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**RE: DHS RIN 1615-AC92/EOIR RIN 1125-AB32 or Docket No. USCIS-2024-0006/A.G.
Order No. 5943-2024 Public Comment Opposing Proposed Rule: Securing the Border**

The Catholic Legal Immigration Network, Inc. or CLINIC,¹ submits these comments regarding the interim final rule (IFR), titled Securing the Border.² On June 5, 2024, the *Federal Register* released the IFR, and it became effective almost immediately after President Biden announced his plans the day before to close off the southern border to asylum seekers.³ The IFR has effectively shut down the U.S. southern border and the administration justifies this action based on the number of apprehensions taking place at the border daily. The IFR severely limits access to asylum for many people who arrive at the southern ports of entry. Our organization strongly urges the Department of Homeland Security (DHS) and the Executive Office of Immigration Review (EOIR) to rescind the IFR.

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 430 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 IFR.

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² *Securing the Border*, 89 FR 48710. (June 7, 2024).

³ The White House. *A Proclamation on Securing the Border*. (June 4, 2024), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/>.

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 welcome the stranger and care for the vulnerable. Catholic social teaching on immigration strongly 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 and proposed rules⁴ that restrict a noncitizen's right to lawfully seek protection in the United States.

Similar to the Circumvention of Lawful Pathways (CLP) rule and the Mandatory Bars proposed rule, this IFR will restrict thousands of people who have a credible fear of persecution from the ability to seek protection in the United States by preemptively denying them that right.⁵ Asylum is a necessary humanitarian benefit that was made available by Congress for tens of thousands of noncitizens in need of protection. Restricting access to asylum by closing the border and basing that decision primarily on a numerical quota system to justify it, is harmful to asylum seekers who have legitimate claims and serves as a deterrent rather than a long-term solution. It will result in denying vulnerable individuals and families the opportunity to have their claims fairly considered. This IFR combined with the recently proposed rules and the CLP will undoubtedly cause more inefficiencies in resources, time and loss of life at the border and will only complicate the current asylum processes.

Our organization objects to the proclamation and IFR for the following reasons:

I. Thirty days is an insufficient amount of time to adequately comment on and respond to the interim final rule.

A day after President Biden announced his proclamation to secure the border on June 4, the proclamation took effect almost immediately, and DHS and EOIR announced an accompanying IFR to support shutting down the border. Unfortunately, and yet again, the administration is only providing a 30-day comment period for another restrictive asylum policy but this time, for an interim final rule.

The IFR asserts⁶ that it is justified in bypassing the Administrative Procedures Act's (APA) notice-and-comment procedures and the minimum 30-day delay between a policy's promulgation and its effective date because it qualifies for the foreign affairs exception. The agencies' argument is that because the government engages with other regional countries regarding migratory flows, a regulation affecting asylum eligibility must implicate foreign affairs. This overly broad interpretation of the foreign affairs exception does not align with the Congressional intent of the APA. Indeed, the court in *Capital Area Immigrants' Rights Coal. v. Trump* held that the foreign affairs exception did not apply under very similar circumstances.⁷ Further, a pattern has emerged

⁴ *Circumvention of Lawful Pathways*, 88 FR 31314 (May 16, 2023) and *Mandatory Bars in Fear Screenings*, 88 FR 41347 (May 13, 2024).

⁵ *Id.*

⁶ *Securing the Border*, 89 FR 48710, 48759. (June 7, 2024).

⁷ *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 55–56 (D.D.C. 2020).

in recent years in which agencies with no direct foreign affairs mission, including immigration agencies, increasingly attempt to use the foreign affairs exception to the APA to bypass the notice-and-comment process, and courts have generally reacted with skepticism.⁸ CLINIC objects to lack of opportunity for public comment before the policy took effect, and to the overly broad application of the foreign affairs exception to the APA.

The agencies alternately justified the inadequacy of public commenting opportunity based on the APA’s “good cause” exception, describing an “urgent” need and referring to precedent addressing an “emergency situation.”⁹ Migrants coming through the U.S. southern border is not an emergent situation that developed a few weeks or months ago. There has been a steady increase of migrants coming through the U.S.-Mexico border for a significant period during and prior to the Biden administration. Further, the agency’s worry that a comment period might lead to increased arrivals at the border is an insufficient justification. Seeking asylum is legal. An agency cannot use concern that individuals will exercise their right to apply for asylum ahead of their intention to restrict that right.

At minimum the administration should provide at least a 60-day comment period, given the significant negative impact this policy creates. We urge the administration to rescind the IFR in its entirety, as these policies will lead to erroneous denials and more harm towards people with legitimate asylum claims. Should the administration refuse to rescind the IFR, we ask that it consider changing the timeframe of this comment period from 30 days to a minimum of 60 days, which is a much more reasonable timeframe given the restrictive nature of this rule.

II. The interim final rule denies access to asylum for migrants seeking protection at the U.S. southern border during a period of closure and is contrary to asylum law.

This IFR currently has restrictions set in place, which is causing confusion and forcing people and their families to think of unreasonable and dangerous alternatives to seek protection. CLINIC and other advocates have already seen the irreparable harm similar policies have had on both sides of the border. CLINIC opposes this rule, for the following reasons:

A. The interim final rule is contrary to U.S. asylum law.

Title 8 of the U.S. Code explicitly indicates that any person “who arrives in the United States whether or not at a designated port of arrival...irrespective of status”¹⁰ may apply for asylum. With this fundamental principle in mind, the IFR limits how many people may seek protection at the southern border on a daily basis. The statute uses plain and clear language that leaves no room for doubt or confusion on why the new rule, which is currently in effect, goes against congressional intent.

The legal justifications the Biden administration uses to support this IFR are sections 212(f) and

⁸ See Migala, Stephen, *The Lost History of the APA’s Foreign Affairs Exception*, 31 Geo. Mason L. Rev. 119, 128 (2023).

⁹ *Securing the Border*, 89 FR 48710, 48762. (June 7, 2024).

¹⁰ 8 U.S.C. § 1158 (June 27, 2024).

215(a) of the Immigration and Nationality Act (INA). Section 212(f) has been used in the past to limit or halt the entry of asylum seekers attempting to enter the United States. However, federal courts have concluded such policies are unlawful. During the prior administration, 212(f) was invoked with the purpose of imposing restrictions on who and how they enter to the United States, such as the Muslim Ban.¹¹ The Trump administration also invoked 212(f)¹² to suspend the entry of people between ports of entry across the southern border. When President Biden took office, he revoked both the Muslim and asylum ban.

This IFR denies migrant's rights guaranteed by U.S. law, such as the right to seek asylum. The use of 212(f) to limit, halt, return or expel asylum seekers at the southern border is unlawful.¹³ The implementation of this rule alongside the current asylum transit ban will make it nearly impossible for asylum seekers to attain safety. Practitioners on the ground have reported anecdotally that they have already witnessed grave humanitarian consequences in Mexico. Individuals and families will be forced to seek more dangerous alternatives to keep safe amid the intensifying violence in the region.

CLINIC urges the administration to revoke this policy and create policies that strengthen border safety and security while also restoring the fundamental rights of migrants afforded by our asylum law.

B. The interim final rule is contrary to international law.

The United States, under the 1951 Refugee Convention and its Protocol, has an obligation to uphold the rights of those seeking protection at its border and not to return people to harm. The *non-refoulement* doctrine is an essential protection under international human rights, refugee, humanitarian and customary law. It prohibits any form of return, removal, expulsion or transfer of people to where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.¹⁴ This is regardless of their immigration or migration status.

The United States continues to undermine its legal obligations under the Refugee Convention, placing lives at great risk, and violating international human rights and refugee law. The U.S. Congress adopted international refugee law and enacted the 1980 Refugee Act, codifying the Refugee Convention's definition of a refugee and thus creating asylum and resettlement in US law. The current administration has chosen to follow in the harmful footsteps of the previous administration to perpetuate harmful and restrictive policies that are contrary to international and U.S. law protecting asylum seekers.

The Biden Administration's non-compliance with international human rights and refugee law has and continues to cause dire and even fatal consequences for those who are already living in

¹¹ Exec. Order No. 13769 (January 27, 2017), *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 FR 8977 (Feb 1, 2017).

¹² Proclamation 9822 of November 9, 2018, *Addressing Mass Migration Through the Southern Border of the United States* 83 FR 57661 (Nov 15, 2018).

¹³ 8 USC § 1158 (June 28, 2024).

¹⁴ UN High Commissioner for Refugees, *UNCHR Note on the Principle of Non-Refoulement*, (Jun. 14, 2024), available at <https://www.refworld.org/policy/legalguidance/unhcr/1997/en/36258>. UN Human Rights Office of the High Commissioner, *The principle of non-refoulement under international human rights law*, (Jun. 14, 2024), available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

deplorable circumstances. CLINIC’s network and staff, legal practitioners, congresspersons, humanitarian aid workers, academics, advocates, faith leaders and many more have witnessed firsthand and documented the nightmarish reality that policies like this one have created.¹⁵ With the global rise of people and families fleeing conflict, persecution, and human rights violations,¹⁶ this proclamation is yet another policy that appallingly disregards the lives and dignity of those seeking safety.

III. INA § 212(f) does not provide a legal basis to override the U.S. asylum statute.

The Immigration and Nationality Act (INA) § 212(f) (8 U.S.C. § 1182(f)) authorizes the president of the United States to create restrictions on immigration by proclamation. INA § 212(f) allows the president to temporarily “suspend the entry” of noncitizens or place restrictions on the entry of certain noncitizens if he determines that their entry would be detrimental to the interests of the United States. However, this statute does not provide the President a legal basis to override U.S. asylum laws to effectively eliminate asylum access for individuals based solely on their manner of entry into the United States.

Former President Trump invoked INA § 212(f) to implement restrictions on entries into the United States and suspend irregular entries at the U.S. southern border.¹⁷ President Biden revoked these proclamations when he took office.¹⁸ When former President Trump invoked INA 212(f) to carry out the “Muslim Ban”¹⁹ and states challenged the legality of the ban, the Supreme Court found that it did not conflict with the statute because INA § 212(f) grants the President broad authority to impose entry restrictions.²⁰ The Court acknowledged, however, that federal courts widely agreed that Section 212(f) “does not give the President authority to countermand Congress's considered policy judgments.” *Id.* The Supreme Court then specifically held that Section 212(f) “does not allow the President to override particular provisions of the INA.”²¹ Therefore, while the President may impose temporary suspensions on *entry* under INA 212(f), he may not change asylum law by calling for the imposition of additional restrictions on asylum eligibility thereby overriding section 208 of the INA.

The Proclamation on Securing the Border and the IFR²² attempt to override the asylum statute

¹⁵International Organization for Migration, *US-Mexico Border World’s Deadliest Migration Land Route*, (June 27, 2024), available at <https://www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route#:~:text=Geneva%2FBerlin%2FSan%20Jos%C3%A9%20E%80%93,for%20migrants%20worldwide%20on%20record.>

¹⁶ UN High Commissioner for Refugees, *UNCHR warns against apathy and inaction amid spike in forced displacement*, (Jun. 15, 2024), available at [https://www.unhcr.org/news/press-releases/unhcr-warns-against-apaty-and-inaction-amid-spike-forced-displacement.](https://www.unhcr.org/news/press-releases/unhcr-warns-against-apaty-and-inaction-amid-spike-forced-displacement)

¹⁷ *Presidential Authority to Suspend Entry of Aliens Under 8 U.S.C. § 1182(f)*, Congressional Research Service (Feb. 2024), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10458#:~:text=For%20example%2C%20in%20one%20case,does%20not%20afford%20the%20President.>

¹⁸ *Id.*

¹⁹ Pres. Proc. No. 9,645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (amended by Pres. Proc. No. 9,723, 83 Fed. Reg. 15,937 (Apr. 13, 2018)).

²⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018).

²¹ *Id.* at 2411.

²² *Securing the Border*, 89 FR 48710 (June 7, 2024).

by implementing a numerical daily-average threshold for irregular entries that, if reached, triggers the asylum restriction measures set forth in the IFR. These numerical caps are contrary to the asylum statute and countermand Congress's considered policy judgments. INA § 208 does not create nor contemplate numerical limitations on the number of individuals who may seek asylum in the U.S. per day.²³

Additionally, under the IFR, individuals who enter irregularly would be barred from asylum unless they fall under one of the limited exceptions. However, INA § 208 does not require that asylum seekers enter with inspection to be eligible for asylum.²⁴ By law, asylum seekers can apply for asylum regardless of how and where they enter the United States.²⁵ Specifically, the statutory language provides any noncitizen “who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status” the right to “apply for asylum in accordance with this section.”²⁶ The IFR is thus in direct conflict with the statutory language. It is also important to note the IFR was issued in response to the “emergency border” situation created by irregular crossings despite the implementation of the (CLP)²⁷ rule, which imposes severe asylum restrictions on individuals who enter irregularly.²⁸ Asylum restrictions simply do not curb irregular entries.

IV. The interim final rule implements a “manifestation of fear” process at the border which will result in fewer meritorious claims for asylum being identified.

When the IFR's emergency border limitations are in effect, individuals apprehended between ports of entry will not be eligible for asylum even if they otherwise have a valid claim that may likely have been granted asylum before the implementation of this rule. These individuals may still, however, seek other more limited and temporary forms of relief, such as withholding of removal and relief under the Convention Against Torture (CAT).

A. Manifestation of fear requirements have proven to be ineffective in screening for asylum.

According to federal regulations, DHS officials screening noncitizens apprehended at the border who are subject to expedited removal, must customarily inquire as to whether they have a fear of return to their country of origin.²⁹ The officials must read noncitizens the contents of Form I-867A, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, which includes the following advisal:

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about

²³ See INA § 208; 8 U.S.C. § 1158.

²⁴ *Id.*

²⁵ INA § 208(a)(1).

²⁶ *Id.*

²⁷ *Circumvention of Lawful Pathways*, 88 FR 11704, at 11715(Feb. 23, 2023).

²⁸ See Pres. Proc. No. 10773, 89 FR 48487 (Jun. 7, 2024).

²⁹ 8 C.F.R. §235.3(b)(2)(i).

being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

If the noncitizen informs the interviewing official of a fear of persecution or return to their country of origin, the official then refers them for a credible fear screening with an Asylum Officer (AO). The individual will only be deported if the outcome of the credible fear interview is negative or if they rescind their claim. This requirement to explicitly inquire as to whether someone fears persecution is meant to decrease the risk that a noncitizen will be deported to a country where they face torture or death.

Under the IFR, however, screening officials are no longer required to ask those fleeing persecution in their home countries whether they fear return to that country. Instead, that fear must now be “manifested” either “verbally, non-verbally, or physically, in order for DHS personnel to refer them for a credible fear interview.”³⁰ This is reminiscent of the same “shout test” implemented into the border process in 2020 under Title 42, requiring those apprehended at the border to affirmatively express their fear rather than receive a fear screening.³¹

Individuals who fail to “manifest” fear, verbally or non-verbally, to the satisfaction of the examining officials, may be deported without being subject to any adequate screening for fear of persecution regardless of whether they indeed have a fear of return.

This “shout test” has historically proven to be ineffective in screening for valid fear of persecution. In 2022, the Center for Gender & Refugee Studies (“CGRS”) and other immigrants’ rights groups conducted interviews with 97 families expelled under Title 42 along the United States and Mexico border.³² A majority of those interviewed reported that they had verbally and non-verbally expressed a fear of return to their country of origin. Out of all those who were interviewed and who expressed fear, not one was referred for a fear screening by CBP despite their expressions of fear. Some families reported that they were, instead, told to “shut up” and that they had “no right” to a credible fear interview.³³ This CGRS research clearly demonstrates that the manifestation of fear requirement implemented under Title 42 and now, again, under this IFR, counteracts the effective detection of valid claims of fear of persecution.

There are already reported examples of migrants who have been deported despite having expressed fear of expulsion.³⁴ Some noncitizens who expressed fear were told that “there is no asylum,” “the border is closed,” or that the CBP officer did not speak Spanish. These individuals were then promptly removed.³⁵ Other noncitizens apprehended at the border who expressed

³⁰ *Securing the Border*, 89 FR. 48710, at 48731. (June 7, 2024).

³¹ ICE, *Processing of Noncitizens Manifesting Fear of Expulsion Under Title 42* (May 21, 2022, rescinded May 11, 2023), available at https://drive.google.com/file/d/1vSqHop58LAvGwk_afo3tMQ-MrLx0J-he/view.

³² “*Manifesting*” Fear at the Border: Lessons from Title 42 Expulsions, CGRS (Jan. 30, 2024), available at <https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9Cmanifesting%E2%80%9D-fear-border-lessons-title-42-expulsions>.

³³ *Id.* at 2.

³⁴ Christina Asencio (@christielaine23), X (June 14, 2024), <https://x.com/christielaine23/status/1801732285043249356>.

³⁵ *Id.*

either fear of return or their desire to pursue asylum were told that “asylum had ended Tuesday,” that they should “bring [their] problems up to [their] government and not” the United States, or that it was not the CBP officer’s problem.³⁶ Most of these asylum seekers did not know a new rule had been implemented, and some will have no choice but to return to the place from which they fled persecution.³⁷

What makes this reality even more grim is that the reason for implementation of this requirement is not rooted in a desire to better or more accurately identify valid asylum claims, but rather to decrease the burden on the government’s resources. The Administration admits as much within the language of the IFR itself:

“The record numbers of migrants invoking the credible fear procedures at the southern border exacerbate the risk of severe overcrowding in USBP facilities and POEs, and it creates a situation in which large numbers of migrants—only a small proportion of whom are likely to be granted asylum—are not able to be expeditiously removed but are instead referred to backlogged immigration courts.”³⁸

Knowingly, deporting even “a small proportion” of valid asylum seekers to their death is not a satisfactory tradeoff for avoiding strain to governmental resources. The rule goes on to state that these limited governmental resources should be conserved for those lawfully pursuing immigration to the United States, ignoring the fact that seeking asylum is a lawful pathway.

Asylum seekers already face life-threatening challenges in attempting to reach the United States and other barriers to entry. They often arrive at the border tired, hungry, and traumatized, exhibiting symptoms of the very real persecution and trauma they have faced.³⁹ Most times, the very first sight they come across in the United States is armed border patrol or other immigration officers. Many noncitizens apprehended at the border by CBP officials report abuse, both verbal and physical, from these officials.⁴⁰ It is unlikely that these migrants will voluntarily and easily “manifest” their fear of conditions in their home country while grappling with their fear of some unfriendly officials.

B. Lack of clear guidance for border officials will result in inconsistent application of the new regulation.

In addition, there is no clear, published guidance for ICE and CBP officials as to how to practically implement this measure. This will likely result in inconsistent application of the requirement across screening facilities. As with Title 42, this rule will lead to a lack of transparency regarding

³⁶ Emily Bregel, Arizona Daily Star *Border agents ignoring fear claims, migrants say, in violation of Biden order exception*, (June 15, 2024), available at https://tucson.com/news/local/border/us-mexico-border-arizona-biden-order-asylum-seekers/article_461bd3a4-29b1-11ef-b884-5f9fc26ba81b.html

³⁷ *Id.*

³⁸ *Securing the Border*, 89 FR. 48710, at 48732. (June 7, 2024).

³⁹ Human Rights First *A Line that Barely Budges: U.S. Limiting Access to Asylum*. (June 2023), available at https://humanrightsfirst.org/wp-content/uploads/2023/06/A-Line-That-Barely-Budges_Nogales-Arizona-1.pdf

⁴⁰ WOLA. Advocacy for Human Rights in the Americas. *Abuses at the U.S.-Mexico Border: How to Address Failures and Protect Rights*. (August 2023), available at <https://www.wola.org/wp-content/uploads/2023/07/Abuses-at-the-US-Mexico-Border-How-To-Address-Failures-and-Protect-Rights.pdf>

the screening measures followed from facility to facility.

The IFR lists some of the ways in which CBP will be guided on how to implement the new rule. Some of that guidance appears ineffective and incomplete to make up for the lack of a fear inquiry requirement. Specifically, the IFR states that CBP is to post signs in their facilities that tell apprehended noncitizens that they may inform officials of a fear of return and that they will be referred for a screening. The IFR also states that CBP is to play a video on loop telling apprehended noncitizens, among other things, of their ability to claim a fear of return. However, these signs and videos will only be available in the languages spoken by the most common nationalities encountered by CBP and thus will not be understood by all asylum seekers.⁴¹

The IFR itself, therefore, acknowledges that the only asylum-related guidance given to migrants during processing by CBP will leave out many asylum seekers who speak other languages. While the rule states that processes will be implemented for those who do not speak those particular languages, it also acknowledges that noncitizens apprehended under this rule are held in these facilities “only for as long as it takes to complete inspection and processing”⁴² There is a very real likelihood that some asylum seekers may not, through the duration of their processing in these facilities, encounter this information and understand their right to ask for sanctuary.

C. Implementation of manifestation of fear requirements have historically resulted in expulsion of those with fear of persecution upon return.

Under the Migrant Protection Protocols (MPP), approximately 70,000 asylum seekers were returned to Mexico at the border between January 2019 and December 2020 to await their court date.⁴³ Many of these noncitizens faced harm during this waiting period, and some were unable to eventually attend their hearings due to the danger they encountered in Mexico.

Nicole* fled Honduras with her husband **Wilmer*** and their young child. Her father was recently murdered and most of their family is either dead or fleeing for their lives. She is a strong woman, but when asked if she fears being in Juarez, she does her best to hold back tears. The men that have been hunting down her family have tried to find them in Mexico as well. They have tried to find a safe place to wait for their hearing, but she knows they will never be safe amongst organized crime in Mexico. They have already escaped two kidnapping attempts. In the most recent attempt against their lives, however, she fell trying to escape one of the men and suffered a miscarriage. She prays for her family to stay alive and be able to appear before a U.S. immigration court in December."

Wilmer's eyes are red from not sleeping. He does not eat much, and he says very little. When asked if he feared being in Mexico, his eyes widened and he said, "Yes." When asked why he fears being in Mexico, he bluntly stated that organized crime does not end. He was seeking safety for his family in the United States —

⁴¹ *Securing the Border*, 89 FR. 48710, at 48741. (June 7, 2024).

⁴² *Id.* at 48742.

⁴³ American Immigration Council. *The "Migrant Protection Protocols": an Explanation of the Remain in Mexico Program*, (Jan. 7, 2022) available at <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>

instead, they were placed at greater risk.⁴⁴

In these cases, the asylum seekers at least had the distant hope of their claims being heard. The migrants who will be sent back under the Securing the Border IFR will have no such hope.

Circumstances under Title 42 were much the same. Families reported being told they had no right to seek protection or that the border was closed. Upon expulsion, some succumbed to the same persecution they had been trying to flee.

Maria* and her two minor children arrived in Ciudad Juarez, Mexico, in September 2022. The family had left their home in Central Mexico fleeing gender-based violence. Maria's children are survivors of sexual violence committed by their father. Before they arrived in Ciudad Juarez, Maria and her young children had been hiding within a shelter network in Mexico for a year, in a failed attempt to protect themselves from their abuser.

Maria and her children presented themselves before U.S. immigration officers at the Santa Fe, New Mexico, port of entry. The officers informed them that the border was closed and pushed the family back into Mexico, leaving them vulnerable to the dangers they were fleeing. A local Mexican government agency refused to help Maria and her children. Maria tried her best to hide their identity and whereabouts and provide for her children by working informal jobs. However, once again Maria began to receive threats from the father of her children.

By December 2022, Maria's persecutor had found her and her children in Ciudad Juarez. He falsely accused her of kidnapping the children, and Maria was detained by local police while the children were taken by their father. As of today, no one knows if Maria ever recovered her children or if she is still alive.⁴⁵

The manifestation of fear requirement will lead to the expulsion of those fearing persecution and death in their countries of origin. Even when a noncitizen sufficiently manifests fear to the satisfaction of the immigration official and even when that noncitizen is successful in attaining a credible fear review, they will still have to meet the heightened, yet otherwise ill-defined, standard of "reasonable probability." In those cases where the heightened standard is met, asylum seekers will still only be able to seek the much more limited and temporary forms of relief of withholding of removal and protection under the CAT.

CLINIC, therefore, opposes the IFR's lack of requirement for immigration officials to explicitly ask those noncitizens they are screening at the border whether they fear persecution. This change will result in refolement of those with a valid asylum claim. The "manifestation of fear" process implemented by this rule is insufficient to screen for meritorious asylum claims.

⁴⁴ CLINIC. *Seven Migrant Protection Protocols stories from Estamos Unidos: Asylum Project*, (Nov. 18, 2019), available at <https://www.cliniclegal.org/stories/seven-migrant-protection-protocols-stories-estamos-unidos-asylum-project> [*names changed to protect identity].

⁴⁵ Tania Guerrero, CLINIC. *Title 42 Continues to Separate Families and Harm Asylum Seekers and Migrants*, (Jan. 27 2023), available at https://www.supremecourt.gov/DocketPDF/22/22-592/254400/20230209131649500_2023.02.08%20Final%20Title%2042%20Brief%20USCCB%20CLINIC.pdf [*names changed to protect identity]

V. Raising the legal standard combined with the increasing lack of counsel issues for detained migrants creates an added layer to the restrictive asylum policies.

A. Raising the credible fear standard will not deter irregular entries.

The CLP rule raised the long-standing “credible fear” standard in initial asylum screening interviews from a “significant possibility” (which was established to mean a 10 percent chance or higher) of persecution to the much higher standard of “reasonable possibility” of persecution.⁴⁶ The IFR raises the credible fear standard even higher; a person who is subject to the suspension of entry and asylum restrictions must establish a “reasonable probability” of persecution to pass the interview and be placed into INA § 240 proceedings.⁴⁷ Problematically, the IFR provides that the heightened fear standard will remain in place even if the asylum eligibility restrictions are struck down in court.⁴⁸

While the IFR defines reasonable probability as: “substantially more than a reasonable possibility, but somewhat less than more likely than not,” how it will be applied in practice and affect screening interview passage rates is unknown. However, the implementation of the CLP rule showed that raising the credible fear standard did not significantly lower the interview passage rate.⁴⁹ Nor did it, apparently, deter people from entering irregularly to the satisfaction of the administration, despite the fact that border crossings are significantly less in 2024 as compared to 2023. The heightened fear standard set forth in the IFR would do little to combat irregular entries but would instead lead to confusion among screening officers while granting them broad discretion in applying the standard. This in turn could result in misapplication of the new standard that results in mass-scale credible fear interview denials where individuals warrant approvals.

B. There is a lack of access to counsel while individuals are detained in CBP custody which may lead to erroneous denials.

Noncitizens who enter the United States through the southern border and request protection when detained, often do not have the opportunity or face great challenges in trying to secure counsel before they are ordered deported or their first initial screening. Noncitizens who enter the United States and are placed in immigration 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.⁵⁰

Immigration advocates and attorneys on the ground are facing myriad obstacles trying to provide consultations to detainees who await expedited removal, and some would agree that the

⁴⁶ 88 FR. 11704.

⁴⁷ 89 FR. 48710.

⁴⁸ *Id.*

⁴⁹ American Immigration Council. *An American Immigration Council Analysis of the President’s 212(f) Proclamation and Interim Final Rule Restricting Asylum*, (June 2024), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/american_immigration_council_analysis_of_presidents_212f_proclamation_0.pdf

⁵⁰ 8 U.S.C § 1362 (May 22, 2024).

lack of counsel issues are profound. Access to counsel is much more limited at the initial screening stage and for the individuals who are detained at the border, they are sometimes unsuccessful in obtaining counsel at all. For example, in a report by an immigration advocacy organization, advocates report that USCIS failed to notify attorneys of their clients interviews and EOIR failed to notify attorneys when their clients were scheduled for immigration judge review after failing their CFIs.⁵¹

One of the other concerns that practitioners and advocates have experienced is that CBP sometimes interferes with an individual's ability to obtain counsel. Reports indicate that many who are in custody are unable to even make a call to an attorney let alone hire one for legal consultation prior to their CFI.⁵² This type of behavior will inevitably lead to erroneous denials and unjust deportations, and it is a waste of government resources that can be used towards improving access to the CBP One app or some other tool to aid in the asylum process. If individuals do not have access to counsel, do not have access to private phone services, do not have access to the most basic provisions such as pen and paper to write down essential information, they are being set up for defeat in their interviews and before a judge if they even make it that far along in the process.

VI. The Biden administration must provide DHS with sufficient resources at the border to increase CBP One appointment availability and improve the CBP One app, and the interim final rule must include a provision for those individuals unable to use the app.

If the administration seeks to indefinitely restrict asylum eligibility to only those who present at a port of entry or attend a CBP One appointment, with few limited exceptions, they must also provide DHS sufficient resources to conduct more CBP One appointments each day and improve the accessibility of the CBP One app. The IFR must also carve out an exception for those unable to access or use the app.

Providing DHS with sufficient resources to conduct more CBP One appointments each day and address the app's technical issues would reduce irregular entries more effectively than the declaration of draconian asylum restrictions without the ability to effectuate them. We have seen in practice with the CLP rule that DHS lacks sufficient resources to actually implement the processes set forth in the CLP rule; some people who are subject to the CLP are released into the United States and placed in INA § 240 removal proceedings without first undergoing an initial screening by an asylum officer (AO) as contemplated under the rule. The IFR's asylum provisions cannot be implemented if more resources are not first diverted to the border, and these funds would be better utilized in releasing far more CBP One appointments each day and improving the app to serve the administration's stated goal of reducing irregular entries.

Lastly, while the CLP rule carves out exceptions for people who are unable to access or use the CBP One app,⁵³ the IFR does not.⁵⁴ The IFR should include an exception to asylum ineligibility

⁵¹ National Immigrant Justice Center. *Obstructed Legal Access: June 2023 Update*. (June 20, 2023), available at <https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update>

⁵² *Id.*

⁵³ *Circumvention of Lawful Pathways*. 88 FR. 11704. (May 16, 2023).

⁵⁴ *Securing the Border*. 89 FR. 48710. (June 7, 2024).

for individuals who cannot access the CBP One app due to its pervasive accessibility issues. Advocates and asylum seekers have both complained that the application requires reliable internet for a sustained period to successfully and consistently search within it to schedule an appointment. Many asylum seekers do not have access to reliable and consistent internet, which means scheduling an appointment via their mobile phones is not a viable option for them. Another significant glitch in the CBP One app is in the facial recognition feature. As a requirement to complete registration, asylum seekers must have their faces scanned for facial recognition. Many times, this feature freezes or issues an error message, and has been more prone to error for those with darker skin tones. Lastly, the CBP One app is only available in three languages: English, Spanish, and Haitian Creole. Individuals who do not speak or read those three languages, or who experience any of the other technical problems when they attempt to use the app, are faced with the impossible decision between waiting in Mexico in danger and uncertainty, returning to the country from which they are seeking asylum, or crossing irregularly only to be barred from asylum under the IFR.

VII. Implementation of the interim final rule will lead to further separation of families.

Although the language of the rule itself asserts that it should not result in family separation,⁵⁵ advocates believe it inevitably will.⁵⁶ When in effect, the rule does not bar unaccompanied children from asylum eligibility. Desperate parents who have traversed hundreds of miles to reach safety, many times on foot and through dangerous conditions, may send their children ahead to pursue their asylum claims as the alternative may be to face homelessness or worse in Mexico, a country which many of these migrants are not from.⁵⁷ Further, when the Biden administration exempted unaccompanied minors from Title 42 expulsions and CBP officers had broad discretion to decide how to process any other individuals, CBP agents routinely expelled some members of a family group pursuant to Title 42 and released others into the United States or detained them in long-term ICE custody.⁵⁸ The Rule's exception for unaccompanied children should be extended to include protections for entire family units otherwise its implementation would separate countless families as illustrated by the devastating effects of Title 42.

VIII. Conclusion

The IFR should have a full 60-day comment period so immigrant advocates and others can have the opportunity to share and address their concerns about this new policy that is restrictive in nature. More importantly, placing restrictions at the border that result in a halt of asylum processing is not a long-term solution and will not prevent people from seeking protection. The

⁵⁵ *Id.* at 48733

⁵⁶ Associated Press, *Deportations under Biden's asylum ban reach 500 a day in Arizona*. (June 14, 2024), available at <https://www.12news.com/article/news/regional/the-border/some-mexican-shelters-see-crowding-south-of-the-border-bidens-asylum-ban-takes-hold/75-aeaeb110-1394-4fa1-b47c-1bd433599bbd>.

⁵⁷ New York Times, *Biden's Border Crackdown Could Disproportionately Affect Families*. (June 8, 2024), available at <https://www.nytimes.com/2024/06/08/us/politics/biden-border-crackdown-families.html>.

⁵⁸ *Cruel Indifference: Family Separation at the U.S.-Mexico Border Before and After Zero Tolerance*, University of California, Los Angeles Immigrants' Rights Policy Clinic (June 2024), available at https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Cruel_Indifference.pdf

result of such policies will be more asylum seekers being placed into danger and finding other solutions that are unsafe. Asylum seekers need a process that is fair and safe not one based on deterrence and forces migrants to remain in Mexico or to be expelled back into harm. 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 interim final 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,

A handwritten signature in blue ink that reads "Anna Gallagher". The signature is written in a cursive, flowing style.

Anna Gallagher
Executive Director