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RE: DHS RIN 1615-AC91 or Docket No. USCIS-2024-0005
Public Comment Opposing Proposed Rule: Application of Certain Mandatory Bars in Fear Screenings

The Catholic Legal Immigration Network, Inc. or CLINIC,[1] submits these comments regarding the Notice of Proposed Rulemaking, or proposed rule, titled Application of Certain Mandatory Bars in Fear Screenings. This rule will deny people the full and fair opportunity to seek asylum at the southern border due to the early application of the mandatory bars to asylum during initial screening interviews, leading to an increase in erroneous denials of asylum claims and expedited removals. Our organization strongly urges the Department of Homeland Security (DHS) to withdraw this proposed rule in its entirety.

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to more than 450 diocesan and community-based programs in 49 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. In partnership with its affiliates, CLINIC advocates for the just and humane treatment of noncitizens. Many of CLINIC's affiliates offer legal services to help qualified noncitizens apply for asylum, an immigration benefit that will be affected by this proposed rule.

As a Catholic organization, we base our work with immigrants on our belief in the fundamental and equal dignity of all people as created in the image of God, as well as our call as Christians to

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welcome the stranger and care for the vulnerable. Catholic social teaching on immigration supports the right of migrants to seek asylum. The U.S. Conference of Catholic Bishops has consistently condemned policies that would weaken asylum access, including this and previous asylum regulations[2] that restrict a noncitizen's right to lawfully seek protection in the United States.

Similar to the Circumvention Lawful Pathways[3] (CLP) rule, this proposed rule will prevent thousands of people who have a legitimate fear of persecution from the ability to seek protection in the United States by preemptively denying them that right. Asylum is a vital lifeline for tens of thousands of noncitizens in need of protection. Applying the mandatory bars during initial screenings, when most asylum seekers do not have access to counsel, will only result in denying vulnerable individuals the opportunity to have their claims fairly considered. This proposed rule will only cause more inefficiencies at the border and add additional complexities to the asylum process.

Our organization objects to the proposed rule for the following reasons:

I. Thirty days is an insufficient amount of time to adequately comment on and respond to the Notice of Proposed Rule Making.

On May 13, 2024, DHS proposed a new rule that would regulate the application of the mandatory bars during fear screenings. The Biden administration is only providing a 30-day comment period for the proposed rule. This is an insufficient timeframe considering the complexities of the proposed rule's implementation and the fact that the rule denies people the right to seek asylum with dignity. Executive Order 12866[4] states that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."

The proposed rule, while not overly excessive in length, is complex in substance. Understanding the intricacies of mandatory bars and how they are applied can be a complicated process, even for an experienced immigration judge (IJ). The idea of implementing this rule after a 30-day comment period, where the rule will give asylum officers (AOs) the discretion of applying the bar in a time restricted and high-pressured environment is unreasonable. At minimum, the comment period should be 60 days. We urge the administration to rescind the proposed rule in its entirety, as the application of mandatory bars already has its existing place in the asylum process. Should the administration refuse to rescind the rule, we ask that it consider changing the timeframe from 30 days to a minimum of 60 days, which is a much more reasonable timeframe given the complicated nature of this rule.

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[2] *Circumvention of Lawful Pathways*, 88 FR 31314 (May 16, 2023).
[3] *Id.*
[4] Exec. Order No. 12866, 3 C.F.R., Vol. 58, No. 190 (1993), https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf

II. The Notice of Proposed Rule Making would result in a denial of due process for asylum seekers.

If finalized, the notice of proposed rule would ensure that some asylum seekers do not have a just initial fear screening, are erroneously denied, and deported back into imminent harm or death. Specifically, the proposed rule would "allow [AOs] to consider the potential applicability of certain bars to asylum and statutory withholding of removal during certain fear screenings."[5] A noncitizen who is apprehended at the U.S. southern border and declares that they want to begin the asylum process, will then be placed into a CFI or a RFI, if the applicant is not eligible for asylum and is eligible only for withholding of removal.

CFIs and RFIs are not full hearings before an IJ or full interviews on the merits but rather an opportunity for the applicant to explain their fear of persecution. This initial screening opens the door to begin the asylum process. The issue with being placed into a CFI or RFI almost immediately after being apprehended is that it leaves no room for that individual to obtain or consult with counsel. Detained asylum seekers, many of whom make the trek for hundreds of miles through dangerous terrain and other obstacles are expected to recount their persecution and relive their trauma in a matter of hours without being able to provide much or any evidence. If denied, and the applicant does not know to ask for IJ review of the negative finding, they will be placed in the deportation process. For this reason, asylum officers have traditionally applied a low standard at this stage; that is, whether the applicant has demonstrated a "significant possibility" of establishing eligibility for asylum, withholding of removal, or protection under CAT. This new proposal injects unnecessary complexity into what should be a straightforward screening process.

III. Legal representation is limited at the initial screening stage, which could lead to erroneous denials when the mandatory bars to asylum are applied.

Noncitizens who enter the United States through the southern border and request protection when detained often do not have the opportunity to secure counsel before their initial screening. Noncitizens who enter the United States and are placed in removal proceedings have the legal right to obtain counsel, at no expense to the government. It is a statutory right covered by the Due Process Clause of the Fifth Amendment.[6]

However, access to counsel is much more limited at the initial screening stage. For example, an attorney or accredited representative is only permitted to make a statement "at the discretion of the asylum officer."[7] The limited role that attorneys and representatives are permitted to play at this initial stage makes it even more problematic to apply complex asylum bars at this early phase. Even the few applicants who are lucky enough to have representation at this initial stage will be hampered by the fact that their representatives cannot zealously represent them in the same way they would before the immigration court.

These concerns only worsen when legal counsel is not present. During interviews, there is often

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[5] *Application of Certain Mandatory Bars in Fear Screenings*, 88 FR 41347 (May 13, 2024).
[6] 8 USC § 1362 (May 22, 2024).
[7] 8 CFR § 208.30 (d)(4)

limited privacy; inadequate language access, which leaves applicants without a competent person to interpret their claims; destruction of evidence by detention center staff; and failure to notify the applicant of their interview decision. Even in cases where all the facts support the applicant's claim, it can be difficult to receive a positive initial screening without legal representation.

Applicants without representation are left on their own to figure out the ambiguous rules of presenting evidence during the interview. An unrepresented applicant who walks into the initial screening room which is filled with unknowns and ambiguities and must present their case to an AO who holds the power to determine whether their trauma is credible, is more likely to receive a negative result in their initial screening and face deportation than those with representation. The proposed application of mandatory bars during the fear screening stage would result in the unjust refoulement of many vulnerable people into harm's way, due to lack of due process.

IV. The mandatory bars to asylum are extremely complex.

A. The initial screening is an inappropriate venue for application of the complex mandatory bars.

Asylum applicants who meet the definition of a refugee, which is an individual located outside the United States who demonstrates a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group, may nonetheless be barred from asylum because of one or more of the mandatory bars. The mandatory bars found in the statute include the terrorism-related inadmissibility grounds (TRIG), the persecutor bar, the particularly serious crime bar, the serious non-political crimes bar, and the firm resettlement bar. Given the gravity of a determination that one of these bars applies, such a finding has traditionally been made only after the applicant has had a full and fair opportunity to obtain legal counsel and present evidence in support of their case.

The new rule proposes to give "flexibility" to AOs to apply certain mandatory bars (excluding the firm resettlement bar) earlier in the process. The agency claims that the rule will be implemented only in the most clear-cut cases of applicability of a mandatory bar to asylum. However, CLINIC is concerned that a desire for haste and expediency in processing these initial screenings will win out over the due process rights of asylum seekers.

There is no doubt that the mandatory bars element of the asylum process is extraordinarily complex. For example, the "persecutor bar" prevents individuals who themselves persecuted others from obtaining asylum. The analysis as to whether an applicant is subject to the persecutor bar can be broken into four elements: (1) whether the act in which the applicant participated is severe enough to rise to the level of persecution; (2) whether the act was committed against the subject of the persecution on account of the subject's race, religion, nationality, membership in a particular social group, or political opinion; (3) whether the applicant's conduct constitutes participation or assistance in the act committed against the subject; and (4) whether the applicant knew that his actions would assist in persecution.[8] Further, there have been years, if not decades,

[8] See: Charles Shane Ellison, Defending Refugees: A Case for Protective Procedural Safeguards In the Persecutor Analysis, 33 Georgetown Immigration Law Journal 213 *citing Matter of D-R-*, 27 I&N Dec. 105, 120 (BIA 2017) (the applicant must have "sufficient knowledge that the consequences of his actions may assist in acts" of persecution "to make those actions culpable").

of litigation around the persecutor bar and its application. For example, after more than fifteen years of litigation, a Supreme Court decision, and multiple agency and Board of Immigration Appeals (BIA) decisions, it is still unclear under the current law whether there is a duress exception to the persecutor bar.[9]

The proposed rule leaves unexplained exactly how an asylum officer would determine that an asylum applicant is subject to a mandatory bar. If the persecutor bar is at issue, will the officer consider a duress exception? Is a history of participation in armed conflict alone sufficient for an officer to find an applicant subject to the persecutor bar? If these questions cannot be explained with clear guidelines for officers, the proposed rule should not be finalized.

CLINIC is also particularly concerned about the impact of this proposed rule on Afghan asylum-seekers. CLINIC knows from advising its network of affiliates on affirmative asylum filings that DHS has screened extensively for all possible mandatory bars as part of the affirmative asylum process. There has been a particular focus on the potential applicability of the persecutor bar to any Afghan with prior military experience, including those who fought valiantly alongside American troops in Afghanistan. Our affiliates have described multiple, hour-long asylum interviews with questioning about any participation in persecutory acts of others. Of course, this line of questioning is entirely appropriate for the affirmative asylum interview context, where applicants have access to counsel and can present evidence to show their eligibility despite prior military service. Indeed, in the majority of cases, the agency has ultimately determined that the mandatory asylum bars do not apply to Afghan asylum seekers. However, CLINIC is very concerned that an asylum officer may cut off an Afghan applicant from asylum protection based solely on a history of military service (including service supporting the U.S. government) without spending the time to determine whether the persecutor bar is truly implicated in each case.

B. The regulations should clarify that TRIG exemptions and exceptions must be considered as part of the initial screening process.

As already noted above, CLINIC is opposed to the agency's proposal to apply the mandatory bars to asylum at initial screening interviews. However, in the event that the agency chooses to implement this proposed rule, CLINIC recommends that the agency make clear that the AO must also consider any group or situational exemptions to a TRIG bar before making a finding that a bar applies. Specifically, CLINIC requests that the proposed regulations at 8 CFR § 208.30(e)(2) and 8 CFR § 208.31(c) be amended to read that the "asylum officer must consider the applicability of any currently designated group or situational exemptions before finding an applicant ineligible for asylum under INA § 208(b)(2)(A)(v))."

The TRIG grounds located in the Immigration Nationality Act (INA), specifically INA § 212(a)(3) are also included in the mandatory bars to asylum at INA § 208(b)(2)(A)(v)). The TRIG bars are a complex array of rules and interconnected definitions that the government interprets very broadly. Such a broad interpretation leaves room for error and allows for too much discretion from the AO making the determination at the initial screening stage. Several of the provisions of the TRIG bars---namely the bars related to providing so-called "material support"

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[9] *Matter of Negusie*, 28 I&N Dec. 399 (A.G. 2021) (Attorney General Garland vacating prior AG determination finding no duress exception to the persecutor bar without providing a clear framework for analysis of the duress exception).

to a terrorist organization—sweep up individuals that most people would not consider to have engaged in or supported terrorism. Rather, many of these individuals have themselves been the victims of terrorism.

For instance, the U.S. Citizenship & Immigration Services (USCIS) and courts have found that "providing funds" includes ransom payments made to secure the liberty of kidnapped family members, as well as forced payments made to pass through checkpoints on a road. Both federal courts and the BIA have ruled that even minor or low-level support constitutes "material support" to a terrorist organization. Finally, in 2018, the BIA issued a precedent decision, *Matter of M-H-Z*, concluding that there is no implied duress exception in the material support bar.[10] The BIA reasoned that since the statute allows for the agency to apply waivers where it deems necessary, Congress must not have intended for the statute to contain a duress exception.[11]

Recognizing the breadth of the TRIG bars, the statute incorporates a discretionary exemption provision for certain grounds of inadmissibility under INA § 212(a)(3)(B). The exemption authority can be exercised by the secretary of DHS or Department of State (DOS) after consultation with the Department of Justice (DOJ).[12] Exemptions fall into two main categories: **group-based exemptions** and **situational exemptions**. Thus far, Congress has delegated USCIS the authority to determine whether a person meets the criteria for any exemption. USCIS keeps a running list of exemptions on its website with the implementation memos and regulations.[13] These exemptions include duress exemptions, certain limited material support, routine commercial and social transactions, and Afghan civil servants, among others.

We urge that the agency make clear in this proposed regulation that an asylum officer ***must*** consider any currently designated group or situational exemption before finding that a mandatory TRIG bar applies. To not clarify this in the rule itself gives too much discretion to the officer to make an adverse decision and send an asylum-seeker into harm's way.

C. CLINIC supports DHS's decision to not apply the firm resettlement bar at the initial screening stage of the asylum process.

CLINIC supports DHS's decision to not apply the firm resettlement bar at the initial screening stage. There are no national security or public safety reasons to apply the firm resettlement bar at the initial screening stage. In addition, the firm resettlement bar is especially complex, as it often involves research into another country's immigration laws and a determination of whether the applicant received an offer or receipt of permanent resident status in that third country. Finally, the case law on firm resettlement is also quite complex, involving a four-part, burden shifting analysis.[14] In addition, a precedential case on firm resettlement issued by the BIA in 2020, was vacated by the Ninth Circuit in 2021, leaving its precedential value in question.[15] For

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[10] *Matter of M-H-Z-*, 26 I&N Dec. 757, 727 (BIA 2016).
[11] *Id.*
[12] INA § 212(a)(3)(B)(i).
[13] U.S. Citizenship & Immigration Services. *Terrorism-Related Inadmissibility Grounds Exemptions.* (July, 13, 2022) https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-exemptions.
[14] *Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011).
[15] *Matter of K-S-E-*, 27 I&N Dec. 818 (BIA 2020), *Vacated and Remanded by Sylvestre v. Garland*, 2021 WL 2453043 (9th Cir. June 09, 2021).

the foregoing reasons, CLINIC supports the agency's decision to not apply the firm resettlement bar at the initial screening stage.

V. The mandatory bars rule should not be paired with the Circumvention Lawful Pathways Rule to preemptively deem asylum seekers ineligible for asylum.

When DHS announced the notice of proposed rulemaking on mandatory bars, it indicated that "…this new guidance, consistent with the CLP rule will ensure early identification and removal of individuals."[16] On May 16, 2023, the Biden administration implemented the CLP final rule despite over 290+ organizations signing onto a letter asking the administration to rescind the rule.[17] The CLP rule, which restricts asylum seekers from lawfully seeking protection coupled with this proposed rule, which would certainly deport eligible asylum applicants back to harm should both be rescinded. In July 2023, the CLP was ruled unlawful and vacated by Judge Tigar of the U.S. District Court of California for three reasons: 1) the Asylum Ban violated U.S. law; 2) it was arbitrary and capricious under the Administrative Procedures Act; and 3) the government did not provide the public adequate time to provide comments on the proposed rule.[18] Although the appeal of this decision is currently being held in abeyance at the Ninth Circuit Court of Appeals, the point remains that the CLP rule is harmful and will be especially harmful when a second layer of restrictive measures is added. The administration should rescind the proposed rulemaking in its entirety or modify the rule so it does not work simultaneously with CLP rule. Both are being used as a punitive and restrictive rules to prevent noncitizens entering the United States at the southern border from seeking refuge and together both rules will ramp up erroneous removals, sending applicants back into harm.

VI. The proposed rule will further perpetuate discrimination against certain asylum seekers based on racial, economic, and other factors.

Asylum applicants, especially Black migrants, will suffer greatly if this proposed rule is implemented. Black asylum seekers who make the journey on foot to the southern border are often met with racial discrimination.[19] Their skin color alone makes them an easy target of human trafficking, assault, extortion and more. These restrictive rules leave the most vulnerable populations without any consideration of the additional harm it will pose to them. A recent report from Human Rights First states:

> People seeking asylum face onerous barriers to asylum; Black asylum seekers must contend with additional harms. These include the asylum ban and related restrictions

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[16] Department of Homeland Security. *DHS Announces Proposed Rule and Other Measures to Enhance Security, Streamline Asylum Processing.* https://www.dhs.gov/news/2024/05/09/dhs-announces-proposed-rule-and-other-measures-enhance-security-streamline-asylum (May 2024)

[17] Human Rights First. Sign-on letter to Biden administration. https://humanrightsfirst.org/wp-content/uploads/2023/01/Letter-to-President-Biden-re_-asylum-ban-NPRM-1.pdf

[18] Center for Gender and Refugee Studies. Summary Judgment Order. *East Bay Sanctuary Covenant v. Biden. https://cgrs.uclawsf.edu/legal-document/summary-judgment-order*

[19] S. Priya Morley et al., *There is a Target on Us* - The Impact of Mexico's Anti-Black Racism on African Migrants at Mexico's Southern Border , (2021) https://www.immigrationresearch.org/system/files/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf

> that deny most African asylum seekers equal access to asylum at ports of entry and punish those who cross between ports of entry to seek safety. These barriers strand Black asylum seekers in Mexico for months where they face targeted violence. Black asylum seekers also face disparate treatment and anti-Black discrimination within the U.S. immigration, detention, and enforcement systems, including unjust credible fear denials and expedited removals, and alarming mistreatment in immigration detention.[20]

Black migrants are more likely to become victims of crime in and outside of detention, before, during and after the initial fear screenings and are also faced with limited resources, particularly financial resources and limited language access. These vulnerable individuals face a heightened level of discrimination and are susceptible to become victims of human trafficking or face other types of crimes or at worst, death. If the mandatory bars rule is implemented and applied during initial fear screenings, Black migrants will likely face disproportionate scrutiny and harm, and therefore we urge the administration to withdraw this rule.

VII. Conclusion

This proposed rule contains complex procedural elements that require a full 60-day comment period to adequately address the issues. We oppose the application of the mandatory bars to asylum at the initial screening stage given how complex these bars are. This proposed rule will cause a further strain on due process during credible fear and reasonable fear interviews and will restrict many asylum seekers from accessing a fair and just asylum process. Immigrants seeking safety deserve a fair and dignified process and one that aligns with U.S. and international law. We call upon the administration to withdraw the proposed rule in its entirety.

Thank you for your consideration of these comments. Please do not hesitate to contact Karen Sullivan, Director of Advocacy, at ksullivan@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,

Anna Gallagher
Executive Director

[20] Human Rights First. *U.S. Border and Asylum Policies Harm Black Asylum Seekers.* (February 2024) https://humanrightsfirst.org/wp-content/uploads/2024/02/Asylum-Policies-Harm-Black-Asylum-Seekers-FACTSHEET-formatted.pdf