

Submitted via www.regulations.gov

September 27, 2026

Markwayne Mullin
Secretary of the Department of Homeland Security
c/o Asylum Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: Affirmative Asylum Referrals Without Interview, RIN 1615–AD18 or CIS No. 2851–26; DHS Docket No. USCIS–2026–0199

Dear Secretary Mullin:

The National Immigration Project submits the following comment in opposition to the U.S. Citizenship and Immigration Services (USCIS) Interim Final Rule (IFR) titled “Affirmative Asylum Referrals Without Interview.” The IFR turns asylum protection on its head, no longer ensuring that asylum seekers’ claims be adjudicated in a non-adversarial setting by specially trained Asylum Officers. The rule is an extraordinary departure from decades of established procedure and should not have been issued as an IFR without giving the public the opportunity in advance to submit comments.

The National Immigration Project 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. The National Immigration Project fights for fairness and transparency in immigration adjudication systems and believes that all noncitizens should be afforded the right to fair adjudications of their claims to remain in the United States. Our attorneys practice before USCIS, in immigration court, before the Board of Immigration Appeals (BIA), and in federal court. Additionally, we provide mentorship to other counsel that appear before these adjudicators. We believe that this rule significantly diminishes the rights of asylum seekers, prioritizes backlog reduction over asylum seekers’ rights, and advances this administration’s false narrative that most asylum seekers’ claims are not meritorious. The National Immigration Project urges the Department of Homeland Security (DHS) to withdraw this rule in its entirety.

I. The National Immigration Project Objects to DHS's Procedure in Issuing This IFR

A. The National Immigration Project Objects to DHS Issuing This Rule as an IFR Instead of Through Notice and Comment Rulemaking

DHS's decision to issue this rule, which radically alters the role of the USCIS Asylum Office, as an IFR is improper. The purpose of notice and comment is to allow the public a meaningful opportunity to comment. In general, the Administrative Procedure Act (APA) § 553 requires that the public as "interested parties" be afforded "a reasonable opportunity to participate in the rulemaking process."¹ 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."² 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 days."³ Likewise, Executive Order 13563 explicitly states, "[t]o 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."⁴ Offering this limited opportunity to respond to changes *after* they have already been implemented contradicts these Executive Orders and makes it less likely that the agencies will consider or implement feedback on the change.

Here, DHS has published this rule as an IFR rather than through a Notice of Proposed Rulemaking (NPRM) process, even though the rule has extraordinary significance and will affect the rights of hundreds of thousands of asylum seekers.⁵ DHS claims that this rule is exempt from the NPRM process because it is a "procedural rule" exempted from notice-and-comment rulemaking under the APA.⁶ But DHS acknowledges that the procedural rule exception to the default rule requiring notice and comment "covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." . . . *JEM Broad. Co., Inc. v. FCC*, 22 F.3d 320, 326-27. (D.C. Cir. 1994).⁷ And even as DHS claims that this rule does not "alter rights," the Executive Summary of the rule highlights that the new rule is "removing references to a 'right' to an interview."⁸ (emphasis added). The IFR is literally writing out the asylum seekers' rights and then claiming that no such right exists.

This rule is not, as the IFR wrongly suggests, a simple "agency organization, procedure, or practice" rule, because it will profoundly affect noncitizens' rights and the rights of their family

¹ *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

² *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012) [internal citations omitted].

³ See Exec. Order No. 12866, § 6(a)(1), 58 Fed. Reg. 51735, 51740 (Oct. 4, 1993).

⁴ Exec. Order No. 13563, § 2 (b), 76 Fed. Reg. 3821, 3821-22 (Jan. 21, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

⁵ By DHS's own count, there are 1,434,145 asylum cases in the affirmative backlog, and the preamble estimates that over 400,000 of those asylum seekers could be affected by the rule. 91 Fed. Reg. 47101, 47103 (July 28, 2026).

⁶ 91 Federal Register 47101, 47115-16 (July 28, 2026).

⁷ *Id.*

⁸ *Id.* at 47102.

members. Citing *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987), the IFR states that “a procedural rule generally may not ‘encode[] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior,’ . . . ‘the fact that the agency’s decision was based on a value judgment about procedural efficiency does not convert the resulting rule into a substantive one.’” [internal citations omitted].⁹ But this administration has vilified asylum seekers and their counsel since it took office. As recently as September 15, 2026, DHS General Counsel, James Percival, sent a letter to the American Immigration Lawyers Association (AILA) claiming that “conditions in most Western Hemisphere countries simply are not a basis for asylum.”¹⁰ It is clear that by removing an important procedural safeguard—a non-adversarial interview by trained asylum officers—DHS is manifesting its value judgment that most asylum claims are without merit.

In March 2026, the U.S. District Court for the District of Columbia granted partial summary judgment on an analogous rulemaking through an IFR which would have permitted the BIA to summarily deny almost all appeals without issuing a decision. The District Court issued a preliminary injunction to allow the Executive Office for Immigration Review (EOIR) to fully consider public comments *before* finalizing the rule. As the Court said:

The question before the Court is simply whether these changes to long-standing BIA regulations “alter the rights or interests of parties,” *Batterton*, 648 F.2d at 707, or “trench[] on substantial private rights and interests,” *Mendoza*, 754 F.3d at 1023 (citation modified), in a manner that “is sufficiently grave ... that notice and comment are needed to safeguard the policies underlying the APA,” *EPIC*, 653 F.3d at 5–6 (citation modified). As explained above, even “[w]hen a rule prescribes a timetable for asserting substantive rights ... the proper question is whether the time allotted is so short as to foreclose effective opportunity to make one’s case on the merits.” *Lamoille Valley R. Co.*, 711 F.2d at 328. Here, the Court is persuaded that this case falls well beyond the bounds of the narrow exception, *AFL-CIO*, 57 F.4th at 1034, for rules of agency procedure or practice that lack the type of “substantive effects” that implicate the “policies underlying the APA[’s]” requirement for notice and comment, *JEM Broad. Co.*, 22 F.3d at 327 (citation modified). *Amica Ctr. for Immigrant Rts. v. Exec. Off. for Immigr. Rev.*, 822 F. Supp. 3d 119, 157 (D.D.C. 2026), *dismissed*, No. 26-5156, 2026 WL 2582126 (D.C. Cir. Aug. 17, 2026).¹¹

For the reasons discussed below, the asylum IFR similarly alters substantive rights, denying asylum seekers a longstanding right to present their cases on the merits to USCIS and have a full adjudication after a non-adversarial interview.

⁹ *Id.* at 47116.

¹⁰ Letter from James H. Percival II, Gen. Counsel, U.S. Dep’t of Homeland Sec., to Am. Immigr. Laws. Ass’n 2 (Sept. 15, 2026), <https://x.com/DHSGenCounsel/status/2100340961821757606?s=20>.

¹¹ With the injunction in effect, DOJ dropped its appeal of the rule and the parties voluntarily dismissed the case pending rulemaking following the notice and comment period. See Jared Foretek, *White House Drops Appeal Over Fast-Track Immigration Rule*, LAW360 (Aug. 12, 2026), <https://www.law360.com/articles/2512644>.

Likewise, DHS’s claim that the rule is not subject to notice and comment based on a foreign affairs exception¹² is unavailing. First, unlike the orders and case law cited above, this foreign affairs determination is not a longstanding rule, but rather an overbroad determination made in 2025, seemingly designed to increase executive authority and limit public participation in rulemaking. Second, it is arbitrary and capricious to apply the Foreign Affairs exemption to notice and comment rulemaking to this rule.¹³ The preamble claims that this rule should be exempt from notice and comment because it implicates “the status, entry and exit of people, and the transfer of goods, services, data, technology, and other items across the borders of the United States.”¹⁴ In our global economy, virtually all rules affect these issues in some way but that does not mean that these actions affect foreign affairs. Finally, claiming that this rule is significant enough to affect foreign affairs at the same time it claims to not have a significant impact on the asylum seekers themselves is nonsensical, arbitrary, and capricious.

B. The IFR Fails to Address Its Direct Costs as Required by Executive Order 12866

Executive Order 12866 requires agencies to consider the costs and benefits of the rule,¹⁵ but this IFR fails to adequately do so. The IFR acknowledges that the IFR will “initially” increase the EOIR backlog and increase costs at the Department of Justice (DOJ),¹⁶ but it does not acknowledge that EOIR adjudications are more expensive than asylum office adjudications because EOIR adjudications involve both an immigration judge and a DHS prosecutor, whereas asylum office interviews are non-adversarial and thus only involve the asylum officer. Further, while the IFR cites to “efficiencies” in saving costs for interpreters by denying asylum seekers interviews, the immigration court uses in-person, government-paid interpreters whereas the Asylum Office requires asylum seekers to bring their own interpreters¹⁷ and only uses telephonic interpretation monitors.¹⁸ The IFR fails to include *any* breakdown of how costs would be saved by the asylum office or how costs will be increased at EOIR.

The IFR includes a table entitled “TABLE 4—OMB A-4 ACCOUNTING STATEMENT (\$ MILLIONS, 2024) TIME PERIOD: FY 2026 THROUGH FY 2035,” apparently to comply with Office of Management and Budget (OMB) Circular A-4, which it cites in a footnote.¹⁹ However, the table, which is supposed to set forth an accounting statement, actually includes no accounting whatsoever; instead, it merely restates the purported qualitative benefits already discussed elsewhere in the IFR. OMB Circular A-4 includes a requirement that the agency discuss cost-effectiveness of the rule.²⁰ One of the requirements under this OMB document is that the agency consider the cost and effectiveness of alternatives.²¹ Here, DHS does not even attempt to measure the cost of the rule, nor does it discuss or measure the costs of any alternatives.

¹² 91 Fed. Reg. at 47116.

¹³ See 90 Fed. Reg. 12200 (claiming a foreign affairs exemption for most immigration-related regulations.)

¹⁴ *Id.*

¹⁵ Exec. Order No. 12866, § 1(a), (b)(6), 58 Fed. Reg. at 51735–36.

¹⁶ 91 Fed. Reg. at 47117.

¹⁷ *Id.* at 47121; 8 C.F.R. § 1003.22.

¹⁸ 8 C.F.R. § 208.9(g).

¹⁹ 91 Fed. Reg. at 47120–21.

²⁰ OMB, Circular A-4 § D (Sept. 17, 2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4.

²¹ *Id.* § A; see also 91 Fed. Reg. at 47117.

The preamble acknowledges that placing asylum seekers into removal proceedings earlier on may result in their retaining counsel earlier than they would have if they were given an asylum interview,²² but does not acknowledge parallel rulemaking which will make it nearly impossible for many asylum seekers to obtain an employment authorization document (EAD) while their asylum applications are pending.²³ The preamble seems to acknowledge that it is more difficult for asylum seekers to navigate the adversarial immigration court system without counsel than the non-adversarial asylum office system, but does not address how asylum seekers without work authorization can pay counsel.

C. The IFR Fails to Adequately Consider Alternatives as Required by Executive Order 13563

Executive Order 13563 requires agencies to consider alternative options to the rule.²⁴ However, DHS fails to provide any alternative options to this IFR. For example, the IFR does not discuss hiring more asylum officers. Nor does it discuss the fact that with decreased border crossings, asylum officers who were previously tasked with conducting credible fear screenings should now be available to conduct merits interviews. The IFR likewise does not consider the fact that for the first time since the Refugee Act was passed in 1980, asylum seekers must now pay an initial and an annual asylum fee, nor does it address the significant fee increases for virtually every benefit under the H.R. 1 of 2025.²⁵ Congress has significantly increased DHS funding; DHS could choose to add asylum officers but did not even consider doing that. Indeed, in its table explaining the “estimated benefits” of the IFR, one purported benefit is “Time and resource savings (AO time, interpreter resources, and administrative support) for USCIS that could be reallocated to other priority caseloads.”²⁶ Thus, at the same time that the IFR discusses the nearly 1.5 million pending affirmative asylum applications for individuals who DHS acknowledges are fleeing global displacement, including persecution,²⁷ it is already considering moving resources *away* from the Asylum Office, when adding more resources to the Asylum Office would be a reasonable alternative to this IFR.

Further, while the IFR states that one benefit for asylum seekers of the IFR is that those with “strong or meritorious claims could see reduced waiting times and faster adjudication of their cases,”²⁸ it does not consider expanding existing alternatives to speed up some asylum adjudications. For example, asylum offices have long had policies in place allowing asylum seekers with urgent issues, such as family members in harm’s way in the country of feared harm, to seek expediting of their claims. Likewise, some asylum offices have maintained a “short list” to fill in any open spots on short notice with asylum seekers who are immediately ready for their interview. The IFR does not discuss any alternatives to address the backlog other than

²² 91 Fed. Reg. at 47104 n.7.

²³ See 91 Fed. Reg. 8616, 8618 (Feb. 23, 2026). Significantly, the EAD proposed rulemaking is being implemented through an NPRM, while the instant rulemaking—which will determine the merits of asylum seekers’ cases—is not.

²⁴ Exec. Order No. 13563, § 1(b)(3), (5), 76 Fed. Reg. at 3821.

²⁵ Act of July 14, 2025, Pub. L. No. 119-21, §§ 100002, 100009, 139 Stat. 72, 364, 371 (codified at 8 U.S.C. §§ 1802, 1808) <https://www.congress.gov/bill/119th-congress/house-bill/1/text>.

²⁶ 91 Fed. Reg. 55735, 55736 (Aug. 31, 2026).

²⁷ 91 Fed. Reg. at 47108 n.34.

²⁸ 91 Fed. Reg. at 47118.

eliminating the very thing that the asylum office was created to do—allow asylum seekers to present their claim to specially trained officers in a non-adversarial setting.²⁹

The IFR briefly states that it considered offering a 30-minute short-form screening instead of eliminating the right to asylum interviews entirely, but DHS rejected this option because “if an AO determined before the shortform, targeted interview that [a noncitizen] should be referred to EOIR, there is likely nothing that could have been said in testimony during an interview that would have changed the expected outcome of ineligibility.”³⁰ It again notes that it is more operationally “efficient” to eliminate interviews and again approaches the issue of asylum interviews from the false premise that asylum seekers’ testimony does not change outcomes, despite recognizing that asylum applications often lack fully developed evidence. The IFR ignores the legitimate reasons asylum seekers have for filing an asylum application without all evidence they intend to present before the interview. These reasons include: the need to file within the one-year filing deadline, lack of counsel, and the longstanding expectation that there will be an interview and an opportunity before the interview to submit additional, updated evidence.

The IFR states that DHS also considered and rejected enhanced screening of applications at intake and rejecting those that are not complete.³¹ This rejection process would have changed existing procedures in only one way. That process would have led to DHS rejecting incomplete asylum applications instead of leaving them in the asylum processing queue. Interestingly, “DHS rejected this alternative because expanding rejection authority for asylum could have inadvertently led to the rejection of filings from vulnerable [noncitizens] who face literacy or language challenges, and/or lack access to legal aid. As such, this approach could have been perceived as reducing access to the asylum process.”³² Nonetheless, DHS ignores these exact same vulnerabilities, which often lead to asylum seekers being better able to present their claims orally than in writing and further ignores the fact that many asylum seekers whose cases will be referred to immigration court are likely to have those same minimally complete asylum applications pretermitted.³³

D. The IFR Mistakenly States That the Rule Does Not Affect Small Entities

While the IFR defines “small entities” to include “small businesses [and] not-for-profit organizations,”³⁴ it concludes that the rule will not have a direct effect on them because the rule does not directly regulate them. However, the IFR performs no analysis on how the rule will

²⁹ See 8 C.F.R. § 208.1(b) (“ensur[ing] that asylum officers receive special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles”).

³⁰ 91 Fed. Reg. at 47125.

³¹ 91 Fed. Reg. 47125-26

³² *Id.* at 47126.

³³ See *Matter of C-A-R-R-*, 29 I&N Dec. 13 (BIA 2025); Victoria Neilson, *Think Immigration: The BIA Gives Immigration Judges License to Ignore Party Stipulations*, AILA Think Immigration Blog (Oct. 15, 2025), <https://www.aila.org/library/think-immigration-the-bia-gives-immigration-judges-license-to-ignore-party-stipulations> (noting that recent BIA decisions “encourage[] immigration judges to pretermitt asylum cases without giving applicants a day in court”).

³⁴ 91 Fed. Reg. at 47126.

affect small office and solo legal practitioners who will increasingly have to represent asylum seekers in immigration court and thereby change their business model. It also does not address the effect on not-for-profit organizations, many of which are faith-based, which rely on the legal services provided by partially accredited DOJ representatives. There are over 2,000 DOJ accredited representatives, the majority of whom are only accredited to appear before DHS and not the immigration court.³⁵ The IFR could make it impossible for these representatives to continue to provide representation to asylum seekers and could make it difficult for the not-for-profit organizations to remain open or to continue to employ accredited representatives whose work will be significantly curtailed by the mass referrals of their asylum cases to immigration court. The IFR therefore fails to provide required analysis on the effect on small entities.

E. The IFR Mistakenly States That the Rule Does Not Affect Family Well-Being

While the IFR concludes, with no analysis, that no data indicate the rule will affect family well-being,³⁶ it does not consider the fact that many asylum seekers who are already in the backlog have lived in the United States for many years and may now have U.S. citizen children. Placing parents into removal proceedings and putting them at risk of removal from the United States, without even giving them an interview, puts both the asylum seeker and their U.S. citizen child(ren) who may return to the dangerous country with the parent, at risk of harm. Nor does the IFR consider other family members, including adult sons and daughters, parents, or grandparents who may be affected by having their family member deprived of an interview at which they could have established eligibility to remain in the United States permanently. The IFR should have evaluated the effect on family well-being; instead, it summarily and erroneously determined that it would have no impact.

F. USCIS Should Have Sought Comments on Its Changes to the I-589 and I-589 Instructions Prior to Amending Those Forms

In addition to significantly altering asylum seekers' rights through this rulemaking, DHS also revised the I-589 application form and instructions without seeking comment and in violation of the Paperwork Reduction Act. Specifically, the Shelanski Memo requires agencies to allow public comment on changes to forms unless those changes are "de minimis" or "non-substantive."³⁷ But here the forms and instructions substantially change how the asylum seeker must complete the form and what the asylum seeker must include with the form's submission. Failure to follow these significant changes will result in a radical change in procedure by the Asylum Office—no asylum interview at all.

Specifically, the July 28, 2026, version of the I-589 form and instructions now include the language, "USCIS may adjudicate your application without conducting an interview and without

³⁵ See DOJ accredited representative roster (last updated Sept. 13, 2026).
<https://www.justice.gov/eoir/page/file/942311/dl?inline>.

³⁶ 91 Fed. Reg. at 47127.

³⁷ Memorandum from Howard Shelanski, Adm'r, Off. of Info. & Regul. Affairs, to the Heads of Exec. Dep'ts & Agencies & Indep. Regul. Agencies, *Flexibilities Under the Paperwork Reduction Act for Compliance with Information Collection Requirements* at 4 (July 22, 2016), https://bidenwhitehouse.archives.gov/wp-content/uploads/legacy_drupal_files/omb/inforeg/inforeg/pa_flexibilities_memo_7_22_16_final.pdf.

issuing a request for evidence. Your application and any supporting evidence that you provide now may be your only opportunity to meet your burden of proof to establish eligibility for asylum before USCIS.”³⁸

Any claim that the changes in the forms are not sufficiently substantive to require public comment is belied by the preamble to the IFR itself, which says “USCIS will also clearly state in the revised Form I–589 filing instructions that, because an AO may adjudicate the application without conducting an interview or requesting additional evidence, the [noncitizen] should ensure that his or her explanations are complete and detailed.”³⁹ The form and instructions have removed critical, longstanding language and are now supposed to alert asylum seekers to the need to file all evidence with their applications.⁴⁰ This is a substantive change in longstanding policy and practice and should be subject to comment.

While the amendments may change a few words on the form and instructions, these changes, coupled with the changes to asylum procedures implemented by the IFR, substantially change the burden of completing an I-589 form. When DHS makes even relatively minor changes to forms, it must undergo an analysis of the number of hours the new form will take to complete as well as the cost of these additional hours.⁴¹ As the IFR claims, one “benefit” of the rule is that it will result in “improved application quality and completeness.”⁴² However, asylum seekers have relied on their ability to develop their claim further at asylum interviews and therefore have not had to write an extensive narrative in their I-589 form or submit legal briefing arguing the merits of their case. However, as a result of this rule, USCIS can refer asylum seekers to immigration court based solely on their submitted application with no prior notice. Thus, the I-589 now instructs asylum seekers “that the application and any supporting evidence the [noncitizen] provides may be the [noncitizen’s] only opportunity to meet his or her burden of proof to establish eligibility for asylum before USCIS.”⁴³ As a result, asylum seekers must devote many more hours to completing their asylum application and submitting supporting documents at the time of filing (even though they may have to do so again in the future if the application is not quickly scheduled for an interview). Yet the IFR ignores this new burden and fails to analyze the number of hours the amended form will take to complete as well as the cost of these hours. Instead, DHS hides behind the claim that the changes in the I-589 are “non-substantive.”⁴⁴ That omission is itself grounds to rescind this rulemaking.

³⁸ See USCIS I-589 form (July 28, 2026), <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf> and USCIS I-589 Instructions (July 28, 2026), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

³⁹ 91 Fed. Reg. at 47112.

⁴⁰ For example, the prior I-589 Instructions said, “You can amend or supplement your application at the time of your asylum interview with an asylum officer and at your hearing in Immigration Court by providing additional information and explanations about your asylum claim” whereas they now say, “You may amend or supplement your application until a decision is issued.” See <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

⁴¹ United States Office of Personnel Management, Paperwork Reduction Act (PRA) Guide (Apr. 27, 2017), <https://www.opm.gov/about-us/open-government/digital-government-strategy/fitara/paperwork-reduction-act-guide.pdf>.

⁴² *Id.* at 47104.

⁴³ *Id.* at 47127.

⁴⁴ 91 Fed. Reg. 47127.

II. The National Immigration Project Strongly Opposes the Substance of This Rule

A. *The IFR Will Gut the Asylum Office and Deny Asylum Seekers Their Statutory Right to an Interview*

The preamble claims that there is no statutory right to an asylum interview even while it quotes language at INA § 208(d)(5)(A)(ii) that specifically refers to “an initial interview.”⁴⁵ The IFR claims that it is not denying asylum seekers any right by eliminating the right to an asylum interview since asylum seekers who do not get an interview before the asylum office are referred to immigration court for a hearing. However, as a footnote in the preamble acknowledges that under BIA precedent established under this administration, asylum seekers are also no longer guaranteed hearings in immigration court.⁴⁶ Thus, DHS’s arguments in favor of the rule that those who are denied asylum interviews can pursue their claims in immigration court, are disingenuous in that asylum seekers are increasingly also being denied hearings in court through the prepermission process sanctioned by the BIA in *Matter of C-A-R-R*, 29 I&N Dec. 13 (BIA 2025) and *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025).⁴⁷

The IFR guts asylum seekers’ rights and eliminates the asylum office’s very purpose. The rule “permits USCIS to refer an asylum application to EOIR in various situations, including but not limited to, when the [noncitizen] is barred from applying for asylum due to the one-year filing deadline, is barred from a grant of asylum, does not merit a grant as a matter of discretion, or is not eligible on the merits of the claim.”⁴⁸ The sweeping language cited here demonstrates that the Asylum Office could refer virtually anyone to court without an interview if that is their goal, particularly on issues such as discretion, for which there are no clear legal guidelines. The preamble devotes considerable space to describing the current process for discretionary decisions, including that “[a]bsent any negative factors, USCIS ordinarily exercises discretion favorably,”⁴⁹ but does not explain how, with the implementation of this rule, USCIS may broaden discretionary denials: if USCIS intended to continue to exercise favorable discretion in the vast majority of grantable asylum cases, there would be few efficiency gains in adjudicating discretion first. The preamble says, “This may also include cases where negative factors outweigh any positive factors in the totality of the circumstances as outlined in a discretionary analysis.”⁵⁰ Since asylum seekers will not know what discretionary factors, other than criminal or terrorism issues, may affect the asylum officer’s discretionary analysis, asylum seekers have no guidance on what facts in their cases may lead to a referral without an interview. As a result of the IFR, asylum seekers, both those in the backlog⁵¹ and those newly filing, may feel

⁴⁵ *Id.* at 47107.

⁴⁶ *Id.* at 47107 n.22.

⁴⁷ At the same time the IFR states “Therefore, such [noncitizens] could be placed in removal proceedings to present his or her application for asylum or withholding of removal in front of an IJ,” 91 Fed. Reg. at 47108, it has already acknowledged that the IJ also may not give the applicant a hearing at all.

⁴⁸ 91 Fed. Reg. at 47103.

⁴⁹ *Id.* at 47107.

⁵⁰ *Id.* at 47113.

⁵¹ DHS admits in the preamble that considering discretion before determining whether an applicant meets the elements of an asylum claim contravenes “long-standing USCIS practice.” *Id.* at 47114–15.

compelled to submit voluminous evidence to demonstrate that they merit a favorable exercise of discretion.⁵² Voluminous evidence that may not even be material to discretion will require more work to review and assess; a result that undermines the efficiency goals of this IFR.

In the section of the preamble describing the “affected population” subject to this rule, the section titled, “b. [Noncitizens] Barred From a Grant of Asylum or Do Not Merit a Grant as a Matter of Discretion” cites statistics of asylum seekers who were found to have mandatory asylum bars in the credible fear interview context and acknowledges that these statistics may not carry over to the affirmative asylum context.⁵³ The IFR postulates that there may be more affirmative asylum seekers subject to a mandatory bar since it is possible that DHS did not complete all background checks⁵⁴ at a land border setting, but it does not consider the fact that asylum seekers who are admitted into the United States on visas are likely to have undergone background screenings before admission. Furthermore, despite the title of this section, the IFR includes no analysis or estimate of the number of asylum seekers who may be referred to court without interviews based on discretion or on the merits of their claim. Thus, the IFR provides no guidance for how it will apply the discretion and merits grounds of referral and no estimate on how many asylum seekers these sweeping changes could affect.

Furthermore, even though the IFR cites the language of the prior rule that has now been removed in the preamble, “the purpose of an interview is to ‘elicit all relevant and useful information bearing on the applicant’s eligibility for asylum.’ 8 CFR 208.9(b),”⁵⁵ it does not even attempt to explain why the agency no longer benefits from eliciting all useful information on the merits of the asylum application. The preamble states that USCIS intends to issue “future policy guidance about which categories of cases should be prioritized by the agency for referral without interview based on evolving trends and agency priorities”⁵⁶ but does not disclose what those future priorities will be. Unlike the rule itself, “guidance” is not subject to public comment, and may not even be made publicly available. Nonetheless, without giving the public notice of how DHS intends to broaden the rule further in the future, DHS estimates that 132,167 noncitizens may be referred without an interview annually.⁵⁷

Similarly, in one short paragraph, the preamble states that “USCIS intends to implement subregulatory guidance, as needed in the future, on how to refer applications without interview where the [noncitizen] is ineligible for asylum on the merits of the claim.”⁵⁸ But deciding the merits of the claim is precisely what happens in an asylum interview. As discussed below, the I-

⁵² USCIS recently issued a memo in the adjustment of status context, radically altering its guidance to officers on how to analyze discretion, requiring applicants to affirmatively demonstrate significant positive equities. See American Immigration Lawyers Association, *Policy Brief: USCIS’s New Policy Weaponizes Discretion to Make It Harder to Get a Green Card* (May 21, 2026) <https://www.aila.org/advocacy-tools/policy-briefs/policy-brief-uscis-s-new-policy-weaponizes-discretion-to-make-it-harder-to-get-a-green-card>. With no guidance on how USCIS may analyze discretion outside of interviews, asylum seekers must now submit considerable evidence of positive equities to avoid possible referral to court without an interview.

⁵³ *Id.* at 47122.

⁵⁴ *Id.*

⁵⁵ *Id.* at 47111.

⁵⁶ *Id.* at 47103.

⁵⁷ *Id.*

⁵⁸ *Id.* at 47115.

589 form itself has a checkbox for the protected characteristic under which the asylum seeker is applying but nowhere requires the asylum seeker to delineate the exact contours of the protected characteristic.⁵⁹ Nonetheless, the paragraph on merits referrals gives, as an example of a reason to refer cases without an interview: “USCIS may choose to begin referring applications where the alleged or feared persecution is not on account of a protected ground under [the] INA.”⁶⁰ However, as the BIA itself has said, particular social group claims should be evaluated on a case-by-case basis;⁶¹ a full analysis of this complex area of the law requires an interview or hearing.

The preamble claims, “A primary benefit of no longer interviewing all applicants prior to the referral of an affirmative asylum application to EOIR is the increased operational efficiency of the affirmative asylum process within USCIS.”⁶² Obviously, not holding interviews at all, indeed, not having an Asylum Office, would increase USCIS “efficiency” in that it would no longer be doing the work it was created to do. But the IFR reduces the most fundamental purpose of the Asylum Office system—eliciting information from the asylum seeker through a non-adversarial interview—to a “personal interest” that some asylum seekers may have. “[Noncitizens] may have personal interests in sharing sensitive elements of an asylum claim face-to-face with an asylum officer, where for example, someone may be more comfortable and elaborative in a non-adversarial interview setting.”⁶³

The longstanding requirement of in-person asylum interviews is not based on “personal interests”; it is based on the understanding of the unique vulnerabilities of individuals who have suffered or fear future persecution and is the very reason the Asylum Office exists. “Personal interest” is peculiar framing for the longstanding core function of in-person asylum interviews: to respond to the unique vulnerabilities of individuals who have suffered or fear future persecution. The reality is that, for example, a man who was been sexually assaulted may be ashamed and fearful to document that harm in writing. Until the publication of this IFR, the asylum office has recognized the unique vulnerabilities of asylum seekers.

The IFR favors speed over accuracy in deciding asylum applications and repeatedly blames asylum seekers for USCIS’s own failure to keep up with the asylum backlog. The IFR accuses asylum seekers of “strategic delay of removal proceedings through prolonged affirmative application pendency”⁶⁴ when the Asylum Office itself has not allocated sufficient resources to address its backlog, and much of the backlog was created by DHS’s Office of the Principal Legal

⁵⁹ There have been reports of asylum offices finding ways to swiftly refer cases to court in the past, specifically based on credibility. See Safe Harbor Clinic, *A Fiefdom on Long Island: An Investigation Into the Culture and Practices of the New York Asylum Office* (Sept. 13, 2023), <https://www.brooklaw.edu/media/jm1lgic1/a-fiefdom-on-long-island.pdf>. It is not hard to imagine asylum officers quickly referring cases without interviews based on a finding that the asylum seeker’s PSG is not cognizable, even though the cognizability of a PSG requires an individualized review. See *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

⁶⁰ 91 Fed. Reg. at 47115.

⁶¹ See *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (“such a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.”).

⁶² *Id.* at 47103.

⁶³ *Id.* at 47116.

⁶⁴ *Id.* at 47103.

Advisor's (OPLA) decision to dismiss cases pending before EOIR—often over the respondent's objection—under the previous administration.

Additionally, the preamble to the IFR contradicts itself, acknowledging that one reason for the increase in asylum filings is “global displacement,” which the preamble defines as “recurring increases in the number of people forced to leave their homes due to various factors, such as armed conflicts, persecution, natural disasters, climate change, or economic instability.”⁶⁵ Thus, at the same time DHS is blaming asylum seekers for “strategic delay,” it acknowledges the global displacement crisis—which includes people fleeing persecution—but fails to consider less drastic options such as hiring more Asylum Officers. Similarly, while the preamble highlights the efficiency gains by permitting applications to be “adjudicated without offering an interview,” which “allows USCIS to adjudicate some asylum applications more quickly,”⁶⁶ nowhere in the IFR does DHS consider allowing Asylum Officers to grant clearly grantable cases without an interview. Granting asylum without an interview, for example for women from Afghanistan who would be forced to live under Taliban rule, is the most efficient process and least resource intensive outcome in that neither USCIS nor EOIR will continue adjudicating the asylum claim.

While much of the preamble focuses on the One Year Filing Deadline (OYFD) and discretionary denials, the preamble also cites the so-called “Asylum Cooperative Agreements” (ACA) as a mandatory bar found in the INA, which could be applied in the Asylum Office setting.⁶⁷ The preamble does not describe a process for referring asylum seekers to court on the basis of ACAs, but it does not seem that anything in the rule would prevent USCIS from unilaterally deciding that an ACA may apply and therefore referring most asylum seekers to immigration court. The ACA mandatory bar could essentially swallow any remaining opportunity to seek asylum before USCIS. As the U.S. District Court for the District of Columbia had held, a right to apply without a right to adjudication is no right at all.⁶⁸

In the narrative cost-benefit analysis, DHS makes statements that are inaccurate and do not reflect current realities.⁶⁹ Contrary to the purported “benefits” to asylum seekers, the IFR is clearly designed to diminish asylum seekers' rights. The IFR states that reduced wait times and potentially being referred to court sooner would allow asylum seekers to obtain work authorization sooner.⁷⁰ Work authorization is based on the time the asylum application is pending, not the date the interview is scheduled. Moreover, as noted elsewhere, faster referral to immigration court is more likely to result in asylum seekers having to retain counsel before they have received an EAD, making it more difficult or impossible to pay for the legal assistance they need. Furthermore, the other purported “benefits” to asylum seekers are no benefit at all. The IFR says, “[f]or [noncitizens] with applications that can be referred to EOIR, this interview preparation becomes a duplicative burden.”⁷¹ Unless the result of the interview is a foregone conclusion, the interview is not a “burden,” but rather an opportunity to present their case in a

⁶⁵ *Id.* at 47108 n. 34.

⁶⁶ *Id.* at 47109.

⁶⁷ *Id.* at 47105.

⁶⁸ *See O.A. v. Trump*, 404 F. Supp. 3d 109, 148 (D.D.C. 2019) (finding that an asylum seeker has the right to apply for asylum and, to do that, needs a meaningful opportunity to present their claim to an adjudicator.).

⁶⁹ 91 Fed. Reg. at 47123.

⁷⁰ *Id.*

⁷¹ *Id.*

non-adversarial setting. Moreover, the alleged “benefit” of being “placed in INA 240 removal proceedings earlier, shortening the total time before they obtain a final decision,”⁷² completely ignores the current reality of immigration court, where adjudicators are increasingly accelerating cases of unrepresented noncitizens to obtain in absentia removal orders,⁷³ and where immigration judges have “pretermitted” tens of thousands of asylum applications, both under ACAs and based on noncitizens’ alleged failure to show prima facie asylum eligibility.⁷⁴ It is disingenuous at best to imagine that DHS actually believes that the purpose of this IFR is to “benefit” asylum seekers who are increasingly unlikely to get an adjudication on the merits of their claims in immigration court.

B. *The IFR Is Ultra Vires to the TVPRA*

DHS’s failure to exempt unaccompanied children (UCs) from this IFR⁷⁵ renders the rulemaking *ultra vires* to the Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). Under the TVPRA, Congress required USCIS to take initial jurisdiction over UCs’ asylum applications. Congress further required DHS to issue “regulations which take into account the specialized needs of [UCs] and which address both procedural and substantive aspects of handling [UCs] cases” whenever applications for asylum were at issue.⁷⁶

It is impossible to reconcile these Congressional mandates with this IFR that allows USCIS to refer UCs to the immigration court without first holding an interview. Initial jurisdiction only for the purpose of receiving and referring the asylum application to the immigration court makes a mockery out of Congress’s vision to ensure that UCs’ first opportunity to seek asylum involves a non-adversarial process. Surely Congress did not intend for USCIS to have initial jurisdiction of UCs’ asylum cases solely for a receipt and referral function when immigration courts can receive asylum applications directly and otherwise have the authority to adjudicate asylum applications. In other words, Congress would not have established initial USCIS jurisdiction over UCs for performative purposes only, especially given the historically high asylum backlog.

Instead, Congress intended for USCIS to adjudicate UC asylum claims on the merits and USCIS immediately responded accordingly. In its training materials following the passage of the TVPRA, USCIS recognized that the “non-adversarial nature of the affirmative asylum adjudication and the special consideration associated with adjudicating a child’s claim, a close working relationship with the child’s representative and support person may be necessary to ensure that the child’s claim is fully explored.”⁷⁷ It is impossible to take into account the special

⁷² *Id.*

⁷³ Ximena Bustillo, *Immigration Courts Are Using a New Tactic to Speed Up Deportations*, NPR (May 26, 2026), <https://www.nprillinois.org/2026-05-26/immigration-courts-are-using-a-new-tactic-to-speed-up-deportations>.

⁷⁴ Joseph Gunther and Brandon Marrow, *No Hearing Necessary*, bklg.org (Mar. 16, 2026), <https://bklg.org/blog/pretermmission-03-26/>; *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025). The IFR mentions *H-A-A-V-* in passing in stating that the “cost” to the government of referring cases directly to court may not be great since immigration judges also may not give a full hearing. 91 Fed. Reg. at 47125.

⁷⁵ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008).

⁷⁶ TVPRA 2008 § 235(d)(8).

⁷⁷ USCIS Asylum Officer Basic Training Course, “Guidelines for Children’s Asylum Claims,” at 43 (Revised Dec. 6, 2024), https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf.

considerations in a child's claim, work closely with the child's representative, or support the child in fully exploring the claim without an interview. Without an interview, a child's special considerations are irrelevant, working with the child's representative is unnecessary, and substantive questioning that allows the case assessment to be more complete and accurate is impossible. Eliminating the interview limits DHS's adjudications to a paper-based process only and does not allow for "[r]eassurance, empathetic support, carefully framed questions, encouragement, and topic-shifting are crucial techniques for facilitating interviews of children."⁷⁸ Ultimately, if a paper-based process lacking an interview sufficed, the TVPRA would not require DHS to issue regulations that "address both procedural and *substantive* aspects" of adjudicating UC cases and would have included only a procedural requirement. Allowing DHS to refer UC asylum cases to the immigration court without an interview would render TVPRA protections for this unique and vulnerable population meaningless.

C. The IFR Contravenes the Reliance Interest of Asylum Seekers

With no notice and no opportunity to comment before it went into effect, DHS immediately began applying the IFR on July 28 to the 1,434,145⁷⁹ pending affirmative asylum cases. DHS estimates that among these cases, 31 percent of asylum seekers whose cases are pending will be referred to court without an interview, and potentially without any individualized notice about alleged deficiencies in their applications.⁸⁰ Those numbers are apparently based on asylum seekers who filed more than one year after entering the United States.⁸¹ The IFR goes on to say that it cannot estimate how many cases will be referred without an interview because the noncitizen "is not eligible on the merits of the claim."⁸² Thus, it is possible that, pursuant to the increasingly hostile asylum decisions issued by the BIA, and with an executive branch that has repeatedly called asylum a "loophole," including the USCIS director himself,⁸³ the Asylum Office may in the future refer the vast majority of cases filed there without an interview.

The IFR makes the audacious claim that the rule is "limited," stating "in recognition of potential reliance interests, DHS has limited this change to referral cases where one is barred from applying for or being granted asylum, does not merit a grant as a matter of discretion, or is not

⁷⁸ *Id.* at 31.

⁷⁹ It is further arbitrary and capricious that USCIS is able to justify this IFR with such specific data, including predictions about who may be referred without an interview in the future, when in its rulemaking on asylum employment authorization documents, USCIS could not estimate within a *century* how long it would take to adjudicate the cases in its backlog. *See* 91 Fed. Reg. 8616, 8618 (Feb. 23, 2026) (claiming that "it may take between 14 and 173 years to reach a 180-day processing time"). Likewise, the instant IFR now claims that "individuals seeking asylum may wait over 7.3 years for resolution," 91 Fed. Reg. at 47108, when just five months earlier the agency claimed to have no ability to calculate how long it would take to schedule asylum seekers' interviews.

⁸⁰ 91 Fed. Reg. at 47103.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Joseph Edlow, USCIS Director, Facebook post (July 27, 2026), <https://www.facebook.com/uscis/posts/for-far-too-long-the-asylum-system-has-been-exploited-for-purposes-of-delay-and-/1468622441977545/> ("For far too long, the asylum system has been exploited for purposes of delay and work authorization, not legitimate claims of protection. America's asylum system exists to protect individuals who genuinely fear persecution and this rule will help ensure that resources are directed to the timely adjudication of those claims instead of to those seeking to use the system as a loophole.").

eligible on the merits of the claim.”⁸⁴ But this “limited change” literally encompasses everything that an asylum seeker must prove—at the same time DHS claims to be limiting the scope of the rule (in recognition of reliance interests), it literally applies no limit to the rule, other than excluding asylum seekers who are in lawful status who are not removable and cannot be referred to immigration court.

The preamble explains several rulemakings USCIS has undergone on asylum and acknowledges that since 2000—for a quarter of a century—regulations have required an interview because, “[t]he 2000 rule . . . determined, at that time and in part, that the decision on an untimely filing issue could best be made after an ‘asylum officer, in an interview, or immigration judge, in a hearing’ had given a [noncitizen] the opportunity to present any relevant and useful information bearing on any prohibitions on filing.”⁸⁵ Yet the IFR discounts the reliance interests of asylum seekers who came forward to file an affirmative application, believing they would have the protections afforded by the Asylum Office, particularly having an adjudication in a non-adversarial, interview setting, without being subjected to cross-examination by an adversarial opposing attorney, as a mere “personal interest.”⁸⁶

Furthermore, the IFR fails to adequately account for changes at the Asylum Office which will adversely affect asylum seekers who filed for asylum before the IFR was issued. Under the IFR, Asylum Officers can determine whether or not to schedule an interview “based on a review of the record and other relevant evidence, to include the asylum application, supporting documents, other information in the file.”⁸⁷ While the preamble notes that Asylum Officers may send out a Request for Evidence (RFE), it also states that asylum seekers in the backlog can be informed of the need to update their evidence via a “public web alert.”⁸⁸ For years it has been common practice for asylum seekers to update their applications *after* they have been scheduled for interviews. This practice makes sense, given the USCIS-created asylum backlog, and the fact that some asylum seekers will wait several years between filing for asylum and having their application adjudicated. In the ensuing months or years, there may be changes in the applicant’s eligibility. For example, country conditions may have worsened, or an asylum seeker may have undergone a religious conversion, which may affect their claim. Under the IFR, there is no requirement that the Asylum Office alert the asylum seeker that the application will be reviewed before the Asylum Office does so.⁸⁹ As a result, asylum seekers who do not immediately update their asylum applications may be at risk of summary referral to immigration court. However, the IFR does not take into account recent changes at the Asylum Offices which make it virtually impossible to communicate with them or to submit evidence. Until recently, asylum seekers could communicate with the Asylum Offices via regular mail, phone, email, or walk-in hours. In the past several months, however, the Asylum Office announced that it is no longer responding

⁸⁴ 91 Fed. Reg. at 47117.

⁸⁵ *Id.* at 47108.

⁸⁶ *Id.* at 47116.

⁸⁷ *Id.* at 47111.

⁸⁸ *Id.*

⁸⁹ While the preamble does state that the asylum office may be more likely to issue an RFE on cases filed before the publication of the IFR since those applicants would not be on notice about the no-interview policy when the application was filed, it also states that the asylum office is not required to issue RFEs. *Id.* at 47112.

to emails, phone calls, or mail.⁹⁰ Moreover, the Asylum Offices have eliminated walk-in hours entirely.⁹¹ It is therefore unclear, as a practical matter, how asylum seekers *can* update the evidence in their applications, particularly for individuals who filed their applications on paper and/or individuals who do not have a MyUSCIS account. While they may try to mail updated evidence to the Asylum Office, under current policies, the Asylum Office does not acknowledge the receipt of additional evidence. The author of this comment is aware of many representatives in recent months who have filed supplementary evidence in advance of an interview, only to be told by the officer at the interview that the supplementary evidence is not in the file. It has therefore always been best practice to bring supplementary materials to the Asylum Office interview. But, under the IFR, with no interviews scheduled, asylum seekers will have no way to communicate with the Asylum Office to even confirm whether the officer has received and considered supplementary evidence.

Additionally, DHS acknowledges that discretionary referrals to court without a full adjudication are a “significant departure from its previous long-standing use of discretion in affirmative asylum adjudications and that many asylum applicants had become accustomed to this practice.”⁹² Yet, with no analysis, the IFR states that there is no reliance interest in maintaining the practice, and that even if there were a reliance interest that interest would be outweighed by “public safety” benefits by implementing the rule.⁹³ But there is no need for DHS to apply discretion in this way; the IFR already permits DHS to refer cases without interview if there are mandatory bars. Instead, the discretionary referral rule will allow Asylum Officers to apply a largely undefined legal standard to asylum seekers and may quickly review files to deny them interviews.

DHS states that it is particularly interested in comments on this subject,⁹⁴ and the National Immigration Project feels strongly that if DHS does not fully rescind this rule (as it should), at a minimum, asylum seekers must receive a written request for further evidence prior to their case being referred to immigration court without an interview. For example, there is no requirement that asylum seekers include a written declaration with their asylum application, nor does the I-589 form itself require an asylum seeker to specify the particular social group they belong to (in cases based on PSGs). It would be arbitrary and capricious for the agency to refer asylum seekers’ cases to court based on their not providing information that has never been requested of them.

D. The IFR Will Harm Asylum Seekers Whose Interests the Asylum Office Was Created to Protect

By focusing on asylum seekers who have missed the OYFD, the Asylum Office is likely to send asylum seekers who are most in need of the non-adversarial USCIS adjudication system into

⁹⁰ Advocates learned of these changes in some cases through email auto-responses, telephonic responses, and being turned away by Asylum Office personnel.

⁹¹ See, e.g., USCIS, Asylum Office—New York (last updated Apr. 20, 2026), <https://www.uscis.gov/about-us/asy/NY/New%20York>. (“The New York Asylum Office does not accept walk-in requests or provide in-person information services.”).

⁹² 91 Fed. Reg. at 47115.

⁹³ *Id.*

⁹⁴ *Id.* at 47112.

immigration court, to face a DHS prosecutor and a more formal adjudication system. Existing regulations set forth several codified exceptions to the OYFD, including those based on extraordinary circumstances. These extraordinary circumstances exceptions include individuals who were unable to timely file due to “serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past,” individuals with mental impairments, victims of ineffective assistance of counsel, and individuals whose family members have died or suffer serious illness.⁹⁵ In other words, the regulations specifically recognize some significant vulnerabilities of asylum seekers. While these vulnerabilities may be sufficient to excuse the asylum seekers from a statutory deadline, DHS has determined that these same vulnerabilities do not merit full evaluation in a non-adversarial setting. This is an absurd and cruel outcome.

The preamble includes a table that shows the percentage of asylum seekers whose cases were referred to immigration court based on the asylum seeker having missed the OYFD.⁹⁶ But neither the table nor the text of the preamble provides data on the number of asylum seekers who were found to have met a OYFD exception by the Asylum Office. Further, DHS’s data lumps together data on cases by asylum seekers who have missed the OYFD and who have not been interviewed, with those who have been interviewed and for whom the Asylum Office has not yet rendered a decision.⁹⁷ The fact that it may take the Asylum Office a long time to issue a decision after an interview only underscores the complexity of the factual and legal analysis that is required by these cases, and that is best accomplished after an asylum seeker can explain their claim before an officer. It is further unclear whether the OYFD data includes asylum seekers who timely filed for asylum with EOIR, whose cases OPLA, moved to dismiss, often over respondents’ objection, and who refiled with USCIS; under USCIS’s own guidance, such applications should not be considered untimely.⁹⁸

The preamble acknowledges that the I-589 instructions state that the noncitizen “is also told that he or she must be prepared to explain at the ‘interview or hearing’ why he or she did not file the asylum application within the first year after arrival”⁹⁹ but does not acknowledge that the new instructions have changed the language to advise asylum seekers that they must be prepared to discuss their claims “At any scheduled interview with an asylum officer or hearing,”¹⁰⁰ changing

⁹⁵ 8 C.F.R. § 208.4(a)(5)(i)-(iii), (vi).

⁹⁶ 91 Fed. Reg. at 47109 tbl.2.

⁹⁷ *Id.*

⁹⁸ As discussed below, thousands of asylum seekers had their defensive applications dismissed under the Biden administration and refiled affirmatively. While USCIS policy states that such asylum seekers will retain the date they filed with the immigration court for OYFD purposes, nothing prevents this administration from revoking the prior administration’s policy guidance on this issue. See USCIS, *USCIS Issues New Instructions for Filing Asylum Applications with USCIS After EOIR Dismissal or Termination of Removal Proceedings* (Oct. 13, 2023), <https://www.uscis.gov/newsroom/alerts/uscis-issues-new-instructions-for-filing-asylum-applications-with-uscis-after-eoir-dismissal-or>,

⁹⁹ 91 Fed. Reg. at 47106.

¹⁰⁰ USCIS I-589 Instructions (July 28, 2026), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

the instructions so subtly from “at your interview”¹⁰¹ to “at any interview” that it is extremely unlikely an asylum seeker would understand the change to be removing the right to an interview.

E. *The IFR Politicizes Asylum Procedures and Is Arbitrary and Capricious*

Under the Biden Administration, DHS OPLA undertook an effort to reduce the immigration court backlog by dismissing immigration court proceedings and allowing asylum seekers to seek asylum affirmatively instead. As noted above, many asylum seekers whose cases had been pending before EOIR for months or even years fought against OPLA’s prosecutorial discretion initiatives because they wanted their asylum applications timely adjudicated. While the Biden administration prioritized the EOIR backlog, and shifted much of it to USCIS,¹⁰² the Trump administration is now doing the opposite through this IFR. As discussed above, shifting the backlog back to EOIR is neither efficient nor cost-effective. More importantly, DHS does not account for the interests of asylum seekers who have been ping-ponged back and forth between agencies, often for political reasons. The IFR acknowledges that evidence “may deteriorate during multi-year waits”¹⁰³ but does not acknowledge that DHS’s own decisions, including through this IFR, have contributed to the delayed adjudications.

The IFR claims that another benefit of not interviewing all asylum seekers is that the policy will allow USCIS to more quickly identify “dangerous” noncitizens.¹⁰⁴ But asylum seekers are fingerprinted shortly after filing their asylum applications and nothing under existing rules prevents Asylum Offices from referring asylum applicants to immigration court if they are removable based on criminal or security grounds.¹⁰⁵

III. Conclusion

This rule guts the USCIS Asylum Office, largely eliminating its reason for existing—to give asylum seekers the opportunity to present their claims in a non-adversarial interview. Even while the IFR acknowledges the vast numbers of asylum seekers, including those who filed long before the issuance of this IFR, who will no longer have the right to an asylum interview, it has made the decision to issue this rule as an IFR rather than an NPRM. DHS erred as a matter of procedure in issuing the rule as an IFR and by failing to perform all required regulatory analyses. More importantly, DHS has unlawfully abrogated asylum seekers’ right to be interviewed in the Asylum Office and through this rule further undermines the safety of asylum seekers and the stature of the United States as a country that respects human rights and its obligations under international law. DHS should withdraw this rule in its entirety.

¹⁰¹ See National Immigration Project, *Fighting for a Day in Court: Understanding and Responding to Pretermission of Asylum Applications* 19 (July 21, 2026), <https://nipnlg.org/work/resources/fighting-day-court-understanding-and-responding-pretermission-asylum-applications> (including a full quote of the now-replaced language).

¹⁰² Hamed Aleaziz, *The Biden Administration Is Now Allowing Prosecutors To Dismiss Certain Deportation Cases*, BuzzFeed (Apr. 4, 2022), <https://www.buzzfeednews.com/article/hamedaleaziz/biden-administration-prosecutors-deportation-cases>.

¹⁰³ 91 Fed. Reg. at 47104.

¹⁰⁴ *Id.*

¹⁰⁵ The preamble also disingenuously claims that not giving interviews to noncitizens who are “dangerous” will protect asylum office personnel and even other asylum seekers, without citing a single incident of violence having occurred in an asylum office setting. *Id.*

Please do not hesitate to contact Michelle N. Méndez at michelle@nipnlg.org if you have any questions or need any further information.¹⁰⁶

Respectfully,

A handwritten signature in black ink, appearing to read 'Michelle Méndez', with a stylized flourish at the end.

Michelle N. Méndez
Legal Director
National Immigration Project
1763 Columbia Road NW, Ste. 175 #896645
Washington, DC 20009
(410) 929-4720

¹⁰⁶ Victoria Neilson, Managing Attorney, authored this comment with contributions from Michelle N. Méndez, Legal Director. We thank Karla Galiano Herrera, New York Law School, anticipated graduation May 2027, for her review of the comment.