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Asylum Division

U.S. Citizenship and Immigration Services (USCIS)

Department of Homeland Security

5900 Capital Gateway Drive

Camp Springs, MD 20746

RE: ILRC Comment in Opposition to Interim Final Rule: Affirmative Asylum Referrals Without Interview— CIS No. 2851-26; DHS Docket No. USCIS-2026-0199; RIN 1615-AD18 (“IFR”)

Dear USCIS,

The Immigrant Legal Resource Center (ILRC) submits this comment in strong opposition to the Department of Homeland Security (“DHS”) United States Citizenship and Immigration Services (“USCIS”) IFR, CIS No. 2851-26; DHS Docket No. USCIS-2026-0199; RIN 1615-AD18, Affirmative Asylum Referrals Without Interview, published on July 28, 2026.

I. Introduction

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. 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. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law and emerging issues, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations supporting in building their capacity to support immigrants and their families.

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. It is through this lens that we provide this comment on the IFR.

I. USCIS has not considered the substantive, harmful effect that the IFR will have on asylum seekers and the asylum system as a whole.

The ILRC vehemently opposes the promulgation of this rule, and we urge USCIS to withdraw it and return to the long-established practice of interviewing affirmative asylum seekers. The agency, without cognizable justification, issued the IFR in violation of the Administrative Procedures Act (APA). In doing so, the agency asserts that this change is merely procedural and does not affect the substantive rights of asylum seekers. This could not be further from the truth. This change removes an essential step in the asylum process that allows an asylum seeker to fully present their claim with all of the nuances and complexities that often accompany an asylum case. Specifically, USCIS has failed to consider the following substantive effects of the IFR:

- One-year filing deadline inquiries can be complex and involve issues around an applicant's mental state and circumstance around trauma experiences. These issues can be presented through the filing, but an interview can solicit more details and help fill in gaps that may have been present at the time of filing. This is particularly true for pro se applicants, who may not be familiar with the nuances of asylum law and may be better equipped to demonstrate asylum eligibility in an in-person setting rather than on paper. Restricting an applicant's ability to do this could result in the denial of their legitimate asylum claim and removal to a country where they will experience persecution.
- Asylum cases are complex and often the situations that applicants find themselves in need to be explained with more nuance than what can be provided on the application form and accompanying documents. Likewise, the background information that is provided through security checks done by the agency are not always reliable and the IFR allows adjudicators to rely on this information to refer an application without allowing an applicant to clear up any misunderstandings or inconsistencies. Allowing applicants to explain some of these nuances in person could mean the difference between the grant of an asylum application and a referral to immigration court.
- By shifting the burden of these cases to the immigration court, USCIS will have simply traded one backlog for another and placed vulnerable asylum seekers - including children, survivors of violence and those with diminished mental capacity - into an adversarial system with increasingly weak due process protections (expansive use of expedited removal, mega-master calendar hearings, issues with service of court documents, etc.). Further, immigration court proceedings require more resources than an asylum interview in terms of staffing (immigration judge, DHS counsel, interpreter, court staff, etc.) and in terms of process (even longer backlogs, likelihood of multiple court dates, complications that arise from detaining respondents). While this rule may save resources for one agency of the U.S. federal government, those savings pale in comparison to the increased burden on another agency.
- The IFR has a disproportionate impact on immigrants of color. The U.S. asylum system substantially serves individuals fleeing persecution in Latin America, the Caribbean, Africa, the

Middle East, and Asia.¹ As such, the rule's practical effect will be to disproportionately refer immigrants of color to immigration court which is only further exacerbated by the impacts laid out above.

USCIS has failed to consider the actual effect of the IFR on those seeking asylum, most of whom applied before the rule came into effect and with the understanding that there would be an interview.

II. The IFR will harm vulnerable populations, undermine their statutory protections, and deprive eligible asylum seekers of relief

A. The IFR violates the Trafficking Victims Protection Reauthorization Act and the government's obligations under the JOP v. DHS settlement

The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) provides that an asylum officer shall have initial jurisdiction over any asylum application filed by an unaccompanied child (UC) as defined in 6 U.S.C. § 279(g).² The statute further mandates that such applications for asylum and other forms of relief be "governed by regulations which take into account the specialized needs" of such children.³ This IFR violates both of these requirements by undermining initial asylum office jurisdiction and failing to take into account the specific needs of UC asylum seekers.

The Department fails to take into account the legal protections of UCs beyond a cursory mention that they are statutorily exempt from the one-year filing deadline.⁴ This plainly violates the TVPRA and its unique jurisdictional provision that clearly gives USCIS initial jurisdiction over UC asylum applications. This key protection mandates that UCs receive an interview in the non-adversarial setting of the USCIS asylum office. A rule that would allow the asylum office to refer UC applications back to EOIR after a cursory review of the initial application clearly violates the statutory intent of the TVPRA. Yet this is exactly the type of end-around that the Department is seeking to create with this IFR.

Beyond violating the statute, the IFR also violates the JOP v. DHS settlement.⁵ The settlement orders the Department to fulfill its statutory obligations and exercise jurisdiction over UC asylum claims. For the same reasons that the IFR violates the TVPRA it also violates the Department's own settlement in JOP.

Applying the IFR to UC asylum claims would disproportionately harm vulnerable child asylum applicants. The Department's own training materials, unlike this IFR, acknowledge the unique nature of child asylum claims.⁶ Asylum officers are given an entire training module that discusses the needs, legal protections,

¹ See, e.g., Jeanne Batalova, *Refugees and Asylees in the United States*, Migration Pol'y Inst. (Jan. 8, 2026), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states> (Top countries of origin for asylees in FY 2023 include: Afghanistan, China, Venezuela, El Salvador, India, Guatemala, Honduras, Russia, Turkey, and Colombia).

² Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, § 235(d)(7), 122 Stat. 5044, 5080-81 (2008).

³ *Id.* at § 235(d)(8).

⁴ 91 Fed. Reg. 47,113.

⁵ JOP v. DHS, 8:19-cv-01944 (D. Md.)

⁶ USCIS, RAIO Directorate, *Children's Asylum Claims*, https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf.

and challenges that come with children's asylum claims. The Department's materials recognize that "[i]n evaluating the evidence submitted to support the application of a child seeking refugee or asylum status, adjudicators should take into account the child's ability to express his or her recollections and fears, and should recognize that it is generally unrealistic to expect a child to testify with the precision expected of an adult."⁷ These materials also recognize that children in particular may need to rely solely on their own credible testimony to support their claim.⁸ Children who are subject to this rule will be denied this opportunity outright. If they are unable to fully articulate and support their claim on the papers, they will be deprived of the non-adversarial process provided by the asylum office. Instead, they will be thrust into the adversarial and retraumatizing setting of a courtroom, where it will be even more difficult and retraumatizing to tell their stories. This is precisely the harm that the TVPRA seeks to avoid. The Department's training materials on children's claims reflect decades of asylum office experience. They clearly show why a rule such as this IFR is especially ill-suited to children's asylum claims. Yet the Department inexplicably ignores its own guidance in making UCs subject to this IFR.

B. The IFR deprives vulnerable asylum seekers of an opportunity to show their asylum eligibility or that they meet an exception to a bar to asylum

The Department does not address how it intends to prejudge applications without an interview while avoiding referring a large number of meritorious claims to EOIR. Nor does it explain how adjudicators will "elicit all relevant and useful information bearing on an applicant's eligibility for asylum" with nothing more than the initial application.⁹ On the contrary, the Department seems to envision mass referrals as it "electronically scan[s] applications for certain parameters."¹⁰

The bars to asylum that the Department is seeking to determine are complex and their exceptions are even more so. Assessing the one-year bar is not simply a matter of looking at the filing date. An analysis of possibly changed or extraordinary circumstances is required. Then, if such circumstances are present, the adjudicator must make a case-by-case determination as to whether the application was filed within a reasonable time.¹¹

The Department justifies the rule by downplaying the harmful impact of referring asylum applications to EOIR. It acknowledges the inevitable consequence of the rule that eligible asylum applicants "could erroneously be referred without interview," but then adds that applicants will retain an opportunity to present their claim to the IJ *de novo*.¹² In other words, a rushed incomplete adjudication from the asylum office is no problem at all in the Department's view because the applicant will presumably get a full adjudication in removal proceedings. This completely upends the statutory asylum scheme that distinguishes between affirmative and defensive claims. This rule effectively deprives affirmative asylum applicants of the initial interview envisioned by the statutory scheme. Moreover, a referral could result in the applicant being detained and losing eligibility for certain forms of relief on account of being placed in removal proceedings.

⁷ *Id.* at 41.

⁸ *Id.*

⁹ 8 CFR 208.9(b).

¹⁰ 91 Fed. Reg. 47,111.

¹¹ See 8 CFR § 208.4(a)(2).

¹² 91 Fed. Reg. 47,113.

The Department's own rule acknowledges that such complex factual determinations cannot definitively be made without an interview. Where an applicant provides evidence of eligibility in their filing or in response to a request for evidence, it clarifies that this "will not be a final determination" that they have met their burden of proof. An interview is needed to confirm eligibility. The Department does not get to have it both ways. If it concludes that an interview is required to find an applicant eligible, it cannot claim that it can definitively find them to be ineligible on the papers alone.

The Department's rule will inflict disproportionate harm on the most vulnerable asylum applicants. Many survivors of persecution and torture face challenges in navigating the legal process, recollecting past events, and gathering evidence. Asylum officers are trained to conduct asylum interviews in a way that allows survivors of torture and trauma to share the full details of their claim. This process elicits the underlying facts much more effectively than the application and supporting materials alone. Many applicants will be unable to build a similarly robust record from their filing alone regardless of the merits of their claim. Perversely, those who have suffered the most severe forms of persecution and torture will be the most disadvantaged by this rule.

These dangers are particularly acute for pro se applicants who may have completed their written I-589 without the assistance of a qualified legal services provider. In addition to the vulnerabilities described above, pro se applicants may not be familiar with the nuances and complexities of asylum law and may have limited written communication abilities in general. Applications filed by pro se asylum seekers are likely to be less detailed and to speak less directly to the requirements for asylum, increasing the likelihood that these applications will be erroneously flagged for referral without an interview, bypassing the step in the process that is most likely to accurately assess the applicant's eligibility. Moreover, pro se applicants are more likely to misunderstand a referral and NTA, which is likely to result in more in absentia removal orders of asylum seekers who may not have had an opportunity to consult with an attorney.

For asylum applicants to receive a fair adjudication, they must be afforded a meaningful opportunity to demonstrate eligibility, show positive discretionary factors, and meet exceptions to any applicable bars. A full asylum interview is essential to creating a sufficient record for a fair adjudication.

C. USCIS fails to consider the reliance interests of those who had pending asylum applications on the effective date of the IFR.

The IFR states that it will apply not only to affirmative asylum applications filed on or after the effective date, July 28, 2026, but also to applications already pending as of that date.¹³ USCIS estimates that more than 444,000 asylum seekers may have their applications referred to EOIR without an interview as a result of this rule, or approximately 31% of the current affirmative asylum caseload. That is nearly a half-million people who applied for asylum with the understanding that, according to current regulations, they would have an opportunity to present their case in a non-adversarial interview unless they failed to appear at their interview or biometrics appointment.¹⁴

¹³ 90 Fed. Reg. at 47103.

¹⁴ See 8 CFR § 208.10 (2022).

When an agency regulation changes, courts conduct a five-factor balancing test to balance the regulated party's reliance interest on the previous rule against the agency's interest in retroactive application of the new rule.¹⁵ These factors include:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Here, all five factors weigh heavily against applying the IFR retroactively, and yet the Department does so while barely even mentioning applicants' reliance interests. First, this is not a question of first impression; to the contrary, since 1996, INA § 208 itself has required that every asylum applicant "shall" undergo an "interview or hearing" within a certain timeframe after applying, absent exceptional circumstances.¹⁶ Moreover, since at least 1990, the regulations have enshrined the applicant's right to an asylum interview unless they are deemed to have waived that right in certain limited circumstances.¹⁷ Second, the new rule is not merely "fill[ing] a void," but it is enacting a complete reversal of the well-settled practice that affirmative asylum applicants generally have a right to an interview.

There is no question that affirmative asylum applicants who applied prior to this IFR did so in reliance on the assurance that their application would be reviewed, first, in a non-adversarial interview rather than in a courtroom setting. As discussed above, many asylum seekers have survived severe violence and abuse and, as a result, have difficulty talking about their experiences. The affirmative asylum interview has historically offered a less intimidating and contentious environment to present their cases, making the asylum process accessible to individuals who may otherwise not even apply because of trauma symptoms.¹⁸ Affirmative asylum applicants understood that their case would be evaluated not in a courtroom, but in a regular office; that they would be seated next to their attorney instead of in a witness stand; that they would be asked about their claim by a regular person sitting at a desk, not by an authoritative judge clad in a robe sitting on a dais. This is a fundamentally different process than presenting one's case in a courtroom setting, and applicants undoubtedly prepared mentally and emotionally for this non-adversarial interview process when they chose to apply for asylum.

Fourth, the burden of retroactive application on these nearly half million applicants is substantial, particularly in light of recent changes in USCIS and EOIR policy. For example, the agency suggests that an applicant "can still supplement his or her application and USCIS still retains discretion to RFE for additional information."¹⁹ But just one week after publishing this IFR, the agency published a separate policy and updated its Policy Manual, instructing officers not to issue RFEs in the very types of cases that

¹⁵ See *Retail, Wholesale and Dep't Store Union v. NLRB*, 466 F.2d 380, 390-93 (D.C. Cir. 1972)

¹⁶ INA § 208(d)(5)(A).

¹⁷ See 8 CFR § 208.9(a) (1990) ("For each application for asylum or withholding of deportation within the jurisdiction of an Asylum Officer, an interview shall be conducted by that Officer, either at the time of application or at a later date to be determined by the Officer in consultation with the applicant.").

¹⁸ See, e.g., Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457, 488 (2016).

¹⁹ 90 Fed. Reg. at 47117.

will be impacted by the IFR.²⁰ Additionally, since 2025 EOIR has instructed adjudicators to preterm applications that do not establish prima facie eligibility for asylum, meaning many applicants who otherwise might be able to establish eligibility through oral testimony are being denied in court without any opportunity to testify.²¹ As a practical matter, affirmative asylum applicants who are referred to court without an interview are very likely to have their claims denied without ever speaking to a U.S. government official, contrary to the INA and international law.

Finally, the IFR will not serve any legitimate government interest, at least not one that is consistent with the Due Process Clause of the United States Constitution.²² The IFR asserts that this change is necessary to clear the Asylum Office backlog by fast-tracking cases it believes are not meritorious.²³ But as noted above, all that will accomplish is to shift the backlog from USCIS to immigration courts, where the resources to process an asylum case are even greater.

III. The issuance of the rule as an IFR is unlawful as it violates the clear language and intent of the Administrative Procedures Act.

The agency promulgated this rule as an IFR raising the blanket foreign affairs exception the agency believes itself to have and the incorrect assertion that doing so does not affect the substantive rights of asylum seekers as it is a procedural rule only. As the U.S. Supreme Court has held, “[n]otice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision.”²⁴

A. The IFR does not fall under the foreign affairs exception under the APA.

The foreign affairs exception to the APA only applies where “the public rulemaking provisions should provoke definitely undesirable international consequences....” Otherwise, the exception “would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs.”²⁵ The Second Circuit has noted that “it would be problematic if incidental foreign affairs effect eliminated public participation in this entire area of administrative law.”²⁶ In other words, this exception applies where the international consequence is obvious or the agency has explained the need for immediate implementation of a final rule. Examples of foreign affairs exceptions include a rule

²⁰ See USCIS, *Evidence, Requests for Evidence, and Notices of Intent to Deny* (Aug. 5, 2026), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20260805-EvidentiaryStandards.pdf>; 1 USCIS-PM E.6(F)(2) (instructing that officers need not issue an RFE “if all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility”).

²¹ *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025).

²² See, e.g., *G&V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”)

²³ 90 Fed. Reg. 47102-03.

²⁴ *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019).

²⁵ *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir 1980) *cited with approval* *East Bay Sanctuary Covenant*, 993 F.3d at 676 (internal citations omitted).

²⁶ *City of N.Y. v. Permanent Mission to India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010); *Rajah v. Mukasey* 554 F.3d 427, 437 (2d Cir. 2008).

responding to the September 11, 2001 attacks;²⁷ a rule responding to the Iranian hostage crisis;²⁸ and, a rule regarding stricter import restrictions that would provoke immediate response from foreign manufacturers.²⁹ The current rule - eliminating a guaranteed interview for affirmative asylum seekers - is too dissimilar from the established fact patterns to be recognized under the foreign affairs exception.

In asserting the foreign affairs exception, the agency provides no justification other than a March 2025 declaration³⁰ by the Secretary of State that all regulations related to the “status, entry and exit of people” fall under the foreign affairs exception.³¹ The entry and exit of people is only tenuously related to the entry and exit of people into the United States as, by definition, affirmative asylum seekers have already entered the United States and deprivation of an in-person interview does not negate that fact. Further, referring the asylum applicants to immigration court without an interview does not change their status as asylum seekers, but rather moves them from one backlogged process to another.³² Taken together, the IFR does not meet the standard for the foreign affairs exception and should be withdrawn.

B. The IFR is not simply a procedural rule that allows for an exception to notice and comment requirements.

The agency contends that the removal of a guaranteed interview at the asylum office does not “alter the rights or interests of parties.”³³ It also asserts that the change does not constitute a change with “sufficiently grave” effects.³⁴ This is incorrect, particularly in regard to the well-over one million asylum applicants who had an I-589 pending on the effective date of the IFR.³⁵ These applicants - many of whom filed applications several years ago - did so with the understanding that there would be an opportunity to present their claim in person to a USCIS adjudicator. This presumption was based in longstanding practice and policy and affected what was submitted in the initial asylum filing. The effectuation of this rule without prior notice and its applicability to those with pending asylum applications represents a significant, substantive, material change that could affect their ability to fully present their claims. The agency does not address this aspect of the asylum application process and it pays short shrift to the

²⁷ Rajah, 544 F.3d at 437.

²⁸ *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981).

²⁹ *Am. Ass’n of Exps. & Imps. - Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985).

³⁰ See, Dept. of State, *Determination: Foreign Affairs Functions of the United States*, 90 F.R. 12200 (March 14, 2025). This declaration to enact a blanket exception to the APA is not supported by case law or statute.

³¹ 91 FR 47101 at 47116.

³² According to TRAC, as of the end of July 2026, the immigration court backlog stands at over 3 million cases. See TRAC, *Immigration Court Backlog*, (last visited Sept. 10, 2026)

<https://tracreports.org/phptools/immigration/backlog/>

³³ 91 FR 47101 at 47115.

³⁴ *Id.* at 47116.

³⁵ As of the end of June 2026, USCIS reported 1,392,782 pending I-589 applications while the IFR went into effect on July 28, 2026. While it is possible that USCIS was able to clear some of the I-589 backlog between the end of June and the IFR effective date, it is unlikely that it would have been more than the 161,687 applications completed during the entirety of the third quarter of Fiscal Year 2026. See USCIS, *All USCIS Application and Petition Form Types (Fiscal Year 2026, Quarter 3)*, (Sept. 8, 2026).

actual effect on an asylum seeker should they be denied the opportunity to provide in-person testimony at the asylum office.

IV. Conclusion

The agency should withdraw this rule given the harmful effects on those seeking asylum. Further, this rule was improperly promulgated as an IFR and should be withdrawn.

Sincerely,

The Immigrant Legal Resource Center