

October 19, 2021

Submitted via <https://www.regulations.gov/>

Re: Comments in Response to *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 86 Fed. Reg. 46,906 (Aug. 20, 2021), DHS Docket No. USCIS-2021-0012, RIN 1615-AC67; A.G. Order No. 5116-2021, RIN 1125-AB20

The Tahirih Justice Center¹ (Tahirih) submits the following comments to the Department of Homeland Security (DHS) and the Department of Justice (DOJ) Executive Office of Immigration Review (EOIR) in response to the notice of proposed rulemaking (NPRM) listed above.² Tahirih appreciates the agencies' stated intent to improve the asylum system but strongly believes that the NPRM's new proposed process will fail to achieve that objective. Thus, although we support ancillary pieces of the NPRM—namely, the proposals to roll back recent changes to the expedited removal process, the proposal to reduce pre-credible fear interview detention, and the specification that credible fear interviews must be conducted by USCIS asylum officers—we cannot support the NPRM's new proposed process without major modifications.

I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has served more than 30,000 survivors of gender-based violence and their families since its inception in 1997. Our clients are survivors of gender-based violence, including domestic violence, rape and sexual torture, forced marriage, human trafficking, widow rituals, female genital mutilation/cutting (FGM/C), and so-called “honor” crimes.³

¹ <https://www.tahirih.org/>. We note that although these comments are the official comments of Tahirih as an organization, individual Tahirih employees may also have submitted comments on the NPRM in their personal capacities. The agencies must, of course, also consider those individual comments.

² All sources cited in this comment—including, but not limited to, court opinions, legislative history, and secondary sources—are to be considered part of the administrative record.

³ For background information on these types of gender-based violence, *see, e.g.*, UNHCR, *Guidelines on the Protection of Refugee Women* 17, <https://www.unhcr.org/3d4f915e4.html>; UN Women, *Defining “honour” crimes and “honour” killings*, <https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html>;

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Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our clients' stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence. *See, e.g.,* Tahirih Justice Center, *Tahirih in the News*;⁴ Tahirih Justice Center, *Congressional Testimony*;⁵ Tahirih Justice Center, *Comments*.⁶

II. The Agencies Must Consider—But Have Not Yet Considered—the Negative Effects of the Rule on People Seeking Asylum and on Legal Service Providers

We begin with a global note. It is well-established that, in promulgating regulations, the agencies must consider all important aspects of the problem. In the context of rules regarding the asylum system, this includes the on-the-ground realities faced by people seeking asylum and the possible negative effects of the rule on those people. *See, e.g.,* *Grace v. Barr*, 965 F.3d 883, 902 (D.C. Cir. 2020); *Casa de Maryland v. Wolf*, 2020 WL 5500185, at *26 (D. Md. Sept. 11, 2020). It also includes the effect of the rule on legal service providers. *See, e.g.,* *CLINIC v. EOIR*, D.D.C. No. 1:20-cv-3812, Dkt. 34, at 26-28 (Jan. 18, 2021) (order granting preliminary injunction).

The NPRM does not even begin to meaningfully discharge those duties. In this Part II, we describe particular factors the agencies must consider in detail. And in the discussion of particular provisions of the NPRM in Parts IV and V below, we explain how the NPRM's failure to account for those factors will lead to serious adverse effects, up to and including systematic *refoulement*.

A. Effects on Survivors of Gender-Based Violence and Other People Seeking Asylum

The NPRM ignores at least two crucial realities faced by survivors. It does not take into account the important and undeniable fact survivors of gender-based violence, and all other people who submit bona fide asylum applications, have experienced trauma. It also does not take into account that it is extremely difficult for survivors to gather documentary evidence.

1. By Definition, Survivors Have Endured, and Suffer from the Effects of, Severe Trauma

The first basic and irrefutable fact with profound consequences for the NPRM's proposals—which Tahirih knows from its decades of experience working with survivors of gender-based violence—is that survivors, and other people seeking asylum, have undergone severe trauma. *See, e.g.,* Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled*, 31 *Hastings Int'l & Comp. L. Rev.* 725, 726, 728 (2008); U.S. Dep't of Justice, Office on Violence Against Women, *The Importance of Understanding Trauma-Informed Care and Self-*

https://en.wikipedia.org/wiki/Female_genital_mutilation;
https://en.wikipedia.org/wiki/Forced_marriage; <https://www.widowsrights.org/>.

⁴ <https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news>.

⁵ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131.

⁶ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=261.

Care for Victim Service Providers (July 30, 2014) (“Trauma-Informed Care”).⁷ Rates of post-traumatic stress disorder, depression, anxiety, and other mental health challenges occur in far higher rates among people seeking asylum than the general population. See U.N. High Comm’r for Refugees, *Refugee Resettlement: An International Handbook to Guide Reception and Integration*, at 233 (2002).⁸ And the simple fact of trauma has several well-understood, well-established effects that deeply affect survivors’ ability to navigate the asylum system.

As an initial matter, trauma has serious effects on memory. Severe stress—which is routinely occasioned by traumatic events—can “inhibit processing of and memory for peripheral details.” Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1455-56 (2001). Moreover, traumatic experiences “are often stored in the memory as sensations or emotional states” that are not immediately recorded as personal narratives. Evert Bloemen et al., *Psychological and Psychiatric Aspects of Recounting Traumatic Events by Asylum Seekers*, Care Full 62, 74 (2006). Traumatic memories may therefore be available only “as isolated, nonverbal, sensory, motor, and emotional fragments.” *Id.*

The result is that many trauma survivors suffer from an “impairment of recall” as a result of the trauma. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 Geo. Immigration L.J. 367, 388 (2003) (quoting Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 Int’l J. Refugee L. 293, 298, 308 (2001)); Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. Health & Biomedical L. 37, 44-45 (2010). Such loss of memory can take the form of broad “psychogenic amnesia,” or “loss of memory caused by psychological trauma.” Davis & Follette, *supra*, at 1462. It can also manifest as much more narrow memory loss that goes only to “selected components of the traumatic event.” *Id.* at 1462-63.

Memory problems are especially acute for survivors of repeated abuse. Such survivors may be able to recall the “gist” of traumatic experiences while “confus[ing] the details of particular incidents,” such as times, dates, and “which specific actions occurred on which specific occasion.” Davis & Follette, *supra*, at 1514; see Int’l Ass’n of Chiefs of Police, *Sexual Assault Incident Reports: Investigative Strategies* 3 (Aug. 8, 2018);⁹ J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 Dialogues Clinical Neuroscience 445, 448-49 (2006). Dates are particularly problematic, because human brains are skilled at recalling relative sequences of events but not exact dates. See Cohen, *supra*; Melanie A. Conroy, *Real Bias: How Real ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 Berkeley J. Gender L. & Just. 1, 37 (2009); Carol M. Suzuki, *Unpacking Pandora’s Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 Hastings Race & Poverty L.J. 235, 257 (2007). But survivors may also have difficulty identifying details that those who have not experienced trauma would view as central. To take a well-known example, many survivors are unable to identify the person who inflicted violence or torture on

⁷ <https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-andself-care-victim-service-providers>.

⁸ <https://www.unhcr.org/3d98623a4.html>.

⁹ <https://www.theiacp.org/resources/document/sexual-assault-incident-reports-investigative-strategies>.

them, often because their minds were focused on other, more immediately salient details—such as the presence or use of a weapon. Davis & Follette, *supra*, at 1457.

In many cases, survivors' memories improve over time as they process traumatic experiences. "Talking, disclosing events, retrieving painful memories—in summary, verbalizing experiences—sets up a process in which the individual can access the suppressed memories and feelings, gain consciousness of the origin and development of his/her current distress, and put words to previously undefined emotions." David S. Gangsei & Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 *Torture* 79, 83 (2007); see Kagan, *supra*, at 389. It is therefore "not unusual to find a victim or witness who at first is unable to fully describe what happened, but is able to later provide much richer and coherent reports." Davis & Follette, *supra*, at 1456; see Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 *N.Y.L. Sch. L. Rev.* 123, 140 (1992).

The effects of trauma on memory therefore will often cause apparent inconsistencies in testimony. *E.g.*, Altaf Saadi et al., *Associations between memory loss and trauma in US asylum seekers: A retrospective review of medico-legal affidavits* at 5 (Mar. 23, 2021), *PLoS ONE* 16(3):e0247033;¹⁰ Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 *Law & Ineq.* 315, 327 (2018); Bloemen, *supra*, at 78. Because time can work to restore memories, this is particularly true where "more time [has] passed between interviews." Kagan, *supra*, at 388-89. For example, trauma survivors will often be able to provide more details in a hearing before an immigration judge than they could during a credible fear interview held years earlier. And this fact will be due *solely* to trauma. See, *e.g.*, Jane Herlihy et al., *Discrepancies in Autobiographical Memories-Implications for the Assessment of Asylum Seekers: Repeated Interviews Study*, 324 *BMJ* 324 (Feb. 9, 2002) (study of accounts of traumatic events, in which there was no incentive to fabricate events, finding serious differences in recounting of those events over time).

In addition to its effects on memory, trauma has severe emotional consequences. This is not surprising. After all, the stress of trauma "is almost guaranteed to create dissonance between thoughts, feelings, and behavior that can greatly reduce flexible coping and rational decisions that could be expected of people in free conditions." T. K. Logan et al., *Understanding Human Trafficking in the United States*, 10 *Trauma, Violence, & Abuse* 3, 16 (January 2009). Trauma can, for instance, lead to avoidance and dissociation. Maureen E. Cummins, *Post-Traumatic Stress Disorder and Asylum: Why Procedural Safeguards Are Necessary*, 29 *J. Contemp. Health L. & Pol'y* 283, 289 (2013). This can reflect attempts to cope with trauma by "block[ing] certain memories" and the stress, anxiety, and pain those memories induce. *Id.*; see *Trauma-Informed Care*, at 69, 73-74; Angela E. Waldrop & Patricia A. Resick, *Coping Among Adult Female Victims of Domestic Violence*, 19 *J. Fam. Violence* 291, 294, 299 (2004); Gangsei & Deutsch, *supra*, at 80; Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 *U. Pa. L. Rev.* 399, 410-11 (2019). It can also reflect deeply painful guilt and shame at having experienced the trauma. See Mosley, *supra*, at 326-27; Gangsei & Deutsch, *supra*, at 80; Conroy, *supra*, at 38; Kagan, *supra*, at 389.

The recollection of trauma can also be emotionally overwhelming, especially when survivors recount their experiences. Doing so effectively retraumatizes a survivor by forcing her to

¹⁰ <https://doi.org/10.1371/journal.pone.0247033>.

“relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring.” Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Nat’l Crime Victim Law Institute, Violence Against Women Bulletin at 1-2 (Sept. 2011) (internal quotation marks and alteration omitted); Gangsei & Deutsch, *supra*, at 86; Piwowarczyk, *supra*, at 157; Mosley, *supra*, at 321; Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457, 486 (2016). Indeed, sometimes just “remembering constitutes new trauma.” Conroy, *supra*, at 35 (emphasis added).

These effects of trauma are uniformly severe, but individual responses to trauma are not uniform. See U.S. Dep’t of Health & Hum. Servs., Substance Abuse & Mental Health Servs. Admin., *A Treatment Improvement Protocol (TIP) Series No. 57, Trauma-Informed Care in Behavioral Health Services* 61 (2014), (“Trauma-Informed Care”);¹¹ Heather J. Clawson et al., U.S. Dep’t of Health & Hum. Servs., *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking* 1 (2008).¹² Indeed, although some people are able to process their trauma, others are not, and suffer “persistent and devastating” emotional effects. *Treating the Hidden Wounds, supra*, at 1; *Sexual Assault Incident Reports*, at 5; *Trauma-Informed Care*, at 46. Cultural differences also affect how specific people react to trauma. See Nat’l Council Juv. & Fam. Ct. Judges, *Thinking About Trauma in the Context of Domestic Violence: An Integrated Framework*, 6 (2014); Amina Memon, *Credibility of Asylum Claims: Consistency and Accuracy of Autobiographical Memory Reports Following Trauma*, 26 Applied Cognitive Psych. 677, 677 (2012); Jane Herlihy et al., *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*, 26 Applied Cognitive Psych. 661, 668-69 (2012).

Despite this variation, the effects of trauma generally lead to two results that have great significance for the asylum process. The first is that it is difficult for survivors to tell their story. The effects of trauma on memory naturally contribute to this problem, given that a “difficulty in information processing and in the logical, verbal reconstruction and description of the memory is at the very core of trauma reactions.” Bloemen, *supra*, at 78. A person who was tortured, for instance, may be left with memories of “the sensory data from the traumatic event—the sights, sounds, smells, and bodily sensations—but without the linguistic narrative structure that gives a person’s ordinary memories a sense of logical and chronological coherence.” Paskey, *supra*, at 487; see Davis & Follette, *supra*, at 1459; Epstein & Goodman, *supra*, at 411; Mosley, *supra*, at 326; Hannah Rogers et al., *The Importance of Looking Credible: the Impact of the Behavioural Sequelae of Post-Traumatic Stress Disorder on the Credibility of Asylum Seekers*, 21 Psych., Crime & L. 139, 140 (2015).

The emotional effects of trauma also significantly impede survivors’ ability to recount events. Detachment can “make it difficult for people to coherently communicate what they have survived.” Kagan, *supra*, at 396. And being emotionally overwhelmed can lead survivors to appear “ambivalent in telling their stories of abuse” or to “minimize[] the seriousness of the abuse.” Catrina Brown, *Women’s Narratives of Trauma: (Re)storying Uncertainty, Minimization, and Self-Blame*, 3 Narrative Works 1, 11-12, 17 (2013). Indeed, survivors of gender-based persecution who manage to flee in pursuit of safe haven often cannot meaningfully recount their stories in meaningful detail until and unless they receive medical, mental health, and other services. See, e.g.,

¹¹ <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf>.

¹² <https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf>.

Tahirih Justice Center, *Immigrant Survivors Fear Reporting Violence* (May 2019).¹³ And even when they can, survivors of sexual and other severe trauma may need “second and subsequent interviews ... in order to establish trust and to obtain all necessary information.” UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees* 9 (May 2, 2002) (“*Gender Guidelines*”).¹⁴

The second, equally straightforward result is that many trauma survivors will behave in ways that untrained people may read as indicating a lack of credibility. As shown above, trauma will lead to apparent inconsistencies as survivors become able to recount additional details over time. Trauma can also lead survivors to dissociate, or to be nervous, passive, unable to make eye contact, or reluctant to speak, and it also affects their cadence, affect, and tone. *See, e.g., Trauma-Informed* 61-62, 69; Conroy, *supra*, at 34; Kagan, *supra*, at 396. Trauma can cause survivors to “hesitate,” “waver,” or seem uncertain when describing traumatic experiences. Paskey, *supra*, at 484, 489; Scheppele, *supra*, at 126-27. Survivors can also appear mechanical or unemotional as they do so. *See* Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 *Geo. Immigr. L.J.* 155, 157-58 (2001); Lustig, *supra*, at 726.

All of this is well-established, and none of it is novel.¹⁵ Indeed, courts across the country have recognized the effects of trauma on survivor interviews and testimony. *See, e.g., Ortiz-Ortiz v.*

¹³ <https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5d290b07a8dea8000138bf97/1562970888076/2019-Advocate-Survey-Final.pdf>.

¹⁴ <https://www.unhcr.org/3d58ddef4.pdf>

¹⁵ Other relevant sources that discuss the effects of trauma include the following: (1) Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 *Seton Hall L. Rev.* 1, 1-41 (2020); (2) Holly Johnson, *Why Doesn't She Just Report It?: Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police*, 29 *Canadian J. Women & Law* 1, 36-59 (2017); (3) Jim Hopper, *Important Things to Get Right About the “Neurobiology of Trauma”: Part 1: Benefits of Understanding the Science*, End Violence Against Women International (Sept. 2020); (4) Jim Hopper, *Important Things to Get Right About the “Neurobiology of Trauma”: Part 2: Victim Responses During Sexual Assault*, End Violence Against Women International (Sept. 2020); (5) Melanie Randall & Lori Haskell, *Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping*, 36 *Dalhousie L.J.* 2, 501 (2013); (6) Linda Barnard & Andrea L. Bible, *When Community-Based Advocates Testify as Experts: Understanding and Explaining Trauma and its Effects*, National Clearinghouse for the Defense of Battered Women (Sept. 2014); (7) Shea Rhodes & Gina (Cautilli) Dietz, *Trauma and the Trafficking Victim: A Barrier to Assistance*, Delaware Lawyer 18-21 (Summer 2016); (8) Jim Hopper, *How Reliable Are the Memories of Sexual Assault Victims?*, *Scientific American* (Sept. 27, 2018); (9) James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Complete Memories*, TIME Ideas (Dec. 9, 2014); (10) Nicole P. Yuan, Mary P. Koss, & Mirto Stone, *The Psychological Consequences of Sexual Trauma*, National Online Resource Center on Violence Against Women, 1-11 (Mar. 2006); (11) Jane Herlihy & Stuart Turner, *Untested Assumptions: Psychological Research and Credibility Assessment in Legal Decision-Making*, 6 *European J. of Psychotraumatology* 1, 27380 (2015); (12) Kristine A. Peace & Stephen Porter, *Remembrance of Lies Past: A Comparison of the Feature and Consistency of Truthful and Fabricated Trauma Narratives*, 25 *Applied Cognitive Psychology* 414-23 (Apr. 21, 2010); (13) Sarah Harsey & Jennifer J. Freyd, *Deny, Attack, and Reverse Victim and Offender*

Sessions, 698 F. App'x 868, 871 (9th Cir. 2017); *Marouf v. Lynch*, 811 F.3d 174, 185 (6th Cir. 2016); *Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015); *Morgan v. Mukasey*, 529 F.3d 1202, 1209 (9th Cir. 2008); *Longwe v. Keisler*, 251 F. App'x 718, 720 (2d Cir. 2007); *Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d Cir. 2003); *Curumi v. Ashcroft*, 119 Fed. Appx. 468, 473 (4th Cir. 2005); *Singh v. Gonzales*, 403 F.3d 1081, 1091 (9th Cir. 2005); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 154 (3d Cir. 2005); *Balasubramanrim v. INS*, 143 F.3d 157, 163 (3d Cir. 1998); *Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998). So, too, has UNHCR. See UNHCR, *Gender Guidelines*; see also Executive Committee of the High Commissioner's Programme, *Refugee Women and International Protection No. 64*, § (a)(iii) (1990).¹⁶ The agencies must likewise take account of the reality of trauma.

2. Survivors Face Severe Difficulties in Gathering Corroborating Evidence

The second irrefutable fact faced by survivors for which the agencies must account is that corroborating evidence is largely elusive. There are at least four reasons for this. *First*, given the desperate circumstances under which they flee their homes in pursuit of safe haven, survivors do not stop to gather paperwork. And even if they did so, they would need a sophisticated understanding of the U.S. asylum system to understand what documents would be helpful.

Second, just as trauma makes it effectively impossible for survivors to tell full and coherent stories, it also severely interferes with survivors' ability to carry out even the basic administrative tasks needed in order to obtain evidence. See, e.g., Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (Oct. 2009).¹⁷ Further, the trauma associated with reviewing evidence of violence can prevent survivors

(*DARVO*): *What Is the Influence on Perceived Perpetrator and Victim Credibility?*, 29 J. Aggression, Maltreatment & Trauma 8, 897-916 (2020); (14) Cortney A. Franklin, Alondra D. Garza, Amanda Goodson, & Leana Allan Bouffard, *Police Perceptions of Crime Victim Behaviors: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors' Trauma Responses*, 66 Crime & Delinquency 8, 1055-86 (2020); (15) Charlotte Bishop & Vanessa Bettinson, *Evidencing Domestic Violence, Including Behaviour That Falls Under the New Offence of 'Controlling or Coercive Behaviour'*, 22 Int'l J. Evidence & Proof 1, 3-29 (2018); (16) Kristine A. Peace, Stephen Porter, & Daniel F. Almon, *Sidetracked by Emotion: Observers' Ability to Discriminate Genuine and Fabricated Sexual Assault Allegations*, 17 L. & Criminological Psychology, 322-35 (2012); (17) Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, 1 Am. Prosecutors Research Inst. 4 (2006); (18) Mary Malefyt Seighman, Erika Sussman, & Olga Trujillo, *Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys*, Nat'l Ctr. on Domestic Violence, Trauma & Mental Health (Dec. 2011); (19) Carly B. Dierkhising & Shawn Marsh, *A Trauma Primer for Juvenile Probation and Juvenile Detention Staff*, Nat'l Council of Juvenile and Family Court Judges (2015); and (20) Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, American Prosecutors Research Institute (Aug. 2007).

¹⁶ <https://www.unhcr.org/en-us/excom/exconc/3ae68c441f/refugee-women-international-protection.html>.

¹⁷ https://www.tahirih.org/wp-content/uploads/2009/10/Precarious-Protection_Tahirih-Justice-Center.pdf.

from fully documenting their cases. For example, after Tahirih client Marya's¹⁸ abusive intimate partner arranged for their daughter to be killed, Marya could not bring herself to view the photographs of her daughter's deceased body and would not permit their submission as evidence in support of her asylum case.

Third, it is well established that external actors often bar survivors from retaining or gathering corroborating evidence. Human traffickers and people who commit domestic violence notoriously prevent survivors from holding bank accounts, purchasing bus passes, or even obtaining library cards—all potential sources of evidence in other types of cases. People who perpetrate domestic violence also routinely prevent survivors from seeking medical and law enforcement assistance, eliminating the initial creation of evidence. People who abuse survivors often confiscate documents ranging from passports to personal correspondence to further manipulate, isolate, and punish survivors and prevent them from escaping or seeking help. A survivor might thus have to risk her safety trying to retain or regain control over her own documents and other belongings that could serve as key evidence in her case. *See, e.g.,* Anne L. Ganley, *Health Resource Manual* 37 (2018); Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* (2019) (“*No Visible Bruises*”); Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 *Women's Health & Urb. Life* 15, 21-24 (2012); Misty Wilson Borkowski, *Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration Relief*, 31 *U. Ark. Little Rock L. Rev.* 567, 569 (2009); Nat'l Domestic Violence Hotline, *Abuse and Immigrants*;¹⁹ Edna Erez & Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003);²⁰ Julieta Barcaglioni, *Domestic Violence in the Hispanic Community* (Aug. 31, 2010);²¹ Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), at 7-8;²² Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 *Feminist Criminology* 32, 46-47 (2009); Immigration & Customs Enforcement, *Information for Victims of Human Trafficking* (2016);²³ National Sexual Violence Resource Center, *Assisting Trafficking Victims: A Guide for Victim Advocates 2* (2012).²⁴

Fourth, although expert evidence is likely to be available in the United States and not in the control of those from whom a survivor is fleeing, survivors and other people seeking asylum are typically in no position to gather the type of evidence. Indeed, people seeking asylum are unlikely to know what expert evidence is, much less that it is frequently helpful in immigration cases; what kinds of expert evidence, such as country-conditions evidence and psychological evaluations, are most useful; or where to find experts. And even if survivors somehow had all of that knowledge,

¹⁸ All client names in this comment are pseudonyms.

¹⁹ <https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2>.

²⁰ <https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf>.

²¹ <https://safeharborsc.org/domestic-violence-in-the-hispanic-community>.

²² <https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf>.

²³ <https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf>.

²⁴ https://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf.

communication and payment would remain effectively insuperable obstacles. The result is that survivors are exceptionally unlikely to be able to procure expert evidence until they have retained counsel, have built a relationship of trust with counsel, and have sufficiently processed trauma to be able to relay their experiences to counsel. All of that takes significant amounts of time—as does the process of counsel then finding relevant experts and securing reports, declarations, and the like.

In short, as noted by UNHCR in “gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution.” *Gender Guidelines* at 10.²⁵ Thus, “cases in which an applicant can provide” documentary “evidence of all of his statements will be the exception rather than the rule.” UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* § 196 (1979).

Taken together with the effects of trauma, the general unavailability of documentary evidence means that the very people who have suffered the worst persecution are often the *least* able to present evidence, be it oral or written, in support of their asylum applications. Any proposal to amend the asylum system that fails to take account of this fact will have perverse effects and result in systematic *refoulement*. As shown in Parts IV and V below, the NPRM’s proposed process would have precisely that effect.

B. Effects on Legal Service Providers

The effects of regulatory changes on legal service providers are less severe—they are not a literal matter of life or death—but are nevertheless ones for which the agencies must account. Three broad types of effects are particularly relevant here. *First*, Tahirih and other legal service providers are negatively affected by fee increases. After all, when fees for immigration relief applications rise, fewer people can afford to hire paid counsel, and the demand for pro bono services rises without an offsetting increase in supply. Further, the more money that any legal service providers—including pro bono providers—spend on fees, the less money they have to spend on other services on behalf of clients. *See, e.g., CLINIC v. EOIR*, D.D.C. No. 1:20-cv-3812, Dkt. 34, at 26-28 (Jan. 18, 2021).

Second, regulatory changes that increase the time legal service providers must spend on a case mean that those providers can serve fewer clients, impairing the providers’ missions and threatening their funding. Additional steps in immigration-court cases, such as newly required motions practice, therefore harm legal service providers. So, too, do changes that limit the access people have to legal service providers at early stages in the asylum process—because service providers must then attempt to remedy deficiencies in the cases at later stages, when doing so requires additional work, including additional motions practice.

Third, changes that force cases to be processed on expedited timelines also harm legal service providers. Such changes lower providers’ capacity by frontloading work. And for providers like Tahirih that work closely with pro bono attorneys from private firms, expedited timelines make it very difficult to find outside counsel to handle new cases, because counsel often has prior commitments that preclude immediate work on an asylum matter.

²⁵ <https://www.unhcr.org/3d58ddef4.pdf>.

III. Features of the NPRM That Tahirih Supports

A. Rescission of Harmful Credible Fear Policies

Tahirih supports the portions of the rule that would alter 8 C.F.R. § 208.30 by formally rescinding changes to the credible fear process made by the now-enjoined rules published at *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (Dec. 11, 2020) (“Anti-Asylum Rule”), and *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67,202 (Oct. 21, 2020) (“Asylum Bar Rule”). In particular, we support (1) rescission of the requirement that bars to asylum—including the new bars in the October 21, 2020, rule—be conducted in credible fear interviews; (2) restoration of the “significant possibility” standard for all forms of relief at the credible fear stage; (3) reinstatement of the presumption that a person seeking asylum requests review of a negative credible fear finding by an immigration judge absent an express statement to the contrary; and (4) the return to placing individuals who receive positive credible fear findings and who will have their asylum applications adjudicated by immigration judges into proceedings under INA § 240.

As an initial matter, we note that the Anti-Asylum Rule and the Asylum Bar Rule were issued by acting officials serving in violation of the Homeland Security Act and the Federal Vacancies Reform Act. *See, e.g., Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, No. 20-cv-9253, 2021 WL 75756, at *3-6 (N.D. Cal. Jan. 8, 2021); *Batalla Vidal v. Wolf*, No. 16-cv-4756, 2020 WL 6695076, at *1 (E.D.N.Y. Nov. 14, 2020); *Nw. Imm. Rights. Proj. (NWIRP) v. USCIS*, 496 F. Supp. 3d 31, 55 (D.D.C. 2020), *appeal dismissed*, No. 20-5369, Dkt. 7 (D.C. Cir. Jan. 12, 2021); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 529-36 (N.D. Cal. 2020); *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 964-70 (D. Md. 2020), *appeal dismissed*, No. 20-2217, Dkt. 23 (4th Cir. Mar. 23, 2021); *La Clinica De La Raza v. Trump*, No. 19-cv-4980, 2020 WL 7053313, at *7-9 (N.D. Cal. Nov. 25, 2020); U.S. Gov’t Accountability Off., No. B-331650, *Decision: Matter of Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security* (Aug. 14, 2020). Both rules are therefore null and void. Those rules are also void in their entirety because they were mere pretexts for enshrining anti-immigrant sentiment into U.S. law and because DHS and DOJ provided insufficient time for comment on its complicated provisions, which were interwoven with numerous other rules proposed at roughly the same time. *See, e.g., Centro Legal de la Raza v. EOIR*, No. 3:21-cv-463, Dkt. 59, at 36-48 (N.D. Cal. Mar. 10, 2021); Anti-Asylum Rule Comment 8-11, 13-14.

1. No Consideration of Asylum Bars at the Credible Fear Stage

As Tahirih has previously stated, consideration of asylum bars at the credible fear stage contravenes the INA, is unworkable, and significantly increases the risk that survivors will be subject to *refoulement*. *See* Tahirih Justice Center, *Comments in Response to Joint Notice of Executive Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* (“Anti-Asylum Rule Comment”), at 69-71.²⁶ As an initial matter, the INA states that asylum officers conducting credible fear interviews are to do no more than determine whether a person seeking asylum “has a credible fear of persecution”—*i.e.*, whether

²⁶ https://www.tahirih.org/wp-content/uploads/2020/07/Attachment1_Tahirih-comment-on-anti-asylum-NPRM.pdf.

they have a “significant possibility” of establishing “eligibility for asylum” under 8 U.S.C. § 1158. 8 U.S.C. § 1225(b)(1)(B)(ii) & (v). And section 1158 in turn states that a person demonstrates “eligibility” for asylum by showing that they are a “refugee within the meaning of” 8 U.S.C. § 1101(a)(42)(A) (*id.* § 1158(b)(1)(A))—which is to say, if they suffered past persecution, or have “a well-founded fear of” future persecution, “on account of race, religion, nationality, membership in a particular social group, or political opinion” (*id.* § 1101(a)(42)(A)). Thus, the INA directs that credible fear interviews are limited to a determination of whether there is a significant possibility that a person can establish past persecution, or a well-founded fear of future persecution, on account of a protected ground. The provisions of the Anti-Asylum Rule that require consideration of bars to asylum at the credible fear stage are therefore inconsistent with the governing statute.

There is good reason for that statutory limitation. Without exception, the statutory bars to asylum (*see* 8 U.S.C. § 1158(b)(2)) require fact-intensive determinations that have no place in the summary, initial forum of a credible fear interview. To take just one example, the “serious non-political crime” bar in 8 U.S.C. § 1158(b)(2)(A)(iii) requires consideration of, at a minimum, the nature of the offense, its intended target, the type and quantum of evidence suggesting that the person seeking asylum committed the crime, any extenuating evidence, and the circumstances surrounding the supposed action. A brief credible fear interview is a wholly inappropriate forum in which to make such determinations.

There can also be no question that consideration of asylum bars at the credible fear stage violates the government’s duty of *non-refoulement*. Doing so forces fact-intensive and legally nuanced adjudications into a forum that people seeking asylum enter very soon after they arrive in the United States. As a result, the Anti-Asylum Rule requires that asylum bars be adjudicated at a time when people seeking asylum are very unlikely to have counsel; when, as a result, they have no notice of the bars to asylum; and before they could possibly gather evidence relevant to the bars to asylum.

Worse still, survivors of severe trauma are, as shown in Part II above, very unlikely to be able to discuss fact-intensive issues when they arrive at the border. And it is not just trauma that leaves survivors particularly vulnerable at the credible fear stage. Given that people in credible fear interviews likely just arrived in the United States, many of them also suffer from hunger, exhaustion, linguistic and cultural barriers, possible family separations, and the effects of immigration detention. Requiring people facing all of those barriers to demonstrate the non-application of asylum bars is a recipe for *refoulement*.

These problems are particularly acute when it comes to the application of the domestic violence-related bar in the Asylum Bar Rule. As Tahirih has made clear, that bar will result in grave injustices, including the deportation of many survivors of severe domestic violence, because abusers often cause survivors who take self-defense measures to be arrested, because it can be very difficult to determine whether someone is a “primary perpetrator” of domestic violence, and because the safeguards in the Asylum Bar Rule are patently inadequate to protect survivors. *See* Tahirih Justice Center, *Comments in Response to Proposed Rule: Procedures for Asylum and Bars to Asylum Eligibility* (Jan. 21, 2020).²⁷ Those problems are greatly magnified in the context of an

²⁷ https://www.tahirih.org/wp-content/uploads/2020/01/Tahirih-Comments_Asylum-Bars-NPRM.pdf.

initial interview in which survivors are unlikely to be able to provide any evidence beyond their own stories—and frequently will, thanks to the effects of trauma, not even be able to provide full details of their experiences. For all of these reasons, Tahirih strongly supports the rescission of this illegal, ill-advised policy change.

2. Restoration of “Significant Possibility” Standard

Tahirih also supports the NPRM’s proposal to restore the longstanding “significant possibility” standard at the credible fear stage. Congress, of course, expressly mandated the use of that standard. 8 U.S.C. § 1225(b)(1)(B)(v). The Anti-Asylum Rule’s use of a different standard for withholding of removal and CAT claims therefore expressly violated the INA. Its attempt to heighten the standard for asylum claims while retaining the “significant possibility” language also violated the statute. After all, the Anti-Asylum Rule sought to define “significant possibility” as a “substantial and realistic possibility of succeeding.” But that is not what “significant” means. It is also not what Congress intended, given that credible fear interviews were meant only to screen out people “who indisputably” would not qualify for asylum. H.R. Conf. Rep. 104-828, at 209 (1996); *see also, e.g.*, 142 Cong. Rec. H11054, H11066-67 (daily ed. Sept. 25, 1996) (statement of Rep. Smith); 142 Cong. Rec. S4457-91 (daily ed. May 1, 1996) (statement of Sen. Hatch); *see also* DOJ, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,321 (Mar. 6, 1997). And it is contrary to Supreme Court precedent, given that Court’s holding that a fear of persecution is well-founded if it has a 10% chance of occurring (*INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987)) and that the “significant possibility” standard is *lower* than the standard for a well-founded fear.

The problems with the Anti-Asylum Rule’s attempt to raise the standard at credible fear interviews do not end there, as Tahirih has previously pointed out at length. *See* Anti-Asylum Rule Comment 64-69. Crucially, neither the proposed version of the Anti-Asylum Rule nor the final version of that rule meaningfully engaged with the interaction of a heightened standard with the effects of trauma. For those who successfully make their way to the U.S. border to seek asylum based on such persecution, that trauma is likely to be, if anything, sharpened by a dangerous journey, fear of the asylum process, fear of being returned to their conditions of persecution, and fear of border officials. Especially in the fear screening that occurs at or near the time of reaching the border, that trauma is likely at its zenith. Virtually any survivor interview at the border is affected by this trauma, and the effects of trauma in a screening fear interview, discussed at length in Part II above, are real and indisputable. The Anti-Asylum Rule’s failure to consider or engage with those effects was inexcusable as well as arbitrary and capricious.

3. Presumption That Immigration Judge Review Has Been Requested

The NPRM also appropriately proposes to reinstate the prior presumption that a person seeking asylum wishes for an immigration judge to review a negative credible fear finding unless they expressly decline review. The Anti-Asylum Rule sought to upend this longstanding presumption. In doing so, however, that rule once again failed to account for the realities faced by people fleeing from severe trauma. The preamble to the Anti-Asylum Rule took the position that “it would be unusual” for people seeking asylum to “be unaware of the nature of the process.” 85 Fed. Reg. at 80,296.

The rule cited no evidence to support that supposition, for the good reason that it runs directly counter to experience and common sense. As Tahirih—and every other organization that serves people seeking asylum—knows, survivors do *not* understand the U.S. asylum process. Most survivors do not know what a credible fear interview is, or what its purpose is, much less that they can request review by an immigration judge if they are found to lack a credible fear of persecution. And even when asylum officers explain that option, people are unlikely to know what an immigration judge is, much less the contours of that judge’s review of the negative credible fear finding. Further, survivors are often reluctant to sign papers—and for good reason: U.S. immigration officials are notorious for forcing people to sign documents that ensure their own deportation, whether or not they understand the documents. Tahirih client Maria, for example, had a pending U-visa petition that USCIS agreed to expedite. ICE agents, however, then forced Maria to sign a document, which she did not understand, stating that she was withdrawing her U-visa petition—and then immediately deported her. *See also* Section IV.A.1, *infra*.

4. Placement of People Seeking Asylum in Full Section 240 Proceedings

The NPRM would undo the Anti-Asylum Rule’s provision forcing people who receive positive credible fear findings, and are then placed directly into proceedings before an immigration judge, into asylum- and withholding-only proceedings rather than full Section 240 proceedings. Tahirih also supports this change, which is both appropriate and necessary. *See, e.g.*, Anti-Asylum Rule Comment 57-62.

The provisions of the Anti-Asylum Rule forcing people into asylum- and withholding-only proceedings are directly inconsistent with the text of the INA. When Congress amended the statute as part of IIRIRA in 1996, it created two specific removal processes: expedited removal proceedings in INA § 235 (codified at 8 U.S.C. § 1225) and regular removal proceedings in INA § 240 (codified at 8 U.S.C. § 1229a). Under this statutory framework, Section 240 proceedings are the default and “exclusive” admission and removal proceedings “unless otherwise specified” in the INA. 8 U.S.C. § 1229a(a)(3).

Consistent with that general rule, Congress has specified that certain classes of individuals are not to be placed in full removal proceedings. *See* 8 U.S.C. § 1229(a)(3) (persons convicted of particularly serious crimes); *id.* § 1187(b) (prohibiting Visa Waiver program participants from contesting inadmissibility or removal except on the basis of asylum). Indeed, within the expedited removal statute itself, Congress specified one group of arrivals—stowaways—who are excluded from Section 240 proceedings. *See id.* § 1225(a)(2). In contrast, Congress deemed people seeking asylum to be applicants for admission under 8 U.S.C. § 1225(a)(1), and it did not similarly exclude them from Section 240 proceedings. *See id.* § 1225(b).

Thus, Congress created the default rule that arriving individuals are to be placed in Section 240 proceedings, and it specifically excluded one subset of arriving persons from Section 240—but it did not exclude people seeking asylum from those proceedings. The inescapable conclusion is that people who pass credible fear screenings *cannot* be placed in immigration-court proceedings under than § 240 proceedings. The legislative history of IIRIRA confirms as much. *See* H. Rep. 104-828, at 209; 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Hatch); *see also* H. Rep. 104-460, at 158 (1996). The Anti-Asylum Rule’s exclusion of people seeking asylum from § 240 proceedings therefore cannot be reconciled with the statutory text.

As Tahirih has shown, DHS and DOJ also acted arbitrarily and capriciously by requiring people with positive credible fear findings to be placed in asylum- and withholding-only

proceedings. Anti-Asylum Rule Comment 59-62. Most importantly, the agencies failed to consider the effects of that requirement on people who have been present in the United States for some time, and are eligible for other kinds of relief, but could be placed in expedited removal under the 2019 expansion of that process. Placing such people in asylum- and withholding-only proceedings would effectively deny them access to any other form of relief for which they might be eligible, including different forms of cancellation of removal, adjustment of status, and different types of waivers. For example, a non-citizen may be eligible for adjustment of status if the applicant is married to a U.S. citizen and otherwise eligible. Similarly, a non-citizen may be eligible for a U- or a T-visa, or for relief under VAWA as a self-petitioner or as an applicant for cancellation of removal. There are procedures in § 240 proceedings to allow respondents to raise those issues: For example, a survivor of gender-based violence who has a pending U or T visa petition with USCIS can request additional time in § 240 proceedings to permit the agency to provide a prima facie determination on the petition or complete adjudication of the petition. But under the Anti-Asylum Rule, an immigration judge would be strictly limited to considering only claims for asylum, withholding of removal, or relief under CAT. Therefore, the judge would almost certainly refuse to grant continuances or requests for stays of removal based on other kinds of relief.

B. New Parole Authority

Tahirih supports the portions of the rule that would alter 8 C.F.R. § 235.3(b)(2)(iii) by allowing parole, rather than detention, for people awaiting credible fear interviews on the ground that detention is unavailable or impracticable, including for health and safety reasons. The current rule limits parole consideration before the credible fear determination to those individuals for whom parole “is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.” 8 C.F.R. § 235.3(b)(2)(iii) & (b)(4)(ii). The proposal to allow parole in a third circumstance—where “detention is unavailable or impracticable”—expands the availability of parole for those awaiting a credible fear interview. Because detention is a harmful and punitive practice that serves no legitimate purpose, Tahirih supports any effort to reduce the use of detention in immigration.

However, DHS proposes this change for the express purpose of expanding the use of expedited removal. For the myriad reasons noted in Section IV.A, *infra*, Tahirih vehemently opposes any expansion of expedited removal. Finally, this single additional basis on which parole may be granted is not sufficient to reduce the overuse of detention among the immigrant population.

1. Any Reduction in Detention Is a Positive Development

The availability of parole where detention is unavailable or impracticable is a welcome addition to the bases for parole. In particular, Tahirih supports the reduction or elimination of detention in situations where detention would have an undue impact on the health or safety of individuals with special vulnerabilities.

People seeking asylum, many of whom are survivors of serious trauma, persecution and hardship, qualify as those with special vulnerabilities. And survivors have a far higher incidence of post-traumatic stress disorder, depression, and anxiety than that of the general population. M. von

Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason & C. Katona, *The impact of immigration detention on mental health: a systematic review*, BMC Psychiatry (Dec. 6, 2018).²⁸

Detention exposes survivors of trauma to a number of serious deleterious effects. Survivors in detention experience a high likelihood of retraumatization, including reliving their previous persecution. Such retraumatization flares the sense of powerlessness and loss of sense of self. Such experiences can lead to further adverse psychological impact.

Detention also risks exacerbation of mental health difficulties. *Id.* Indefinite prolonged detention causes serious psychological and physical trauma. Such effects include anxiety, stress, depression, and post-traumatic stress disorder. Statement for the Record by the Center for Victims of Torture, U.S. House of Rep. Comm. On the Judiciary, Subcommittee on Immigration and Citizenship, *The Expansion and Troubling Use of ICE Detention (“Expansion”)* 2 (Sept. 26, 2019).²⁹ For survivors of trauma, these effects are exacerbated, sometimes profoundly. *Id.* (“For survivors, . . . the immigration detention experience is often retraumatizing and may lead survivors to relive their horrid experiences of torture, including the profound sense of powerlessness and loss of sense of self, contributing to further psychological damage.”).

Detention often results in family separation, which has devastating impacts on survivors. In many cases, survivors have fled their home countries primarily to rescue their children from harm and danger, and separating such families can be deeply traumatizing. Physicians for Human Rights, Letter to Kirstjen Nielsen, Secretary, U.S. Dep’t of Homeland Security (June 14, 2018) (“The relationship of children and parents is the strongest social tie most people experience, and a threat to that tie is among the most traumatic events people can experience.”).³⁰ Further, a child’s separation from parents is an adverse child experience, which can lead to an increased risk of mental health challenges. *Expansion* 7.

Because detention imposes severe impacts on survivors, who are especially vulnerable because of their higher incidence of mental health challenges, this new basis for parole is a welcome mechanism to parole people seeking asylum.

2. The NPRM Should Go Much Farther in Reducing Detention

Although Tahirih supports this proposal to replace some detention with parole, Tahirih opposes the omission of further and systematic efforts to limit or eliminate detention of immigrant survivors. Detention, a harmful and punitive practice, should be reduced or eliminated completely.

The harm associated with detention is well established. Sustained detention is correlated with higher incidence of distress, anxiety, depression, post-traumatic stress disorder, and other mental health challenges. *Expansion* 2. Further, detention is rife with corruption, abuse, and racism. NYU Law Immigrant Rights Clinic, Black Alliance for Just Immigration, *The State of Black Immigrants: Part II: Black Immigrants in the Mass Criminalization System*, at 24-26 (documenting increases in frequency of detention for Black immigrants);³¹ *see also* Michelle

²⁸ <https://bmcp psychiatry.biomedcentral.com/articles/10.1186/s12888-018-1945-y>.

²⁹ <https://www.congress.gov/116/meeting/house/110017/documents/HHRG-116-JU01-20190926-SD005.pdf>.

³⁰ https://s3.amazonaws.com/PHR_other/Separation_Letter_FINAL.pdf.

³¹ <https://oir.sccgov.org/sites/g/files/exjcpb1026/files/sobi-deprt-blk-immig-crim-sys.pdf>.

Alexander, *The Injustice of This Moment is Not an ‘Aberration,’* New York Times (Jan. 17, 2020).³² ICE guards sexually assault detainees with impunity, sometimes even threatening deportation to prevent prosecution of the crime. Lomi Kriel, *ICE Guards “Systematically” Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, ProPublica (Aug. 14, 2020);³³ CIVIC Complaint, filed with Office for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Security (April 11, 2017) (“CIVIC Complaint”);³⁴ Alice Speri, *Detained, Then Violated, The Intercept* (Apr. 11, 2018);³⁵ Tina Vasquez, *Texas Detention Center Faces Allegations of Widespread Sexual Abuse—Again*, Rewire News (Nov. 22, 2017);³⁶ Tina Vasquez, *‘A Huge Victory’: Woman Who Alleged Assault by Guard Finally Released from Detention*, Rewire News (Mar. 19, 2018).³⁷ And detention centers are plagued by medical negligence. ACLU Research Report, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, at 31 (identifying several deaths linked to neglectful medical care of immigrants);³⁸ Katherine Hawkins, *Medical Neglect at a Denver Immigration Jail*, Project on Government Oversight (May 21, 2019) (documenting inadequate medical care leading to deaths among detainees).³⁹

Importantly, detention is not necessary to achieve the goal of ensuring that people seeking asylum appear for their appointments. Studies show that about 90% of people seeking asylum arriving at the southern border can identify someone who will host them in the United States. H. Altman & M. Ascherio, *Policy Brief: 5 Reasons to End Immigrant Detention*, National Immigrant Justice Center (Sept. 14, 2020).⁴⁰ And 90% of participants in community-based case management and other alternatives to detention comply with court and other requirements. *Id.* At the same time, use of community-based case management can reduce costs by up to 80%. *Id.*

Given the egregious harms worked by the use of detention in immigration in the United States and the well-documented limitations on its effectiveness to ensure compliance with immigration procedures, the use of detention should be severely curtailed or abolished completely.

³² <https://www.nytimes.com/2020/01/17/opinion/sunday/michelle-alexander-new-jim-crow.html>.

³³ <https://www.propublica.org/article/ice-guards-systematically-sexually-assault-detainees-in-an-el-paso-detention-center-lawyers-say>.

³⁴ https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9da297419202ab8be09c92/1520280217559/SexualAssault_Complaint.pdf.

³⁵ <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/>.

³⁶ <https://rewire.news/article/2017/11/22/texas-detention-center-faces-allegations-widespread-sexual-abuse-again/>.

³⁷ <https://rewire.news/article/2018/03/19/huge-victory-woman-alleged-sexual-assault-ice-contracted-detention-guard-finally-released/>.

³⁸ https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2020-04/Justice-Free%20Zones_Immigrant_Detention_Report_ACLU-HRW-NIJC_April-2020.pdf.

³⁹ <https://www.pogo.org/investigation/2019/05/medical-neglect-at-a-denver-immigration-jail/>.

⁴⁰ <https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention>.

C. Credible Fear Interviews Conducted by USCIS Asylum Officers

Tahirih also supports the NPRM’s specification that “USCIS asylum officers” must perform credible fear interviews. 86 Fed. Reg. at 46,944. That specification is necessary to achieve the NPRM’s stated goal of ensuring that the credible fear process is “consistent with congressional intent.” *Id.* at 46,914. The INA expressly requires “asylum officers”—defined as immigration officers with “professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of” asylum applications and is supervised by someone with the same training and “substantial experience adjudicating asylum applications”—to conduct credible fear interviews. 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(i), & (b)(1)(E).

USCIS asylum officers are the only DHS employees who satisfy the statutory definition of “asylum officer.” No other DHS employees receive anything like the training provided to asylum officers, who receive six weeks of residential basic training, three weeks of distance training, and at least four hours a week of ongoing training. “two six-week residential training programs” and continual weekly trainings thereafter. *See* GAO, *Actions Needed to Strengthen USCIS’s Oversight and Data Quality of Credible and Reasonable Fear Screenings* (Feb. 2020);⁴¹ *see also* Ashley Caudill-Mirillo, *Laws of Hospitality: Asylum and Refugee Law Panel*, at 3 (May 2011);⁴² USCIS, *Asylum Division Training Programs* (Dec. 19, 2016).⁴³

The Homeland Security Act of 2002 (HSA) confirms that USCIS asylum officers are the only DHS employees able to conduct credible fear interviews. The HSA gave the Director of USCIS authority over “[a]djudications of asylum and refugee applications.” 6 U.S.C. § 271(b)(3). By doing so, Congress expressly perpetuated the sharp distinction between the independent asylum corps instantiated as part of the former Immigration and Naturalization Service (INS) in 1990 and the enforcement activities of the INS. *See* INS, *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30,674 (July 27, 1990); Cong. Res. Serv., *Immigration: U.S. Asylum Policy* 11 (Feb. 19, 2019).

Given all of this, one might well think that DHS employees other than USCIS asylum officers could never be assigned to conduct credible fear interviews. That, unfortunately, has proven not to be true. In July 2019 and again in January 2020, purported DHS officials serving in violation of the Federal Vacancies Reform Act entered into memoranda of agreement to allow agents in Customs and Border Protection (CBP) to conduct credible fear interviews. *See A.B.-B. v. Morgan*, D.D.C. No. 1:20-cv-846, Compl. (Dkt. 1);⁴⁴ *A.B.-B. v. Morgan*, 2020 U.S. Dist. LEXIS 157397 (D.D.C. Aug. 29, 2020) (order granting preliminary injunction). They did so even though, by DHS’s own admission, CBP agents were given significantly less training before conducting credible fear interviews than asylum officers receive. *A.B.-B.*, 2020 U.S. Dist. LEXIS 157397, at *24. The result of this failure to train gave rise to situations like the one faced by Tahirih client In Jena, who was incorrectly told by a CBP agent conducting a credible fear interview that

⁴¹ <https://www.gao.gov/assets/710/704732.pdf>.

⁴² https://villagillet.files.wordpress.com/2011/05/caudill_mirillo_ashley_en.pdf.

⁴³ <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs>.

⁴⁴ https://1tts613brjl37btzk4eg60v-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/Morgan-Complaint_Filed.pdf.

persecution inflicted because of her sexual orientation could not be a legal basis for asylum. Further, the improperly acting officials also did so even though CBP agents are law enforcement agents who are categorically incapable of conducting the “nonadversarial” interviews required by 8 C.F.R. § 208.30(d). *A.B.-B. Compl.*; *see also A.B.-B.*, 2020 U.S. Dist. LEXIS 157397, at *25-27. And they did so even though it is clear from numerous public reports that CBP has a culture that is both xenophobic and misogynistic. *See, e.g., A.B.-B. Compl.* ¶¶ 62-63 & nn.17-18 (citing sources). It is therefore unfortunately clear that the NPRM’s specification that “USCIS asylum officers” must conduct credible fear interviews is necessary as well as appropriate in light of the statutory requirements.

IV. Features of the NPRM That Tahirih Opposes

A. Expansion of Expedited Removal

Tahirih opposes the NPRM’s proposal to force additional people through the deeply flawed, inhumane expedited removal process. All available evidence demonstrates that the expedited removal process is systematically unreliable for at least three independent reasons: (1) CBP agents frequently refuse to refer people who express fear to credible fear interviews; (2) the notes of credible fear interviews do not reliably relate the content of those interviews even though reviewing adjudicators often base (or affirm) adverse credibility determinations on credible fear notes; and (3) many people who have survived trauma and seek asylum in the United States are unable to recount their trauma to asylum officers during credible fear interviews. For each of these reasons, expanding expedited removal will result in routine violations of the United States’ duty of *non-refoulement*.

1. CBP Systematically Deprives People of Their Rights in the Expedited Removal Process

Abuses perpetuated by CBP agents against people seeking asylum are systematic and well-documented. A full accounting of CBP’s atrocities would take hundreds, if not thousands, of pages. The documents listed below, and many more like them, demonstrate beyond any doubt that CBP agents systematically deprive people seeking asylum of their rights in the expedited removal process; systematically inflict verbal and physical abuse, including sexual abuse, on people seeking asylum; and operate in a culture that has been xenophobic, misogynistic, and racist for many decades. We further note that the agencies have not provided any evidence to the contrary, much less evidence to support the view that CBP agents systematically fulfill their obligations to people seeking asylum. Any assertion to that effect would therefore be both contrary to the evidence before the agencies and arbitrarily based on nothing more than the agencies’ own *ipse dixit*.

- 1) ACLU, *American Exile: Rapid Deportations That Bypass the Courtroom* (Dec. 2014);⁴⁵
- 2) ACLU, *Border Patrol Violently Assaults Civil Rights and Liberties* (July 24, 2020);⁴⁶

⁴⁵ <https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom>.

⁴⁶ <https://www.aclu.org/news/immigrants-rights/border-patrol-violently-assaults-civil-rights-and-liberties/>.

- 3) ACLU, *CBP Fails to Discredit Our Report on Abuse of Immigrant Kids* (May 31, 2018);⁴⁷
- 4) ACLU of Arizona, *Record of Abuse: Lawlessness and Impunity in Border Patrol's Interior Enforcement Operations* (Oct. 2015);⁴⁸
- 5) ACLU of San Diego, *The Right to Seek Asylum: Migrants' Stories of the Struggle for Human Rights, Dignity, Peace and Justice in the United States* (Dec. 10, 2019);⁴⁹
- 6) Julia Ainsley et al., *ACLU asks DHS to take action on complaints of abuse, misconduct by U.S. border agents*, NBC News (Mar. 5, 2021);⁵⁰
- 7) American Immigration Council, *Bordering on Criminal: The Routine Abuse of Migrants in the Removal System* (Dec. 2013);⁵¹
- 8) American Immigration Council, *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants* (Sept. 2017);⁵²
- 9) American Immigration Council, *Deported with No Possessions: The Mishandling of Migrants' Personal Belongings by CBP and ICE* (Dec. 21, 2016);⁵³
- 10) American Immigration Council, *Detained Beyond the Limit: Prolonged Confinement by U.S. Customs and Border Protection along the Southwest Border* (Aug. 18, 2016);⁵⁴
- 11) American Immigration Council, *Hieleras (Iceboxes) in the Rio Grande Valley Sector* (Dec. 17, 2015);⁵⁵
- 12) American Immigration Council, *High Profile Cases Highlight Border Patrol Abuses and Need for Systemic Change* (Apr. 17, 2018);⁵⁶

⁴⁷ <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/cbp-fails-discredit-our-report-abuse-immigrant>.

⁴⁸ https://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf.

⁴⁹ https://www.aclusandiego.org/sites/default/files/The_Right_to_Seek_Asylum-Migrant-Stories_with_Links-1.pdf.

⁵⁰ <https://www.nbcnews.com/politics/immigration/aclu-asks-dhs-take-action-complaints-abuse-misconduct-u-s-n1259657>.

⁵¹ <https://www.americanimmigrationcouncil.org/research/bordering-criminal-routine-abuse-migrants-removal-system>.

⁵² <https://www.americanimmigrationcouncil.org/research/deportations-dark>.

⁵³ <https://www.americanimmigrationcouncil.org/research/deported-no-possessions>.

⁵⁴ <https://www.americanimmigrationcouncil.org/research/prolonged-detention-us-customs-border-protection>.

⁵⁵ <https://www.americanimmigrationcouncil.org/research/hieleras-iceboxes-rio-grande-valley-sector>.

⁵⁶ <https://immigrationimpact.com/2018/04/17/high-profile-cases-highlight-border-patrol-abuses-need-systemic-change/#.YWWmWH0pDIU>.

- 13) American Immigration Council, *The Legacy of Racism within the U.S. Border Patrol* (Feb. 10, 2021);⁵⁷
- 14) American Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context* (May 2014);⁵⁸
- 15) American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* (2014);⁵⁹
- 16) American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* (Aug. 2017);⁶⁰
- 17) American Immigration Council, *Why Caution is Needed Before Hiring Additional Border Patrol Agents and ICE Officers* (Apr. 2017);⁶¹
- 18) Amnesty International, *Facing Walls: USA and Mexico's Violations of the Rights of Asylum Seekers* (2017);⁶²
- 19) Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border* (2017);⁶³
- 20) Jenn Budd, *Border Patrol Whipping Haitians is Standard Behavior* (Sept. 21, 2021);⁶⁴
- 21) The Center for Latin American Studies, University of Arizona, *In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security* (Mar. 2013);⁶⁵
- 22) CIVIC Complaint, *supra*;

⁵⁷ <https://www.americanimmigrationcouncil.org/research/legacy-racism-within-us-border-patrol>.

⁵⁸ https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_and_credible_fear_claims_final_0.pdf.

⁵⁹ https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf.

⁶⁰ <https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered>.

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⁶² <https://www.amnestyusa.org/reports/facing-walls-usa-mexicos-violation-rights-asylum-seekers/>.

⁶³ https://7dac4932-ebde-4b1a-96f5-fac5c6bec362.filesusr.com/ugd/e07ba9_72743e60ea6d4c3aa796becc71c3b0fe.pdf.

⁶⁴ <https://www.jennbudd.com/post/border-patrol-whipping-haitians-is-standard-behavior>.

⁶⁵ https://www.researchgate.net/publication/284349191_In_the_Shadow_of_the_Wall_Family_Separation_Immigration_Enforcement_and_Security.

- 23) Complaint from ACLU, et al., to DHS Acting Officer for Civil Rights and Civil Liberties and DHS Acting Inspector General, Re: Abuse of power, excessive force, coercion, and unlawful confiscation of property by CBP at ports of entry along the U.S.-Mexico border (May 9, 2012);⁶⁶
- 24) Complaint from ACLU of Arizona, et al., to DHS Deputy Inspector General and DHS Officer for Civil Rights and Civil Liberties, Re: Abuses at U.S. Border Patrol interior checkpoints in southern Arizona, including unlawful search and seizure, excessive force, and racial profiling (Jan. 15, 2014);⁶⁷
- 25) Complaint from ACLU of San Diego & Imperial Counties to CBP San Ysidro Port of Entry and CBP San Diego Field Office, Re: Denial of Food to Asylum Seekers Awaiting Processing at San Ysidro Port of Entry (Mar. 23, 2016);⁶⁸
- 26) Complaint from American Immigration Council, et al., to DHS Officer for Civil Rights and Civil Liberties and DHS Acting Inspector General, Re: The Use of Coercion by DHS Officials Against Parents Who Were Forcibly Separated From Their Children (Aug. 23, 2018);⁶⁹
- 27) Complaint from American Immigration Council, et al., to DHS Officer for Civil Rights and Civil Liberties and DHS Inspector General, Re: CBP's Systemic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border (Jan. 13, 2017);⁷⁰
- 28) Complaint from National Immigrant Justice Center, et al., to DHS Officer of Civil Rights and Civil Liberties and DHS Inspector General, Re: Inadequate U.S. Customs and Border Protection screening practices block individuals fleeing persecution from access to the asylum process (Nov. 13, 2014);⁷¹
- 29) Complaint from National Immigrant Justice Center, et al., to DHS Officer for Civil Rights and Civil Liberties and DHS Inspector General, Re: Systemic Abuse of Unaccompanied Immigrant Children by CBP (June 11, 2014);⁷²

⁶⁶ https://www.aclu.org/sites/default/files/field_document/aclu_2012_cbp_abuse_complaint_2.pdf.

⁶⁷ https://www.aclusandiego.org/sites/default/files/field_documents/aclu-az-complaint-re-cbp-checkpoints-2014-01-15.pdf.

⁶⁸ <https://www.aclusandiego.org/sites/default/files/wp-content/uploads/2016/03/2016-03-23-Ltr-re-Denial-of-Food-at-SYS-POE-FINAL.pdf>.

⁶⁹ https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/the_use_of_coercion_by_u.s._department_of_homeland_security_officials_against_parents_who_were_forcibly_separated_from_their_children_public_fin_0.pdf.

⁷⁰ https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf.

⁷¹ <https://immigrantjustice.org/sites/immigrantjustice.org/files/images/Right%20to%20Asylum%20-%20CRCL%20Complaint%20Cover%20Letter%20-%2011.13.14%20FINAL%20PUBLIC.pdf>.

⁷² <https://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

- 30) Julia Craven, *The Ugly History Behind Those Border Patrol Agents Chasing Haitian Migrants on Horseback*, Slate (Sept. 25, 2021);⁷³
- 31) DHS Office of the Inspector General, *Special Review—Initial Observations Regarding Family Separation Under the Zero Tolerance Policy* (Sept. 27, 2018);⁷⁴
- 32) Mark Dow, *Sex Abuse and Homeland Security*, The Crime Report (May 12, 2017);⁷⁵
- 33) Manny Fernandez, *They Were Stopped at the Texas Border. Their Nightmare Had Only Just Begun*, N.Y. Times (Nov. 12, 2018);⁷⁶
- 34) Garrett M. Graff, *The Border Patrol Hits a Breaking Point*, Politico (July 15, 2019);⁷⁷
- 35) Garrett Graff, *The Green Monster: How the Border Patrol became America’s most out-of-control law enforcement agency.*, Politico (Nov./Dec. 2014);⁷⁸
- 36) Homeland Security Advisory Council, DHS, *Final Report of the CBP Integrity Advisory Panel* (2016);⁷⁹
- 37) Human Rights First, *Barred at the Border: Wait “Lists” Leave Asylum Seekers in Peril at Texas Ports of Entry* (Apr. 2019);⁸⁰
- 38) Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (May 2017);⁸¹
- 39) Human Rights First, *Fact Sheet: Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguards to Protect Refugees* (Apr. 2019);⁸²

⁷³ <https://slate.com/news-and-politics/2021/09/border-patrol-horseback-haitian-migrants-del-rio.html>.

⁷⁴ <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

⁷⁵ <https://thecrimereport.org/2017/05/12/sex-and-the-dhs/>.

⁷⁶ <https://www.nytimes.com/2018/11/12/us/rape-texas-border-immigrants-esteban-manzanares.html>.

⁷⁷ <https://www.politico.com/magazine/story/2019/07/15/border-patrol-trump-administration-227357/>.

⁷⁸ <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220/>.

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⁸⁰ https://www.humanrightsfirst.org/sites/default/files/BARRED_AT_THE_BORDER.pdf.

⁸¹ <https://www.humanrightsfirst.org/resource/crossing-line-us-border-agents-illegally-reject-asylum-seekers>.

⁸² <https://www.humanrightsfirst.org/resource/allowing-cbp-conduct-credible-fear-interviews-undermines-safeguards-protect-refugees>.

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- 41) Human Rights First, *Violations at the Border: The El Paso Sector* (Feb. 2017);⁸⁴
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- 43) Human Rights Watch, *“You Don’t Have Rights Here”*: US Border Screening and Returns of Central Americans to Risk of Serious Harm (Oct. 16, 2014);⁸⁶
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- 47) No More Deaths, *Crossing the Line: Human Rights Abuses of Migrants in Short-Term Custody on the Arizona/Sonora Border* (Sept. 2008);⁹⁰
- 48) No More Deaths, *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody* (2011);⁹¹
- 49) OneAmerica, et al., *The Growing Human Rights Crisis Along Washington’s Northern Border* (Mar. 2012);⁹²

⁸³ <https://www.humanrightsfirst.org/blog/they-lied-us-biden-administration-continues-expel-mistreat-families-seeking-asylum>.

⁸⁴ <https://www.humanrightsfirst.org/resource/violations-border-el-paso-sector>.

⁸⁵ <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells.discr>

⁸⁶ <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk#>.

⁸⁷ <https://www.phoenixnewtimes.com/news/arizona-border-patrol-agents-allegedly-beat-and-mock-migrants-11908305>.

⁸⁸ <https://www.politico.com/news/2021/09/23/cbp-americans-caravans-border-513829>.

⁸⁹ <https://elpasomatters.org/2021/09/28/cbp-turned-away-asylum-seekers-claiming-they-didnt-have-room-for-them-it-often-wasnt-true/>.

⁹⁰ <https://nomoredeaths.org/wp-content/uploads/2014/10/CrossingTheLine-full.compressed.pdf>.

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⁹² https://cbpabusestest2.files.wordpress.com/2018/11/northern_border_2012.pdf.

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- 52) Max Rivlin-Nader, *Documents Reveal Serious Abuse Allegations by Minors in Border Patrol Custody*, KPBS (Oct. 17, 2019);⁹⁵
- 53) Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. Times (July 9, 2019);⁹⁶
- 54) Vanessa Romo, *U.S. Border Agents Seen on Video Trying to Deport a Man Who 'Looks Mexican'*, NPR (Apr. 12, 2018);⁹⁷
- 55) Jacob Soboroff & Julia Ainsley, *Migrant kids in overcrowded Arizona border station allege sex assault, retaliation from U.S. agents*, NBC News (July 9, 2019);⁹⁸
- 56) Speri, *supra*;
- 57) A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019);⁹⁹
- 58) Sarah Tuberville & Chris Rickerd, *Abusing migrants while on horseback? That fits with the Border Patrol's long history of brutality*, L.A. Times (Sept. 22, 2021);¹⁰⁰
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⁹³ https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1¶ms=/context/wps/article/1049/&path_info.

⁹⁴ <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/60aed211ae956b032f242e94/1622069777656/Expedited+Removal+Brief+Schacher+FINAL.pdf>.

⁹⁵ <https://www.kpbs.org/news/midday-edition/2019/10/17/documents-reveal-years-serious-abuse-allegations-m>.

⁹⁶ <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html>.

⁹⁷ <https://www.npr.org/sections/thetwo-way/2018/04/12/601507466/u-s-border-agents-seen-on-video-trying-to-deport-an-man-who-looks-mexican>.

⁹⁸ <https://www.nbcnews.com/politics/immigration/migrant-kids-overcrowded-arizona-border-station-allege-sex-assault-retaliation-n1027886>.

⁹⁹ <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes>.

¹⁰⁰ <https://www.latimes.com/opinion/story/2021-09-22/haitian-migrants-del-rio-border-patrol-horseback>.

¹⁰¹ <https://www.uscirf.gov/publications/barriers-protection-treatment-asylum-seekers-expedited-removal>.

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- 61) University of Chicago Law School International Human Rights Clinic, et al., *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (May 2018);¹⁰³
- 62) Nick Valencia et al., *Border Patrol agents allegedly tried to shame a migrant by making him hold a sign reading 'I like men,' emails show*, CNN (July 4, 2019);¹⁰⁴
- 63) Nick Valencia et al., *US-born teen detained for weeks by CBP says he was told 'you have no rights,' CNN* (July 26, 2019);¹⁰⁵
- 64) John Washington, *Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims*, The Intercept (Aug. 11, 2019);¹⁰⁶
- 65) John Washington, *"Kick Ass, Ask Questions Later": A Border Patrol Whistleblower Speaks Out About Culture of Abuse Against Migrants*, The Intercept (Sept. 20, 2018);¹⁰⁷
- 66) Anna Werner & Laura Strickler, *"Disturbing" sex abuse within agency that patrols U.S. border, says former top official*, CBS News (May 4, 2015);¹⁰⁸
- 67) WOLA, *Fixing a Culture that Protects and Rewards Abuse at U.S. Border Agencies* (Oct. 14, 2020).¹⁰⁹

2. Credible Fear Interviews Are Systematically Unreliable

The problems with the implementation of expedited removal do not stop with CBP. Decades of experience with expedited removal have shown that asylum officers also routinely violate the rights of people seeking asylum during credible fear interviews. These violations include failing to elicit all relevant information at the interview and compiling notes of credible fear interviews that do not accurately reflect either the statements of people seeking asylum or the effects of trauma on those people. They also include the refusal to follow USCIS's own guidelines concerning children and credible fear interviews—violations that are incredibly pernicious, because when faced with the choice of traumatizing their own children by sharing the details of their persecution with the asylum officer, many reasonable parents and guardians choose silence. And poor official oversight, including because of high attrition rates and insufficient training, prevents the correction of errors. *See, e.g.*, Am. Immigration Lawyers Ass'n et al., Letter to Leon Rodriguez

¹⁰² <https://www.uscirf.gov/publications/report-asylum-seekers-expedited-removal>.

¹⁰³ <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1001&context=ihrc>.

¹⁰⁴ <https://www.cnn.com/2019/07/04/us/honduran-migrant-shamed-border-patrol/index.html>.

¹⁰⁵ <https://www.cnn.com/2019/07/25/us/us-citizen-detained-texas/index.html>.

¹⁰⁶ <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/>.

¹⁰⁷ <https://theintercept.com/2018/09/20/border-patrol-agent-immigrant-abuse/>.

¹⁰⁸ <https://www.cbsnews.com/news/u-s-border-patrol-has-a-sex-abuse-problem-says-whistleblower/>.

¹⁰⁹ <https://www.wola.org/analysis/fixing-a-culture-protects-rewards-abuse-us-border-agencies/>.

and Sarah Saldana (Dec. 24, 2015);¹¹⁰ Human Rights First, *How to Protect Refugees and Prevent Abuse at the Border: Blueprint for U.S. Government Policy* (2014);¹¹¹ Statement for the Record of Eleanor Acer, Dir., Refugee Protection, Human Rights First, Hearing before the Subcomm. on Immigration and Border Security of the H. Comm. Judiciary, at 6 (Feb. 11, 2015);¹¹² Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 Minn. J. Law & Inequality 315 (July 2018);¹¹³ Katherine Shattuck, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 Wash. L. Rev. 459, 482-483 (2018); American Immigration Council, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* (May 2017);¹¹⁴ *Barriers to Protection*, *supra*; Human Rights Watch, *Separated Families Report Trauma, Lies, Coercion* (July 26, 2018);¹¹⁵ *Discretion to Deny*, *supra*; *American Exile*, *supra*; Human Rights Watch, *Comment on Designating Aliens for Expedited Removal* (Sept. 23, 2019);¹¹⁶ Government Accountability Office, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* (Feb. 2020);¹¹⁷ USCIS RAIO Directorate-Officer Training, *RAIO Combined Training Course, Training Module: Interviewing—Introduction to the Non-Adversarial Interview*, at 18 (Mar. 24, 2017).¹¹⁸

Our experience is fully consistent with this systemic evidence. For example, Tahirih client Marta's fear of return to her home country was rooted in years of severe abuse by her partner, including rapes that left her pregnant. Rather than discuss sexual assault in front of her child, who was in the room, Marta did not disclose it. To take another example, a Tahirih attorney recounted that at the conclusion of one credible fear interview, the agent read back a summary of the interview, which was rife with errors based on the agent's misunderstandings. The attorney provided clarifications and the agent corrected the summary, but the notes taken throughout the interview remained uncorrected and rife with errors because the agent declined to review the notes in addition to the summary. The result was an internally inconsistent set of credible fear notes that disadvantaged the client in her § 240 proceedings.

The failure to provide adequate interpretation also mars the credible fear process. DHS's stated policy requires the provision of "meaningful language access for individuals with limited

¹¹⁰ <https://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process>.

¹¹¹ <https://www.humanrightsfirst.org/sites/default/files/Asylum-on-the-Border-final.pdf>.

¹¹² <https://docs.house.gov/meetings/JU/JU01/20150211/102941/HHRG-114-JU01-20150211-SD003.pdf>.

¹¹³ <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1600&context=lawineq>.

¹¹⁴ https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf.

¹¹⁵ <https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion>.

¹¹⁶ <https://www.hrw.org/news/2019/09/23/human-rights-watch-comment-designating-aliens-expedited-removal>.

¹¹⁷ <https://www.gao.gov/assets/gao-20-250.pdf>.

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English proficiency.” U.S. Dep’t of Homeland Sec., *Message from the Secretary* (introducing DHS’s Fiscal Year 2012 plan for providing meaningful language access).¹¹⁹ Yet by its own admission, the policy is not “appropriately implemented.” DHS Advisory Comm. On Family Residential Ctrs., *Report of the DHS Advisory Committee on Family Residential Centers 3*, at 78 (2016);¹²⁰ *see id.* at 77-108. And interpretation problems are frequent and systemic, especially when interpretation is provided remotely via telephone or videoconference. *See, e.g.*, Rachel Nolan, *A Translation Crisis at the Border*, *The New Yorker* (Dec. 30, 2019).¹²¹

Worse still, when a person seeking asylum speaks a rare dialect, such as an indigenous Central American dialect, the asylum office often cannot find an interpreter who speaks both the indigenous dialect and English. In such cases, the office employs dual interpretation, in which the person seeking asylum speaks to a first interpreter in the indigenous dialect. The first interpreter then relays the content in Spanish to a second interpreter, who then relays the content in English to the asylum officer. Such a tortured process is rife with errors. Shattuck, *supra*, at 484; *see also* Jennifer Medina, *Anyone Speak K’iche’ or Mam? Immigration Courts Overwhelmed by Indigenous Languages*, *N.Y. Times* (Mar. 19, 2019).¹²² Tahirih’s recent experiences—which include a merits hearing in which the immigration judge proceeded, over an objection, with relay translation from English to Spanish to a dialect of Mam the person seeking asylum did not speak fluently, with errors occurring at every stage of the process—confirm as much. And in still other cases, indigenous-speaking people are interviewed in Spanish despite notifying the asylum officer that they do not speak Spanish. Shattuck, *supra*, at 483-84.

We note that the experience of EOIR with interpreters confirms that existing government processes and contracts do not result in readily available and accurate translations. *See* Laura Abel, Brennan Center for Justice, *Language Access in Immigration Courts* 6-8 (2011);¹²³ National Language Access Advocates Network, *Language Access Problems in Immigration Court* (2010);¹²⁴ Medina, *supra*. Notably, immigration judges indicated that problems of interpretation became significantly worse as EOIR increased the use of telephone interpreters as opposed to in-person interpreters. *See, e.g.*, Joseph Darius Jaafari, *Immigration Courts Getting Lost in Translation*, *The Marshall Project* (Mar. 20, 2019);¹²⁵ Medina, *supra*; Abel, *supra*, at 8-9.

¹¹⁹ <https://www.dhs.gov/sites/default/files/publications/crcl-language-access-plan-s1-message-english.pdf>.

¹²⁰ <https://perma.cc/T6N3-LPLP>.

¹²¹ <https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border>.

¹²² <https://www.nytimes.com/2019/03/19/us/translators-border-wall-immigration.html>.

¹²³ https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf.

¹²⁴ https://www.prisonlegalnews.org/media/publications/national_language_access_advocates_network_problems_in_immigration_court.pdf.

¹²⁵ <https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation>.

3. Even If Perfectly Run, the Expedited Removal Process Would Systematically Result in *Refoulement*

The evidence above demonstrates beyond all room for contradiction that the expedited system has never been run as Congress intended. However, both research on trauma and a quarter-century of experience with expedited removal make clear that the process would continue to routinely result in *refoulement* even if it were run perfectly in every case.

As shown above (*see* Section II.A, *supra*), people seeking asylum have experienced trauma—which affects their ability to coherently and persuasively recount the details of persecution to others—and also are in no position to gather documentary evidence. The expedited removal process makes both problems worse. Indeed, because the expedited removal process singularly fails to account for either fact, it would result in the *refoulement* of countless survivors even if it had ever been carried out punctiliously by all officials involved in the process.

There can be no doubt that expedited removal exacerbates the effects of trauma that survivors already face. There are at least three reasons for this: the fact that survivors repeatedly encounter government officials; the format of credible fear interviews; and the universal use of detention under horrifying conditions. *First*, as part of the expedited removal process, survivors repeatedly encounter law enforcement and other officials—Border Patrol agents, USCIS asylum officers, and others. Many trauma survivors, however, fear law enforcement and other government officials. *See Treating the Hidden Wounds, supra*, at 3; Kagan, *supra*, at 379-80. This is no surprise, given that officials in survivors’ countries of origin either inflicted persecution or torture—or looked the other way while others did so. Law enforcement is thus a perceived threat, and survivors of trauma can be hypersensitive around perceived threats, whether or not those threats are real. Shawn C. Marsh et al., *Preparing for a Trauma Consultation in Your Juvenile and Family Court*, Nat’l Council Juv. & Fam. Ct. Judges 10 (Apr. 3, 2015). In any event, in the expedited removal context, the threat *is* real: government officials routinely abuse people seeking asylum (*see* Section IV.A.1, *supra*) and detain them (*see* Section III.B.2, *supra*), and the fact that the asylum officer is from a different agency in the same department of the same government as those other officials is hardly likely, much less sufficient, to instill confidence in a survivor. Thus, even the rare survivor who fully remembers her traumatic experience may be unable to recount that experience when faced with government officials. *See* Jim Hopper et al., *Important Things to Get Right About the “Neurobiology of Trauma” Part 3: Memory Processes*, End Violence Against Women Int’l 5-6 (Sept. 2020); Sabrineh Ardalán, *Access to Justice for Asylum Seekers*, 48 U. Mich. J.L. Reform 1001, 1001-1002 (2015); Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 Int’l Migration Rev. 230, 232 (1986).

Second, the format of credible fear interviews makes matters worse. Recounting trauma through a series of questions and answers, as in the context of a credible fear interview, simply heightens responses to trauma. Kagan, *supra*, at 394. For those who understand the credible fear process, the stress added by the stakes of the interview, which can end in deportation back to trauma exacerbates the situation further. So, too, do the facts that credible fear interviews are held very quickly and with unfamiliar government officials. *See* Conroy, *supra*, at 13-14. Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 Law & Sexuality 135, 140-41 (2006). Time limits on credible fear interviews, including those inherent in demanding quotas, also prevent asylum officers from eliciting full and complete details of fear of return. In short, far from being designed to allow survivors of serious trauma to explain their experiences, credible fear interviews make that exceedingly difficult task significantly more difficult still.

Third, credible fear interviews take place while survivors are held in detention, a harmful and punitive practice that retraumatizes survivors of violence, exacerbates mental health challenges, and compounds the difficulties of finding counsel, language access, and evidence to support the credible fear finding. Indefinite and prolonged detention—a common practice given the long delays associated with credible fear interviews in many detention centers—leads to severe psychological impacts, complicating a survivor’s ability to coherently present the relevant facts in an interview. *See* Section III.B.2, *supra*.

Just as the expedited removal process exacerbates the effects of trauma, it also exacerbates problems with documentary evidence. Because credible fear interviews take place quickly and at the border, before people seeking asylum can reach family members or other support systems, they can present no corroborating evidence besides documents that they carried with them (and that were not destroyed by DHS officials, *see* Section IV.A.1, *supra*). The credible fear process thus rests on the interview or nothing.

Thus, to avoid immediate removal as part of the expedited removal process, survivors must recount at least significant portions of their experiences in order to “pass” a credible fear interview held by a government official, while the survivor is cut off from support networks and often detained, very soon after their arrival in the United States. Moreover, if they wish to avoid adverse credibility arguments down the road, they must recount *all* of their traumatic experiences. For many survivors of severe trauma, either standard is impossible to satisfy. After all, as shown above, trauma plays havoc with memory, and trauma expressly prevents the recounting of experiences, and these effects are usually worse soon after traumatic events, when survivors are experiencing other traumatic conditions or do not feel safe, in the presence of government officials, and in question-and-answer settings.

Tahirih knows from experience—and common sense dictates—that another set of factors also affects the ability survivors to recount trauma in credible fear interviews. Many people have little understanding about the role of the interview in the asylum process, or the standards that are applied. Further, as shown above interpretation problems in credible fear interviews are rife. *See* Section IV.A.2, *supra*. And extremely limited access to counsel during the fear screening process exacerbates the other flaws in that process. *See, e.g.,* Shattuck, *supra*, at 484-86. Counsel could partner with a person seeking asylum to gain their trust, explain what is expected during the fear screening, assist the person in understanding what facts are relevant to present, guard against curtailment of the person’s expression of the facts surrounding her fear, and identify and work to resolve issues of inadequate interpretation. Yet representation of people seeking asylum at the fear screening stage is very low. As a result, many people seeking asylum do not clearly understand the contours of what is relevant and do not feel empowered to share their full stories with asylum officers, resulting in improper negative fear findings.

In short, an overwhelming amount of evidence accumulated over decades shows that, even in the hands of government agents who acted perfectly, the design of the expedited removal process means that it would result in the *refoulement* of many survivors of severe trauma. And the agencies have no evidence to the contrary. The NPRM’s proposal to expand expedited removal therefore will unquestionably result in routine violations of the United States’ obligations under international law. That aspect of the NPRM must accordingly be abandoned.

B. Removal of USCIS Authority to Reconsider Negative Credible Fear Findings

Tahirih opposes 8 C.F.R. § 208.30(g) and the portions of the rule that would remove the authority of the Asylum Office to reconsider negative credible fear findings. Under current 8 C.F.R. § 208.30(g)(2)(iv)(A), the Asylum Office may reconsider a negative credible fear finding. This procedural mechanism is essential to protect people seeking asylum from removal to circumstances that risk their health and safety.

The agencies claim that elimination of this crucial procedural safeguard will prevent “obstruct[ion] of the streamlined process that Congress intended in creating expedited removal” and undermining of “the necessary efficiencies implemented in this proposed rule.” 86 Fed. Reg. 46,915. But the cost of this alleged efficiency will be the risk of erroneous deportation of people seeking asylum to further persecution. This reconsideration safeguard was implemented in 2000 in response to widespread reports of erroneous credible fear denials and wrongful deportations under expedited removal. *See Human Rights First, Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture* (Sept. 2021), at 1 (“*Move to Eliminate*”).¹²⁶ An attempt in 2020 to cut reconsideration was abandoned because of the intolerable risks of *refoulement*. *Id.* Particularly in the context of the error-ridden expedited removal process, the eradication of reconsideration of the credible fear determination heightens the chance that a person seeking asylum with a legitimate claim is nonetheless wrongly returned to harm. Such a dire consequence cannot be justified in service to mere efficiency.

As shown above, the credible fear process is rife with errors—both those inherent in the process and those systematically introduced by human abuses and errors. *See* Section IV.A, *supra*. In light of these many sources of error, review of a negative credible fear determination by an immigration judge is inadequate to protect against erroneous expulsion of people seeking asylum. And the immigration judge review process is cursory: It is usually scheduled within 24 hours of the first CFI, eschews the right to counsel, bars the presentation of new evidence, and construes newly presented facts as evidence of lack of credibility. *Move to Eliminate*, at 1-3. Not surprisingly, in practice these reviews are usually highly deferential to the underlying negative fear finding. Between June 2017 and June 2018, immigration judges affirmed negative fear findings in 76 percent of cases. *Id.* at 3. Given these woeful procedural shortcomings, which are only exacerbated in the context of expedited removal, reconsideration is essential to prevent wrongful deportation. *Id.*

The availability of reconsideration or reinterview plays a crucial role in correcting these errors. An opportunity to revisit the documents or redo the interview is a crucial procedural safeguard to ensure that people seeking asylum are not wrongly returned to danger. Eliminating this step risks curtailing the due process rights of people seeking asylum and, ultimately, sending people with a credible fear back to continued persecution.

C. Agency Authority to Deny Applications Without Issuing Notice of Failure to Appear

Tahirih opposes proposed 8 C.F.R. § 208.10(a)(1)(v) and the portions of the NPRM that would permit a removal order, without previously issuing a notice of failure to appear, on the basis

¹²⁶ <https://www.humanrightsfirst.org/resource/biden-administration-move-eliminate-requests-reconsideration-would-endanger-asylum-seekers>.

of failure to appear for an interview or hearing before an asylum officer or a biometrics services appointment for an asylum application. Such a draconian measure creates the risk of removal orders in cases where a failure to appear is not fairly attributable to the applicant. And the agencies provide no rationale at all for their decision not to provide notice. *See* 86 Fed. Reg. at 46,919.

There are a number of reasons an applicant might miss an interview, hearing or biometrics services appointment that are not reasonably attributable to the applicant. The asylum office may not promptly update changes of address, resulting in mailing notices of interview, hearing or biometrics appointments to previous addresses even in cases where applicants have dutifully updated their addresses. In other cases, applicants have promptly updated their address with ICE but were not clearly notified in a language they understand that they must also separately update their address with an asylum office. Many offices are slow to accept and process Form G-28 for representation by an attorney or other legal advocate, leading to failures to properly notify the advocate of such appointments.

The notice of failure to appear provides an important safeguard preventing the issuance of a removal order against those individuals who do not attend an interview, hearing or biometrics appointment through no fault of their own.

D. Ability of Immigration Judges to Review Grants of Relief

Tahirih opposes proposed 8 C.F.R. §§ 208.14(c)(5), 1003.48(c), 1208.2(b) and 1208.14(c)(5) insofar as those provisions would permit an immigration judge to review grants of relief when reviewing denials of other relief at the request of the applicant. This provision would force survivors to make an impossible choice. If a survivor receives withholding of removal or CAT relief from the asylum officer, they would have one of two options. They could seek referral to an immigration judge—knowing that, by doing so, they are putting their own safety at risk and face the renewed possibility of a final removal order. Or they could decline referral to the immigration judge—knowing that, by doing so, they forfeit their ability to bring close family members to the United States and thus risk both permanent family separation and, in some cases, the lives of their children, spouse, or parents. No one should be forced to face this Sophie’s choice.

Worse still, forcing survivors of abuse to make that choice perpetuates the cycle of abuse. People who inflict abuse seek to control survivors and to deprive survivors of autonomy over their lives. In particular, those who abuse others use control over children—and the threat that a survivor will lose access to her children—as a means of perpetuating control. A person who commits abuse thus forces the survivor to choose between fleeing to secure her own safety and staying, and facing further abuse, to protect her children. *See, e.g.,* Michelle Ciurria, *The Loss of Autonomy in Abused Persons: Psychological, Moral, and Legal Dimensions*, 7 *Humanities* 48 (May 17, 2018); Marilyn Friedman, *Autonomy, Gender, Politics* (2003); Domestic Abuse Intervention Programs, *Understanding the Power and Control Wheel*;¹²⁷ Domestic Abuse Intervention Programs, *Using Children*;¹²⁸ Nat’l Domestic Violence Hotline, *Children as an Abusive Mechanism*;¹²⁹ *No Visible*

¹²⁷ <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/>.

¹²⁸ <https://www.theduluthmodel.org/wheels/understanding-power-control-wheel/#children>.

¹²⁹ <https://www.thehotline.org/resources/children-as-an-abusive-mechanism/>.

Bruises, supra; Nat’l Coalition Against Domestic Violence, *Why Do Victims Stay?*.¹³⁰ Though it might well not be intentional, that is precisely what the NPRM proposes to do: It would force survivors to put themselves at great personal risk of deportation and further persecution in order to attempt to their families.

In addition, we note that allowing immigration judges to review grants of relief is inconsistent with fundamental principles of adversarial adjudication. In that situation, USCIS—an agency within DHS—has granted relief to an individual. But DHS, of course, also acts as the adverse party to a person seeking asylum in immigration court. Thus, if an immigration judge is to review a grant by USCIS, one of two things must be true: Either DHS must argue that DHS itself erroneously granted relief, or the immigration judge must review a claim that is not in dispute between the parties. Either result would be absurd and unsustainable.

There is no reason to countenance these outcomes. Nothing in governing law requires immigration judges to review grants of relief by asylum officers. The sole justification provided by the NPRM is instead that “DHS could provide documentation or testimony before the IJ that is admissible . . . and that indicates that the applicant does not qualify for any of the relief or protection at issue.” 86 Fed. Reg. at 46,921. That factor does not come close to outweighing the absurd situation in which DHS would be forced to be at odds with itself, much less a forced choice between one’s life and one’s family. Of course it is true that DHS will not be present to provide evidence in a non-adversarial proceeding. But it is also true that applicants—and their representatives—will have to swear, under penalty of perjury, that they have fully completed applications designed to elicit *both* information supportive of their application and information detrimental to their application.

Further, that situation already exists in affirmative asylum interviews before asylum officers. The NPRM does not (and cannot) suggest that it has caused significant fraud or other problems. Accordingly, the NPRM correctly does not suggest that immigration judges should be able to review *any* grant of asylum made by USCIS. And if there is no reason for an immigration judge to review a grant of asylum, which requires a lower evidentiary showing in many respects while entailing greater benefits, there is no reason at all for an immigration judge to review a grant of withholding or deferral of removal.

V. Features of the NPRM That Must Be Amended

A. Use of Asylum Officers to Conduct Initial Interviews

As a general matter, Tahirih supports replacing adversarial proceedings in immigration court with non-adversarial interviews. As the agencies note, “non-adversarial proceedings are well suited for this process because they are considerably less resource-intensive than immigration court proceedings” and “lend themselves to a fuller understanding of the strengths and weaknesses of an applicant’s case. 86 Fed. Reg. at 46,918. Non-adversarial interviews also carry the potential to take account of the effects of trauma in ways that are exceedingly difficult in adversarial adjudicatory proceedings. *See, e.g., Annie S. Lemoine, Good Storytelling: A Trauma-Informed Approach to the Preparation of Domestic Violence-Related Asylum Claims*, 19 Loy. J. Pub. Int. 27, 39 (2017).

¹³⁰ <https://ncadv.org/why-do-victims-stay>.

The devil is, however, in the details—and those details force Tahirih to oppose the NPRM as currently drafted. There are five reasons for this: *First*, the last four years demonstrated that the USCIS asylum corps is far from immune to political pressure, and that the corps as currently constituted lacks the ability to conduct trauma-informed interviews and to grant asylum applications that should be granted under governing statutory and regulatory standards. *Second*, the time and place at which interviews are held will matter greatly to survivors’ ability to recount their stories, to their ability to provide other evidence, and to their ability to meaningfully avail themselves of their right to counsel—and the NPRM is all but silent on both issues. *Third*, the procedure during interviews also matters a great deal, and the NPRM both pays scant attention to that issue and, when it breaks its silence, mandates procedures that will exacerbate the effects of trauma. *Fourth*, the NPRM proposes to hire a significant number of new asylum officers to implement its procedure, and to do so on the basis of significant fee hikes. Doing so, however, would both place the least expert asylum officers in a situation requiring significant expertise and place the cost of asylum officer expansion on those least able to afford it. *Fifth*, and finally, although Tahirih appreciates the agencies’ proposal to mandate USCIS-provided interpreters at asylum interviews, the NPRM provides insufficient guarantees against severe breakdowns in interpretation.

1. The USCIS asylum corps must be rebuilt and insulated from future political pressure

When operating as intended, the USCIS asylum corps is a professional, trauma-informed group of interviewers, and interviews before asylum officers are, from the perspective of survivors of gender-based violence and other trauma, far preferable to adversary proceedings in immigration court. A wealth of evidence, however, makes clear that the asylum corps is not currently operating as intended.

As a threshold matter, asylum officers are dealing with a significant backlog of cases largely caused by shifting priorities. Although the NPRM mentions the backlog in the immigration courts, asylum officers currently face a backlog of over 400,000 asylum cases. *See USCIS, Number of Service wide Forms By Quarter, Form Status, and Processing Time, Fiscal Year 2021, Quarter 3.*¹³¹ This backlog includes many people who filed for asylum five years ago or more—but who have never been offered an interview because of the agency’s 2018 shift from a first-in-first-out interview scheduling policy to a last-in-first-out policy. *See, e.g., Compl., Tahirih Justice Center v. USCIS*, No. 1:21-cv-934, Dkt. 1 (E.D. Va.). More than five years is not an acceptable time from application to adjudication before USCIS any more than it is an acceptable time from application to adjudication before EOIR.

The asylum office as it currently exists therefore categorically lacks the ability to adjudicate additional asylum cases. And although the NPRM proposes to hire new asylum officers to adjudicate applications under its proposed process (*see* 86 Fed. Reg. at 46,921), existing asylum office employees would nevertheless be disrupted by the change, because experienced supervisors would be needed and extensive training would be necessary. Further, the NPRM’s process requires additional asylum officers at two points, because it also contemplates significantly increasing the number of credible fear interviews conducted each year. The foreseeable short- to medium-term

¹³¹ https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q3.pdf.

effect of the NPRM would thus be to *worsen* the backlog of affirmative asylum applications—and any long-term improvement is speculative, given that number of people placed in the new process, and the number of asylum officers, would both remain in the discretion of DHS, including future DHS leadership, moving forward.

Backlogs are, however, not the only significant problem at the asylum office as things stand. The process of having people apply before USCIS first, and then appear before EOIR if asylum is denied, should increase efficiency, because it should mean that USCIS is granting cases that clearly should be granted. The data, however, demonstrate that, at least in recent years, this has not happened. The most recent publicly available report from USCIS, from September 2019, shows that the asylum office approved only 34% of adjudicated asylum applications. USCIS, *Asylum Office Workload September 2019*.¹³² This includes an approval rate of 22.7% in Arlington, 47.3% in San Francisco, 7.8% in Boston, and 6.6% in New York. *See id.* at 5. For the same fiscal year—2019—EOIR granted asylum in *more than 70%* of cases referred from USCIS asylum officers. *See* TRAC, *Asylum Decisions*.¹³³ Indeed, in fiscal year 2019, the total grant rates by immigration judges were 60.4% in Arlington, 52% in San Francisco, 53.8% in Boston, and 57% in New York. *Id.* And these numbers are weighed down by defensive applications, which are granted at substantially lower rates across EOIR as a whole and in all of the courts specified here. *Id.*

Things, then, are amiss. There are plenty of reasons for this state of affairs. One is that asylum officers have, in recent years, been routinely reassigned *away* from conducting asylum interviews. “From FY 2015 to present, USCIS used asylum staff to fill 1,882 temporary assignments (rotations) to the border for credible fear and reasonable fear screenings.” USCIS Ombudsman, *Annual Report 2020*, at 48-49 (June 30, 2020) (“*Annual Report 2020*”).¹³⁴ Fully 89% of USCIS asylum officers were subject to these temporary deployments, which also involved deployments to programs struck down by courts as flagrant violations of the INA. Human Rights First, *Protection Postponed 2* (Apr. 2021).¹³⁵ In fact, USCIS has been told repeatedly since at least 2015 that increases in the number of credible fear interviews contribute to the backlog. CIS Ombudsman, *Annual Report 2015*, at xi (June 29, 2015).¹³⁶ But the agencies never mention this problem, which the NPRM would only make worse. Given that the agencies expressly state their intent to place more people in expedited removal, enacting the NPRM’s process would increase the need for temporary deployments at the border.

Further, USCIS has had substantial trouble hiring and retaining asylum officers. In fiscal year 2020, for example, it employed only 866 asylum officers—just two-thirds of the total 1,296 asylum officers it was authorized to employ. *Protection Postponed 2*; *see* USCIS, *Budget*

¹³² <https://www.uscis.gov/sites/default/files/document/data/PEDAffirmativeAsylumStatisticsFY2019.pdf>.

¹³³ <https://trac.syr.edu/phptools/immigration/asylum/>.

¹³⁴ https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf.

¹³⁵ <https://www.humanrightsfirst.org/sites/default/files/ProtectionPostponed.pdf>.

¹³⁶ https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2015-annual-report-to-congress.pdf.

Overview;¹³⁷ *Annual Report 2020*, at 45. It is clear that part of this difficulty was due to border details (which, again, will continue) and illegal policies promulgated by USCIS starting in 2017, which cause many veteran asylum officers to retire, quit, or move to new positions. See, e.g., Molly O’Toole, *Asylum officers rebel against Trump policies they say are immoral and illegal*, L.A. Times (Nov. 15, 2019);¹³⁸ Doug Stephens, *Why I Quit My Job Carrying Out Trump’s Immigration Policies*, N.Y. Times (Nov. 20, 2019);¹³⁹ AFGE, *USCIS Union: Asylum Officers Protest DHS Policies That Place Asylum Seekers in Harm’s Way* (Nov. 25, 2019);¹⁴⁰ Eric Katz, *Homeland Security Says It Will Dramatically Increase Asylum Workforce By Year’s End*, Government Executive (Oct. 23, 2019);¹⁴¹ Zolan Kanno-Youngs, *Asylum Officers Condemn What They Call ‘Draconian’ Plans By Trump*, N.Y. Times (July 15, 2020).¹⁴² The broader politicization of the asylum office, including the forced reassignment of its director in 2019, also played a role. Hamed Aleaziz, *The Top US Asylum Official Has Been Pushed Out By The Trump Administration*, BuzzFeed News (Sept. 4, 2019);¹⁴³ Ted Hesson, *Top asylum official reassigned to Virginia processing center*, Politico (Sept. 4, 2019).¹⁴⁴ Nothing in the NPRM even begins to prevent such abuse of the asylum office’s responsibilities—or a resulting exodus—from recurring in the future. See *Protection Postponed* 16.

There are also more general factors for hiring difficulties, including that USCIS pays its asylum officers substantially less than immigration judges. Once again, the NPRM proposes merely to perpetuate, rather than to fully remedy, this issue. See 86 Fed. Reg. at 46,934. More broadly, the agencies have failed to acknowledge—much less taken steps to remedy—staffing challenges. Further, those challenges take on especial importance in the context of the asylum office, because when one asylum officer leaves the agency, “it takes a minimum of six months on the job for an asylum officer to become proficient enough to adjudicate asylum applications at [USCIS’s] expected pace.” *Annual Report 2020*, at 45 (citing information provided by USCIS).

Training for asylum officers also changed significantly in recent years. The April 2019 lesson plan for credible fear interviews was altered so significantly that it violated the INA in numerous ways. *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 36-50 (D.D.C. 2020). The same lesson plan astonishingly, and impermissibly, erased every mention of trauma in the credible fear

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https://www.dhs.gov/sites/default/files/publications/united_states_citizenship_and_immigration_services.pdf.

138 <https://www.latimes.com/politics/story/2019-11-15/asylum-officers-revolt-against-trump-policies-they-say-are-immoral-illegal>.

139 <https://www.nytimes.com/2019/11/20/opinion/trump-asylum-remain-mexico-policy.html>.

140 <https://www.afge.org/article/uscis-union-asylum-officers-protest-dhs-policies-that-place-asylum-seekers-in-harms-way/>.

141 <https://www.govexec.com/workforce/2019/10/homeland-security-says-it-will-dramatically-increase-asylum-workforce-years-end/160828/>.

142 <https://www.nytimes.com/2020/07/15/us/politics/asylum-officers-trump.html>.

143 <https://www.buzzfeednews.com/article/hamedaleaziz/uscis-asylum-lafferty-out-reassigned-cuccinelli-trump>.

144 <https://www.politico.com/story/2019/09/04/asylum-official-reassigned-virginia-1705522>.

context—even though trauma represents the central fact that asylum officers conducting credible fear interviews must contend with. *See* Amicus Br. of Tahirih Justice Center et al., *Kiakombua v. McAleenan*, D.D.C. No. 1:19-cv-1872, Dkt. 39, at 13-20 (Sept. 19, 2019).

In short, the USCIS asylum office already forces affirmative asylum applicants to wait unconscionably long times for an interview; fails to grant large numbers of asylum claims that should be granted; is short-staffed; lost many of its most experienced asylum officers over the past four years, thanks in large part to politicization; and has trained newer asylum officers in patently deficient ways.

Faced with this situation, the NPRM proposes to place a very significant additional burden on that office without doing anything to remedy existing problems (aside from stating its goal hiring asylum officers, which is an empty promise given USCIS’s inability to fill existing asylum officer positions). Moreover, the NPRM proposes to create a process unfamiliar to asylum officers and their supervisors—a process that includes forms of relief they have not previously adjudicated; that is more formal than any other proceeding before asylum officers; that relies exceptionally heavily on asylum officers’ ability to quickly elicit information from severely traumatized people; and that provides for vague supervisory review without a transcript. The NPRM therefore would not just perpetuate existing problems with the asylum office—it would exacerbate those problems significantly. And the agencies must address these problems before seeking to vastly expand the jurisdiction of the asylum office.

2. The scheduling and venue of asylum interviews must reflect the realities of trauma and the difficulties survivors face in gathering evidence and finding counsel

Other than asserting that asylum decisions under the proposed procedure “would be made within timeframes more in line with those established by Congress in” 8 U.S.C. § 1158(d)(5) (86 Fed. Reg. at 46,910), the NPRM says nothing about the time or place of asylum interviews. But those topics are critical, because they bear directly on survivors’ ability to tell their stories, gather documentary evidence, and find counsel.

Both the timing of interviews and the place of interviews directly affect survivors’ ability to tell their stories to asylum officers. As shown above (*see* Section II.A.1, *supra*), trauma requires healing, which requires time. And a trauma survivor’s ability to access mental health services and to have the support of friends and family is critical to their ability to recount traumatic events. Thus, although *adjudications* of asylum applications should be expeditious, *interviews* are not meaningful if held shortly after a person’s arrival in the United States, because they will systematically fail to elicit all relevant information. Similarly, interviews held at the border, with people held in *hieleras* or in prison, will systematically fail to elicit all relevant information.

For the reasons in Section II.A.2 above, the timing and place of interviews also directly affect survivors’ ability to provide documentary evidence. Specifically, because people seeking asylum are in flight for their lives, because those who abuse or traffic survivors routinely confiscate papers, because trauma interferes with survivors’ ability to carry out administrative tasks, and because it takes time to receive evidence from a survivor’s country of origin or from domestic experts, survivors require both time and a safe place to provide documentary evidence. And it is no answer at all to claim that documentary evidence is not necessary: The brute fact of trauma alone is enough to belie that claim. Worse still, the high rates of referrals from asylum officers reflect that U.S. asylum law has continually become more complicated and more evidence heavy. Survivors of

gender-based violence, for instance, must frequently show membership in a particular social group—and unless they provide ample evidence to show that that group is both particular and visible in the relevant society, tasks that require extensive country-conditions evidence, their applications face no prospect at all of success. *See, e.g.,* Tahirih Justice Center, *Ensuring Equal and Enduring Access to Asylum: Why ‘Gender’ Must Be a Protected Ground* (2021).¹⁴⁵ Indeed, the timing provision in the INA strongly suggests that the unchecked growth of evidentiary requirements in asylum cases must be significantly pruned.

Furthermore, the ability to find counsel also depends on the time and place of the interview. Interviews held shortly after the credible fear interview will not give survivors a chance to find free or affordable counsel, because the demand for counsel greatly exceeds the supply. Similarly, interviews held while survivors are held in prison by ICE mean that they are much less likely to be able to find counsel. *See* TRAC, *Asylum Decisions*; Eagly & Shafer, *Access to Counsel in Immigration Court* (Sept. 28, 2016);¹⁴⁶ Maria Benevento, *Legal representation for detained migrants hindered by access issues*, Nat’l Catholic Reporter (Dec. 2018);¹⁴⁷ Niskanen Center, *Legal Representation for Asylum Seekers: An Overlooked Area of Reform for a System in Crisis* (Aug. 2021).¹⁴⁸ Interviews held at the southern border, as opposed to a survivor’s intended destination in the United States, likewise make finding counsel more difficult, because supply and demand issues are exacerbated at the border. And as shown above, placing cases on highly expedited timeframes interferes with the mission—and, ultimately, the funding—of legal service providers. *See* Section II.B, *supra*.

Moreover, there can be no doubt at all that having counsel is critical to a survivor’s eventual chance of success on the merits. *See* TRAC, *Asylum Decisions*; Eagly & Shafer, *supra*; Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. Mich. J. L. Reform 1001 (2015).¹⁴⁹ The reasons for this are far beyond the survivor’s control. The fact that asylum law is complex, especially as it pertains to particular social groups, cannot be changed by survivors. Nor can the current need for expert evidence in asylum proceedings. But without counsel, survivors cannot understand the law and cannot retain experts, dooming their claims. Thus, although Tahirih appreciates that agencies’ proposal to expressly provide a right to counsel in asylum interviews (86 Fed. Reg. at 46,911), we cannot support the NPRM’s procedure in part because it contains no safeguards to ensure that right is meaningful.

To ensure that survivors have a meaningful opportunity to find counsel and to present evidence in their asylum interview, the agencies must modify the NPRM significantly. At a minimum, the final rule should (1) provide a streamlined process for automatic extensions of the interview date in order for survivors to find counsel, gather evidence, and/or sufficiently process trauma to allow them to relate their experiences in the interview; (2) mandate that even applicants who do not seek extensions will have a period of no less than 90 days to provide evidence to

¹⁴⁵ <https://trac.syr.edu/phptools/immigration/asylum/>.

¹⁴⁶ <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

¹⁴⁷ <https://www.ncronline.org/news/justice/legal-representation-detained-migrants-hindered-access-issues>.

¹⁴⁸ <https://www.niskanencenter.org/legal-representation-for-asylum-seekers-an-overlooked-area-of-reform-for-a-system-in-crisis/>.

¹⁴⁹ <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1141&context=mjlr>.

USCIS between the date of the credible fear interview and the date of the asylum interview; (3) require interviews to be held at a person's destination location in the United States, with a guarantee that they will not need to travel more than 2 hours each way to the interview; and (4) provide a simple, automatic mechanism for changing the venue of interviews if a person moves within the United States.

3. The procedure used in asylum interviews must also reflect the realities of trauma and the difficulties survivors face in gathering evidence

The NPRM says very little about the procedure asylum officers are to follow during interviews, except that the interview should “elicit all relevant and useful information bearing on the applicant’s eligibility for asylum,” that it will be “nonadversarial,” that the applicant “may present witnesses” and “submit affidavits,” and that “[t]he applicant or the applicant’s representative shall have the opportunity to make a statement” at the end of the interview. 86 Fed. Reg. at 46,942. The stated goal of eliciting all relevant information is laudable.

The NPRM, however, will necessarily fail to achieve that goal. Some of the reasons, including the haziness of the time and place of interviews, are described above. Others have to do directly with trauma. The proposed format of the interview, for example, cuts directly against the agencies’ goal. As shown above (*see* Section IV.A.3, *supra*), questioning by a government official is the format *least* likely to elicit all relevant information. Rather, the way to maximize the chance that a person will be able to recount facts about traumatic experiences that they deem important is to begin the interview with either a statement by the person seeking asylum or, at the option of the person seeking asylum, the presentation of a detailed, sworn declaration by that person. If counsel or another representative is present, that representative should then have the opportunity to ask follow-up questions. Other witnesses and declarations should follow. Then, the asylum officer should pause to assess the evidence as it stands and determine which, if any, elements of a claim are not yet satisfactorily presented, and what evidence might cure the defects. At that time, and only at that time, the asylum officer should ask questions that go only to those gaps. Proceeding in this way would improve efficiency as well as fairness, as illustrated by the fact that merits hearings in immigration court typically last less than 3 hours—while affirmative asylum interviews now routinely run much longer.

Other safeguards, added to this basic structure, will further maximize the chance that the interview will elicit all relevant evidence. One is to allow the person seeking asylum to request, in advance, that the interview be before a female or male asylum officer—or, in the case of asylum claims premised on persecution against people who are LGBTQIA+ or non-binary, to request an interview before an asylum officer who so identifies. This creates a process by which a person can choose an asylum officer more likely to feel safe, and therefore someone to whom the person is more likely to recount their experiences. A second is to require asylum officers to allow breaks in the interview at the request of the person seeking asylum or her representative, and to make clear that although these breaks are for mental health purposes and to allow the person to tell her story, the need for a break will not always manifest in symptoms such as crying or shaking, and so breaks must be granted even if the person does not appear to be in distress.

Safeguards around the decisions of asylum officers are also needed. Given that trauma prevents many survivors from detailing their experiences in the context of credible fear interviews, the agencies must remove inconsistency with statements made during, or the notes of, those interviews as a basis for adverse credibility determinations.

Other safeguards around decisions are required by the drastically foreshortened process the NPRM envisions: For example, given the likelihood that people—especially those proceeding *pro se*—will not believe they need to provide evidence before the asylum interview, the agencies must remove the ability of asylum officers to make frivolousness determinations. Otherwise, the process will result in serious invited error by lulling people into moving forward on applications that asylum officers will deem frivolous. In doing so, the agencies should also formally revoke the expansive, unconscionable definition of “frivolous” put forth in the Anti-Asylum Rule. *See Anti-Asylum Rule Comment* 71-76. Further, because *pro se* applicants, and many lawyers, do not understand particular social groups or other elements of the asylum claim, the agencies must impose an affirmative duty on asylum officers to assist in formulating those groups and in developing other elements of the claim. *See, e.g., Arevalo-Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021).

The agencies should similarly require asylum officers to introduce relevant country-conditions evidence—including evidence concerning gender-based violence and gang violence in that country and the effectiveness or ineffectiveness of formal measures to combat such violence—where a person has not done so. To ensure that the choice of this evidence is non-adversarial, the relevant evidence should be selected, on a country-by-country basis, by experts who have been retained by advocates in prior asylum cases to provide information about the situations in given countries. At the same time, and again to ensure the interview is non-adversarial, asylum officers should be prohibited from introducing any other country-conditions evidence, or any other evidence adverse to the person seeking asylum, into the record.

Finally, to ensure that asylum officers do not continue to deny cases that should be granted, the agencies should require that asylum officers issue a reasoned, written decision in any case in which they deny relief. Further, to ensure that asylum officers take trauma into account, the agencies should specify that such decisions must address how the officer took account of the likely effects of trauma before denying relief. And because people who have suffered past threats or violence have, by definition, undergone traumatic experiences, this requirement must be applied in *all* cases, not just in those in which the person provides expert psychological evidence.

4. Expansion of the asylum office is necessary even without the new procedure, but survivors cannot and must not bear the cost of that expansion

Given the significant backlog of affirmative asylum cases, Tahirih agrees with the agencies that USCIS needs more asylum officers, whether or not this NPRM is ever finalized. But we do not agree with the NPRM’s simple-minded approach to remedying that problem. As shown above, the NPRM does nothing about longstanding, endemic problems in retaining and hiring asylum officers. It also suggests that expansion of the asylum office would be achieved through significant fee increases. 86 Fed. Reg. at 46,937. This is entirely inappropriate. Because the NPRM makes clear that any fee increases would be part of a “future fee rule,” not this rule, we will not discuss the issue at length here. We do, however, note that any fee increase will negatively affect the safety and independence of survivors of gender-based violence and would also negatively affect Tahirih and other legal service providers. *See* Section II.B, *supra*. We further incorporate our prior comments to EOIR and USCIS on fee increases by reference. *See* Tahirih Justice Center, *Comments in Response to Executive Office for Immigration Review; Fee Review* (Mar. 30,

2020);¹⁵⁰ Tahirih Justice Center, *Comments in Response to U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements* (Dec. 29, 2019).¹⁵¹

5. The NPRM must include safeguards against serious issues of interpretation

Tahirih appreciates the agencies’ proposal to require USCIS to “arrange for the assistance of an interpreter in conducting the” asylum interview at no cost to the applicant. 86 Fed. Reg. at 46,942. Doing so is wise. Interpreters are a necessity, and most people applying for asylum cannot afford to hire interpreters. The agencies, however, have not taken any steps to ensure that interpreters are both available and accurate—and they must do so. Further, accuracy during asylum interviews is critical, not least because when statements, questions, or answers are lost in translation, *refoulement* is the all-too-frequent result.

The systematic problems with interpretation discussed above (*see* Section IV.A.2, *supra*) therefore demand a response in the form of significant procedural safeguards. Any final rule based on the NPRM must, for example, mandate that interpretation cover everything said during the asylum interview, and must do so in a language and dialect in which the person seeking asylum is fluent. Because telephonic and video interpretation significantly increases the risk of errors and omissions, any final rule must also specify that telephonic or video interpretation will be used only if no qualified in-person interpreter is available in the interview location on the date of the interview or for 90 days thereafter, and even then only with the consent of the person seeking asylum. Similarly, because the use of multiple interpreters greatly increases the risk of errors, any final rule must specify that relay interpretation may only be used if a qualified direct interpreter is not available in the interview location on the date of the interview or for 90 days thereafter, and even then only with the consent of the person seeking asylum.

Further, to preserve some chance that errors in interpretation will later be discovered on review by EOIR, the final rule must specify that everything said *in any language* during an asylum interview must be included in the record, if not in writing then as part of a recording (if the person seeking asylum consents to a recording). In addition, any final rule must specify that asylum officers will receive both initial training and ongoing training in techniques for identifying problems in interpretation. Finally, any final rule must specify that interpreters will be screened at high levels and routinely evaluated to ensure consistent accuracy. This screening *must* be conducted by USCIS, as the error rates for translators—and direct evidence from screening exams (*see, e.g., Nolan, supra*) demonstrates that the quality control procedures used by for-profit private companies are completely inadequate.

B. Use of Credible Fear Notes as Asylum Application

When a credible fear interview results in a positive credible fear finding, the NPRM proposes to treat the notes of the credible fear interview as an asylum application. Tahirih

¹⁵⁰ <https://www.tahirih.org/wp-content/uploads/2020/03/Tahirih-EOIR-fee-proposal-comments.pdf>.

¹⁵¹ <https://www.tahirih.org/wp-content/uploads/2020/01/Tahirih-Fee-Rule-Comments.pdf>.

recognizes that this proposal benefits survivors in some ways. However, without significant amendments, the proposal will also result in the *refoulement* of many survivors.

1. The NPRM Appropriately Ensures Timely Filing of Asylum Applications

Tahirih supports the creation of a process by which people seeking asylum are automatically deemed to have submitted an application for asylum. This has two key benefits for survivors and others: It ensures that people satisfy the one-year deadline in 8 U.S.C. § 1158(a)(2)(B). And it begins the waiting period for an employment authorization determination under 8 C.F.R. § 208.7(a)(1)(ii).

The one-year filing deadline in 8 U.S.C. § 1158(a)(2)(B) operates as a bar to asylum to many survivors fleeing persecution. It does so for four interrelated reasons. *First*, because of the trauma they experienced, survivors are often unable to recount their experiences before the one-year bar expires. *See* Section II.A.1, *supra*. And because they are severely traumatized, socially and economically isolated, and unable to obtain work authorization until well *after* they apply for asylum, survivors are often unable to access those services quickly.

In one case, for example, Tahirih client Maria was kept by a man as his property for 11 years, referring to her as “mi perra” (“my dog”) and whistling rather than calling her by name. He told her she was registered to him like a car, and he constantly abused, controlled, and humiliated her. He tied her child up and tried to light him on fire. He mocked Maria’s religion, beat her for trying to go to church, and told her he owned her vote too. After she reported him to the police twice to no avail, he threatened to kill Maria if she did so again. He sharpened his machete in front of her, saying he wanted a clean edge when he cut her head off. Survivors of such abuse and torture often need significant time to begin processing and healing from their trauma in order to effectively describe their ordeals in even the most basic terms needed for filling out their asylum applications.

Second, survivors need counsel to assist them with preparing their applications. Even the most straightforward cases require technical legal analysis to ensure meaningful access to the asylum process. A recent national study found only 37% of respondents were represented in immigration court, and around 86% of immigrants in detention were unrepresented. *See* Eagly & Shafer, *supra*.

Moreover, cases involving gender-based persecution are notoriously complex. On average, pro bono attorneys representing clients in defensive asylum cases through Tahirih spend 300 hours during their first year of representation. It goes without saying that a respondent with no legal training would require much more. This is because, as a historically marginalized population, survivors have faced a long, hard road in establishing that gender-based persecution is in fact a human rights abuse from which they deserve legal protection. While survivors who endure abuses such as FGM/C, domestic violence, forced marriage, and human trafficking may qualify for asylum in the United States, decision-making is routinely flawed in these cases. Among other things, this is the result of (1) ever evolving legal standards; (2) politicization within our immigration agencies; (3) the nature of trauma itself; (4) the evidentiary challenges survivors face; and (5) a longstanding, cis-male centered analytical framework that clings to an artificially simplistic public/private distinction to the detriment of survivors who are predominantly women and girls.

Survivors, however, are mostly indigent. *See* Section V.B.2, *infra*. Indeed, according to a nationwide survey of advocates, immigrant women, and service providers that Tahirih conducted, safe and affordable housing and economic hardship ranked among the top three most urgent and

prevalent systemic challenges, respectively, confronting immigrant women in the United States. See Tahirih Justice Center, *Nationwide Survey: A Window into the Challenges Immigrant Women and Girls Face in the United States and the Policy Solutions to Address Them* (Jan. 31, 2018).¹⁵² Survivors therefore need a significant amount of time in order to be able to find specialized and affordable or free counsel. Indeed, even with the extensive pro bono program that Tahirih has meticulously built over decades, it can take over three months *after* a survivor contacts us to match a pro bono team with her case. And although Tahirih has served many thousands of survivors, we are able to meet only a fraction of the demand for our work.

Third, as shown at length in Section II.A.2 above, survivors face serious obstacles in obtaining documentary evidence to support their asylum claims.

Fourth, many survivors are, for the period before they file their asylum application, “detained” (which is to say, imprisoned for no crime). Detention compounds the three problems above. See, e.g., Tahirih, *Nationwide Survey*. People seeking asylum are exceedingly unlikely to have access to lawyers from prison; are unlikely to be able to understand the I-589 asylum application, much less meaningfully understand the requirements they must meet to receive relief under U.S. asylum law without that assistance; and have exceedingly few ways to gather relevant evidence.

2. The NPRM Appropriately Allows for Earlier Work Authorization

Work authorization for survivors, meanwhile, can literally mean the difference between life or death. Close to 100% of survivors of domestic violence report suffering financial abuse, and 75% of women report staying in abusive relationships due to economic barriers. See, e.g., Postmus et al., *Understanding economic abuse in the lives of survivors*, 27(3) *Journal of Interpersonal Violence* 411 (2012); Adams et al., *Development of the scale of economic abuse*, 13 *Violence Against Women* 563 (2008); The Mary Kay Foundation, *The 2012 Mary Kay Truth About Abuse Survey Report* (2012).¹⁵³ The role of financial resources in promoting women’s well-being and safety from violence, including prevention of future abuse, thus cannot be overstated. See, e.g., Nat’l Immigrant Women’s Advocacy Project, *Transforming Lives: How the VAWA Self-Petition and U Visa Change the Lives of Survivors and Their Children After Employment Authorization and Legal Immigration Status* (June 8, 2001).¹⁵⁴

Further, until they receive an EAD, survivors are also unable to open a bank account and obtain a driver’s license. A prolonged wait for an initial EAD therefore serves as an affirmative barrier to safety and independence for indigent survivors. Such a wait also serves as a tool of manipulation and control for people who abuse survivors, who are at the mercy of others when they are forced to wait for an EAD. Indeed, as DHS and DOJ implicitly acknowledged in promulgating the unconscionable (and flagrantly illegal) rules restricting EADs for people seeking asylum in 2020, homelessness is often survivors’ only alternative to continued abuse absent an EAD. See Aaron Reichlin-Melnick, *DHS Suggests Asylum Seekers Should Get Used to ‘Homelessness’ After*

¹⁵² <http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf>.

¹⁵³ <http://content2.marykayintouch.com/Public/MKACF/Documents/2012survey.pdf>.

¹⁵⁴ <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf>.

Stripping Work Permits, Immigration Impact (June 24, 2020).¹⁵⁵ Worse still, indigent survivors who do flee abuse but cannot work risk losing their children to the system if they are deemed unable to protect and provide for them. And continuing to live in a chronically unsafe, threatening situation exacerbates trauma and often results in extreme social isolation. This, in turn, prolongs trauma-induced mental health conditions—with taxpayers bearing the burden of both short and long-term treatment. We therefore support the NPRM insofar as it would shorten the wait for EADs under 8 C.F.R. § 208.7(a)(1)(ii).

3. Additional Procedural Safeguards Are Needed to Prevent the *Refoulement* of Survivors

All that said, Tahirih cannot support the use of credible fear notes as an asylum application without significant additional procedural safeguards. As an initial matter, and as shown above (*see* Section IV.A.3, *supra*), credible fear interviews are in no way trauma-informed—meaning that the vast majority of credible fear interviews will not, and cannot, elicit all information relevant to an asylum application. And as further shown above (*see* Section IV.A.2, *supra*), credible fear notes are not reliable indicators even of the limited information gleaned during credible fear interviews. Credible fear notes, without more, are therefore a very poor proxy for an asylum application.

One result of this mismatch is that the NPRM’s proposed process sets a trap. People seeking asylum—especially people seeking asylum who are not represented—have no reliable way of knowing that they should, in fact, seek to augment the credible fear notes. To the contrary, the natural inference to someone without knowledge of asylum law is that, if they “passed” the first interview, they’ll also pass the next interview. Along the same lines, people who pass a credible fear interview without counsel or other representation will naturally believe that they do not need representation for the asylum interview. These inferences, though natural, are deeply incorrect: After all, as shown above (*see* Section V.A.1, *supra*), asylum officers have recently granted fewer applications than immigration judges before whom DHS acts as a party adverse to people seeking asylum. In short, the NPRM, as written, opens the door to routine *refoulement*—a result that would be arbitrary, violate due process, and contravene the United States’ obligations under international law.

The NPRM would also negatively affect legal service providers. Because few people can secure counsel for credible fear interviews, representatives would enter most cases subject to the NPRM’s procedure *after* the filing of the initial asylum application. This greatly increases the work that representatives must dedicate to each case, because it forces them to take the credible fear interview—universally a partial, error-ridden exercise—as providing the basis for the asylum claim and either to force all of the client’s evidence into the result of that interview or to try to later expand the bases for an asylum claim. Either path requires more work than a case in which counsel is present at the outset. And either path therefore forces counsel to represent fewer people seeking asylum. *See* Section II.B, *supra*.

The NPRM pays scant attention to these problems. It asserts that the credible-fear notes “would provide sufficient information upon which to conduct a full asylum interview.” 86 Fed. Reg. at 46,916. But it reaches that conclusion solely because “the credible fear screening process is based on the noncitizen’s own testimony under oath in response to questions from a trained USCIS asylum officer.” *Id.* As shown above (*see* Section V.A.1), however, the recent training of USCIS

¹⁵⁵ <https://immigrationimpact.com/2020/06/24/asylum-seeker-work-permit/#.YWcuNn0pDIU>.

asylum officers has been highly deficient. And as further shown above (*see* Sections II.A.1 and IV.A.3, *supra*), the effects of trauma mean that people who are fleeing serious persecution and torture will *not* be able to give full accounts of their experiences in the context of credible-fear interviews. The agencies' supposition on this point is therefore arbitrary and capricious because it is unsupported, contrary to the evidence, and fails to account for the situation of people seeking asylum.

Significant procedural protections are necessary to ensure that survivors and others with valid asylum claims are not removed to face further persecution. *First*, the agencies should specify that everyone placed in the proposed new process must be informed of their right to present additional evidence, to retain counsel, and to expand the grounds for their asylum claim, before the asylum interview. This information must be given in a language in which the person seeking asylum is fluent and literate (if any; if not, the information must be given to a literate third party of the person's choosing). And it must specify both that the person seeking asylum must satisfy a much higher bar at the asylum interview; specify that counsel or other representation is critical to ensuring that those with valid asylum claims receive asylum; and include a comprehensive, up-to-date listing of pro bono and low bono legal service providers and the contact information of those providers in the area in which the asylum interview will be held.

Second, to ensure that the opportunities to find counsel and gather evidence are meaningful, people seeking asylum must be given an adequate time to prepare for the asylum interview. Further, the NPRM must specify that this time is extendable upon request by the person seeking asylum, or their representative, and that the circumstances warranting a continuance include the immediate unavailability of counsel in the area; the inability to gather evidence in time for the scheduled interview; and the need for counsel preparation. Furthermore, because all of these bases for a continuance rest outside the control of the person seeking asylum, none of them must count against that person for purposes of the provisions of the (illegal) asylum EAD rule.

Third, the regulations should mandate extensive procedural protections during the credible fear process. They should, for example, require any asylum officers conducting credible fear interviews to undergo extensive and continuing training in trauma-informed interview practices to guard against the probability that interviews will otherwise fail to elicit as much relevant information as trauma survivors can present in the context of a credible fear interview. The regulations should also require asylum officers to begin the interview by fully explaining the purpose of the interview, the standards applied in the interview, and the role the interview plays in the asylum process. The regulations should provide trauma survivors the option of requesting an interviewer who identifies as male, female, or non-binary—to prevent the all-too-common situation in which a survivor of gender-based violence is unreasonably expected to detail gender-based trauma to someone who shares a gender identity with the person who inflicted the trauma. The regulations should specify that credible fear interviews must be conducted with skilled interpreters in a language in which the person seeking asylum is fluent. And the regulations should specify that the notes of credible fear interviews must reflect that they are *not* to be used as a complete, exhaustive, or authoritative version of events and that it is normal for survivors of trauma to provide additional or different details after time in a relatively safe environment. Without all of these protections, the regulations will ensure the *refoulement* of people who have suffered serious persecution and torture, and they will do so *because* those people are still experiencing the effects of serious persecution and torture.

Fourth, with adequate guidelines for credible fear interviews in place, those interviews should be recorded to avoid further questions about the reliability of notes. The technology for

doing so and the cost of doing so is, at this point, trivial, and the gains in reliability far outweigh that cost. The only significant concern with recording is that the person seeking asylum must be given the opportunity to refuse recording. In some cases, trauma survivors who have been recorded by audio or video during persecution will be retraumatized by recording—and therefore exceptionally unlikely to be able to recount their stories if the interview is recorded. The asylum officer conducting the credible fear interview should therefore ask the person seeking asylum if recording would be retraumatizing in light of their experiences—and, if it is, should explain that they have the right to refuse recording if they would prefer to proceed on the basis of written notes.

C. Procedures for Review by Immigration Judges

Although Tahirih agrees with the agencies that review by immigration judges under a *de novo* standard of review, and the rights to appeal to the BIA and file a petition for review in the appropriate federal court of appeals, are necessary and appropriate following any initial review by an asylum officer, we cannot support the review procedure in the NPRM. The agencies have inappropriately proposed to place people seeking asylum in something less than § 240 proceedings and to severely curtail the evidence that can be presented to immigration judges. The agencies must abandon this position and revise any final rule to place people in § 240 proceedings. The agencies must also specify that immigration judges may never pretermite asylum applications. These steps constitute the only path consistent with the INA, due process, and the government’s duty of *non-refoulement*.

1. De Novo Review by Immigration Judges, with the Right to Appeal to the BIA and File a Petition for Review, Is Appropriate and Necessary

Tahirih supports the portion of proposed 8 C.F.R. § 1003.48(e)(1) specifying that immigration judge would apply a “*de novo*” standard of review following initial determinations by asylum officers. 86 Fed. Reg. at 46,947. Any other standard of review would be inconsistent with the problems of trauma and evidence described throughout this comment as well as with the engrained view of asylum officers that their role is to grant or refer cases, not to deny applications for relief.

2. Applicants Who Seek Review Must Be Placed in Full Proceedings Under INA § 240

The NPRM must, however, be amended to specify that people who seek review by immigration judges following denials of relief by asylum officers will be placed in full removal proceedings under INA § 240. As shown in detail above (*see* Section III.A.4, *supra*), the statute requires that result. Tellingly, the NPRM never even attempts to come to grips with the statutory sections requiring that result. *See* 86 Fed. Reg. at 46,917. Further, none of the separate statutory sections on which the NPRM relies even comes close to displacing the statutory presumption that, when a noncitizen is forced into immigration court, they must be placed in full § 240 proceedings unless the statute specifies otherwise. Nor do those sections come close to demonstrating that Congress excepted people seeking asylum who pass credible fear interviews, or any subset of that population, from full § 240 proceedings.

The agencies’ statutory interpretation rests on the negative inference that 8 U.S.C. § 1225(b)(1) must allow proceedings other than § 240 proceedings because it, unlike § 1225(b)(2), does not expressly require § 240 proceedings. *See* 86 Fed. Reg. at 46,917. But that reading badly misunderstands the statute. Section 1225(b)(1) states a general rule that applicants for admission

must be placed in § 240 proceedings. Section 1225(b)(2)(B)(ii) then creates an exception to that automatic entitlement for those defined as “arriving” in § 1225(b)(1), because those people are instead placed in expedited removal. That is, the agencies screen (b)(1) applicants to determine which of the two statutorily established methods of removal will apply: expedited removal for those without fear, and normal removal (consistent with the exclusivity provision in 8 U.S.C. § 1229a) for those who establish fear. The statute has never been and cannot now reasonably be understood to exclude all (b)(1) applicants from a full removal hearing, once they are no longer subject to the alternative of expedited removal.

The agencies’ reliance on 8 U.S.C. § 1225(b)(2)(A) fares no better. The agencies read that section to mean that “noncitizens whom DHS has elected to process into the United States using the expedited removal procedure are expressly excluded from the class of noncitizens who are statutorily guaranteed section 240 removal proceedings.” 86 Fed. Reg. at 46,917. Credible fear screening, however, creates an *exit* from expedited removal proceedings. By design, those who establish credible fear are effectively screened out of expedited removal proceedings; they are no longer subject to expedited removal. See 8 U.S.C. § 1225(b)(1)(B)(ii)–(iii) (those with credible fear to be detained and “referred” for consideration of their claims, and those who have not established fear ordered removed without “further hearing or review” as an expedited removal order). The agencies’ view that people seeking asylum can be forced into lesser proceedings in immigration court is thus contrary to law.

As further shown above (*see* Section III.A.4, *supra*), forcing people into asylum- and withholding-only proceedings would result in the removal of survivors and others entitled to status in the United States. As in the Anti-Asylum Rule, however, the agencies have not considered the needs of survivors when proposing to limit the relief for which people are available. A continued failure to do so would render the final rule arbitrary and capricious.

The agencies’ only claim in favor of limited proceedings is that placing people in the statutorily required § 240 proceedings would be “unnecessary, duplicative, and inefficient.” 86 Fed. Reg. at 46,918. The NPRM bases that assertion on three grounds: (1) the claim will already be “fully” developed; (2) a § 240 proceeding would not “add[] value or procedural protections”; and (3) the noncitizen can provide new evidence before the immigration judge. *Id.* None of those claims is plausible. As shown above (*see* Sections V.A.2-3 & V.B.3, *supra*), all available evidence demonstrates that the claim will *not* be fully developed, because of the effects of trauma and the difficulty of providing documentary evidence on short notice. For the same reason, a full § 240 proceeding would add value and procedural protections by permitting the person seeking asylum to actually present a full case.

Further, the NPRM itself belies the claim that § 240 proceedings do not involve additional procedural protections. *See* 86 Fed. Reg. at 46,920 (“the Departments propose that *many of* the procedural safeguards that apply in section 240 removal proceedings would apply to the IJ review proceedings as well”); *id.* at 46,917 (“additional procedural protections” in § 240 proceedings). Those protections are crucial. For example, a person in § 240 proceedings may challenge removability—while the NPRM proposes to exempt that challenge from its truncated IJ review process. So, under the NPRM, a survivor subject to expanded expedited removal, and who has actually been in the country for years (but failed to convince an immigration officer of that fact on the spot) could be shunted to asylum-only proceedings where removability could not be contested.

That leaves only the NPRM’s claim concerning the evidentiary provisions of the IJ review process. Obviously, those procedures—even if adequate—could not cure the absence of other procedural protections, as in the removability example above. But as we show at length below (*see*

Section V.B.3, *infra*), the evidentiary procedures proposed by the NPRM during immigration judge review are vague and entirely inadequate. As a result, each of the NPRM’s articulated rationales for forcing people into a truncated hearing rather than full § 240 procedures is arbitrary and capricious.

Judicial review provides still another reason to place people in § 240 proceedings following the denial of a claim by an asylum officer. We appreciate the agencies’ recognition that judicial review is vitally important and their intent that agency decisions denying asylum, withholding of removal, or CAT protection made in a new process will be reviewable by federal courts on a petition for review. Such review is indeed critical, and we write to offer suggestions for further safeguarding its availability.

Under the process set forth in the NPRM, following a positive credible fear determination, “[i]f the asylum officer denies asylum” to a noncitizen on the merits, the asylum officer also “orders the individual removed based on the immigration officer’s initial inadmissibility determination [made during expedited removal screening] under . . . 8 U.S.C. 1225(b)(1)(A)(i).” *E.g.*, 86 Fed. Reg. 46,906, 46,911 (Aug. 20, 2021). “An individual who is denied asylum may request review by an IJ of the asylum decision, as well as any denial of withholding or deferral of removal.” *Id.* “[A] noncitizen may appeal the IJ’s decision to the BIA.” *Id.* at 46,921. The Proposed Rule states that “as with BIA decisions in removal proceedings, the noncitizen may seek judicial review before the appropriate circuit court of appeals.” *Id.* at 46,921; *see also id.* at 46,921 n.59.

Given the importance of judicial review, we urge the agencies to ensure that the availability of such review is placed on the strongest possible footing. In that spirit, we strongly urge the agencies to modify the approach set forth in the NPRM such that those individuals not granted the relief they seek by an asylum officer and who desire further review are referred to full § 240 proceedings before an immigration judge. Under this modified approach, the immigration judge would make an inadmissibility determination in the § 240 proceedings; and if the immigration judge finds the noncitizen inadmissible and also denies asylum, the immigration judge would then enter a removal order. The noncitizen could then appeal the immigration judge’s decision to the BIA and seek judicial review of the BIA’s decision.¹⁵⁶

Finally, the proposal not to place people in § 240 proceedings would have the serious and untenable effect of people seeking asylum from any opportunity at parole. Those who pass credible fear interviews are entitled to parole only under 8 C.F.R. § 212.5(b). That section provides parole detained to people “detained in accordance with [8 C.F.R.] § 235.3(c)” —and § 235.3(c) in turn applies *only* to people “placed in removal proceedings pursuant to section 240.” Thus, although the NPRM states an intention to decrease detention, its proposal not to place people in § 240

¹⁵⁶ Should the agencies decide not to place people in § 240 proceedings, they should ensure judicial review by modifying the NPRM’s process as follows, at least with respect to individuals not granted the relief they seek by an asylum officer and who desire further review: (1) the case should be referred to the immigration judge for review without the asylum officer entering a removal order; (2) the immigration judge should be required to make and enter an inadmissibility determination during the immigration judge review proceeding; and (3) if the immigration judge finds the noncitizen inadmissible and denies asylum, the immigration judge should issue a removal order only at the conclusion of the immigration judge review procedure. The noncitizen could then appeal the immigration judge’s decision to the BIA and seek judicial review of the BIA’s decision.

proceedings would vastly *increase* detention by eliminating the only avenue to parole for many people who pass credible fear interviews.

3. The NPRM's Restrictions on New Evidence Must Be Abandoned

Still another reason to abandon the lesser, non-§ 240 proceedings contemplated by the NPRM is that the NPRM's proposal to limit the evidence that can be presented to immigration judges is arbitrary and entirely inappropriate. The NPRM proposes to limit new evidence to evidence that "is not duplicative of testimony or documentation already presented to the asylum officer" and that "is necessary to ensure a sufficient factual record upon which to base a reasoned decision on the application." 86 Fed. Reg. at 46,947. As shown above (*see* Sections V.A.2-3, *supra*), the NPRM's proposed process would foreclose many survivors from presenting documentary evidence (either lay or expert) and from presenting their full histories orally to the asylum officer and would also make it extremely difficult for survivors to find counsel before their asylum interviews. And it is clear from the statistics above (*see* Section V.A.1, *supra*) that asylum officers do not grant asylum *without* substantial amounts of evidence, often evidence introduced by counsel.

The result is that, under the new procedure, the vast majority of cases (more than the two-thirds of affirmative cases currently referred by asylum officers) will reach immigration judges. And in most of those cases, the record will be skeletal and will not reflect anything like the full range of persecution, torture, or other violence experienced by the person seeking asylum. To be sure, the ever-lengthening processing times in immigration court mean that many survivors might have a chance to retain counsel and gather evidence *after* being referred to immigration court. But placing restrictions on the introduction of new evidence at that stage inappropriately penalizes survivors and other people seeking asylum for the facts that the NPRM proposes a lightning-fast procedure before asylum officers and that U.S. asylum law has evolved to require substantial amounts of evidence that cannot possibly be gathered in the NPRM's contemplated timeframe. Such restrictions are, insofar as they keep out relevant supporting evidence, a recipe for *refoulement* and amount to a violation of due process rights.

That conclusion applies with full force to the specific restrictions proposed by the NPRM. Those standards are highly restrictive: Much evidence that is relevant, including much evidence that is *critical*, can be seen as not "necessary" to "a reasoned decision." After all, if a person seeking asylum says simply "I do not feel safe in my country," and there is no other evidence in the record from the asylum interview, an immigration judge could issue a reasoned decision saying that the person has not established past persecution and that, though they may subjectively fear future harm, they have not established that such future harm will rise to the level of persecution; that the persecution will be inflicted on account of a protected ground; or that it will be inflicted by the government or an actor the government is unable or unwilling to control. Thus, even if the same person was actually subject to repeated and severe violence by a government agency on account of their feminist political opinion—and could provide the immigration judge with evidence to prove as much—that evidence could not be presented to the immigration judge, because it is not necessary to a reasoned decision. Although that example is extreme, the evidence above makes clear that there will *routinely* be significant evidence supporting an asylum claim that the person seeking asylum could not present to the asylum officer.

The standard that evidence not be “duplicative” will also cause problems. “Duplicative” can mean “effectively identical,” and it can also mean “involving duplication” to some lesser degree. Dictionary.com.¹⁵⁷ In the latter sense, it means “*unnecessarily* doubled or repeated.” Garner, *Modern American Usage* 284 (3d ed. 2009) (emphasis added). The latter meaning of the term therefore opens numerous questions, many of them subjective: Is a second beating duplicative of the first? Is one report of crimes in a country duplicative of another report of similar crimes in a country? Is a second utterance by a persecutor that goes to the reasons for persecution duplicative of the first? And so forth. The NPRM, however, provides no basis for determining what is “duplicative,” and given that the rules of evidence do not apply in immigration court, the interpretation of that word will be up to individual immigration judges. And we know all too well, both from Tahirih’s own experiences and from systemic data, that immigration judges differ wildly in their interpretations. See TRAC, *Asylum Decisions*. The NPRM’s proposed limits on evidence are thus, in their turn, incredibly restrictive and inevitably subject to wildly different interpretations. And as a result, the restrictions would, if implemented, lead to inconsistent application and the *refoulement* of survivors.

Those restrictions would also have negative effects on both legal service providers and EOIR itself. Service providers would be able to take on fewer cases, because each asylum case referred by an asylum officer under the new proceeding would involve significant immediate work. To fulfill their ethical duties to their clients, legal advocates would have to immediately seek to fill the inevitable evidentiary gaps in the record—and then prepare written motions seeking to admit that evidence and seeking a full individual merits hearing before the immigration judge. And of course, there is no guarantee under the NPRM that such work will have any effect on the proceedings at all. The NPRM will therefore force legal service providers to serve fewer clients (and thus indirectly lead to further *refoulement*) by forcing advocates to spend untold amounts of time doing immediate and potentially (or even likely) useless work gathering evidence and filing motions with the court.

Meanwhile, the agencies’ apparent belief that EOIR will be spared work under the new procedure amounts to nothing more than wishful thinking. Given current asylum office trends, the vast majority of cases will end up in immigration court. And because the vast majority of people will *not* have representation before an asylum officer, immigration judges will be flooded with requests to present new evidence and for individual hearings. Even if those motions are uniformly denied (the result the NPRM all but forces), EOIR judges will be forced *both* to adjudicate those motions *and* then to adjudicate the underlying asylum claims. Furthermore, because the federal courts are likely to (correctly) view transcripts from asylum officer hearings with less deference than full trial transcripts from immigration court, the number of remands from federal court will also increase. As a result, any claim that the new procedure will be time-saving for EOIR amounts to speculation backed by neither evidence nor common sense.

All of these outcomes are exacerbated by the NPRM’s view that “an IJ ordinarily would not conduct an evidentiary hearing on the noncitizen’s asylum application.” 86 Fed. Reg. at 46,919. EOIR has long recognized that the full examination of an applicant [is] an essential aspect of the

¹⁵⁷ <https://www.dictionary.com/browse/duplicative>. We note that Merriam-Webster’s online dictionary, Webster’s New World College Dictionary (3d ed. 1997), and Black’s Law Dictionary (2d pocket ed. 2001) all lack an entry for “duplicative.”

asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.” *Matter of Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989). But under the NPRM’s procedure, a full examination will *not* occur before asylum officers, because the process will make it exceedingly difficult for individuals to retain counsel, because it sharply restricts counsel’s role in those proceedings, because the process pays no attention at all to the effects of trauma on a person’s ability to meaningfully recount traumatic events, and because asylum officers typically do not entertain oral testimony from people other than the applicant. By then also generally foreclosing evidentiary hearings before an immigration judge, the NPRM ensures that many survivors and other people seeking asylum will *never* have a meaningful opportunity to present their full story. That outcome is particularly inappropriate in situations where an immigration judge denies an application on the basis of an adverse credibility finding; doing so without providing the applicant with an opportunity to appear in court to both explain the supposed inconsistencies and provide evidence of prior trauma that could explain differences in testimony over time amounts to an abject denial of due process.

The NPRM does not acknowledge, much less engage with, any of these problems. Instead, it builds a rosy picture on the basis of unfounded assumptions. The agencies, for instance, defend the process on the ground that “the noncitizen [would] have notice of the reasons for the asylum officer’s denial in advance.” 86 Fed. Reg. at 46,920. But there is no reason to believe that is true. The NPRM itself would require notice only of the *fact* of the decision; it contains no requirement of reasoning. And asylum officers’ historical practice has *not* been to issue such reasoning. To the contrary, they routinely refer cases to immigration court in one or two lines.

The agencies’ supposition that the proposed process will allow “the IJ to conduct a *thorough* review of the asylum officer’s decision based on the application and *complete* record” (86 Fed. Reg. at 46,920 (emphases added)) is similarly unmoored from reality. Where there is no written reasoning to review, the immigration judge obviously cannot review that reasoning. Further, the notion that the NPRM’s proposed procedure would result in anything like a “complete” record is, for the reasons above (*see* Sections II.A, IV.A, & V.A, *supra*), at odds with the evidence before the agency. And the new procedure will not “bring[] litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective records.” 86 Fed. Reg. at 46,920 n.56 (quoting *INS v. Abudu*, 485 U.S. 94, 107 (1988)). To the contrary, the rule will *both* foreclose applicants from having a meaningful opportunity to develop the record *and* ensure additional litigation in the federal courts.

The claim that the evidentiary restrictions in the rule “would ensure a full and fair evaluation of the applicant’s application for asylum” (86 Fed. Reg. at 46,920) is likewise arbitrary and capricious. The agencies never even attempt to reckon with the fact, shown above, that the restrictions are worded to be highly restrictive and vague. And it defies belief to claim, as the agencies do (*id.*), that having an immigration judge explain these restrictive and vague standards to pro se applicants in open court will sufficiently apprise those applicants of the process and what they need to do to provide further relevant evidence to the court. Further, the fact that an applicant could have further review by the BIA and the federal courts (*id.* at 46,921) means very little given such review is uniformly conducted on the basis of a partial, incomplete record and that, in many cases, the first trip through each level of the system would involve challenging the imposition of limitations on the introduction of evidence.

4. The Agencies Should Expressly Prohibit the Pretermission of Asylum Applications

In addition to placing people in full § 240 proceedings if their applications are denied by asylum officers, the agencies should prohibit immigration judges from ever pretermittting asylum applications. In the context of asylum claims, pretermission always has malignant effects. “With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’” *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting Elizabeth Hull, *Without Justice for All* 107 (1985)). The law has not become less complex since 1987. Many people seeking asylum proceed pro se and have limited English proficiency, much less familiarity with the intricacies of U.S. asylum law. Their ability to present a prima facie case for asylum in writing thus bears no relationship to the merit of their underlying claim. Further, because people seeking asylum often cannot provide significant documentary evidence (*see* Section II.A.2, *supra*), “the full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.” *Matter of Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989); *see also Matter of E-F-H-L-*, 26 I&N Dec. 319, 324 (BIA 2014) (“in the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of the applications, including an opportunity to provide oral testimony and other evidence, without first having to establish prima facie eligibility for the requested relief”), *vac’d as moot*, 27 I&N Dec. 226 (AG 2018).

Pretermission is particularly harmful to survivors of gender-based violence. It ensures that people who simultaneously have pending VAWA or U-visa petitions will likely be removed before decisions on those petitions, which could allow them to remain in the U.S., have been rendered. Survivors who are removed despite pending petitions will face new unlawful presence bars requiring waivers to be filed from abroad, will have limited if any access to counsel and face additional, undue barriers in responding to Requests for Evidence and other critical correspondence about their cases, and will be vulnerable to life-threatening violence and other harm that will prevent them from ever safely returning to the United States even if their petitions are ultimately granted. Worse still, T-visa petitioners who are deported will eventually have their petitions denied outright for failure to maintain presence in the United States. These results would grossly undermine the express intent of Congress in enacting these remedies for survivors. And although current ICE policy concerning survivors should prevent the removal of those with pending petitions before USCIS, that policy is subject to revocation at the stroke of a pen.

Pretermission should therefore never occur, and we urge DHS and DOJ both to rescind the provisions of the Anti-Asylum Rule that expressly permit pretermission of asylum claims and to enact a broad regulatory bar on the practice. At a minimum, however, the agencies should expressly prohibit immigration judges from pretermittting applications referred by asylum officers as part of the procedures outlined in the NPRM. After all, the new process is designed in ways that prohibit the introduction of significant evidence before the asylum officer and that both make it difficult to obtain counsel and minimize the role that counsel plays. Allowing immigration judges to pretermitt claims following such minimal process would violate the constitution and make a mockery of our pledge not to *refoul* refugees.

VI. Suggestion for Additional Change: The Agencies Should Rescind Changes to 8 C.F.R. § 1003.42(f) Made by the Anti-Asylum Rule

As described in Section III.A above, Tahirih supports the NPRM’s proposal to rescind illegal provisions of the Anti-Asylum Rule. DHS and DOJ should also unwind another major change made to credible fear interviews as part of that rule. Under longstanding USCIS policy, asylum officers conducting credible fear interviews consider the court precedent most favorable to the applicant. *See, e.g.*, USCIS, 2017 Credible Fear Training 17; RAI0 Training Course, Credible Fear (Feb. 28, 2014), at 16; RAI0 Training Course, Credible Fear of Persecution and Torture Determinations (Apr. 14, 2006), at 14; *Grace v. Barr*, 965 F.3d 883, 900-01 (D.C. Cir. 2020). The Anti-Asylum Rule, however, sought to amend 8 C.F.R. § 1003.42(f)(1) to require immigration judges reviewing negative credible fear determinations to consider only the opinions of “the [f]ederal circuit court of appeals having jurisdiction over the immigration court where the [r]equest for [r]eview is filed.”

Reversing this “provision[] of the” Anti-Asylum Rule is “necessary [and] appropriate to accomplish” the NPRM’s stated goal of creating “a more efficient and effective credible fear screening process.” 86 Fed. Reg. at 46,914-15. After all, this feature of the Anti-Asylum Rule created a direct disconnect under which credible fear determinations can be *made* under one set of binding legal precedents but *reviewed* under a different set of precedents. That situation is hardly one designed to promote efficiency and effectiveness.

Furthermore, it is USCIS policy, not the policy promulgated by the Anti-Asylum Rule, that sets a sensible and appropriate standard. *See* Anti-Asylum Rule Comment 62-63. It is USCIS’s policy, not the policy promulgated by the Anti-Asylum Rule, that implements Congress’s intent to ensure that “[l]egal uncertainty ... adhere[s] to the applicant’s benefit” at the credible fear stage. 142 Cong. Rec. H616 (daily ed. Apr. 18, 1996) (statement of Rep. Smith). It is USCIS’s policy, not the provisions of the Anti-Asylum Rule, that accounts for the fact that asylum claims are often adjudicated in federal circuits other than the one where the credible fear interview is held. *See* TRAC, *Asylum Decisions*;¹⁵⁸ USCIS, *Asylum Office Locator*.¹⁵⁹ And it is USCIS’s policy, not the policy promulgated by the Anti-Asylum Rule, that appropriately takes into account the fact that the asylum framework of the INA must be applied with particular care in cases of gender-based violence because the bases for asylum claims in 8 U.S.C. § 1101(a)(42)(A) reflect outdated, male-dominated thinking. The agencies should therefore rescind the provision of the Anti-Asylum Rule that sought to limit the court opinions that immigration judges may consider in reviewing credible fear findings.

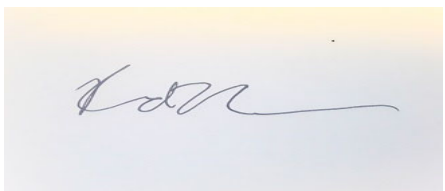
¹⁵⁸ <https://trac.syr.edu/phptools/immigration/asylum/>.

¹⁵⁹ <https://egov.uscis.gov/office-locator/#/asy>.

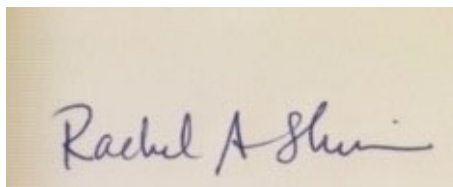
VII. Conclusion

For the reasons above, Tahiri supports certain limited portions of the NPRM but opposes the proposed new procedure for considering asylum claims absent major modifications to that procedure.

Sincerely,

A rectangular image showing a handwritten signature in dark ink on a light-colored background. The signature is stylized and appears to read 'R. Caldarone'.

Richard Caldarone
Litigation Counsel

A rectangular image showing a handwritten signature in dark ink on a light-colored background. The signature is written in a cursive style and clearly reads 'Rachel A. Sheridan'.

Rachel Sheridan
Litigation Counsel