INNOVATION LAW LAB

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RE: RIN 1615-AC67; Public Comment on Proposed Rules on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers

Our organization, Innovation Law Lab ("Law Lab"), submits this comment urging the Department of Homeland Security ("DHS") and Department of Justice ("DOJ") (collectively, "the Departments" or "the agencies"), to substantially revise the proposed rule.[1] Law Lab appreciates that the Departments are open to re-envisioning certain aspects of the asylum system. Indeed, Law Lab supports the proposal to roll back changes to the expedited removal process, and the proposal that credible fear interviews be conducted in a nonadversarial context by asylum officers. However, we can not support the proposed rule without adding more due process protections. We have grave concerns that, as written, the proposed rules will lead to many asylum seekers being rushed through a "streamlined" system where their due process rights are greatly reduced. In particular, we are concerned that this streamlined system violates the right to counsel during asylum proceedings as guaranteed by the U.S. Constitution and the Immigration and Nationality Act ("INA"). Instead, Law Lab proposes modifications to the proposed rule in order to safeguard the due process rights of asylum seekers.

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014 in response to the mass detention and deportation of asylum seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country. Innovation Law Lab works directly with low-income immigrants and the pro bono attorneys who serve them, providing legal services, direct representation, and tactical support before U.S.

[1] U.S. Dep't of Homeland Security & Exec. Off. for Immigr. Review, "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 86 FR 46906, (Aug. 20, 2021), https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat (hereinafter "proposed rule").

Citizenship and Immigration Services ("USCIS") and the Executive Office for Immigration Review ("EOIR").

1. **The Streamlining Proposal Violates the Due Process Guarantees of the U.S. Constitution and the INA, which Provide a Right to Counsel in Removal Proceedings.**

We strongly object to proposed sections 8 CFR §§ 1003.48 and 208.14(c)(5) because the focus on "streamlining" asylum ("Streamlining Proposal") eviscerates the due process guarantees of the U.S. Constitution and the INA. Both the Constitution and the INA entitle asylum seekers to meaningful access to counsel during asylum proceedings. The Due Process Clause of the Fifth Amendment protects the right of noncitizens to consult with and obtain counsel during immigration proceedings. *See, e.g.*, *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554, 565 (9th Cir. 1990) (recognizing that noncitizens "have a due process right to obtain counsel of their choice at their own expense," and affirming injunction against the government's cumulative practices that "prevent[ed] aliens from contacting counsel and receiving any legal advice"); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the [Fifth Amendment] Due Process Clause"). "While the right to counsel in immigration proceedings is rooted in the Due Process Clause, the right to counsel in expedited removal proceedings is also secured by statute." *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012) (internal quotation marks and citation omitted). A noncitizen "may consult with a person or persons of [their] choosing prior to the [credible fear] interview or any review thereof" by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iv); *see also* 5 U.S.C. § 555(b) (entitling all persons "to be accompanied, represented, and advised by counsel" whenever "compelled to appear in person before an agency or representative thereof"). This statutory right to counsel extends throughout the course of immigration proceedings. 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (guaranteeing right to counsel in removal proceedings at no cost to the government).

The Streamlining Proposal under proposed sections 8 CFR §§ 1003.48 and 208.14(c)(5) would dramatically alter the due process rights of individuals seeking asylum[2] who have been placed in expedited removal and who have passed their credible fear interview("CFI").[3] In particular, the proposed rule would undermine asylum-seeking individuals' right to meaningful access to counsel. Individuals who pass their CFI would have their applications for asylum and related relief heard by an asylum officer rather than being referred to immigration court for full proceedings under section 240 of the INA. While Law Lab fully supports providing all asylum applicants with the ability to present their asylum claim for adjudication in a nonadversarial setting, under the current proposal, individuals seeking asylum would be unable to meaningfully access their full procedural rights in the asylum adjudication process. *See* Proposed 8 CFR §§ 1003.48; 208.14(c)(5).

[2] To the extent that this comment addresses issues that affect applicants for asylum, withholding of removal and protection under the Convention Against Torture, it will refer to applicants for all of these forms of protection as "individuals seeking asylum."

[3] To the extent that this comment addresses asylum seekers who have undergone reasonable fear interviews, it will use the term "credible fear interview" to mean applicants who have undergone credible fear or reasonable fear interviews.

Under this proposed rule, if an individual who received a positive credible fear finding is not granted asylum by the USCIS asylum officer, that asylum seeker would not be placed into removal proceedings under INA § 240. Without access to § 240 removal proceedings, at no point in the adjudication process would asylum seekers have the right to full representation by an attorney. During the CFI stage, asylum seekers can only consult with their attorney before the interview and have the attorney present. But asylum seekers do not have the right to have an attorney advocate for them during the interview. Under the proposed rule, individuals denied asylum would be unable to seek meaningful review of the asylum officer's decision and the interview transcript. If an individual wants to present further evidence to the immigration court, they "must establish that the testimony or documentation is not duplicative of testimony or documentation already presented to the asylum officer, and that the testimony or documentation is necessary to ensure a sufficient factual record upon which to base a reasoned decision on the application or applications." Proposed 8 CFR § 1003.48(e)(1).

Absent other due process guarantees, we strongly object to the proposed rule in its current form because it violates both the U.S. Constitution and the INA, which guarantee meaningful access to counsel. Under this Streamlining Proposal, individuals seeking asylum in the U.S. could be ordered removed without ever having a fair day in court. Asylum interviews are conducted by USCIS asylum officers and give limited opportunity for counsel to question the applicant or present other witness testimony, such as expert testimony.[4] If the application is denied by the asylum officer, the asylum seeker would have to request review by an immigration judge to avoid an immediate, final removal order. While the rule calls the review by the judge "de novo," we are deeply troubled that the asylum seeker can only present new evidence at the discretion of the judge. Moreover, without a traditional trial transcript to review, we are concerned that BIA and federal circuit court review will likewise be cursory. We thus fear that this Streamlining Proposal will allow immigration judges to rubber stamp denials from asylum officers with little due process and without meaningful participation by asylum seekers' counsel. We are also particularly concerned that the proposed rule would disproportionately harm vulnerable, minority populations. The proposed rule does not account for language access issues. When an individual seeking asylum speaks a rare dialect, such as an indigenous Central American language, the asylum office frequently cannot find an interpreter. This language gap frequently results in mistakes in the record. Given the heightened evidentiary standard for introducing new evidence into the record, *see* Proposed 8 CFR § 1003.48(e)(1), any interpretation mistakes would be hard to correct through the appeal process proposed.

[4] The proposed rule explicitly allows the representative to "as follow-up questions" and make a statement but only at the completion of the interview. Proposed 8 CFR § 208.9(d)(1).

2. Meaningful Access to the Courts and Counsel is Essential to the Fair and Efficient Operation of the U.S. Immigration System

Access to counsel during the asylum seeking process is not only legally mandated, it is also essential to ensuring that asylum-seeking individuals receive the protections they merit under U.S. and international law. As our experience at Law Lab demonstrates, access to counsel plays a pivotal role in protecting detained individuals from inhumane conditions of detention and in ensuring accuracy in the asylum process, particularly for traumatized individuals. Meaningful access to counsel also often determines an individual's ability to gain release from detention and ultimately win relief on the merits of their claims—with significant benefits for the fair and efficient operation of the immigration system itself. Law Lab's involvement in several large-scale credible fear representation projects has shown us firsthand the difference that access to counsel makes to asylum-seeking immigrants who were formerly detained without legal support.

Law Lab's experience representing asylum-seeking families at the detention center in Artesia, New Mexico, highlights the importance of access to counsel in the asylum process. On June 24, 2014, the U.S. government created its first family detention center in Artesia, New Mexico. Set in a remote location with virtually no legal infrastructure, Artesia detained nearly 1,200 women and children over the course of 2014. *See* Stephen W. Manning, *The Artesia Report*, ch. IV, *available at* https://perma.cc/4CU6-WBWY. The families held at Artesia were fleeing a widespread humanitarian crisis in Central America, where persecution by transnational gangs and violence against women had risen to extraordinary levels, in what scholars called a vast femicide.

Artesia was built in a remote corner of southern New Mexico devoid of legal resources: there were no immigration attorneys, immigration legal services providers, or human rights organizations within hundreds of miles. Indeed, this was by design: government officials publicly stated that the facility was meant to "expedite the removal" of Central Americans "without a hearing before an immigration judge." As a result, during the first month of Artesia's operation, the government effectively denied detained women and children all access to counsel. Women could neither reach attorneys by phone nor meet with attorneys in person—resulting in a 38 percent credible fear pass rate and the issuance of twenty deportation orders every day.

The situation changed dramatically after a coalition of legal service providers, including Law Lab, gained access to the facility. Law Lab, in conjunction with other partners, implemented a universal representation model that provided access to counsel for every family who requested an attorney. Within one month, the pace of deportations at Artesia had fallen by 80 percent; within two months, it had fallen by 97 percent. Because advocates provided meaningful access to counsel over the course of twenty-one weeks, by December 2014, almost 70 percent of the 1200 mothers and children detained at Artesia had passed their credible fear interviews and had been released into the United States to pursue their claims for asylum before the immigration court.

Similarly, Law Lab's work representing asylum seekers detained at the Federal Corrections Institute (FCI) in Sheridan, Oregon, also made clear how critical access to counsel was to ensuring asylum seekers' due process rights. In May 2018, 124 asylum-seeking men were

transferred from detention at the United States–Mexico border to the Federal Corrections Institute (FCI) in Sheridan, Oregon. Held in a facility designed for criminal defendants and prisoners, not for civil immigration detainees, the men spent the first 22 days locked in cells, allowed to leave only for showers. Federal prison guards forbade them from making phone calls or otherwise reaching out to seek legal assistance. Attorneys who tried to make legal visits to the facility to meet with detainees in person were uniformly turned away, and the detained asylum seekers were not permitted to call the toll-free legal services hotline that Law Lab set up to facilitate requests for legal assistance. Conditions were so dire that at least one man attempted suicide; many were so hopeless that they gave up their cases altogether and asked to be deported immediately.

Ultimately, these men were only able to challenge the conditions of their confinement and assert their meritorious claims to protection after Law Lab gained in-person access to the detention center through a court order. Without access to counsel, these men would almost certainly have been rapidly deported. With legal representation from Law Lab, however, 100 percent of the men who accepted our legal representation received a positive decision in their credible fear interviews, and 97 percent were later released from detention on bond or parole.

As these representation projects demonstrate, access to counsel is often the key factor in determining whether a person seeking asylum can meaningfully demonstrate their likely eligibility for relief from removal. Without an attorney, migrants are often left unable to navigate the process and successfully articulate their claims for relief to an adjudications officer. The proposed rule in its current form would effectively eviscerate this important protection and make it much more likely that persons in need of humanitarian protection will be wrongly deported.

3. The Streamlining Proposal Would Cause Significant Harm to Law Lab and Its Clients

The proposed rule in its current form would cause significant harm to Law Lab's organizational mission and programming, and to the clients we serve. Law Lab was founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families. Since then, Law Lab has built several massive collaborative representation projects centered around preventing unjust deportations, many of which focus on intervention and representation during credible fear interviews, as well as direct representation before EOIR on claims for asylum, withholding of removal and CAT relief.

Currently, many of Law Lab's projects advocate for individuals seeking asylum in the time period following passage of the credible fear interview. Law Lab's Defending Asylum program runs pro se workshops to help unrepresented asylum seekers pursue their claims before hostile immigration courts. Further, the Equity Corps of Oregon provides universal representation to low-income persons in removal proceedings before the Portland Immigration Court. Many of the asylum seekers Law Lab serves in these programs have been removed from expedited removal after passing a credible fear interview and are fleeing widespread and systemic persecution in their home countries.

If the proposed changes are enacted, Law Lab will have to make significant changes in its programming in order to provide meaningful representation and pro bono services to the populations that it serves. Without access to counsel, asylum seekers would be less likely to prevail on the merits of their claims post-CFI. The fast-tracking of these interviews and the limitations on attorney representation during the interviews would significantly hinder Law Lab's ability to provide legal services to asylum-seeking individuals in a timely and meaningful manner. As a result, Law Lab would have a much smaller population it could represent in the United States. Law Lab may also have to divert more resources to represent asylum seekers in appeals, limited to insufficient records and an unfavorable standard of review, if their application is denied by the asylum officer. These appeals would be less likely to succeed given the proposed rule's heightened standard for introducing new evidence to the record.

Many of Law Lab's clients are disproportionately targeted by this proposed rule, as Law Lab serves a large number of migrants from Central and South America minority and indigenious groups who are fleeing persecution. These migrants face significant language access issues. Given the proposed rule's heightened evidentiary standard, individuals may not be able to correct interpretation mistakes upon appeal. Further, many people with strong claims to asylum - including families and young children - will be unlawfully and unjustly denied the right to seek the protection to which they are entitled, meaning that they will be sent back to countries where they face harm, persecution, and even death. The consequences of these proposed changes in its current stage would be devastating for tens of thousands of refugees whom the United States has committed to protecting.

4. Proposed Modifications to the Proposed Rule

The proposed rule, as written, lacks procedural safeguards that asylum seekers are entitled to. We do not object to the proposal to allow asylum seekers to present their cases in a nonadversarial interview in the first instance. However, if implemented, this change must be accompanied by crucial due process protections in order to improve, rather than undermine, the asylum adjudication process.

We strongly advise the agency to modify the proposed rule in three ways. First, individuals seeking asylum should be granted meaningful access to counsel during asylum officer interviews. Counsel should be able to present witness and expert testimony and be given the opportunity to question their client. Second, individuals who are not granted asylum by the asylum officer should also be given the option to be referred to full INA § 240 proceedings, unlimited to the asylum interview record, to ensure that their claims for protection are fully and fairly heard. In these § 240 proceedings, immigration judges should review the record under a de novo standard of review. Lastly, the standard for introducing new evidence on appeal should be relaxed. Asylum seekers should be able to seek review of the asylum officer's decision and interview transcript, and they should be able to freely supplement the record in front of the immigration court.

Conclusion

The proposed rule would dramatically change adjudication procedures for asylum seekers who have been placed into expedited removal proceedings. In particular, we are concerned that the proposed rule violates due process protections in removal proceedings, including the right to counsel, as guaranteed by the U.S. Constitution and the INA.

While we support the move to adjudicate asylum claims, in the first instance, through a non-adversarial process before an asylum officer, this non-adversarial setting can only provide a fair forum when it guarantees due process protections, such as access to counsel; and when appeals of asylum denials can be fully and meaningfully reviewed in immigration court, subject to the full procedural guarantees of § 240 proceedings and relaxed evidentiary standards for introducing new evidence into the record.

We thank you for the ability to comment on these proposed changes and urge you to rescind or substantially rewrite this Proposed Rule.

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