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RE: RIN 1125-AB26/ 1615-AC83; DHS Docket No. USCIS-2022-0016; CIS No. 2736-22; A.G. Order No. 5605-2023
Comment in Opposition to Joint Notice of Proposed Rulemaking Entitled Circumvention of Lawful Pathways

Dear Assistant Director Reid and Acting Director Delgado:

The Immigrant Legal Resource Center (ILRC) submits this comment on the notice of proposed rulemaking, "Circumvention of Lawful Pathways," issued by the Departments of Homeland Security and Justice. We urge the Departments to withdraw the rule in its entirety and restore access to full and fair asylum procedures to those seeking refuge at the southwest border, as required by the statutory framework enacted by Congress. The ILRC is a national non-profit organization that works to advance immigrant rights through advocacy, educational materials, and legal trainings. Since 1979, the ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. We serve the individuals and community of organizations that are most impacted by this rule.

The ILRC builds the capacity of immigration advocates to assist immigrants in their removal defense cases in order to provide more immigrants with a meaningful chance at justice. We support immigration legal service providers nationwide, serving hundreds of organizations and practitioners that work with immigrants. The ILRC provides technical assistance on immigration court procedure through our webinars and our Attorney of the Day service, in which we work with advocates on their specific cases and questions.

As experts in the field, the ILRC publishes *Removal Defense: Defending Immigrants in Immigration Court*, a manual which provides a thorough guide to the immigration court process with practice tips. The ILRC also publishes *Essentials of Asylum Law*, a manual that provides an overview of asylum law for practitioners.

I. The ILRC Objects to the Thirty-Day Notice and Comment Period for the Proposed Rule

We wish to object to the short public comment period provided for this rule. Executive Orders governing the regulatory process require federal agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than sixty days*.”¹ At just thirty days, the comment period is too short to provide the level of feedback on all aspects of the proposed rule that is warranted by such a massive change to U.S. asylum law. The justification that has been provided for this truncated comment period – the end to Title 42 when the emergency orders related to COVID-19 are set to be rescinded – is also insufficient. The Biden administration announced on January 30, 2023, that the emergency orders would be rescinded on May 11, 2023.² It is reasonable to assume that the decision to end the emergency orders was made after careful deliberation over a period of weeks if not months. Further, the Biden administration has been engaged in litigation over Title 42 in multiple courts since taking office in 2021, raising the specter that Title 42 could be ended at any point during such litigation. Finally, the Biden administration announced its intention to end Title 42 in April of 2022.³ Taken together, the Biden administration had been publicly contemplating an end to Title 42, a temporary emergency order, for almost a year by the time this rule was published on February 23, 2023. As such, the Departments had ample time to publish the proposed rule such that a sixty-day comment period could have been provided to the public. A thirty-day comment period is insufficient to provide meaningful comment on the proposed rule. This rule proposes to fundamentally change the U.S. asylum system and severely limit the numbers of asylum-seekers who will be able to fully present their claims for protection. Organizations and individuals who could provide meaningful feedback to the agency are hindered by a short comment period. As detailed below, the ILRC has elected only to present arguments on pieces of the rule where, if given more time, we could provide comments that are more comprehensive. By truncating the comment period, the Departments have all but ensured that the public is not able to provide meaningful feedback. We urge the agencies to re-open the comment period to allow organizations and individuals an opportunity to provide more comprehensive feedback.

II. The ILRC Agrees with Other Commenters that this Proposed Rule is an Amalgam of Unlawful Policies from the Previous Administration and Would Gut Access to Asylum at the Southern Border.

Due to the shortened comment period, the ILRC’s comment will focus specifically on how this proposed rule would strip due process protections from the expedited removal process and how the rule plainly violates the credible fear interview (CFI) provisions of INA § 235. However, we fully agree with many other commenters who have pointed out other deep flaws with this proposed rule. Were we afforded a

¹ Exec. Order No. 12866, 58 Fed. Reg. 51735 (October 4, 1993).

² Adam Cancryn, *Biden to end Covid health emergency declarations in May*, Politico (Jan. 30, 2023).

³ Center for Disease Control, *CDC Public Health Determination and Termination of Title 42 Order* (April 1, 2022).

full comment period, we could have discussed the concerns below in full as well. Beyond the legal defects, we note that this rule will fail to accomplish its stated objective like the asylum bans before it. It will result in family separations despite its narrow “family unity” provision. It will be yet another boon to organized criminal groups and smuggling networks. Finally, it will result in the deaths of more asylum seekers forced to attempt to enter the United States between ports of entry because they are unlawfully deprived of the opportunity to seek asylum at ports of entry.⁴

A. The Proposed Asylum Ban Violates U.S. and International Law.

The proposed rule contains sweeping changes that will deprive thousands of refugees from accessing asylum procedures at the southwest U.S. border in violation of domestic and international law. This rule combines multiple asylum policies of the Trump administration, many of which have already been found unlawful by federal courts. The proposed rule attempts to overcome its plain illegality and make itself more palatable by claiming that it is not a bar, but rather a “rebuttable presumption of ineligibility” that can be rebutted through enumerated exceptions. This is a distinction without a difference. The previous asylum bans, from which this rule unsuccessfully tries so hard to distance itself, were bars to asylum that could only be overcome through specific exceptions. A “rebuttable presumption of ineligibility” that can only be rebutted through specific exceptions, is therefore indistinguishable in practice from an asylum bar or asylum ban. Yet the proposed rule uses this euphemistic language to attempt to sidestep federal court rulings that have already invalidated its precursor policies.

B. The Two-Year Timeframe and Criteria for Extension are Arbitrary and Capricious.

The proposed rule purports to be “temporary,” but provides no justification as to why it should remain in effect for two years. Moreover, considering the fact that many asylum seekers will not receive a merits hearing on their asylum claim for many years, even if it is not renewed this rule will be applied to asylum cases far beyond the two-year period. The Departments claim that this rule is necessary in the wake of the lifting of the Title 42 public health order, but fail to give any explanation as to why then they would need a two-year “condition” on asylum rather than a shorter period. Moreover, the criteria for its extension are subject to highly subjective criteria, including “current and projected migration patterns,” “resource limitations,” “the availability of lawful, safe, and orderly pathways,” and “foreign policy considerations.” These amorphous criteria could be used to perpetuate the asylum ban indefinitely by future administrations as a political matter as soon as the first sunset date contemplated by the proposed

⁴ Fiscal years 2021 and 2022, the years when the Title 42 order has been in effect have seen the highest numbers of border deaths in recent history. The Departments themselves point out that more than 890 migrants died attempting to enter the United States in FY2022. 85 Fed. Reg. 11,714. The thousands of migrant deaths since the 1990s are the entirely avoidable and horrifying result of the policy choices that resulted in the militarization of the U.S. border by the Department of Homeland Security and its predecessor agency. Although these deaths are often overlooked in discussions over the border and immigration it bears mentioning here, especially when the Departments cite to migrant deaths in order to justify a further hardening of the border that will only result in more deaths. See U.S. Border Patrol, *Border Patrol Strategic Plan 1994 and Beyond*, 7, (Aug. 8, 1994), available at <https://www.hsdh.org/?abstract&did=721845>; U.S. Border Patrol, Southwest Border Deaths by Fiscal Year, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-deaths-fy1998-fy2018.pdf>.

rule. As such, the Departments' two-year period and their criteria for indefinite extensions beyond the two years are arbitrary and capricious.

C. The Proposed Rule Conflicts with Provisions of INA § 208.

The proposed rule plainly violates the language of INA § 208. Though the statute allows for additional conditions on asylum, they must be consistent with the statute.⁵ The statute clearly mandates that asylum seekers be able to access asylum procedures whether or not they have entered at a port of arrival and regardless of their status. Yet this proposed rule would ban asylum applicants who do not receive an appointment to present themselves at a port of entry through the CBP One app. The preamble to the rule revives the argument, already struck down in federal court,⁶ that the previous administration used to defend the 2018 Proclamation Ban,⁷ arguing that being allowed to "apply" for asylum is not the same as being "eligible" for it.⁸ This is not a reasonable interpretation.

Similarly, as was the case of the 2019 Transit Ban ("TCT Bar"), the transit ban component of this rule violates the firm resettlement and safe third country provisions of INA § 208. In *East Bay Sanctuary Covenant v. Garland*, the Ninth Circuit found that the TCT bar was inconsistent with the safe-third country and firm resettlement statutory bars.⁹ Moreover, it found that the TCT bar failed to ensure that the third country was actually a safe option, a critical component to the statutory bars.¹⁰ The Departments contend that this proposed rule is consistent with both of these statutory bars and that its "scope and effect are significantly different" from them.¹¹ Specifically, the Departments argue that the proposed rule "would not make asylum eligibility hinge exclusively on the availability of protection in a third country" because it would not apply if the applicant availed themselves of a "lawful pathway."¹² In other words, the Departments assert that this bar would not apply where an exception is met and therefore asylum does not "hinge exclusively" on it. This tautological argument does not resolve the conflict between the proposed rule and either of these existing bars nor does it distinguish this rule from the TCT Bar. This proposed rule therefore conflicts with both statutory provisions and is unlawful.

⁵ INA § 208(b)(2)(C).

⁶ See *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669-70 (9th Cir. 2021) ("It is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress in section 1158(a). As the district court stated, '[i]t would be hard to imagine a more direct conflict' than the one presented here").

⁷ Presidential Proclamation No. 9,822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018).

⁸ The Departments further supports this distinction through an argument about the one-year filing deadline to asylum that is plainly wrong. They argue that "a noncitizen present in the country for more than one year may not apply." That is false. A person who has been present in the country for more than one year can apply for asylum and may be granted asylum if they can show that an exception to the filing deadline applies. See 88 Fed. Reg. 11,735.

⁹ *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020).

¹⁰ *Id.* at 977. The court also added that the "protection" of requiring a third country to be a signatory to the 1951 Refugee Convention or 1967 Protocol do "not remotely resemble the assurances of safety built into the two safe-place bars of [INA § 208]." *Id.* Here the Departments reintroduce the same illusory safeguard of requiring that the third-country be a Convention or Protocol signatory though it fully recognizes that, Mexico being a signatory to both treaties, "only Mexican nationals would be categorically exempt." Thus this "safeguard" is a mere circumlocution.

¹¹ 88 Fed. Reg. 11,736.

¹² *Id.*

D. The Proposed Rule Would Condition Access to Asylum on Use of a Flawed Scheduling Mechanism

The ILRC also strongly opposes the conditioning of asylum access on scheduling technology, namely the CBP One app. The app is deeply flawed, unreliable, difficult to access, available in only a few languages, and raises a host of privacy and data security concerns.¹³ The app is inaccessible to many asylum seekers and frequently crashes, reportedly only displaying error messages in English when it does so. Practitioners report that those who have been able to access the app report only a very small number of available appointments that are taken quickly. Those traveling with multiple family members who must input their information in a short timeframe are especially affected. The Departments dismiss concerns about accessibility pointing to a single survey of ninety-five migrants by U.S. Customs and Border Protection (“CBP”) officers, as well as their anecdotal observation that most noncitizens have smartphones. In addition to the myriad problems with the app itself, this use of CBP One replicates the Trump administration’s unlawful metering policy and the apps required use conflicts with INA § 208. By the Departments’ own admission, CBP can currently only process 326 asylum seekers per day along the entire southern border.¹⁴ Yet the Departments falsely promote this mechanism as an effective “lawful pathway” to asylum. Moreover, they propose to bar from asylum anyone who does not use this pathway, that itself is still mostly nonexistent and inaccessible to the vast majority of asylum seekers.

E. The Enumerated Exceptions are Inadequate and Will Be Illusory in Practice.

The proposed rule outlines certain exceptions to the asylum ban, however, the way that they are structured raises concerns that these exceptions only exist on paper. The “exceptionally compelling circumstances,” including showing that the applicant was unable to access the CBP One app to schedule an appointment, must be demonstrated by the applicant by a preponderance of the evidence, an unduly high evidentiary standard, both for the CFI, as discussed further below and for the asylum merits stage. At the asylum merits stage, exceptions may have to be proven years after the underlying compelling circumstances have occurred. Additionally, the Departments fail to provide sufficient guidance as to how someone can properly document and prove that it was impossible to access the CBP One app.¹⁵ The “imminent and extreme threat to life and safety” exception is a standard that is apparently higher even than the statutory standard for withholding of removal, which itself is much stricter than asylum. The Departments also explicitly state that generalized threats of violence will not satisfy the safety exception. The Departments falsely tout these exceptions as further distinguishing this asylum ban from the ones that came before it, but for most asylum seekers, these exceptions will be illusory.

The Departments do create a post-hearing family unity exception for those traveling with family members who are granted withholding of removal but barred from asylum. However, this exception does not

¹³ Raul Pinto, *CBP One Is Riddled With Flaws That Make the App Inaccessible to Many Asylum Seekers*, Immigration Impact, American Immigration Lawyers Association (Feb. 28, 2023).

¹⁴ 88 Fed. Reg. 11,729.

¹⁵ There is little guidance as to what constitutes a “significant technical failure” or “ongoing and serious obstacle,” nor is there any information as to how an applicant could demonstrate this fact to an adjudicator. See Proposed 8 C.F.R. § 208.33(a)(ii).

provide any recourse for asylum seekers subject to the ban whose relatives did not travel with them. It therefore only partially addresses the family separation that will result from this proposed rule.

F. The Departments Have Failed to Adequately Consider Alternatives

The Departments limit their analysis of alternatives to maintaining the “status quo,”¹⁶ reviving two unlawful policies from the previous administration, namely the Migrant Protection Protocols and Safe Third Country agreements, and a reduction of CFI use. The administration considers no further alternatives though immigration advocates have proposed many.¹⁷ The proposed rule gives little explanation for dismissing the “status quo” as an option except for observing that the Departments expect that many people will apply for asylum. While a reduction in the use of CFIs would address the Departments’ concern about a large number of asylum seekers, it also quickly dismisses this as a possibility. The Departments claim that this would strain “already stretched State and local governments, as well as supporting NGOs,” but provide no support for this conclusion.¹⁸

The ILRC specifically takes exception to the claim that this rule is being justified by citing the capacity of “supporting NGOs.” As an NGO that supports asylum seekers, we reject this argument and ask that this asylum ban not be justified in our name.

III. The Proposed Rule Violates the Plain Statutory Language Governing the CFI and Expedited Removal Process and Would Deprive Asylum Seekers of Due Process Protections and Meaningful Access to Asylum.

As discussed above and regardless of the terminology the Departments use to describe it, the proposed rule creates a bar to asylum. Applying the proposed rule at the CFI stage violates the statute, forces CFI interviewees to demonstrate eligibility for factually complex and difficult to prove exceptions under the high evidentiary standard typically reserved for full merits hearings and deprives asylum seekers of due process. The rule will result in the expedited removal of many asylum seekers who have meritorious claims, including those who would be able to overcome the exceptions of the proposed rule if given a meaningful opportunity to do so.

A. The Proposed Rule Effectively Creates an *Ultra Vires* Pre-CFI Screening, Depriving Affected Migrants of Actually Receiving a Full CFI Altogether.

The proposed regulations instruct the officer to begin the CFI by determining whether the asylum ban applies to the interviewee, and if so, whether they have rebutted it. If the ban applies and is not rebutted,

¹⁶ It is difficult to determine what is meant by “status quo” here when access to asylum procedures at the border has been subject to a continuously changing set of formal and informal barriers to asylum in recent years even before the Title 42 order was issued.

¹⁷ See, e.g., Human Rights First, *Leading by Example, Honoring Commitments*, Jan. 26, 2023, <https://humanrightsfirst.org/library/leading-by-example/>.

¹⁸ To the extent that asylum applicants produce any “strain” on local resources, one possible solution would be for the Departments to actually comply with the thirty-day statutory processing period for work authorization applications, which the Departments have consistently failed to do in violation of existing regulations. 8 C.F.R. § 208.7(a)(1).

then a complete CFI is never actually conducted. Instead, the interviewee is summarily given a negative fear determination even if they have never even been asked a single substantive question about their fear of persecution or eligibility for asylum. They are then subject to an interview solely meant to determine withholding of removal or Convention Against Torture (CAT) eligibility under the non-CFI standard of “reasonable possibility.”¹⁹

In other words, the proposed rule is not applied at the CFI process, so much as it supplants the CFI itself in cases where the person cannot rebut the “presumption” of ineligibility by proving that one of the factually complicated exceptions applies. The proposed rule instructs asylum officers to summarily enter a negative finding of credible fear of persecution without asking a single question related to persecution. Affected asylum seekers who trigger this bar are therefore deprived of ever receiving a full CFI as required by the statute and existing regulations. Moreover, the summary denial of credible fear will fail to produce an adequate written record of the determination as required by INA § 235(b)(1)(B)(iii)(II). A written record from an incomplete CFI that contains no information about the actual claim of persecution fails to satisfy this requirement. In this way, the pre-CFI screening created by this rule violates the requirements of INA § 235.

The Departments also contend that the summary denial of a CFI is permissible because if a noncitizen is subject to the “presumption of ineligibility” and cannot rebut it, there is no significant possibility that they could be eligible for asylum. Beyond the enjoined Global Asylum Rule, statutory bars on asylum do not serve a gatekeeping function at the CFI stage as the proposed rule is intended to. If an applicant has a negative discretionary factor, or if there is evidence that they may have triggered a statutory bar to asylum, they must still be afforded a CFI and must still be asked substantive questions about their underlying claim.²⁰ No reasonable reading of the authority to add conditions to asylum in INA § 208 supports the notions that the Departments can decide to summarily deprive a whole class of asylum seekers of a full CFI.

The only pre-CFI screening mechanism currently in effect is the one implementing the U.S.-Canada Safe Third Country Agreement at the CFI stage. This differs from the present proposal in several important respects. First, the exceptions to the proposed bar are far more complex than the exceptions provided in the U.S.-Canada Agreement.²¹ They are much more comparable with the provisions of the enjoined Global Asylum Rule. Second, the U.S.-Canada Agreement exists under a different statutory framework and context. There are serious questions as to whether the U.S.-Canada Agreement regulations

¹⁹ Proposed 8 C.F.R. § 208.33(c)(2).

²⁰ This is especially crucial because of the role of the CFI. It is conducted early in the asylum process and in many cases the person being interviewed is detained and has little opportunity to present evidence. An apparent bar to asylum at the CFI stage may not actually apply upon a full showing of the facts at the asylum merits stage.

²¹ The exceptions to the U.S.-Canada Agreement apply to someone who (1) is a citizen or habitual resident of Canada or, not having a country of nationality, is a habitual resident of Canada; (2) has certain relatives with immigration status or pending asylum application in the United States; (3) is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States; (4) have a valid U.S. visa; or (5) is allowed to pursue their claim in the United States as a matter of discretion. See 8 C.F.R. § 208.30(e)(6)(iii) From an evidentiary standpoint, these exceptions are far easier to determine during a screening interview than any of the “compelling exceptional circumstances” enumerated in the proposed rule.

themselves violate the credible fear statute.²² However, these are mitigated by the fact that the Agreement regulations provide clear-cut exceptions that can be more easily ascertained during a CFI and that Canada has a fully functioning system of refugee protection that does not raise the same *refoulement* concerns. In other words, it does not summarily deprive the applicant of a path to asylum and subject them to expedited removal in the same way that the Departments propose here.

The pre-CFI screener that this rule proposes violates the statutory requirements governing CFIs in INA § 235 and deprives asylum seekers of the opportunity for a full CFI.

B. The Complexity of the Proposed Rule Would Raise the CFI Interviewee’s Burden Far Beyond the “Significant Possibility” Standard of the Statute.

The Departments contend that the proposed rule is “far simpler” than the multiple bars that the Global Asylum Rule proposed to include in the CFI. Yet, far from being a “single, stand-alone condition,” the proposed rule will require intensive factual analysis to determine whether the “presumption of ineligibility” can be rebutted by one of several exceptions.²³ At the CFI stage, this raises the standard for affected asylum seekers and neither the bars, nor their exceptions would truly be assessed under the “significant possibility” of eligibility required by statute.

The proposed rule’s bar to asylum can only be overcome by certain enumerated exceptions.²⁴ The proposed rule’s exceptions, other than the exceptions for a final denial of asylum, parole or pre-scheduled entry, and unaccompanied child status, must be rebutted under the preponderance of the evidence standard. This evidentiary standard not only would apply at the merits stage of the asylum process but also at the CFI itself. Meanwhile the statutory standard governing the CFI itself is a “significant possibility” that the applicant “could” establish eligibility for asylum under INA § 208.

Preponderance of the evidence is defined as demonstrating that the underlying fact is “probably true.”²⁵ This is the evidentiary standard for most USCIS benefits, including adjustment of status.²⁶ It is also the burden of proof for asylum applicants in immigration court to show a well-founded fear of persecution for asylum and clear probability of a threat to life or freedom for withholding.²⁷ Therefore to be eligible for withholding an applicant must demonstrate by a preponderance of the evidence that their life or

²² The Agreement has not been the subject of much litigation due to its limited applicability and the fact that affected people are afforded access to Canada’s asylum system. However, the unlawful attempt by the Trump administration to implement similar “Asylum Cooperation Agreements” with El Salvador, Guatemala, and Honduras for asylum seekers arriving at the southern border did raise legal challenges. *See U.T. v. Barr*, No. 1:20-cv-00116 (D.D.C.).

²³ *See* 88 Fed. Reg. 11,744.

²⁴ Although it is termed a “presumption of ineligibility” no amount of evidence of actual eligibility for asylum will overcome it. It can only be overcome through exceptions that are themselves unrelated to the actual elements of asylum or the refugee definition.

²⁵ *See Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *see also* Preponderance of the Evidence Definition, *Black’s Law Dictionary* (11th Ed. 2019) (“the greater weight of the evidence”).

²⁶ 1 USCIS-PM E.4(B).

²⁷ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

freedom would be threatened on account of a protected ground.²⁸ Given the complexity of the enumerated exceptions to the proposed rule, applying them at the CFI stage contradicts the “significant possibility” standard and undermines its intended function as a low evidentiary threshold to screen asylum claims.

The rule’s fact-intensive exceptions shoehorn an extremely high evidentiary burden into the CFI process. One example that highlights the absurdity of this proposal is the exception for “imminent and extreme threat to life or safety.” This standard appears to be even higher than the withholding of removal “threat to life or freedom” standard given the added qualifiers “imminent” and “extreme.” In order to overcome the presumption of ineligibility under this exception, an applicant would functionally have to win a withholding of removal case – or rather meet a standard even higher than withholding – within their CFI.

The same holds true for the remaining exceptions based on “extremely compelling circumstances.” An applicant must demonstrate they are a victim of a severe form of trafficking under the same evidentiary standard that USCIS applies in the final adjudication of a T visa. Or an applicant must show that it is probable that they suffered a medical condition at a CFI with almost no opportunity to prepare evidence or obtain medical records.

The other exception that must be met by a preponderance of the evidence is demonstrating that it “was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.” The Departments do not detail how a person can demonstrate these exceptions other than to say that it will only apply to a “narrow set of cases” in which access was “truly not possible.” Yet, applicants in a CFI will somehow be expected to prove this negative by a preponderance of the evidence.

The CFI is governed by the “significant possibility” standard because it is a threshold interview and is not meant to be a full adjudication of one’s claim. There is little opportunity to prepare or present evidence at this stage. Frequently the CFI occurs while a person is detained. Relevant facts are often overlooked or only minimally explored due to time constraints. Forcing an interviewee to demonstrate a fact by a preponderance of the evidence within such a proceeding is wholly inappropriate. It also conflicts with the plain meaning of “significant possibility” that one “could” be eligible for asylum. One can show a significant possibility of eligibility even if they have triggered an apparent bar to asylum. After all, the person could demonstrate that they meet an exception to the bar in a full evidentiary hearing.

Yet the proposed rule argues that if someone cannot definitively rebut the presumption of ineligibility under the standard of proof applied in full merits hearings, they *per se* cannot show a “significant possibility” of eligibility. This distorts the intended function of the CFI and plainly contradicts the “significant possibility” evidentiary standard set out in the statute.

²⁸ INA § 241(b)(3)(A).

C. Asylum Seekers Deprived of a Full CFI by the Proposed Rule Would Be Unlawfully Forced to Meet the Reasonable Possibility Standard.

The imposition of the “reasonable possibility” for screenings for withholding of removal or CAT eligibility lacks an adequate explanation, and it violates the Global Asylum Rule injunction.

In last year’s Asylum Processing Interim Final Rule (IFR), the Departments themselves took the opposite approach finding that the “significant possibility” standard was “preferable for multiple reasons . . . including because it aligned with Congress’s intent that a low screening threshold standard apply.”²⁹ The Departments further cited to the executive’s own policy on asylum as further support for imposing the significant possibility standard for all parts of the CFI, including the withholding of removal and CAT screening. Moreover, the Departments found no evidence “that this approach resulted in more successful screening out of non-meritorious claims while ensuring the United States complied with its non-refoulement obligations.”³⁰ The Departments fail to provide an adequate explanation for their reversal from the position taken in the Asylum Processing IFR. They cite to the “unique context” and “changed circumstances,” but the proposed rule would be applied in the exact same context and under materially unchanged circumstances.

In the Asylum Processing IFR, the Departments recognized that the injunction against the Global Asylum Rule warranted that the CFI screening for withholding of removal and Convention Against torture relief be conducted under the significant possibility standard.³¹ In *Pangea Legal servs. v. DHS*, the district court enjoined the Department from implementing the Global Asylum Rule and “any related policies or procedures.”³² This injunction remains in effect. As the Departments correctly pointed out in the Asylum Processing IFR, the imposition of the reasonable possibility standard violates this injunction.

D. The Proposed Rule Inexplicably Curtails Immigration Judge Review of CFI Denials.

The proposed rule insulates the new asylum bar from meaningful review by requiring applicants to affirmatively request a credible fear review (CFR) from an immigration judge.³³ This is once again an unexplained departure from the Departments’ CFI practice as well as their own approach under the 2022 Asylum Processing IFR. Just like the imposition of the “reasonable possibility” standard discussed above, it also violates the *Pangea* injunction.

The Departments recognize that there are many reasons why someone may not indicate that they are requesting immigration judge review. Yet they insist that a vague plan to “change the explanations” provided to applicants will be a sufficient safeguard.³⁴ It is not, especially considering the lack of access to

²⁹ 88 Fed. Reg. 11,745-46.

³⁰ Asylum Processing IFR, 87 Fed. Reg. 18,092 (Mar. 29, 2022).

³¹ 87 Fed. Reg. 18,091.

³² 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021)

³³ See Proposed 8 C.F.R. § 208.33(c)(2)(v)

³⁴ 88 Fed. Reg. 11,747.

counsel and other due process concerns during the CFI process and the Departments' repeated failure to properly advise asylum seekers of their rights in other contexts.³⁵

The Departments' efforts to curtail review violate the due process rights of asylum seekers. This is especially compounded by the fact that the Departments intend to impose an asylum bar with complex exceptions at the CFI stage. Moreover, they intend to have multiple different standards apply during the same interview depending on whether the person is being screened for asylum or withholding of removal and CAT. This will result in erroneous denials and the mistaken applications of the wrong standard in different parts of the CFI. The Departments will further exacerbate the impact of these denials by depriving many asylum seekers of the opportunity to have the decisions reviewed.

E. The Proposed Rule Violates the CFI Statutory Framework Created by Congress.

The Department claims that the proposed rule is necessary to strike a balance between being able to quickly identify non-meritorious asylum claims while still preserving access to asylum. Yet, that balance has already been struck by Congress when it created the expedited removal framework. As detailed in the next section, that framework itself is extremely flawed and fails to protect due process rights and meaningful access to asylum. Here, rather than carrying out this Congressionally mandated framework, the Departments seek to discard the expedited removal framework set up under the statute and replace it with one of their own design.

The Departments' rationale behind substituting their policy preferences for those of Congress is flawed. With scant evidentiary support, the Departments proclaim that too many applicants with non-meritorious claims are able to access the asylum system. They point out that "[eighty three] percent of people who were subject to [expedited removal] and claimed fear from 2014 to 2019" were referred to Section 240 proceedings and only fifteen percent of these cases resulted in a grant of asylum or other protection. First, the Departments fail to identify how many of the people referred to Section 240 proceedings received a CFI as opposed to being placed into proceedings directly, which happened frequently during the identified time period. Second, the Departments fail to account for the fact that many of these cases remain pending and therefore the number of completed cases is statistically skewed.³⁶ Third, the termination of cases through prosecutorial discretion or for other reasons are not counted as "other protection" in these figures. Fourth, the high denial rate of asylum is not proof of non-meritorious claims, but the result of deep flaws in asylum adjudication that result in the denial of claims that should be granted. The Departments fail to acknowledge the role played by lack of access to counsel, fundamentally unfair adjudications,³⁷ and harsh anti-asylum policies in the high denial rate of the time period in

³⁵ See Kathryn Shepherd and Royce Bernstein Murray, American Immigration Council, *The Perils of Expedited Removal*, May 2017, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf.

³⁶ For example, many people have received in absentia orders of removal, often due to deficiencies in the EOIR notice process. These cases are generally completed sooner because there is no hearing on the merits and therefore will be disproportionately represented among completed cases.

³⁷ The creation in recent years of "asylum-free zones" out of whole jurisdictions where judges routinely denied well over 90% of asylum claims is well documented. Some Immigration Judges have denied every asylum application they have adjudicated. See TRAC Immigration, Judge Reports,

question.³⁸ Tellingly, the Departments point out that Mexico has granted relief in seventy two percent of the asylum cases it has adjudicated, a grant rate far higher than that of the Departments. The reason behind the disparity between CFI and asylum adjudications is not that CFI grant rates are too high, but that the Departments routinely deny meritorious asylum claims.³⁹

The Departments also cite the length of the asylum process as another reason why it must alter the expedited removal structure. They point out that half of the asylum claims take more than four years to complete. This timeframe is entirely within the control of the Departments, which together are tasked with carrying out asylum adjudications. Their inability to execute the laws as written cannot be an excuse to disregard them.

Congress has already directly addressed the issue that the Departments seek to address in its proposal. It has, through the statutory expedited removal and CFI process, instructed the Departments as to how to strike the balance between access to asylum at the border and expeditiously removing migrants who do not have meritorious claims. The Departments cannot discard Congress's statutory framework and substitute it with their own. To the extent that the proposed rule does that, it violates the statute and places *ultra vires* conditions on the expedited removal process.

F. Applying the Rule to the Procedurally Deficient Expedited Removal Framework Will Deprive Asylum Seekers of a Meaningful Opportunity to Rebut the "Presumption of Ineligibility."

The rampant due process problems that already impact the expedited removal framework will only serve to exacerbate the harsh provisions of this rule. The result will inevitably be a fundamentally unfair CFI process that deprives asylum seekers with valid claims of a meaningful opportunity to access the asylum system.

The CFI, intended to be a low screening threshold for asylum claims, has become an increasingly challenging bar for even strong asylum claims. Asylum seekers frequently must undergo the CFI while they are detained, often in inhumane and overcrowded conditions. Observers of CFIs have noted hostile adversarial interviews and CFIs that have failed to adequately explore important aspects of someone's claims. There is limited access to counsel in the CFI process and almost no opportunity to obtain and

<https://trac.syr.edu/immigration/reports/judge2022/00778HOU/index.html> (last accessed Mar. 17, 2023); Noah Lanard, *Inside the Courtroom Where Every Asylum Seeker Gets Rejected*, Mother Jones, Jul. 2019, <https://www.motherjones.com/crime-justice/2019/07/inside-the-courtroom-where-every-asylum-seeker-gets-rejected/>.

³⁸ For example, the Third Country Transit ban, which is the policy predecessor to the current proposal, forced many asylum seekers to meet the higher evidentiary burden of withholding of removal. Meanwhile, prevailing case law such as the now overruled decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), resulted in the denial of many valid asylum claims while it was in effect.

³⁹ Most individuals undergoing a CFI are not represented by counsel. Representation is a key factor in whether an asylum seeker is ultimately granted relief. See Vera Institute of Justice, *The Case for Universal Representation*, <https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1> (last accessed Mar. 22, 2023).

present evidence. Applicants routinely report a lack of adequate access to interpreters and being forced to present their cases in languages that they do not speak well.

The proposed rule will have an especially pronounced impact on individuals with heightened vulnerabilities, including people suffering from mental illness or people with disabilities or other medical diagnoses. Many of them are excluded by the narrow “acute medical emergency” exception, while those who meet it may be unable to meet the high burden of proof to show that it applies to them.

Within this context, forcing asylum seekers to meet the high burden of showing one of the “exceptionally compelling circumstances” by a preponderance of the evidence will completely deprive asylum seekers of a meaningful opportunity to present their case. As stated above, applicants will be forced to demonstrate evidentiary complex exceptions under a standard of proof wholly inappropriate for a CFI. The high burdens of proof in addition to the physical conditions and limitations asylum seekers face at the CFI stage will be further exacerbated by the proposed rule and will inevitably result in the summary deportation of asylum seekers with meritorious claims who should have been found to qualify for one of the exceptions. Most of them will have had no meaningful opportunity to rebut this “presumption of ineligibility.”

IV. Conclusion

The ILRC would like to emphasize our deep disappointment with the language and framing employed by the Departments throughout the proposed rule. Advocates who have read the Departments’ regulatory proposals over the last six years, including the previous asylum bans, have sadly become accustomed to the dehumanizing terms, the framing of refugees in search of protection as an inherent problem to be mitigated, and overall hostile language concerning immigration in general. When President Biden took office, we had hoped that the announced objectives of “restoring and enhancing asylum processing at the border”⁴⁰ marked a rejection of this rhetoric and general approach. Inexplicably, the Departments now embrace the Trump administration’s policies using largely the same language and framing. We were deeply disheartened to see the Departments’ employ dehumanizing terminology like “surge” to describe groups of people seeking access to asylum.⁴¹ We are also disheartened that the Departments continue to perceive asylum seekers as a problem to be mitigated or reduced. The arrival of asylum seekers at our southern border is a recognition of our country as a place of refuge. It represents an opportunity for our government to carry out its international obligations toward refugees in the face of a serious ongoing refugee crisis.

The tragic irony is that this asylum ban, much like the ones that came before it, will not achieve the intended objectives of the Departments. The Departments have created the humanitarian crisis at the border by deviating from the asylum framework enacted by Congress and mandated by U.S. and international law. Starting with an informal policy of metering, then various iterations of unlawful asylum barriers, and finally with the full closure of the border to asylum seekers through the Title 42 public health order, the Departments have in the span of a few years completely transformed the asylum process at the southern border. Migrant camps and shelters have appeared along the border in recent

⁴⁰ Exec. Order No. 14010, DCPD-202100109 (Feb. 2, 2021).

⁴¹ The word “surge” appears twenty-six times in the proposed rule, mostly referring to migration.

years where migrants face inhumane living conditions and violence. Increasingly, migrants are making the dangerous crossing into North American through the Darien Gap, as the United States has collaborated with the governments of Mexico and Panama to push its border enforcement and militarization farther and farther south.

The primary cause of the current humanitarian crisis at the border is the Departments' continued disruption over the last six years of the statutory asylum framework it has been tasked by Congress to carry out. This disruption has stranded thousands of asylum seekers and unjustifiably curtailed their legal right to access the asylum system. Still, the Departments believe incorrectly that through yet another asylum ban, they will finally be able to resolve the crisis. They will not. The solution to this crisis is to restore the statutory asylum framework that had been in place for nearly forty years since the Refugee Act's enactment and to allow people seeking refuge to access the U.S. asylum system.

We urge the Departments to reconsider the implementation of this proposed asylum ban and to return to the Administration's commitment to restore a humane and just asylum system.

Sincerely,

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