirmed negative credible fear determinations for hundreds of asylum seekers from Cuba, Haiti, Honduras, Nicaragua, and Venezuela** – even though many people from these countries who are permitted to file asylum applications are granted refugee protection. For instance, in FY 2021, more than [72 percent](#) of Venezuelan asylum seekers were granted refugee protection by U.S. immigration judges, according to government data analyzed by Syracuse University’s Transactional Records Access Clearinghouse (TRAC).

Rather than employing the highly flawed expedited removal process, which endangers the lives of refugees by blocking them from even applying for asylum, governmental resources would be better devoted to [conduct full asylum office interviews](#) (outside of the expedited removal process) for asylum applicants and, while expedited removal continues to exist, retain the safeguard of Asylum Office requests for reconsideration.

### Immigration Judges Continue to Overwhelmingly Affirm Negative Fear Decisions in “Rubber Stamp” Reviews

Immigration judge reviews are often simply a “[rubber stamp](#)” for erroneous credible fear determinations and are inadequate to protect against wrongful deportation in violation of U.S. refugee law and treaty obligations. Analysis of immigration judge reviews [published](#) in July 2018 by TRAC found that immigration judges affirmed 76.4 percent of credible fear reviews conducted in FY 2014 to FY 2017. In addition, TRAC [found](#) enormous, unfair variation in

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<sup>1</sup> Our profound thanks to the Human Rights Center Investigations Lab at U.C. Berkeley, including student team leads – Catey Vera and Vyoma Raman, team members – Aayush Patel, Aliyah Behimino, Carolyn Wang, CJ Manna, Ellie Wong, Karina Cortes Garcia, Maggie Carroll, Rosie Foulds, and Upasana Dilip, and project advisors – Dr. Alexa Koenig, Stephanie Croft, and Sofia Kooner, for their work to review and analyze the data cited here.

outcomes depending on the immigration judge assigned to review the credible fear determination, with some judges affirming negative determinations in nearly every case.

Review of recent immigration court [hearing data](#) shows that between FY 2018 and FY 2021 (through August), **immigration judges affirmed on average 72.4 percent of negative credible fear determinations.**

<b>Negative Credible Fear Reviews by Immigration Judges</b>			
Fiscal Year	Denial Affirmed	Credible Fear Found	Denial Affirmance Rate <sup>2</sup>
2018	5333	1353	79.8%
2019	9861	3497	73.8%
2020	8714	4070	68.2%
2021 <sup>3</sup>	5234	2172	70.7%

As Human Rights First has previously [explained](#), immigration judge reviews are an inadequate safeguard for erroneous credible fear decisions because:

- These reviews are often conducted within 24 hours of the initial determination – leaving asylum seekers with virtually no time to prepare or consult with counsel – and fail to provide interpretation in the asylum seeker’s native or best language. In addition, immigration judges frequently bar attorneys from participating in reviews, reject additional evidence or testimony, and interpret additional information the asylum seeker did not have time or ability to present at the credible fear interview as impugning the credibility of the asylum seeker.
- 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.
- 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.

Erroneous decisions can be deadly. A [Honduran asylum seeker](#) deported through expedited removal after an immigration judge affirmed an asylum officer’s decision that the man did not have a credible fear was murdered just weeks after being deported to Honduras.

The immigration court data also shows **concerning patterns of affirmances of negative fear determinations since President Biden took office for nationals of countries from which many refugees – who are eligible for U.S. asylum protection – have fled.** For instance, in just the first seven months of President Biden’s term (late January to the end of August 2021), immigration judges have affirmed negative credible fear determinations for at least:

- **349 asylum seekers from Cuba** (affirming negative credible fear findings in 56.8 percent of immigration judge reviews conducted under the Biden administration),
- **547 asylum seekers from Haiti** (affirming negative credible fear findings in 75.5 percent of immigration judge reviews conducted under the Biden administration),
- **162 asylum seekers from Honduras** (affirming negative credible fear findings in 73 percent of immigration judge reviews conducted under the Biden administration),

<sup>2</sup> The denial affirmance rate is calculated by dividing affirmed negative credible fear determinations by the total number of affirmed and vacated negative credible fear determinations. This excludes a small number of cases where the decision was unknown, which is the same approach used by [TRAC](#). Corrupted data rows were also removed prior to analysis.

<sup>3</sup> Through the end of August 2021.

- **722 asylum seekers from Nicaragua** (affirming negative credible fear findings in 68.8 percent of immigration judge reviews conducted under the Biden administration), and
- **335 asylum seekers from Venezuela** (affirming negative credible fear findings in 45.3 percent of immigration judge reviews conducted under the Biden administration).

Without an opportunity to request reconsideration by the Asylum Office, these asylum seekers could be deported to the countries where they are fleeing persecution and torture. For instance, in summer 2021, a negative credible fear determination for [a Nicaraguan asylum seeker](#) that had been affirmed by an immigration judge was reversed only 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 had threatened to rape and kill the man for his political opposition views, according to his attorney at RAICES.

Unlawful and improper conduct by government agents has contributed to the many erroneous credible fear decisions under the Biden administration, including threatening and intimidating represented asylum seekers to undergo their interviews without their attorneys present and forcing asylum seekers—including dozens of African asylum seekers—to conduct their interviews in a language in which they are not fully fluent. For example, a Nicaraguan asylum seeker who had been arrested and jailed for her political opposition to the Nicaraguan government received a negative credible fear determination in summer 2021 after Immigration and Customs Enforcement officers persuaded her to go ahead with the interview without her attorney present. The immigration judge barred the woman’s attorney from participating in the fear review and affirmed the erroneous decision. She was forced to go into hiding, fearing for her life, after the U.S. government deported her to Nicaragua.

## Proposed Regulatory Changes Would Eliminate Safeguard Against Erroneous Deportations of Refugees

In August 2021, the Biden administration proposed a [rule](#) that would significantly [alter](#) the U.S. asylum system, including the expedited removal process. Among other changes, the regulation seeks to eliminate the requests for reconsideration [safeguard](#) that protects asylum seekers placed in expedited removal from being wrongly deported without an opportunity to present their full asylum claim to an immigration judge. This guardrail on the expedited removal process allows asylum seekers who have wrongly received a negative credible fear determination that has been affirmed by an immigration judge to ask the USCIS Asylum Office to review and reconsider its decision.

The administration claims that eliminating requests for reconsideration will render expedited removal “[more efficient and streamlined](#)” and that immigration judge reviews of negative determinations will act as a sufficient “[check](#) to ensure that individuals who have a credible fear are not returned based on an erroneous screening determination by USCIS.” In its justification for eliminating requests for reconsideration, the administration [explained](#) that when an asylum “office recommends a follow-up interview, . . . the complete review process could take more than 5 hours per request.”

Given the clear importance of requests for reconsideration as a safeguard to identify erroneous decisions, five hours is not too much ask when the very lives of people seeking refuge in the United States are stake.

## Recommendations

Rather than choosing to employ expedited removal (and eliminate crucial safeguards against wrongful deportations), the government [should focus](#) resources on adjudicating asylum claims through full USCIS Asylum Office interviews. These interviews should be conducted outside of the fundamentally flawed and inefficient expedited removal process, which should not be employed given its due process deficiencies and inherent danger of returning refugees to persecution and torture. However, as long as expedited removal exists, the safeguard of requests for reconsideration must be [retained](#).