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Daniel Delgado, Director for Immigration Policy  
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U.S. Department of Homeland Security  
Washington, D.C. 20528

**RE: Comments in Opposition to the Notice of Proposed Rulemaking entitled *Application of Certain Mandatory Bars in Fear Screenings*; RIN: 1615-AC91; DHS Docket No. USCIS-2024-0005**

Dear Director Delgado:

The National Immigration Project (NIPNLG)<sup>1</sup> submits the following comment in response to the Department of Homeland Security's (DHS) request for comments on its rule that will, for the first time, apply complex asylum bars during truncated border screenings. For the reasons stated below, NIPNLG strongly opposes this proposed regulation and calls on DHS to rescind it in its entirety.

NIPNLG is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system. Additionally, we fight for fairness and transparency in immigration adjudication systems and believe that all noncitizens should be afforded the right to fair adjudications of their claims to remain in the United States. The proposed rule will disproportionately affect marginalized noncitizens, including those who have been wrongly targeted by foreign criminal legal systems. The rule would gut important protections and send noncitizens back to danger without affording them even minimal due process. Moreover, issuing this Notice of Proposed Rulemaking (NPRM) with only a 30-day comment period contradicts longstanding executive orders as well as this administration's stated commitment to transparency and input from affected community members.

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<sup>1</sup> The primary author of this comment is NIPNLG supervising attorney, Victoria Neilson, with thanks to Director of Legal Resources and Training, Michelle N. Méndez for her review.

## I. NIPNLG Strongly Opposes the NPRM Process Which Only Gives Stakeholders 30 Days to Submit Comments

As discussed below, the proposed regulations would dramatically curtail the rights of asylum seekers by subjecting them to complex adjudications of asylum bars at the border, almost always without the asylum seeker having the ability to access counsel.

The Administrative Procedures Act (APA) § 553 requires that the public “interested persons” have “an opportunity to participate in the rule making.” In general, the agencies, must afford “interested persons a reasonable and meaningful opportunity to participate in the rulemaking process.”<sup>2</sup> Courts have found that for the agencies to comply with this participation requirement the comment period they give must be “adequate” to provide a “meaningful opportunity.”<sup>3</sup> Given the importance of the public’s participation in the rule-making process, Executive Order 12866 specifies that “in most cases should include a comment period of not less than 60 days.”<sup>4</sup> Likewise, Executive Order 13563 explicitly states, “To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”<sup>5</sup> While the NPRM claims that 30 days is adequate, in part because it relates to “a discrete topic that has been addressed in multiple recent notice-and-comment rulemakings,”<sup>6</sup> it does not acknowledge that the most recent of these prior rulemakings the agency reached the *opposite* conclusion, finding that it is not appropriate to apply bars at the border.<sup>7</sup> The purpose of notice and comment is to allow the public a meaningful opportunity to comment. The government should welcome suggestions from experts in the field; instead the brevity of the comment period has left experts unable to comment on most of the substance of the proposed changes.

Furthermore, the 30-day comment period for this proposed rule now overlaps with an interim final rule, made public on June 3, 2024, and which went into effect on June 5, 2024, which allows DHS to “close the border” and deny asylum to those who do not meet narrow exceptions.<sup>8</sup> Having this new rule, layered on top of the instant “Mandatory Bar” rule, adds further complexity to analyzing the instant rule. It is simply not possible to fully digest the Border Closure rule, which is 63 pages long, and how it intersects with, or potentially contradicts the Mandatory Bar rule within 30 days. This overlap alone is reason to rescind the instant rule in addition to the substantive reasons for rescission discussed below.

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<sup>2</sup> *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

<sup>3</sup> *N.C. Growers’ Ass’n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).

<sup>4</sup> See Exec. Order No. 12866, § 6(a), 58 Fed. R. 51,735 (October 4, 1993)

<sup>5</sup> Executive Order 13563 -- Improving Regulation and Regulatory Review (Jan. 18, 2011),

<https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulationand-regulatory-review>.

<sup>6</sup> 89 Federal Register 41347, 41358 (May 13, 2024) <https://www.govinfo.gov/content/pkg/FR-2024-05-13/pdf/2024-10390.pdf>

<sup>7</sup> DHS and EOIR, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18134 (Mar. 29, 2022).

<sup>8</sup> DHS, Securing the Border, 89 Fed. Reg. 18710 (June 7, 2024).

## II. NIPNLG Strongly Opposes the Substance of the Proposed Rule

### A. Applying Asylum Bars in an Expedited Setting Violates Congressional Intent and International Law

When Congress created the expedited removal process in 1996, it greatly curtailed existing rights that noncitizens presenting at the border had at the time. Prior to the creation of the expedited removal process, noncitizens who presented at a port of entry without proper documents or who were apprehended between ports of entry, would be placed into full exclusion proceedings before an immigration judge. The entire expedited removal system has been criticized as having racist origins.<sup>9</sup> This rule will only exacerbate the negative impact of the flawed expedited removal system on Black, Indigenous and People of Color (BIPOC) noncitizens because these groups are overrepresented in the border detention data given their lack of access to U.S. visas due to their economic status.

Under expedited removal, rather than receiving a full exclusion hearing before an immigration judge, anyone presenting at a port of entry without a visa, or apprehended near the border, could be given a removal order by DHS that could only be vacated by passing a credible fear interview.<sup>10</sup> Congress specifically determined that the legal standard governing this interview should be a low enough threshold to not exclude legitimate asylum seekers. Section 235(b)(1)(B)(v) of the Immigration and Nationality Act (INA) defines “credible fear” as meaning, “that there is a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen’s] claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum under section [208] of this title.” The INA does not reference bars to asylum in the context of credible fear interviews (CFIs) at all.

In the early days of his presidency, President Biden called on agencies to begin a review of procedures for individuals placed in expedited removal to make them more fair.<sup>11</sup> Advocates for noncitizens, including NIPNLG, hoped that the administration would reimagine expedited removal, and wrote to the administration urging it to end the use of expedited removal for asylum seekers.<sup>12</sup> Instead, the agencies now seek to further curtail the rights of those arriving at

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<sup>9</sup> See Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, UNIVERSITY OF CHICAGO LEGAL FORUM: Vol. 2007: Iss. 1, Article 18, 565 at 586 -87, <http://chicagounbound.uchicago.edu/uclf/vol2007/iss1/18>. (“By allowing a high level of discretion that is influenced by the racist sentiments of the time, this arrangement aggravates the problem that facially neutral immigration laws can, in practice, discriminate on the basis of race. This could be particularly problematic in the enforcement of expedited removal because statistics covering the first few years of its enforcement clearly indicate that, from its inception, the procedure has been used disproportionately to remove certain nationalities.”)

<sup>10</sup> 8 CFR§ 208.30(f).

<sup>11</sup> President Joe Biden, Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, (Feb. 02, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>

<sup>12</sup> Various NGOs, Re: Use of Expedited Removal Process for Asylum Seekers at the Border (Feb. 16, 2021) [https://www.humanrightsfirst.org/sites/default/files/LetterDHSExpeditedRemoval\\_2.16.21.pdf](https://www.humanrightsfirst.org/sites/default/files/LetterDHSExpeditedRemoval_2.16.21.pdf)

the border, forcing asylum seekers to provide proof that they are not subject to bars that they likely do not understand. President Biden’s move to apply asylum bars to an already draconian expedited removal regime therefore violates congressional intent.

UNHCR has also been critical generally of excluding asylum seekers at the border, and specifically of applying any bars in truncated proceedings. The UNHCR, Guidelines on International Protection state unequivocally that:

Given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made.<sup>13</sup>

Since 1804, the United States Supreme Court has recognized the importance of interpreting U.S. domestic law in accordance with international law, where possible.<sup>14</sup> And the Supreme Court reaffirmed this approach in *INS v. Cardoza-Fonseca*, explaining:

If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968.<sup>15</sup>

As the number of refugees continues to rise world-wide,<sup>16</sup> it is imperative for the United States to continue to adhere to international norms in providing humanitarian protections. If the United States fails to live up to its international obligations, it is likely that other countries will feel free to flout international standards as well.

#### **A. Each of the Proposed Bars Which Could Be Applied at the Border is Complex, and Their Application in an Expedited Context Will Lead to Unjust Results and Create a Greater Burden on Adjudicators**

Asylum law is extremely complicated, and the work of asylum officers to quickly determine whether an asylum seeker has shown a significant possibility of meeting the elements is very challenging under any circumstances. This rule would now place a greater onus on asylum

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<sup>13</sup> UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, 4 Sept. 2003, <https://www.unhcr.org/us/media/guidelines-international-protection-no-5-application-exclusion-clauses-article-1f-1951>.

<sup>14</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804). This section of the comment is largely based on the excellent analysis of retired immigration judge Jeffrey Chase, in his blog, *Proposed Asylum Bar Regs Are At Odds With International Law (And Why That Matters)* (May 16, 2024), <https://www.jeffreychase.com/blog/2024/5/16/proposed-asylum-bar-regs-at-odds-with-international-law-and-why-that-matters>.

<sup>15</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

<sup>16</sup> United Nations, Global Refugee Crisis Growing Worse, with Aid Workers near Breaking Point, Little Respect for Basic Rules of War, High Commissioner Warns Security Council (May 30, 2024) <https://press.un.org/en/2024/sc15713.doc.htm>.

officers to consider potential bars to asylum along with the noncitizen’s underlying claim for protection during accelerated, high-stakes interview.

Just two years ago, DHS discussed the possibility of applying bars in the CFI context, and rejected the idea, rescinding part of the Trump era “Global Asylum Rule” in issuing the “Asylum Processing Rule.” As the agency stated in the preamble to the 2022 rule:

[R]equiring asylum officers to apply mandatory bars during credible fear screenings would make these screenings less efficient, undermining congressional intent that the expedited removal process be truly expeditious. Because of the complexity of the inquiry required to develop a sufficient record upon which to base a decision to apply a mandatory bar, such a decision is most appropriately made in the context of a full merits hearing, whether before an asylum officer or an IJ, and not in a screening context. *Furthermore, due process and fairness considerations counsel against applying mandatory bars during the credible fear screening process.* Due to the intricacies of fact finding and legal analysis required to make a determination on the applicability of any mandatory bars, individuals found to have a credible fear of persecution should be afforded the additional time, procedural protections, and opportunity to further consult with counsel that the Asylum Merits process or section 240 proceedings provide. [Emphasis added.]<sup>17</sup>

DHS was correct in reaching this conclusion two years ago. It is still more appropriate for complex bar issues to be decided in full merits proceedings and 180 degree shift by the agency is arbitrary and irrational. Nothing has changed which would make it easier to adjudicate asylum bars in the two years since DHS published this statement; instead the many changes to asylum screening procedures have greatly increased the complexity of asylum law. As discussed below, the bars are some of the most complex areas of law, with constantly evolving legal standards. Asylum seekers should not be subject to these bars during expedited screenings.<sup>18</sup>

Furthermore, this rule is promulgated by DHS, but is not a joint rule issued with the Department of Justice (DOJ). Although immigration judges are employed by DOJ and follow DOJ regulations, this rule does not amend the DOJ asylum regulations to give immigration judges new binding regulations on how to adjudicate CFI review hearings. The preamble points out this critical defect at footnote 37, stating, “The Department notes that if DHS finalizes this NPRM, DOJ may wish to clarify the procedures immigration judges will follow in reviewing DHS screenings.”<sup>19</sup> Despite this acknowledgement, the rule does not explain how immigration judges can apply this rule that does not apply to them. Without clear resources on how to apply the rule, immigration judges may waste valuable time and resources trying to comprehend whether they are required to apply the rule and, if so, how to do so. Given the increased likelihood of unjust results discussed throughout this comment, the inability of immigration judges to properly review

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<sup>17</sup> 87 Fed. Reg. 18134-35 (Mar. 29, 2022).

<sup>18</sup> The rule specifically excludes the firm resettlement bar from consideration at the border because of the burden shifting scheme of adjudication. 80 Fed. Reg. 41355. NIPNLG appreciates that DHS recognizes that it would be unfair to impose the firm resettlement bar at the border, but, as discussed below, believes that all of the bars are too complex to be applied in an expedited setting.

<sup>19</sup> 89 Fed. Reg. 41355.

asylum officers' determinations is especially alarming and is, in itself, a reason that this rule should be withdrawn.<sup>20</sup>

### **1. Proposed 8 CFR § 208.30, Which Allows Asylum Officers to Apply the Persecutor Bar in Expedited Fear Screenings Will Lead to Unjust Results**

Under the proposed rule asylum officers could apply the persecutor bar in accelerated fear screenings. NIPNLG strongly opposes the application of this complex and unsettled area of the law in an expedited setting.

In *Matter of Negusie*, the immigration judge, BIA, and Fifth Circuit court of appeals all found that the persecutor bar applied, even though Mr. Negusie argued that he had served as a prison guard in Eritrea only after being tortured himself and under threat of his own life.<sup>21</sup> The case eventually made its way to the U.S. Supreme Court, which remanded it to the agency for further consideration.<sup>22</sup> In 2020, Attorney General Barr issued a lengthy decision finding that there is no duress exception to the persecutor bar.<sup>23</sup> A year later, Attorney General Garland referred the decision back to himself for further adjudication.<sup>24</sup> In short, there are few areas of law that have been more unsettled over the past decade than how to apply the persecutor bar and when, if ever, the fact that an asylum seeker has acted under duress is relevant to the persecutor bar analysis. Regardless of the ultimate resolution of the *Negusie* case, its long history of changing legal conclusions, shows how complicated this area of law is and how inappropriate it would be for an asylum officer to try to sort through these complex factual and legal issues to reach a fair decision in a truncated proceeding.

### **2. Proposed 8 CFR § 208.30, Which Allows Asylum Officers to Apply the Particularly Serious Crime Bar in Expedited Fear Screenings Will Lead to Unjust Results**

The proposed rule would allow asylum officers to apply the “particularly serious crime” (PSC) bar during preliminary fear screenings. NIPNLG strongly opposes the application of this complex and evolving area of the law in an expedited setting. Section 208(b)(2)(A)(ii) of the INA bars asylum to noncitizens who, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.” This brief provision actually contains three elements, each of which is too complicated to be fairly decided in an expedited, telephonic adjudication.<sup>25</sup>

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<sup>20</sup> Even if the standard that immigration judges use to review denied CFIs were clearly articulated here, the rule would still violate noncitizens' due process rights because they would have no ability to challenge negative determinations of these very complex, and highly litigated bars, before the Board of Immigration Appeals (BIA) or federal courts.

<sup>21</sup> *Matter of Negusie*, 27 I&N Dec. 347, 368 (BIA 2018).

<sup>22</sup> *Negusie v. Holder*, 555 U.S. 511 (2009).

<sup>23</sup> *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020).

<sup>24</sup> *Matter of Negusie*, 28 I&N Dec. 399 (A.G. 2021).

<sup>25</sup> The only example of the type of crime where this bar would be applied in the fear assessment setting is if “if a noncitizen was convicted of murder and sentenced to ten or more years in prison in a country with a fair and independent judicial system.” 89 Fed. Reg. 41354. But as discussed below, most countries from which noncitizens seek asylum do not have “fair and independent judicial systems,” and most crimes that an asylum officer would have to evaluate would not be as clearly a PSC as murder is.

First, a noncitizen may not understand whether there has been a “final judgment” in a criminal matter. The regulations do not specify that an asylum officer must obtain reliable conviction records. Instead the rule is silent on what type of evidence an asylum officer would need to obtain to apply this bar. Thus an officer could wrongly bar an asylum seeker from having an asylum hearing because the noncitizen does not understand that having been accused of a crime, charged with a crime, or convicted of a crime that is on direct appeal, does not constitute a “final judgment.” For example, the Board of Immigration Appeals has had to address the issue of whether “deferred adjudication” meets the “final judgment” legal standard. *See Matter of D-L-S-*, 28 I&N Dec. 568 (BIA 2022). This type of complex analysis is not appropriate in the expedited border context. Furthermore, in full INA § 240 proceedings, an immigration judge requires production of the final judgment of conviction before applying this bar. This rule does not require similar evidence and could lead to wrongful denials at the border.

Second, the substantive definition of “particularly serious crime” has been the subject of significant litigation. PSCs are defined differently in the context of asylum and withholding of removal.<sup>26</sup> Asylum seekers are subject to the PSC bar if they have committed an aggravated felony, whereas the bar to withholding of removal is only triggered if the noncitizen has committed an aggravated felony that carries a five year sentence. Moreover, crimes that are not aggravated felonies can still be considered PSCs but only following an in-depth, case-specific analysis of the crime. It would not be possible for an asylum officer in an expedited setting to conduct this type of analysis especially when they may be reviewing foreign charges stemming from any country in the world.

This section of the rule requires asylum officers to employ a different legal analysis based on a noncitizen’s potential eligibility for asylum or withholding of removal—a level of complexity asylum officers have not been required to employ in border adjudications before. Misapplication of the PSC analysis for withholding, could bar noncitizens from being placed into removal proceedings at all, even when they could be eligible for withholding of removal. Under this rule, those who asylum officers determine are barred from asylum can only be placed in proceedings if they can meet a higher standard of likelihood of future torture. Thus there could be noncitizens who are eligible for withholding, but not asylum, under the correct PSC analysis, who are erroneously barred from being placed in removal proceedings.

Finally, one of the areas of PSC litigation that has changed substantially in recent years is whether adjudicators can factor in a noncitizen’s mental health in determining whether or not a conviction is particularly serious. Under *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014), adjudicators were not permitted to consider a noncitizen’s mental health. However, in 2022, following several federal court decisions rejecting *G-G-S-*, the attorney general reversed course and held that an applicant’s mental health is relevant to the PSC determination. *See Matter of B-Z-R-*, 28 I&N Dec. 563 (A.G. 2022). Determining whether a noncitizen suffers mental health issues in an abbreviated interview, and, if they do, whether those issues affected their criminal history, is an impossible task and will likely lead to noncitizens with mental illness being removed from the United States without a full hearing. Further, if an asylum officer did sufficiently explore an asylum seeker’s mental health issues and the effects of those issues on

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<sup>26</sup> Contrast INA §208(b)(2)(B)(i) and INA §241(b)(3)(B).

their prior criminal actions, the “expedited” interview would necessarily become much longer defeating the purpose of quick fear screenings.

### **3. Proposed 8 CFR § 208.30, Which Allows Asylum Officers to Apply the Serious Nonpolitical Crime Bar in Expedited Fear Screenings Will Lead to Unjust Results**

The proposed rule would also allow Asylum Officers to screen for a noncitizen’s potential commission of a “serious nonpolitical crime” (SNPC) in their home country. Again, the potential for asylum officers to make errors in considering this complex bar in an expedited setting is too great to justify this portion of the rule.

First, persecutory governments often wrongfully accuse asylum seekers of crimes that they did not commit.<sup>27</sup> If the asylum officer has erroneous information in a database that the noncitizen committed a crime in their home country, that alone may lead to a denial of the CFI, and the noncitizen may never have an opportunity to fully present their claim to an immigration judge. Since there is no specific evidentiary requirement that the asylum officer must apply, it is possible that that asylum seekers themselves may raise a wrongful imprisonment or arrest warrant in their home country, which the asylum officer could then use to deny the asylum seeker a day in court.

Second, even if an asylum officer has access to some “proof” from the home country that the asylum seeker committed a SNPC, it would be impossible for the asylum officer to gauge the reliability of that documentation in a truncated, expedited interview. Reliability of documents should matter to USCIS as an adjudicative body, especially if ICE, an enforcement and prosecutorial body, understands the importance of relying on inherently reliable documents. Immigration and Customs Enforcement (ICE) recently revised its procedures on accepting the validity of Interpol Red Notices in recognition of their inherent unreliability. Specifically, ICE Deputy Director and Senior Official Performing the Duties of the Director Patrick Lechleitner explained that “[e]nhanced training, deeper scrutiny, and consistent adherence to this updated directive will further mitigate any potential abuse of these types of notices and diffusions, *particularly in instances where a criminal record might be based on unsubstantiated or fabricated evidence.*”<sup>28</sup> [Emphasis added.]

Third, as with PSC discussed above, the substantive law surrounding the application of the SNPC bar is complex and evolving. Not only must an adjudicator determine whether the noncitizen committed a crime abroad, they must also determine whether the political aspects of the crime outweighed the nonpolitical aspects. For example, in *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012), the BIA determined that the adjudicator properly weighed the seriousness of the crime of burning buses against its political impact. It would be extremely difficult for the asylum officer to undertake this weighing of factors in an expedited setting.

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<sup>27</sup> See *Matter of W-E-R-B-*, 27 I&N Dec. 795, 800, FN 5 (BIA 2020) (noting that the Russian government abuses Red Notices for political reasons.)

<sup>28</sup> ICE, *ICE Updates Guidance for Use of INTERPOL Red Notices During Law Enforcement Actions* (Sep. 20, 2023) <https://www.ice.gov/news/releases/ice-updates-guidance-use-interpol-red-notices-during-law-enforcement-actions>.



#### **4. Proposed 8 CFR § 208.30, Which Allows Asylum Officers to Apply the Security and Terrorism Bars in Expedited Fear Screenings Will Lead to Unjust Results**

The proposed rule would allow asylum officers to apply the security and terrorism bars during the CFI. This is another complex adjudication that is not appropriate in an expedited setting. The rule does not explain what information the asylum officer would rely on to determine that an asylum seeker poses a threat to national security. Presumably this information would come from databases that the asylum officer checks,<sup>29</sup> but the asylum seeker would not be privy to any classified information and would likely find it difficult to rebut evidence they cannot access.<sup>30</sup>

Moreover, these types of databases are notoriously overbroad. In the context of airline travel many noncitizens and U.S. citizens are placed on “no-fly lists” due to hits on terrorist databases.<sup>31</sup> This problem is common enough for DHS to have had to create a redress system for individuals to attempt to get their names off the list.<sup>32</sup> In the context of an expedited border screening, an erroneous hit on a terrorist list could lead to a noncitizen being returned to their country of persecution with no ability to fight against the erroneous label in a database that they may never even learn was the ground for denial.

### **III. The Proposed Rule Will Lengthen and Complicate Border Fear Screenings, Exacerbating Existing Backlogs and Leading to Unjust Results**

The proposed rule will make the difficult task of asylum officers assessing a claim quickly, and generally by phone, even harder. In addition to the assessment required by Congress of whether the noncitizen has demonstrated a “significant possibility” of prevailing on an asylum claim, asylum officers would be required under this rule to apply five complicated bars, for which the governing law is frequently evolving through caselaw. Applying these bars will lengthen the time of each interview, further straining a system that is working beyond capacity.

Despite DHS acknowledging that the number of asylum seekers who will be barred by the rule is relatively low, the effects of the increased screening times will be felt by all asylum seekers and asylum officers. The preamble to the rule acknowledges that in Fiscal Year 2024 asylum officers only flagged potential bars in 2.5 percent of CFIs.<sup>33</sup> And, given that the new rule is permissive, not mandatory, presumably asylum officers would not have barred the full 2.5 percent of asylum seekers if the rule had been in effect during that period of time. Nevertheless, asylum officers will have to ask asylum bar questions in every fear screening interview, and where there is a possibility of a bar, will need to spend extensive time exploring the bar’s possible applicability.

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<sup>29</sup> One such database is run by ICE’s Homeland Security Investigations. See *Biometric Identification Transnational Migration Alert Program* (Last updated Apr. 22, 2024) <https://www.dhs.gov/hsi/programs/bitmap>.

<sup>30</sup> In fact, DHS recently revised its guidance on using classified information in immigration court, making it easier for them to do so. See, DHS, *DHS Policy and Guidelines for the Use of Classified Information in Immigration Proceedings* (May 9, 2024). (Applying broader guidance in “immigration proceedings” including exclusion and removal proceedings.)

<sup>31</sup> See Federal Bureau of Investigation, *Terrorist Screening Center*, <https://www.fbi.gov/investigate/terrorism/tsc> (discussing “no fly list” and means of screening for terrorists.)

<sup>32</sup> ACLU, *What to Do If You Think You're on the No Fly List*, <https://www.aclu.org/know-your-rights/what-do-if-you-think-youre-no-fly-list>.

<sup>33</sup> 89 Fed. Reg. 41351.

The preamble also acknowledges this increased time for both asylum officers and supervisory asylum officers, but seeks to minimize the significance of the rule's effect because the application of the rule is not mandatory.<sup>34</sup> The promulgation of this rule will increase the time of fear screening for every asylum seeker, and decrease the productivity of asylum officers, while simultaneously increasing the likelihood of bona fide asylum seekers being denied a day in court.

#### **IV. The Interplay Between the Proposed Rule, Changes to Asylum Procedures Published Last Year, and New Restrictions Announced During this Comment Period, Create an Impossibly Complicated System for Asylum Seekers and for Asylum Officers**

Last year, DHS and DOJ issued the Circumvention of Lawful Pathways (CLP) rule, barring from asylum most asylum seekers who enter the United States without a visa or pre-approved appointment with Customs and Border Protection (CBP). NIPNLG submitted a comment vehemently opposing that rule and joined a letter with Indigenous-led organizations pointing out the specific injustices the rule visits upon Indigenous peoples.<sup>35</sup> The results of the implementation of the CLP have been a greatly decreased CFI passage rate because of the heightened standard applied at the border, and more noncitizens seeking protection who are foreclosed from asylum and instead may only be eligible withholding of removal before the immigration court. As a result of this rule, asylum officers will have to consider whether there is a significant possibility that those subject to the CLP can win withholding of removal. And, as discussed above, that will mean applying a different particularly serious crime standard for those subject to CLP without an exception or rebutting the presumption.

While the “significant possibility” standard of succeeding on an asylum claim, codified by Congress in the INA, is appropriately straightforward for the accelerated adjudications asylum officers must conduct in border and detained settings, the new rules promulgated in the last year create multiple legal standards with different thresholds the asylum seeker must meet. For example, the preamble to the instant rule lays out what the asylum officer should do if one of the five bars is triggered during the interview:

the AO would enter a negative credible fear of persecution determination if the noncitizen fails to demonstrate a significant possibility that the noncitizen would be able to prove by a preponderance of the evidence that the given bar would not apply and if the noncitizen was otherwise unable to demonstrate a credible fear of torture pursuant to 8 CFR 208.30(e)(3).<sup>36</sup>

The interplay between significant possibility and preponderance of the evidence, coupled with the burden shifting referenced in this “explanation,” will be extremely difficult for asylum

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<sup>34</sup> “In addition, the proposed rule would, in some cases, result in AOs spending additional time, during fear screenings, to inquire into the applicability of the above cited mandatory bars, additional time writing up the required mandatory bar analysis for the credible or reasonable fear determination, and additional time spent by SAOs to review any mandatory bar analysis conducted in such determinations. . .” 89 Fed. Reg. 41359.

<sup>35</sup> Letter to Sec. Mayorkas, “The “Circumvention of Lawful Pathways” Rule Leaves Indigenous Peoples with No Pathway to Seek Asylum” (June 1, 2023) [https://nipnl.org/sites/default/files/2023-06/2023\\_June-Indigenous-Peoples-Asylum-Letter.pdf](https://nipnl.org/sites/default/files/2023-06/2023_June-Indigenous-Peoples-Asylum-Letter.pdf).

<sup>36</sup> 89 Fed. Reg. 41355.

officers to apply in practice in an expedited setting, and nearly impossible for counsel to try to explain to the lucky few asylum seekers who are able to have a consultation before their CFI.

Moreover, the “Border Closure” interim final rule (IFR) creates yet another legal standard that asylum officers will have to overlay on the instant rule and the CLP that went into effect one year ago. Under the new Border Closure IFR, those who are barred from asylum under the rule:

will receive a negative credible fear determination with respect to their asylum claim unless there is a significant possibility the noncitizen could demonstrate by a preponderance of the evidence that exceptionally compelling circumstances exist. Such noncitizens will thereafter be screened for a reasonable probability of persecution because of a protected ground or torture, a higher standard than that applied to noncitizens in a similar posture under the Circumvention of Lawful Pathways rule. The “reasonable probability” standard is defined to mean substantially more than a “reasonable possibility” but somewhat less than more likely than not.<sup>37</sup>

The “reasonable probability” standard appears nowhere in the INA and is only defined in this nebulous section of the preamble. It is difficult to imagine that most asylum officers, many of whom are not attorneys, and many of whom have been recently hired, could apply these different legal standards in a consistent and fair manner. CFIs were designed by Congress to screen out noncitizens who clearly do not have a fear-based claim. With these new regulations, DHS has created overlapping and inconsistent legal standards that sound like a question on a law school exam. It strains credulity to imagine that during accelerated interviews asylum officers could accurately apply these overlapping standards.

Furthermore, the vast majority of noncitizens in expedited removal proceedings do not have access to counsel. With the announcement on June 3 of Biden’s “Border Closure” rule, noncitizens placed into expedited removal will have a mere four hours to find an attorney with whom to consult before being scheduled for their fear screening.<sup>38</sup> Assuming the likely impossibility of reaching an attorney by phone who can take a detainee’s call immediately and spend an hour or more explaining the increasingly complex rules that govern border fear screenings, most noncitizens who ever reach an attorney, will likely do so after both their CFI interview and IJ review. Yet, even if there was an egregious error in the CFI decision, including in the application of the bars to the applicant, or improper application of the relevant legal standard, counsel no longer has any ability to request reconsideration of the asylum officer’s decision, as a result of changes implemented under last year’s “Circumventing Lawful Pathways” Rule.<sup>39</sup>

Finally, the preamble to the rule mentions another rule, the “Security Bars” rule which is currently being held in abeyance, but which is slated to go into effect on December 31, 2024.<sup>40</sup>

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<sup>37</sup> 89 Fed. Reg. 48718. (June 7, 2024).

<sup>38</sup> While the “border closure” rule does not explicitly state that noncitizens will have four hours to access counsel, agency officials have made this statement on several stakeholder calls.

<sup>39</sup> 8 CFR §208.33(b)(2)(v) (newly implemented revision of any right for an asylum seeker to seek further review of a denied CFI by USCIS.)

<sup>40</sup> 89 Fed. Reg. 41350, FN 5.

That rule would impose even more bars on asylum seekers, and it is not clear whether this rule would then apply those additional bars in border fear screenings, if that rule goes into effect.

### **Conclusion**

NIPNLG urges DHS to rescind this rule in its entirety. The rule seems designed to punish asylum seekers as a deterrent to entering the United States at the border. Deterrence measures have never been successful, and this rule will undoubtedly lead to bona fide asylum seekers being returned to harm's way because DHS has created an unworkable, convoluted, and unfair system of fear screening at the border. Please do not hesitate to contact Michelle N. Méndez at [michelle@nipnlg.org](mailto:michelle@nipnlg.org) if you have any questions or need any further information. Thank you for your consideration.

Respectfully,



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