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**RE: RIN 1125-AB20 and 1615-AC67; CIS No. 2692-21; DHS Docket No. USCIS-2021-0012
A.G. Order No. 5116-2021; Public Comment Opposing Proposed Rule on Procedures for
Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT
Protection Claims by Asylum Officers**

To Whom It May Concern:

The Harvard Immigration & Refugee Clinical Program (“HIRC”), the HLS Immigration Project (“HIP”), and other Massachusetts immigrant advocacy organizations (listed below) submit this comment on the proposed rulemaking published August 20, 2021 by the Department of Homeland Security (“DHS”) and the Executive Office for Immigration Review (“EOIR”) of the U.S. Department of Justice (“DOJ”), entitled Procedures for Credible Fear Screening and

Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers (the “Proposed Rule”). We recommend that the rulemaking be withdrawn or substantially revised. As written, the Proposed Rule undermines asylum seekers’ due process rights, forcing them through a “streamlined” system without a full hearing on their claims and denying them their day in court. The Proposed Rule’s stated goal is to “ensure due process, respect human dignity, and promote equity.” Yet many of the changes proposed would do the exact opposite, rushing asylum seekers through the adjudication process without providing them the protection they need, in direct violation of U.S. obligations under domestic and international law.¹

I. Statement of Interest

HIRC is one of the oldest clinical programs in the country that focuses on the advancement of immigrants’ rights while teaching students critical lawyering skills. HIRC includes two distinct clinics: (1) the Immigration & Refugee Advocacy Clinic, which represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts and (2) the Crimmigration Clinic, which focuses on the growing intersection of criminal law and immigration law. HIRC faculty and staff also teach a range of courses concerning immigration policy, refugee law and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. HIRC faculty and staff regularly publish scholarship concerning asylum adjudication, due process protections in removal proceedings, working with traumatized refugees, crimmigration, and immigration detention.

HIRC has worked with thousands of immigrants and refugees since its founding in 1984. Its advocacy includes representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants’ rights. HIRC has an interest in the proper application and development of U.S. asylum law to ensure that the claims of individuals seeking asylum and related relief receive fair and proper consideration under standards consistent with U.S. law and treaty obligations.

HIP is a student-practice organization under the supervision of HIRC, which provides law students with the opportunity to gain practical, hands-on legal experience. HIP represents clients seeking release from detention in Massachusetts, promotes policy reform, and provides representation to refugees and asylees who are seeking family reunification and legal residency. HIRC and HIP regularly partner to offer Know Your Rights presentations and advice and counsel legal clinics throughout the greater Boston community.

HIRC and HIP also respectfully submit this comment on behalf of the Immigration Coalition (IMCO) of the Massachusetts Law Reform Institute (MLRI), which consists of the 14

¹ See United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268. See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (recognizing that Congress enacted the Refugee Act of 1980 “to bring United States refugee law into conformance with the 1967 Protocol” and therefore the Refugee Convention).

regional legal aid programs in the Commonwealth of Massachusetts, including Greater Boston Legal Services, the largest and oldest legal service provider in New England and co-founder of the coalition, along with 140 other immigration service providers, representing thousands of low-income immigrants in the state and the region. MLRI is the statewide nonprofit poverty law and policy center whose mission is to secure economic, racial, and social justice for low-income people and communities in Massachusetts. The services and expertise of local legal aid programs, social service, health care and human service providers, and community organizations that serve low-income people, inform our concern about the effect the Proposed Rule will have on asylum seekers. We are particularly concerned about the effects on asylum seekers who are low-income and pro se, and on their families as well. Individual coalition organizations signing on to these comments are listed at the end.

We regard the Proposed Rule as contrary to U.S. obligations under both the Protocol to the Refugee Convention and domestic law. Among other proposed changes, the Proposed Rule would drastically curtail procedural protections for asylum seekers, leading to the forced return of bona fide refugees to countries where they face persecution and torture. We urge DHS and EOIR to withdraw and/or revise the current proposal immediately.²

II. The Proposed Rule’s Denial of a Full Hearing Before an Immigration Judge Will Endanger Asylum Seekers.

The Proposed Rule would put many asylum seekers³ at risk by dramatically altering the rights of those who have passed their credible fear interviews (“CFI”) and in so doing have demonstrated their fear of return to persecution or torture. Currently, asylum seekers who pass their CFIs are referred to immigration court for full proceedings under section 240 of the Immigration and Nationality Act (“INA”). By contrast, under the Proposed Rule, those who pass their CFIs would no longer have a right to a full hearing in immigration court. Instead, an asylum

² The Proposed Rule would make multiple, often problematic, changes to established practices. This comment focuses on a few key proposed changes that urgently need to be revisited or withdrawn in order to protect asylum seekers from return to persecution or torture. The fact that we have not discussed a particular proposed change does not reflect our agreement with that proposed change; it merely reflects our need to focus on other provisions, given resource and time constraints. Courts have recognized that “90 days is the ‘usual’ amount of time allotted for a comment period.” *Becerra v. U.S. Dep’t of the Interior*, 381 F. Supp. 3d 1153, 1176 (N.D. Cal. 2019) (quoting *Prometheus Radio Proj. v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011)). The 60-day timeframe is the floor, not the ceiling for comments in executive rulemaking. See Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, § 2(b) (Jan. 18, 2011) (“To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment . . . , with a comment period that should generally be at least 60 days.”); see also Exec. Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735, § 6(a) (Sept. 30, 1993) (“[I]n most cases [rulemaking] should include a comment period of not less than 60 days.”). A more robust comment period is particularly critical where, as here, the changes proposed are significant and necessitate careful evaluation of the impact on each step of an asylum seeker’s case. The timeframe for this NPRM does not afford us the opportunity to dedicate the resources and expertise needed for such careful review. We thus object to the timeframe for this comment.

³ To the extent that this comment addresses issues that affect applicants for asylum, withholding of removal and protection under the Convention Against Torture, it will use the term “asylum seekers” to mean applicants for all these forms of protection.

officer from United States Citizenship and Immigration Services (“USCIS”) would hear these asylum seekers’ applications for asylum and related relief with only limited review available. While providing access to the affirmative asylum process in the first instance may lessen the burden on the immigration courts and provide a faster avenue for relief to some asylum seekers, continued access to a full de novo hearing in immigration court is critical to ensure accurate adjudications of asylum seekers’ claims for the reasons described below.

First, unlike in immigration court proceedings, interviews with the Asylum Office under the Proposed Rule provide only limited opportunities for the asylum seeker’s counsel to help elicit the asylum seeker’s narrative or to offer other evidence or testimony, including from experts and witnesses, in support of their client’s claim. Specifically, according to proposed section 8 C.F.R. § 208.9(d)(1), not until “completion of the interview or hearing before an asylum officer” will the applicant’s representative have “an opportunity to make a statement or comment on the evidence presented” or “to ask follow-up questions.” Because of these constraints on counsel, and perhaps more importantly, significant barriers to even accessing competent counsel, there is a high risk of erroneous denials for vulnerable asylum seekers who are unfamiliar with U.S. asylum laws but qualify for protection.

Second, the Proposed Rule would place severe constraints on the immigration court review process that would undermine asylum seekers’ ability to have their day in court. Under the new Proposed Rule, if an asylum seeker is denied asylum by an asylum officer, the asylum seeker must affirmatively request review by an immigration judge to avoid an immediate, final removal order. An immigration judge would thus review the asylum officer’s denial of protection, *only if* an asylum seeker requests such review. For pro se asylum seekers, this provision will in effect mean that many forfeit their day in court.

Furthermore, any new evidence that the asylum seeker attempts to present will only be reviewed at the discretion of the immigration judge. Specifically, if the asylum seeker wants to present further evidence to the immigration court, they “must establish that the testimony or documentation is not duplicative of testimony or documentation already presented to the asylum officer, and that the testimony or documentation is necessary to ensure a sufficient factual record upon which to base a reasoned decision on the application or applications.” 8 C.F.R. § 1003.48(e)(1). The Proposed Rule would thus place stringent restrictions on the submission of new evidence to the immigration judge. Asylum seekers would have to justify that evidence to the court, by “establish[ing] that the testimony or documentation is not duplicative” *and* “that the testimony or documentation is necessary to ensure a sufficient factual record.”⁴

These significant restrictions on evidence submission will inevitably lead to asylum claims being adjudicated without a full record, resulting in denials of asylum to those with bona fide fears of persecution. It is well established under U.S. law that asylum seekers often flee for their lives without the ability to stop and collect documentation to support their claims, and it can

⁴ The Proposed Rule indicates that “in cases involving pro se applicants, IJs will, before proceeding with the case, explain in court the standards for submitting additional testimony and documentation” but these standards will be difficult, if not impossible for pro se applicants to satisfy, given the hurdles to presenting evidence imposed by the Proposed Rule.

be difficult, if not impossible, for asylum seekers or their representatives to gather evidence from family and friends in their country of origin.⁵ It is thus unreasonable to expect that asylum seekers will present all their evidence at a streamlined hearing before an asylum officer, which is what the Proposed Rule in effect requires.

Not only will the immigration judge review under the Proposed Rule be incomplete because of the constraints on asylum seekers' submissions of evidence to the immigration court, but it will also be inadequate because this "streamlined" approach will allow immigration judges to reach their decisions based primarily on an interview transcript and the asylum officer's decision. Indeed, as the background to the Proposed Rule indicates, "the Departments expect that the IJ generally would be able to complete the de novo review solely on the basis of the record before the asylum officer"—an approach that belies the purported de novo review. As such, the Proposed Rule will lead to the rubber-stamping of asylum denials without due process and without meaningful participation by counsel, in violation of section 292 of the INA, which provides a right to counsel in removal proceedings. Although the Proposed Rule describes the new immigration judge review procedures as de novo, these drastic limitations on the immigration court review and hearing process mean that asylum seekers will not, in fact, have a full and fair hearing in immigration court.

As law clinics and legal service providers, we regularly represent asylum seekers who do not prevail in front of the Asylum Office but ultimately are granted asylum after full de novo immigration court proceedings. Take for instance the case of a Ugandan asylum seeker who stood up for democracy and free elections and was tortured because of it. In both an initial interview and re-interview with the USCIS Asylum Office, the client's severe trauma history impeded his ability to fully explain himself and what he suffered and feared. The Asylum Office declined to grant his case, and it was only after a full de novo hearing in immigration court where counsel was able to question the client, clarify points of confusion, and present expert testimony that he was awarded much-needed protection. Without a full hearing before an immigration judge, he would have faced return to torture and almost certain death.

Indeed, EOIR statistics confirm the need for a full de novo hearing in immigration court. In 2016, for example, there was an eighty-three percent grant rate in immigration court of cases referred by the USCIS asylum office;⁶ in other words, in the vast majority of cases where the USCIS Asylum Office declined to grant protection, immigration judges ultimately awarded asylum seekers the protection they sought, upon de novo review and a full hearing. Stripping asylum seekers of their right to that full hearing process would inevitably result in bona fide refugees being returned to persecution, torture, or even death.

⁵ United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶¶ 196–97 (1979, Rev. 1992) (hereinafter UNHCR Handbook); *see also In re S-M-J-*, 21 I. & N. Dec. 722, 737–38 (B.I.A. 1997) (Rosenberg, concurring) (recognizing the many practical difficulties faced by asylum seekers in obtaining evidence for their asylum claims).

⁶ DEPT. OF JUSTICE OFFICE OF PLANNING, ANALYSIS, & STATISTICS, FY 2016 STATISTICS YEARBOOK at K3 (2016), available at <https://www.justice.gov/eoir/page/file/fysb16/download>.

While allowing asylum seekers to present their cases in a non-adversarial setting would be a positive first step, the Proposed Rule creates an unacceptable risk by denying many asylum seekers their day in court. Without the opportunity to present evidence on their behalf before a judge, countless asylum seekers will be denied the protections that should be granted to them under U.S. and international law. Instead of truncated procedures in immigration court that purport to provide de novo review, asylum seekers who are not granted asylum by the Asylum Office, should be referred to immigration court for full proceedings under INA § 240.

Additionally, we have strong concerns about the proposed provisions that would allow an immigration judge to review and revoke an asylum officer's grant of withholding of removal or Convention Against Torture protection if an applicant seeks review of the asylum officer's asylum denial. 8 C.F.R. § 1003.48(a). Requiring immigration judges to review protection grants undermines the stated streamlining purpose of the rule. More importantly, this proposal would in effect force bona fide refugees to choose between seeking review of an asylum denial and risking return to persecution or torture or declining to ask for review of the asylum denial and facing permanent separation from family members, since withholding and CAT do not allow for family reunification. The agencies should not force an impossible choice on asylum seekers between their own safety, on the one hand, and reunification with their family members, on the other hand.

Finally, the restrictions imposed on immigration judges under these limited review proceedings prevent them from considering other forms of immigration relief beyond asylum, withholding of removal and CAT. As a result, many individuals who would otherwise be eligible for humanitarian protections under U.S. law, including Special Immigrant Juvenile Status (SIJS) and T-Visas for trafficking survivors or U-Visas for crime victims, would not have the ability to access those protections if these rules were in effect.

Our clients frequently apply for these other forms of immigration relief concurrently with their applications for asylum, withholding, and CAT, leading to the administrative closure and termination of their claims in immigration court and thereby serving the stated goal of efficiency in immigration proceedings. Under the Proposed Rule, however, the mechanism for stating a claim for another form of relief—a motion filed by the applicant to vacate an asylum officer's removal order that shows prima facie eligibility for a form of relief that cannot be granted in these new procedures—will be out of reach for many, particularly those who are unrepresented. The fact that individuals would be limited to only one such motion—and would have to file the motion before the IJ decides whether they are eligible for asylum or related protection—presents further obstacles that directly undermine the stated goal of balancing fairness and efficiency.

III. The Proposed Rule’s Elimination of the Ability to Seek Reconsideration from the Asylum Office Means that Bona Fide Refugees Will Be Returned to Persecution or Torture.

The proposed language at 8 C.F.R. § 208.30(g) would eliminate the Asylum Office’s authority to reconsider negative credible fear findings once such a finding is upheld by an immigration judge. Under the current process, the Asylum Office may at its discretion reconsider a negative credible fear finding that has been reviewed by an immigration judge.⁷ By eliminating that critical reconsideration process, the Proposed Rule would strip asylum seekers of critical due process protections. The CFI process is frequently completed while asylum seekers are detained and almost immediately after they have braved difficult and dangerous travel to reach the United States. Many have suffered abuse and violence in transit and days without food or water; many are disoriented and afraid.

Given these circumstances, many are not initially able to open up about the past trauma and harm they have suffered and their fears of return. It is often only after speaking with advocates or friends and family, that asylum seekers are able to slowly open up and begin to describe their past trauma. Asylum seekers who speak indigenous languages often face additional barriers given the dearth of interpreters and the obstacles to communication with asylum officers. We have worked with asylum seekers as they go through the CFI process, and in so doing, we have witnessed firsthand the role of requests for reconsideration in safeguarding the lives of asylum seekers, preventing their return to torture or persecution in their home countries without having their claims heard.

The stated purpose of the Proposed Rule is to ensure that the CFI and expedited removal regulations are consistent with congressional intent to establish a “truly expedited process.”⁸ The agencies claim that the proposed changes will make the CFI and expedited removal process more efficient and streamlined while ensuring due process for asylum seekers. The agencies cite in support of their proposed changes “growing numbers of meritless reconsideration requests, which have strained agency resources and resulted in significant delays to the expedited removal process.”⁹ Specifically, they note that “reconsideration requests that previously were considered are resubmitted numerous times without additional information.”¹⁰

We object to both the premise and conclusion of these proposed changes. We disagree with the premise that the current reconsideration process runs contrary to congressional intent. The statute states that “review shall include an opportunity for [a non-citizen] to be heard and questioned by the immigration judge” but does not prohibit separate review.¹¹ Furthermore, although the statute provides that the decision of immigration judge is not “subject to

⁷ 8 C.F.R. § 208.30(g)(2)(i).

⁸ “Supplementary Information” to Proposed Rule § (III)(B), at 86 Fed. Reg. 46915.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

administrative appeal,”¹² Congress did not explicitly prohibit additional reconsideration by the Asylum Office.

We also oppose the conclusion that elimination of the reconsideration process is necessary to achieve efficiency. The obstacle to efficiency is not the reconsideration process; rather, it is the flawed initial interview process that fails to provide individuals with the time and support necessary to open up. Given the well-documented flaws in the CFI process,¹³ the request for reconsideration mechanism is critical to ensuring that bona fide refugees are not returned to harm or even death.

IV. The Proposed Rule Includes Some Positive Changes to the CFI and Asylum Application Process.

As a threshold matter, we support the agencies’ efforts to clarify that CFIs must be performed by a USCIS officer, 8 C.F.R. § 208.30(d), in contrast to the prior administration’s efforts to allow Customs and Border Protection officers with limited asylum law training, and with a background in law enforcement rather than protection, to conduct these critical interviews.¹⁴ We also applaud the agencies for rejecting changes to the credible fear standard put forth under the prior administration and restoring the standard to what had been in effect for the past two decades. 8 Fed. Reg. 46914. The proposed rule, at 8 C.F.R. § 208.30(e)(2), clarifies that asylum seekers need only demonstrate “a significant possibility” that they can prevail on their claim for asylum, withholding of removal, or Convention Against Torture protection. These changes provide important protections to those who are in expedited removal and comport with INA § 235(b)(1)(B).

In addition, we generally support the idea of allowing the CFI to serve as the asylum application for purposes of the one-year filing deadline and eligibility for work authorization. Under the current process, which requires an asylum seeker to file their application on their own within a year of entering the United States, many are barred from the vital protections they need simply because they missed the filing deadline due to lack of notice, among other reasons. Indeed, a recent class action lawsuit recognized the negative impact of the lack of information and confusion regarding the one-year filing deadline on asylum seekers.¹⁵ The proposed change allowing for the CFI to serve as the asylum application would thus significantly improve upon the current system for meeting the filing deadline.

However, the proposal is flawed in allowing for an asylum officer’s CFI notes to form the basis of the application, without providing asylum seekers the right to amend or supplement their

¹² 8 U.S.C. § 1225(b)(1)(C).

¹³ See Elizabeth Cassidy & Tiffany Lynch, *Barriers to Protection: The Treatment Of Asylum Seekers In Expedited Removal*, U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (2015), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

¹⁴ A federal court enjoined that practice in *A.B.-B. v. Morgan*, No. 20-CV-846 (RJL), 2020 WL 5107548, at *1 (D.D.C. Aug. 31, 2020).

¹⁵ Settlement Agreement, *Mendez Rojas v. Wolf*, (No. 2:16-cv-01024), accessible at <https://www.justice.gov/eoir/page/file/1336541/download>.

application. The Proposed Rule would leave it up to the discretion of the asylum officer whether an asylum seeker would be permitted to amend or supplement their application—a concerning proposition given the documented flaws in the CFI process.

V. Conclusion

If the Proposed Rule were to take effect, bona fide refugees would face return to persecution or death, given the lack of procedural protections to ensure that their claims are fully heard and considered. While it may be appropriate for asylum applications to be heard in the first instance in a non-adversarial interview setting, we strongly believe that prior to removal from the United States, asylum seekers should have the right to a full hearing in court where their counsel can present all necessary evidence.

The proposed changes are expensive and ineffective—failing to address the hundreds of thousands of asylum seekers currently waiting for adjudication of their cases. The agencies should seek additional funding for the immigration courts and Asylum Office alike, to hire more asylum officers to adjudicate claims, and immigration judges to review them, rather than building a new system to “streamline” proceedings for recent arrivals without due process protections.

We appreciate the opportunity to provide comments on the Proposed Rule and recommend that you rescind or substantially rewrite this NPRM. If you have questions, please contact us by phone at (617) 384-8165 or by email at hirc@law.harvard.edu.

Sincerely,

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Central West Justice Center

Children’s Law Center

DeNovo Center for Justice and Healing

Greater Boston Legal Services

HarborCOV

Immigrant Legal Advocacy Project (ILAP)

The Justice Center of Southeast Massachusetts

Mabel Center for Immigrant Justice

Maine Business Immigration Coalition

Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA)

Massachusetts Law Reform Institute (MLRI)

Northeast Justice Center

Political Asylum and Immigrant Refugee Project (PAIR)

Rian Immigrant Center