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July 3, 2024

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RE: Comment in Opposition to the Interim Final Rule entitled *Securing the Border;* USCIS Docket No. USCIS–2024–0006; RIN 1615–AC92; A.G. Order No. 5943–2024; RIN 1125–AB32

Dear Director Delgado and Assistant Director Alder Reid:

The National Immigration Project (NIPNLG)[1] submits the following comment in response to the Department of Homeland Security's (DHS) and the Executive Office for Immigration Review's (EOIR) request for comments on its Interim Final Rule (IFR) that will render asylum seekers ineligible for asylum based solely on their manner of entry. For the reasons stated below, NIPNLG strongly opposes this interim final regulation and calls on the agencies to rescind it in its entirety.

NIPNLG is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system. Additionally, we fight for fairness and transparency in immigration adjudication systems and believe that all noncitizens should be afforded the right to fair adjudications of their claims to remain in the United States.

[1] The primary author of this comment is NIPNLG supervising attorney, Victoria Neilson, with thanks to legal intern Bill de la Rosa, and Director of Legal Resources and Training, Michelle N. Méndez for her review.

NIPNLG opposes both the substance of the IFR and the procedure used to implement it. The IFR is unlawful because it directly conflicts with the Immigration and Nationality Act (INA) and U.S. obligations under international law. Building on other recent unlawful and unconscionable agency actions, the IFR completely shuts out countless asylum seekers from the U.S. protection system. The IFR will disproportionately affect marginalized noncitizens, particularly those who speak rare languages, including Indigenous asylum seekers.[2] Even though the IFR is already in effect, the agencies have given the public a mere 30 days to comment on these sweeping and draconian changes to the law. Eviscerating asylum protections through an IFR, without allowing public comment before the rule takes effect, contradicts longstanding executive orders as well as this administration's stated commitment to transparency and input from affected community members. The agencies must rescind the IFR in its entirety.

I. NIPNLG Strongly Opposes the IFR Process Which Implements the Rule Before Giving Stakeholders an Opportunity to Comment and Then Only Gives Stakeholders 30 Days to Submit Comment After the Rule's Start Date

As discussed below, the IFR guts longstanding asylum protections and directly contradicts established statutory rights. It was arbitrary for the agencies to implement such sweeping changes without giving the public an opportunity to comment before the rule went into effect. The preamble to the IFR acknowledges that border encounters are lower in 2024 than they were in 2023.[3] This decrease in border crossers belies the agencies' claim that this sweeping rule must be issued as an IFR because of the "emergency" at the border, given that border encounters have in fact decreased since last year.

Furthermore, even assuming arguendo that the agencies had a legitimate reason to issue this rule as an IFR rather than through a Notice of Proposed Rulemaking (NPRM), it was arbitrary and unfair to give stakeholders a mere 30 days to comment on the IFR. The rule is already in effect, so forcing stakeholders to comment on an accelerated timeline serves no purpose for the agencies. Moreover, DHS issued an NPRM titled "Application of Certain Mandatory Bars in Fear Screenings," on May 13, 2024, also with a meager 30-day comment period, with comments due on June 12, 2024. Forcing overworked immigration organizations to respond to these substantial changes both in the law and in their practices while setting aside time to write comments on complex and lengthy rules is unreasonable.

The Administrative Procedures Act (APA) § 553 requires that the public as "interested persons" have "an opportunity to participate in the rule making." In general, the agencies must afford "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[4] Courts have found that to comply with this participation requirement, the agencies must offer a comment period that is "adequate" to provide a "meaningful opportunity."[5] Given the importance of the public's participation in the rulemaking process, Executive Order 12866 specifies that rulemaking "in most cases should include a comment period of not less than 60

[2] *See* Mayan League, Biden's Proclamation a Betrayal to Indigenous Peoples Seeking Refuge and Safety (June 4, 2024) https://issuu.com/mayanleague.org/docs/iml_statement_executive_order_june_4_2024.docx.
[3] 89 Federal Register 48710, 48712, 48713 (June 7, 2024) ("While encounter levels in calendar year 2024 have decreased from these [2023] record numbers. . .").
[4] *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).
[5] *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).

days."[6] Likewise, Executive Order 13563 explicitly states, "To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[7] The purpose of notice and comment is to allow the public a meaningful opportunity to comment. The government should welcome suggestions from experts in the field. Instead, the short comment period has left experts unable to fully digest and comment on the substance of the proposed changes.

The preamble claims that it issued this rule as an IFR rather than an NPRM because the agencies are exempt from the application of the APA under its "foreign affairs" exception.[8] Despite a lengthy summary of recently imposed border measures, there is nothing in the preamble that explains why this rule—and not the numerous other changes to border processing under this administration—implicates "foreign affairs" when prior rules affecting the border did not. Applying the foreign affairs exemption broadly to any rule that implicates the border or migration flows would eviscerate APA requirements,[9] for public participation and meaningful input.[10]

Likewise, the claimed "good cause" exception is unavailing. When the administration published the Circumvention of Lawful Pathways (CLP) NPRM last year, which like the IFR severely limited asylum eligibility for most border crossers, it did so through an NPRM. While it is true that Title 42 remained in effect during the CLP comment period delaying its start in practice, it is disingenuous to compare the current IFR with the lifting of Title 42, which, as the agencies report, led to increased border entries.[11] Title 42 effected a near-complete closure of the border to asylum seekers. It is unsurprising that when asylum seekers learned that there was a possibility of seeking asylum rather than face immediate expulsion,[12] they would attempt to seek asylum immediately. By way of contrast, the IFR heightens standards of review for fear claims at the border and replaces asylum with more restrictive forms of protection like withholding of removal and CAT protection. Most asylum seekers fleeing harm are unlikely to understand the differences in these forms of protection.

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[6] *See* Exec. Order No. 12866, § 6(a), 58 Fed. Reg. 51735 (October 4, 1993).
[7] Exec. Order No. 13563, 76 Fed. Reg. 3821 Improving Regulation and Regulatory Review (Jan. 18, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulationand-regulatory-review.
[8] 89 Fed. Reg. 48759-62.
[9] The importance of APA requirements have just been reconfirmed generally in the importance of which, generally, have just been reconfirmed in *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.,* No. 22-1008, 2024 WL 3237691, at *12 (U.S. July 1, 2024).
[10] Indeed, the agencies issued last year's CLP rule as an NPRM and discussed comments concerning the important family unity provision in their final rule. *See* 88 Fed. Reg. 31347 (May 16, 2023) https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf. This IFR incorporates those family unity provisions, confirming the importance of public input in good policy making.
[11] *See* 89 Fed. Reg. 48764.
[12] *See* American Immigration Lawyers Association, Practice Pointer: Title 42 and Asylum Processing at the Southern Border, AILA Doc. No. 22102512 (Jan. 13, 2023), https://www.aila.org/library/practice-pointer-title-42-and-asylum-processing.

Furthermore, the IFR must be analyzed in conjunction with the NPRM issued in May, "Application of Certain Mandatory Bars in Fear Screenings."[13] Stakeholders are still trying to understand what the effects of that rule, which has not been finalized, will be. This uncertainty leaves stakeholders commenting on the IFR without knowing how it will overlap with the final version of the Mandatory Bars rule.

II. NIPNLG Strongly Opposes the Substance of the Interim Final Rule

A. Increasing Barriers to Adjudication of Protection Claims for Noncitizens in Expedited Removal Violates Congressional Intent in Creating the Fear Screenings Which Are an Integral Component of Expedited Removal

When Congress created the expedited removal process in 1996, it greatly curtailed the existing rights of noncitizens presenting at the border. Prior to the creation of the expedited removal process, noncitizens who presented at a port of entry without proper documents or who were apprehended between ports of entry, would be placed into full exclusion proceedings before an immigration judge.[14] The entire expedited removal system has been criticized for its racist origins.[15] This rule will only exacerbate the negative impact of the flawed expedited removal system on Black, Indigenous and People of Color (BIPOC) noncitizens, who are overrepresented in the border detention data given their lack of access to U.S. visas due to their economic status.

Under expedited removal, rather than receiving a full exclusion hearing before an immigration judge, anyone presenting at a port of entry without a visa, or apprehended near the border, could be given a removal order by DHS, which could only be vacated by passing a credible fear interview.[16] Congress specifically determined that the legal standard governing this interview should be a low enough threshold to not exclude legitimate asylum seekers.

Section 235(b)(1)(B)(v) of the INA defines "credible fear" as "a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen's] claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum under section [208] of this title." The INA does not grant the agencies authority to implement a different fear standard at the border.

In the early days of his presidency, President Biden called on agencies to review expedited removal procedures to make them fairer.[17] Advocates for noncitizens, including NIPNLG, hoped

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[13] 89 Fed. Reg. 41347 (May 13, 2024).
[14] 8 CFR § 1240.30 *et seq*.
[15] *See* Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, UNIVERSITY OF CHICAGO LEGAL FORUM: Vol. 2007, Article 18, 565 at 586 -87, http://chicagounbound.uchicago.edu/uclf/vol2007/iss1/18. ("By allowing a high level of discretion that is influenced by the racist sentiments of the time, this arrangement aggravates the problem that facially neutral immigration laws can, in practice, discriminate on the basis of race. This could be particularly problematic in the enforcement of expedited removal because statistics covering the first few years of its enforcement clearly indicate that, from its inception, the procedure has been used disproportionately to remove certain nationalities.")
[16] *See* 8 CFR§ 208.30(f).
[17] *See* Exec. Order No. 14010, Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (Feb. 2, 2021), https://www.whitehouse.gov/briefing-room/presidential-

that the administration would reimagine and end the use of expedited removal , and wrote to the administration urging it to end the use of expedited removal for asylum seekers.[18] Instead, the agencies now seek to further curtail the rights of those arriving at the border, completely shutting asylum seekers out of the asylum process based solely on how they arrived in the United States.

UNHCR has also been critical of limiting access for asylum seekers at the border. The UNHCR Guidelines on International Protection state unequivocally that:

> Given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made.[19]

Since 1804, the United States Supreme Court has recognized the importance of interpreting U.S. domestic law in accordance with international law, where possible.[20] And the Supreme Court reaffirmed this approach in *INS v. Cardoza-Fonseca*, explaining:

> If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968.[21]

As the number of refugees continues to rise world-wide,[22] it is imperative for the United States to adhere to international norms in providing humanitarian protections. If a world leader like the United States fails to live up to its international obligations, it is likely that other countries will feel free to flout international standards as well.

B. The Border Closure Rule Directly Contradicts the INA and Is Unlawful

Section 208 of the INA unequivocally grants anyone present on U.S. soil the right to seek asylum. "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 and including an alien who is brought to the United States after having been interdicted in international or United States

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actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/

[18] *See* Various NGOs, Letter to Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Use of Expedited Removal Process for Asylum Seekers at the Border (Feb. 16, 2021), https://humanrightsfirst.org/wp-content/uploads/2022/10/LetterDHSExpeditedRemoval_2.16.21.pdf.

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

[20] *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804).

[21] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 436-37 (1987).

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

waters), irrespective of such [noncitizen's] status, may apply for asylum in accordance with this section. . ." INA § 208(a)(1).

The agencies argue in the preamble that this section of the INA only requires them to allow asylum seekers to "apply," not to be granted asylum.[23] This argument is irrational. Taken to its logical conclusion, the agencies could publish a rule allowing asylum seekers to submit I-589s but pre-determining that all such applications would be denied. Under this reasoning, such a rule would comport with INA § 208(a)(1) because asylum seekers would be allowed to "apply." Clearly, Congress's intent was for asylum seekers, regardless of manner of entry, to have meaningful access to the U.S. asylum system. The preamble also repeatedly cites *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987), to bolster its argument that manner of entry is relevant to the exercise of discretion, even while acknowledging, as they had to, that *Pula* found that manner of entry should not result in the automatic denial of an asylum seeker's application.[24]

The preamble to the IFR acknowledges that the authority upon which this rule rests, section 212(f) of the INA, "though broad, does not authorize the President to override the asylum Statute."[25] Yet that is exactly what this IFR does. In 2018, the Trump administration sought to impose a nearly identical bar on asylum for those who enter between ports of entry, which a federal court found unlawful.[26] The agencies seek to distinguish the IFR from the prior ban by stating it is only in effect during a declared emergency and that some "lawful pathways" remain available to asylum seekers.[27] However, even if the ban in the IFR is not total, it is clear that most asylum seekers who cannot wait for a CBP One app appointment[28] will be barred from asylum.

C. The Exceptions to the Border Closure Rule, like the Exceptions to the CLP, Are Very Narrow, Leaving Many Asylum Seekers with No Protection

The IFR, like the CLP, provides certain limited exceptions to the rule's implementation, through which the agencies attempt to argue that the rule is not really a ban. However, after a year of the CLP's implementation, it is clear that these exceptions are interpreted very narrowly, preventing legitimate asylum seekers who cannot meet the heightened standard at the border from ever receiving a day in court.[29] Indeed, the CLP preamble acknowledged that without its restrictions on asylum, "most non-Mexicans processed for expedited removal under Title 8 would likely establish credible fear and remain in the United States for the foreseeable future."[30]

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[23] 89 Fed. Reg. 48735.
[24] 89 Fed. Reg. 48737. The agencies' discussion in this section is even more extreme, blaming asylum seekers who *fully comply with the law* and present themselves at ports of entry, stating that under current circumstances, "even arrivals at POEs significantly contribute to the Departments' inability to process migrants and deliver timely decisions and timely consequences to those without a lawful basis to remain."
[25] 89 Fed. Reg. 48717 (citing *Trump v. Hawaii*, 585 U.S. at 689, 695 (2019) at note 41.)
[26] *See O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) (vacating Proclamation Bar IFR*); East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021).
[27] 89 Fed. Reg. 48735.
[28] *See* 89 Fed. Reg. 48737.
[29] *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/wp-content/uploads/2024/05/Asylum-Ban-One-Year-Report_final-formatted_5.13.24.pdf.
[30] *See* 89 Fed. Reg. 48720 (citing 88 Fed. Reg. at 31363).

The CLP exempts some asylum seekers from the rule and allows others to rebut the presumption of the rule's applicability. The IFR provides many of the same exceptions as the CLP, while inexplicably eliminating two of those exceptions. Under the CLP, noncitizens can rebut the presumption of asylum ineligibility by proving that they applied for asylum in a country they transited through, and that the application was denied on the merits.[31]

Likewise, the CLP allows asylum seekers who present themselves at a port of entry to potentially rebut the presumption against asylum eligibility if they can prove that they were unable to access CBP One due to language or technological issues.[32] The IFR does not explain why the agencies chose to include these exceptions to the asylum restrictions it codified last year, but chose not to include them in this year's restrictions. It is arbitrary to grant exceptions to a subset of asylum seekers how crossed the border unlawfully in last year's regulations and then deny that same subset of asylum seekers any protection in this year's regulations.

Under the IFR, asylum seekers are exempted from the rule's prohibition on asylum if they meet one of three exceptions: "the noncitizen or a member of the noncitizen's family as described in 8 CFR 208.30(c) with whom the noncitizen was traveling faced an acute medical emergency; faced an imminent and extreme threat to their life or safety; or was a 'victim of a severe form of trafficking in persons' as defined in 8 CFR 214.11."[33] The IFR acknowledges that these exceptions "mirror" the rebuttal provisions under the CLP rule.[34] Because these three limited exceptions are the same as those in the CLP, NIPNLG incorporates herein our comment opposing the CLP.[35]

Unlike the CLP, which only included a "family unity" provision in the DOJ regulation and not the DHS regulation,[36] the IFR allows DHS to apply the "family unity" provision and grant asylum through the Asylum Merits Interview (AMI) process. This provision applies if the principal applicant is found eligible for withholding of removal or CAT protection and has a spouse and/or minor children who would be eligible for derivative asylum status but for the imposition of the rule. NIPNLG supports the inclusion of DHS in this provision if the agencies do not rescind the IFR in its entirety as we recommend. If Asylum Officers can again regularly conduct AMIs, it is logical for them to apply the same family unity provision as immigration judges. Since asylum officers can consider withholding and CAT claims during AMIs, it is more efficient that they would also consider exceptions to both the CLP and the IFR. NIPNLG also recommends that the agencies add a section to the CLP regulations granting DHS this authority. Otherwise, there will be significant confusion among applicants, counsel, and asylum officers if

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[31] *See* 88 Fed. Reg. 31339.

[32] *See* 88 Fed. Reg. 31347. In practice, it is almost impossible for asylum seekers who do not have a CBP One app appointment to approach U.S. ports of entry.

[33] 89 Fed. Reg. 48733.

[34] *Id.*

[35] NIPNLG, NIPNLG Comment Opposing the "Circumvention of Lawful Pathways" Rule (March 23, 2023), https://nipnlg.org/work/resources/nipnlg-comment-opposing-circumvention-lawful-pathways-rule.

[36] 88 Fed. Reg. 31426.

they can apply the family unity exception to noncitizens subject to the Border Closure rule but not to the CLP, when both rules are in effect and overlapping[37] in many adjudications.

D. Asylum Seekers Should Not Be Required to "Manifest" Fear to Receive a Credible Fear Interview

One of the most significant and damaging changes made by the IFR is changing the procedures CBP officials use at the border when processing individuals who have been placed into expedited removal. The IFR preamble lays out the process that existed prior to the IFR's implementation. Specifically, CBP officials were required to give noncitizens a specific advisal about seeking asylum, using an interpreter if required, while preparing Form I-867A. They would then again ask noncitizens if they have a fear of return or would be harmed if returned when preparing a second form, Form I-867B.[38]A primary reason the agencies cite for no longer requiring individualized information about screening for fear is that completing these forms may take a Border Patrol agent 20 to 30 minutes to complete.[39] However, this short amount of time may mean the difference between an asylum seeker being returned to persecution or death, simply to save Border Patrol a few minutes of paperwork. The agencies are clearly sacrificing legitimate asylum seekers' claims in the name of speed.

NIPNLG and the American Immigration Council, have documented abuses by CBP in other contexts including, among other issues: racial profiling, excessive use of force, and First Amendment violations.[40] In the past, media have documented CBP erroneously completing form I-213 on behalf of babies, who were alleged to have stated that they were entering the United States to work.[41]

Studies have shown that when asylum seekers are required to "manifest" fear rather than being asked about their fear, they are far less likely to receive a fear screening.[42] Many asylum seekers flee violence at the hands of government officials; expecting an asylum seeker to affirmatively volunteer their fear of return or desire to seek asylum to uniformed Border Patrol agents, who are asking numerous identification-related questions but nothing that would elicit a narrative about their fear, is unreasonable. Asylum seekers who will have to "manifest" this fear within hours of arrival in the United States, and without prompting by border officials, may have no idea that the

[37] Adding further confusion to the overlap of these recent rules, the IFR states that when noncitizens subject to this rule cannot demonstrate an exception and are thus screened for withholding or CAT, the asylum office can retain jurisdiction of the claim for an AMI. But, because the officer would not have elicited all relevant asylum information, the applicant would have to complete an I-589 form. 89 Fed. Reg. 48755. While this provision has some logic, it highlights the extraordinary procedural complexity these overlapping rules add to what is supposed to be a streamlined screening process and asylum adjudication process (the AMI). The numerous changes to asylum procedures since 2022 introduce so many moving parts that it is hard to imagine they could all be applied correctly to every asylum seeker.

[38] *See* 89 Fed. Reg. 48739.

[39] *Id.*

[40] Hold CBP Accountable, https://holdcbpaccountable.org/.

[41] John Washington, *Bad Information Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims*, THE INTERCEPT, Aug. 11, 2019, https://theintercept.com/2019/08/11/border-patrol-asylum-claim/.

[42] Center for Gender & Refugee Studies (CGRS), "Manifesting" Fear at the Border: Lessons from Title 42 Expulsions, Policy Memo, at 2 (Jan. 30, 2024), https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9Cmanifesting%E2%80%9D-fear-border-lessons-title-42-expulsions.

experiences they suffered based on gender, racism, or homophobia or transphobia, may be grounds for asylum. It is hard to imagine anyone raising these difficult and personal issues, with a uniformed, law enforcement officer, without being asked.

The preamble states that based on DHS's years of experience with expedited removal, "when individuals are asked affirmative questions, such as those on Form I-867B, individuals are more likely to respond in the affirmative, even if they do not in fact have a fear of return or intention of seeking asylum."[43] Yet the preamble does not cite any statistics about noncitizens failing to present legitimate fear claims in their credible fear interviews (CFIs), nor does it account for the obvious reason that more people seek a CFI if they know that it's available—they do not otherwise know that they need to ask, whom to ask, or when to ask for a screening interview.

The preamble then cites old statistics on CFIs, from 2014 through 2019, to state that only 18 percent of noncitizens screened in through CFI win their asylum claims.[44] Though the preamble contrasts arrivals at the border in past years with current arrivals in multiple places, it simply cites to an old statistic to imply that most people claiming fear at the border are not legitimate asylum seekers. These statistics have been directly contradicted by Syracuse's TRAC which has found that over 25 percent of decisions in immigration courts determine that noncitizens had established a credible fear of prosecution after an asylum officer first denied the claim.[45] The agencies admit in footnote 221 that multiple studies of the expedited removal process have found it critical that asylum seekers be asked specifically about their fear, with one study finding that asylum seekers are seven times more likely to assert a claim if asked.[46] Instead of relying on these studies of the actual CFI system, the agencies cite general academic articles about "acquiescence bias."[47] This tortured explanation reveals that the agencies' primary reason for implementing the "manifestation" standard is to reduce the number of border crossers who seek asylum, whether or not they have bona fide claims.

Moreover, if a Border Patrol (BP) agent is required to complete two forms and affix their names to them, it is more likely that they will be truthful about the steps they have taken to advise the noncitizen of their rights. If these forms will never be added to a noncitizen's case file unless the asylum seeker affirmatively "manifests" a fear, then supervisors or others reviewing case files would not expect the forms to be in the file. Put more bluntly, it is easier for BP agents to ignore an asylum seeker's stated fear and not complete a form than it is to complete the forms (which, as the preamble says, takes time away from other tasks.) With no paper trail, there is no accountability if the BP officer ignores an asylum seeker's request for a fear interview.

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[43] 89 Fed. Reg. 48743.

[44] *Id.*

[45] *See* Syracuse University Transactional Records Access Clearinghouse, Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases, Report (Mar. 14, 2023), https://trac.syr.edu/reports/712/.

[46] 89 Fed. Reg. 48743. "(*See, e.g.*, Allen Keller et al., Study on Asylum Seekers in Expedited Removal as Authorized by Section 605 of the International Religious Freedom Act of 1998: Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States 16–18 (2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/evalCredibleFear.pdf ("USCIRF Report") (finding that noncitizens who are read the information in Form I-867A are seven times more likely to be referred for a credible fear interview and "the likelihood of referral for a Credible Fear interview was roughly doubled for each fear question asked"); *see also* U.S. Gov't Accountability Off., Opportunities Exist to Improve the Expedited Removal Process, No. GAO/GGD-00-176 (Sept. 2000)."

[47] Footnote 220, 89 Fed. Reg. 48743.

Furthermore, neither the IFR nor the preamble explain how asylum seekers who speak rare languages, or any language other than English or Spanish, are expected to manifest fear. As explained in the preamble, when BP agents were required to complete the forms, they had to access an interpreter to do so.[48] With that requirement stricken, there is no incentive for a BP agent to use an interpreter if they can engage in basic communication with the noncitizen. As a result, this rule is likely to disproportionately harm Indigenous language speakers,[49] who may be able to communicate basic identification information in Spanish but not discuss their fear-based claim.

While the preamble claims that asylum seekers will also be referred to fear screenings if they manifest non-verbal signs of fear, including "things like noises or sounds without any words, while physical manifestations could include behaviors, with or without sound, such as shaking, crying, or signs of abuse,"[50] it does not explain how, as a practical matter, a BP agent could assess whether, for example, a recently arrested noncitizen is crying out of fear of returning to their country or simply due to exhaustion. Instead the preamble states that if a noncitizen presents "similarly to [a] manifestation of fear. . . DHS immigration officers will use their expertise and training to determine whether the noncitizen is manifesting a fear."[51]

The preamble acknowledges at footnote 194, "that an argument could be made that the requirement in section 235(b)(1)(B)(iv) of the INA, 8 U.S.C. 1225(b)(1)(B)(iv), which states that DHS 'shall provide information concerning the asylum interview . . .to aliens who may be eligible,' is not limited only to noncitizens who are eligible for a credible fear interview, but instead applies to noncitizens who are suspected of qualifying for expedited removal and 'may' be eligible for an interview."[52] Despite this acknowledgement that the rule could conflict with the statute, the preamble glosses over this problem, stating that there will be posters and videos in the waiting rooms. However, there is no explanation in the preamble or the rule itself as to how DHS intends to communicate the complex concepts of credible fear screenings without one-on-one interpretation for those who do not speak Spanish or other common languages. Currently, signs are available only in English, Spanish, Mandarin, and Hindi.[53] The preamble states that noncitizens in expedited removal "will be read the contents of the sign and video in a language they understand."[54] If Border Patrol agents have the time to work with all detained noncitizens, through the use of signs, to determine their best language, contact an interpreter, and then have that interpreter translate the sign and video, it does not seem that this new process will save BP officers the 20 to 30 minutes that the new process purportedly seeks to save them. Instead it is more likely that either Border Patrol agents will not have the time to ensure this translation or

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[48] *See* 89 Fed Reg. 48739.
[49] *See* Denise N. Obinna, *Alone in a Crowd: Indigenous Migrants and Language Barriers in American Immigration*, 13 Race & Just. 488, 489-90 (2023), https://doi.org/10.1177/21533687211006448. (". . .language barriers are a contributing factor to the difficulties which indigenous Central American migrants face at the U.S-Mexico border. . .").
[50] 89 Fed. Reg. 48740.
[51] *Id.* at 48744.
[52] 89 Fed. Reg. 48741.
[53] *Id.*
[54] *Id.*

that this translation will simply not happen, and this lack of information provision will never be recorded anywhere.

The preamble acknowledges that this process is a "departure" from the procedure that has been in place since 1997 when expedited removal was first passed into law by Congress.[55] This rule reverses 27 years of practice at the border, and doing so without even allowing for public comment before implementing this radical change in procedure.

E. The Heightened, and Convoluted Fear Standards at the Border Will Lead to Many Asylum Seekers Being Returned to Harm's Way

The IFR creates a new legal standard to border fear screenings out of whole cloth—a "reasonable probability" standard.[56] Section 235(b)(1)(v) of the INA clearly sets forth the standard an asylum seeker who is placed into expedited removal must meet in order to have their merits' claim adjudicated, "a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen's] claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum under section 208." The new standard is *ultra vires* to the significant possibility standard set forth in the INA.

The IFR defines this newly created standard as "substantially more than a reasonable possibility, but somewhat less than more likely than not."[57] "More likely than not" is the standard applied to statutory withholding claims and CAT protection claims in a full adversarial hearing, after a noncitizen has often been able to retain counsel and, at a minimum, been explained the legal standard by an immigration judge.[58] Under this new standard, a person fleeing harm must be able to articulate a specific risk of persecution or torture, and their claim will fail without a detailed account of why the applicant "in particular" is likely to be harmed.[59] The preamble claims that if the noncitizen—who will almost certainly not have had a chance to meet with an attorney and who will be questioned within hours of arriving from an exhausting journey—cannot describe to a government official with specificity the details of the harm they suffered or that others similarly situated suffered, that they would be "unlikely to prevail at the merits stage."[60] Nowhere does the preamble account for the effects of trauma on those who have been persecuted and the difficulty they may experience in providing detailed accounts of harm they suffered within hours of being arrested and processed at the border; instead, the focus of the IFR is entirely on decreasing the number of asylum seekers who ever get to a merits hearing.

First, the reasonable probability standard is far too high for a preliminary fear screening conducted within four hours of a noncitizen's arrival at the border.[61] Second, asylum officers will now be required to apply three different legal standards in border fear screenings: significant possibility, reasonable possibility, and reasonable probability. Even experienced lawyers and

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[55] *Id.* at 48742.
[56] New 8 CFR §§ 208.35(b)(2)(i); 1208.35(b)(2)(ii).
[57] 8 CFR §§ 208.35(b)(2)(i), 1208.35(b)(2)(ii).
[58] 8 CFR § 1208.16.
[59] 89 Fed. Reg. 48747.
[60] *Id.*
[61] *See* Human Rights First, *Two Weeks of the Biden Border Proclamation and Asylum Shutdown* (June 20, 2024), https://humanrightsfirst.org/library/two-weeks-of-the-biden-border-proclamation-and-asylum-shutdown/.

judges might be confused about how to apply each of these different standards to a set of facts. Requiring United States Citizenship and Immigration Services (USCIS) officers conducting screenings, many of whom are neither attorneys and nor fully trained asylum officers,[62] to correctly apply these complex and nuanced standards during a phone interview in expedited circumstances is untenable and likely to lead to erroneous denials.

The preamble goes to great lengths to explain why the agencies believe that applying different legal standards to different stages of the same truncated interview will not be difficult for asylum officers and immigration judges. It argues that the significant possibility standard would only be applied to determine whether the noncitizen is subject to the IFR.[63] The preamble fails to acknowledge, however, that unlike the CLP, the "border closure" rule applies to Mexican asylum seekers. Thus, the "exceptionally compelling circumstances" which caused them to cross between ports of entry may form the basis of an exception to the IFR and would likely be very relevant to their fear-based claim, which would be evaluated under two different legal standards. For asylum seekers of all nationalities, adjudicators would be forced to apply different legal standards to the same set of facts in determining the applicability of the IFR and then deciding whether they qualify for a merits hearing. Given that the vast majority of these interviews are being conducted pro se, there will be on mechanism for accountability if a mistake occurs.

As the preamble acknowledges, the first level of analysis by the asylum officer is under the statutory "significant possibility" standard.[64] If the asylum officer determines that the noncitizen is subject to the IFR, the asylum officer must then apply the newly created reasonable probability standard to their fear-based claim.[65] Nonetheless, the preamble acknowledges that under the overlapping mandatory bars asylum rule, which has been promulgated but not yet finalized, an asylum officer would have to screen for the bars applying a reasonable possibility standard.[66] Likewise, the CLP has implemented the "reasonable possibility" standard for asylum seekers who asylum officers find are subject to the ban and therefore only potentially eligible for withholding or CAT.[67] These overlapping but different standards are extremely complex, and their misapplication is likely to lead to erroneous results.

From the preamble, it is clear that the primary goal of this heightened standard under the CLP is to decrease the number of asylum seekers who get a chance to present their claims. Using Orwellian language, the preamble refers to screening out potentially bona fide asylum seekers by creating a heightened, *ultra vires* standard, thereby achieving "greater operational efficiencies."[68] The IFR thus recognizes that it will cause legitimate asylum seekers to be returned to harm's way, but ignores this reality in choosing operational efficiencies over the agencies' protection obligations.

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[62] In fact, since the end of Title 42, USCIS has been using USCIS officers who have received asylum law training, but are not actually asylum officers, to conduct fear screenings. *See* 89 Fed. Reg. 41356.
[63] 89 Fed. Reg. 48749.
[64] *Id.* at 48745.
[65] *Id.*
[66] *Id.* at note 231.
[67] 89 Fed. Reg. 48746; 88 Fed. Reg. 31336.
[68] 89 Fed. Reg. 48746.

Even acknowledging that fewer asylum seekers are permitted to pursue their claims under the CLP standard, the agencies now seek to create an even more difficult standard for those seeking protection to meet, simply to have the merits of their claims adjudicated. The agencies claim that the "screen in" rate remains higher under the reasonable possibility standard in the CLP than the actual court grant rate.[69] However, there is nothing in the legislative history of the expedited removal statute that indicates these rates should be identical. Asylum law is complex and ever-changing, and grant rates vary significantly from court to court and judge to judge.[70] The preamble implies that no one should receive a day in court unless they will win every case, a level of success clearly not intended by Congress when it codified the significant possibility standard. Instead, unlike Congress, the agencies have determined that it is okay for legitimate asylum seekers to be turned away at the border. The preamble to the IFR acknowledges a "potential marginal increase in the likelihood that a meritorious case would fail under the raised screening standard" but says that the "efficiencies outweigh" the challenges.[71]

The standards of review that immigration judges must apply in reviewing negative asylum officer fear screenings are equally untenable. While judges may generally have more training on applying different standards of review, determining which standard applies to which applicant, whether the asylum officer applied the correct standard, and weighing the limited facts elicited during an abbreviated border fear screening under these different standards is a nearly impossible task. The preamble lays out the overlapping and conflicting standards that immigration judges will be forced to apply. This lengthy section of the preamble is quoted in its entirety because it is too complex to even summarize:

> First, where the AO [Asylum Officer] determines that the noncitizen is subject to the limitation on asylum eligibility under paragraph (a)—including that there is not a significant possibility, see INA 235(b)(1)(B)(iii), 8 U.S.C. 1225(b)(1)(B)(iii),292 that the noncitizen could establish an exception under section 3(b) of the Proclamation—and that there is not a significant possibility that the noncitizen could establish an exception to the limitation under paragraph (a)(2), the AO will enter a negative credible fear determination with respect to the noncitizen's asylum claim and continue to consider the noncitizen for potential eligibility for statutory withholding of removal and CAT protection under the procedures in paragraph (b)(2), as described below. See 8 CFR 208.35(b)(1)(i). Second, where the AO determines that the noncitizen is not subject to this IFR's limitation on asylum eligibility because there is a significant possibility that the noncitizen could establish that they are not described in § 208.13(g), the AO will follow the procedures for credible fear interviews relating to the Lawful Pathways condition in § 208.33(b). See id. 208.35(b)(1)(ii). This provides that those noncitizens who are not subject to the Proclamation because they did not enter during emergency border circumstances are processed under the provisions governing the Lawful Pathways condition—and under § 208.33(b)(1)(ii), if the noncitizen is not subject to that condition,

[69] *Id.*
[70] *See* Syracuse University Transactional Records Access Clearinghouse, Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022, Published Oct. 26, 2022, https://trac.syr.edu/immigration/reports/judge2022/; (.) *see also* Andrew I. Schoenholtz, Jaya Ramji-Nogales & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 316 (2007), https://scholarship.law.georgetown.edu/facpub/1902. (". . .the regional deviation rates vary tremendously-from 2% to 51%.)
[71] 89 Fed. Reg. 48746.

> they will be screened for a significant possibility of eligibility for statutory withholding of removal or CAT protection consistent with § 208.30.293 Third, where the AO determines that the noncitizen is not subject to this IFR's limitation on asylum eligibility because there is a significant possibility that the noncitizen could establish either that they are described in section 3(b) of the Proclamation or exceptionally compelling circumstances exist under paragraph (a)(2), the AO will conduct the screening consistent with 8 CFR 208.30. See id. 208.35(b)(1)(iii).[72]

Whether or not asylum officers or immigration judges will understand these procedures and apply them correctly, unrepresented noncitizens seeking protection will not understand what their burden is in these screenings. Moreover, for the very limited number of asylum seekers fortunate enough to reach counsel by phone before their fear screening, it would be impossible for counsel to describe these different but overlapping processes in a comprehensible way in the very limited time available during a phone consultation.

Congress's intent in establishing expedited removal and an easily applied "significant possibility" standard at the border was to quickly screen out economic migrants and allow those with fear-based claims a full hearing.[73] The new, extraordinarily complex system established by this rule and the mandatory bars rule put in place at the border create an extreme departure from the screening system that has been in place for almost 30 years and contradicts Congress's intent in legislating the significant possibility standard.

F. The IFR Puts Mexican Asylum Seekers at Risk

The IFR applies to Mexican citizens seeking asylum in the United States, making the consequences of this rule more drastic for Mexican asylum seekers than previous border regulations. Even the so-called Migrant Protection Protocols implemented by the Trump administration[74] and last year's CLP rule specifically exempted Mexican asylum seekers from restricted border asylum processes.[75] While the IFR's preamble acknowledges a "sharp increase in referrals for credible fear interviews of Mexican nationals" in the last year, the agencies have nonetheless decided to implement this rule against Mexican asylum seekers.[76] Indeed, rather than consider the increase in Mexican asylum seekers as evidence of increasingly dangerous conditions in Mexico and the increased protection needs of Mexican citizens, the agencies decided to apply this rule precisely *because* more Mexican citizens are seeking protection.[77] Thus, Mexican citizens who are in harm's way will be forced to wait in dangerous conditions for

[72] 89 Fed. Reg. 48755.
[73] *See* Lexie Marilyn Ford, *A Reasonable Possibility of Refoulement: The Inadequacies of Procedures to Protect Vulnerable Noncitizens from Return to Persecution, Torture, or Death*, 9 Tex. A&M L. Rev. 209, 222-23 (2021), https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1236&context=lawreview.
[74] DHS, Migrant Protection Protocols (Trump Administration Archive), (Last Updated: Nov. 1, 2022). https://www.dhs.gov/archive/migrant-protection-protocols-trump-administration#:~:text=Who%20is%20subject%20to%20MPP,Section%20240%20of%20the%20INA.
[75] 89 Fed. Reg. 48738.
[76] *Id.*
[77] 89 Fed. Reg. 48738. ("Because of this sharp increase from the historical average, the Departments believe that applying this rule to Mexican nationals will result in faster processing of a significant number of Mexican noncitizens and thereby significantly advance this rule's overarching goal of alleviating the strain on the border security. . .")

a possible CBP One appointment or cross the border and be barred from asylum. This rule contradicts U.S. protection obligations towards Mexican citizens.

G. Punishing Those Fleeing Harm Does Not Reduce Border Crossings

The preamble to the IFR points out numerous steps the administration has taken to limit access to asylum, including deploying additional Customs and Border Protection agents and Department of Defense personnel at the border and the promulgation of last year's CLP rule.[78] That rule, which NIPNLG vigorously opposed,[79] bars asylum seekers from winning asylum if they enter the United States unlawfully, subject to certain limited exceptions. As we explained in our comment last year, that rule gutted asylum protections and punished legitimate asylum seekers who are unable to remain in Mexico for weeks or months, waiting to win the CBP One appointment "lottery."

The express purpose of the CLP is to punish asylum seekers with "consequences" if they enter the United States without a visa or pre-approved appointment.[80] The fact that the administration is now adding further punishments to asylum seekers only shows that deterrence measures do not work.[81] The administration itself states that the number of asylum seekers has continued to grow *after* it already severely restricted eligibility for asylum, underscoring the point NIPNLG made in our comment to the CLP: those fleeing harm will continue to flee regardless of the punishment the U.S. government imposes on them. Furthermore, asylum seekers in desperate situations often cannot comprehend the difference in rights between winning asylum and withholding of removal.

While most border crossers currently seek out CBP officials once they are in the United States to initiate the asylum application process,[82] a consequence of the IFR will be to push asylum seekers to enter through more desolate and dangerous locations. If asylum seekers understand that even if they turn themselves in, they are forever barred from asylum because of their manner of entry, and they are much less likely to ever have a merits adjudication, they have very little incentive to turn themselves in. Instead they are more likely to choose remote and dangerous entry points, and more likely to flee from Border Patrol agents, putting both the agents and the noncitizens at risk of injury.

In addition to implementing the CLP, the agencies have put other anti-asylum measures into place, including holding asylum seekers in CBP custody, giving a mere 24 hour "consultation" period to try to reach counsel via telephone, and returning non-Mexican citizens to Mexico.[83]

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[78] 89 Fed. Reg. 48710, 48712.
[79] NIPNLG, NIPNLG Comment Opposing the "Circumvention of Lawful Pathways" Rule, (Mar. 23, 2023), https://nipnlg.org/work/resources/nipnlg-comment-opposing-circumvention-lawful-pathways-rule.
[80] 88 Fed. Reg. 11704, 11706 (Feb. 23, 2023).
[81] Human Rights Watch, Nothing but Bones: 30 Years of Deadly Deterrence at the U.S.-Mexico Border, https://www.hrw.org/content/388364. ("While the deterrence strategy has failed to reduce migration numbers, it has enriched criminal groups, including smugglers and kidnappers, and wasted billions of taxpayer dollars. For some border agents, tasked with carrying out these policies, the work has led to moral injury and even suicide.").
[82] *See* Rebecca Santana, What's Behind the Influx of Migrants Crossing the U.S. Southern Border?, Associated Press (Sept. 21, 2023), https://www.pbs.org/newshour/politics/whats-behind-the-influx-of-migrants-crossing-the-u-s-southern-border.
[83] 89 Fed. Reg. 48723.

Despite these punitive measures for unlawful entry, the preamble states that they have not sufficiently reduced border entries. The preamble states that in December 2023, CBP saw its highest ever number of border encounters.[84] This statement alone demonstrates that deterrence and punishment do not prevent those fleeing for safety from entering the United States. Doubling down on punitive measures may seem like good politics, but it is not good policy.

The preamble to the IFR explicitly states that raising the legal standard for those fleeing harm at the border may serve as a "deterrent" and that "this deterrent effect could lead to lower encounter levels."[85] But due process requires that each claim be decided on its own merits and not used to try to alter the behavior of other people who are not even in the United States.

H. The Border Closure System Based on Numbers of Crossings Is Unworkable

The IFR creates a new system whereby the anti-asylum rule is in effect based on the number of border crossers over a 7-consecutive day period.[86] Once there have been 2,500 border crossers, minus certain exempted noncitizens, the rule is in effect. Thereafter, the rule remains in effect until there have been fewer than 1,500 daily unlawful crossings in a 14-week period.[87] While the administration has created a website that states whether the border is currently open or closed,[88] it is hard to imagine noncitizens in desperate conditions in Mexico checking the website before deciding to cross the border. In any event, if the border were to reopen under this rule, it seems inevitable that smugglers would charge higher fees to move noncitizens across the border during the time that the border is open. Noncitizens looking to enter while asylum is an option, if they understand the rule at all, would likely flood the border when it is not "closed," leading again to its immediate closure.

The preamble acknowledges the complexity of the new system and states that this complexity is why it opted to close the border based on 7-day/14-day trends rather than making decisions on a day-by-day basis, which would not be "operationally viable" and would be:

> extraordinarily complex and unwieldy if the rule were to be activated and deactivated regularly. Legal service providers and migrants would similarly face a great deal of confusion about when the provisions of this rule were in effect based upon a single threshold of 1,500 encounters to activate or deactivate the measures in this rule. The burden of tracking, identifying, and applying different standards that change back and forth over a matter of days is significantly more complex for USCIS personnel as they consider protection claims.[89]

The preamble acknowledges that it cannot swiftly change from one means of processing to another and sets the threshold number of entries for suspending the border closure rule at 1,500. It also states that since May 2023 (after the implementation of the CLP), border crossings have been over 2,500 every day. This explanation makes clear that the agencies' intent is not to create

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[84] *Id.* at 48724.
[85] *Id.* at 48748.
[86] *Id.* at 48715.
[87] *Id.*
[88] DHS, Securing the Border, Presidential Proclamation and Rule, https://www.dhs.gov/immigrationlaws.
[89] 89 Fed. Reg. 48753.

a flexible rule, but rather to keep this rule in place indefinitely, punishing asylum seekers in a flawed attempt to deter them from seeking protection in the United States.

Moreover, the preamble does not take into account that this same complexity will affect and significantly complicate merits' adjudications. The IFR states that the prohibition on asylum will apply to all merits adjudications for noncitizens who enter during a period of "border closure."[90] Noncitizens who enter without inspection would have to prove with certainty their date of entry and research whether the border was "closed" on that date to argue for eligibility for asylum versus lesser forms of protection. Each additional impediment and extra step the agencies impose on asylum adjudications simply leads to longer, more complex hearings in an already overwhelmed, backlogged system.

I. The Rule Is Arbitrary Because the Administration Has Declared an Emergency While Asserting that Border Crossings Are Down

In the IFR, the agencies claim, simultaneously, that prior deterrence measures are working to reduce border crossings, that crossings are lower than they were in May 2023, and that, even with reduced crossings, there is currently an "emergency" situation requiring the agencies to invoke an emergency section of the INA to further punish asylum seekers. It is arbitrary for the agencies to simultaneously claim that their prior deterrence measures have worked and that crossings are down, while invoking emergency authorities to create a draconian rule designed to shut asylum seekers out of the U.S. protection system.

In stating their "need for these measures" in the preamble, the agencies essentially concede that there is no emergency now but fear that there *will* be one in the future.

> DHS projects that, absent the policy changes being promulgated here, irregular migration *will once again increase*, and that any disruption in Mexican enforcement will only exacerbate that trend. Without the Proclamation and this rule, the *anticipated increase* in migration *will,* in turn, worsen significant strains on resources already experienced by the Departments and communities across the United States.[91] [Emphasis added.]

By its own admission, the administration's claim for the need for these emergency measures, and especially for the promulgation of this rule by IFR rather than through an NPRM, is not justified.

J. The Border Closure Rule, Combined with the Administration's Announcement of Increasing 8 USC §§ 1325 and 1326 Prosecutions, Further Criminalizes Noncitizens

Unlike the "emergency" rules that led to noncitizens being expelled under Title 42,[92] the IFR will subject those who cross the border irregularly to expedited removal. This difference means that those who do not pass a CFI, or who are never given a CFI for the reasons discussed above, will be removed subject to a removal order. Noncitizens who subsequently return to the United States unlawfully will be potentially subject to felony charges and may be imprisoned for up to two

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[90] 89 Fed. Reg. 48732.
[91] 89 Fed. Reg. 48726.
[92] 89 Fed. Reg. 48720.

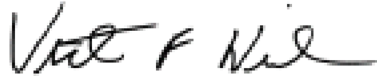
years. 8 USC §1326(a)(2). Since the start of the Biden administration, prosecutions of immigration violations have increased.[93] Moreover, just before issuing the IFR, the Department of Justice (DOJ) announced its intent to put more resources into prosecutions at the border.[94] One study estimated that border prosecutions between 2005 and 2015 cost taxpayers over $7 billion to incarcerate immigrants charged or convicted with illegal entry or re-entry crimes.[95] NIPNLG strongly opposes the increased issuance of expedited removal orders, which will inevitably lead to more migrants re-entering after removal orders and being charged with felonies. Noncitizens seeking entry to the United States and the asylum system should not be criminalized and incarcerated for these actions.

Conclusion

NIPNLG urges DHS to rescind this rule in its entirety. The rule seems designed to punish asylum seekers as a deterrent to entering the United States at the border. Deterrence measures have never been successful, and this rule will undoubtedly lead to bona fide asylum seekers being returned to harm's way because DHS has created an unworkable, convoluted, and unfair system of fear screening at the border.

Please do not hesitate to contact Victoria Neilson, victoria@nipnlg.org, if you have any questions or need any further information. Thank you for your consideration.

Respectfully,



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[93] *See* Syracuse University Transactional Records Access Clearinghouse, Immigration Prosecutions Increase with New Push for Border Enforcement, Published June 25, 2024, https://trac.syr.edu/reports/745/.

[94] DOJ, Justice Department Expands Efforts to Dismantle Human Smuggling Operations and Support Immigration Prosecutions (May 31, 2024), https://www.justice.gov/opa/pr/justice-department-expands-efforts-dismantle-human-smuggling-operations-and-support.

[95] NIPNLG, *Biden Administration's Newest Efforts to Criminalize Migration* (June 6, 2024), https://nipnlg.org/sites/default/files/2024-06/2024_NIPNLG-Criminalizing-Migration.pdf.