

June 10, 2024

Daniel Delgado  
Director for Immigration Policy  
Office of Strategy, Policy, and Plans  
U.S. Department of Homeland Security  
2707 Martin Luther King Jr. Ave. SE  
Washington D.C. 20528

Submitted via the Federal Rulemaking Portal at <https://www.regulations.gov>.

**RE: Comments in Opposition to the Proposed Rule by the Department of Homeland Security (DHS) on Application of Certain Mandatory Bars in Fear Screenings, DHS Docket No. USCIS-2024-0005.**

Dear Director Delgado:

On behalf of the American Bar Association (ABA), I submit the following comments in response to the Notice of Proposed Rulemaking regarding the Application of Certain Mandatory Bars in Fear Screenings (hereinafter, the “proposed rule”). The proposed rule is likely to undermine due process and access to full and fair adjudications for some noncitizens seeking asylum and withholding of removal. The proposed rule is likely to increase the chances of erroneous exclusions of legitimate asylum seekers from consideration for legal relief, often before having access to or representation by an attorney. While the proposed rule purportedly seeks to increase efficiency in processing recent entrants at the border, it does so at the expense of asylum seekers, well-established federal law, and our nation’s international treaty obligations. For these and other reasons, described in further detail below, the ABA urges the Department of Homeland Security (DHS) to rescind the proposed rule.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, and works to build public understanding around the world of the importance of the rule of law. Working with and through its Commission on Immigration, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public on immigration law issues; and develops and assists in the operation of pro bono legal representation programs for immigrants and asylum seekers, with a special emphasis on the needs of the most vulnerable.

Our views are informed in part by our experience in operating the Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, and the Immigration Justice Project (IJP) in San Diego, California, that serve adult and unaccompanied minor immigrants and asylum seekers, as well as the Children’s Immigration Law Academy (CILA), a national legal resource

center in Houston, Texas, serving legal providers nationwide that focuses on children’s immigration law matters.

The ABA’s policy work in the immigration field is concentrated primarily on ensuring fair treatment and due process rights for asylum seekers and other immigrants, from the time of their arrival at the U.S. border through the final adjudication of their cases. ABA policy supports an asylum system that affords all applicants seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law; the elimination of unduly restrictive limitations that prevent asylum seekers from initiating claims; improvements to the immigration adjudication process; and the preservation and amplification of fair asylum laws and procedures. While the ABA recognizes the challenges presented by processing asylum claims in the face of new and complex patterns of human mobility,<sup>1</sup> the proposed rule is inconsistent with many of these recommended policy priorities and adds yet another barrier that contravenes our nation’s protection obligations.

First and foremost, the ABA is concerned by the abbreviated 30-day notice period DHS has provided for the submission of comments on the proposed rule and urges an expansion of the comment date to a minimum of 60 days.<sup>2</sup> The proposed rule states that the customary 60-day notice period was not provided in order to finalize the rule “as quickly as possible to provide an additional tool to more promptly remove noncitizens who pose public safety and national security risks.”<sup>3</sup> The abbreviated period gives the public and stakeholders less opportunity to meaningfully comment on a complex issue that would curtail asylum seekers’ access to full and fair adjudication of their claims, opportunities for evidence collection, and access to legal representation. Any expediency resulting from this proposed rule does not outweigh the risk of returning vulnerable noncitizens to home countries where they will face persecution or torture. The consequences and implications of the proposed rule require the customary notice period as intended by the Administrative Procedures Act to allow for constructive comments and proposed alternatives for consideration.<sup>4</sup>

**The ABA urges that the proposed rule be rescinded for the following reasons:**

- 1. The proposed rule increases the likelihood of erroneously excluding noncitizens with potentially meritorious asylum and withholding of removal claims from applying for relief from removal.**

The proposed rule gives asylum officers discretion to consider the potential applicability of certain mandatory bars to asylum and withholding of removal during Credible Fear Interviews (CFIs) and Reasonable Fear Interviews (RFIs) (a similar process in which a higher standard is

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<sup>1</sup> See Adam Lichtenheld, Sigrid Lupieri, and Natalie Chaudhuri, *The Future of U.S. Immigration Policy in a Turbulent World*, Carnegie Endowment for International Peace, <https://carnegieendowment.org/posts/2023/12/the-future-of-us-immigration-policy-in-a-turbulent-world?lang=en> (Dec. 23, 2023).

<sup>2</sup> Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 41347 (proposed May 13, 2024) (to be codified at 8 CFR 208).

<sup>3</sup> *Id.*

<sup>4</sup> 5 USC §§ 551–559.

applied to noncitizens with a prior order of removal).<sup>5</sup> Under current policy, asylum officers ask cursory questions pertaining to the bars to flag them for further investigation and analysis in either an Asylum Merits Interview (AMI) or during a removal hearing before an Immigration Judge (IJ).<sup>6</sup>

An assessment of mandatory bars during a CFI or RFI is inappropriate due to the cursory nature of both screening interviews, coupled with the complexity of the relevant bars, resulting in the likelihood of erroneous decisions and the deportation of noncitizens fleeing persecution in their home countries (i.e., *refoulement*). These interviews were intended by Congress to be a method to rapidly assess the potential eligibility of noncitizens coming to the U.S. border for immigration protection in the United States including asylum, withholding of removal, and protection under the Convention Against Torture (CAT).<sup>7</sup> During a CFI and RFI, individuals are questioned and assessed as to whether there is a significant possibility or reasonable possibility, respectively, that the individual qualifies for protection under U.S. law.<sup>8</sup> Individuals who are found to have a credible fear or a reasonable fear are permitted to apply for asylum or other protections and to have their claims fully adjudicated by an asylum officer or an IJ at a later date.<sup>9</sup> Individuals with a negative credible fear or reasonable fear determination may appeal the determination before an IJ, but appeals beyond the IJ's determination are not permitted.<sup>10</sup> Individuals who are found not to have a credible fear or reasonable fear will be deported back to their home countries, barring any other form of immigration eligibility.<sup>11</sup>

In 2023, 174,757 noncitizens were referred for CFIs and 12,972 noncitizens were referred for RFIs.<sup>12</sup> Because of their intended purpose (i.e., to swiftly deduce whether there is a significant possibility that the interviewee qualifies for protection), CFIs and RFIs are necessarily superficial when compared to a removal hearing before the Executive Office for Immigration Review (EOIR) or an asylum interview before U.S. Citizenship and Immigration Services

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<sup>5</sup> The relevant bars include those who participated in persecution of a person on account of their race, religion, nationality, membership in a particular social group, or political opinion (the persecutor bar); those who have been convicted of a particularly serious crime (the particularly serious crime bar); if there is serious reason to believe the individual committed a serious nonpolitical crime outside of the United States (the serious nonpolitical crime bar); having reasonable grounds for regarding the individual as a danger to the security of the United States; or subject to the Terrorism Related Inadmissibility Grounds (the TRIG bar). Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 41347 (proposed May 13, 2024) (to be codified at 8 CFR 208).

<sup>6</sup> *Id.*; 8 CFR § 208.30; 8 CFR § 1208.31.

<sup>7</sup> Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 41347 (proposed May 13, 2024) (to be codified at 8 CFR 208); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, [Public Law 104-208](#), div. C, 110 Stat. 3009, 3009-546.

<sup>8</sup> Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 41347 (proposed May 13, 2024) (to be codified at 8 CFR 208); 8 CFR § 208.30; 8 CFR § 1208.31; *see also*, USCIS, *Reasonable Fear Screenings*, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/reasonable-fear-screenings>; USCIS, *Credible Fear Screenings*, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings>.

<sup>9</sup> 8 CFR § 208.30; 8 CFR § 1208.31.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See* USCIS, *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions*, <https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions>.

(USCIS). The abbreviated nature of this assessment is a necessary part of these screenings, especially given the number of asylum seekers seeking protection in the United States.<sup>13</sup>

CFIs reportedly take anywhere from around ninety minutes to four hours to complete.<sup>14</sup> They also take place under stressful and disorienting circumstances. Noncitizens who are subject to CFIs have come to the U.S. border and expressed a fear of being returned to their home countries. Many have experienced trauma in their home countries and/or on their journeys to the United States. Once they arrive at the U.S. border and express fear of *refoulement*, noncitizens are detained by Customs and Border Protection (CBP) and often held in Immigration and Customs Enforcement (ICE) detention centers, another stressful and often traumatic experience.<sup>15</sup> The CFI can take place in as little as 24 hours after the United States has detained the noncitizen.<sup>16</sup> While CFIs are traditionally conducted while a noncitizen is detained in an ICE detention center, in some more recent instances the CFI has been conducted while a noncitizen has been in CBP custody.<sup>17</sup> Asylum seekers subjected to the CFI or RFI often do not have adequate time or resources to secure counsel.<sup>18</sup> They are given a brief orientation on the process and subjected to a relatively short interview exploring the extent of their experiences and the source of their fear.<sup>19</sup> This interview often takes place over the phone or by video with the help

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<sup>13</sup> These concerns are reportedly shared by some asylum officers. A May 2024 news report captured the concerns of a long-time asylum officer and president of the American Federation of Government Employees that represents USCIS employees in the Washington area and a spokesperson for the larger council, "...said that while the impact cannot be fully assessed until a final rule is issued and implementation guidance is distributed, his members are already questioning how realistic it is to take on more responsibilities during initial screenings... 'You're asking us to do something that is very complex where the stakes are very high, in a screening situation where people are being held at temporary holding [centers]... We're under pressure to quickly make our screening determinations in 24 hours or 48 hours at the most. Now you're adding more lines of inquiry. That's inevitably going to mean a longer interview.'" Eric Katz, *Is Biden's new immigration rule doomed without more staffing?*, Government Executive (May 13, 2024), <https://www.govexec.com/management/2024/05/bidens-new-immigration-rule-doomed-without-more-staffing/396521/>.

<sup>14</sup> American Immigration Lawyers Association (AILA), Policy Brief: The Asylum Credible Fear Standard, (Nov. 27, 2023), <https://anywhere.aila.org/aila-files/84232834-ec30-4264-8726-6388f5a060ec/23112244b.pdf>.

<sup>15</sup> See generally ABA Commission on Immigration, Primer: Immigration Enforcement Mechanisms at the U.S. Border, (Oct. 2023), <https://www.americanbar.org/content/dam/aba/administrative/immigration/border-primer.pdf>; DHS, *Fact Sheet: Implementation of Credible Fear and Asylum Processing Interim Final Rule*, <https://www.dhs.gov/news/2022/05/26/fact-sheet-implementation-credible-fear-and-asylum-processing-interim-final-rule>.

<sup>16</sup> USCIS, *Questions and Answers: Credible Fear Screening*, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>.

<sup>17</sup> See Eileen Sullivan, *Lawyers Say Helping Asylum Seekers in Border Custody Is Nearly Impossible*, N.Y. Times, Jul. 22, 2023, <https://www.nytimes.com/2023/07/22/us/politics/biden-asylum-policies-border.html>.

<sup>18</sup> See generally American Immigration Lawyers Association (AILA), Policy Brief: The Asylum Credible Fear Standard, (Nov. 27, 2023), available at: <https://anywhere.aila.org/aila-files/84232834-ec30-4264-8726-6388f5a060ec/23112244b.pdf>; National Immigrant Justice Center, *Obstructed Legal Access: NIJC's Findings from 3 Weeks of Telephonic Legal Consultations In CBP Custody*, <https://immigrantjustice.org/staff/blog/obstructed-legal-access-nijcs-findings-3-weeks-telephonic-legal-consultations-cbp>; Human Rights First, *Rushed Timelines, Inadequate Access to Legal Representation Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule*, <https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumProcessingRuleFactSheet10.21.2022.pdf>.

<sup>19</sup> USCIS, *Questions and Answers: Credible Fear Screening*, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>.

of an interpreter.<sup>20</sup> The noncitizen is expected to recount traumatic events to an official they do not know, and often do not see, while they are being held in detention.

CFIs and RFIs, in their current forms, raise many accuracy concerns given their rushed and arduous nature. At present, even without the application of the bars, CFIs frequently yield erroneous findings, as demonstrated by IJ reversal rates. Data on twenty-five years of CFIs (1998-2023) revealed that on average, CFIs that were appealed resulted in IJs overturning the CFI's negative determination 25% of the time.<sup>21</sup> The proposed rule will create further obstacles to accessing asylum and withholding of removal for legitimate asylum seekers by adding the additional barrier of a rushed analysis of complex mandatory bars.

The analysis of asylum bars is particularly convoluted. The bars cast a wide and imprecise net for exclusion from asylum and challenge even the most seasoned immigration attorneys and adjudicators. In fact, the mandatory bars as applied have long raised fairness and arbitrariness concerns.<sup>22</sup> For example, evidence to support the bars are often obtained from foreign governments, which the United States cannot independently verify.<sup>23</sup> To expect asylum officers to elicit and verify information related to these bars at the initial stages of asylum proceedings and to correctly and uniformly apply them is unrealistic. If DHS proceeds with this course of action, individuals who qualify for asylum and withholding are likely to be erroneously deported back to the countries from which they fled. In one recent case in South Texas, an asylum seeker from Afghanistan had escaped Taliban occupation with his family. He was flagged as a national security risk when processed during a CBP One appointment due to his attendance at a university controlled by the Taliban. As a result of this assessment, he was separated from his family and placed into detention. Due to this flag, his detention and the credible fear process was much more difficult. Through legal advocacy and representation, his security risk was reassessed by the Joint Terrorist Task Force and his security risk was lowered. Ultimately, this individual was granted asylum. However, many individuals from Afghanistan and other former war-torn countries do not have the benefit of legal representation. They are at risk of being denied basic rights under the existing expedited removal process should the bars to asylum be implemented earlier in the asylum process.

Asylum interviews and immigration court hearings are the more appropriate venues for adjudicating asylum and withholding of removal claims. This is especially so when adjudicating cases with potential bars. To the contrary, the proposed rule encourages asylum officers to essentially adjudicate the applicability of the bars during a rushed screening interview. The

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<sup>20</sup> *LOP General Orientation Addendum: A Guide to Summary Removal Proceedings and Fear Interviews*, vera.org, [https://www.vera.org/knowledge-bank/GO-Script-Addendum\\_English.pdf](https://www.vera.org/knowledge-bank/GO-Script-Addendum_English.pdf); Memorandum from Ashley Caudill-Mirillo Acting Chief USCIS, Asylum Division to Asylum Division Staff, (Jul. 6, 2022), [www.uscis.gov/sites/default/files/document/memos/Language-Access-in-Credible-Fear-Screenings.pdf](https://www.uscis.gov/sites/default/files/document/memos/Language-Access-in-Credible-Fear-Screenings.pdf).

<sup>21</sup> TRAC Immigration, *Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases*, (Mar 14, 2023), <https://trac.syr.edu/reports/712/>.

<sup>22</sup> American Immigration Council, *Fact Sheet: The Biden Administration's Proposed Regulation On Asylum Bars: An Analysis*, (May 10, 2024), <https://www.americanimmigrationcouncil.org/research/biden-administration-proposed-regulation-asylum-bars-analysis>; Human Rights First, *Denial and Delay: The Impact of the Immigration Law's 'Terrorism Bars' on Asylum Seekers and Refugees in the United States*, (Nov. 2009), [www.humanrightsfirst.org/wp-content/uploads/2022/12/HRF-Denial-and-Delay-Terrorism-Bars-2009.pdf](http://www.humanrightsfirst.org/wp-content/uploads/2022/12/HRF-Denial-and-Delay-Terrorism-Bars-2009.pdf).

<sup>23</sup> *Id.*



mandatory bars to asylum and withholding of removal require an in-depth study of the facts, derogatory evidence, collection of evidence to rebut any allegations, and an intricate legal analysis. Their complexity necessitates access to counsel and representation, which are largely unavailable at the CFI and RFI stage. Representation is a critical factor in the likelihood of success of a claim.<sup>24</sup> The average immigration attorney dedicates between fifty and seventy-five hours preparing for a single asylum hearing.<sup>25</sup> Historically, only one out of every ten pro se asylum seekers win their case.<sup>26</sup> For those who are represented, nearly half are successful.<sup>27</sup> If the proposed rule becomes regulation, some asylum seekers will face yet another fatal barrier to obtaining legal representation and thus prevailing on potentially legitimate claims.

## **2. By establishing unnecessarily restrictive barriers to asylum and withholding of removal, the proposed rule threatens to increase the likelihood of violations of both federal and international law.**

The proposed rule's risks to asylum seekers necessarily threaten violations to both federal law as well as U.S. treaty obligations. The United States is a party to the 1967 Protocol Relating to the Status of Refugees.<sup>28</sup> The Protocol, incorporating some articles from the 1951 Refugee Convention, obligates signatories not to return noncitizens who qualify as refugees to their home countries.<sup>29</sup> The U.S. has also formally enshrined these duties in federal law.<sup>30</sup> To proceed with the proposed rule knowing the risks of erroneous *refoulement* of legitimate asylum seekers shirks our international treaty obligations and violates federal law.

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<sup>24</sup> In fact, the Immigration Court Practice Manual dictates that while a noncitizen may theoretically consult with a person of their choosing under 8 CFR 1003.42, a noncitizen is not represented at the credible fear review. See U.S. Dep't of Justice., Immigration Court Prac. Manual, Ch. 7.4, available at: <https://www.justice.gov/eoir/reference-materials/ic/chapter-7/4>. See also e.g., Austin Fisher, *Asylum officer rushing migrants through screenings, advocates say*, Source New Mexico, May 12, 2023, <https://sourcenm.com/2023/05/12/asylum-officers-rushing-migrants-through-screenings-advocates-say/>; *Rushed Timelines, Inadequate Access to Legal Representation Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule*, Human Rights First, (Oct. 2022), [www.humanrightsfirst.org/wp-content/uploads/2022/10/AsylumProcessingRuleFactSheet10.21.2022.pdf](http://www.humanrightsfirst.org/wp-content/uploads/2022/10/AsylumProcessingRuleFactSheet10.21.2022.pdf); Eileen Sullivan, *Lawyers Say Helping Asylum Seekers in Border Custody Is Nearly Impossible*, N.Y. Times, Jul. 22, 2023, <https://www.nytimes.com/2023/07/22/us/politics/biden-asylum-policies-border.html> ; Jeffrey S. Chase, *Attorneys and Credible Fear Review*, Jul. 22, 2018, <https://www.jeffreyschase.com/blog/2018/7/22/attorneys-and-credible-fear-review>.

<sup>25</sup> American Immigration Lawyers Association, *High-Stakes Asylum: How Long an Asylum Case Takes and How We Can Do Better* (June 14, 2023), <https://www.aila.org/aila-files/91508EE0-B02C-4D8F-869C-78B697B68E56/23061202.pdf>.

<sup>26</sup> *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, TRAC Immigration, <https://trac.syr.edu/immigration/reports/491/>.

<sup>27</sup> *Id.*; see generally *Asylum Grant Rates Climb Under Biden*, TRAC Immigration, [https://trac.syr.edu/immigration/reports/667/#:~:text=Over%20the%20past%20two%20decades.%25\)%20asylum%20seekers%20were%20represented.](https://trac.syr.edu/immigration/reports/667/#:~:text=Over%20the%20past%20two%20decades.%25)%20asylum%20seekers%20were%20represented.)

<sup>28</sup> UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, available at: <https://www.refworld.org/docid/3ae6b3ae4.html> [hereinafter referred to as "The Protocol"].

<sup>29</sup> *Id.*

<sup>30</sup> 8 USC §1231(b)(3) stating, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."

The ABA recognizes the challenges DHS faces in managing resources and costs associated with adjudicating the claims of asylum seekers. However, as stated in the DHS 2022 NPRM eliminating the application of the mandatory bars from the CFI analysis, “[a]djudicatory resources designed to ensure that noncitizens are not *refouled* to persecution due to the erroneous application of a mandatory bar are not expended in vain. Rather, the expenditure of such resources helps keep the Departments in compliance with Federal law and international treaty obligations.”<sup>31</sup> DHS should continue prioritizing the nation’s federal and international legal responsibility to provide refuge for qualifying individuals by utilizing its resources to ensure a full and fair adjudicatory process.

**3. The proposed rule jeopardizes due process protections of individuals who are erroneously deemed to be barred from asylum and withholding of removal during preliminary stages of the immigration process.**

Once a noncitizen has entered the United States, they are afforded certain procedural due process protections and may only be expelled after proceedings conforming to traditional standards of fairness.<sup>32</sup> As discussed above, the CFI is a time-pressed interview. It is most often conducted within a short period of time after a noncitizen’s entry and detention within the United States. More often than not, individuals subject to the CFI are not able to obtain representation for the interview in the limited period before a CFI takes place.<sup>33</sup> The alternative, to remain in detention longer in the hopes of securing counsel, is a deterrent that often motivates asylum seekers to proceed with an interview without representation. The conditions related to the CFI, such as limited access to attorneys, the possibility of prolonged detention, and the rapid scheduling of the interview following a noncitizen’s entry, do not support increasing the complexity of a screening measure to the level of an adjudication.

The proposed rule is a sharp departure for DHS, even on a discretionary basis. Just two years ago, DHS and the Department of Justice (DOJ) (collectively the “Departments”) acknowledged that the application of mandatory bars at the CFI or RFI level would be a threat to due process.<sup>34</sup> In the federal rule, DHS and DOJ opposed the application of mandatory bars during CFIs, stating that:

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<sup>31</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 87 Fed. Reg. 18093, <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat> (Mar. 29, 2022).

<sup>32</sup> *Shaughnessy v. United States ex rel. Mazei*, 345 US 206 (1953).

<sup>33</sup> Austin Fisher, *Asylum officer rushing migrants through screenings, advocates say*, Source New Mexico, May 12, 2023, <https://sourcenm.com/2023/05/12/asylum-officers-rushing-migrants-through-screenings-advocates-say/>; *Rushed Timelines, Inadequate Access to Legal Representation Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule*, Human Rights First, (Oct. 2022), [www.humanrightsfirst.org/wp-content/uploads/2022/10/AsylumProcessingRuleFactSheet10.21.2022.pdf](http://www.humanrightsfirst.org/wp-content/uploads/2022/10/AsylumProcessingRuleFactSheet10.21.2022.pdf); Eileen Sullivan, *Lawyers Say Helping Asylum Seekers in Border Custody Is Nearly Impossible*, N.Y. Times, Jul. 22, 2023, <https://www.nytimes.com/2023/07/22/us/politics/biden-asylum-policies-border.html>.

<sup>34</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 87 Fed. Reg. 18093, <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat> (Mar. 29, 2022).

[T]he Departments recognize that considerations of procedural fairness counsel against applying mandatory bars that entail extensive fact-finding during the credible fear screening process. In response to the Global Asylum NPRM [which, among other facets, sought to have asylum officers globally apply the mandatory bars during CFIs], a commenter emphasized that each of the mandatory bars involves intensive legal analysis and asserted that requiring asylum officers to conduct this analysis during a screening interview would result in “the return of many asylum seekers to harm’s way....” Another commenter expressed the concern that “countless asylum-seekers could be erroneously knocked out of the process based on hasty decisions, misunderstandings, and limited information....” Upon review and reconsideration, due to the intricacies of the fact-finding and legal analysis often required to apply mandatory bars, the Departments now believe that individuals found to have a credible fear of persecution generally should be afforded the additional time, procedural protections, and opportunity to further consult with counsel that the Asylum Merits process or section 240 removal proceedings provide.<sup>35</sup>

The rule goes on to explain that even where consideration of mandatory bars in § 240 proceedings result in delays to removal, the Departments believe that those delays serve important purposes, namely to ensure that the procedures and forum for determining applicability of the mandatory bars account for the complexity of the inquiry and afford the applicant a reasonable and fair opportunity to contest the applicability of the mandatory bars.<sup>36</sup> The Departments acknowledged the complexity of the legal and factual inquiry that goes into application of the mandatory bars.<sup>37</sup> They concluded that “due process and fairness considerations counsel against applying mandatory bars during the credible fear screening process.”<sup>38</sup>

Furthermore, allowing the discretionary application of the mandatory bars during CFI and RFIs does not allay the concerns the Departments expressed in 2022. Mandatory bar analyses are complex and fact intensive. All individuals subject to the mandatory bars should therefore be afforded adequate time, procedural protections, and opportunities to further consult with counsel.<sup>39</sup> If the mandatory bars are applied at the asylum officer’s discretion, the outcome will

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> The Proposed Rule indicates that the mandatory bars are flagged in relatively few CFIs (2.5% of the total), while they are implicated in 20% of RFIs. As a matter of principle, we insist that all asylum seekers merit full and fair adjudications. Relatively few cases being impacted by the rule indicate that any arguments regarding efficiency are made essentially moot. Due process concerns, however, are paramount regardless of the number of cases impacted. Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 41347 (proposed May 13, 2024) (to be codified at 8 CFR 208).



likely be an inconsistent and arbitrary application of the bars. The ABA is also concerned that this could result in an unfair application based on the individual officer's biases and prejudices. Consistency, access to representation, and the opportunity to prepare one's own defense are essential elements of a full and fair adjudication process. If the proposed rule becomes regulation, many noncitizens will be stripped of these due process rights.

We appreciate your consideration of our views in light of the serious implications of the proposed rule. If you have any questions or need additional information, please contact Christina Ennis, Legislative Counsel, ABA Governmental Affairs Office at [christina.ennis@americanbar.org](mailto:christina.ennis@americanbar.org).

Sincerely,

A handwritten signature in cursive script that reads "Mary Smith".

Mary Smith  
President