AMERICAN IMMIGRATION LAWYERS ASSOCIATION

July 3, 2024

Mr. Daniel Delgado
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Immigration Policy
U.S. Department of Homeland Security

Ms. Lauren Alder Reid
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Submitted via http://www.regulations.gov.

Re: U.S. Citizenship and Immigration Services, Department of Homeland Security, and Executive Office for Immigration Review, Department of Justice, Interim Final Rule: Securing the Border (USCIS Docket No. USCIS–2024–0006, A.G. Order No. 5943–2024, RIN 1125-AB32)

Dear Mr. Delgado and Ms. Reid:

The American Immigration Council (the Council) and the American Immigration Lawyers Association (AILA) submit the following comment in response to the above-referenced Department of Homeland Security (DHS) and Department of Justice (DOJ) (collectively, "Departments") Interim Final Rule ("IFR"), USCIS Docket No. USCIS–2024–0006, A.G. Order No. 5943–2024, Securing the Border, 89 Fed. Reg. 48710 (June 7, 2024).

Congress has explicitly established a process to provide asylum seekers a fair and meaningful opportunity to seek and apply for asylum in the United States. For more than four decades, federal law—consistent with the United States' international treaty obligations—has ensured the right for those fleeing persecution to seek protection in the United States. That long-established commitment is undergirded by fundamental principles of the U.S. legal system: that an adjudication of essential rights and liberties must be fair and must comport with basic due process principles, such as the consistent application of the law.

Through this IFR, the Departments have severely restricted access to asylum and other humanitarian protections.[1] The IFR does this by making three changes to the process to seek asylum, withholding of removal and protection under the Convention Against Torture ("CAT") for those who cross the border while emergency border circumstances are in place. First, it makes asylum seekers ineligible for asylum, with narrow exceptions, if they enter through the southern border through an unapproved process; second, it requires asylum seekers facing expedited removal to manifest their fear of persecution or an intent to apply for asylum while

[1] *See* Securing the Border, 89 FR 48487, 48491 (June 7, 2024) (Presidential Proclamation) (suspending and limiting the entry of noncitizens under "emergency border circumstances" at the U.S. southern border, which are triggered after seven days of average border apprehensions (between ports of entry) of 2,500 or more and lifted 14 days after the conclusion of a seven-day period in which an average of 1,500 people or fewer are apprehended per day between ports of entry.).

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removing DHS' existing individualized notice requirements; and three, it establishes a heightened standard during the credible fear screening process for withholding of removal and CAT.[2] The net effect of these changes is to indefinitely make it insurmountably difficult for asylum seekers to qualify for protection, as well as to infuse confusion and the arbitrary application of the law into border processing.[3] While the policy states that restrictions remain in place only when border apprehensions exceed a certain level, apprehension data indicates the restrictions are very unlikely ever to be lifted.

Although the stated justification for the IFR is to "improve the Departments' ability to deliver timely decisions and consequences to noncitizens who lack a lawful basis to remain,"[4] the practical effect will be to deny protection to those fleeing persecution in their home countries contrary to U.S. obligations under both domestic and international law.

The IFR's changes violate the clear intent of Congress—enacted in the 1980 Refugee Act—that the United States provide a meaningful and fair path to protection for those fleeing persecution. We submit the following comments in opposition to the IFR and, for the reasons stated below, urge the Departments to withdraw it.

I. About AILA and the Council

Established in 1946, AILA is a voluntary bar association of nearly 17,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Council is a nonprofit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and Constitutional rights of noncitizens, advocates on behalf of asylum seekers before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

II. This IFR is in direct conflict with the Immigration and Nationality Act, which allows asylum seekers to request asylum regardless of their manner of entry.

The Immigration and Nationality Act (INA) expressly incorporates a statutory scheme regulating who may apply for asylum in the United States, what needs to be shown to qualify, and the procedures that must be followed.[5] The statute creates limited bars to asylum and grants

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[2] *See* Securing the Border, 89 Fed. Reg. 48710, 48768 (June 7, 2024).
[3] *See, e.g.*, Adam Isacson, WOLA, "Weekly U.S.-Mexico Border Update: Biden Administration Asylum Shutdown, Mexico's Asylum Applications Drop," June 7, 2024, https://www.wola.org/2024/06/weekly-u-s-mexico-border-update-biden-administration-asylum-shutdown-mexicos-asylum-applications-drop/ (showing that daily border apprehensions have not decreased below 1,500 since July 2020, during the early period of the COVID-19 pandemic).
[4] *See* Securing the Border, 89 Fed. Reg. at 48715.
[5] *See, generally* INA § 208; 8 U.S.C. § 1158.

the Attorney General limited authority to establish, by regulation, "additional limitations and conditions, consistent with this section, under which [an asylum seeker] shall be ineligible for asylum."[6]

In this statutory scheme, Congress expressly indicated that the manner of a noncitizen's entry into the U.S. does not impact their ability to seek asylum. Section 208(a)(1) of the INA, which was enacted through the Refugee Act of 1980, provides that "any [noncitizen] who is physically present in the United States or who arrives in the United States . . . whether or not at a designated port of arrival . . . may apply for asylum."[7] The rationale for providing this permanent and inclusive system was to codify humanitarian principles of protection. In the hearings leading up to the enactment of the Refugee Act, humanitarian concern was repeatedly cited in congressional testimony as the driving force behind the legislation. For example, Congressman Peter Rodino described the final version of the Refugee Act as:

> [O]ne of the most important pieces of humanitarian legislation ever enacted by a United States Congress. . . . [It] confirm[ed] what this Government and the American people are all about. . . . By their deep dedication and untiring efforts, the United States once again . . . demonstrated its concern for the homeless, the defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes.[8]

Despite Congress' clear statutory directive, through this IFR, the Departments and the President have used their authority to ban an overwhelming majority of noncitizens from obtaining asylum based on their manner of entry, with narrow categories of exempt noncitizens.[9]

While the Departments claim the contrary, this IFR's provisions on asylum ineligibility are not materially distinguishable from regulations previously held to conflict with Section 208(a)(1) of the INA and should be rescinded.[10] For example, in 2021, the Ninth Circuit upheld a preliminary injunction against an Interim Final Rule and Proclamation issued in November 2018 ("2018 Asylum Ban") by former President Donald Trump. The 2018 Asylum Ban "stripped asylum eligibility from every migrant who crosse[d] into the United States between designated ports of entry."[11] The Departments allege that their limitation on asylum, and the Proclamation authorizing it, differ from the 2018 Asylum Ban because they "do not treat the manner of entry as dispositive in determining eligibility."[12] This is because the limitation applies both at and

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[6] 8 U.S.C. § 1158(b)(2)(C).
[7] *See* 8 U.S.C. § 1158(a)(1).
[8] 26 Cong. Rec. 1519, 1522 (1980).
[9] *See* Securing the Border, 89 FR at 48491(Presidential Proclamation). Section 3(b) of the Proclamation exempts any noncitizen national of the United States; any lawful permanent resident of the United States; any unaccompanied child as defined in 6 U.S.C. § 279(g)(2); any noncitizen who is determined to be a victim of a severe form of trafficking in persons, as defined in 22 U.S.C. § 7102(16); any noncitizen who has a valid visa or other lawful permission to seek entry or admission into the United States, or presents at a port of entry pursuant to a pre-scheduled time and place; any noncitizen who is permitted to enter by the Secretary of Homeland Security, acting through a CBP officer, based on the totality of the circumstances; and any noncitizen who is permitted to enter by the Secretary of Homeland Security, acting through a CBP immigration officer, due to operational considerations at the time of the entry or encounter that warranted permitting the noncitizen to enter. *Id.*
[10] 89 Fed. Reg. at 48737.
[11] *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 658 (9th Cir. 2021).
[12] 89 Fed. Reg. at 48735.

between ports of entry.[13] In other words, regardless of how one enters, "those who 'circumvent orderly refugee procedures,' . . . during emergency border circumstances without meeting one of the recognized exceptions will be ineligible for asylum."[14] However, this is a distinction without a difference. The practical effect is that the overwhelming majority of asylum seekers will be banned from asylum due to their manner of entry. In FY 2023, 83% of Customs and Border Protection's (CBP) border encounters included individuals presenting themselves betweens ports of entry.[15] So far, in FY 2024, that figure is 76%.[16]

Furthermore, asylum seekers presenting themselves at ports of entry are overwhelmingly doing so with express permission of CBP through the CBP One application process. Estimates from May 2024 indicate that approximately 100 people per day were able to "walk up" to ports of entry without an appointment.[17] By contrast, in May 2024 the Border Patrol reported an average of 3,803 daily apprehensions.[18] As a result, the ratio of people banned under the IFR is 38:1 in favor of those who cross the border between ports of entry. Thus, it is clear that the overwhelming impact of the IFR, while not exclusively directed at asylum seekers entering between ports of entry, is to ban asylum seekers precisely because of their manner of entry.

The government also claimed that the May 2023 Circumvention of Lawful Pathways (CLP) rule, which didn't exclusively make asylum seekers ineligible for asylum based on their entry between ports of entry, was consistent with the INA in defending the rule in litigation last year.[19] The CLP establishes a presumption of asylum ineligibility for non-Mexican noncitizens encountered at the southern border unless they (1) received advance permission to travel to the U.S. to apply for parole; (2) presented at a port of entry for a pre-scheduled appointment; or (3) have already sought and been denied asylum or other protection in another country en route to the U.S.[20] The presumption may be rebutted in exceptionally compelling circumstances.[21] In defense of a lawsuit challenging the validity of that rule, the U.S. government argued that the CLP did not conflict with Section 208(a)(1) and previous Ninth Circuit precedent as it did not impose a categorical bar to asylum because a noncitizen could avoid the application of the

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[13] *See* 89 Fed. Reg. at 48735.
[14] 89 Fed. Reg. at 48737.
[15] In FY 2023, CBP encountered a total of 2,475,669 noncitizens at the southern border. Of those, 2,045,838 were encountered between ports of entry by Border Patrol agents. *See* U.S. Customs and Border Protection, *Southwest Land Border Encounters*, last accessed June 21, 2024, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.
[16] Between October 2023 and May 2024, CBP encountered a total of 1,691,251 noncitizens at the southern border. Of those, 1,278,722 were encountered between ports of entry by Border Patrol agents. *See* U.S. Customs and Border Protection, *Southwest Land Border Encounters*, last accessed June 21, 2024, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.
[17] Stephanie Leutert & Caitlyn Yates, "Asylum Processing at the U.S.-Mexico Border: May 2024," *Strauss Center*, May 30, 2024, https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-may-2024/.
[18] U.S. Customs and Border Protection, *Nationwide Encounters*, last accessed June 22, 2024, https://www.cbp.gov/newsroom/stats/nationwide-encounters.
[19] *See East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023); *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (May 16, 2023) (codified at 8 C.F.R. §§ 208.33, 1208.33).
[20] 88 Fed. Reg. at 31318.
[21] 88 Fed. Reg. at 31318. A noncitizen may rebut the presumption if they demonstrate by a preponderance of the evidence that the noncitizen, or a member of the noncitizen's family with whom the noncitizen is traveling, (1) faced an acute medical emergency; (2) faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or (3) satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11(a). *Id.* at 31321.

presumption by qualifying for an exception.[22] The district court, however, rejected this argument and found the presumption of asylum ineligibility conflicts with the Section 208(a)(1) requirement that asylum seekers be allowed to apply for asylum regardless of their manner of entry.[23] The district court found that, while the CLP did not impose a categorical bar to asylum on all noncitizens subject to the CLP, the "failure to present at a port of entry will exclude [from asylum eligibility] those for whom other exceptions are not available and who cannot rebut the presumption."[24] The same is true in this IFR. For those asylum seekers presenting between ports of entry who cannot meet an exception, they will be ineligible for asylum due to their manner of entry.

Notably, the exceptions provided in the IFR do almost nothing to mitigate the harm to asylum seekers. First, their bases—acute medical issues, imminent and extreme threats to life or safety, or severe forms of trafficking—are extremely limited.[25] Second, the idea that a person who has just fled across the border seeking safety would have the means to provide evidence of an acute medical issue, an imminent and extreme threat, or trafficking, is absurd. Functionally, these exceptions are nearly impossible for an asylum seeker to meet. The end result is to make the vast majority of asylum seekers ineligible for asylum if they enter through the southern border between ports of entry.

It is clear that the IFR's asylum limitation, like those before it, directly contravenes Section 208(a)(1) of the INA and should be rescinded immediately.

Recommendation: Given the IFR's limitation on asylum conflicts with INA Section 208(a)(1), the Departments must rescind it. There is no conceivable way to modify this limitation on asylum to conform with Congress's clearly stated intent of allowing asylum seekers to apply for protection regardless of how they entered the United States.

III. The Manifestation of Fear Requirement Further Undermines the Credible Fear Process and Leads Asylum Seekers to be Removed to Danger

The IFR removes the preliminary screening questions that serve an important role in the credible fear process and implements a requirement that asylum seekers affirmatively "manifest fear." Under long-standing government policy dating back to its initial implementation in 1997,[26] before a person may be removed, a U.S. immigration official is required to ask a person whether they fear persecution or torture in the country to which they would be deported. If they answer yes, the immigration official is obligated to refer the person for a screening with an asylum official and the person can only be ordered removed if they fail that screening or rescind their claim.

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[22] *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1041 (N.D. Cal. 2023).
[23] *See East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1042 (N.D. Cal. 2023), *stayed by East Bay Sanctuary Covenant v. Biden*, No. 23-16032, 2023 WL 11662094, at *1 (9th Cir. Aug. 3, 2023).
[24] *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1042 (N.D. Cal. 2023). The district court noted that while "a noncitizen may attempt to preserve their eligibility for asylum by meeting another of the (CLP)'s exceptions" or that "their failure to present at a port of entry may be excused upon a showing of exceptionally compelling circumstances", these restrictions on asylum eligibility were still based on place of entry, which conflicts with Section 208(a)(1) of the INA. *Id.*
[25] *See* 89 Fed. Reg. at 48732-48733.
[26] 89 Fed. Reg. at 48742.

Under the IFR, people seeking protection will be required to affirmatively "manifest or express" a fear of return, or proactively ask for asylum or relief from persecution, a process which is colloquially known as a "shout test." Without "shouting" their fear to a CBP officer, the asylum seeker may be removed without a full screening process. However, calling this policy a "shout test" is inaccurate because even when the asylum seekers do overtly "manifest fear" to government officials, their shouts go unheard. Despite nonverbal cues being accepted under policy, it is unlikely that these are being honored given that even express manifestations of fear are being ignored. Studies already demonstrate that requiring asylum seekers to manifest fear results in wrongful removals of eligible asylum seekers.

During a previous use of a "manifesting fear" requirement under Title 42, many people reported expressing fear and nevertheless being denied a screening. One study in 2022 interviewed 97 families who had been expelled under Title 42.[27] Even though 51 families reported verbally expressing a fear to Border Patrol agents, none were provided fear screenings as required.[28]

The refusal of agents to recognize a clear expression of fear is already occurring under the IFR. In an article published only days after the policy was implemented, one migrant removed to Mexico under this new policy said "They never let me talk so I could ask for asylum."[29] He was not the only one. The article details multiple families and individuals who were not allowed to speak up, or were ignored when they did so.

> While some families said they didn't get the opportunity to request asylum, others [said] they did express their fear and asylum request to border agents. That's supposed to trigger a credible-fear screening, albeit at a higher standard than before Biden's order took effect. . . . But border agents ignored their fear claims, or chastised them for asking, the asylum seekers said.
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> "He said even if I spoke to someone (to request asylum) it would only elongate the process, because I wasn't going to get asylum anyway," said a Mexican woman who asked to be identified only by her first name, Ángeles.[30]

Other interviewed asylum seekers report that after claiming fear to border agents, the agents "told them there was no asylum, that asylum had ended on Tuesday, or that it wasn't their

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[27] Center for Gender & Refugee Studies, "'Manifesting' Fear at the Border: Lessons from Title 42 Expulsions," January 30, 2024, https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9Cmanifesting%E2%80%9D-fear-border-lessons-title-42-expulsions.

[28] Center for Gender & Refugee Studies, "'Manifesting' Fear at the Border: Lessons from Title 42 Expulsions," January 30, 2024, https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9Cmanifesting%E2%80%9D-fear-border-lessons-title-42-expulsions.

[29] Emily Bregel, "Border agents ignoring fear claims, migrants say, in violation of Biden order exception," *Tucson.com*, June 15, 2024, https://tucson.com/news/local/border/us-mexico-border-arizona-biden-order-asylum-seekers/article_461bd3a4-29b1-11ef-b884-5f9fc26ba81b.html. *See* Appendix A for a copy of this article.

[30] Ibid.

problem."[31] Similar incidents of Border Patrol agents' refusal to document "manifestations" of fear and refer people for credible fear screenings have been reported since the IFR began operating, including clear instances of *refoulement* of Mexican asylum seekers to Mexico without a fear screening.[32]

These incidents directly undermine the IFR's justification for removing the safeguards included in the expedited removal process since 1997. The IFR indicates that the Departments believe that "agents and officers [will] effectively identify noncitizens with potential fear or asylum claims under a manifestation approach" and thus "DHS believes that this rule remains consistent with the need to 'safeguard[]' the rights of asylum seekers," which was the justification for requiring the screening questions in the 1997 regulations implementing expedited removal.[33] However, initial evidence indicates quite strongly that INS was correct in 1997; leaving the decision to record a manifested fear up to individual immigration officers has already proven not to be a sufficient safeguard. Furthermore, given that reporting indicates that even people who do verbally express fear are being ignored, it is not likely that CBP is complying with statements in the rule about non-verbal manifestations of fear.

Removing the requirement that immigration officials proactively ask the previously required questions adds further arbitrariness and confusion at the border and opens the door to a widespread on the ground disregard of the very purpose of the congressionally-created credible fear process.

Recommendation: End the requirement that asylum seekers manifest fear and reinstate the preliminary questions to ensure proper implementation of the credible fear process.

IV. The Heightened Reasonable Probability Screening Standard Will Be Ineffective and Will Lead the United States to Violate our International Agreements

The IFR raises the burden of proof for withholding of removal and CAT protection to "reasonable probability" during emergency border circumstances.[34] The Departments define this as "substantially more than a reasonable possibility, but somewhat less than more likely than not" that the asylum seeker would be persecuted because of their race, religion, nationality, membership in a particular social group or political opinion, or tortured, if returned to their home country.[35] A higher standard is contrary to congressional intent. Congress explicitly rejected imposing a standard higher than the significant possibility, because such a higher standard could bar meritorious claims. Congress originally debated a definition of "credible fear" that would have required an individual to show that it was "more probable than not" that the individual would qualify for asylum. That language was dropped in favor of the significant possibility

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[31] Emily Bregel, "Border agents ignoring fear claims, migrants say, in violation of Biden order exception," *Tucson.com*, June 15, 2024, https://tucson.com/news/local/border/us-mexico-border-arizona-biden-order-asylum-seekers/article_461bd3a4-29b1-11ef-b884-5f9fc26ba81b.html.

[32] Yael Schacher, Twitter, https://twitter.com/YaelSchacher/status/1803934882797883870, June 20, 2024, 7:36 PM (detailing the *refoulement* of a Mexican asylum seeker who manifested a fear but was removed to Mexico); Christina Ascensio, Twitter, https://twitter.com/christielaine23/status/1801732277703164274, June 12, 2024, 5:43 PM (detailing interviews of multiple Mexican asylum seekers returned to Nogales, Mexico who had manifested a fear but been removed anyway).

[33] 89 Fed. Reg. at 48744-48745.

[34] 89 Fed. Reg. at 48746.

[35] 89 Fed. Reg. at 48746.

standard. As Congressman Henry Hyde described at the time of passage, the "standard [was] redrafted in the conference document to address fully concerns that the 'more probable than not' language in the original House version was too restrictive."[36]

Notably, the Departments' imposition of a completely new heightened standard is based on very little evidence and a lot of conjecture about its possible efficacy and deterrent effect. The Departments allege that this new standard will lead to more efficiencies because it will screen out noncitizens who are unlikely to succeed at the merits stage of their protection claims.[37] The IFR notes that asylum seekers previously in expedited removal had a significantly lower grant rate of protection in removal proceedings (25%) as compared to the rate of positive credible fear screenings (83%) between 2014 and 2019, concluding that the current screening standard could be tightened to better focus "on processing those who are most likely to be persecuted or tortured if removed."[38] Missing from this comparison are the myriad reasons why rates may differ. For example, according to EOIR, current legal representation rates are at 36%, which is in line with previous estimates made in the early 2010s.[39] Pro se asylum seekers are less likely to file applications for relief and have a disproportionately negative likelihood of success in immigration proceedings compared to their represented counterparts.[40] Thus, relying on this comparison is misplaced.

Nevertheless, this is a misleading statistic that misses the point. The purpose of the credible fear standard is not to identify with perfect accuracy who will win asylum; as noted above, it is to determine which claims are credible, deliberately erring on the side of over-inclusivity to avoid the possibility of an unlawful *refoulement*. Thus, contrary to the Departments' suggestion, the fact that more people pass the credible fear interview than are granted asylum is an expected result of the system operating as designed, not a failure requiring the Departments to override the intent of Congress and heighten the standard.

Furthermore, contrary to the Departments' assertions, this new standard will insert more confusion into the credible fear process.[41] Specifically, it will require officers conducting credible fear interviews to perform several analyses involving different standards of proof that may be applicable for only short periods of time. During emergency border circumstances, an officer conducting the CFI would need to apply the "significant possibility" standard to an asylum seeker's asylum, withholding of removal, and CAT claims if the person entered through a pre-scheduled appointment or if they meet an exemption or exception.[42] If the asylum seeker

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[36] Representative Hyde (IL). Conference Report on H.R. 2202, Illegal Immigration Reform and Immigrant Responsibility Act of 1996; Congressional Record, Vol. 142, No. 134 (September 25, 1996) p. H11081.
[37] 89 Fed. Reg. at 48746.
[38] 89 Fed. Reg. at 48746.
[39] *See* Executive Office for Immigration Review: Adjudication Statistics, "Current Representation Rates," https://www.justice.gov/eoir/media/1344931/dl?inline (data generated January 18, 2024); American Immigration Council, *Special Report: Access to Counsel in Immigration Court*, September 28, 2016, https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court (showing that nationally 37% of all immigrants secured legal representation in their removal case).
[40] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 9 (2015) ("With respect to the efficacy of representation, we find that immigrants who are represented by counsel do fare better at every stage of the court process—that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain the relief they seek.")
[41] 89 Fed. Reg. at 48747 (indicating that the Departments are confident that asylum officers can apply this standard effectively).
[42] *See* 89 Fed. Reg. at 48758; 8 C.F.R. 208(a), (b); 8 C.F.R. 1208.35(a), (b).

does not meet an exemption or exception, the officer must apply the heightened "reasonable probability" standard, which will require additional training and time to conduct the interview.[43] To complicate matters, the emergency border circumstances could theoretically end in as little as 21 days.[44] Thus, an asylum officer could be required to return to assessing non-exempt asylum seekers for additional exceptions under the CLP rule, which requires applying the rebuttable presumption of asylum ineligibility and the "reasonable possibility" standard for withholding of removal and CAT claims.[45] Then, theoretically, the officer could be back to conducting interviews under the "reasonable probability" standard within a week.[46] Requiring asylum officers to apply such varied and nuanced standards not only belies the Departments' claims that the heightened standard can lead to more efficiency, but raises serious due process concerns regarding asylum officers' ability to apply uniform standards across the border.

The Departments also claim that a heightened standard would deter migrants from presenting themselves at the southern border without prior approval.[47] Specifically, they highlight the Cuba, Haiti, Nicaragua, and Venezuela ("CHNV") parole processes as an example that the consequences of swift removal will, at least in part, cause a decrease in unauthorized entries. These programs establish direct pathways to apply for parole for certain individuals from those countries to the U.S. while allowing for their repatriation to Mexico.[48] However, conspicuously missing from the Departments' assessment is the fact that deterrence-based border policies only produce temporary effects. During the past decade, we have seen that newly implemented restrictions result only in short-term drops in the number of migrants encountered at the U.S.-Mexico border.[49] As a result, it is likely that a higher standard will not have the long-term deterrent effect claimed by the Departments. Rather, this new standard, which could be implemented in conjunction with a recently proposed rule that would introduce additional bars to asylum during the credible fear screening stage,[50] will merely prevent some people fleeing persecution from accessing the U.S. asylum system. For this reason, we strongly recommend rescinding this standard.

Instead, reports indicate that an expansion of lawful pathways to legally enter the U.S., such as those established by the CHNV parole processes and CBP One, may be stronger factors

[43] *See* 89 Fed. Reg. at 48746; 8 C.F.R. 208(b)(2); 8 C.F.R. 1208.35(b)(2).
[44] *See* 89 Fed. Reg. at 48715 (describing that 14 days after the Secretary of the Department of Homeland Security makes a determination that there has been a 7-consecutive-calendar-day-average of less than 1,500 encounters the Proclamation and IFR's asylum suspension and limitation on entry will be discontinued).
[45] *See* 89 Fed. Reg. at 48758; 8 C.F.R. 208(a), (b); 8 C.F.R. 1208.35(a), (b).
[46] *See* 89 Fed. Reg. at 48715 (stating that if the Secretary of the Department of Homeland Security makes a determination that there has been a 7-consecutive-calendar-day-average of 2,500 encounters or more, the Proclamation and IFR's asylum suspension and limitation on entry will apply the next calendar day).
[47] *See* 89 Fed. Reg. at 48748 (The "higher standard will be more likely to create a deterrent").
[48] *See* 89 Fed. Reg. at 48746. The Departments also highlight the continuation of repatriation flights to Guatemala and Honduras as leading to a decrease in encounters at the U.S.-Mexico border with those nationals. However, those decreases were only temporary.
[49] *See* Adam Isacson, WOLA, "The Futility of 'Shutting Down Asylum' by Executive Action at the U.S.-Mexico Border," June 4, 2024, https://www.wola.org/analysis/futility-of-shutting-down-asylum-by-executive-action-us-mexico-border/.
[50] *See* Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 41347 (May 13, 2024).

in deterring unauthorized entries.[51] For example, Haitians have consistently been one of the top two nationalities presenting themselves at the U.S. southern border using the CBP One application.[52] The ability to pre-schedule an appointment at a port of entry dramatically shifted Haitian migration patterns whereby the number of Haitians taken into Border Patrol custody dropped over 99% between May 2022 and February 2023.[53] In fact, numerous articles and reports show that asylum seekers want to use the CBP One application, and, in fact, do, but that the months-long waiting periods place them in danger on the Mexican side of the border.[54] Ultimately, safety concerns and wait times undercut the strength of this policy.[55] Similarly, demand is high for the CHNV program with 1.5 million pending requests; however, it is capped at 360,000 per year.[56] As a result, a more effective policy to deter unauthorized entries would be to expand options, including through parole, for asylum seekers to travel to the United States without having to risk their lives traveling to the U.S.-Mexico border.

Recommendation: Rescind the reasonable probability standard and, instead, expand alternative pathways to lawfully enter the United States for asylum seekers, including increasing the number of CBP One appointments, expanding the number of countries that have access to parole programs, and increasing the number of parolees accepted under the CHNV program.

V. Pinning Access to Asylum to Border Encounter Numbers Will Create Further Adjudication Difficulties in the Asylum Process

While the current norm is for asylum seekers to actively seek out Border Patrol and turn themselves in when entering without inspection (EWI), that has not always been the case and cannot be relied on in the future. Even now, there are inevitably undetected EWIs. If a person who EWI'ed without detection applies for asylum in the interior after arrival, either affirmatively or defensively, it is unclear how the agencies—or the attorneys representing asylum seekers—will accurately determine whether this IFR applies. Even assuming the agencies create

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[51] *See, e.g.*, FWD.us, "New Survey Data Show the Administration's Parole Policy for the Americas is a Successful Model for New Legal Pathways," January 25, 2024, https://www.fwd.us/news/chnv-parole/ ("When safe, legal pathways are removed, unsafe and unregulated pathways become the only option for migrants desperate to escape violence and political oppression.")

[52] Camilo Montoya-Galvez, CBS News, "Migrants in Mexico have used CBP One app 64 million times to request entry into U.S.," February 12, 2024, https://www.cbsnews.com/news/immigration-cbp-one-app-migrants-mexico-64-million/ ("Illegal border crossings by Cubans and Haitians, two of the top nationalities using CBP One, have remained very low compared to 2022 and 2021").

[53] American Immigration Council, *Beyond Border Solutions*, May 3, 2023, https://www.americanimmigrationcouncil.org/research/beyond-border-solutions.

[54] *See, e.g.*, Human Rights Watch, "We Couldn't Wait. Digital Metering at the US-Mexico Border," May 1, 2024, https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border; The Strauss Center for International Security and Law, "Asylum Processing at the U.S.-Mexico Border: February 2024," February 2024, https://www.strausscenter.org/wp-content/uploads/Feb_2024_AsylumProcessing.pdf (Civil society organizations report that Black, LGBTQ+, Indigenous, and non-Spanish speaking asylum seekers have faced targeted discrimination while waiting in Mexican border cities.").

[55] *See, e.g.*, Human Rights Watch, "We Couldn't Wait. Digital Metering at the US-Mexico Border," May 1, 2024, https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border.

[56] Women's Refugee Commision, "Creating Accessible Regional Pathways for Migrant Women and Families: Lessons from the Parole Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (P4CHNV)," June 2023, https://www.womensrefugeecommission.org/wp-content/uploads/2023/06/Creating-Accessible-Regional-Pathways-Policy-Brief.pdf.

a detailed—and publicly accessible—database where it is possible to check whether this Proclamation was in effect on a given day, few people remember the exact date they crossed and even fewer have evidence with a timestamp of this crossing. The IFR's start and end dates are ever changing and opaque, creating a legal "gray area" of uncertainty that requires additional research and evidence for both attorneys and adjudicators. In contrast, the Circumvention of Lawful Pathways (CLP) is in effect between certain concrete dates, creating a "gray area" of just the start and sunset date of the CLP.

The arbitrary nature of when this eligibility criteria applies opens up the asylum adjudication process to further arbitrary decisions by an adjudicator who could potentially just decide that the policy applies—even without evidence. This will in turn result in further delays, appeals, and backlogs within the asylum system.

Recommendation: The Departments should develop a clear policy for applications for asylum, withholding of removal, and CAT protection submitted by people who EWI'ed without detection. The Departments should also immediately create and maintain a publicly accessible database listing all dates and periods of time this IFR is in effect.

VI. The Family Unity Provision Creates a Troubling Ethical Dilemma for Attorneys

The family unity provisions in both the IFR and the CLP are intended to address the issue caused by withholding of removal not allowing for derivatives, and the potential impact of family separation.[57] The family unity provision allows an individual to be granted asylum despite the IFR or CLP where the principal asylum applicant (1) is granted withholding of removal or CAT protection and would have been eligible for asylum but for the IFR and CLP bars; and (2) has an accompanying spouse or child who does not independently qualify for asylum or other protection from removal; or (3) the spouse or child would be eligible to follow to join.[58]

While AILA and the Council support the intent behind the family unity provision, it puts lawyers representing clients in an untenable ethical quandary. This predicament arises when an attorney represents a lead respondent whose spouse and children are already in the United States. In this instance, which is common in the detained context, the attorney must advocate zealously for asylum, which is a superior form of relief compared to withholding of removal. To do so, the attorney must argue that the spouse and minor children do not independently qualify for any form of relief, including withholding of removal. This argument directly undermines the interests of the spouse and minor children, causing serious ethical implications when an attorney is representing one spouse in removal proceedings in one court (such as a detained court), while simultaneously representing the spouse and children in another court (such as a non-detained court).

Similarly, in consolidated removal proceedings involving an entire family, best practices dictate submitting Form I-589 for each family member, arguing both independent bases for relief under asylum and withholding of removal, as well as derivative status. Often, spouses and minor children may have strong family-based particular social group claims and could independently qualify for withholding of removal. However, zealously demonstrating their eligibility for withholding of removal inherently compromises the lead respondent's chances of obtaining

[57] "The Departments have determined that the possibility of separating the family should be avoided." 89 Fed. Reg. at 48733; *see also* 88 Fed. Reg. at 3132, 31449.
[58] 89 Fed. Reg. at 48733; *see also* 88 Fed. Reg. at 3132, 31449.

asylum under the family unity provision. This ethical dilemma necessitates a difficult decision: Should the attorney zealously argue on behalf of the lead respondent by asserting that the spouse and minor children do not independently qualify for withholding of removal? Or should they advocate for withholding of removal for all clients, knowing this might render the lead respondent ineligible for asylum and a pathway to permanent status?

This conflict creates significant challenges in advising clients effectively, particularly when representing both spouses or parents and their minor children. While one solution to this conflict of interest could be for families to seek out independent counsel and sever their cases, this is a poor option given: 1) the additional operational burden placed on the immigration courts and the Office of Chief Counsel; 2) the financial and emotional burden on the families if forced to sever their proceedings; and, 3) the shortage of available immigration attorneys.

Recommendation: The requirement within the family unity provision that an accompanying spouse or child must not independently qualify for protection from removal should be eliminated. Expanding the family unity provision to permit grants of asylum based on demonstrated family unity would resolve these ethical conflicts. Alternatively, DHS and EOIR should explicitly exclude disclosures related to the family unity provision from the consideration of any future immigration matters for the dependents of the principal applicant.

VII. DHS has not shown sufficient good cause to forgo the APA's delayed effective date procedures.

The IFR claims that the Departments have good cause to forego the APA's notice-and-comment and delayed effective date procedures. The Biden administration justifies this bypass of the APA by stating there is a "critical need to immediately implement more effective border management measures" and that "DHS's ability to manage the increase in encounters has been significantly challenged by the substantial number of noncitizens."[59]

Given that the the daily average of migrant encounters exceeded the proposed trigger of 2,500 per day every month since February 2021,[60] it is unclear why the migrant encounter levels are now so urgent that addressing the issue could not wait for the traditional 60-day comment period, or even the 30-day comment period, when this was not the case for the past three years. The Biden administration argues that giving notice "would incentivize even more irregular migration by those seeking to enter the United States before the rule would take effect."[61] There are two significant problems with this argument. First, the government could arguably try to apply that logic to every border regulation, carving out an exception within the APA for all things related to the border. Second, asylum seekers are consistently unaware of the reality of immigration policy changes, something found time and time again.[62] Recent research from Human Rights First demonstrates examples of these changes, such as unawareness of both the CLP, which had been in effect for a year at the time the report was published, and the CBP One app, which predated the rule.[63] How third party smugglers spin rumored policy changes is not

[59] 89 Fed. Reg. at 48762.
[60] WOLA, "Border Oversight," June 4, 2024, https://borderoversight.org/2024/06/04/june-4-2024/.
[61] 89 Fed. Reg. at 48762.
[62] *See* Christina Asencio, "Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban," Human Rights First, May 7, 2024, https://humanrightsfirst.org/library/trapped-preyed-upon-and-punished/.
[63] *See* Christina Asencio, "Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban," Human Rights First, May 7, 2024, https://humanrightsfirst.org/library/trapped-preyed-upon-and-punished/.

something the administration can control—and is not a sufficient reason to erode the public protections inherent to the APA. Finally, the good cause alleged does not outweigh the very real consequences for asylum seekers at the southern border.

VIII. Recommendations

Given the IFR's limitation on asylum conflicts with INA Section 208(a)(1), the Departments must rescind it. There is no conceivable way to modify this limitation on asylum to conform with Congress's clearly stated intent of allowing asylum seekers to apply for protection regardless of how they entered the United States. There is no way this rule can be applied while maintaining access to due process and without risking *refoulement*.

If DHS and DOJ decide to continue with this rule, the following changes should be made:

- End the requirement that asylum seekers manifest fear and reinstate the preliminary questions to ensure proper implementation of the credible fear process.
- Rescind the reasonable probability standard and, instead, expand alternative pathways to lawfully enter the United States for asylum seekers, including increasing the number of CBP One appointments, expanding the number of countries that have access to parole programs, and increasing the number of parolees accepted under the CHNV program.
- The Departments should develop a clear policy for applications for asylum, withholding of removal, and CAT protection submitted by people who EWI'ed without detection. The Departments should also immediately create and maintain a publicly accessible database listing all dates and periods of time this IFR is in effect.
- The requirement within the family unity provision that an accompanying spouse or child must not independently qualify for protection from removal should be eliminated. Expanding the family unity provision to permit grants of asylum based on demonstrated family unity would resolve these ethical conflicts. Alternatively, DHS and EOIR should explicitly exclude disclosures related to the family unity provision from the consideration of any future immigration matters for the dependents of the principal applicant.

IX. Conclusion

AILA and the Council oppose the interim regulations because they will return vulnerable individuals who deserve protection to danger and potential death. The Departments and President Biden claim that this rule is needed due to Congress' inability to provide the executive branch with more resources. However, as the Ninth Circuit has stated, "continued inaction by Congress is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws."[64] These and other policies are choking off access to asylum and are fundamentally undermining the U.S. commitment to protect those fleeing persecution and harm. We urge the Departments to reconsider the IFR and withdraw it.

[64] *East Bay Sanctuary Covenant v. Trump*, 932 F. 3d 742, 774 (9th Cir. 2019).

For any questions, please reach out to Amy Grenier at agrenier@aila.org or Adriel D. Orozco at aorozco@immcouncil.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE AMERICAN IMMIGRATION COUNCIL