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*FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.*



FEDERATION FOR AMERICAN IMMIGRATION REFORM

October 19, 2021

Ms. Andria Strano  
Acting Chief, Division of Humanitarian Affairs  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
5900 Capital Gateway Drive  
Camp Springs, MD 20588

Ms. Lauren Alder Reid  
Assistant Director, Office of Policy  
Executive Office for Immigration Review  
Department of Justice  
5107 Leesburg Pike  
Falls Church, VA 22041

**RE: DHS Docket No. USCIS-2021-0012: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers**

Dear Ms. Strano and Ms. Alder Reid,

The Federation for American Immigration Reform (“FAIR”) respectfully submits the following public comments to the Department of Homeland Security (“DHS”) and Department of Justice (“DOJ”) (collectively, “the Departments”) in response to their request for information, as published in the Federal Register on August 20, 2021. *See Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers* (DHS Docket No. USCIS-2021-0012).

FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. Our organization examines trends and effects, educates the public on the impacts of sustained high volume immigration, and advocates for sensible solutions that enhance America's



environmental, societal, and economic interests today, and into the future.

## I. Request for Extension

FAIR requests the Departments to delay the comment period for the proposed rule, and any other regulation proposing asylum process changes. The comment period set for this proposed rule is inappropriate while the Departments are simultaneously preparing to promulgate regulations to comply with President Biden’s February 2, 2021 order, entitled *Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border* (Executive Order 14010).

As a general matter, the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, “requires agencies to engage in ‘reasoned decision making,’”<sup>1</sup> directs that agency actions be ‘set aside’ if they are ‘arbitrary’ or ‘capricious.’<sup>2</sup> An agency commits a serious procedural error, however, when it fails to reveal portions of technical basis for proposed rule in time to allow for meaningful commentary.<sup>3</sup> Further, where public notice is inadequate, agency’s consideration of comments received in response thereto, no matter how careful, cannot cure defect.<sup>4</sup>

With Executive Order 14010, the President directed the Attorney General and Secretary of Homeland Security 270 days to promulgate regulations governing the interpretation of the phrase “membership in a particular social group” in section 101(a)(42)(A) of the Immigration and Nationality Act (“INA”), “as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.”<sup>5</sup> The President’s 270-day deadline for

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<sup>1</sup> *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

<sup>2</sup> 5 U.S.C. § 706(2)(A); *Dep’t of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. \_\_\_ (2020), slip op. at 9.

<sup>3</sup> *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525 (D.C. Cir.), cert. denied, 459 U.S. 835, 103 S. Ct. 79, 74 (1982).

<sup>4</sup> *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988).

<sup>5</sup> Asylum and refugee status are limited forms of protection. To establish eligibility for asylum under the INA, as amended by the Refugee Act of 1980, or statutory withholding of removal, the applicant must demonstrate, among other things, that she or he was persecuted, or has a well-founded fear of future persecution, on account of a protected ground: “race, religion, nationality, membership in a particular social group, or political opinion.” See INA §101(a)(42), 8 U.S.C. § 1101(a)(42); see also INA § 208(b)(1)(A) and 241(b)(3)(A), 8 U.S.C. § 1158(b)(1)(A) and § 1231(b)(3)(A). Congress, however, has not defined the phrase “membership in a particular social group.” Nor is the term defined in the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, or the related Refugee Protocol. Further, the term lacks the benefit of clear legislative intent. See *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (Alito, J.) (“Thus, neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase ‘particular social group.’”); cf. *Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA

the new regulation will conclude on October 29, 2021, less than two weeks after the comment period for this proposed rule closes.

Any decision to expand or contract the meaning of the term “particular social group” as it pertains to asylum eligibility may have a drastic impact on both the volume of asylum applications and credible fear claims made, as well as the demographics of the populations submitting such claims. Without knowledge of the forthcoming regulation defining this important term, the public is not equipped to properly assess and consider a proposed rule to reform the process in which these claims will be considered and adjudicated.

## **II. USCIS Jurisdiction over Applications for Asylum in Expedited Removal**

FAIR strongly opposes the creation of 8 C.F.R. § 208.2, which gives U.S. Citizenship and Immigration Services (“USCIS”) asylum officers initial jurisdiction over asylum applications in expedited removal. This rule purports to streamline the adjudication of asylum claims made by aliens in expedited removal by cutting out immigration judges from DOJ’s Executive Office of Immigration Review (“EOIR”) and prosecutors from U.S. Immigration and Customs Enforcement (“ICE”) and allowing USCIS asylum officers to grant an alien’s defensive asylum application. Not only will the proposed changes remove safeguards in the credible fear process that weed out fraud and ensure asylum, statutory withholding of removal, and protection under the regulations implementing the Convention Against Torture (“CAT”) are only granted to aliens with legitimate fear claims, but the proposal will also significantly strain the USCIS Asylum Division and drastically increase the agency’s already-historically high asylum backlog. Taken as a whole, the new process will further encourage illegal immigration into the United States at the worst possible time: during a dangerous border surge with no end in sight.<sup>6</sup>

### **A. Utilizing a Non-Adversarial Process Will Increase Fraud in the Asylum System**

FAIR strongly disagrees with the Departments’ assessment that all asylum cases are best handled in a non-adversarial process with USCIS rather than in immigration court. Transiting from an adversarial process to non-adversarial process will result in a higher

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1985) (“Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol”), overruled on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

<sup>6</sup> U.S. Customs and Border Protection, *Southwest Land Border Encounters*, (May 11, 2021) available at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>; John Grimalich, Pew Research Center, *Migrant Encounters at U.S.-Mexico Border are at a 21-Year High* (August 13, 2021), available at <https://www.pewresearch.org/fact-tank/2021/08/13/migrant-encounters-at-u-s-mexico-border-are-at-a-21-year-high/>.

rate of non-meritorious claims improperly receiving asylum, withholding of removal, or protection under the regulations implementing CAT.

The need for administrative deterrence is critical given the current crisis at the southern border, specifically the sharp increase of encounters with aliens at the border, a subsequent dramatic increase in requests for asylum relief, and the large number of meritless, fraudulent, or frivolous asylum claims that are straining the nation's immigration system. The availability of prompt release from detention, as well as employment authorization availability, has caused the number of credible fear claims to skyrocket to crisis levels in the past decade, and most drastically, in 2021.<sup>7</sup>

Apprehending and processing the growing number of aliens who arrive illegally into the United States and make fear claims consumes an ever-increasing amount of DHS resources, which must surveil, apprehend, screen, and process the aliens who enter the country and must represent the U.S. Government in cases before DOJ immigration judges, the Board of Immigration Appeals (“BIA”), and the U.S. Courts of Appeals.<sup>8</sup> Most asylum claims, however, ultimately fail, and many are fraudulent. The past decade has seen over a 1,883% increase in credible-fear claims (data for fiscal years 2008 to 2018).<sup>9</sup> In 2018 specifically, DHS processed 99,035 credible fear claims.<sup>10</sup> Immigration courts received over 162,000 asylum applications in FY 2018, a 270 percent increase from five years earlier.<sup>11</sup> Given reports that unlawful border crossings have reached a 20-year high in Fiscal Year 2021, credible fear and asylum claim totals will continue to rise.

Indeed, in recent decades, the Departments have already received high rates of fraudulent or otherwise non-meritorious fear claims made at the border. Over the past decade, the majority of credible fear claims were determined to be meritless. The Supreme Court noted, when evaluating the expedited removal process, that a random sampling of asylum claims found 58 percent possessed indications of fraud, while 12 percent were conclusively fraudulent.<sup>12</sup> Moreover, of the applicants determined to have a credible fear (or a significant possibility of establishing eligibility for asylum or withholding of removal), about 50% over the same 10-year period, ultimately did not submit an asylum

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<sup>7</sup> *Id.*

<sup>8</sup> *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934, 55935 (Nov. 9, 2018).

<sup>9</sup> *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829, 33838, (July 16, 2019).

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

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

<sup>12</sup> *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. at 1959, 1967-68.

application after their fear screening.<sup>13</sup> In 2019, a grant of asylum followed a credible fear determination just 15% of the time.<sup>14</sup>

Removing safeguards built into the expedited removal process to weed out fraud will only serve to increase illegal immigration into the United States. During immigration court proceedings, ICE attorneys are able to cross-examine aliens who entered illegally and offer evidence that contradicts those aliens' claims when such evidence exists. Additionally, immigration judges are able to closely scrutinize existing case law and determine whether new precedent governing asylum eligibility should be issued. Because BIA and Circuit Court precedent is binding on USCIS, asylum officers, unlike immigration judges, are powerless to correct what may be legally improper case law.

Under the system created by the proposed rule, however, improper precedent can only be challenged through the appeal process if the asylum officer's decision results in a denial of asylum. By removing ICE attorneys and immigration judges completely from the adjudication, but allowing aliens to be represented by counsel and other immigration service-providers, the American people, of whose laws DHS and DOJ are entrusted to enforce by implementing the expedited removal process, lose their representation in the process.

Finally, because asylum officers are not required to have law degrees and many are not attorneys, asylum officers are also unlikely have the impetus to challenge BIA or circuit court precedent. This imbalance will further accentuate the structural bias in the asylum system. Accordingly, improperly lenient case law governing credible fear will rarely have an opportunity be corrected in the imbalanced system the proposed rule creates.

### **B. The Proposed Rule Extends the Credible Fear Appeal Process Beyond the Bounds of Congressional Intent**

The asylum application process set up by the proposed rule will further extend the levels of review available to aliens who are in expedited removal, from approximately four layers to at least five. By imposing additional layers of review, the proposed rule creates a structural bias in favor of granting asylum, statutory withholding of removal, or CAT protection and is directly at odds with Congress's intent in creating the expedited removal process to quickly and fairly remove certain inadmissible aliens from the United States with minimal administrative burdens.

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<sup>13</sup> See Executive Office of Immigration Review, *Adjudication Statistics: Rates of Asylum Filings in Cases Originating With a Credible Fear Claim* (Nov. 2018); see also 84 Fed. Reg. 33841 (noting that many instead abscond).

<sup>14</sup> See Executive Office of Immigration Review, *Asylum Decision Rates in Cases Originating With a Credible Fear Claim* (Oct. 2019).

Currently, after receiving a negative credible fear determination, an alien is able to appeal the negative fear finding to an EOIR immigration judge.<sup>15</sup> If the immigration judge agrees with the negative determination, the alien could then appeal the immigration judge's denial to the BIA, which would be able to review the immigration judge's application of the law *de novo*.<sup>16</sup> If the alien does not receive asylum, statutory withholding, or protection under the regulations implementing CAT from the asylum officer, immigration judge, or BIA, the alien could then file a petition for review with the local federal circuit court.<sup>17</sup> Finally, the alien, even still, can then file a petition for *certiorari* with the Supreme Court.

The system proposed by this rule, however, would also give the alien the right to seek *a de novo* review of the asylum officer's denial of asylum, statutory withholding, or protection under the regulations implementing CAT.<sup>18</sup> By allowing the entire review process to start fresh, the applicant would receive from the immigration judge what is essentially an appeal from the asylum officer's denial. This process, however, not only adds an extra formal level of review, but will also be subject to supervisory review by a supervisory manager within the Asylum Division, and USCIS Headquarters review for any decision that warrants further scrutiny for legal or merely political reasons.<sup>19</sup>

Accordingly, the proposed process created by this rule conflicts with the legislative intent behind expedited removal. Congress intended the expedited removal process to be streamlined, efficient, and truly "expedited" in order to allow immigration officers to quickly remove certain inadmissible aliens or aliens who committed fraud or misrepresentation. To accomplish this end, Congress' created a statutory scheme to limit the administrative review of expedited removal orders,<sup>20</sup> impose temporal limits on review of negative credible fear determinations by immigration judges,<sup>21</sup> and limit judicial review of determinations made during the expedited removal process.<sup>22</sup> Creating additional levels of review will only serve to significantly slow the credible fear process, waste administrative resources, and run counter to Congress's legislative aims.

### **C. The Proposed Rule Will Significantly Strain the USCIS Asylum Division**

Further, by transferring the significant asylum application burden from EOIR to USCIS, this rule will significantly strain the USCIS Asylum Division, which already has reported

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<sup>15</sup> INA § 25(b)(1)(B)(III).

<sup>16</sup> 8 C.F.R. § 1003.42; 8 C.F.R. § 1208.31.

<sup>17</sup> See INA § 242, 8 U.S.C. § 1252(a)(1).

<sup>18</sup> Proposed 8 C.F.R. § 1003.48(e).

<sup>19</sup> *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 86 Fed. Reg. 46906, 46915 (Aug. 20, 2021).

<sup>20</sup> INA § 235(b)(1)(C).

<sup>21</sup> INA § 235(b)(1)(B)(iii)(III).

<sup>22</sup> INA § 242(e).

over a 400,200 affirmative asylum case backlog this year.<sup>23</sup> Because the proposed rule does nothing to discourage applicants for admission from making frivolous or fraudulent asylum claims as a means to remaining in the United States, the rate at which credible fear claims are made at the border will remain extraordinarily high, if not continue to spike beyond historical trends.<sup>24</sup> Transferring the credible fear caseload from EOIR's asylum backlog to USCIS's backlog will ultimately do nothing to reduce the administrative burden that the current border crisis imposes.

While it is true, as the Departments argued in the proposed rule, that allowing asylum officers to fully adjudicate asylum claims is “not new,” the proposed rule will require asylum officers to both grant orders of removal and fully adjudicate withholding of removal and CAT claims for the first time in the USCIS's history.<sup>25</sup> While withholding and deferral of removal under CAT are similar forms of protection from removal to asylum and statutory withholding of removal, the analysis required for CAT protection is significantly more fact-intensive than typical persecution-based adjudications.

To be granted asylum or statutory withholding, the alien must show a well-founded fear of persecution inflicted on account of a limited number of grounds: race, religion, nationality, membership in a particular social group, or political opinion.<sup>26</sup> Withholding and deferral of removal under the CAT regulations, on the other hand, is available to an alien who shows that it is more likely than not that he or she would suffer “severe pain or suffering (physical or mental) that is intentionally inflicted by or at the instigation of or with the consent or acquiescence of a public official, or other person acting in an official capacity.”<sup>27</sup> Unlike asylum eligibility, no specific reason or nexus for such harm must be demonstrated by the applicant.

Further, while it is true that many asylum officers already adjudicate affirmative asylum applications (which are asylum applications that are submitted to DHS while the alien is in the United States and is not currently in expedited removal or INA § 240 removal proceedings), the USCIS Asylum Division is not equipped to quickly process full asylum

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<sup>23</sup> U.S. Citizenship and Immigration Services, Number of Service-wide Forms Fiscal Year to Date by Quarter and Form Status (2020), available at [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2020Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf).

<sup>24</sup> U.S. Customs and Border Protection reported an historic 1,741,956 enforcement actions in FY 2021. See U.S. Customs and Border Protection, CBP Enforcement Statistics Fiscal Year 2021(2021), available at <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>; John Grimalich, Pew Research Center, *Migrant Encounters at U.S.-Mexico Border are at a 21-Year High* (August 13, 2021), available at <https://www.pewresearch.org/fact-tank/2021/08/13/migrant-encounters-at-u-s-mexico-border-are-at-a-21-year-high/>.

<sup>25</sup> See HSA; FARRA; INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A); *Regulations Concerning the Convention Against Torture*, 64 FR at 8478, as corrected by *Regulations Concerning the Convention Against Torture*, 64 FR 13881 (Mar. 23, 1999).

<sup>26</sup> INA § 208; INA § 241(b)(3)(B).

<sup>27</sup> 8 C.F.R. § 208.18.

adjudications for aliens who are recent arrivals and detained in expedited removal. Because the asylum division will quickly become overwhelmed, the full asylum adjudication process will inevitably be slowed. Rather than “streamline” the asylum process, which the proposed rule purports to do, the proposed rule will merely transfers EOIR’s caseload to the already backlogged USCIS Asylum Division. Consequently, the public can expect that asylum officers will need to utilize the parole authority proffered by this rule to accommodate the large number of aliens in mandatory detention on the basis of limited resources.

As explained in more detail below, the process is set up to both increase incentives for aliens to illegally enter the United States and make a credible fear claim upon apprehension. Thus, the harm that the Departments are seeking to remedy through this proposed rule will itself be direct result of the rule and will further encourage lawlessness on the border. The proposed rule will also divert already scarce agency resources from aliens who submit affirmative asylum applications in addition to unaccompanied alien minors (“UACs”), over whose asylum claims USCIS has initial jurisdiction over.<sup>28</sup>

### **III. Authorization to “Modify or Correct” Credible Fear Record**

FAIR urges the Departments to strike the proposed 8 C.F.R. § 208.3(a)(2) from this rule, which permits aliens submit modifications or corrections to their asylum application “up until seven days prior to the scheduled asylum hearing before a USCIS asylum officer, or for documents submitted by mail, postmarked no later than 10 days before the scheduled asylum hearing.” The provision will only serve to facilitate fraud in the asylum process and is unnecessary given the current regulatory framework governing credible fear interviews.

In the current credible fear review process, the applicant’s record (which includes credible fear testimony) serves as important evidence for an immigration judge and ICE attorney to consider the veracity of the claims made.<sup>29</sup> Under the proposed rule, an alien’s asylum application consists primarily of the written record reflecting the applicant’s testimony provided during their credible fear interview with an asylum officer.<sup>30</sup> Every alien who receives a positive credible fear determination would be considered to have filed an application for asylum at the time the determination is serviced. Regulations already require that asylum officers confirm with the applicant that the record accurately reflects his or her testimony and allow the applicant to make changes to any errors that may have been transcribed.<sup>31</sup>

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<sup>28</sup> INA § 208(b)(3)(c).

<sup>29</sup> 8 C.F.R. § 208.30(d).

<sup>30</sup> Proposed 8 C.F.R. § 208.3.

<sup>31</sup> 8 C.F.R. § 208.30(d)(6).



Allowing applicants to amend their testimony after the conclusion of their credible fear interview, however, will do nothing but facilitate fraud and conflicts with INA § 208(b)(1)(B)(III), which requires asylum officers to consider “the totality of the circumstances, and all relevant factors,” when making credibility determinations.<sup>32</sup> The asylum officer “may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.”<sup>33</sup> Thus, the asylum officers must consider the totality of circumstances in making a credibility determination, which includes the original testimony provided by the alien at the time of the credible fear interview.

Permitting an alien to modify or “correct” their testimony, which serves as the alien’s asylum application under the proposed system, deprives the trier of fact an important piece of evidence in evaluating the veracity of the applicant’s claims. If the process change proffered by this proposed rule are implemented, asylum officers must be able to review the testimony and all evidence presented by the alien at the time of the alien’s credible fear screening in order to make a proper credibility determination.

#### **IV. Reckless and Unlawful Expansion of DHS’s Parole Authority**

FAIR strongly opposes the Departments’ proposal to amend 8 C.F.R. § 235.3(b)(2)(iii) to authorize officers to parole aliens subject to mandatory detention into the United States when DHS determines that detention is “unavailable or impracticable.” The proposed rule violates the INA’s mandatory detention requirements, permits parole on the basis of conditions that are broadly defined and ripe for abuse, and, if implemented, will encourage lawlessness on the United States’ international borders.

##### **A. The Proposed Rule’s Expansion of Parole Violates Section 1225 of the INA**

Congress mandated that DHS detain aliens in expedited removal pending their credible fear and removal proceedings, and has only authorized DHS to parole aliens in specific circumstances.

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<sup>32</sup> INA § 208(b)(1)(B)(III).

<sup>33</sup> *Id.*

First, INA § 235(b)(2)(A) provides that, if an immigration officer determines that an applicant for admission is not clearly and beyond a doubt entitled to be admitted, then the alien “shall be detained” for a proceeding under INA § 240 to determine whether he will be removed from the United States. Alternatively, if an alien lacks valid entry documentation or misrepresents his identity, the alien shall be removed from the United States “without further hearing or review” unless the alien indicates either an intention to apply for asylum or a fear of persecution.<sup>34</sup> If the alien makes such a showing, the INA again requires that the alien “shall be detained for further consideration of the application for asylum.”<sup>35</sup>

Further, when DHS places an applicant for admission into INA § 240 removal proceedings, the alien is subject to mandatory detention during that proceeding. Finally, INA § 235(b)(2)(A) provides that if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien “shall be detained” for a proceeding under INA § 240.

DHS does, however, retain the discretion to parole certain aliens for urgent humanitarian reasons or significant public benefit.<sup>36</sup> Parole may only be granted: (1) temporarily, (2) “on a case-by-case basis,” (3) for no other purpose than “urgent humanitarian reasons or significant public benefit,” (4) if the parolee was in the “custody” of DHS at the time of the grant of parole, and (5) if the grant of parole is never (“shall not be”) “regarded as an admission of the alien.”<sup>37</sup> Current regulations limit the parole of aliens in expedited removal to those situations in which DHS determines “in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”<sup>38</sup>

Authorizing DHS to parole inadmissible aliens into the United States whenever DHS determines that detention is “unavailable or impractical,” with no guiding standard to limit agency abuse of parole, directly conflicts with INA § 212(d)(5) and Congressional intent in delegating limited parole authority to DHS. Indeed, the history of the parole statute is one of increasing tightening of its language in response to agency overreach. Congress’s actions have resulted in the restriction of agency discretion, not an expansion.<sup>39</sup> According to the House Judiciary Committee, Congress tightened the parole authority because:

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<sup>34</sup> INA § 235(b)(1)(A)(i).

<sup>35</sup> INA § 235(b)(1)(B)(ii).

<sup>36</sup> INA § 212(d)(5); *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

<sup>37</sup> 8 U.S.C. § 1182(d)(5)(A).

<sup>38</sup> 8 C.F.R. § 235.3(b)(2)(iii), (b)(4)(ii).

<sup>39</sup> As a response to agency abuse of discretionary parole, Congress included in the 1980 Refugee Act a prohibition the discretionary exercise of parole for any “alien who is a refugee,” unless the Attorney General determined that “compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section

“[t]he text of section 212(d)(5) [8 U.S.C. § 1182(d)(5)] is clear that the parole authority was intended to be used on a case-by-case basis to meet specific needs, and not as a supplement to Congressionally-established immigration policy. In recent years, however, parole has been used increasingly to admit entire categories of aliens who do not qualify for admission under any other category in immigration law, with the intent that they will remain permanently in the United States. This contravenes the intent of section 212(d)(5), but also illustrates why further, specific limitations on the Attorney General's discretion are necessary.”<sup>40</sup>

Understanding the limitations to DHS's parole authority imposed by Congress, DHS has only one lawful alternative to mandatory detention when detention is unavailable or otherwise impractical: DHS may, in the case of an alien described in INA § 235(b)(2)(A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, return the alien to that territory pending a proceeding under INA § 240.<sup>41</sup> Parole on the basis of unavailability or impracticality of detention, however, is not a legally viable option and has directly conflicts with Congressional intent in limiting parole to case-by-case instances that rise to the level of urgent humanitarian or significant public benefit concerns.

### **B. The Definitions of “Unavailable” and “Impractical” Are Not Well Defined and Are Ripe for Agency Abuse**

The proposed rule inadequately defines the terms “unavailable” and “impractical,” leaving the proposed parole authority expansion overbroad and ripe for abuse. As explained above, expanding parole eligibility at times DHS determines that detention is unavailable or impractical (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities) with no guiding standard to limit agency abuse of parole directly conflicts with Congress's intent in enacting the parole authority.

Further, nowhere in the rule do the Departments justify their proposal to expand parole eligibility to include instances where detention is unavailable or impractical when statute limits this authority to case-by-case instances of “urgent humanitarian or significant public interest” concerns. Indeed, the availability or practicality of detention may be entirely unrelated to urgent humanitarian or significant public interest concerns. For instance, an administration could unilaterally decide that resource and logistical

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207.” 8 U.S.C. § 1182(d)(5)(B). In 1996, Congress acted again to rein in agency abuse of discretion to parole aliens into the United States by authorizing discretionary grants of parole by “only” where additional conditions had been met.

<sup>40</sup> H.R. Rep. No. 104-469, at 140 (1996).

<sup>41</sup> INA § 235(b)(2)(C).

impediments imposed by detention outweigh other administrative priorities. An administration could also affirmatively terminate all detention housing contracts, effectively making detention for any alien unavailable or impractical. These situations fall outside the scope of Congress' scheme to require detention of nearly all aliens in expedited removal and require only sparing use of DHS's parole authority.

FAIR comments that Departments mischaracterize *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), to support the proposed expansion of parole authority. The Supreme Court in *Jennings*, however does not interpret the limits of INA § 212(d)(5), which limits parole on to "urgent humanitarian or significant public interest" grounds. Rather, the Court affirms Congress's mandate that arriving aliens subject to INA § 235(b) be detained "throughout completion of applicable proceedings."<sup>42</sup> The proposed rule, however, sets up process that will inevitably allow DHS to release aliens whenever an administration determines in its own judgment that continued detention is "unavailable or impractical," whether such resource limitations or impracticalities are self-inflicted, as such is the case with the current crisis on the border, or when detention is otherwise outside of the design of an administration's limited enforcement priorities.

### **C. The Proposed Rule's Expansion of Parole Will Weaken the Integrity of the Immigration System**

If promulgated, this rule will beacon the message that all aliens who illegally cross the border need to do to be released into the interior of the United States will be to make a credible fear claim. Taken as a whole, the proposed rule does little to support the integrity of the immigration system and ensure limited government resources are directed towards aliens with legitimate fear claims. Parole on the basis of the unavailability or impracticality of detention will become an inevitability,<sup>43</sup> and will unlawfully supplement the immigration scheme mandated by Congress.

### **V. Employment Authorization Documents**

FAIR agrees with the Departments' decision to restrict employment authorization document ("EAD") eligibility solely on the basis of receiving parole under this proposed rule and recommends that the Department maintain this decision. Congress has created a detailed and comprehensive scheme for regulating the admission and employment of aliens, including entrepreneurs, refugees, and familial relatives, into the United States.<sup>44</sup> It would be unreasonable to conclude that Congress regulated employment by aliens as

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<sup>42</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

<sup>43</sup> U.S. Citizenship and Immigration Services, *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions* (Sept. 2021), available at <https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions>.

<sup>44</sup> See 8 U.S.C. § 1101 et seq.

carefully as it has, but also intended DHS to be able to use parole to admit an indefinite number of additional aliens, in its discretion, and to allow them to engage in employment.<sup>45</sup> Equally important, providing EAD eligibility solely on the basis of being paroled under the provisions of this rule will serve as an additional and powerful pull factor for illegal immigration into the United States and a powerful incentive to make a fraudulent credible fear claim.

As discussed in detail above, the expanded parole authority created by the proposed rule is *ultra vires* and should not be the basis of employment authorization eligibility in the United States. DHS does not have the authority to grant EADs to aliens for whom the INA does not provide such eligibility or for whom the INA expressly grants the Secretary discretionary authority, such as is the case with asylum based EADs.<sup>46</sup> Rather than unlawfully expand employment authorization, FAIR urges DHS to protect job opportunities for American workers consistent with the employment-based admission limitations passed by Congress.

#### **A. The INA Requires Asylum Applicants to Wait At Least 180 Days to Receive an EAD**

Aliens subject to the parole provisions of the proposed rule are subject to INA § 208(d)(2), and accordingly, may only receive a discretionary EAD grant subject to the INA's requirements. The INA authorizes the Secretary of Homeland Security, through regulations, to authorize employment for aliens who request asylum while the asylum application is pending adjudication on a discretionary basis. Even if the Secretary chooses to grant employment authorization to an asylum applicant, under the current statute and regulations, he or she cannot grant such authorization until 180 days after the filing of the application for asylum.<sup>47</sup> Because aliens who may benefit from the expanded parole provisions created by this proposed rule are applicants for asylum, DHS must abide by the INA's 180-day restriction.

#### **B. DHS Does Not Have the Authority to Designate New Classes of Aliens for Work Authorization Eligibility**

Article I of the U.S. Constitution gives Congress plenary power over immigration, and Congress has established an extensive scheme for the admission of immigrant and nonimmigrant foreign workers into the United States through the creation of numerous

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<sup>45</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (“[H]ad Congress wished to assign [‘a question of deep economic and political significance’] to an agency, it surely would have done so expressly.”); See also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress [] does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.”).

<sup>46</sup> Pub. L. No. 104-208, § 604, 110 Stat. 3009, 3009-693.

<sup>47</sup> *Id.*

visa programs. Congress has never conferred nor delegated the authority to DHS to create employment eligibility for classes of aliens not already provided by law. Designating new classes of eligible populations undermines the deliberate scheme created by Congress which has contemplated intricate social, economic, and foreign policies beyond the scope of DHS's interests and mission.

Further, contrary to DHS's regulatory position (which DHS later disavowed in litigation), Congress did not confer such authority with the enactment of the definition of "unauthorized alien," in 8 U.S.C. § 1324a. Section 1324a was enacted by the Immigration Reform and Control Act of 1986 ("IRCA") to, for the first time, criminalize and impose civil sanctions on the act of hiring an alien who is not authorized to work in the United States. Section 1324a(h)(3) defines those aliens that it is unlawful for an employer to hire. This section, however, is merely definitional and refers to the authorities the Secretary already possesses through enactment of other provisions in the INA. It does not itself grant any authority.

Rather, since the enactment of this position, Congress has specifically extended and limited DHS's authority to grant work authorization to similar classes of aliens on numerous occasions. Interpreting the definition of "unauthorized alien" to confer such broad authority would also render Congress's later enactments superfluous and violate the non-delegation doctrine as an impermissible delegation of legislative authority without sufficient intelligible principles to guide the Secretary.

### **C. Expanding EAD Eligibility to Aliens who Receive Parole Under This Rule Will Further Encourage Lawless Migration**

In order to maintain the very integrity of the asylum system, it is imperative that DHS take all necessary measures to create disincentives to come to the United States for aliens who do not fear persecution on the five protected grounds or torture.<sup>48</sup>[43] Providing work authorization to applicants for admission, who make fear claims, without adhering to the INA's 180-day waiting period, would only serve to encourage illegal immigration and fraud in the asylum system.

## **VI. Reconsideration of a Negative Credible Fear Determination**

FAIR supports repeal of 8 C.F.R. § 208.30(g)(2)(i), which currently allows USCIS to reconsider a negative credible fear determination after it has been reviewed and upheld by an immigration judge. Given the immigration judges ability to review all negative credible fear determinations de novo and accept additional evidence, the current process

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<sup>48</sup> Fleeing poverty and generalized crime in one's home country does not qualify an individual for asylum in the United States. See, e.g., *Hui Zhuang v. Gonzales*, 471 F.3d 884, 890 (8th Cir. 2006) ("Fears of economic hardship or lack of opportunity do not establish a well-founded fear of persecution.").

provides aliens an unnecessary layer of review that only serves to further slow the expedited removal process beyond what Congress intended.

FAIR agrees with the Department's assessments that the repeal of 8 C.F.R. § 208.30(g)(2)(i) more closely aligns with the statutory scheme of INA § 235, under which it is the immigration judge review of the credible fear determination that serves as the check to ensure that individuals who have a credible fear are not returned based on an erroneous screening determination by USCIS.<sup>49</sup> The clarification that the immigration judge has sole jurisdiction to review the individual's negative credible fear determination and that asylum officers may not reconsider or reopen a determination that already has passed to the jurisdiction of the immigration judge is necessary to ensure that requests for reconsideration to USCIS do not obstruct the streamlined process that Congress intended in creating expedited removal.

The practice of filing requests for reconsideration for claims that have already been screened or adjudicated and subsequently reviewed *de novo* by an immigration judge in INA § 240 removal proceedings has become an overwhelmingly popular tactic to delay the removal of aliens in expedited removal without meritorious fear claims. Such tactics only serve to further drain USCIS resources and divert resources away from alien with legitimate and unresolved fear claims. FAIR respectfully urges the Departments to enact this change regardless of whether the other process changes this rule proposes are implemented.

## **VII. Alternative Reforms Needed To Address the Border Crisis and Mass-Asylum Fraud**

While FAIR agrees with the Departments' assessment that the asylum system is "overwhelmed and in desperate need of repair," this proposed rule does not make any reforms that will address the surge in asylum claims received by DHS as a result of the ongoing crisis at the southern border. Instead, the proposed rule will perversely encourage more illegal immigration into the United States by promising and fraudulent asylum claims which divert agency resources from the consideration and adjudication of legitimate fear claims.

Further, while administrative reforms are sorely needed to promote efficiency in USCIS's administration of immigration benefits, these reforms should not come at the expense of the American public, who are the primary stakeholders in their country's immigration system. Thus, FAIR urges DHS to heavily weigh national security interests, public safety interests, and the overall integrity of the immigration system when evaluating reforms to enhance access to the immigration system and to protect the interests of American

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<sup>49</sup> See INA § 235(b)(1)(B),

residents and workers, on whose behalf Congress has created numerical and categorical limitations in immigration law to protect.

The Departments cannot claim to be addressing EOIR's backlog by simply not adding existing cases to the immigration courts' dockets and piling them onto the USCIS Asylum Division's backlog instead. Rather, DHS and DOJ must make the following reforms to deter illegal immigration, fraudulent asylum claims, and support the overall integrity of the immigration system.

**A. Reinstate the Migrant Protection Protocols (“MPP”) or Otherwise Implement Section 235(b)(2)(C) of the INA**

FAIR urges DHS to continue operation of INA § 235(b)(2)(C) and require certain arriving aliens to wait in Mexico pending their removal proceedings with an immigration judge in the United States as an alternative to detaining arriving aliens in the United States under INA § 235(b)(1) (known as “expedited removal” proceedings) or removal proceedings pursuant to INA § 235(b)(2)(a)(i). DHS's operation of MPP, which implemented INA § 235(b)(2)(C), has a proven track record to reduce illegal immigration across the southern border and successfully ended the 2019 border crisis. DHS should reinstate MPP to end the current crisis.

The availability of employment authorization with a pending asylum application, combined with “catch-and-release” policies that ensure most aliens can avoid detention and be released into the United States, provides a strong incentive for illegal border crosses, and once apprehended by DHS, for making a fraudulent or frivolous asylum claims and later disappear into the interior of the United States. By eliminating the possibility of release into the interior of the United States pending an alien's immigration court hearing, MPP eliminated the most significant pull factor for illegal border crossings. MPP also provides amenable aliens a significantly quicker avenue to an immigration hearing, where they are able to pursue a claim for any relief or benefits for which they may be eligible. Reducing the overall numbers of fraudulent and frivolous claims is critical to allow both DHS and DOJ to reduce their backlogs and allow legitimate asylum seekers access to benefits without unreasonable delays.

**B. Reunite Unaccompanied Alien Minors with the Families in their Home Countries**

DHS must ensure that all inadmissible families and unaccompanied alien minors who arrive illegally and are ineligible to obtain a lawful immigration status are reunited safely at home, not in the United States. Repatriating and reuniting aliens in their home countries, rather than in the United States, is the most humane policy that maintains the integrity of the immigration system, consistent federal immigration law. Importantly, this



policy would eliminate the incentive to send minors on the dangerous journey alone or with smugglers to illegally cross the southern border and will mitigate the humanitarian crisis that has unsustainably strained and diverted the immigration system's limited resources.

### **C. Require Asylum Officers to Apply the Mandatory Bars to Asylum and CAT protections to Credible Fear Screenings**

FAIR strongly urges the Departments to implement the joint final rule, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020), which among many important updates and clarifications to the asylum process, requires USCIS asylum officers to apply the mandatory bars to asylum and statutory withholding of removal at the credible fear stage. Specifically, DHS should require asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under INA § 208(a)(2)(B)-(D), or the bars to asylum eligibility under INA § 208(b)(2), including any eligibility bars established by regulation under INA § 208(b)(2)(C); and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the regulations implementing CAT.

With this policy in place, an alien who establishes a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal should receive a negative fear determination, unless the alien establishes a reasonable possibility of torture, in which case he or she should be referred to the immigration court for asylum-and-withholding-only proceedings. In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations.

As DHS and DOJ have jointly acknowledged, it is pointless, wasteful, and inefficient to adjudicate claims for relief in section 240 proceedings when it can be determined that an alien is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage. Accordingly, applying those mandatory bars to aliens at the "credible fear" screening stage would eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate the waste of adjudicatory resources currently expended in vain. These resources could instead be used to process and adjudicate claims from applicants that have a greater likelihood of success in their asylum application.

### **D. Maintain "Last in, First Out" Processing Priorities**

USCIS should maintain its “Last In, First Out” asylum application processing priorities. Giving priority to recent filings allows USCIS to promptly place such individuals into removal proceedings, which reduces the incentive to file for asylum solely to obtain EAD. This approach, which had been used for nearly two decades, paused in 2014 and reinstated in 2018, also has allowed USCIS to decide qualified applications in a more efficient manner and allowed the agency to focus more resources on applications that are more likely to be meritorious as a result.

### **E. Terminate the Unlawful Deferred Action for Childhood Arrivals (“DACA”) Program**

DHS must immediately terminate the unlawful DACA program, which allows certain illegal aliens who arrived in the United States as minors to apply for a two-year forbearance of removal.<sup>50</sup> Continuing DACA through rulemaking is both unlawful and bad immigration policy. Recent judicial decisions have held that DACA violates both substantive and procedural requirements under federal law.<sup>51</sup> As a result, any regulatory proposal to maintain DACA will not only continue to fuel the crisis on the Southern border, encourage the inhumane trafficking of minors, and have catastrophic impact on border security, but will also be ultra vires.<sup>52</sup> DACA is unsupportable under federal law and the U.S. Constitution and should be set aside as a reckless immigration policy.

As an unauthorized and unfunded program, all costs stemming from implementation of this program, including manpower, diverts attention and resources from lawful immigration programs, which only increase costs and delays for legitimate immigrant and nonimmigrant programs. More importantly, the creation of the DACA program is one of the strongest pull-factors that ignited recent border crisis. U.S. Customs and Border Protection (“CBP”) began reporting unprecedented numbers of illegal border crossing of unaccompanied alien minors and family units in excess of single adult aliens after the U.S. Government began signaling an unwillingness to enforce immigration law against these populations.<sup>53</sup> The humanitarian crisis on the border continues to serve as a threat to national security, public health, wage levels and employment security, and poses unsustainable strains to DHS, DOJ and Department of Health and Human Services (“HHS”) resources.

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<sup>50</sup> See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891(2020).

<sup>51</sup> See *State of Texas, et al., v. United States of America, et al.*, 1:18-CV-00068, (S.D. Texas July 16, 2021) (“Texas II”).

<sup>52</sup> *Id.*

<sup>53</sup> U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children FY 2014*, (Nov. 2015) available at <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014>.

## VIII. Conclusion

**FAIR strongly urges the Departments to withdraw the proposed rule and, instead, implement reforms that will discourage illegal immigration into the United States, remove incentives to submit fraudulent or frivolous asylum claims, and regain order on the U.S.-Mexico border.** Although the process the Departments have proposed may alleviate some processing hurdles, it does nothing to discourage illegal immigration or eliminate any incentive to make a fraudulent credible fear claim. Rather, the reform will streamline but weaken the credible fear review process, resulting in a higher rate of aliens without adequate claims receiving protection from removal, which in turn, will only encourage more illegal immigration and fraudulent asylum claims. Further, the proposed rule will stand up a systematic violation of Congress's mandatory detention requirements for the sole purpose of alleviating administrative complications that the proposed rule will itself create.

FAIR also suggests the Departments maintain provisions repealing regulations that permit reconsideration of a negative credible fear determination after an immigration judge has concurred with the asylum officers finding. This commonsense reform will save agency resources by eliminating redundancies in the credible fear review process and further Congress's intent that the expedited removal process allow for fair and expeditious review of fear claims.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dan Stein', written in a cursive style.

Dan Stein  
President  
Federation for American Immigration Reform (FAIR)