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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.



May 31, 2022

Ms. Samantha Deshommès
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20746

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. Deshommès,

The Federation for American Immigration Reform (“FAIR”) respectfully submits the following public comment to the U.S. Department of Homeland Security (“DHS”) in response to the agency’s request for information, as published in the Federal Register on March 29, 2022. *See Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers* (DHS Docket No. No. USCIS-2021-0012; A.G. Order No. 5369-2022).

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. FAIR 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).¹

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

With Executive Order 14010, the President gave 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.”⁶ While the President’s 270-day deadline for the new regulation concluded on October 29, 2021, the Office of Management and Budget has included the rule in the Unified Agenda for current year.⁷

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

¹ Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, *Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions, Agency Rule List* (2021), available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1600&csrf_token=EC5F8C36BD571DA1AF8F3FF72E4F197793A9A9C8E6F2421D44D84F12CA3A2ACC6864E1989DC8451C78E373F4883893883D65.

² *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

³ 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.

⁴ *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 218 U.S. App. D.C. 134, 1982 U.S. App. LEXIS 20990 (D.C. Cir.), cert. denied, 459 U.S. 835, 103 S. Ct. 79, 74 L. Ed. 2d 76, 1982 U.S. LEXIS 205 (1982).

⁵ *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 267 U.S. App. D.C. 367, 27 Env’t Rep. Cas. (BNA) 1288, 18 Env’t. L. Rep. 20473, 1988 U.S. App. LEXIS 1626 (D.C. Cir. 1988).

⁶ 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 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).

⁷ Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, *Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions, Agency Rule List* (2021), available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1600&csrf_token=EC5F8C36BD571DA1AF8F3FF72E4F197793A9A9C8E6F2421D44D84F12CA3A2ACC6864E1989DC8451C78E373F4883893883D65.

applications and credible fear claims made and 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 the proposed rule which makes reforms to the process in which these claims will be considered and adjudicated.

II. U.S. Citizenship and Immigration Services (“USCIS”) Jurisdiction Over Applications for Asylum in Expedited Removal

FAIR strongly opposes the creation of new 8 CFR 208.2(a)(1)(ii), 208.30(f), 1208.2, and 1208.30(g), which gives USCIS asylum officers initial jurisdiction over asylum applications in expedited removal. This IFR purports to streamline the adjudication of asylum claims made by aliens in expedited removal by limiting the role of immigration judges from the Department of Justice Executive Office of Immigration Review (“EOIR”) and prosecutors from U.S. Immigration and Customs Enforcement (“ICE”) from credible fear cases and allowing USCIS asylum officers to grant an alien’s defensive asylum application.⁸ Further, for aliens given negative credible fear determinations, the IFR unlawfully requires immigration judges to defer to an asylum officer’s determinations on statutory withholding of removal and Convention Against Torture eligibility.⁹

Not only will the proposed changes remove safeguards in the credible fear process that weed out fraud and ensure protection is 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, historic, and on-going border surge.¹⁰

A. The IFR Unlawfully Limits Immigration Judges’ Authority Over Withholding of Removal and Convention Against Torture Cases

New section 8 C.F.R. § 1240.17(i)(2) unlawfully impedes immigration judges’ authority to consider an alien’s eligibility for statutory withholding of removal and protection under the regulations implementing the CAT. Congress created DHS and reassigned authorities over the immigration system through the Homeland Security Act of 2002.¹¹ The Homeland Security Act of 2002 “charged the Secretary ‘with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,’ . . . and granted the power to take all actions ‘necessary for carrying out’ the Secretary’s authority under the immigration laws.” Further, the Homeland Security Act of 2002 mandated that the Attorney General retain all authorities and functions relating to the immigration and naturalization of aliens as were

⁸ 8 C.F.R. § 208.9.

⁹ New 8 C.F.R. § 1240.17(i)(2).

¹⁰ 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/>.

¹¹ Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002), available at: <https://www.congress.gov/107/plaws/publ296/PLAW-107publ296.pdf>.

exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.¹²

New 8 C.F.R. § 1240.17(i)(2), nevertheless, provides that, where the asylum officer does not grant asylum but determines the respondent is eligible for statutory withholding of removal or CAT relief, and where the immigration judge subsequently denies asylum and issues a removal order, the immigration judge shall generally give effect to the asylum officer's determinations. In such circumstances, the immigration judge must issue a removal order, but the immigration judge “shall give effect to the asylum officer's determination by granting statutory withholding of removal or protection under the CAT unless DHS presents evidence or testimony that specifically pertains to the respondent, that was not in the record of proceedings for the USCIS Asylum Merits interview, and that demonstrates that the respondent is not eligible for the protection in question.”¹³

Immigration judges, however, possessed the sole authority to make protection under statutory withholding of removal and CAT, before and after passage of the Homeland Security Act of 2002. Historically, asylum officers have participated in the *screening* of aliens for eligibility under statutory withholding of removal and CAT in credible fear and reasonable fear screenings. Their determinations did not limit the authority of immigration judges who had sole authority to exercise discretion and make final decisions.

Thus, by restricting immigration judges' authority to consider evidence and exercise discretion with regard to statutory withholding of removal and protection under the regulations implementing CAT, an authority immigration judges retained since the creation of DHS, the IFR violates the Homeland Security Act of 2002. Accordingly, FAIR urges the Departments to comply with the statute, withdraw these provisions, and maintain immigration judge authority in immigration proceedings.

B. Creating a Non-Adversarial Process Will Increase Fraud in the Asylum System

FAIR strongly disagrees with the Departments' assessment that credible fear cases are best handled in a non-adversarial process with USCIS rather than in immigration court. Transitioning from an adversarial process to a non-adversarial process will result in a higher 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

¹² 8 U.S.C. § 1103(g)(1).

¹³ 87 Fed. Reg. 18078, 18083 (Mar. 29, 2022).

2021.¹⁴ U.S. Customs and Border Protection (“CBP”) reported that in just April 2022, officers encountered 234,088 aliens at the southern border. This startling does not include “got-aways,” or aliens who were detected but evaded CBP apprehension.

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 Department of Justice (“DOJ”) immigration judges, the Board of Immigration Appeals (“BIA”), and the U.S. Courts of Appeals.¹⁵ 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).¹⁶ In 2018 specifically, DHS processed 99,035 credible fear claims.¹⁷ Immigration courts received over 162,000 asylum applications in FY 2018, a 270 percent increase from five years earlier.¹⁸ Given CBP has reported that unlawful border crossings have reached a 20 year high in 2021, and an all-time monthly high of 234,088 encounters in April 2022, credible fear and asylum claim totals are expected to 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.¹⁹ 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 application after their fear screening.²⁰ In 2019, a grant of asylum followed a positive credible fear determination just 15% of the time.²¹ This percentage would be significantly smaller if taken all credible fear claims into account.

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

¹⁴ *Id.*

¹⁵ *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934, 55935 (Nov. 9, 2018).

¹⁶ *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829, 33838, (July 16, 2019).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. at 1959, 1967-68.

²⁰ 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).

²¹ See Executive Office of Immigration Review, *Asylum Decision Rates in Cases Originating With a Credible Fear Claim* (Oct. 2019).

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. The regulation's imposition of supervisory review should not be relied upon to correct institutional or cultural misunderstandings in asylum law that could originate as a result of USCIS administrative orders or guidance. Accordingly, improperly lenient case law governing credible fear will rarely have an opportunity be corrected in the imbalanced system the proposed rule creates.

C. The IFR Extends the Credible Fear Appeal Process Beyond the Bounds of Congressional Intent

The asylum application process set up by the IFR 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. Currently, receiving a negative credible fear determination, an alien is able to appeal the negative fear finding to an EOIR immigration judge.²² 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*.²³ 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.²⁴ Finally, the alien, even still, the alien can then file a petition for certiorari with the Supreme Court.

The system proposed by the IFR, however, would also give the alien an opportunity to contest an asylum officer's denial of asylum, statutory withholding, or protection under the regulations implementing CAT in section 240 removal proceedings.²⁵ By allowing an inadmissible alien an the opportunity to introduce even more arguments or evidence in removal proceedings, the applicant would receive from the immigration judge an appeal of the asylum officer's denial.

²² Immigration and Nationality Act ("INA") § 235(b)(1)(B)(III).

²³ 8 C.F.R. § 1003.42; 8 C.F.R. § 1208.31.

²⁴ See INA § 242, 8 U.S.C. § 1252(a)(1).

²⁵ Amended 8 C.F.R. § 208.14 and 8 C.F.R. § 1208.14.

This process 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.²⁶

Accordingly, the proposed process created by the IFR conflicts with the legislative intent in creating 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.²⁷ To accomplish this end, Congress created a statutory scheme to limit administrative review of expedited removal orders,²⁸ impose temporal limits on review of negative credible fear determinations by immigration judges,²⁹ and limit judicial review of determinations made during the expedited removal process.³⁰ 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.

D. The IFR Will Significantly Strain the USCIS Asylum Division

By transferring the significant asylum application burden from EOIR to USCIS, this rule will significantly strain the USCIS Asylum Division, which already has reported over a 432,000 affirmative asylum case backlog this year.³¹ 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.³² 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 IFR, 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.³³ While withholding and deferral of removal under CAT are similar forms of protection from removal to asylum and statutory withholding of removal, the analysis

²⁶ See 8 C.F.R. § 208.30(e)(8).

²⁷ 85 Fed. Reg. 36264, 36267 (Jun. 15, 2020).

²⁸ INA § 235(b)(1)(C).

²⁹ INA § 235(b)(1)(B)(iii)(III).

³⁰ INA § 242(e).

³¹ U.S. Citizenship and Immigration Services, *Number of Service-wide Forms Fiscal Year to Date by Quarter and Form Status* (2022), available at https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2022_Q1.pdf.

³² 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*, 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/>.

³³ 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).

required for CAT protection is significantly more fact-intensive than typical asylum 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.³⁴ 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 be 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.”³⁵ Unlike asylum eligibility, no specific reason 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 section 240 removal proceedings), the USCIS Asylum Division is not equipped to quickly process full asylum 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 migrate to 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 scare agency resources from aliens who submit affirmative asylum applications in addition to unaccompanied alien minors (“UACs”), over whose asylum claims USCICS has initial jurisdiction over.

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 7 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

³⁴ INA § 208; INA § 241(b)(3)(B).

³⁵ 8 C.F.R. § 208.18.

the veracity of the claims made.³⁶ 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.³⁷ 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.³⁸

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.³⁹ 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.”⁴⁰ 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 changes 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 Abuse of the Parole Authority

FAIR disagrees with the Departments’ interpretation of the parole statute, articulated in the response in the IFR stating that DHS may release alien using humanitarian parole on the basis of resource constraints,⁴¹ or where detention is “unavailable” and “impractical,” as the NPRM originally sought to codify.⁴² FAIR recognizes that the IFR amended the language of the NPRM to replace the “unavailable or impractical” language mirroring current 8 C.F.R. § 212.5(b), but FAIR remains alarmed at DHS’s interpretation of the Immigration and Nationality Act (“INA”)

³⁶ 8 C.F.R. § 208.30(d).

³⁷ Proposed 8 C.F.R. § 208.3.

³⁸ 8 C.F.R. § 208.30(d)(6).

³⁹ INA § 208(b)(1)(B)(III).

⁴⁰ *Id.*

⁴¹ 87 Fed. Reg. 18078, 18108 (Mar. 29, 2022).

⁴² 86 Fed. Reg. 46946 (proposed 8 CFR 235.3(b)(2)(iii)).

§ 212(d)(5) and the agency’s willingness to abuse the parole authority to grant parole *en masse*, directly in contradiction to the statute and Congress’s intent.

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. 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.⁴³ 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.”⁴⁴

Further, when DHS places an applicant for admission into section 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 retain the discretion to parole certain aliens for urgent humanitarian reasons or a significant public benefit.⁴⁵ 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.”⁴⁶ The statute emphasizes that DHS “may not parole into the United States an alien who is a refugee unless the Attorney General determines 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.”⁴⁷ 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.”⁴⁸

The history of the parole statute, however, 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.⁴⁹ According to the House Judiciary Committee, Congress tightened the parole authority because:

⁴³ INA § 235(b)(1)(A)(i).

⁴⁴ INA § 235(b)(1)(B)(ii).

⁴⁵ INA § 212(d)(5); *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

⁴⁶ 8 U.S.C. § 1182(d)(5)(A).

⁴⁷ 8 U.S.C. § 1182(d)(5)(B).

⁴⁸ 8 C.F.R. § 235.3(b)(2)(iii), (b)(4)(ii).

⁴⁹ 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 207.” 8 U.S.C. § 1182(d)(5)(B). In 1996,

“[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.”⁵⁰

As the Fifth Circuit recently explained in *Texas v. Biden*, 20 F.4th 928, 947 (5th Cir. 2021), the “[q]uintessential modern uses of the parole power include, for example, paroling aliens who do not qualify for an admission category but have an urgent need for medical care in the United States and paroling aliens who qualify for a visa but are waiting for it to become available.” Congress has limited this authority. “DHS cannot use that power to parole aliens *en masse*; that was the whole point of the ‘case-by-case’ requirement that Congress added in IIRIRA.”⁵¹

FAIR notes that Departments continue to mischaracterize *Jennings v. Rodriguez* to support an abuse of the parole authority. The Supreme Court in *Jennings* does not interpret the limits of INA § 212(d)(5), which limits parole on to “urgent humanitarian or significant public interest” grounds.⁵² Rather, the Court affirms Congress’s mandate that arriving aliens subject to INA § 235(b) be detained “throughout completion of applicable proceedings.”⁵³ The Departments’ interpretation, conversely, indicates that the government intends to set forth process that will allow DHS to release aliens whenever an administration determines 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.

Granting parole on the basis of resource constraints alone, however, directly conflicts with Congress’s explicit delegation of a limited parole authority to DHS. An unavailability of detention space may be entirely unrelated to urgent humanitarian or significant public interest concerns. For instance, an administration could unilaterally decide that resource and logistical 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.

Further, DHS’s unlawful interpretation of its parole authority beacons the message that all an alien who illegally crosses the border needs 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 IFR 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 of detention

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.

⁵⁰ H.R. Rep. No. 104-469, at 140 (1996).

⁵¹ See *Texas v. Biden*, 20 F.4th 928, 947 (5th Cir. 2021)

⁵² *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

⁵³ *Id.*

will become an inevitability,⁵⁴ and will unlawfully supplement the immigration scheme mandated by Congress.

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 § 240.⁵⁵ Parole on the basis of resource limitations or the unavailability 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.

V. Employment Authorization Documents

FAIR agrees with 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.⁵⁶ It would be unreasonable to conclude that Congress regulated employment by aliens as 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.⁵⁷ 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. 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. *Id.* Because aliens who

⁵⁴ 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>.

⁵⁵ INA § 235(b)(2)(C).

⁵⁶ See 8 U.S.C. § 1101 et seq.

⁵⁷ 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’n*, 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.”).

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 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 section 1324a of the INA. 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 as well as torture.⁵⁸ Providing work authorization to applicants for admission, who make credible 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 urges the Departments to return to the NPRM's proposal and repeal of 8 C.F.R. § 208.30(g)(2)(i), which currently allows USCIS to reconsider a negative credible fear

⁵⁸ 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.").

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

FAIR believes that the Departments' original assessment that the repeal of 8 C.F.R. § 208.30(g)(2)(i) more closely aligns with the statutory scheme of INA § 235(b)(1)(B), 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. 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 section 240 removal proceedings has become an overwhelmingly popular tactic to delay the removal of aliens without meritorious fear claims in expedited removal. 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. Incomplete Cost Analysis

The Departments' cost analysis, detailed in Section V.B of the preamble of the IFR, is inadequate and does not account for the costs that state and local entities, as well as the general American public, will incur by the increase in illegal immigration this rule will provoke. States spend significant amounts of money providing services to illegal aliens because of the United States government's failure to enforce federal law.⁵⁹ These benefits include health care, education, and numerous other taxpayer-funded benefits,⁶⁰ as well as divert judicial and law enforcement resources to apprehend, detain, prosecute, and defend criminal alien offenders.

In addition to foreseeable fiscal costs, increased illegal immigration also has an impact on national security, public safety, employment, and the environment.⁶¹ These expenses are exacerbated in jurisdictions with non-cooperation laws and policies (sometimes referred to as "sanctuary policies"), which force state and local law enforcement to release removable criminal

⁵⁹ Federation for American Immigration Reform, *2021 Update: How Many Illegal Aliens Live in the United States?* (Apr. 2022), available at <https://www.fairus.org/issue/illegal-immigration/2021-update-how-many-illegal-aliens-live-united-states>; Federation for American Immigration Reform, *2021 Year in Review: Biden's Immigration Numbers Reveal Record Failures, Costs and Risks to Americans* (Dec. 2021), available at <https://www.fairus.org/issue/border-security/2021-year-review-biden-immigration-numbers-record-failures-costs>.

⁶⁰ For example, federal law requires states to include illegal aliens in its Emergency Medicaid program, which provides health care coverage for low-income children, families, seniors and the disabled. The program costs the State of Texas alone tens of millions of dollars annually.

⁶¹ Testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform Before the U.S. Senate Committee on the Judiciary Subcommittee on Immigration and Refugee Affairs, August 3, 1994.

aliens back into communities instead of transfer custody to federal immigration officials for immigration proceedings.

As of the end of 2021, FAIR calculated that approximately 15.5 million illegal aliens reside within the United States, costing U.S. taxpayers an estimated \$132 billion annually.⁶² The Biden administration's lax enforcement policies have contributed substantially to this burden. In April 2022, FAIR reported that during the first year of the Biden administration, the illegal alien population of the United States increased by about 1 million, adding an additional \$9.4 billion in costs to American taxpayers.⁶³ This increase is in large part due to DHS's abuse of parole, a practice of which is reasonably foreseeable that the IFR will exacerbate.

VIII. 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 as a result of the on-going 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 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, deter fraudulent asylum claims, and support the overall integrity of the immigration system.

A. Fully Implement the Migrant Protection Protocols ("MPP") or Otherwise Operationalize Section 235(b)(2)(C) of the INA

FAIR urges DHS to robustly utilize INA § 235(b)(2)(C) and require amenable 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 expedited removal,

⁶² Federation for American Immigration Reform, *2021 Update: How Many Illegal Aliens Live in the United States?* (Apr. 2022), available at <https://www.fairus.org/issue/illegal-immigration/2021-update-how-many-illegal-aliens-live-united-states>.

⁶³ Federation for American Immigration Reform, *Biden's Policies Fueled One Million New Illegal Aliens and Added Nearly \$10 Billion in Costs During his First Year in Office, Finds New FAIR Study* (Apr. 2022), available at <https://www.fairus.org/press-releases/illegal-immigration/bidens-policies-fueled-one-million-new-illegal-aliens-and-added>.

pursuant to INA § 235(b)(1), 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.⁶⁴ DHS should reinstate MPP to end the current crisis.

In August, the U.S. District Court for the Northern District of Texas ruled that DHS had not lawfully terminated MPP and issued an order requiring DHS to restart the program.⁶⁵ The court order prohibits DHS from terminating the program until the Department is both able to fully comply with procedures required by the Administrative Procedures Act and is able to regain control of the border.⁶⁶ The court concluded that MPP's termination has, in large part, caused the massive spike of illegal border crossing, prompting DHS to violate federal law to attempt to manage the crisis.⁶⁷

In December 2021, the Court of Appeals for the Fifth Circuit upheld the court order.⁶⁸ The Fifth Circuit Court of Appeals agreed that in terminating MPP, DHS violated both the APA and violated Congress's statutory mandates in the INA. The Court of Appeals determined, "[t]he Government's position thus boils down to this: We can't do one thing Congress commanded (detain [inadmissible aliens in the United States pending their immigration hearings as required by federal law]), and we don't want to do one thing Congress allowed [implement MPP]. Parole does not provide a way out of the box created by DHS's can'ts-and-don't-wants."⁶⁹ The court went on to condemn DHS's abuse of parole, referring to the practice as DHS's "pretended power to parole aliens while ignoring the limitations Congress imposed on the parole power."⁷⁰ Despite the clear language of the court order, DHS continues to unlawfully release aliens *en masse* into the United States and has placed a negligible number of aliens into MPP.⁷¹

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

⁶⁴ U.S. Citizenship and Immigration Services, *Credible Fear Workload Report Summary, FY2019 Total Caseload, U.S. Citizenship and Immigration Services* (undated), available at:

https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf; U.S. Department of Homeland Security, *Assessment of the Migrant Protection Protocols (MPP)* (October 28, 2019), available at https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf

⁶⁵ *Texas v. Biden*, No. 2:21-CV-067-Z (N.D. Tex. Aug. 13, 2021).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021).

⁶⁹ *Id.* at 996.

⁷⁰ *Id.* at 998.

⁷¹ U.S. Department of Homeland Security, *Migrant Protection Protocols Cohort Reports* (May 2022), available at <https://www.dhs.gov/immigration-statistics/special-reports/migrant-protection-protocols-report>.

to allow both DHS and DOJ to reduce their backlogs and allow legitimate asylum seekers access to benefits without unreasonable delays.

B. End the 1997 Flores Settlement Agreement and Comply with the INA's Detention Requirements for Recent Inadmissible Alien Arrivals

DHS must also take action to end the 1997 Flores Settlement Agreement (“FSA”) if it wants to take meaningful action to end the border crisis. Expedited removal is only effective when DHS is able to, consistently with Congressional design, detain aliens pending completion of their proceedings. The near guarantee of family unit release into the United States as a result of the FSA’s outdated restrictions on detention is a strong and well-known pull-factor for illegal immigration and has caused the humanitarian crisis at Southern border.⁷²

As DHS has explained in detail in its 2019 *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children* rule, the restrictions created by the FSA and limited detention space prevent DHS from detaining most family units for sufficient time to receive an immigration court ruling.⁷³ Coupled with the Biden administration’s current refusal to use its authority to process most amenable illegal border crossers under MPP, DHS unlawfully paroles most family units who cross the border illegally.⁷⁴ Prospective migrants to the United States, including adults and criminal organizations, are aware of this loophole to U.S. immigration law and exploit children to enter the United States.⁷⁵ Often, these inadmissible aliens disappear into the interior of the country without ever appearing before an immigration judge.⁷⁶

Consistent with DHS’s longstanding position, a bipartisan DHS panel in 2019 confirmed that the likelihood of release from DHS custody is a primary pull-factor for aliens seeking to illegally

⁷² Specifically, the FSA and subsequent, related court rulings restricted DHS’s ability to keep minors (including minors who are accompanied by an adult relative) in family residential centers (“FRCs”) for periods longer than 20 days. Under the FSA, the government must release unaccompanied alien minors, without unnecessary delay, to parents, other close relatives, or a suitable guardian, pending a determination of the unaccompanied alien minors’ claims to remain in the United States. The agreement also reasonably stipulated that if there was no suitable relative or guardian to take custody, minors would be held in the “least restrictive” setting possible, and receive basic comforts and amenities. In 2015, the U.S. Court of Appeals for the Ninth Circuit extended this consent decree to include family units. *See Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015). As a result, DHS cannot detain any adult migrant arriving to the United States with a relative child in excess of 20 days. The agreement, however, is inconsistent with federal laws that require certain recent border crossers to remain in federal detention for the duration of their immigration court hearings. It also disrupted the careful scheme Congress explicitly created to manage border surges and encounters with alien minors.

⁷³ 84 Fed. Reg. 44392, 44398-99 (Aug. 23, 2019) (explaining the history of the *Flores* Settlement Agreement).

⁷⁴ *See Texas v. Biden*, No. 21-10806 at 105-6 (5th Cir. 2021).

⁷⁵ Homeland Security Advisory Council, *Final Emergency Interim Report, CBP Families and Children Care Panel* (Apr. 2019), available at https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

⁷⁶ Jon Feere, Center for Immigration Studies, *Thousands of Aliens Released at the Border on the Honor System, DHS data show that around 80% don't report in* (Jul. 15, 2021), available at <https://cis.org/Feere/Thousands-Aliens-Released-Border-Honor-System>.

cross the U.S. border to bring a child with them.⁷⁷ In its interim report, the panel urged DHS to take immediate action to roll-back the FSA, concluding:

Emergency legislation is needed that limits Flores to unaccompanied minors, but if such legislation is delayed, we recommend that this be done by emergency regulation that, because of the FMU migration crisis, dispenses with ordinary Notice and Rulemaking. The emergency regulation would recognize that, unlike UACs, in some cases FMUs must be held beyond 20 days in order to (1) determine whether there is an actual parental relationship, (2) establish identity, (3) conduct (an unhurried) credible fear interview, (4) make sure the child's healthcare is examined and any issues, especially communicable diseases are taken care of before release for the sake of the child and to assure public health is not threatened in interior urban areas to which the FMUs intend to alight upon release, (5) keep the FMUs intact if it is ineligible for asylum or otherwise, (6) schedule expeditious chartered repatriation for those who are subject to expedited removal, and/or (7) for those eligible after credible fear interview, and based on a release more time to effect a safe and orderly re-settlement. Whether a Flores roll-back is by emergency regulation or as part of emergency legislation, this recommendation is too important and too urgent to reducing risk to accompanied children to be delayed any longer. The lives of children who will be making the treacherous journey are at risk.⁷⁸

Accordingly, DHS must reissue regulations to void the FSA and defend such regulation against litigation that is likely to repeat in the Ninth Circuit. Such regulation, like DHS's *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children* (August 23, 2019), must generally permit DHS to detain accompanied alien minors with their adult relatives. A regulation must also ensure that accompanied alien minors are only given parole consistent with regulations governing parole for all other aliens: "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."⁷⁹ Current DHS regulations interpret the parole statute to only permit a grant of parole in cases of medical necessity or a law-enforcement need.⁸⁰

A new regulation, consistent with DHS's final rule published in 2019, must also allow U.S. Immigration and Customs Enforcement ("ICE") to establish family residential standards without the existence of state licensing. Most states only have licensing laws governing the housing of unaccompanied minors, but not minors who are accompanied by parents or adult relatives.

Replacing the state licensing requirement with an alternative but equivalent federal licensing scheme is necessary to ensure that DHS has the resources and capacity to humanely detain family units who have recently crossed the border pending the duration of their immigration court proceedings. Such a regulation must comply with the relevant and substantive terms of the FSA regarding the conditions for custodial settings for minors, but, through federal licensing, DHS can provide the flexibility necessary to enhance public safety and enforce immigration laws given current challenges that did not exist when the FSA was executed.

Given the likelihood of continued litigation, DHS must also concurrently work with Congress to support legislation to supersede the FSA. A legislative solution terminating the Settlement

⁷⁷ Homeland Security Advisory Council, *Final Emergency Interim Report, CBP Families and Children Care Panel* (Apr. 2019), available at https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

⁷⁸ *Id.* at 9, n. 8.

⁷⁹ INA § 212(d)(5).

⁸⁰ See 8 C.F.R. § 235.3(b)(4)(ii), (b)(2)(iii).

Agreement or otherwise limiting the FSA's applicability to unaccompanied alien minors would ensure DHS is not forced to violate unrelated provisions of federal immigration law, such as INA § 235 and INA § 212(d)(5), by releasing family units from mandatory detention or separate families to accommodate resource limitations.

C. Rescind the Biden Administration's Non-Enforcement Policies and Resume Worksite Enforcement

FAIR urges DHS to allow ICE to enforce immigration laws by removing arbitrary limitations on who may be arrested or removed. DHS must immediately rescind its recent policies: *Guidelines for the Enforcement of Civil Immigration Law*, September 30, 2021; *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*, October 12, 2021; *Rescission of Civil Penalties for Failure-to-Depart policy*, April 23, 2021; and *Civil Immigration Enforcement Actions in or near Courthouses*, April 27, 2021.

ICE has a Congressionally-mandated role to enforce our immigration laws in the interior of the country. Preventing ICE officers from initiating audits and enforcement actions serves no purpose aside from signaling to the world that the U.S. Government does not intend to enforce immigration laws against the vast majority of aliens unlawfully in the United States. The Biden administration's policies not only threaten public safety and undermine the integrity of the immigration system, but also incentivize illegal immigration and wayward employers to hire unauthorized aliens. These policies must be rescinded immediately to reduce significant and needless strains on the asylum system and restore order on our border.

Furthermore, eradicating unauthorized employment is essential when it comes to enforcing immigration laws as a whole and eliminating pull factors for future illegal immigration into the United States. As Barbara Jordan, chairwoman of the Clinton administration's Commission on Immigration Reform and a civil rights activist, explained in 1994, "As long as U.S. businesses benefit from the hiring of unauthorized workers, control of unlawful immigration will be impossible."⁸¹ For that reason, the Commission concluded that "both employer sanctions and enhanced labor standards enforcement are essential components of a strategy to reduce the job magnet."⁸²

Without engaging in widespread audits and enforcement actions, unscrupulous employers are emboldened to maintain unlawful employment practices and migrants are encouraged to enter the United States illegally. FAIR urges DHS to instead prioritize interior immigration enforcement, including worksite enforcement, to cut off the economic pull-factor for migrants to enter the United States illegally and thereby end family separation at the border.

⁸¹ Testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform Before the U.S. Senate Committee on the Judiciary Subcommittee on Immigration and Refugee Affairs, August 3, 1994.

⁸² *Id.*

D. Increase DHS's Family Detention Capacity

Unless DHS utilizes MPP to manage illegal immigration across the southern border, it must increase its family detention capacity in order to lawfully respond to the growing rate of family unit apprehensions at the southern border. Currently, DHS only has just three family residential centers (“FRCs”), with a combined detention capacity of just 3,326 people.⁸³ To put this figure in perspective, CBP encountered over 54,773 family units in the month of April 2022 alone.⁸⁴ As explained above, the Fifth Circuit Court of Appeals determined that DHS’s use of parole to manage the large numbers of illegal border crossers was inconsistent with federal law. The Court of Appeals condemned the administration’s excessive use of parole, referring to the practice as DHS’s “pretended power to parole aliens while ignoring the limitations Congress imposed on the parole power.”⁸⁵ The INA only allows DHS to parole aliens on only a case-by-case basis for “urgent humanitarian or significant public benefit” reasons.⁸⁶

Accordingly, FAIR urges DHS to work with Congress and states to ensure DHS is able to detain all family units subject to mandatory detention under the INA in the United States in FRCs, maintain current policies that permit credible fear claims to be considered together, and eliminate the incentive for aliens to traffic children across the border. DHS’s practice of paroling family units into the United States as a band aid to maintain family unity in light of the FSA is both unlawful and bad immigration policy. Maintaining custody of family units not placed in MPP will deter illegitimate asylum seekers and criminal aliens from exploiting loopholes in the asylum system to gain entry in the United States and inevitably overwhelming Border Patrol and the defensive immigration system.

E. 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.

⁸³ U.S. Immigration and Customs Enforcement, *Detention Management* (May 2022), available at <https://www.ice.gov/detain/detention-management>.

⁸⁴ U.S. Customs and Border Protection, *Southwest Land Border Encounters* (May 2022), available at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁸⁵ *Texas v. Biden*, No. 21-10806 (5th Cir. 2021).

⁸⁶ INA § 212(d)(5).

F. Require Asylum Officers to Apply the Mandatory Bars to Asylum and CAT protections to Credible Fear Screenings

FAIR strongly urges the Departments to 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.

FAIR disagrees with the Departments justification to exclude this reform to credible fear screenings. The Departments defended the decision in part because they reasoned that, “[r]equiring asylum officers to broadly apply the mandatory bars at credible fear screening would increase credible fear interview and decision times because asylum officers would be expected to devote time to eliciting testimony, conducting analysis, and making decisions about all applicable bars.”⁸⁷ As the Departments established in 2020, however, asylum officers already assess whether certain bars may apply to applications in the credible fear context, “they simply do not apply them under current regulations.”⁸⁸ FAIR stresses that making this reform will facilitate backlog reduction by weeding out cases that asylum officers already know do not have a “significant possibility” of eligibility for protection.

FAIR agrees with the Departments 2020 determination that 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.⁸⁹ Accordingly, applying those mandatory bars to aliens at the “credible fear” screening stage would eliminate removal delays inherent in section 240 proceedings that

⁸⁷ 87 Fed. Reg. 18078, 18093 (Mar. 29, 2022).

⁸⁸ 85 Fed. Reg. 80274, 80296 (Dec. 11, 2020); See Government Accountability Office, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* at 10 (Feb. 2020), <https://www.gao.gov/assets/710/704732.pdf> (“In screening noncitizens for credible or reasonable fear . . . [a] USCIS asylum officer is to determine if the individual has any bars to asylum or withholding of removal that will be pertinent if the individual is referred to immigration court for full removal proceedings.”); U.S. Citizenship and Immigr. Serv., *Lesson Plan on Credible Fear of Persecution and Torture Determinations* at 31 (2019), <https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf> (“Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not.”).

⁸⁹ 85 Fed. Reg. 36264, 36272 (Jun. 15, 2020).

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.

G. 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 an 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.

H. 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.⁹⁰ 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.⁹¹ 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.⁹² DACA is unsupported 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 man-power, 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. 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.⁹³ 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 on DHS, DOJ and HHS resources.

⁹⁰ See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891(2020).

⁹¹ See *Texas, et al., v. United States of America, et al.*, 1:18-CV-00068, (S.D. Texas July 16, 2021) (“Texas II”).

⁹² *Id.*

⁹³ 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>.

IX. Conclusion

FAIR strongly urges the Departments to withdraw the IFR. Instead, the Departments must implement reforms to 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.

The need for administrative deterrence is critical given the current border crisis, specifically the sharp increase of encounters with aliens, 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. But instead of deterring fraud and abuse, the IFR will 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. In doing so, the IFR will unlawfully restrict immigration judges' authority over withholding of removal and CAT. Further, the IFR will stand up a systematic violation of Congress's mandatory detention requirements for the sole purpose of alleviating administrative complications that the IFR will itself create.

FAIR urges the Departments to heavily weigh national security, public safety, and the overall integrity of our immigration system when drafting immigration rules. The humanitarian crisis on the border continues to serve as a threat to national security, public health, wage levels, employment security, and poses unsustainable strains on government resources. The IFR addresses none of these things.

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)