Comment on the Department of Homeland Security (DHS) and the Executive Office for Immigration Review Rule on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers

The National Immigration Forum (the Forum) respectfully submits this comment regarding the Notice of Proposed Rulemaking on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers: DHS Docket No: USCIS-2021-0012, published on August 20, 2021.

The Forum is a nonprofit organization that works to advance sound federal immigration solutions through its policy expertise, communications outreach, and coalition building work, which forge powerful alliances of diverse constituencies across the country. The Forum represents a network of faith, law enforcement, business and national security leaders and veterans who have come together to establish a new consensus on the important role of immigrants in America. The perspectives of these leaders complement the Forum's issue expertise on asylum and border policy and inform our interest in the DHS and EOIR Notice of Proposed Rulemaking.

The stated aim of the proposed rule is to "improve the Departments' ability to consider the asylum claims of individuals encountered at or near the border more promptly while ensuring fundamental fairness." The Forum applauds the desire to reform our asylum system to make it both more efficient and more humane, and to that end we have for years called for an increased role for USCIS asylum officers at the border. In this respect, we support the proposed rule, particularly the additional responsibility given to asylum officers (AOs), the expanded grounds for parole within expedited removal (ER) proceedings, and the creation of an expedited asylum application procedure within the CFI.

However, the Forum retains serious concerns that some parts of the proposed rule would impinge upon asylum seekers' access to due process and a fair day in court. The ER process is already fraught with due process concerns. The Departments acknowledge that increasing the speed of the asylum system must be balanced with careful consideration of each asylum seeker's claim, but absent further clarification, some of the proposed changes could make the ER process even worse.

The Forum recommends DHS and EOIR implement the bulk of the proposed rule as soon as possible and apply the new procedure to eligible asylum seekers arriving at the border, including those who are now being placed into Title 42 proceedings. The Forum further asks DHS and EOIR to alter the proposed rule to address the specific concerns listed below, and to provide further rationale concerning the proposed elimination of AOs' ability to reconsider negative CFIs, as well as the proposed restrictions on the provision of supplemental evidence for those who request "de novo" EOIR reviews of AO decisions.

I. The Forum applauds the creation of a faster, non-adversarial process for asylum seekers within expedited removal who are determined to have a credible fear of persecution.

As the proposed rule states, the current asylum system is untenable, particularly given demographic changes and overall increases in migration at the border. The Forum agrees that the massive backlog in the defensive asylum system "delays justice and certainty for those who need protection, and it encourages abuse by those who would not qualify for protection and smugglers who would exploit the delay for profit."

Allowing USCIS AOs to shoulder more of the load at the border would represent a positive step towards addressing these challenges. AOs are already trained to evaluate asylum claims both during CFIs and during affirmative asylum proceedings, and they would be able to provide faster, fairer adjudications than under current EOIR proceedings. Furthermore, it is not appropriate to put those who have successfully demonstrated a "significant possibility" of persecution into adversarial removal proceedings (often without access to counsel). The proposed system would ensure that EOIR is not deploying attorneys and sapping immigration court resources in order to prosecute unrepresented parties who have already been determined to have a credible fear of persecution.

The speed and efficacy of the new process (and its impact on those in the affirmative asylum backlog) will rely on the ability of USCIS to hire and properly train new personnel and fund the new processes. However, the proposed reforms would certainly achieve the goal of creating a more effective and efficient alternative to the current defensive asylum system, under which — as the proposed rule notes — the average case currently takes over 3.75 years to complete.

II. The Forum supports other proposed changes to the expedited removal process that would make it easier for asylum seekers to initiate applications and to access parole.

The proposed rule addresses two other existing shortcomings with how ER applied at the border: Too many migrants (1) are held in detention without access to parole in reasonable circumstances and (2) denied the ability to formally applying for asylum status without jumping through unnecessary hoops. The Forum applauds proposed changes that would address these shortcomings.

A. Increasing access to parole

Migrants placed in ER are kept in often-squalid detention conditions with limited access to legal counsel and translation services, which can prevent them from effectively navigating the credible fear process, including Credible Fear Interviews (CFI) and appeals of negative CFI decisions. Existing regulation allows for parole from detention only for medical emergencies or if there is a legitimate law enforcement objective. The proposed rule would expand the grounds for parole in ER proceedings to include circumstances for which detention is "unavailable or impractical." Detention should only be considered practical if asylum seekers are provided with the ability to access medical care, legal counsel, and language assistance.

B. Streamlining the asylum application process

Currently, many migrants with positive credible fear determinations are placed in removal proceedings but never actually submit official applications for asylum (I-589s). This is because

I-589s are lengthy, complex forms that must be submitted in English and must be filed after official placement into removal proceedings. Migrants who lack legal representation often struggle to complete this application process. Accordingly, as the rule notes, only 62% of applicants referred to EOIR by USCIS ultimately file their asylum application — and those who are able to submit the form must wait for several months after their successful credible fear screening to do so. This is especially problematic because the 180-day clock to receive work authorization and other benefits does not start for asylum seekers until an I-589 is filed.

The proposed rule would simplify the asylum application process by considering a positive CFI to *constitute* an official application for asylum. This proposed change would expedite the asylum process, allow asylum seekers to receive benefits more quickly, and eliminate a burdensome requirement for many who are representing themselves pro se.

III. While the proposed rule's improvements are helpful, fundamental shortcomings of the expedited removal process itself continue to raise serious due process and other concerns.

While the proposed rule includes several improvements over the status quo, the underlying due process concerns with ER proceedings still remain, Given the speed and stripped down nature of ER, there are longstanding concerns about whether it affords migrants sufficient due process, including whether it provides them with adequate preparation time to present asylum and other claims. While including some noteworthy improvements, the new procedure set forth in the proposed rule continues to rely on ER proceedings, which retain many of these fundamental shortcomings, [particularly for those who receive negative CFI determinations.

Under ER processes, migrants are rapidly expelled unless a Customs and Border Protection (CBP) officer reports that they have expressed a desire to apply for asylum. There are numerous documented instances of CBP either failing to properly ask migrants if they have a fear of being returned to their home countries or failing to properly refer individuals who have made asylum requests to USCIS for CFIs.

Once asylum seekers in ER are referred to USCIS, they are given very little time to prepare for CFIs. Many do not have access to counsel, lack adequate interpretation, and/or are unable to fully explain their story due to recent traumatic experiences, mental health concerns, or other issues. Negative CFI rulings result in rapid reviews by immigration judges where there is zero access to legal counsel (even if counsel *was* present during the CFI).

In this context, it is essential that additional safeguards are established for ER proceedings to be effective. The Forum applauds several improvements in the proposed rule, including the expansion of parole, the clarification that AOs must be the ones to conduct CFIs, and the assurance that unaccompanied children shall not be subject to ER.

However, the Forum recommends additional safeguards be implemented to address longstanding concerns associated with ER proceedings. These should include additional checks to ensure all those who have been placed in ER have an opportunity to request asylum or indicate a fear of return, an expansion of codified exemptions to ER to include particularly vulnerable individuals or family units, and additional provision of due process protections including the expansion of "Know Your Rights" training and Legal Orientation Programs (LOP) for those held in detention prior to CFIs.

The theory behind ER proceedings is sound: Those who do not have a good chance of receiving protection should be quickly removed, and those who do have credible claims should be provided every opportunity to make their case. The proposed process would improve ER proceedings, but primarily for those with positive CFI determinations. Due process concerns related to ER prior to the CFI and after a negative CFI must also be addressed for the proposed rule to achieve its stated purpose.

IV. The restrictions on asylum officer reconsiderations at the CFI stage and on providing supplemental evidence during the "de novo" review stage should be removed or clarified.

In addition to broad concerns about the ER process, the Departments should provide additional rationale for proposed provisions which could interfere with asylum seekers' access to due process.

As currently justified, the Forum does not support the proposal to eliminate the ability for AOs to reconsider negative CFI determinations after a negative review from an immigration judge. The proposed rule notes that DHS has received "growing numbers of meritless reconsideration requests," and references anecdotal instances of one applicant submitting multiple meritless requests. But the rule does not provide any data on the rate of successful or unsuccessful reconsiderations, and one could point to several instances in which successful reconsiderations have saved lives.

The Forum recommends the Departments either remove the provision eliminating reconsiderations or provide significant additional rationale as to why reconsiderations are unnecessarily slowing down the asylum process.

The Forum also has concerns about the new review process that is established for those who are denied asylum by AOs under the new proposed process. The rule appropriately establishes a "de novo" review before an immigration judge for asylum seekers who receive adverse decisions from AOs. The Forum further supports the creation of a separate queue for these claims, so those individuals' cases are expedited and they are not forced to wait over three years in the EOIR backlog. However, the proposed rule establishes limitations to the kinds of evidence that may be presented by asylum seekers in this review process, and the process is explicitly *not* a "full evidentiary hearing." Under the rule, providing supplemental evidence is considered to be an exceptional circumstance that would require a separate petition and approval from the presiding immigration judge.

However, it is reasonable to expect that many such asylum seekers would want to provide supplemental evidence. Many may have only just obtained counsel upon receiving an adverse decision from USCIS, and with additional guidance might want to provide supplemental evidence further corroborating their claim. For this reason, the Forum recommends the Departments provide further assurances that asylum seekers will be able to provide additional evidence and that they are entitled to a comprehensive review of their case before an immigration judge.

Conclusion

Currently, thousands of arriving migrants at the U.S.-Mexico border are being placed in Title 42 proceedings and summarily expelled without a chance to request asylum or other forms of

protection. Those who are allowed in to pursue their claims are placed in court backlogs that are hundreds of thousands of cases long, forced to wait for years in limbo.

The Forum support efforts to fix this broken system, and believes the proposed rule is an important step forward towards achieving that goal. Allowing USCIS asylum officers the ability to see cases all the way through to the end would be an effective way to speed up the process.

However, the Forum also agrees with the Departments that increased speed must be partnered with "ample procedural safeguards designed to ensure due process, respect human dignity, and promote equity." The proposed rule would create a more humane process for those who receive positive credible fear determinations, but it still takes place in the fraught context of expedited removal proceedings. With regards to specific provisions listed above, additional safeguards and clarity are needed to ensure a fully functional, fair, and secure asylum system for all those seeking protection.