



September 23, 2019

Via Federal e-Rulemaking Portal

Acting Secretary Kevin K. McAleenan
Department of Homeland Security
Washington, D.C. 20528

RE: Request for Comment on Designating Aliens for Expedited Removal
84 Fed. Reg. 35409 (Jul. 23, 2019)
Docket No. DHS-2019-0036-0001

Dear Acting Secretary McAleenan,

Brooklyn Defender Services (“BDS”) submits these comments to the Department of Homeland Security (“DHS”) Notice on Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409, issued on July 23, 2019 (hereinafter, the “Rule”), Docket No. DHS-2019-0036-0001.

BDS is a full-service public defender office in Brooklyn, New York. Our organization provides multi-disciplinary and client-centered criminal defense, family defense, immigration, civil legal services, social work support and advocacy in nearly 30,000 cases involving indigent Brooklyn residents every year. Since 2009, BDS has counseled, advised or represented more than 10,000 immigrant clients. About a quarter of BDS’s criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and, therefore, at risk losing the opportunity to obtain lawful immigration status as a result of their criminal or family defense case. Our criminal-immigration specialists provide support and expertise on thousands of such cases. In addition, BDS is one of three New York Immigrant Family Unity Project (“NYIFUP”) providers and has defended more than 1,000 people in detained deportation proceedings since the inception of the project three years ago. NYIFUP is the New York City Council-funded first-in-the-nation program providing counsel in removal proceedings to immigrant New Yorkers who are detained and facing deportation and separation from their families and communities. BDS’s immigration practice also represents criminal and family defense clients and members of the community in applications for immigration relief, adjustment of status, and naturalization before the United States Citizenship and Immigration Services (“USCIS”), and in non-detained removal proceeding in New York’s immigration courts. We are a Board of Immigration Appeals-recognized legal service provider.

As set forth below, BDS opposes the Rule, because it drastically expands the scope of expedited removal beyond what Congress intended and the Constitution permits. DHS expands the reach of expedited removal and makes it effective immediately, despite knowing that the expedited removal process is already rife with flaws, errors, and prone to constitutional violations; the Rule will aggravate these defects. It will have an immediate and devastating impact on the due process and statutory rights of individuals subject to expedited removal under the new Rule, but who otherwise have the right to their day in immigration court. BDS requests

that DHS immediately halt implementation of the Rule and, instead of expanding expedited removal, ameliorate the well-documented problems in the expedited removal process as it existed prior to the adoption of the Rule.

1. Relevant Background

The expedited removal process allows DHS to remove certain noncitizens without a hearing before an immigration judge, if DHS determines that they lack valid entry documents or engaged in fraud or misrepresentation regarding admission. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1). If an individual expresses a fear of return during the expedited removal process, they should be given a Credible Fear Interview (“CFI”) with a USCIS Asylum Officer who determines if they have a credible fear of return. Only if they pass this interview will the individual be allowed to apply for asylum before an immigration judge. Since the expedited removal process was created, federal immigration authorities have authorized its use in the limited circumstances where noncitizens sought admission at a port of entry, were apprehended near the border within 14 days of entering the country, or arrived by sea within two years. In sharp contrast, the new rule dramatically expands the scope of expedited removal and permits DHS to use it against noncitizens residing anywhere in the country who are unable to prove “to the satisfaction of an immigration officer” that they have been continuously present in the United States for at least two years.

Since its inception in 1996, errors, officer misconduct, and rights violations have plagued the expedited removal process. A 2005 study commissioned by Congress documented numerous “serious problems” in the expedited removal process “which put some asylum seekers at risk of improper return.” U.S. Comm’n on Int’l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* 4-5, 10 (2005) (“2005 USCIRF Study”). A 2016 follow-up study “revealed continuing and new concerns about [Customs and Border Protection (“CBP”)] officers’ interviewing practices and the reliability of the records they create, including . . . certain CBP officers’ outright skepticism, if not hostility, toward asylum claims; and inadequate quality assurance procedures.” U.S. Comm’n on Int’l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 2 (2016) (“2016 USCIRF Study”). The Rule’s expansion of expedited removal would unacceptably expand these problems, which have long gone unaddressed by DHS.

2. The Rule Strips Noncitizens of Important Due Process Rights

In broadening the group of noncitizens subject to expedited removal to those who have been in the United States for up to two years—and those who cannot prove otherwise—individuals who are part of our communities, who have family and children in the United States, will be targeted for detention and removal without due process. The Supreme Court has categorically held that once an individual has entered the United States, they are entitled to the protection of the Due Process Clause of the Fifth Amendment of the U.S. Constitution. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (differentiating noncitizens present within the United States from those seeking entry). Because the expedited removal system lacks access to counsel, basic safeguards, and opportunity for judicial review, it violates the due process rights of these noncitizens who, absent the Rule, would be afforded at least access to counsel and the minimal safeguards present in immigration court.¹

¹ There is a growing consensus that immigration court proceedings themselves lack the necessary due process safeguards, such as right to counsel and discovery and judicial independence, for a process whose potential outcome is the severe consequence of deportation. In subjecting more members of our immigrant community to a cursory proceeding before a low-level immigration officer, and deciding to

In expedited removal, a low-level immigration enforcement officer determines removability and acts as both prosecutor and adjudicator. Individuals in expedited removal may want to contest the factual or legal requisites for having been placed there, but have neither the opportunity to do so nor the ability to seek assistance from counsel. Individuals have the burden of proving, to the “satisfaction” of the immigration officer, continuous presence for at least two years in the United States. 8 U.S.C. § 1225(b)(1)(A)(iii)(II); 8 C.F.R. § 235.3(b)(1)(ii). They carry this burden despite being detained, and not having the time or ability to gather evidence or reach out for help. As BDS’s NYIFUP team is particularly aware, it is extremely difficult for individuals to gather the necessary information and documents to prove their case while in immigration detention. The importance of counsel for detained individuals cannot be overstated.² For example, the implementation of NYIFUP, which provides *pro bono* representation to detained individuals at Varick Street Immigration Court, was projected to increase the rate of successful outcomes to 48%, from a 4% success rate where immigrants proceeded *pro se*.³

Moreover, expedited removal policies do not require immigration officials to assess whether an individual is mentally competent or has the capacity to participate in the inspection process. Even if competency issues are identified, no additional safeguards are mandated. Such individuals may find it difficult to affirmatively demonstrate two years of physical presence, even if they have been in the United States more than that and have family or other ties. This is particularly concerning as detention can exacerbate trauma-related stress disorders and other capacity issues.⁴ Without counsel, to identify potential competency/capacity issues and advocate for safeguards, such individuals will go through the expedited removal process without a full opportunity to assert claims of U.S. citizenship, lawful permanent residence or other lawful status, continual residence more than two years, or satisfy the credible fear threshold for asylum.

Further, with limited exceptions, there is no avenue for administrative or judicial review of an expedited removal order. *See* 8 U.S.C. §§ 1225(b)(1)(C)-(D), 1252(e)(1); *United States v. Raya-Vaca*, 771 F.3d 1195, 1202 (9th Cir. 2014); *Shunaula v. Holder*, 732 F.3d 143, 147 (2d Cir. 2013) (holding that 8 U.S.C. § 1252(a)(2)(A) deprived the court of jurisdiction to hear collateral

make the Rule effective immediately, DHS fails to account for this position. *See* Ltr. from Legal Associations to Congress Calling for an Independent Immigration Court System, July 11, 2019, <https://www.aila.org/advo-media/aila-correspondence/2019/legal-associations-call-independent-court-system>; S.663 - Immigration Court Improvement Act of 2019, 116th Congress (2019-2020) (introduced March 5, 2019) (“Congress finds that the United States tradition as a nation of laws and a nation of immigrants is best served by effective, fair, and impartial immigration judges who have decisional independence and are free from political influence.”).

² *See, e.g.*, U.S. Dep’t of Homeland Sec. Advisory Comm. on Family Residential Ctrs., *Report of the DHS Advisory Committee on Family Residential Centers*, at 37 (2016), <https://bit.ly/2yFluu0> at 37 (noting the “overwhelming evidence that individuals seeking the protection of asylum and other forms of violence . . . are significantly more successful when the individuals are represented by counsel,” and describing that attorneys representing mothers in the CFI process at DHS family detention centers report high success rates during both the initial CFI interviews and the appeal of a *pro se* adverse credible fear determination).

³ *See* Jennifer Stave, et al., *Evaluation of the New York Immigrant Family Unity Project*, Nov. 2017, at 6, <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf> (projecting a 48% success rate based on statistical modeling and completed cases).

⁴ *See Report of the DHS Advisory Committee on Family Residential Centers* at 7-8, n.42 (noting that “many asylum seekers suffer from post-traumatic stress disorder, depression, anxiety disorders, and other psychological disorders,” and “[n]umerous studies have documented how detention exacerbates existing mental trauma and is likely to have additional deleterious physical and mental health effects on immigrants – particularly traumatized persons like asylum seekers”).

attack on order of expedited removal and, therefore, to hear the derivative claims of petitioner's wife and son). The administrative review, which constitutes a supervisor sign-off, is not meaningful or independent. 8 C.F.R. § 235.3(b)(7). And the Government takes the position that the writ of habeas corpus and constitutional suits against the expedited removal policy are severely restricted for individuals with an expedited removal order. See 8 U.S.C. §§ 1252(e)(2)-(3).⁵ Not only does this lack of review threaten the suspension clause of the U.S. Constitution, see Const. Art. 1, § 9, Cl. 2, it highlights the irreversible harm inherent in the process and why expansion of this system is dangerous.

Notably, even before the expansion of the expedited removal process, courts repeatedly found due process violations in the process. Since there is limited opportunity for judicial review, these orders were found invalid in the context of criminal indictments, such as for illegal reentry, where the order served as the predicate. See, e.g., *Raya-Vaca*, 771 F.3d at 1202-11 (holding removal order invalid, because defendant's due process rights were violated when immigration officer failed to advise him of his removability charges and permit him to review the sworn statement the officer prepared); *United States v. Rojas-Fuerte*, No. 3:18-cr-347, 2019 WL 1757523, at *7 (D. Or. Apr. 19, 2019) (same); *United States v. Sanchez-Figuero*, No. 3:19-cr-00025, slip op. at 2, 9 (D. Nev. July 25, 2019) (dismissing unlawful reentry indictment where defendant, who had not slept for 36 hours at the time of apprehension, "was not informed of the charge against him and never received a meaningful opportunity to review the sworn statement"); *United States v. Mejia-Avila*, No. 2:14-cr-0177, 2016 WL 1423845, at *2 (E.D. Wash. Apr. 5, 2016) (dismissing indictment where defendant should not have been subject to expedited removal because the record was "clear" that he had lived in the United States for more than two years).

Moreover, such due process violations have resulted in erroneous deportations, even before the Rule. This includes multiple reported instances of deportations of U.S. citizens.⁶ Similarly, DHS regularly fails to identify immigrants who should not be subject to the process because, for example, they have lived in the United States for many years or they have credible fear of persecution.⁷ In order to prevent improper deportation, including to countries where individuals face persecution or torture, DHS should halt implementation of the Rule.

3. The Procedural Flaws in the Expedited Removal Process Are Substantial, and Cannot Sustain a Significant Increase in the Number or Complexity of Cases

Similarly, DHS should not expand the scope of expedited removal because officers routinely record inaccurate or false information on expedited removal forms, coerce noncitizens

⁵ Vanessa M. Garza, *Unheard and Deported: The Unconstitutional Denial of Habeas Corpus in Expedited Removal*, 56 Hous. L. Rev. 881, 895-96(2019), <https://houstonlawreview.org/article/7954-unheard-and-deported-the-unconstitutional-denial-of-habeas-corpus-in-expedited-removal>.

⁶ See, e.g., *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1272-73 (M.D. Ga. 2012); *Maria de la Paz v. Jeh Johnson*, No. 1:14-cv-016 (S.D. Tex. habeas petition filed Jan. 24, 2014) (U.S. citizen was erroneously subjected to expedited removal); Ian James, *Wrongly Deported, American Citizen Sues INS for \$8 Million*, L.A. Times (Sept. 3, 2000) (recounting expedited removal of U.S. citizen Sharon McKnight).

⁷ See, e.g., American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom*, 63 (Dec. 2014) (describing erroneous expedited removal of Mexican citizen who had lived in the United States for 14 years); *id.* at 38 (recounting case of a Guatemalan citizen and mother of four U.S. citizen children who was removed under an expedited removal order even though she told the CBP officers that she was afraid to be deported to Guatemala, where her father had been murdered and her mother had been the target of extortion by gangs); *id.* at 39 (describing 22-year-old woman who fled domestic violence removed to El Salvador without being provided a credible fear interview).

into signing forms they do not understand, and fail to advise noncitizens of their rights. Forcing tens of thousands more individuals, many of whom will have lived in the United States for significant periods of time and developed substantial ties, through this flawed and fast-tracked system is not appropriate.

The content of the paperwork that DHS officers complete during expedited removal proceedings has a profound impact on the individuals subject to expedited removal—for many, it will result in their immediate deportation, for others, it will impact assessments of their credibility in subsequent proceedings. Yet this paperwork is often replete with errors. Multiple reports document DHS officers’ practice of including inaccurate information in expedited removal paperwork, failing to provide people in expedited removal proceedings with the opportunity to review and respond to statements in the paperwork, using coercion to force people to sign forms they do not understand, and requiring individuals to sign documents despite interpretation failures that impact their ability to understand the proceedings.⁸

In addition, practitioners report that immigration officers routinely fail to advise noncitizens of their rights in expedited removal proceedings, including that they may request to withdraw their applications for admission, which allows noncitizens to leave the United States voluntarily and avoid penalties, such as permanent inadmissibility to the country. *See* 8 U.S.C. § 1225(a)(4) (providing that noncitizen seeking admission “may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission”). There is a significant risk that noncitizens subject to the Rule likewise will be erroneously denied this important opportunity, provided by statute, to withdraw their applications for admission.

DHS should halt implementation of the Rule to avoid subjecting more individuals, who either have claims to relief or should not be in the expedited removal process, to a system replete with coercion, factual errors, and inadequate translation.

4. Vulnerable Populations Will Be Especially Hurt By the Rule

By law, expedited removal cannot apply to unaccompanied minors; however, the Rule does not provide *any* other exceptions, including for children arriving in a different context. Thus, children who arrived with parents or family members are subject to the Rule, even though the expedited removal process provides no safeguards or the opportunity for children to assert eligibility for Special Immigrant Juvenile Status (“SIJS”). In 2016 the DHS Advisory Committee on Family Residential Centers recommended that DHS limit or eliminate the use of expedited removal for families;⁹ instead, the Rule will subject additional families and children to both detention and a curtailed removal process.

⁸ *See, e.g.*, Borderland Immigration Council, *Discretion to Deny* at 13 (noting that “[i]ndividuals are forced to sign legal documents in English without translation” and “that CBP affidavits are often inconsistent with asylum-seekers’ own accounts”); 2016 USCIRF Study at 2, 20-22 (discussing “continuing and new concerns about CBP officers’ interviewing practices and the reliability of the records they create”); *American Exile* at 34-36 (describing noncitizens who were required to sign forms in languages they do not understand); 2005 USCIRF Study at 74 (explaining that statements recorded by CBP officers “are often inaccurate and are almost always unverifiable”); *id.* at 55 (“Study observations indicate that paper files created by the inspector are not always reliable indicators” of whether a credible fear interview was merited.); *id.* at 53 (noting that expedited removal forms were routinely inaccurate).

⁹ *Report of the DHS Advisory Committee on Family Residential Centers* at 1-6 (noting that, prior to 2014, families apprehended at or near the border were not put in expedited removal, and recommending that DHS “return to its prior practice of not putting families into expedited removal” and instead place families in regular immigration proceedings and release them promptly as a family); *id.* at 6 (finding the use of expedited removal and detention for families apprehended at or near the border “unnecessary and

In addition, victims of domestic violence and other crimes will lose their opportunity to assert relief for which they are eligible. In authorizing expedited removal for individuals who have lived in the United States for several years, there is a much greater chance that victims of crimes in the United States who have assisted law enforcement, and those who have suffered domestic violence at the hands of a U.S. citizen or lawful permanent resident abuser, will be subjected to the process. Both groups are potentially eligible for immigration relief; however, the expedited removal process does not allow for an opportunity to raise such claims, particularly without counsel to screen for or advise on such relief. As BDS attorneys' who often work with victims of violence know, it can take a series of meetings before an individual is able to confide experiences of trauma; however, in expedited removal proceedings, individuals do not have that time.

Moreover, individuals who speak indigenous Central American languages—many of whom are persecuted in their home countries based on their indigenous ethnicity—will face serious language access issues that can deprive them of the ability to apply for asylum. Such individuals often know little to no Spanish, and the systematic inadequacies in interpretation services during the expedited removal process are well-documented.¹⁰ For example, a DHS report on family detention centers, notes that “the Spanish-language issues are dwarfed by the needs of detainees who speak various Central American indigenous languages,” because “DHS systematically fails to provide [such individuals] appropriate language access,” which “threatens both their health and safety while they are in DHS custody, and their fair immigration adjudication.” Report of the DHS Advisory Committee on Family Residential Centers at 79. The extreme challenges of gathering and producing documents and understanding the legal standards at issue are particularly severe for individuals who speak indigenous languages. The DHS Report explicitly finds that the expedited removal process is inadequate for those that speak indigenous languages, and recommends that such individuals be kept out of detention entirely:

[I]t is our view that providing indigenous language interpretation is almost certainly too challenging for [DHS] to manage. . . . *The time for processing detainees who are in expedited removal proceedings is too short to find necessary language services.* Effective communication for detainees who speak indigenous languages is extremely difficult and in many instances impossible. Accordingly, we make one overarching recommendation on the subject of language access: *that individuals who speak rare languages that pose these kinds of language access difficulties should be kept out of detention.*

Id. at 79-80 (emphasis added). The DHS report also notes inadequate or nonexistent interpretation services during credible fear interviews and immigration judge reviews of negative credible fear determinations, concluding that “it seems clear that indigenous language speakers are not receiving equal access to immigration benefits – and that their cases are probably not receiving fair processing.” *Id.* at 98-99. In implementing the Rule, DHS has

wasteful,” because nearly 90% of individuals in family detention facilities from Guatemala, Honduras, and El Salvador pass their credible or reasonable fear interviews and, thus, “so overwhelmingly demonstrated credible claims”).

¹⁰ *Report of the DHS Advisory Committee on Family Residential Centers* at 84 (finding inadequate screening of language ability by CBP and ICE and no provision of written materials concerning asylum in indigenous languages); *American Exile* at 34 (“Most of the individuals interviewed . . . stated that they were given forms to sign in English, which most did not speak or read, and often were not interviewed by an immigration officer who fluently spoke their language or through an interpreter.”); *see also infra* notes 8, 13.

disregarded the warnings and recommendations contained in its own 2016 report, and instead has ensured that even more individuals who speak indigenous languages will be placed in expedited removal.

Further, in expanding expedited removal beyond the limited scope of individuals arriving at a port of entry, arriving by sea, or those here less than 14 days, there is a much greater chance that parents of young U.S. citizen children will be subjected to the expedited process. Notably, an expedited removal determination does not consider ties to the United States, such as family or children, which is further evidence that the process was not designed to assess the removal of individuals living anywhere in the United States for more than 14 days (much less two years or more).

5. The Rule Gives ICE Further License to Improperly Target Immigrant Communities

The impact of the Rule on vulnerable populations should be considered in light of the appreciable risk of error inherent in the expedited removal process, the burden on the individuals to provide satisfactory evidence, the presumption that they are subject to an expedited removal order if they fail to do, and lack of any meaningful review. Thus, it is not just individuals who have lived in the United States less than two years that are at risk; rather, it is anyone who DHS believes is undocumented and for whom it would be difficult to affirmatively demonstrate two years of physical presence to the “satisfaction” of an officer. *See American Exile* at 63 (describing erroneous expedited removal of Mexican citizen who had lived in the United States for 14 years).

For example, in one case, an individual subjected to the expedited removal process in 2004 told the immigration official he had lived in the United States since 1993—*i.e.*, far more than 14 days. He presented a valid driver’s license issued more than two years prior and, if provided the opportunity, he could also have shown his child was born more than two years prior. However, he was nonetheless issued an expedited removal order. *Mejia-Avila*, 2016 WL 1423845, at *1 (finding expedited removal order underlying criminal indictment was “fundamentally unfair” because due process rights were violated). By increasing the continuous presence requirement from 14 days to two years, the new Rule will make it even more difficult for individuals to satisfy their burden.¹¹

Moreover, under the new Rule, these encounters are licensed anywhere in the United States. If ICE officers know that there is a greater chance that individuals they arrest anywhere in the United States will be placed in expedited removal—where there is no opportunity to argue that the arrest violated statutory or constitutional rights—there is no reason ICE officers will be deterred from rampant violations. Immigrant communities in New York are already facing increased ICE enforcement at municipal courthouses, along with “collateral” arrests during ICE home raids. The Rule will incentivize ICE officers to more aggressively target and racially profile individuals who ICE thinks are likely to have crossed the southern border.

6. The Rule Undermines the Asylum System

DHS should not expand the scope of expedited removal because its officers regularly interfere with the rights of individuals in expedited removal to pursue asylum claims. Multiple reports show that DHS officers, usually those employed by CBP, have utterly failed to carry out

¹¹ *See Unheard and Deported* at 893-94 (describing how noncitizens are erroneously placed in expedited removal proceedings, instead of immigration court proceedings, because of the difficulty in presenting evidence of their continuous presence).

their responsibilities with respect to credible fear interviews that asylum-seekers are entitled to and must pass in order to have their asylum claim heard by an immigration judge. DHS officers are legally required to inform individuals potentially subject to expedited removal of their rights and refer those who express a fear of return to their countries of origin to USCIS asylum officers for CFIs, and should do so without misinformation, harassment, or intimidation.

Instead, the officers regularly fail to record statements by individuals subject to expedited removal that indicate a fear of return, fail to refer individuals who express fear of return for CFIs, fail to ask individuals in expedited removal proceedings about their fear of return, and subject these individuals to harassment and misinformation that actively interferes with their ability to pursue asylum claims.¹² Should DHS continue to implement the Rule, the well-documented failures of immigration officers to fulfill their basic obligations will impact even more asylum seekers. The Rule itself suggests that, now that DHS has expanded the scope of expedited removal, tens of thousands more individuals each year could be forced through this flawed system that routinely deprives already traumatized individuals of their right to speak to an asylum officer for a credible fear interview. *See* 84 Fed. Reg. at 35411. In order to safeguard asylum seekers' right to seek protection from persecution and torture, DHS should halt implementation of the Rule.

¹² *See, e.g.*, Human Rights Watch, *You Don't Have Rights Here* 6 (2014) (finding that fewer than half of individuals interviewed who claimed a fear of return were referred for credible fear hearings); 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* 12 (2017) ("In 12% of the cases documented for this report, individuals expressing fear of violence upon return to their country of origin were not processed for credible fear screenings and instead, were placed into removal proceedings."); DHS Office of the Inspector General, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018) (describing CBP practices amounting to failure to properly refer asylum seekers for CFIs in order to "regulat[e] the flow of asylum-seekers at ports of entry"); Amnesty International, *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers* (2017) (describing CBP agents' coercion of and threats to asylum seekers, including making them recant their claims of fear on video, claiming that they cannot seek asylum without a ticket from officials in Mexico, and claiming that there is no more asylum for individuals from certain countries); American Immigration Council, *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants*, 1, 2, 5, 7-8 (Sept. 2017) (reporting that 55.7% of a survey of 600 deported Mexican migrants were not asked if they feared return to Mexico and describing numerous incidents of CBP interference with asylum claims); American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, 9 (Aug. 2017) (reporting CBP's failure to act in response to complaints of misconduct, including complaints that agents ignored claims of fear or persecution); Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (May 2017) (documenting CBP abuses towards asylum seekers, including ignoring asylum claims, providing false information—e.g., that the United States no longer provides asylum—mocking and intimidating asylum seekers, imposing procedures to deter asylum seekers from pursuing their claims, and coercing asylum seekers into giving up their claims); 2016 USCIRF Study at 20-32 (documenting examples of failure to properly screen for fear of return in CBP primary inspection interviews and noting "certain CBP officers' outright skepticism, if not hostility, toward asylum claims"); *American Exile* at 4 (reporting that 55% of 89 interviewed individuals who received summary removal orders, including expedited removal orders, were not asked about fear of persecution in language they could understand and 40% of those asked about fear were deported without CFI despite expressing fear of return); 2005 USCIRF Study at 4, 10, 64 (documenting numerous "serious problems" in the expedited removal process "which put some asylum seekers at risk of improper return" and describing expedited removal as "a [s]ystem with [s]erious [f]laws"), *id.* at 53-54 (finding that in 15% of observed cases, when a noncitizen expressed a fear of return to an immigration officer during the inspections process, the officer failed to refer the individual to an asylum officer for a credible fear interview).

Even those individuals who receive credible fear interviews after DHS inspection in expedited removal face significant barriers to fair adjudication of their claims. As multiple reports indicate, individuals who must establish a credible fear—rather than immediately being placed in immigration court proceedings to pursue their asylum claims—may not receive adequate consideration of their claims. Instead, they face erroneous denials of credible fear and access to counsel, and inadequacies in interpretation.¹³ It is extremely difficult to expect individuals to be able to navigate the legal complexities of asylum during the CFI process without access to, and fair opportunity to consult with, counsel.

Moreover, at the same time that DHS has expanded the number of individuals in the CFI system, it has recently begun allowing CBP agents, with little additional training, to conduct CFI interviews instead of trained USCIS asylum officers. This has already led to a number of issues, such as victims of sexual and gender-based abuse not being able to request a female asylum officer, screenings being conducted by phone, including with young children, interviews taking longer, and irrelevant questions consistently being asked while critical ones are omitted.¹⁴

Rather than placing additional strain on the CFI system, DHS should halt implementation of the Rule.

* * * *

BDS strongly opposes the Rule. We request that DHS considers these recommendations, halts expansion of the scope of expedited removal, and acts immediately to address the long-standing problems with implementation of the pre-July 23, 2019 expedited removal system.

Please do not hesitate to contact us if you have questions regarding our comments. Thank you for your attention and consideration of our concerns.

Sincerely,

/s/ Brooke Menschel

Brooke Menschel

¹³ See, e.g., *Report of the DHS Advisory Committee on Family Residential Centers* at 96-100 (discussing inadequate or nonexistent interpretation services during credible fear interviews and during immigration judge reviews of negative credible fear determinations); Borderland Immigration Council, *Discretion to Deny* at 13 (describing interpretation failures during CFIs); 2016 USCIRF Study at 28 (describing case of a detained Ethiopian asylum seeker who was denied an interpreter); *Interior Immigration Enforcement Legislation: Hearing Before the H. Judiciary Subcomm. on Immigration & Border Sec. 5* (Feb. 11, 2015) (statement of Eleanor Acer, Dir., Refugee Protection, Human Rights First) (“In some cases, interviews are sometimes rushed, essential information is not identified due to lack of follow up questions, and/or other mistakes are made that block genuine asylum seekers from even applying for asylum and having a real chance to submit evidence and have their case fully considered”).

¹⁴ L.A. Times, *Border Patrol agents, rather than asylum officers, interviewing families for ‘credible fear’* (Sept. 19, 2019), <https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear> (“It’s most difficult for families who have to share really traumatic experiences under really stressful circumstances And now with someone without the appropriate knowledge or training.”).