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RE: DHS Docket No. USCIS-2021-0012 - Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (March 29, 2022).

To Whom it May Concern:

The Southern Poverty Law Center (SPLC) respectfully submits this comment urging the Department of Justice (DOJ) and the Department of Homeland Security (DHS) to substantially revise the above-referenced Interim Final Rule (IFR)¹ issued by the DOJ's Executive Office of Immigration Review (EOIR) and DHS's U.S. Citizenship and Immigration Services (USCIS).²

Founded in 1971, SPLC is a civil rights organization dedicated to litigation and advocacy that make justice and equal opportunity a reality for all. SPLC's Immigrant Justice Project (IJP) represents noncitizens across the Southeast and nationally. Through its litigation team, IJP provides legal representation and support to immigrants in civil rights cases and on issues of regional and national importance, including efforts to protect the integrity of the U.S. asylum system. In April 2017, IJP launched the Southeast Immigrant Freedom Initiative (SIFI), which

¹ Hereinafter, "Interim Final Rule" or "IFR."

² DHS and DOJ are jointly referred to as "the Departments."

engages in advocacy and *pro bono* legal representation in immigration detention centers in Georgia, Louisiana, and Mississippi. SIFI represents clients, including many asylum seekers,³ in custody proceedings, removal proceedings before the EOIR, appeals to the Board of Immigration Appeals (BIA), and petitions for review to federal courts of appeal. SIFI also represents clients in Credible Fear Interviews (CFIs), review of negative CFI determinations before immigration judges, Requests for Reconsideration (RFRs) of negative CFI determinations, and Further Information Gathering (FIG) interviews, and conducts other advocacy for detained people placed in expedited removal proceedings.

In 2021, SIFI represented over 200 clients in bond and other advocacy efforts related to release, in addition to other forms of representation. SIFI's clients spoke at least twenty-one languages and are from various parts of the world. The majority of individuals who call SIFI's Helpline for legal assistance are recent arrivals who are seeking asylum.

SPLC's experience providing representation in legal deserts in the Southeast informed its comment on the related Notice of Proposed Rulemaking (NPRM).⁴ As we explained in our October 2021 comment to the NPRM, SPLC was, and continues to be, the only organization that provides direct representation in the Stewart Immigration Court.⁵ The immigration judges at the Stewart Immigration Court preside over hearings for detained respondents at two detention centers (Stewart and Folkston ICE Processing Centers in Lumpkin and Folkston, Georgia, respectively).⁶ SIFI's office in Louisiana represents detained individuals in both Louisiana and Mississippi. SIFI's offices also regularly represent respondents in several Immigration Courts in different circuits, submit release requests to several ICE Field Offices (Atlanta and New Orleans), and have reviewed CFI determinations made by no fewer than six Asylum Offices (Miami, Tampa, New York, Arlington, Houston, and Denver). SIFI's staff also communicate and submit various requests to additional ICE offices, such as Charlotte and Chicago.

This Comment acknowledges specific improvements made by DHS and DOJ to the Interim Final Rule from the NPRM⁷ and addresses the SPLC's serious concerns with the IFR's expedited timelines for the Asylum Merits Interview and immigration court review. As is explained in more detail below, these timelines, propounded in the name of "efficiency," go too far and are instead unreasonably short, will fail to protect asylum seekers' due process rights, and will increase the risk of the U.S. government returning people to serious danger or even death. The SPLC also incorporates by reference the issues addressed in the joint comment submitted by the SPLC, the Refugee and Immigrant Center for Education and Legal Services (RAICES), and the Florence Immigrant & Refugee Rights Project (FIRRP). The fact that we have not discussed a particular proposed change in this comment does not necessarily mean that we agree with it.

³ Throughout this comment, the term "asylum seeker" is used to refer to individuals seeking humanitarian protection in the form of asylum, withholding of removal (including under the Convention Against Torture (CAT)), and/or deferral of removal under CAT.

⁴ See <https://www.regulations.gov/comment/USCIS-2021-0012-5085>.

⁵ See EOIR, List of Pro Bono Legal Service Providers, Georgia, <https://www.justice.gov/eoir/file/ProBonoGA/download> (updated April 2022).

⁶ SPLC also previously represented detained respondents at the Irwin County Detention Center in Ocilla, GA, which closed in September 2021.

⁷ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46,906 (proposed August 20, 2021).

While the SPLC is encouraged by many of the improvements made by the Interim Final Rule, it also strongly urges the Departments to make additional improvements to the IFR. The SPLC's overarching concern with the IFR is that the Departments have prioritized the swift adjudication of cases at the expense of the protection of asylum seekers' due process rights and the United States' international obligation to the principle of non-refoulement. Non-refoulement is a cornerstone of refugee law⁸, and without significant changes to the IFR—in particular, the portions of the IFR that create impossible and illogical timelines for the adjudication of an individual's claims for relief—the United States will inevitably detain and deport asylum seekers with meritorious claims to countries where they face persecution, torture, or death. The SPLC urges the Departments to make the improvements outlined below.

I. Improvements made from the NPRM.

SPLC applauds several of the improvements contained in the IFR, many of which will help protect individuals as they proceed through the credible fear or asylum merits process. Below are some of the positive changes the SPLC wishes to highlight.

First, the Interim Final Rule maintains the elimination of the need to file a separate asylum application for individuals who receive a positive Credible Fear Interview (8 CFR §§ 208.3–208.4). As SPLC wrote in its comment to the NPRM, allowing a positive CFI to serve as a filed asylum application will streamline the process and, particularly for individuals proceeding *pro se*, reduce confusion for individuals who believe passing their CFI means they have applied for asylum. We are therefore encouraged by the IFR's removal of the requirement for individuals to fill out an asylum application (I-589) after establishing a positive Credible Fear Determination.⁹

Second, the IFR clarifies that CFIs must be conducted by USCIS asylum officers, not CBP officers (8 CFR § 208.30(d)). As we wrote in our Comment to the NPRM, the SPLC was encouraged by the IFR's confirmation that the interviewing officer must be from USCIS, and not Customs and Border Protection (CBP). The prior administration's efforts to use CBP officers to conduct CFIs¹⁰ resulted in unreliable and unjust results, as the CFIs conducted by CBP officers had a 50 percent higher denial rate than CFIs by USCIS Asylum Officers.¹¹

⁸ See, e.g., Matthew Boles, *Refugees v. Internally Displaced Persons: Why the Externality Requirement Should Be Eliminated*, 21 Holy Cross J.L. & Pub. Pol'y 9 (2017).

⁹ Currently, asylum seekers must file an asylum application within one year of their last arrival to the United States (or April 1, 1997), whichever date is later, or unless an exception applies. 8 C.F.R. § 208.4(a)(2). The SPLC, in partnership with several other organizations, has expressed concerns about language access, including filling out an I-589 in English by both the one-year deadline or by a deadline by an immigration judge.

¹⁰ *CBP CFI Production*, American Immigration Council, (March 19, 2020), <https://www.americanimmigrationcouncil.org/FOIA/cbp-cfi-production>.

¹¹ Azadeh Erfani, *DHS Closed The Border To Scores Of Asylum Seekers Long Before COVID-19*, National Immigrant Justice Center at 2 (May 29, 2020), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2020-05/DHS%20CLOSED%20THE%20BORDER%20TO%20SCORES%20OF%20ASYLUM%20SEEKERS%20LONG%20BEFORE%20COVID-19.pdf>.

Third, the IFR returns to the “significant possibility” standard and removes the review of security bars during initial fear screenings (8 C.F.R. § 208.30(b) and (e)). The SPLC is encouraged by the IFR’s return to the preexisting standard that asylum seekers need only demonstrate “a significant possibility” that they can prevail on their claim for asylum, withholding of removal, or protection under the Convention Against Torture. The SPLC applauds the amendment to 8 CFR § 208.30(e)(5) to not apply any bars to asylum or other protection at the initial fear screening stage, a welcome return to long-standing practice. To screen for such bars during this initial phase of the process would be an unnecessary barrier to protection, particularly when individuals are often going through these initial fear screenings without the benefit of legal representation.

Fourth, the IFR allows Asylum Officers to grant withholding of removal and protection under CAT for individuals who have received a positive Credible Fear Determination (8 CFR § 208.9(b)). The SPLC applauds this change to the process for individuals who have passed their CFIs and who proceed to the Asylum Merits Interview with USCIS.¹² This would reduce the number of people who will proceed in immigration court and streamline the process by which an individual may obtain relief. It would also allow individuals to be eligible for work authorization sooner.

II. The Interim Final Rule eliminates essential due process protections of asylum seekers in the name of efficiency by denying them a “full and fair” opportunity for their claims for relief to be heard.

Despite the improvements recognized above, many elements of the NPRM that were problematic remain in the IFR. Moreover, the IFR contains additional changes to the processes by which an asylum seeker would pursue relief that would greatly undermine the due process protections that asylum seekers are afforded and heighten the risk that individuals with colorable claims will be sent back to a country where they face harm, torture, or death. The Departments’ prioritization of speed over the fair and thorough adjudication of an individual’s claims for protection is pervasive through the new regime created by the IFR, from the CFI, through the Asylum Merits Interview before USCIS, to review before the immigration court.

A. The IFR is premised on a process that is systematically and inherently flawed.

First, SPLC continues to assert that any system for the processing of claims for relief that is based on the expedited removal process is inherently flawed. “Fast-track” systems of exclusion and deportation and their expanded use are, like many other aspects of our immigration system, rooted in racism and xenophobia.¹³ Regardless, fast-track systems like the expedited removal process are

¹² See 87 Fed. Reg. 18086.

¹³ See, e.g., Ebba Gebisia, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. Chi. Legal Forum 565 (2007), <https://chicagounbound.uchicago.edu/uclf/vol2007/iss1/18> (describing the racist origins of the rationales upon which the expedited removal process is based); Daniel Kanstroom, *Expedited Removal and Due Process: A “Testing Crucible of Basic Principle” in the Time of Trump*, 75 Wash. & Lee L. Rev. 1323 (2018) (describing the history of the expedited removal system); see generally Doris Marie Provine, *Institutional Racism in Enforcing Immigration Law*, NorteAmérica (Nov. 11, 203), <https://www.revistanorteamerica.unam.mx/index.php/nam/article/view/215/200>; Reece Jones, *WHITE BORDERS* (2021).

still premised on the erroneous assumption that an individual seeking protection will be able to fully disclose information about their fear and reasons for fleeing their home country to a government official while they are detained (frequently experiencing re-traumatization), usually without the benefit of counsel, shortly after arriving, without appropriate language access, and in the face of asylum officers who may be overtly adversarial in their interviewing or hostile to their claims.¹⁴ These issues are addressed more fully in the complaint SPLC and its allies submitted to DHS' Office of Civil Rights and Civil Liberties¹⁵ and in the comment to the IFR jointly submitted by SPLC, RAICES, and FIRRP.

B. The IFR proposes an unreasonable and artificially reduced timeline during the Asylum Merits Interview before USCIS.

The process proposed by the IFR to adjudicate the claims of individuals who receive positive credible fear determinations is untenable and unrealistic to the point of being absurd. Shortly after presenting at a port of entry or being apprehended between ports of entry, asylum seekers are expected to proceed with their CFIs. During this time, individuals are almost always detained, compounding the effects of trauma many of them are experiencing.¹⁶ The short turnaround time between detention and the CFI also means that many individuals are unrepresented, because securing legal representation in such a short timeframe, while in detention—often in remote areas with few legal resources—is challenging and often impossible. Many individuals SIFI meets and ultimately represents have had their CFI before ever encountering potential legal representatives.¹⁷

Under the process proposed by the IFR, if an individual receives a positive credible fear determination, then they are referred for an Asylum Merits Interview, which must be scheduled within 21 to 45 days of the CFI.¹⁸ Supplemental evidence or corrections to the Record of Determination (Form I-870) must be submitted 7 to 10 days before the Asylum Merits Interview.¹⁹ Other evidence must be submitted 14 days before the interview.²⁰ Notably, the date of the Asylum Merits Interview is determined based on the date of the CFI, *not* of the CFI determination, meaning that asylum officers will be pressured to make credible fear determinations quickly and further reducing the amount of time an individual has to prepare and submit additional evidence. The IFR only provides USCIS with limited discretion to extend the period of time during which changes or supplementary evidence may be considered due to “exigent circumstances.”²¹

The IFR will have a considerable and detrimental impact on *pro se* asylum seekers. As discussed below, the IFR will result in a greater percentage of asylum seekers proceeding *pro se*, as they will

¹⁴ See Complaint to Dep't of Homeland Sec. Office of Civil Rights and Civil Liberties calling for an investigation of the Houston Asylum Office's handling of CFIs (Apr. 27, 2021), https://nipnl.org/PDFs/2022_27April-CFI-complaint.pdf.

¹⁵ *Id.*

¹⁶ See, e.g., M. von Werthern, et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC Psychiatry 382 (2018), <https://doi.org/10.1186/s12888-018-1945-y>.

¹⁷ Even though an asylum seeker is permitted to have a “consultant” present at a CFI, the majority of the asylum seekers SIFI is in contact with not have a consultant of any kind during their CFI. See 8 CFR § 208.30(d)(4).

¹⁸ 87 Fed. Reg. 18086; see 8 CFR § 208.9(a)(1).

¹⁹ 87 Fed. Reg. 18096; see 8 CFR § 208.4(b)(2).

²⁰ 8 CFR § 208.9(e)(1).

²¹ 8 CFR §§ 208.9(e)(2), 208.4(b)(2).

not be able to secure legal representation for the Asylum Merits Interview under the revised unreasonably expedited time constraints. The impact of the IFR will be exacerbated in areas like the Southeast, where many individuals are detained and the rates of representation are already abysmally low. At the Stewart Immigration Court, for example, only 6 percent of respondents are represented, which is one of the lowest rates among detained courts and is less than half of the national average (14 percent) of representation for detained respondents.²² In addition to direct representation, SIFI also provides some *pro se* assistance to individuals proceeding before the Stewart Immigration Court, where it is the only organization listed on the court's EOIR *pro bono* list that provides direct representation.²³

SIFI's experiences working with individuals detained across the Southeast indicate that such a restrictive timeline will prevent many individuals from securing legal representation ahead of the Asylum Merits Interview, let alone within the shorter timeframe to submit corrections or supplemental evidence into the record. When an individual calls SIFI's Helpline seeking legal representation, a SIFI staff member typically conducts an intake with the individual and undertakes a subsequent screening process to determine whether SIFI will offer its representation. Due to the volume of calls and the need to review cases before committing to representation, SIFI is often unable to complete the intake, screening, and decision-making process within a week. Under the IFR's proposed process, therefore, SIFI could have as little as one week to meet with a new client, establish the rapport essential to attorney-client conversations involving the disclosure of traumatic history, review the record of the credible fear determination, and collect and submit any supplemental evidence.

Gathering evidence can be challenging under the best circumstances, let alone for someone who is detained, proceeding *pro se*, and, in many circumstances, transferred between different facilities across the country with little to no advance notice. Many asylum seekers flee their home countries without documented evidence of persecution. Under the IFR, *pro se* asylum seekers will be forced to obtain all the evidence related to their asylum case, translate any evidentiary documents to English, and file their supplemental materials, all within only a few weeks of arriving in the United States.²⁴

Should an asylum seeker manage to overcome the odds and secure legal representation ahead of the Asylum Merits Interview, the timeline set by the IFR would be similarly challenging for a legal representative to meet. Even if an asylum seeker manages to make contact with a legal representative on such short notice, attorneys preparing for other cases may not be able to engage in representation of additional clients on such short notice.

²² Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

²³ See *supra* note 5.

²⁴ 87 Fed. Reg. 18086.

The IFR’s timeline is particularly concerning given the numerous barriers to access to counsel that individuals face when in ICE detention.²⁵ For example, at the Stewart Detention Center in Lumpkin, Georgia, SIFI staff have primarily conducted legal visits via legal phone calls and video technology conferencing since the COVID-19 pandemic began, although in-person legal visits are permitted. However, legal phone calls at Stewart are limited to 30 minutes, and VTC visits are limited to 60 minutes, once a day—if the call is allowed to proceed as scheduled.²⁶ It is not uncommon for SIFI attorneys to meet with a client several times a week in order to prepare for a hearing. It would be extremely difficult, if not outright impossible, for a legal services organization, such as SIFI, to obtain all the relevant case information from a detained client if they were retained shortly before the Asylum Merits Hearing.

The IFR’s singular focus on swift adjudication of asylum proceedings will rush individuals to, in some cases, proceed with their Asylum Merits Interview within one month of arriving in the United States.²⁷ The only “exigent circumstances” the IFR contemplates that would warrant USCIS’s delay of the Asylum Merits Interview are narrowly defined to include issues that are largely attributed to the Department’s own inability to proceed, such as the “unavailability of an asylum officer to conduct the interview, the inability of the applicant to attend the interview due to illness, the inability to timely secure an appropriate interpreter pursuant to paragraph (g)(2) of this section, or the closure of the asylum office.”²⁸

The timeline set forth by the IFR will significantly impact the ability of SIFI and other legal service providers to adequately prepare for the Asylum Merits Interview. Meaningful, collaborative, and ethically adequate representation requires time to develop a relationship with a client and a significant amount of time preparing evidence, reviewing the record, and, in many cases, working with experts. Additionally, potential clients may have complex legal issues that require careful analysis. Representing clients seeking withholding of removal or protection under the Convention Against Torture requires separate analyses and arguments that also take significant amounts of time. Under the timelines proposed by the IFR, SIFI would be forced to sacrifice many or all of these additional claims, and ultimately, the accelerated timelines will force SIFI and other legal service providers and attorneys to take on fewer cases. While the SPLC believes that legal representation should not be required to successfully state a claim for relief, the flawed nature of our current immigration laws is such that legal representation is too often a prerequisite of a successful claim for immigration relief.²⁹ Reduced representation will surely result in more individuals with meritorious claims being denied relief.

²⁵ See, e.g., Rebuttal Memorandum from National Immigrant Justice Center, American Immigration Council, ACLU of Southern California, and Southern Poverty Law Center to U.S. House and Senate Appropriations Subcommittees on Homeland Security (Mar. 22, 2022), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2022-03/NGO-Rebuttal-to-ICE-Legal-Access-Report-March-22-2022.pdf>.

²⁶ See *id.* at 7 (reporting that scheduled calls with clients are “regularly canceled or unilaterally rescheduled by facility staff with no notice to attorneys”).

²⁷ 87 Fed. Reg. 18086.

²⁸ 8 CFR § 208.9(a)(1).

²⁹ Highlighting the difference legal representation makes in asylum proceedings, during the 2021 fiscal year, immigration judges denied 66 percent of asylum cases in which the asylum seeker was represented and denied 82 percent of asylum cases when the asylum seeker appeared *pro se*. See TRAC, Asylum Grant Rates Climb Under Biden (Nov. 10, 2021), <https://trac.syr.edu/immigration/reports/667>.

Marco³⁰ fled political persecution in Nicaragua and came to the United States seeking safety. He was detained by CBP for six days and placed directly into removal proceedings without first having a CFI. Marco was initially detained in El Paso, Texas, before being transferred to Stewart Detention Center. Marco was not able to reach the SIFI Hotline until almost a month later, and SIFI confirmed representation several weeks later. Over the course of the next three months, until Marco's Individual Hearing, SIFI gathered and translated at least nine supporting documents and submitted multiple expert reports and a written closing statement. Marcos was ultimately granted asylum by the immigration judge, but under the IFR's timeline, Marcos may have had the Asylum Merits Interview well before he was able to contact SIFI to seek legal representation—or possibly even before he was transferred to Stewart Detention Center.³¹

Jean³² fled his home country to seek safety from persecution on account of his religious beliefs. Shortly over a month after he sought safety in the United States, Jean had a CFI and received a positive determination. His merits hearing was six months later, and Jean remained in detention throughout the course of his immigration proceedings. Throughout that time, his SIFI attorney secured two experts, and each needed time to review the asylum application, CFI notes, and Jean's declaration, as well as speak with Jean himself, before they could complete their reports. After five months, those declarations were submitted to the immigration court. Yet under the IFR's timeline, it would be impractical, if not impossible, to have an expert—let alone two—review the documents and either write a declaration or testify.

The persistent push of the timeline proposed by the IFR also fails to consider that the vast majority of individuals who will be subjected to this process are survivors of trauma. It is well-documented that trauma can have a significant impact on a person's memory, which can affect the ability of an asylum seeker to recount the basis for their claim for relief, both with a legal representative, should they manage to secure one, and with an asylum officer or immigration judge.³³ Many asylum seekers who recently arrived in the United States will still be suffering from the trauma they endured and will be unable to gather the evidence and articulate their claims in such a short timeframe, particularly when enduring dehumanizing and re-traumatizing conditions of confinement in detention. This will result in an increase in denials.

³⁰ Pseudonym used to protect individual's confidentiality.

³¹ See also Liz Vinson, "I'm happy . . . I'm free": SPLC Wins Asylum for Nicaraguan Man Released From Black Hole Immigrant Prison, SPLC (Mar. 25, 2022), <https://www.splcenter.org/news/2022/03/25/im-happy-im-free-splc-wins-asylum-nicaraguan-man-released-black-hole-immigrant-prison>.

³² Pseudonym used to protect individual's confidentiality.

³³ See, e.g., Maureen E. Cummins, *Post-Traumatic Stress Disorder and Asylum: Why Procedural Safeguards Are Necessary*, 29 J. Contemp. Health L. & Pol'y 283 (2013). According to a study published in March 2021, a review of a random sample of medical-legal affidavits for asylum seekers led clinicians to conclude that 69 percent of individuals whose affidavits they had reviewed had Post-Traumatic Stress Disorder, 55 percent had depression, and 21 percent had memory loss. See Altaf Saadi & Kathryn Hampton, et al., *Associations Between Memory Loss and Trauma in US Asylum Seekers: A Retrospective Review of Medico-Legal Affidavits*, PLOS ONE (Mar. 23, 2021), <https://doi.org/10.1371/journal.pone.0247033>.

The consequences of these truncated time frames could not be more dire for individuals fleeing persecution. The SPLC urges the Departments to rescind these changes to the IFR before any implementation takes place to ensure that asylum seekers' rights are protected and that the United States' obligations to international treaties, including the obligation of non-refoulement, are met.

C. The IFR's new process for "streamlined" immigration court review favors expediency over the careful adjudication of the claims of asylum seekers who risk being sent back to harm, torture or death.

The IFR proposes a new immigration court review process that was not included in the NPRM. Under this new process, the Departments seek to funnel migrants who are denied relief at the Asylum Merits Interview stage into a "streamlined section 240 removal proceedings before an [immigration judge]." ³⁴ While the SPLC is encouraged by the Departments' shift away from the process proposed by the NPRM, which only provided that an asylum seeker could *seek* review by an immigration judge of the asylum officer's decision, ³⁵ the process proposed in the IFR prioritizes speed at the expense of fairness.

The SPLC has grave concerns regarding the expedited immigration judge (IJ) review process proposed by the IFR, which unreasonably constricts the time asylum seekers have to prepare a defense and seek legal representation. Under this process, an individual is served with a notice to appear (NTA) after USCIS denies their application for asylum (at the Asylum Merits Interview). ³⁶ A master calendar hearing is then scheduled to take place 30 days, but *no later than 35 days*, after the NTA is served. ³⁷ As a practical matter, SIFI meets with many potential clients who have never seen their NTA, even though they are in removal proceedings and in some cases have had several master calendar hearings. Without the NTA, an individual may not realize they are in removal proceedings and cannot not be expected to meaningfully participate in their own defense when they do not know or understand the administrative charges against them. Conversely, SIFI has seen cases where an NTA has been issued but not filed (or filed with incorrect information), causing confusion, which would be heightened under the IFR, as the master calendar hearing is supposed to be held within 30 days of service of the NTA, and not the date filed with EOIR. In addition to this timeline being unreasonable on EOIR's end, ³⁸ 30 days is a scant period of time to seek legal representation: under the timelines set by the IFR, an individual could be in the United States for as little as two months before they are expected to appear in immigration court. ³⁹

Despite the immense stakes for an individual fleeing persecution, EOIR has created this "streamlined" IJ review process wherein an individual could have only *two* hearings—a master calendar hearing and a status conference—before an IJ makes a determination on their claim for relief. ⁴⁰ After the master calendar hearing, wherein an asylum seeker is advised—possibly for the

³⁴ See 87 Fed. Reg. 18097.

³⁵ See 87 Fed. Reg. 18155–56.

³⁶ 87 Fed. Reg. 18087; see also 8 CFR § 1240.17(b).

³⁷ 87 Fed. Reg. 18087.

³⁸ See *Niz Chavez v. Garland*, 141 S.Ct. 1474, 1484 (2021) ("The government admits that producing compliant notices has proved taxing over time.").

³⁹ See 8 CFR § 1240.17(b); see also 8 CFR § 208.9(a)(1) (scheduling the Asylum Merits Interview between 21 and 45 days after a positive credible fear determination).

⁴⁰ 8 CFR § 1240.17(f).

first time—that they are entitled to counsel (at their own expense), the IFR then provides that the status conference is to be scheduled within 30 days of the master calendar hearing.⁴¹

Despite its name, the “status conference” created by the IFR has massive significance on the outcome of an asylum seeker’s case. Before the status conference, an asylum seeker must identify and correct any errors or omissions in the asylum officer’s decision or in the record of proceedings before the asylum officer. Asylum seekers must also collect and translate evidence to support their claims for relief, all of which must be submitted before the status conference.⁴²

Such a short timeline does not take into consideration the significant amount of evidence that is needed in order for an asylum seeker to establish their claims for asylum, withholding of removal, or protection under CAT, and the herculean effort that collecting such evidence often entails. In SIFI’s experience, many individuals who have been forced to flee their homes do not have all or any supporting documentation. Such evidence must be sought and collected, which can take many weeks or even months. Often times, this evidence is collected with the assistance of family that remains in the asylum seeker’s home country, which requires many coordinating phone calls. Once received, the supporting documentation often needs to be translated into English, another step in the process that can take some time.

Alone, these timeframes are unreasonable and challenging to meet; when taking into consideration that an asylum seeker may also be detained throughout the course of this process, with all its well-documented challenges and dangers,⁴³ the IFR’s artificially rushed process is simply unworkable.

The Departments aver that this process, “predicated on the parties’ participation in the status conference and other procedural steps,” will “ensure [the] efficient adjudication” of asylum seekers’ claims for relief.⁴⁴ But the predicate upon which the Departments so heavily rely is a fiction, as it fails to take into account the different level of participation of a *pro se* asylum seeker against a trained ICE attorney in immigration court. For example, the IFR proposes that the parties and IJ will “identify and narrow” the issues to be considered at a merits hearing.⁴⁵ But the Departments either willfully disregard the fact that many asylum seekers will be unable to obtain legal representatives to represent them at these conferences or fail to consider a *pro se* asylum seekers’ ability to meaningfully negotiate and engage with an ICE attorney.

⁴¹ *Id.*; see also 87 Fed. Reg. 18087.

⁴² 8 CFR § 1240.17(f)(2).

⁴³ See, e.g., *SPLC v. Dep’t of Homeland Sec.*, No. 18-cv-760 (CKK), ECF No. 124 (D.D.C. 2020) (finding that ICE was imposing restrictions and conditions on remote legal visitation and communication that were “more restrictive than standards promulgated for criminal detainees”); *Torres v. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019); American Civil Liberties Union, National Immigrant Justice Center, Human Rights Watch, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration* at 20–23 (2020), https://www.aclu.org/sites/default/files/field_document/justice-free_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf; see also *supra* note 25 (describing access to counsel issues that persist in immigration detention); Complaint to the Dep’t of Homeland Security Office of Civil Rights and Civil Liberties regarding violations of civil, constitutional, and disability rights of medically vulnerable individuals at Stewart Detention Center (Aug. 30, 2021), https://www.splcenter.org/sites/default/files/august_crcl_complaint.pdf.

⁴⁴ 87 Fed. Reg. 18101 (quoting *Matter of A-C-A-A-*, 28 I&N Dec. 351, 352 (A.G. 2021)).

⁴⁵ 8 CFR § 1240.17(f)(2).

Inevitably, the IFR will “streamline” asylum seekers into an IJ review process where they are unable to secure legal representation and forced to present an asylum case that requires an understanding of complex and convoluted immigration law. The SPLC strongly disagrees with the Departments’ position that the IFR will “help parties better prepare their respective positions before the IJ.”⁴⁶

The accelerated procedure proposed by the IFR—a “rocket docket” for asylum seekers who have passed their CFIs yet been denied relief at the Asylum Merits Interview—is no more feasible for individuals who have beat the odds and managed to secure legal representation. The IFR requires attorneys to: review the charging documents; review the record of the CFI and the Asylum Merits Interview; identify any errors or omissions in the record; determine, collect, translate, and submit supplemental evidence; determine which, if any, individuals to present as witnesses; and make any additional arguments for relief that may not have been articulated before USCIS. All this information is due in advance of the status conference, which means that an attorney must initiate and complete these steps shortly after confirming representation of an individual and as early as three months since the asylum seeker’s arrival in the United States.⁴⁷

SIFI’s ability to provide competent representation to individuals detained across the Southeast will be severely compromised if the asylum seekers it represents are subject to the IFR’s rocket docket. In each of the examples included below, SIFI’s client, detained during their individual hearing, had at least five months between the time they arrived at the United States and their individual hearing. In each example, these months were critical in securing and preparing the evidence necessary to establish each asylum seeker’s claim for relief. Despite our best efforts, the logical and natural result of the IFR’s streamlined procedures would be a decrease in the number of people SIFI could represent.

Lucas⁴⁸ fled Cuba after surviving beatings at the hands of Cuban police. After seeking asylum in the United States, he was detained in Louisiana and, unable to secure counsel, represented himself at his Individual Hearing. At that hearing, he asked the IJ to continue his case so that he could obtain corroborating evidence from his family, including evidence related to the beatings he endured while detained by the Cuban police. The IJ denied his request, finding it unlikely that Lucas would receive the evidence within a few weeks, and ultimately denied his claim. It was only after his individual hearing that Lucas was able to contact SIFI, who then represented him in his appeal to the BIA. By the time of his BIA appeal, SIFI was able to secure and submit evidence related to the beatings, including the evidence Lucas had sought from Cuba. The BIA found these documents material to Lucas’s claim and remanded the case for the IJ’s further consideration. On remand, the IJ considered the additional evidence presented and granted Lucas’s application for asylum.

Under the IFR, Lucas would likely not have been able to obtain the necessary proof to support his asylum claim and receive more time to obtain, translate, and present the evidence that was critical to his securing protection on remand from the BIA.

⁴⁶ 87 Fed. Reg. 18101.

⁴⁷ 8 CFR 208.9(a)(1); 8 CFR § 1240.17(f)(2).

⁴⁸ Pseudonym used to protect individual’s confidentiality.

Thomas⁴⁹ and his wife fled Russia after facing religious persecution. After coming to the United States to seek asylum, they were separated and detained. Thomas passed his CFI and was scheduled for an Individual Hearing seven months later.

SIFI connected Thomas with counsel to represent him at his Individual Hearing. While his case was pending, SIFI was able to collect Thomas's medical records from Russia and the United States, which revealed that Thomas had suffered a traumatic brain injury and ongoing memory loss as a result. SIFI represented Thomas in several efforts to secure his release from detention, but ICE denied the requests for parole and the IJ denied Thomas's claim for asylum. SIFI subsequently represented Thomas in his appeal to the BIA, and the BIA remanded Thomas's case back to the IJ. SIFI was able to work with medical experts who reviewed Thomas's medical records and wrote a letter explaining Thomas's medical issues and requesting extra time to prepare for his hearing before the IJ. His case remains pending before the immigration court. Under the IFR's timeline, SIFI would not have had enough time to collect the medical records and work with the medical experts who were critical to Thomas's defensive claim.

Micah⁵⁰ fled Cuba and came to the United States seeking asylum. Micah was unable to secure legal representation in time for his credible fear interview and was only able to contact SIFI two months after arriving in the United States, after his CFI took place. Under the IFR's timeline, Micah would likely have had the Asylum Merits Interview before he could contact SIFI for help.

After the IJ denied his asylum claim, SIFI was able to represent Micah in a motion for custody redetermination (bond) and the subsequent appeal to the BIA. SIFI also collaborated with another nonprofit organization to find an attorney to appeal the asylum denial, and the BIA remanded his case to the IJ, where his defensive claim remains pending. As part of its representation, SIFI translated several documents and collaborated with the family to obtain important evidence in support of Micah's asylum case.

The SPLC has long advocated for changes to the immigration system and would welcome changes that reduce the amount of time individuals must wait in limbo for the adjudication of their asylum claims or are needlessly kept in detention. But the Interim Final Rule as currently drafted is not the change the system requires to ensure efficiency without sacrificing the due process rights of asylum seekers. As explained *supra*, the IFR's procedural hurdles would be near-impossible for a *pro se* asylum seeker to overcome. The Departments' apparent belief that the mere retaining of a legal representative will cure the flaws inherent in the IFR is itself deeply flawed as well as

⁴⁹ Pseudonym used to protect individual's confidentiality.

⁵⁰ Pseudonym used to protect individual's confidentiality.

starkly separated from the reality of the numerous barriers to access to counsel that have been plaguing the immigration system for decades.⁵¹

III. Conclusion

The Interim Final Rule would dramatically change adjudication procedures for asylum seekers. The SPLC welcomes several of the changes included in the IFR, but has serious concerns about the processes and timelines the IFR creates. The Departments' stated desire for efficiency should not lead to straining asylum seekers and legal representatives to the limit, essentially eliminating the time asylum seekers need to properly prepare their case and retain counsel. To be sure, the United States needs an asylum system that is efficient, but that system must also be fair, reliable, and contain sufficient safeguards of individuals' due process rights. The IFR does not promote such a system. The SPLC strongly urges the Departments to rescind, or substantially rewrite, the unethical and legally deficient parts of this IFR.

Sincerely,

Stephanie M. Alvarez-Jones, Staff
Attorney

Matt Boles, Direct Services Attorney,
SIFI

*On behalf of the Southern Poverty Law
Center*

⁵¹ See, e.g., Coalition Letter to DHS and ICE on Access to Counsel in Immigration Detention (Oct. 29, 2021), https://www.aclu.org/sites/default/files/field_document/attorney_access_advocacy_letter.10.29.21.pdf.