PROCESS [ILL]DEFINED: IMMIGRATION JUDGE REVIEWS OF NEGATIVE FEAR DETERMINATIONS

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In 2023, the Biden Administration announced its plan to enhance the use of summary removals, which are administered and completed by low-level immigration officers without further process unless there is an articulated fear of return by the noncitizen. This fear articulation triggers a fear interview with an asylum officer who determines whether the noncitizen has a credible or reasonable fear of return—a process that the Biden Administration further shortened while effectively imposing a higher fear standard through a recent finalized rule. A negative fear determination results in immediate removal unless the noncitizen requests review by an immigration judge. In 2019, only 15,476 migrants subject to the fear screening process requested review of their negative fear determinations. In most of these reviews, 74.3 percent, the immigration judge affirmed the asylum officer's negative fear determination, resulting in the humanitarian relief seeker's deportation as the decision in these reviews is not subject to appeal or further review.

This Article seeks to highlight how the lack of clear process in an immigration judge's review of an asylum officer's negative fear determination under 8 C.F.R. § 208.30(g) and 8 C.F.R. § 1208.31(g) leads to an unchecked judicial discretion that can serve as a barrier to justice and humanitarian relief for those fleeing severe harms in their countries of origin or removal. This Article presents the first sustained examination and critique of the immigration judge review process that grounds decisions to expeditiously return migrants. After a review of the literature on this corner of our immigration system, I present some rare insights into this immigration

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judge review process based on descriptive data collected from an accompanying national survey of immigration advocates with direct experience in these proceedings. I then argue that that the fear screening process in its current form is in violation of the United States' international and domestic obligations and should be dismantled. The lack of clearly defined procedures and meaningful standards and the vast discretion afforded to immigration judges in these proceedings result in egregious failures of both process and substance. In the current process, expediency is championed over accuracy—belying the pretense of humanitarianism and charity that cloaks the entirety of our system of humanitarian protection. Lastly, I present some suggestions for reform to minimize the risk of erroneous fear determinations and ensure a fairer process for *all* migrants—not just those who win the adjudication lottery by being assigned to an immigration judge who approaches review of asylum an officer's negative fear determination as the migrant's legitimate opportunity to be heard and questioned.

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INTRODUCTION

In Fiscal Year 2020, 81 percent of the 239,151 deportations from the United States were completed through two forms of summary removals: expedited removal and reinstatement of removal.[1] Despite this already high reliance on summary removals, on January 5, 2023, the Department of Homeland Security (DHS) announced its plan to further enhance use of expedited removal to facilitate prompt removals of noncitizens who lack a legal basis to remain in the United States.[2] These expedited removals are a part of a summary removal mechanism that allows deportations of certain classes of undocumented individuals, without access to the immigration court system, to be effectuated by low-level immigration officers.[3] This summary removal system traditionally accounted for the majority of removals DHS effectuated—that is, until the controversial use of a Centers for Disease Control and Prevention (CDC) health law provision, Section 265 of Title 42, surpassed it during the COVID-19 pandemic.[4] However, with the end of the use of Title 42 in this manner, DHS has not only shifted gears back

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1. Alan Moskowitz and James Lee, *Immigration Enforcement Actions: 2020*, DEPARTMENT OF HOMELAND SECURITY (Feb. 22, 2022).

2. Press Release, Dep't of Homeland Sec., DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes (Jan. 5, 2023), https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and#:~:text=To%20that%20end%2C%20DHS%20today,come%20to%20the%20United%20States [https://perma.cc/SHY6-DWWE] [hereinafter DHS End of Title 42].

3. Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); *see also* 8 C.F.R. §§ 235.3(b)(2), 1241.8(a) (2022) (explaining regulatory bases for expedited removal and reinstatement of removal).

4. AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf [https://perma.cc/4ZT7-7U6N]; *see also* Louisiana. v. Ctrs. for Disease Control and Prevention, 603 F. Supp. 3d 406 (W.D. La. 2022) (successful action brought by 24 states against the CDC seeking to enjoin the termination of the expulsions under Title 42); P.J.E.S. *ex rel*. Francisco v. Wolf, 502 F. Supp. 3d 492 (D.D.C. 2020) (injunction stayed) (granting an injunction on continued expulsions under Title 42 for class members); P.J.E.S. *ex rel*. Francisco v. Wolf, No. 20-5357, 2021 WL 9100552 (D.D.C. Jan. 29, 2021) (granting a stay on the injunction of Title 42 expulsions for class members pending appeal); Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d 146 (D.D.C. 2021) (adjudicating a preliminary injunction for the Title 42 program); Joel Rose, *On Immigration, Advocates Say A 'Shadow Trump Administration' Is Tying Biden's Hands*, NAT'L PUB. RADIO (May 13, 2022, 3:24 PM), https://www.npr.org/2022/05/13/1098538697/on-immigration-advocates-say-a-shadow-trump-administration-is-tying-bidens-hands [https://perma.cc/YY65-QHK9] (outlining the Biden Administration's struggle to end Trump-era immigration policies, in large part, due to suits led by Republican-led states to prevent their termination, including their suit to enjoin the end of the Title 42 policy).

to its tried and true system of summary removals but also has expanded and further accelerated it.[5]

On May 16, 2023, DHS and the Executive Office for Immigration Review (EOIR) finalized a rule, "Circumvention of Lawful Pathways," that modified the summary removal system by imposing a presumption of asylum ineligibility for all migrants who traversed a third country prior to arriving to the United States in pursuit of humanitarian relief. This rule effectively subjects the majority of humanitarian relief seekers to a faster summary removal process and higher fear standard.[6] While the Northern District of California invalidated this rule on July 25, 2023, it stayed its decision until August 9, 2023.[7] On July 25, 2023, the Biden Administration sought a stay and appeal, which the Court of Appeals for the Ninth Circuit granted—meaning "Circumvention of Lawful Pathways" remains in effect until a decision on the merits is made.[8] This rule and the enforcement plan announced on January 5, 2023 mark a modified and enhanced return to summary removals under Title 8 of the Immigration and Nationality Act (INA).[9] This expansion of Title 8 removals—summary removals—then intensifies the urgency in reexamining systems of fear evaluation.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) brought about the system of summary removals.[10] This Article focuses on two forms of these removals: expedited removal for noncitizens without any previous orders of removal and reinstatement of removal for noncitizens with previous orders of removal.[11] Both processes allow government officials, at their own discretion, to charge and determine removability and then effectuate that removal without due process protections.[12] Deportation at this initial stage of the summary removal

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5. DHS End of Title 42, *supra* note 2; *see also* Circumvention of Lawful Pathways, 88 Fed. Reg. 31, 314 (May 16, 2023), https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf [https://perma.cc/7BCC-848S] (establishing the expanded framework for summary removal) [hereinafter Lawful Pathway Circumvention].

6. Lawful Pathway Circumvention, *supra* note 5.

7. E. Bay Sanctuary Covenant v. Biden, 18-cv-06810-JST, 2023 WL 4729278 (N.D. Cal. July 25, 2023).

8. E. Bay Sanctuary Covenant v. Biden, No. 23-16032 (9th. Cir. Aug. 3, 2023).

9. *Id.*; DHS End of Title 42, *supra* note 2.

10. Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

11. 8 C.F.R. §§ 235.3, 1241.8 (2023).

12. 8 C.F.R. §§ 235.3(b)(2), 1241.8(a) (2023); *see also* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Rules*, 40 VA. J. INT'L L. 673, 700 (2000) (defending due process claims against expedited removal when its application was limited to POEs, noting that those noncitizens are "ostensibly beyond the reach of procedural due process protections"); Michele R. Pistone & John J. Hoeffner, *Rules Are Made To Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 167–75 (2006) (detailing how expedited removal allows immigration officials to remove

process can only be halted upon a showing of a credible or reasonable fear of persecution or torture.[13]

Humanitarian relief seekers—that is, noncitizens seeking protection in the United States due to a fear of persecution or torture in their country of return—must make an articulation of their fear of return to avoid immediate removal.[14] Such a fear articulation then triggers an interview where an asylum officer evaluates the humanitarian relief seeker's fear.[15] The fear interview historically happened within days of the humanitarian relief seeker's entry into the United States[16]—a process that the Biden Administration is further expediting through an increase in asylum officers[17] for accelerated scheduling of fear interviews.[18] If the asylum officer determines the humanitarian relief seeker has a credible or reasonable fear of return—a positive fear determination—they are allowed to continue their pursuit for humanitarian relief.[19] If the asylum officer determines the humanitarian relief seeker has no credible or reasonable fear of return[20]—a

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noncitizens from the United States "without any judicial oversight or review" and with "near absence of oversight of any kind" while removing safeguards like the rights to develop and present witnesses, to an attorney, and to a complete and accurate record).

13. 8 C.F.R. §§ 235.3(b)(4), 1241.8(e) (2023).

14. 8 C.F.R. § 1208.30(a) (2023).

15. 8 C.F.R. § 208.30(b) (2023).

16. *See generally* REBECCA GENDELMAN, HUM. RTS. FIRST, PRETENSE OF PROTECTION: BIDEN ADMINISTRATION AND CONGRESS SHOULD AVOID EXACERBATING EXPEDITED REMOVAL DEFICIENCIES (Aug. 3, 2022), https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies/ [perma.cc/9ZK3-CTVS] (providing an overview of the circumstances and challenges presented during the fear screening process).

17. *See Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration*, DEP'T HOMELAND SEC. (Apr. 27, 2023), https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions- manage-regional-migration [https://perma.cc/CP8X-RG5Z] (describing the allocation of additional asylum officers to permit more rapid completion of fear interviews) [hereinafter DHS, New Actions to Manage Regional Migration].

18. Lawful Pathway Circumvention, *supra* note 5.

19. 8 C.F.R. § 208.30(f) (2023).

20. Though the actual legal determination is "no credible fear" or "no reasonable fear," it is important to note that these determinations are highly charged, as they are often distorted beyond their legal significance and politicized. These fear determinations in society go beyond their legal significance, as a large number of removals conducted through the summary removal procedure are then used to support more restrictive regulations under the argument that people come to the U.S. to "exploit" the asylum system. That is, these negative determinations are not simply seen as examples of fear claims that do not meet the legal criteria, but rather as examples of fraudulent claims and attempts to "cheat" immigration laws. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999) (to be codified as 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, 507) (interim rule) (stating that the purpose of credible fear

negative fear determination—they are immediately removed unless they affirmatively request a review by an immigration judge of the asylum officer's determination under 8 C.F.R. § 208.30(g) and 8 C.F.R. § 1208.31(g) ("IJ Review") and/or submit a Request for Reconsideration (RFR) to the United States Citizenship and Immigration Services (USCIS).[21] Upon the completion of an IJ Review and/or RFR, the determination becomes final, as appeals are unavailable to humanitarian relief seekers.[22] A persisting negative determination following the completion of these review mechanisms will then result in the immediate removal of the humanitarian relief seeker from the United States.[23]

In a purported effort to strike a better balance between ensuring protections for humanitarian relief seekers and expediency, the Biden Administration enacted the Interim Final Rule: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers (Asylum Processing IFR) on March 29,

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screening is to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch"); Press Release, Dep't of Just., The Department of Justice and Department of Homeland Security Issue Third Country Asylum Rule (July 15, 2019), https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-issue-third-country-asylum-rule [https://perma.cc/CM7C-QT69] (alleging that the United States' generosity "is being completely overwhelmed by the burdens associated with apprehending and processing hundreds of thousands of aliens along the southern border" and asserting that the new Rule would "decrease forum shopping by economic migrants and those who seek to exploit our asylum system" while protecting those who are "more likely than not to be tortured or persecuted on account of a protected ground") (quoting then-Attorney General William P. Barr); *see also* Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93. TUL. L. REV. 707, 740 (2019) (detailing the Trump Administration's skepticism of the fear screening process because "'vague, insubstantial, and subjective' asylum applications have 'swamped our system'").

21. 8 C.F.R. §§ 208.30(g)(1), 208.30(g)(1)(i) (2023). Note that the *Circumvention of Lawful Pathways* rule re-introduced the requirement that humanitarian relief seekers must affirmatively request an IJ review. Consequently, as the rule remains in effect since the Ninth Circuit granted the Biden Administration's request for a stay on the order and judgment of the Northern District of California, this affirmative request remains a requirement until a decision on the merits is made by the Ninth Circuit. Only if the Ninth Circuit agrees with the lower court will the process revert to any refusal to respond resulting in an IJ review. *See* Lawful Pathway Circumvention, *supra* note 5, at 11,747 (justifying the affirmative request requirement based on "the need for expedition under the current and anticipated exigent circumstances;" *see also* E. Bay Sanctuary Covenant v. Biden, No. 23-16032 (9th Cir. Aug. 3, 2023) (granting stay of the injunction awarded by the District Court and review on the merits).

22. 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2023).

23. *Id.*

2022.[24] The Asylum Processing IFR went into effect on May 31, 2022.[25] However, the focus of the Asylum Processing IFR remains on efficiency, management of the influxes of migrants, and fraud:

> There is wide agreement that the system for dealing with asylum and related protection claims at the southwest border has long been 'overwhelmed' and in desperate need of repair. As the number of such claims has skyrocketed over the years, the system has proven unable to keep pace, resulting in large backlogs and lengthy adjudication delays. A system that takes years to reach a result is simply not a functional one. It delays justice and certainty for those who need protection, and it *encourages abuse* by those who will not qualify for protection and smugglers who exploit the delay for profit. The aim of this rule is to begin replacing the current system, within the confines of the law, with a better and *more efficient* one that will adjudicate protection claims fairly and *expeditiously*. [26]

Still in the process of being implemented, the Asylum Processing IFR maintains the structure of summary removals as an easy and efficient way for the government to deport people with minimal protections, severely limits the use of RFRs to a single discretionary request, and makes no changes to the IJ Review process.[27] The Biden Administration further demonstrated its prioritization of "discouraging irregular migration," rather than ensuring the protection of humanitarian relief seekers, through its recent enactment of "Circumvention of Lawful Pathways."[28] This rule reimposed Trump Administration policies, including by requiring humanitarian relief seekers to either affirmatively request an IJ Review upon a negative determination or face immediate removal.[29] The result is that the IJ Review remains the final mechanism to which humanitarian relief seekers are entitled in order to remain in the United States to pursue humanitarian protection,[30] augmenting the urgency in its accuracy.

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24. Interim Final Rule: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078 (Mar. 29, 2022) [hereinafter Asylum Processing IFR].

25. *Id.*

26. Notice of Proposed Rulemaking: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 159, 46,906, 46,907 (Aug. 20, 2021) (emphasis added) (internal citation omitted) [hereinafter NPRM: Procedures for Credible Fear Screening].

27. *Id.*

28. *Id.*

29. Lawful Pathway Circumvention, *supra* note 5, at 31,431, 31,352.

30. *Id*. at 31,424.

Immigration judges affirmed 68.6 percent of negative credible fear determinations and 71.3 percent of negative reasonable fear determinations of the 18,826 IJ Reviews conducted in the first three quarters of Fiscal Year 2022.[31] In the vast majority of IJ Reviews conducted since 2000, DHS deported the humanitarian relief seeker because an immigration judge affirmed the asylum officer's negative fear determination.[32] Conversely, in that same timespan, around 29,494 humanitarian relief seekers were able to pursue their claims for protection because an immigration judge vacated the asylum officer's negative fear determination and found the noncitizen to have a credible or reasonable fear of persecution or torture.[33] Significantly, these figures do not account for humanitarian relief seekers who did not seek or receive an IJ Review due to various obstacles, including trauma, language barriers, lack of knowledge on the process, detention fatigue, racial bias, and other factors that are widely documented to affect the legitimacy of the fear screening process in these summary removals.[34]

This Article seeks to explore immigration judges' process of reviewing fear determinations for humanitarian relief seekers deemed to have no credible or reasonable fear by an asylum officer. Much has been written about these summary removals. Scholars have shown that executive overreach has led to heightened fear screening standards.[35] They have also demonstrated how summary exclusions circumvent U.S. treaty obligations[36] in ways that can lead to serious errors and dangerous deprivations of rights[37] as speed is favored over accuracy.[38] Scholars have also explored various

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31. DEP'T OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS, CREDIBLE FEAR REVIEW AND REASONABLE FEAR REVIEW DECISIONS (2023), https://www.justice.gov/eoir/page/file/1104856/download [https://perma.cc/DKE3-XMQJ] [hereinafter EOIR IJ Review Decisions].

32. *Id.*

33. *Id.*

34. *See infra* Section I.A.2 (discussing the documented shortcomings of the summary removal system).

35. Marouf, *supra* note 20, at 207.

36. Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 117 (2001).

37. Martin, *supra* note 12, at 673, 700 (noting that support for expedited removal is premised on key procedural protections such as mandatory advisories and fear questions, and that the absence of these protections would be a "serious mistake"); Pistone & Hoeffner, *supra* note 12; *see also* Lindsay Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1, 22–37 (2019) (emphasizing the deficiencies in humanitarian protections for those who are subject to reinstatement of removal due to failures of Customs and Border Patrol agents to accurately implement the summary removal process).

38. *See* Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671, 693–94 (1996) (noting that the "central purpose of summary exclusion is to dispose quickly of unfounded asylum claims" at the cost of

solutions to these issues. Professor Daniel Kanstroom argues judicial oversight and post-removal review can serve as safeguards.[39] Stephen Manning and Kari Hong highlight how meaningful access to counsel can improve accurate implementation of the fear screening process.[40] Others contend that humanitarian relief seekers are entitled to habeas review of their fear determinations[41] and that delayed implementation of agency precedent in the fear screening process leads to more accurate implementation.[42] This Article contributes to this scholarship by offering a unique insight into the IJ Review process in practice through an exploration of available data on adjudication statistics and qualitative data gathered from an accompanying survey of immigration advocates with IJ Review experience. By centering the accounts of immigration advocates with IJ Review experience, the Article provides a rare glimpse into how the imprecise standards and procedural protections of IJ Reviews can lead to highly inconsistent proceedings and access to humanitarian protection at the discretion of the immigration judge. By identifying the harmful impacts of the lack of meaningful standards and procedure, and the resulting unchecked judicial discretion at this screening stage, this Article exposes the IJ Review as a procedural safeguard that is often "ornamental"[43]—a mere "rubber stamp"[44] of the asylum officers' fear determinations that fails to adequately protect humanitarian relief seekers.

Part I provides a brief overview of summary removals within the immigration system, detailing their legal parameters and application. Part II

"increased likelihood of error"); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 1 (2014) (discussing the significant human consequences of speed deportation, including the "ejection of people who would otherwise qualify for relief before an immigration judge"); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 230–31 (2017) (discussing how these removals are more prone to inaccurate assessments than regular removal proceedings due to their speed and lack of counsel).

39. Daniel Kanstroom, *Expedited Removal and Due Process: A "Testing Crucible of Basic Principle" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323, 1351–60 (2018).

40. Stephen Manning & Kari Hong, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 699–701 (2018).

41. Lauren Schusterman, *A Suspended Death Sentence: Habeas Review of Expedited Removal Decision*, 118 MICH. L. REV. 655, 685 (2020).

42. Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374, 374–75 (2020).

43. *See infra* Section II.B (documenting the case of Diego where an immigration judge characterized counsel's appearance as "ornamental" in an IJ review).

44. Schusterman, *supra* note 41, at 662 ("In reality, the hearing increasingly functions as a rubber stamp for the asylum officer's determination."); *see also* GENDELMAN, *supra* note 16, at 5 ("Immigration court review of negative credible fear determinations is not an adequate safeguard against erroneous determinations and remains, in many cases, a 'rubber stamp.'").

explores the options humanitarian relief seekers have upon a negative credible or reasonable fear determination, noting the import of IJ Reviews given new limitations placed on RFRs by the Asylum Processing IFR. Part III presents the methodology, limitations, and results of the national qualitative Survey of Immigration Practitioners & Legal Service Providers Regarding the Immigration Judge Review Process for Negative Fear Determinations (Survey). Part IV presents proposals to address the identified shortcomings in the fear screening process, including a modification to the IJ Review process through an implementation of mandatory questions to assist in the *de novo* review by immigration judges of negative fear determinations.

I) SUMMARY REMOVALS AND THE FEAR SCREENING PROCESS

This Part provides a brief history of the United States' duty not to return individuals who are at risk of persecution or torture in their country of return.[45] It first outlines the development of the summary removal process from its origins in 1996 to its latest rendition that is the focus of this Article.[46] This Part then details the exact parameters of expedited removal and reinstatement of removal, their processes, and the legal standards utilized to evaluate a humanitarian relief seeker's fear, noting where these two forms of summary removals differ. Finally, this Part concludes with an overview of reports from government agencies and non-governmental organizations (NGOs) documenting the application of the fear screening process in expedited removal and reinstatement.

The principle of non-refoulement is a "cornerstone of international law."[47] Non-refoulement stands for the proposition that "no contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion."[48] Though not a party to the United Nations convention that bore out the principle, the United States subsequently adopted the 1967 Protocol Relating to the Status of Refugees, which

45. U.N. Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1965) [hereinafter 1951 Convention].

46. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

47. Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, U.N. High Comm'r of Refugees Advisory Opinion, ¶ 5 (Jan. 26, 2007) https://www.unhcr.org/4d9486929.pdf [https://perma.cc/3HQW-4L5R].

48. 1951 Convention, *supra* note 45, at art. 33(1).

incorporated and expanded upon the 1951 Convention Relating to the Status of Refugees.[49] Now bound by international treaty obligations[50] and domestic law,[51] the United States cannot remove humanitarian relief seekers who qualify for a form of humanitarian relief: asylum, withholding of removal, or protection under the Convention Against Torture (CAT). These obligations underlie the fear screening process in summary removals, which is intended to ensure that humanitarian relief seekers with possibly meritorious claims for these humanitarian protections are excluded from the summary removal process.[52] Instead, humanitarian relief seekers with possible meritorious claims continue their applications for legal relief and protection in the United States either through an immigration judge under the Executive Office of Immigration Review or an asylum officer under the new Asylum Processing IFR system for those in expedited removal.[53]

A humanitarian relief seeker is generally eligible for asylum if they are physically present in the United States or at a lawful port of entry (POE) and can show they meet the definition of a refugee.[54] A refugee is a person "who is unable or unwilling to return to, and is unable or unwilling to avail [themself] of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," colloquially known as the five protected grounds.[55] A humanitarian relief seeker who is

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49. *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, United Nations High Commissioner for Refugees, https://www.unhcr.org/us/media/states-parties-1951-convention-and-its-1967-protocol [https://perma.cc/8GMN-DR8H] (last visited Oct. 13, 2023).

50. *See Status of Ratification Interactive Dashboard*, U.N. Office of the High Comm'r of Refugees, https://indicators.ohchr.org/ [https://perma.cc/98S4-FJDP] (last visited Oct. 13, 2023) (indicating that the Unites States is a party to the Convention against Torture, which specifically establishes the principle of non-refoulement for refugees at risk of torture).

51. 8 U.S.C. §§ 1158 (b)(1)(A), 1231(b)(3)(B); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681 (1998) [hereinafter FARRA].

52. U.S. CITIZENSHIP AND IMMIGRATION SERV'S-RAIO, ASYLUM DIVISION OFFICER TRAINING COURSE ON REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 6–7 (2017) [hereinafter REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE]; *see also* Regulations Concerning the Convention Against Torture, *supra* note 20 (stating the credible fear interview is designed to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch").

53. 8 C.F.R. §§ 208.30(e), 1208.31(e) (2023); Asylum Processing IFR, *supra* note 24.

54. In addition to meeting the refugee definition, to gain asylum the humanitarian relief seeker must show they merit the exercise of this discretionary form of relief and none of the bars are applicable to them. 8 U.S.C. § 1158(b)(1)(A).

55. 8 U.S.C. § 1101(a)(42)(A).

not eligible for asylum because they are barred[56] or have been previously removed, such as those in reinstatement, is eligible for withholding of removal by establishing that "[their] life or freedom would be threatened in the proposed country of removal" on account of the five protected grounds.[57] These humanitarian relief seekers in withholding-only proceedings are then subject to a higher standard than those eligible for asylum.[58] Lastly, a humanitarian relief seeker is eligible for CAT if they can show it is more likely than not that they will be tortured in their country of removal.[59] Eligibility for all three forms of humanitarian protection can be established through the humanitarian relief seeker's testimony alone.[60]

Prior to 1996, all humanitarian relief seekers generally held the right to an evidentiary hearing on their asylum claim.[61] IIRIRA changed that with the introduction of expedited removal and reinstatement.[62] These two mechanisms, whose basic processes are displayed below in Chart I, allow DHS to summarily deport noncitizens in the United States. Low-level immigration officials determine and execute these summary removals that

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56. Bars to asylum include failing to file within a year of entry into the United States, attaining an offer of permanent residency in another country, participation in the persecution of another, terrorist activity, an aggravated felony conviction as defined in 8 U.S. Code § 1101(a)(43), and committing a "serious nonpolitical crime" outside the United States. 8 U.S.C. § 1158(b)(2); HILLEL R. SMITH, CONG. RSCH. SERV., LSB10816, AN OVERVIEW OF THE STATUTORY BARS TO ASYLUM: LIMITATIONS ON GRANTING ASYLUM (PART TWO) (2022) https://sgp.fas.org/crs/homesec/LSB10816.pdf [https://perma.cc/SNZ6-AVMA].

57. 8 C.F.R. § 208.16(b)(1) (2023).

58. *Compare* 8 C.F.R. § 208.16(b) (2023) (to establish a "future threat to life or freedom[,]" humanitarian relief seekers must show "*it is more likely than not* that [they] would be persecuted") (emphasis added) *with* 8 C.F.R. § 1208.13(b) (2023) (to establish a "well-founded fear of persecution[,]" humanitarian relief seekers must show "there is a *reasonable possibility* of suffering [] persecution") (emphasis added); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that the well-founded fear standard does not require humanitarian relief seekers to establish that persecution is more likely than not).

59. 8 C.F.R. § 208.16(c)(2) (2023).

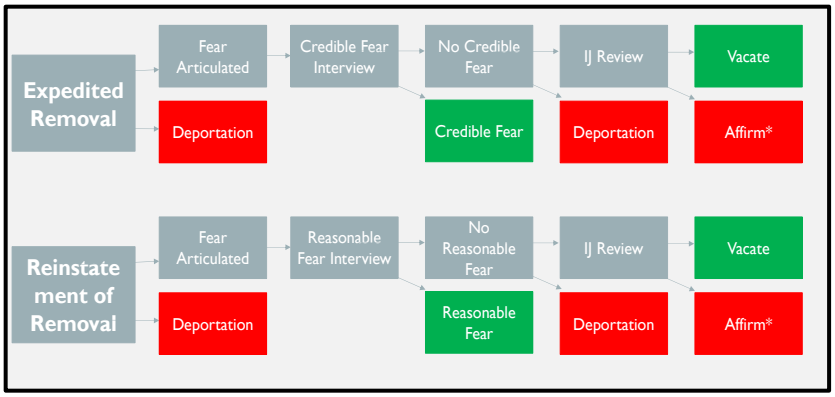
60. 8 U.S.C. § 1158(b)(1)(B)(ii) (2023); 8 C.F.R. §§ 208.16(b), 208.16(c)(2)(2023). The REAL ID Act of 2005 imposed heightened corroboration requirements for these forms of protection that created further barriers in access to humanitarian relief. However, as those changes are not implemented in the fear screening process, they are not covered in this Article. For a brief overview of those changes and their impact for those seeking refuge within the United States, *see* ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, THE END OF ASYLUM 25–26 (2021) (detailing the impacts REAL ID had by codifying more stringent corroboration requirements for noncitizens and broadening the factors that an immigration judge is able to consider in making their credibility determination).

61. Lee, *supra* note 42, at 391–92.

62. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

regularly subject noncitizens to immediate deportation without any access to the judicial system.[63]

Chart I: Summary Removal Process



*Note, humanitarian relief seekers at this stage may seek discretionary RFRs if submitted within 7 days of the IJ review or before they are removed, whichever comes first.

The summary removal process developed in large part as a reaction to a large influx of "illegal" immigration.[64] Consequently, Congress, through IIRIRA and its resulting summary removal system, sought to reduce and deter the "asylum problem"—that is, the significant increase in asylum claims—while resources to adjudicate the claims remained fixed.[65] It follows that much of the dialogue surrounding these accelerated deportations outside the court system continues to advance that such deportations are necessary "to remove individuals who do not have a basis under U.S. law to be in the United States."[66] Yet, a significant portion of noncitizens who are now subject to these removals *do* have a legal basis to be in the United States—they seek humanitarian relief because they fear their country of return.

63. 8 C.F.R. §§ 235.3, 1241.8 (2023).

64. Dan Carney, *As White House Calls Shots, Illegal Alien Bill Clears: Republicans, Eager to Leave Town, Drop Many Provisions on Public Benefits*, 54 CONG. Q. 2864, 2864 (1996).

65. For an examination of the factors shaping Congress's response, *see* Legomsky, *supra* note 38, at 674–76.

66. Press Release, U.S. Customs and Border Protection, CBP Releases August 2021 Operational Update (Sept. 15, 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-august-2021-operational-update?language_content_entity=en [https://perma.cc/N87M-5FHP].

Expedited removal is the process that gives legal authority to immigration officers under the executive branch to deport certain noncitizens from the United States.[67] Noncitizens subject to this process are detained through the pendency of the fear screening process until their removal or determination to have a credible fear. [68] Noncitizens deported through expedited removal are subject to a five-year bar, meaning they are unable to return to the United States for a minimum period of five years from the date of their removal unless they are granted a waiver.[69] In effect, expedited removal allows immigration officials to determine which noncitizens are subject to this legal process, subsequently place them in that legal process, and then effectuate their own determination by deporting the noncitizen while placing a five-year ban on them—all without any oversight from a neutral adjudicator.[70] Unsurprisingly, expedited removal has been a large contributor to the United States' mass deportation system since its inception. In 2019 alone, DHS completed 164,296 expedited removals, which accounted for 46 percent of all deportations from the United States.[71]

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67. 8 U.S.C. § 1225 ("[T]he officer shall order the [noncitizen] removed from the United States without further hearing or review unless the [noncitizen] indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.").

68. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Of note, humanitarian relief seekers often remain detained through the pendency of their application until they are granted humanitarian protection or removed. Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, ADMIN. L. REV. 589, 590.

69. 8 U.S.C. § 1182(a)(9)(A)(i).

70. The INA bars courts of appeals from reviewing expedited removal orders on petitions for review. 8 U.S.C. § 1252(a)(2)(A), (e); *see* Shunaula v. Holder, 732 F.3d 143 (2d Cir. 2013) (holding that judicial review of expedited removal decisions is statutorily limited to challenges to the entire system, not individualized decisions); Khan v. Holder, 608 F.3d 325 (7th Cir. 2010) (finding that the Court lacks jurisdiction to review the expedited removal procedure of particular individuals due to 8 U.S.C. § 1252(a)(2)(A) despite the Court's concern "with the effects of Congress's decision to bar the unwritten actions of the agency from judicial review, particularly where individual CBP agents are given so much discretion and are subjected only to a supervisor's review of their decisions"); Brumme v. INS, 275 F.3d 443 (5th Cir. 2001) (holding that the Court lacked jurisdiction to review the challenge to the expedited removal of the petitioner as 8 U.S.C. § 1252(e)(2) clearly "*limit*[s] the scope of review in a habeas proceeding involving [expedited removal] determinations"). Therefore, the only challenge available is through habeas review which limits challenges to narrow issues regarding citizenship, claim to legal status as a lawful permanent resident, admitted refugee, or asylee, or to determine whether the noncitizen was in fact removed under expedited removal. 8 U.S.C. § 1252(e)(2); *see* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 573–74 (2010) (detailing noncitizen's inability to challenge compliance with required procedures by the immigration officer and the factual support for the no credible fear determination).

71. MIKE GUO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2019 10 (2020),

Under the INA, noncitizens are subject to expedited removal if they cannot "affirmatively show[], to the satisfaction of an immigration officer," that they have been physically present in the country for a continuous two-year period since deemed inadmissible and either: 1) entered without inspection, meaning they are within the United States without proper documentation and were not admitted or paroled in,[72] often referred to as "EWIs" or 2) sought admission into the United States at a POE and were found to lack proper documentation, have a travel document procured by fraud or through willful misrepresentation of a material fact, or falsely claimed citizenship.[73]

However, in practice, expedited removal did not operate to its full statutory extent until 2019. Following the IIRIRA's enactment in 1996, expedited removal was only applied to those noncitizens seeking admission at a POE.[74] It was not until 2002 that the Department of Justice (DOJ) first expanded the application of expedited removal to include noncitizens arriving to the United States by sea without admission or parole.[75] DOJ expanded expedited removal again in 2004 to include EWIs who had been in the United States for less than fourteen days and were within 100 miles of the southwest border; this was then expanded to include all borders in 2006.[76] Yet still this expansion fell below its full statutory potential of application. DOJ maintained these limitations on expedited removal—as an effort to judiciously use financial and human resources in weighing complex questions of fact, humanitarian concerns, and legal protections[77]—until 2019 when the Trump Administration expanded its application to its full statutory extent.[78] Expanded expedited removal continued to operate as

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https://www.dhs.gov/sites/default/files/publications/immigrationstatistics/yearbook/2019/enforcement_actions_2019.pdf [https://perma.cc/C4BM-SV4R].

72. 8 U.S.C. §§ 1225(b)(1)(A)(iii)(II), 1225(b)(1)(A)(i), 1182(a)(7) (2023). Noncitizens outside the United States are "paroled in," that is given permission to enter the United States without a visa, when they can show there are "'urgent humanitarian reasons' or 'significant public benefit'" in their entry. 8 CFR §§ 212.5(f), 212(b).

73. 8 U.S.C. §§ 1225(b)(1)(A)(i), 1182(a)(6)(C) (2023).

74. ALISON SISKIN & RUTH ELLEN WASEM, CONG. RSCH. SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 2 (2009).

75. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,923 (effective Nov. 13, 2002).

76. SISKIN & WASEM, *supra* note 74, at 2.

77. *See* Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16,022 (effective Mar. 21, 2022) (rescinding the DHS' July 23, 2019 notice expanding expedited removal to its full statutory extent authorized by the INA and returning to the "over two decades" parameters) [hereinafter Rescission of the Notice].

78. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (effective July 23, 2019) (expanding expedited removal to all noncitizens who entered through a land

such until its rescission on March 21, 2022, following a DHS determination that its continued operation "is inadvisable at this time due to the Department's need to prioritize the use of its limited enforcement resources."[79] With this rescission, expedited removal reverted back to its "longstanding parameters" adopted in 2006.[80]

Reinstatement similarly grants low-level immigration officers the power to determine and execute deportations for certain noncitizens outside the purview of a neutral adjudicator.[81] Reinstatement, as its names suggests, involves reinstating the noncitizen's previous order of removal while barring the review or reopening of the underlying removal order.[82] Like expedited removal, the same immigration official that makes the determination of whether a noncitizen is subject to reinstatement can also implement the removal with minimal oversight.[83] The immigration official, either a Customs and Border Protection (CBP) or an Immigration and Customs Enforcement (ICE) officer, must first determine that a prior removal order does in fact exist.[84] Then the officer must verify that the noncitizen actually left the United States under that removal order, either through a deportation by the government or a voluntary departure following its issue.[85] Finally, the officer must confirm that the noncitizen unlawfully reentered the country.[86] Upon such a determination, the noncitizen is subject to immediate removal without any right to an administrative hearing.[87] Noncitizens under reinstatement are able to seek a petition for review within thirty days of the reinstatement order.[88] However, the court's review is typically limited to the legality of the reinstatement order as courts have consistently rejected due process challenges to reinstatement.[89]

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border, have been continuously present for less than two years, and are encountered anywhere in the United States).

79. Rescission of the Notice, *supra* note 77, at 16,023.

80. *Id.*

81. 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8 (2023).

82. 8 U.S.C. § 1231(a)(5).

83. Trina Realmuto et al., *Reinstatement of Removal: Practice Advisory*, Am. Immigr. Council & Nat'l Immigr. Project of the Nat'l Lawyers Guild (May 23, 2019).

84. 8 C.F.R. § 1241.8(a)(1) (2023).

85. 8 C.F.R. § 1241.8(a)(2) (2023).

86. 8 C.F.R. § 1241.8(a)(3) (2023).

87. 8 C.F.R. §§ 208.31, 241.8 (2021).

88. HILLEL R. SMITH, CONG. RSCH. SERV., IF11736, REINSTATEMENT OF REMOVAL: AN INTRODUCTION (2021).

89. *Id.*; 8 U.S.C. § 1252(b); *see*, *e.g.*, Lattab v. Ashcroft, 384 F.3d 8, 20–21 (1st Cir. 2004) (declining to address the merits of the petitioner's due process challenge); Garcia-Villeda v. Mukasey, 531 F.3d 141, 149–50 (2d Cir. 2008) (rejecting the petitioner's due process claims as there is no prejudicial effect and there are adequate procedural safeguards); Ponta-Garcia v. Att'y Gen., 557 F.3d 158, 162–64 (3d Cir. 2009) (finding the

Noncitizens are subject to reinstatement, with very limited exceptions, when they unlawfully return to the United States following a previous deportation, exclusion, or removal.[90] Unlike expedited removal, there are no time or geographical constraints for those subject to reinstatement.[91] This means that a noncitizen who re-entered the United States without inspection following a removal order is always subject to reinstatement, no matter how far away from the border they are or how many years they have lived in the United States. Upon a reinstatement of the prior removal order, a noncitizen is subject to a five- to twenty-year bar from re-entering the United States unless a waiver is sought and granted.[92] Though reinstatement has a more limited application, it has still accounted for a significant portion of all removals completed in the United States. In 2019, 39 percent of removals, affecting 139,349 noncitizens, were completed through reinstatement.[93]

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regulation does not violate due process because immigration inspectors are not presumed to be more biased than judges and because the regulation contains procedural protections); Ojeda-Terrazas v. Ashcroft, 290 F.3d 292, 302 (5th Cir. 2002) (declining to decide on the merits of the due process claim because of a failure to allege actual prejudice as a result of the reinstatement procedures); Warner v. Ashcroft, 381 F.3d 534, 539 (6th Cir. 2004) (explaining that the petitioner never alleged prejudice resulting from constitutional deficiencies in the procedure because he never contested the facts of his unlawful return); Gomez-Chavez v. Perryman, 308 F.3d 796, 801-02 (7th Cir. 2002) (applying the balancing test for due process claims and finding the procedure not to violate due process); Ochoa-Carrillo v. Gonzales, 437 F.3d 842, 847–48 (8th Cir. 2006) (denying the petition for review and finding no showing of prejudice); Morales-Izquierdo v. Gonzales, 486 F.3d 484, 495–97 (9th Cir. 2007) (en banc) (finding that the petitioner suffered no prejudice by being denied access to an official to adjudicate the facts and that the procedures in place make the risk of erroneous deprivation low); Duran-Hernandez v. Ashcroft, 348 F.3d 1158, 1162–63 (10th Cir. 2003) (affirming the decision of the INS because the petitioner did not prove he suffered prejudice as a result of the reinstatement procedure); Avila v. U.S. Att'y Gen., 560 F.3d 1281, 1286 (11th Cir. 2009) (finding the order of reinstatement did not violate due process rights because the petitioner satisfies all three elements of 8 C.F.R. § 241.8(a) (2023)).

90. 8 U.S.C. § 1231(a)(5). For an overview of the categories of noncitizens exempt from reinstatement despite a previous deportation, exclusion, or removal, see Realmuto et al., *supra* note 83.

91. 8 C.F.R. § 1241.8 (2023).

92. A noncitizen in reinstatement is subject to a bar as follows: if they sought reentry to the United States through a lawful port of entry—five-year bar; if they reentered without inspection once—10-year bar; and if they reentered without inspection two or more times—20-year bar. 8 U.S.C. § 1182(a)(9)(A).

93. GUO, *supra* note 71, at 10.

A) The Fear Screening Process

Noncitizens subject to expedited removal and reinstatement must be able to satisfactorily articulate a fear of return to a DHS officer—primarily from CBP and less frequently from ICE—within hours of their entry to the United States or risk immediate deportation.[94] Such an articulation results in a screening process that aims to assess whether the fear comports with humanitarian relief law and prevent the "misuse" or "exploitation" of the asylum system "by cracking down on illegal immigration at the border."[95] Noncitizens in expedited removal are generally able to seek asylum, withholding of removal under section 241(b)(3)(B) of the INA, and CAT protection (both withholding and deferred removal) upon a credible fear determination.[96] Noncitizens in reinstatement are barred from asylum due to their prior removal orders, but are generally eligible for withholding of removal under section 241(b)(3)(B) of the INA and CAT protection upon a reasonable fear determination.[97]

DHS officials must refer humanitarian relief seekers to an asylum officer upon an articulation of fear.[98] The asylum officer then evaluates the legitimacy of their fear claim by determining whether their fear rises to the legal standard.[99] Upon a positive fear determination, DHS excludes the humanitarian relief seeker from the summary removal process and issues them a Notice to Appear to be placed in regular removal proceedings.[100] The humanitarian relief seeker may then pursue their humanitarian protection claim.[101]

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94. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 241.8. The Asylum Processing IFR, once fully implemented, will allow for some humanitarian relief seekers who are placed out of expedited removal after receiving a credible fear determination to pursue their asylum claim with USCIS with an asylum officer as the adjudicator instead of being issued an NTA to pursue their claim with EOIR with an immigration judge as the adjudicator.

95. Daniel Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. MIGRATION & HUM. SEC. 192, 192 (2018) (quoting President Bill Clinton at the signing of IIRIRA).

96. Currently, noncitizens may be barred from asylum following a positive fear determination if they 1) fail to file their asylum application within one year of their arrival to the United States, 2) are subsequently convicted of a particularly serious crime, 3) are found to firmly resettle, or 4) committed a serious non-political crime. 8 U.S.C. § 1158(a)(2), (b)(2).

97. *See* 8 C.F.R. § 241.8(e) (establishing the right of a referral to an asylum officer to evaluate whether the humanitarian relief seeker has a reasonable fear of persecution or torture upon an expression of fear of returning to the country of removal).

98. 8 C.F.R. §§ 235.3(b)(4), 1241.8(e).

99. *Id.*

100. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 241.8(e).

101. *Id.*

However, there is an array of barriers that humanitarian relief seekers face in articulating their fear, including trauma, lack of knowledge of the articulation requirement, language access, racial bias, and hostile officers.[102] These barriers heighten the risk of the United States running afoul of their non-refoulement obligations through erroneous deportations. In seeming recognition of the incompatibility of summary removals with humanitarian protections, DHS immigration policy and procedure requires DHS officers, often from CBP, to ask all noncitizens subject to expedited removal four questions to identify anyone who is afraid of return:

1. Why did you leave your home country or country of last residence?
2. Do you have any fear or concern about being returned to your home country or being removed from the United States?
3. Would you be harmed if you were returned to your home country or country of last residence?
4. Do you have any questions or is there anything else you would like to add?[103]

DHS officers must document these interactions—their questions and the noncitizens' responses.[104] DHS procedures similarly require CBP and ICE officers to ask noncitizens in reinstatement whether they have a fear of return and to document their interactions.[105] However, there is a lack of publicly accessible resources on DHS training documenting the type of screening humanitarian relief seekers in reinstatement receive.[106]

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102. *See* Eleanor Acer & Olga Byrne, *How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources*, 5 J. ON MIGRATION & HUM. SEC. 356, 360–63 (2017) (detailing a series of procedural deficiencies in the summary removal process resulting in a system that does not effectively screen all fears and results in erroneous deportations in violation of the *refoulement* prohibition); Kanstroom, *supra* note 39, at 1349–51 (documenting allegations of abuse and misconduct by CBP personnel throughout the summary removal process); Pistone & Hoeffner, *supra* note 12, at 173 (outlining the difficulties humanitarian relief seekers, who are more likely to be subjected to secondary screening, face in the fear screening interviews conducted by CBP) .

103. RUTH ELLEN WASEM, CONG. RSCH. SERV., R41753 ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY 10 (2011); Harris, *supra* note 37, at 22.

104. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., INSPECTORS FIELD MANUAL ch.17.15(b)(1) (2006), https://www.aila.org/File/Related/11120959F.pdf [https://perma.cc/C47A-JG64]; 8 C.F.R. § 235.3(b)(4).

105. Realmuto et al., *supra* note 83, at 7.

106. *See* Harris, *supra* note 37, at 28 (noting how the expedited removal process largely "takes place behind closed doors" due to little external and internal oversight).

106. CUSTOMS & BORDER PROT., *supra* note 104, at ch.17.15(b)(1).

Consequently, it remains unclear whether DHS officers are required to ask the same four questions of noncitizens subject to reinstatement.

Any indication, including non-verbal cues, of a fear of return or intent to apply for asylum by a humanitarian relief seeker should result in immigration officials referring humanitarian relief seekers to an asylum officer for a credible fear interview (CFI) for those in expedited removal and a reasonable fear interview (RFI) for those in reinstatement.[107] In the absence of a referral, the DHS officer issues a removal order and deports the noncitizen.[108]

1) Fear Interviews

CFIs and RFIs are intended to "serve as a screening mechanism to identify *potentially* meritorious claims for further consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing *clearly* unmeritorious or frivolous claims."[109]

During its implementation, DOJ acknowledged that "many [humanitarian relief seekers] who have passed the credible fear standard will not ultimately be granted asylum."[110] This acknowledgment signals the function of these interviews as a screening standard that is broader and easier to meet than the standards required for a grant of humanitarian relief. The standard is purportedly not intended to only identify humanitarian relief seekers who will ultimately be successful in their claim; rather, it is "intended to be a low screening standard for admission into the usual full asylum process."[111] This lower standard accounts for how the accelerated screening by asylum officers of complex issues involving law, trauma, and language and

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107. 8 C.F.R. §§ 235.3(b)(4), 1241.8(e); *see also* ELIZABETH CASSIDY & TIFFANY LYNCH, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM 11–12, 18–23 (2016), https://www.uscirf.gov/sites/default/files/Barriers%20To %20Protection.pdf [https://perma.cc/9ET5-R33Y] (documenting the requirement to refer humanitarian relief seekers to USCIS for fear interviews to be conducted by asylum officers upon expressions of fear and instances of deportations following a failure to refer as required).

108. 8 C.F.R. §§ 235.3(b)(2), 1241(f).

109. REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 52, at 8 (emphasis added); *see also* Regulations Concerning the Convention Against Torture, *supra* note 20 (stating the credible fear interview is to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch").

110. Immigration and Naturalization Service, Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997).

111. 142 CONG. REC. S11491–92 (daily ed. Sept. 27, 1996) (statement of Sen. Orrin Hatch).

cultural barriers cannot accurately identify all humanitarian relief seekers at risk of persecution or torture in their countries of return. However, while lower than the standards required for a grant of humanitarian relief, credible fear and reasonable fear are both complicated, amorphous standards that ultimately act as gatekeeping mechanisms against humanitarian relief seekers with meritorious claims.[112]

Credible fear is statutorily defined as "a significant possibility" that the humanitarian relief seeker *could* establish eligibility for asylum, withholding or CAT protection[113] through a preponderance of the evidence.[114] "Significant possibility" is an elusive threshold that is inconsistently defined, even within USCIS materials intended to train asylum officers on how to implement these standards.[115] Ultimately, the most recent training materials[116] sum up the significant possibility standard as "best understood as requiring that the applicant 'demonstrate a *substantial and realistic possibility* of succeeding,' but not requiring the applicant to show that [they] [are] more likely than not going to succeed when before an immigration judge."[117]

Similarly, the reasonable fear standard is intended to identify *potentially* meritorious claims so that the humanitarian relief seeker may continue their application with EOIR, where they will be subject to more

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112. *See* Kif Augustine-Adams & D. Carolina Núñez, *Sites of (Mis)Translation: The Credible Fear Process in United States Immigration Detention*, 35 GEO. IMMIGR. L. J. 399, 405–09 (2021) (discussing the complexity of "credible fear" as a concept, which in English has a "technical and contested" meaning, and thus when translated into another language, poses even more challenges and confusion for humanitarian relief seekers to navigate).

113. 8 U.S.C. § 1225(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(3).

114. 8 U.S.C. § 1158(b).

115. *See* Manning & Hong, *supra* note 40, at 685–86 (citing U.S. CITIZENSHIP AND IMMIGR, SERVS.–RAIO, ASYLUM DIVISION OFFICER TRAINING COURSE ON CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 14–15 (2014) [hereinafter CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE]) (highlighting the conflicting guidance provided by the course).

116. Though the 2017 Lesson Plan currently dictates the standard and evaluation asylum officers are to conduct, the full lesson is not in effect. *Kiakombua v. Wolf* ordered the termination of implementation of certain key provision, including prohibiting asylum officers from requiring corroboration for their credibility determination, consideration of discretionary factors once significant possibility of asylum has been established through past persecution, and evidence and facts for every element of asylum. Further, though two subsequent training materials were issued in April and September 2019, these materials were vacated after being found to "unlawfully diverge[] from the INA and its implementing regulations" by heightening the standard for a credible fear evaluation which "is meant to be a 'low bar' for the noncitizen." Kiakombua v. Wolf, 498 F. Supp. 3d 1, 59 (D.D.C. 2020).

117. REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 52, at 16.

scrutiny, process, and protections.[118] At the same time, the reasonable fear standard is meant to identify noncitizens seeking to delay their removal "by filing clearly unmeritorious or frivolous claims."[119] Reasonable fear involves a heightened standard, in contrast to the credible fear standard. It is statutorily defined as a showing of a "reasonable possibility" of persecution under the protected grounds or torture in the humanitarian relief seeker's country of return.[120] Reasonable possibility is the same as the well-founded fear standard required for a grant of asylum in regular removal proceedings, though lower than the "more likely than not" standard required for a grant of withholding or CAT protection.[121]

Asylum officers conduct the fear screening interviews.[122] They are housed within USCIS, which is under DHS along with CBP and ICE.[123] An asylum officer is an immigration officer who "has had professional training in country conditions, asylum law, and interview techniques."[124] They must also be supervised by an asylum officer who "has had substantial experience adjudicating asylum applications."[125] Notably, being an attorney is not required to make the perilous negative fear determinations that result in the immediate deportation of the humanitarian relief seeker absent a request for further review by an immigration judge or an RFR to USCIS.[126] A study from 2003 to 2008 highlighted the potential dangers of asylum officers without a law degree.[127] The study found that asylum officers with a juris doctor grant asylum for pro se applicants at a significantly higher rate (24 percent higher) than officers without a law degree.[128] This finding intensifies the potential danger associated with the absent law degree requirement, when contextualized by the fact that most humanitarian relief seekers in the fear screening process proceed pro se.[129]

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118. *Id.* at 8.

119. *Id.*

120. 8 C.F.R. § 1208.31(c).

121. REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 52, at 11, 17.

122. 8 C.F.R. §§ 208.30(d), 1208.31(c).

123. 6 U.S.C. §§ 271(a)(1), 211(a), 252(a)(1); *DHS Law Enforcement Overview*, DEP'T OF HOMELAND SEC. (Apr. 27, 2023), https://www.dhs.gov/dhs-law-enforcement-overview [https://perma.cc/HJG6-VHYJ].

124. 8 U.S.C. § 1225(b)(1)(E).

125. *Id.*

126. *Id.*

127. ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 185–196 (2014) (documenting the benefits of hiring asylum officers with law degrees).

128. *Id.* at 186.

129. GENDELMAN, *supra* note 16, at 35.

Asylum officers approach CFIs and RFIs similarly, in many ways. Asylum officers must conduct both of these interviews in a private, non-adversarial manner,[130] ensure the noncitizens have an understanding of the fear determination process,[131] and actively engage in eliciting information that is pertinent to the fear determination.[132] If the noncitizen is not able to "proceed effectively" in English, the interview must be conducted in a language the noncitizen speaks and understands.[133] Asylum officers are to draft "a summary of the material facts" disclosed by the humanitarian relief seeker and provide them an opportunity to correct errors at the conclusion of the interview.[134] Finally, asylum officers evaluate the same legal concepts in both contexts, albeit with an elevated standard for those in reinstatement.[135] Asylum officers determine whether the humanitarian relief seeker might 1) meet the "refugee" definition and 2) be at risk for "torture."[136] These determinations are made without the application of any bars to humanitarian relief.[137] To make these fear determinations, asylum officers must evaluate a series of complicated, constantly-evolving legal concepts—including the credibility of the testimony, existence of a nexus to

130. 8 C.F.R. §§ 208.30(d), 1208.31(c).

131. 8 C.F.R. §§ 208.30(d)(2), 1208.31(c).

132. REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 52, at 45.

133. 8 C.F.R. §§ 208.30(d)(5), 1208.31(c).

134. 8 C.F.R. §§ 208.30(d)(6), 1208.31(2).

135. 8 U.S.C. § 1158(b); 8 C.F.R. § 1208.31(c).

136. The divergence in CFIs and RFIs does not end with the heightened standard for those in reinstatement. For noncitizens in an RFI, they are permitted representation at the interview who can then introduce relevant evidence and make a closing statement at the discretion of the asylum officer, whereas noncitizens in a CFI are permitted consultants instead of representatives. 8 C.F.R. §§ 1208(c), 208.30(d)(4). There is no statutory timeframe for when a CFI is to occur, whereas asylum officers must conduct RFIs and make their determination within 10 days of the fear articulation and corresponding referral, unless there is an exceptional circumstance impeding the ability to comply. 8 C.F.R. §§ 208.31(b), 1208.31(b). Noncitizens in a CFI benefit from the application of the most favorable Circuit precedent on issues with a Circuit split versus "the precedent for the Circuit in which the applicant resides" for those in RFIs. REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 52, at 11. Lastly, asylum officers are required to consider "whether the applicant's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge" for noncitizens in expedited removal. 8 C.F.R. § 208.30(e)(4); REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 52, at 17, 47. For a greater discussion on how these differences result in significant disadvantages to those in reinstatement, see Harris, *supra* note 37, at 28–31.

137. 8 C.F.R. §§ 208.30(e)(5)(i), 1208.31(c).

a protected ground,[138] classification of the feared harm as persecution or torture, and government participation or acquiescence.[139]

Those found to have a credible fear, for the time being,[140] are primarily placed in regular removal proceedings where they have access to all defenses to deportation, while those found to have a reasonable fear are placed in "withholding only" removal proceedings where they can only apply for withholding of removal and CAT protection.[141] These proceedings take place in front of an EOIR immigration judge—an administrative court under DOJ.[142] Those with negative fear determinations are subject to immediate deportation, unless they request a review of the fear determination by an immigration judge or submit an RFR to USCIS.[143]

2) Fear Screening in Reality

In 2019, DHS completed 85 percent of all deportations through expedited removal or reinstatement, accounting for the removal of 303,645 noncitizens.[144] For fiscal year 2019, CBP and ICE referred 105,439 humanitarian relief seekers for a CFI and 13,197 humanitarian relief seekers for an RFI.[145] Of those referrals, USCIS conducted 94,230 CFIs, with 79.9 percent resulting in a credible fear determination, and 8,501 RFIs, with 38.9 percent resulting in a reasonable fear determination.[146] Though these

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138. Meaning that the harm the humanitarian relief seeker suffered is centrally linked to a protected ground.

139. *See generally* REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 52 (explaining considerations for credible fear determinations).

140. Asylum Processing IFR, *supra* note 24, amends the expedited removal process so that upon a credible fear determination, the noncitizen's asylum claim *may* be adjudicated by an asylum officer in an asylum interview, like humanitarian relief seekers who affirmatively submit asylum applications are able to do.

141. 8 C.F.R. §§ 208.30(e), 1208.31(e).

142. 8 C.F.R. §§ 208.30(f), 1208.31(e).

143. 8 C.F.R. §§ 208.30(g), 1208.31(f), 208.30(g)(1)(i).

144. GUO, *supra* note 71, at 10.

145. U.S. CITIZENSHIP & IMMIGR. SERVS., CREDIBLE FEAR WORKLOAD REPORT SUMMARY: FY 2019 TOTAL CASELOAD 1 (2020), https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf [https://perma.cc/3NLD-R36Y] [hereinafter CREDIBLE FEAR WORKLOAD SUMMARY FY 2019]; U.S. CITIZENSHIP & IMMIGR. SERVS., REASONABLE FEAR WORKLOAD REPORT SUMMARY: FY 2019 TOTAL CASELOAD 2 (2020), https://www.uscis.gov/sites/default/files/document/data/Reasonable_Fear_Stats_FY19.pdf [https://perma.cc/3NLD-R36Y] [hereinafter REASONABLE FEAR WORKLOAD SUMMARY FY 2019].

146. CREDIBLE FEAR WORKLOAD SUMMARY FY 2019, *supra* note 145; REASONABLE FEAR WORKLOAD SUMMARY FY 2019, *supra* note 145. Though outside the purview of this Article, the significantly lower rate of reasonable fear determinations, especially in regard to the

numbers may indicate a functional fear screening mechanism, reports paint a grimmer reality.

Since the implementation of summary removals in 1996, reports have surfaced detailing a fear screening system rife with atrocious violations, outright hostilities, and casual disregards of safeguards in place to protect humanitarian relief seekers.[147]

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interplay of reinstatement and expedited removal, is a crucial area of exploration to which both Lindsay Harris and Jennifer Lee Koh have brought necessary attention in their respective works. Harris, *supra* note 37; Koh, *supra* note 38.

147. *See e.g.,* ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 32–40 (2014), https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom?redirect=immigrants-rights/american-exile-rapid-deportations-bypass-courtroom-report [https://perma.cc/SV2M-C27S] (recounting the experience of various humanitarian relief seekers whose rights were violated or who were grossly mistreated at U.S. points of entry); HUM. RTS. WATCH, "YOU DON'T HAVE RIGHTS HERE": U.S. BORDER SCREENINGS AND RETURNS OF CENTRAL AMERICANS TO SERIOUS HARM (2014), https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk [https://perma.cc/LM45-4ARD] (illustrating deficiencies on the summary removal process through the experience of 35 Honduran humanitarian relief seekers, many of whom were summarily removed without a USCIS referral despite their fear expressions); U.S. COMM'N. ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL, 17–37 (2016), https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf [https://perma.cc/QMM8-QR4M] (documenting serious flaws with the summary removal process for humanitarian relief seekers); HUM. RTS. FIRST, CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS (2017), https://nnirr.org/wp-content/uploads/2014/07/hrf-crossing-the-line-report.pdf [https://perma.cc/MY4Z-SXNY] (documenting instances of CBP deporting humanitarian relief seekers after disregarding their fear expressions or coercing them into denouncing their fears); John Washington, *Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims*, THE INTERCEPT (Aug. 11, 2019), https://theintercept.com/2019/08/11/border-patrol-asylum-claim/ [https://perma.cc/TL4Z-CKXE] (documenting instances of CBP filing official government forms with inaccurate information and fraudulent statements regarding humanitarian relief seekers' fears); OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., CBP HAS TAKEN STEPS TO LIMIT PROCESSING OF UNDOCUMENTED ALIENS AT PORTS OF ENTRY (2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf [https://perma.cc/292Y-CC8U] (finding that CBP intentionally took action to reduce the number of humanitarian relief seekers processed each day, including through its "metering policy" where CBP refused to process any undocumented noncitizen, including humanitarian relief seekers, at seven ports of entry); HUM. RTS. WATCH, "THEY TREAT YOU LIKE YOU ARE WORTHLESS": INTERNAL DHS REPORTS OF ABUSES BY US BORDER OFFICIALS (2021), https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials [https://perma.cc/9TF5-5A5C] [hereinafter "THEY TREAT YOU LIKE YOU ARE WORTHLESS"] (highlighting the results of a Freedom of Information Act request that described allegations of physical abuse and due process violations against humanitarian relief seekers).

The United States Commission on International Religious Freedom (USCIRF) published the first systematic review of the summary removal system in 2005.[148] USCIRF is an independent, bipartisan federal agency tasked to monitor the right to religious freedom and belief both abroad and domestically.[149] USCIRF also advises Congress and the Executive on how to best promote this freedom.[150] For the report, Congress granted USCIRF virtually unrestricted access to the expedited removal proceedings.[151] Congress further authorized USCIRF to conduct studies on whether the legislative changes to the asylum process by IIRIRA, namely the creation of summary removals, impeded on the country's obligation of providing refuge to religious refugees.[152] The 2005 report examined the effect of expedited removal on all humanitarian relief seekers, regardless of the particular protected ground that established their basis for humanitarian protection.[153] The study exposed the susceptibility of expedited removal to vastly inconsistent application, given the vast discretion afforded to immigration officials at every stage of the process. Specifically, USCIRF experts observed instances of immigration officials improperly encouraging humanitarian relief seekers to withdraw their fear claims, failing to refer humanitarian relief seekers to an asylum officer for a fear interview following the fear articulation, neglecting to provide required information to humanitarian relief seekers of their right to apply for protection if they fear return to their countries, and detaining humanitarian relief seekers in prisons or prison-like facilities.[154]

In 2016, USCIRF further found that humanitarian relief seekers in expedited removal face numerous "barriers to protection."[155] These barriers include immigration officers discouraging noncitizens from seeking legal representation, failures to provide statutorily-required information regarding the fear screening process, inaccurate records of interactions between officials and humanitarian relief seekers that were then relied upon as "verbatim transcripts," frequent disregard of the four required fear-screening questions discussed in Section I.A, *supra*, violation of statutory referral requirements following a fear articulation, use of detained noncitizens as interpreters in the fear screening process, and outright

148. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 3–5 (2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf [https://perma.cc/Y2DT-6J8Q].

149. *Id.* at 1.

150. *Id.*

151. *Id.* at 3.

152. *Id.* at 10.

153. *Id.* at 1.

154. *Id.* at 50–55, 60–62.

155. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 148, at 1–3.

skepticism by CBP officials of asylum claims.[156] Examples of these barriers documented by USCIRF included a Salvadoran humanitarian relief seeker who was not asked any of the four screening questions by CBP and whose letter, written by a Salvadoran police officer corroborating his fear, was confiscated by CBP; a Bangladeshi humanitarian relief seeker who asked for asylum at a POE only to be told to "seek asylum in Mexico" by a CBP agent; and a Somali humanitarian relief seeker who was asked by an ICE official about his fear due to his membership in a persecuted minority tribe, at the window of a full waiting room that included other Somalis.[157]

Following the USCIRF reports, both NGOs and government agencies have further documented the failures of the fear screening system. In 2017, Human Rights First (HRF) published a report documenting problematic actions by CBP officers, including unlawful returns of asylum seekers at official ports of entry disregarding statutorily required fear referrals, declarations to humanitarian relief seekers that the United States is no longer accepting asylum claims, applied pressures on humanitarian relief seekers to recant fear expressions, and inaccurate record-keeping.[158] In 2020, the Office of Inspector General (OIG) found that CBP implemented a practice of "Queue Management"—commonly referred to as "metering."[159] Metering became standard practice in 2018, causing a cease in the processing of all undocumented noncitizens, including humanitarian relief seekers, at seven ports of entry.[160] Though metering ended after it was held unconstitutional,[161] it resulted in approximately 650 humanitarian relief seekers being turned away a day while the practice remained in place—an outright violations of the INA through refusals to process humanitarian relief seekers at the instruction of CBP senior leaders.[162] In 2021, Human Rights Watch (HRW) published a report detailing "over 160 cases of misconduct and abuse of asylum applicants at the hands of officers within several DHS components."[163] HRW reported repeated internal allegations by asylum officers of "assault, sexual abuse, due process violations, denial of medical

156. *Id.* at 19–23, 27–28, 31, 50–53.
157. *Id.* at 21-22, 26.
158. HUM. RTS. FIRST, *supra* note 147, at 5–14.
159. OFF. OF INSPECTOR GEN., *supra* note 147, at 5–6.
160. *Id.* at 5–19.
161. Al Otro Lado, Inc. v. Mayorkas, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at *18 (S.D. Cal. Sept. 2, 2021) (holding that metering violated the asylum seekers' constitutional right to due process and government statutory duties under 8 U.S.C. §§ 1158(a)(1), 1225). For greater discussion of executive overreach in the implementation of metering and the havoc it wreaked on access to humanitarian law, *see* Marouf, *supra* note 20, at 764–68.
162. OFF. OF INSPECTOR GEN., *supra* note 147, at 9.
163. "THEY TREAT YOU LIKE YOU ARE WORTHLESS," *supra* note 147, at 1.

care, harsh detention conditions, and dehumanizing treatment" of humanitarian relief seekers by CBP officers and ICE agents..[164] Most recently, in August 2022, HRF released a report illustrating how the fear screening process simply offers a "pretense of protection" as government officials at every stage of the process fail to abide by the law, resulting in unlawful deportations of bona-fide humanitarian relief seekers.[165]

These concerns extend beyond the initial screening process with CBP and ICE. Humanitarian relief seekers who are ultimately able to obtain a referral to an asylum officer face additional barriers to protection. Of particular note is recent documentation of "systematic deficiencies" in CFI and RFI assessments of the Houston Asylum Office (Houston AO)[166]—the USCIS office with the largest percentage of fear screening interviews, totaling at 63,250 CFIs and 2,536 RFIs in 2019.[167] In April 2022, a coalition of leading NGOs documented "severe violations of due process and statutory obligations" during CFIs and RFIs at that office.[168] The NGOs further noted that Houston AO had "a particularly egregious record" with these fear screenings.[169] Concerns included "denial of access to counsel, lack of legal orientation, difficulties with language access, [] biased and deficient individualized fear determinations[,]" application of standards beyond significant possibility, and failure to abide by the order in *Kiakombua v. Wolf*, 498 F. Supp. 3d 1 (D.D.C. 2020), prohibiting implementation of certain provisions from the 2017 Lesson Plan.[170]

Examples provided demonstrated that a much higher standard was applied during these CFIs and RFIs.[171] This can be seen in the case of J.M., a Venezuelan humanitarian relief seeker.[172] In response to J.M.'s political involvement, the Venezuelan government detained, beat, and scarred him.[173] Instead of determining the possibility that J.M. *may* establish his asylum claim in the future with EOIR, the asylum officer evaluated the extent of the harm J.M. suffered and made the legal determination that it did not amount

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164. *Id.*

165. GENDELMAN, *supra* note 16, at 4–5, 35, 39.

166. Am. Gateways et al., *Letter Re: Systematic Deficiencies at the Houston Asylum Office in Assessments of Credible and Reasonable Fear Cause Harm and Irreversible Damage to Asylum Seekers* (Apr. 27, 2022) https://nipnlg.org/PDFs/2022_27April-CFI-complaint.pdf [https://perma.cc/UB3U-ZDM6].

167. CREDIBLE FEAR WORKLOAD SUMMARY FY 2019, *supra* note 145; REASONABLE FEAR WORKLOAD SUMMARY FY 2019, *supra* note 145.

168. Am. Gateways et al., *supra* note 166, at 1–2.

169. *Id.* at 2.

170. *Id.* at 2, 6.

171. *Id.* at 2, 5–12.

172. *Id.* at 6.

173. *Id.*

to past persecution.[174] The asylum officer further concluded that any future harm could be prevented by ending J.M.'s political participation[175]—a conclusion that runs afoul of the rationale behind providing humanitarian protection. The purpose of providing humanitarian protection for those at risk of persecution due to an enumerated ground, which includes political opinion, is because it is seen as an integral aspect of a person that should not need to be altered in order to avoid persecution.[176] For J.M., this meant that the asylum officer found him to have no credible fear and ended his opportunity to further develop his claim.[177] Reports have shown that cases like J.M.'s are not isolated instances,[178] but rather frequent occurrences of unlawful heightened standards.

The continuous reports of failures within the fear screening system are not a mystifying quandary; they are logical results of "the overwhelming reality that the culture in which expedited removal [and reinstatement] occurs is an enforcement culture . . . focus[ing] on enforcing the rules restricting illegal immigration, as opposed to maximizing legal immigration or providing services to immigrants and potential immigrants."[179]

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174. *Id.*

175. *Id.* 6–7.

176. Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) ("Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."), *overruled on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

177. Am. Gateways et al., *supra* note 166, at 6–7.

178. *See e.g.* Afr. Cmtys. Together et al., *Letter Re: Detained Asylum Seekers Deprived of Due Process in Expedited Removal Process* (June 30, 2021) (detailing wait times of up to three months for CFI/RFIs while humanitarian-relief seekers remained detained, failure to provide adequate interpretation, asylum officers conducting fear interviews via telephone, and failure to abide by the restored, lower threshold ordered by *Kiakombua*), https://www.splcenter.org/sites/default/files/detained_asylum_seeker_grievance_letter_30_june_2021.pdf [https://perma.cc/LV72-DMJA]; Am. Immigr. Council et al., *Letter to USCIS and ICE Concerning Due Process Violations at Detention Facilities*, 2–10 (Dec. 24, 2015), https://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process [https://perma.cc/VC69-VHTU] (detailing flawed fear determinations by asylum officers with facially evident errors at various family detention centers, including failure to independently consider children's claim and refusing to make statutorily required referral to immigration judges at noncitizens' requests).

179. Pistone & Hoeffner, *supra* note 12, at 196–97.

II) OPTIONS FOLLOWING AN ASYLUM OFFICER'S NEGATIVE FEAR DETERMINATION

A CFI or an RFI that results in a negative fear determination subjects the noncitizen to immediate deportation without further process unless they request either an IJ Review or RFR. This Section details both these processes. It first outlines the IJ Review process and examines how IJ Reviews operate in practice through analyzing government data and NGO reports documenting vacatur rates, immigration court practices and trends, and individualized humanitarian relief seekers' experiences. The Section then turns to the final mechanism humanitarian relief seekers can seek following an affirmed negative fear determination: RFRs. It details the RFR's standards, purpose, discretionary nature, historical application, and recent changes by the Biden Administration. Lastly, it documents the finality of the decisions made at the IJ Review and RFR stage because of the unavailability of appellate review for these processes.

A) IJ Reviews: Purpose & Process

Upon a negative fear determination, an asylum officer is required to inquire whether the humanitarian relief seeker would like the determination to be reviewed by an immigration judge.[180] An immigration judge is an attorney appointed by the Attorney General to serve the role of an administrative judge within EOIR.[181] Notably, a background in immigration law is not required for the appointment.[182] Immigration judges have a duty to act as the Attorney General's delegates while exercising their independent judgment and discretion in all cases that come before them.[183]

Prior to May 16, 2023, an affirmative indication or a refusal to respond to the inquiry for an IJ Review, for those in expedited removal,[184] required the asylum officer to refer the noncitizen to an immigration judge.[185] The Biden Administration's "Circumvention of Lawful Pathways"

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180. 8 C.F.R. §§ 208.30(g)(1), 1208.30(f).

181. 8 U.S.C § 1101(b)(4).

182. *Make a Difference: Apply for an Immigration Judge Position*, EXEC. OFFICE FOR IMMIGR. REV. (Sept. 25, 2023), https://www.justice.gov/eoir/Adjudicators [https://perma.cc/M4YG-V7MH]; *see also* Marouf, *supra* note 20, at 730 (noting that "the qualifications to serve as an [immigration judge] still do not require any immigration law experience").

183. 8 CFR §§ 1003.10(a)–(b). For an exploration of the politicization of immigration judge appointments and evaluations, *see* Marouf, *supra* note 20, at 728–35.

184. 8 C.F.R. § 208.30(g)(1)(i).

185. 8 C.F.R. §§ 208.30(g)(1), 1208.30(f). The referral process is completed through Form I–869, Record of Negative Credible Fear Finding and Request for Review by

removed the latter safeguard.[186] The rule instead requires that humanitarian relief seekers make affirmative requests—silence or refusals to indicate no longer result in an IJ Review.[187] Absent an exceptional circumstance, IJ Reviews for those in reinstatement are to be conducted within ten days of the filing of the negative reasonable fear determination form,[188] while IJ Reviews for those in expedited removal are to occur within twenty-four hours when possible, or seven days at the latest, of the no credible fear determination.[189] Humanitarian relief seekers remain detained through the pendency of the review process.[190]

The IJ Review is the humanitarian relief seeker's opportunity "to be heard and questioned by the immigration judge, either in person or by telephonic or video connection."[191] To prepare for this opportunity, the humanitarian relief seeker must be provided a copy of their record of determination.[192] There is no requirement for these records to be provided in a language that the humanitarian relief seeker understands.[193] The IJ Review is conducted in English, though an interpreter is required for those who cannot understand or speak English.[194] Noncitizens have no per se right to submit material evidence or have counsel during an IJ Review.[195] While

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Immigration Judge, for those in expedited removal and Form I–898, Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, for those in reinstatement.

186. Lawful Pathway Circumvention, *supra* note 5.

187. "Although the rule amends the standard process so that noncitizens must affirmatively request such review when asked, rather than the review being granted upon a failure to respond, IJ review remains available in all cases with a negative credible fear determination." Lawful Pathway Circumvention, *supra* note 5. It is important to note that the rule will revert to the scheduling of IJ reviews in instances of refusals to respond on August 9, 2023, if the Biden Administration does not appeal, or is not granted a stay if it does appeal, the Northern District of California's decision in *East Bay Sanctuary Covenant v. Biden*, 18-cv-06810-JST, 2023 WL 4729278 (N.D. Cal. July 25, 2023).

188. 8 C.F.R. § 1208.31(g)

189. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

190. 8 C.F.R. § 235.3(a); 8 U.S.C. § 1231(a)(2).

191. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *see also* 8 C.F.R. § 208.30(g)(1) (requiring DHS to ask whether the humanitarian relief seeker wishes to seek review from an immigration judge).

192. 8 C.F.R. §§ 208.30(g)(1), 1208.31(e).

193. *Id.*

194. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REVIEW, IMMIGRATION COURT PRACTICE MANUAL 7.4(d)(4)(E), 7.4(e)(4)(E) (2023) [hereinafter IMMIGRATION COURT PRACTICE MANUAL].

195. *Id.* §§ 7.4(d)(4)(C), 7.4(d)(4)(E), 7.4(d)(5)(C), 7.4(d)(5)(E); s*ee also* Manning & Hong, *supra* note 40, at 688 (describing how a provision enacted to allow humanitarian relief seekers in expedited removal to consult with non-attorneys given that the presence of attorneys in these proceedings was virtually non-existent in 1996, went on to later be

the introduction of evidence is discretionary for humanitarian relief seekers in both expedited removal and reinstatement, administrative regulations only provide humanitarian relief seekers in reinstatement the possibility of representation during the IJ Review at the discretion of the immigration judge.[196] In contrast, humanitarian relief seekers in expedited removal are only permitted the opportunity to consult with a person of their choosing prior to their review, at the immigration judge's discretion.[197] If permitted, the consultant is "not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments."[198] Conversely, a representative is able to conduct these advocacy efforts at the discretion of the immigration judge.[199]

The IJ Review requires the immigration judge to determine whether a noncitizen's fear rises to the level of "significant possibility" under the credible fear standard and "reasonable possibility" under the reasonable fear standard de novo.[200] The review is not intended to be "as exhaustive or in-depth" as full merits hearings where the immigration judge must determine whether to grant humanitarian protection.[201] Rather, it is "simply a review of the USCIS asylum officer's decision."[202] To facilitate the review, copies of the asylum officer's record of determination, notes, summary of the material

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interpreted as a displacement of the right to counsel throughout these fear screening proceedings).

196. *Compare* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at § 7.4(d)(4)(C) (expressly noting that a humanitarian relief seeker "is not represented" during an IJ review of a negative credible fear determination, though "persons consulted may be present" during the review), *with* § 7.4(e)(4)(C) (expressly noting that the humanitarian relief seeker "may be represented" during an IJ review of a negative reasonable fear determination at the immigration judge's discretion).

197. 8 C.F.R. § 1003.42(c).

198. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at § 7.4(d)(4)(C).

199. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at § 7.4(e)(4)(C); 8 C.F.R. § 1208.31(c).

200. 8 C.F.R. § 1003.42(d). The standard of review for IJ reviews of "no reasonable fear" determinations is not technically regulated. *See* 8 C.F.R. § 1208.31(g) (outlining the manner in which IJ reviews of negative reasonable fear determinations are to be conducted with no reference to the standard of review). However, agency policy has clarified that the reasonable fear determination must be made de novo. *See* OFF. OF THE CHIEF IMMIGR. JUDGE, U.S. DEP'T OF JUSTICE, OPERATING POLICIES AND PROCEDURES MEMORANDUM NO. 99-5 IMPLEMENTATION OF ARTICLE 3 OF THE UN CONVENTION AGAINST TORTURE 6–7, 8 (1999), https://www.justice.gov/sites/default/files/eoir/legacy/1999/06/01/99_5.pdf [https://perma.cc/7FHE-6A5C] ("The Immigration Judge must make a *de novo* determination of whether the alien has established a reasonable fear of persecution and/or torture.").

201. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at §§ 7.4(d)(4)(E), 7.4(e)(4)(E).

202. *Id.*

facts, and all other materials relied upon to form the basis of their negative fear determination are to be provided to the immigration judge.[203] Based on this record, and any statements made by the humanitarian relief seeker, the immigration judge decides whether to affirm or vacate the negative fear determination. If the negative fear determination is vacated, the humanitarian relief seeker is no longer subject to summary removal.[204] Instead, they are placed in regular removal proceedings, with the exception of select humanitarian relief seekers in expedited removal whose asylum application is placed with USCIS, where they can proceed forward with their humanitarian relief application.[205] In affirming the negative fear determination, the humanitarian relief seeker is subject to immediate deportation unless they submit an RFR to USCIS.[206] Outside the discretionary RFR, the immigration judge's decision is final and not subject to any further administrative or judicial review.[207]

B) IJ Reviews in Practice

From 2000 to the third quarter of 2022, the United States deported approximately 89,530 humanitarian relief seekers because an immigration judge affirmed the asylum officer's negative fear determination.[208] In that same period, 29,494 humanitarian relief seekers continued their pursuit of protection in the United States following a vacated negative fear determination.[209] Figure 1 depicts the significant level of attrition that occurs at every stage of the fear screening process through a look into Fiscal Year 2021. At every stage, humanitarian relief seekers face increased scrutiny.[210]

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203. 8 C.F.R. §§ 208.30(g)(2), 1208.31(g).

204. 8 C.F.R. §§ 1208.30(g)(2)(B), 1208.31(g)(2).

205. 8 C.F.R. §§ 1208.30(g)(2)(B), 1208.31(g)(2).

206. 8 C.F.R. §§ 1208.30(g)(2)(A), 1208.31(g)(1), 208.30(g)(1)(i).

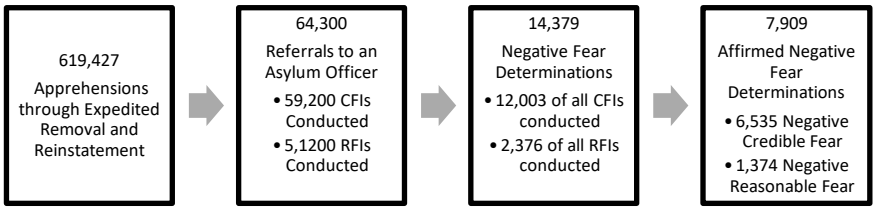
207. 8 C.F.R. §§ 1208.30(g)(2)(A), 1208.31(g)(1).

208. Though the number of humanitarian relief seekers seems low, it is important to note that from 2000–2012, relatively few people subject to summary removals sought an IJ review, ranging from only 197 humanitarian relief seekers in 2000 to 1,482 in 2012. Moreover, it was not until 2016 that the humanitarian relief seekers requesting IJ reviews reached over ten thousand. Notably, since 2019, this number has exponentially increased such that the numbers recorded for 2022 alone account for 18.4 percent of all removals through this process since 2000. EOIR IJ Review Decisions, *supra* note 31.

209. *Id.*

210. *See supra* Part I (documenting how the fear screening process first begins with four questions in which *any* expression of a fear leads to a fear interview with an asylum officer who then evaluates the articulated fear to ensure it meets very particular legal standards).

Figure 1: FY 2021 Fear Screening Figures[211]



At the outset, immigration officers must refer *all* humanitarian relief seekers to an asylum officer for a fear interview.[212] But in Fiscal Year 2021, DHS officers only referred 9.63 percent of all those apprehended through expedited removal and reinstatement to an asylum officer.[213] Of those 64,300

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211. Data for apprehensions gathered from U.S. CUSTOMS AND BORDER PROT., NATIONWIDE ENFORCEMENT ENCOUNTERS: TITLE 8 ENFORCEMENT ACTIONS AND TITLE 42 EXPULSIONS FY 2021 (2021), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021 [https://perma.cc/3SAJ-396W]. Data on referrals for fear interviews gathered from U.S. CITIZENSHIP AND IMMIGR. SERV.'S, ANNUAL STATISTICAL REPORT FY2021: FY 2017-2021 (2021), https://www.uscis.gov/sites/default/files/document/reports/2021%20USCIS%20Statistical%20Annual%20Report.pdf [https://perma.cc/VB9E-7KTM]. Data for the fear interview determinations gathered from U.S. CITIZENSHIP AND IMMIGR. SERV.'S, SEMI-MONTHLY CREDIBLE FEAR AND REASONABLE FEAR RECEIPTS AND DECISIONS BY OUTCOME TYPE: NOVEMBER 16, 2019 TO NOVEMBER 30, 2020, https://www.uscis.gov/sites/default/files/document/reports/Congressional-Semi-Monthly-Report-11-16-20-to-11-30-20.xlsx [https://perma.cc/44RN-W5WZ] [hereinafter SEMI-MONTHLY RECEIPTS AND DECISIONS, NOVEMBER 16, 2019 TO NOVEMBER 30, 2020]; U.S. CITIZENSHIP AND IMMIGR. SERV.'S, SEMI-MONTHLY CREDIBLE FEAR AND REASONABLE FEAR RECEIPTS AND DECISIONS BY OUTCOME TYPE: NOVEMBER 1, 2020 TO NOVEMBER 15, 2021, https://www.uscis.gov/sites/default/files/document/reports/Congressional-Semi-Monthly-Report-11-01-20-to-11-15-21.xlsx [https://perma.cc/9A4W-KKNY] [hereinafter SEMI-MONTHLY RECEIPTS AND DECISIONS, NOVEMBER 1, 2020 TO NOVEMBER 15, 2021]. Data for affirmed negative fear determinations gathered from EOIR IJ Review Decisions, *supra* note 31. It is important to note that the IJ review figures do not account for five instances where an IJ review resulted in "[an]other" decision, which could include administrative closure, rather than an affirming or vacating of the asylum officer's determination as those resolutions are not identified with the summary removal proceeding through which the humanitarian relief seekers were facing removal. Data on IJ review adjudications gathered from EOIR IJ Review Statistics.

212. 8 C.F.R. §§ 235.3(b)(4), 1241.8(e).

213. *Compare* U.S. CUSTOMS AND BORDER PROT., *supra* note 211 (documenting 619, 427 Title 8 apprehensions), *with* SEMI-MONTHLY RECEIPTS AND DECISIONS, NOVEMBER 16, 2019 TO NOVEMBER 30, 2020, *supra* note 211; SEMI-MONTHLY RECEIPTS AND DECISIONS, NOVEMBER 1, 2020 TO NOVEMBER 15, 2021, *supra* note 211 (reporting 64,300 referrals to USCIS for fear interviews). Though the low percentage of referrals *may* be reflective of all humanitarian relief seekers in FY 2021, the inconsistent compliance with mandatory questions and referrals resulting from the minimal oversight over the process that provides officers opportunities to exercise their own discretion discussed in Section I.A.2, *supra*, coupled

noncitizens determined to be humanitarian relief seekers, 22.4 percent received a negative fear determination.[214] Immigration judges then vacated asylum officers' decisions for 3,275 of those humanitarian relief seekers who initially received a negative fear determination, allowing them to continue in their pursuit of humanitarian protection.[215] The other 7,909 humanitarian relief seekers were not as fortunate.[216] Their IJ Reviews resulted in affirmed negative fear determinations, leaving them with only two options: accept their deportation to a country where they may face possible harm or submit an RFR.[217] Of note, immigration judges affirmed negative fear determinations for those in reinstatement at a slightly higher rate (75.3 percent) than for those in expedited removal (69.8 percent),[218] while asylum officers made negative fear determinations at a significantly higher rate (52.6 percent) for those in reinstatement than for those in expedited removal (27.3 percent).[219]

The fear screening process' legitimacy as a safeguard to ensure that bona fide humanitarian relief seekers are not returned in violation of the United States' humanitarian and legal obligations has been questioned since its inception.[220] However, given the process' susceptibility to rampant abuse at the initial screening stage detailed in Section I.A.2, *supra*, scholars have predominantly focused on noncitizens' initial interactions with CBP, ICE, and USCIS instead of the final official barrier against unlawful removals of humanitarian relief seekers with possible meritorious claims.[221] The data and publications that have focused on IJ Reviews—including NGO investigations, government data, and personal accounts of individuals (humanitarian relief seekers and advocates alike) who have experienced the

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with increased reports of people fleeing their countries due to ongoing civil and political strife further cast doubts on the initial screening mechanism by CBP and ICE officers.

214. SEMI-MONTHLY RECEIPTS AND DECISIONS, NOVEMBER 16, 2019 TO NOVEMBER 30, 2020, *supra* note 211; SEMI-MONTHLY RECEIPTS AND DECISIONS, NOVEMBER 1, 2020 TO NOVEMBER 15, 2021, *supra* note 211.

215. EOIR IJ Review Decisions, *supra* note 31.

216. *Id.*

217. *Id.*; 8 C.F.R. §§ 1208.30(g)(2)(A), 1208.31(g)(1), 208.30(g)(1)(i).

218. *Id.*

219. SEMI-MONTHLY RECEIPTS AND DECISIONS, NOVEMBER 16, 2019 TO NOVEMBER 30, 2020, *supra* note 211; SEMI-MONTHLY RECEIPTS AND DECISIONS, NOVEMBER 1, 2020 TO NOVEMBER 15, 2021, *supra* note 211.

220. *See generally* PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA (2020) (detailing the congressional struggle and advocacy efforts to minimize the negative impacts of IIRIRA on the accessibility and viability of humanitarian protection in the United States).

221. *See generally supra* Introduction (detailing the various approaches scholars have taken in their discussion of the summary removal process).

process—indicate limited protections and process afforded to humanitarian relief seekers.[222]

Take the case of Diego, for example.[223] Diego fled his country after one of its largest cartels demanded he allow them to use his business as a front for their drug trafficking.[224] When Diego refused, the cartel responded with unrelenting threats and attacks, including burning down his business.[225] After initially receiving a negative fear determination, Diego sought an IJ Review.[226] Unlike most humanitarian relief seekers in this process, Diego had *pro bono* representation.[227] With counsel, Diego was able to compile and submit a 161-page supplemental filing corroborating his fear of persecution and torture.[228] The evidence filed to demonstrate the reasonable possibility that Diego might succeed in his humanitarian protection claim included country conditions documenting how pervasive and violent the cartel—which operated with impunity—was throughout the country, photographs documenting the destruction to Diego's business, and seven supporting declarations and letters of support documenting the dangers and death threats the cartel posed to Diego.[229]

Diego's supplemental filing took approximately three weeks to compile and complete. His IJ Review was completed in less than ten minutes.[230] The immigration judge prohibited any participation of Diego's *pro bono* counsel, noting that counsel's presence in the courtroom was a

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222. *See e.g., Findings of Credible Fear Plummet Amid Widely Disparate Outcomes by Location and Judge*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (July 30, 2018), https://trac.syr.edu/immigration/reports/523/ [https://perma.cc/8K2V-7PNW] (documenting significant variations in vacatur rates among immigration judges) [hereinafter *Findings of Credible Fear*]; GENDELMAN, *supra* note 16 (detailing the various failures of the IJ Review process as a safeguard against erroneous removals); Letter from Benjamin Johnson, Am. Immigr. Council, to Léon Rodriguez, Dir., U.S. Citizenship & Immigr. Servs. and Sarah Saldaña, Dir., Immigr. & Customs Enf't (Dec. 24, 2015), https://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process [https://perma.cc/4QB8-27J5] (expressing that the IJ Review is insufficient as a process to effectively protect humanitarian relief seekers); Afr. Cmtys. Together et al., *supra* note 178 (documenting variation in the process afforded to humanitarian relief seekers at the IJ Review stage).

223. Client's name has been changed and his country of return omitted to preserve confidentiality.

224. Client Notes from Jocelyn B. Cazares Willingham (on file with the author).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

"courtesy."[231] The immigration judge instead reviewed the asylum officer's notes from the RFI and after asking Diego two questions about his underlying order of removal—rather than about his fear of return—the immigration judge affirmed the negative fear determination.[232] The judge concluded that Diego was not credible with no further explanation.[233] No reference or acknowledgment was made of the supplemental filing.[234] At the conclusion of the review, the immigration judge then audibly pondered with the DHS counsel, "I don't understand why anyone would ever pay an attorney for this—it's not like they can do anything. They are purely ornamental."[235]

While most people in summary removal are unable to acquire counsel or provide any evidence to corroborate their claims,[236] Diego had human rights reports, including one from the Department of State (the gold standard in humanitarian protection claims);[237] photographs; and personal accounts from seven individuals substantiating his fear.[238] For Diego's immigration judge, it was simply not enough. DHS removed Diego from the United States days following the IJ Review.[239] Diego's truncated IJ Review seems exemplary of a common critique of the IJ Review process: it can serve as a mere "rubber stamp for the asylum officer's determination" depending on the immigration judge presiding over the review.[240] The variation of the IJ Review from an "ornamental" process to a legitimate opportunity to put forth a fear claim based on the immigration judge, thereby creates a sort of lottery system where the 'lucky winners' are afforded a fair process and opportunity and the rest are left feeling like they are contestants in a system rigged to ensure their removal.

Government data sheds further light on the notion that the IJ Review process operates as a lottery system for humanitarian relief seekers.

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231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *See generally* GENDELMAN, *supra* note 16 (documenting instances of humanitarian relief seekers being negatively impacted due to the time constraints necessitated in the IJ review process).
237. *See* REAL ID Act of 2005, 109 Pub. L. No. 13, § 101(a)(3)(B)(iii), 119 Stat. 302, 303 (2005) (noting that immigration judges may determine credibility through "the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions)").
238. Client Notes from Jocelyn B. Cazares Willingham (on file with the author).
239. *Id*.
240. Schusterman, *supra* note 41, at 655, 662; *see also* GENDELMAN, *supra* note 16, at 4–5, 35, 39 (discussing how current the IJ review process does not provide adequate protections against mistaken negative fear determinations and often function as "cursory" reviews).

Syracuse University's Transactional Records Access Clearinghouse (TRAC) analyzed government data documenting vacated rates from June 2013 to June 2018.[241] As part of their report, TRAC not only looked into national vacatur rates, but also gathered data on individual immigration courts from October 2015 to June 2018.[242]

241. *Findings of Credible Fear*, *supra* note 222.
242. *Id.*

Table 1

Immigration Court	**Vacatur Rate (no credible fear)** October 2015 - June 2018	**Vacatur Rate (no reasonable fear)** October 2015 - June 2018
National	26.0	23.9
Atlanta	1.7	5.3
Dallas	4.3	7.7
Eloy	4.6	6.5
El Paso	4.3	4.1
Florence	4.4	9.6
Jena	7.6	8.1
Krome	3.8	9.8
Lumpkin	0.6	2.3
Los Fresnos	6.3	4.2
Otay Mesa	9.7	14.3

Table 2

Immigration Court	**Vacatur Rate (no credible fear)** October 2015 - June 2018	**Vacatur Rate (no reasonable fear)** October 2015 - June 2018
National	26.0	23.9
Arlington	59.6	50
Baltimore	49.6	33.3
Chicago	51.9	51
Pearsall	50.5	44
San Antonio	40.2	41
San Francisco	39.2	34.9

Table 1 and Table 2 illustrate how the system of immigration court assignment can drastically alter a humanitarian relief seeker's likelihood of success at IJ Review.[243] The national vacatur rate from 2016 to 2018 was 26.0 for negative credible fear determinations and 23.9 for negative reasonable fear determinations.[244] While some vacatur rates in individual immigration courts did cluster around these averages,[245] many courts' vacatur rates fell

243. *Id.*
244. *Id.*
245. Eight immigration courts in the credible fear context and 14 in the reasonable fear context were within 10 percentage points of the average. *Id.*

considerably below[246] or considerably above[247] the averages. The data therefore indicates that humanitarian relief seekers' likelihood of success varied significantly depending on the immigration court where their fear was evaluated.[248]

Though other factors may contribute to this variation, the significant variation in vacatur rates across multiple immigration courts, in conjunction with documented differences in approaches to the IJ Review, detailed *infra*, support the notion that the IJ Review process operates as a lottery system. TRAC's report furthers this concept through its finding that the rate of vacated fear determinations drastically varied depending on the immigration judge undertaking the IJ Review: "the proportion of asylum seekers passing this screening step varied from as little as 1 percent all the way up to 60 percent—a sixty-fold difference."[249]

The variation by immigration judge can be further seen through Freedom of Information Act results demonstrating that between 2014 and 2016, there was one immigration judge with a vacatur rate of 4.7 percent while another immigration judge in the same immigration court had a 48.2 percent rate.[250] This statistic cuts at arguments that deviations in vacatur rates are solely due to geographical variations in the humanitarian relief seekers' claims. These significant deviations in IJ Review vacatur rates at least demonstrate a concerning pattern that indicates a serious possibility that humanitarian relief seekers experience different processes and opportunities to be heard depending on where and before which immigration judge their IJ Reviews are held. This pattern becomes more concerning when contextualized in stories like Diego's and those of countless others. Such accounts, which have been documented throughout the years by NGOs and the government display a concerning pattern in which immigration judges affirm negative fear determinations in cases where

246. The vacatur rates for immigration courts in Lumpkin, Atlanta, Krome, El Paso, Dallas, Florence, Eloy, Los Fresnos, Jena, and Otay Mesa fell significantly below, as demonstrated in Table 1. *Id.*

247. Humanitarian relief seekers at immigration courts in Arlington, Chicago, Pearsall, Baltimore, San Antonio, and San Francisco were significantly more likely to have their negative fear determinations vacated, as shown in Table 2.

248. *Id.*

249. *Id.*

250. The fluctuation in vacatur rates is also present within the same detention centers. For example, at the South Texas Family Residential Center, one immigration judge had a vacatur rate of 33.7 percent while another immigration judge had a 90.3 percent vacatur rate. Brief for Immigration and Human Rights Organizations as Amici Curiae in Support of Respondent at 24–26, Department of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959 (2020) (No. 19-161), 2020 WL 402611.

humanitarian relief seekers demonstrated either significant or reasonable possibility of persecution or torture.

In 2015, a coalition of NGOs noted the deficiencies in the fear screening process generally and argued that IJ Reviews alone are not sufficient to protect humanitarian relief seekers as they "[do] not always involve testimony and seldom [involve] attorney participation."[251] In 2021, another coalition of NGOs highlighted the serious deprivations of due process in the summary removal process by documenting deficiencies in the fear screening process.[252] The NGOs documented a pattern of issues severely affecting humanitarian relief seekers' opportunities to prepare for and be heard at their IJ Reviews, including lack of notice of IJ Review scheduling, failure to provide required CFI or RFI notes and determination, IJ Review scheduling beyond the regulated timeframes leading to prolonged detention, and severe obstacles to representation.[253] Most recently, a report released by HRF in August 2022 echoed these concerning shortcomings of IJ Review as a protective mechanism against erroneous determinations, finding that the process remains, in many cases, a "rubber stamp."[254] The following Section delves deeper into these documented shortcomings to explore how they may be negatively impacting humanitarian relief seekers' opportunities to be heard at their IJ Reviews.

1) Inadequate Preparation Time & Notice

Diego's case illustrates that while extensive corroboration of a fear claim is necessary, it may not be enough. An immigration judge may still affirm a negative fear determination without any oversight.[255] These forms of corroboration can take a lot of time to acquire, yet IJ Reviews "are typically conducted within twenty-four hours of the initial determination, leaving the humanitarian relief seeker very little time to prepare."[256] Conversely,

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251. Letter from Benjamin Johnson, *supra* note 222.

252. Afr. Cmtys. Together et al., *supra* note 178, at 1–5.

253. *Id.*

254. GENDELMAN, *supra* note 16, at 5.

255. 8 U.S.C. § 1252(a)(2)(A)(iii) (2005); 8 C.F.R. § 1208.31(g)(1) (2023); *see also* Koh, *supra* note 38, at 196, 206 (noting that most expedited removal cases are not subject to review by an IJ or the BIA, and that there are few options to challenge the reinstatement of a prior removal order); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1988–90 (2020) (Breyer, J., concurring) (noting that habeas corpus proceedings are only available to humanitarian relief seekers in expedited removal who "can prove by a preponderance of the evidence that [they] [are] a[] [noncitizen] lawfully admitted for permanent residence, ha[ve] been admitted as a refugee….or ha[ve] been granted asylum" and "such status has not been terminated").

256. Schusterman, *supra* note 41, at 655, 662.

humanitarian relief seekers also face significant issues when their IJ Reviews are scheduled well beyond the regulated deadlines as they result in prolonged detention in prison-like facilities.

Even when humanitarian relief seekers are provided time to prepare between their IJ Review and the initial fear determination, those with representation experience an array of notice issues, including failures by EOIR to notify counsel of the date, time, and location of the IJ Review.[257] Pro se humanitarian relief seekers similarly face little to no notice of when their IJ Reviews will occur—at times learning its scheduling only moments before they are set to appear.[258] Lack of notice can be debilitating for humanitarian relief seekers given the hearing's focus on disclosures of trauma and feared harms—a process difficult enough when mentally prepared, let alone when the required disclosures are abruptly sprung onto humanitarian relief seekers.[259]

2) Interpretation and Language Access

Humanitarian relief seekers who cannot speak or understand English are entitled to an interpreter in their language.[260] Despite this, IJ Reviews are at times conducted with interpreters who do not speak the humanitarian relief seeker's primary language.[261] Instead, humanitarian relief seekers face an unjust choice: accept interpretation in a secondary language or alternative dialect or remain detained until an interpreter in their primary language can be acquired.[262] This decision primarily impacts humanitarian relief seekers who speak indigenous and other languages less

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257. Afr. Cmtys. Together et al., *supra* note 178; GENDELMAN, *supra* note 16; *see also infra* Section III.B (detailing the results of the Survey of Immigration Practitioners & Legal Service Providers Regarding the Immigration Judge Review Process for Negative Fear Determinations, a national survey of immigration advocates with IJ review experience, including reported instances of minimal or no notice in scheduling).

258. Afr. Cmtys. Together et al., *supra* note 178, at 5.

259. Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 L. & INEQ. 315, 321–22 (2018).

260. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at §§ 7.4(d)(4)(E), 7.4(e)(4)(E).

261. GENDELMAN, *supra* note 16, at 13.

262. *Id.* at 5; *see generally* Maya P. Barak, *Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court*, 9 J. MIGRATION & HUM. SEC. 207, 207–23 (2021) (documenting a series of issues in access to accurate interpretation, including misidentified primary languages, "minor communication errors, lack of language proficiency, paraphrasing, interjections of personal opinion, and implicit and explicit bias").

commonly spoken in the United States.[263] Even when language access is not at issue, humanitarian relief seekers face a slew of obstacles to their opportunity to be heard and questioned by the immigration judge, including inaccurate interpretations, summarized responses, and biased interpreters.[264] As most humanitarian relief seekers are unable to acquire corroborating evidence of their fear of return, due to both detention and time constraints limiting what is accessible to them, they are often left with only their testimony to demonstrate that they meet the requisite standards. Consequently, when these issues surrounding language occur, their ability to provide testimony substantially weakens—causing a significant barrier to a fair and just proceeding.

3) Failures to Provide Required Documents

The asylum officer's determination, including their recorded notes, are the starting point for the IJ Review—if not the focal point, as shown in Diego's case. Therefore, the requirement to provide these notes and determination to the humanitarian relief seeker in advance of their IJ Review is crucial to ensure a fair process that allows humanitarian relief seekers to adequately prepare. Absent these required disclosures, humanitarian relief seekers are left in the dark without any mechanism to help them understand why the asylum officer gave them a negative fear determination, what parts of their fear story were recorded in the notes, and whether any mischaracterizations occurred during their fear interview. The ability to identify the answers to these questions is critical because immigration judges often conduct IJ Reviews with the underlying assumption that the asylum officer's notes are accurate and complete, and humanitarian relief seekers will be punished for perceived inconsistencies or omissions.[265]

4) Limited Participation and Process

The level of participation afforded to humanitarian relief seekers and representatives at IJ Reviews further calls into question their legitimacy as a safeguard against unlawful removals of humanitarian relief seekers with

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263. Joseph Darius Jaafari, *Immigration Courts Getting Lost in Translation*, THE MARSHALL PROJECT (Mar. 20, 2019), https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation [https://perma.cc/8X4B-969C].

264. Barak, *supra* note 262, at 213–17.

265. *See* GENDELMAN, *supra* note 16, at 5 (providing an example of an immigration judge who found a Haitian humanitarian relief seeker, who was threatened at gunpoint for his sexuality, not credible because he had not disclosed during the CFI that he is gay after being instructed to answer only the questions asked, none of which pertained to his sexuality).

legitimate claims. IJ Reviews are "riddled with flaws and due process violations, with widespread reports of immigration judges barring asylum seekers from speaking at credible fear reviews, presenting additional evidence, or having legal counsel present."[266]

These reports, advocacy letters, and complaints reveal how immigration advocates, and some humanitarian relief seekers, increasingly view IJ Reviews as futile endeavors. This sentiment can be clearly seen in a 2016 formal complaint filed with DHS's Office of Civil Rights and Civil Liberties noting, "[w]here a mother is too traumatized to explain the circumstances of her plight, the violence she has experienced and observed, or the reasons for her fear of return to her home country, she typically receives a negative credible fear determination, *which is usually affirmed by an immigration judge*."[267]

This underlying skepticism of IJ Reviews is supported by reports documenting "erroneous credible fear determinations and the inadequacy of immigration court review,"[268] such as in many Mauritanian humanitarian relief seekers' cases.[269] Despite the U.S. Committee for Refugees and Immigrants documenting that hundreds of thousands of Black Mauritanians are harshly exploited, discriminated against, trafficked, and enslaved by the Berber and Bidhan ruling classes,[270] Black Mauritanian humanitarian relief seekers providing testimony of experiences of forced labor, imprisonment, atrocious conditions, and beatings due to their race continue to receive negative fear determinations.[271] These negative fear determinations are particularly grave when contextualized by the pervasive anti-Black discrimination that penetrates the U.S. legal system and results in higher

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266. *Id.* at 5–6 (recounting an instance where an immigration judge cut off a humanitarian relief seeker as they recounted their kidnapping and torture, noting they only have 15 minutes to complete the review; in another instance, the immigration judge prohibited a gay Senegalese humanitarian relief seeker from speaking at all).

267. American Immigration Counsel et al., *Letter Re: Ongoing Concerns Regarding the Detention and Fast-Track Removal of Children and Mothers Experiencing Symptoms of Trauma* (Mar. 28, 2016) https://www.aila.org/infonet/cara-crcl-complaint-concerns-regarding-detention [https://perma.cc/E8U9-H3VZ] (emphasis added).

268. GENDELMAN, *supra* note 16, at 40.

269. Frances Madeson, *US Officials Outrageously Claim Black Men Fleeing Slavery Lack "Credible Fear*," TRUTHOUT (Nov. 17, 2021), https://truthout.org/articles/us-officials-outrageously-claim-black-men-fleeing-slavery-lack-credible-fear/ [https://perma.cc/U8DS-Z9LU].

270. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, USCRI BACKGROUNDER: MAURITANIA (2021) https://refugees.org/wp-content/uploads/2021/03/Mauritania-Backgrounder-3.11.21.pdf [https://perma.cc/J6J7-EQZG].

271. Madeson, *supra* note 269.

rates of deportation and asylum denials.[272] Although these reports are only reflective of a fragment of IJ Reviews conducted nationally, significant and widespread concerns remain. They demonstrate the need to revisit the country's approach to screening fear, particularly as the current and historical approaches have resulted in the removal of humanitarian relief seekers who subsequently faced further persecution, and even death, in their country of return.[273]

C) Discretionary Reconsideration of the IJ Review

Following an affirmed negative fear determination by an immigration judge, the humanitarian relief seekers have two choices: accept deportation or submit a discretionary request for reconsideration to USCIS.[274] Though there is no explicit regulatory authorization for RFRs in the context of reinstatement,[275] noncitizens in reinstatement have still been able to successfully submit RFRs to USCIS.[276]

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272. Reema Ghabra, *Black Immigrants Face Unique Challenges*, HUMAN RIGHTS FIRST (Feb. 17, 2022), https://humanrightsfirst.org/library/black-immigrants-face-unique-challenges/ [https://perma.cc/N2VN-7TSY]. The accuracy of the fear screening process is most severely called into question when analyzed in context of the racial landscape of the United States and how it penetrates the legal system. The whipping of Haitian noncitizens by CBP officials on horseback is a prime example of this crueler approach taken in immigration enforcement even when the language of the law is constant. *US Border Agents' Horseback Charge on Haiti Migrants 'Unnecessary'*, BBC (July 8, 2022), https://www.bbc.com/news/world-us-canada-62102019 [https://perma.cc/ZLT5-KQ8L]. This Article does not capture the substantial barriers and harms that people of color face, particularly Indigenous and Black people, that other humanitarian relief seekers do not—volumes could be dedicated to that endeavor.

273. *See* ELIZABETH G. KENNEDY & ALISON PARKER, HUMAN RIGHTS WATCH DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE (2020), https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and [https://perma.cc/T3GW-JAUZ] (documenting the case of a man who was deported following an no reasonable fear determination and subsequently faced death threats and Adriana, a woman, who was deported following a no credible fear determination and subsequently killed after being shot three times).

274. 8 C.F.R. § 208.30(g)(1)(i).

275. *See* 8 C.F.R. § 1208.30(g)(1) (noting what follows an affirmed negative fear determination: "[i]f the immigration judge concurs with the determination of the asylum officer that the [noncitizen] does not have a credible fear of persecution or torture, the case shall be returned to DHS for removal of the [noncitizen]. The immigration judge's decision is final and may not be appealed").

276. *See e.g.* GENDELMAN, *supra* note 16, at 20 (documenting a successful RFR for a Honduran asylum seeker with a traumatic brain injury who received a negative reasonable fear determination).

Prior to the Biden Administration's Asylum Processing IFR, which went into effect on May 31, 2022, humanitarian relief seekers were not limited in the number of RFRs they could submit nor were they subject to any time limitations.[277] The absence of these limits allowed humanitarian relief seekers to supplement initial RFRs in cases where they subsequently acquired representation, gathered additional evidence, or benefitted from a change in the law.[278] The Asylum Processing IFR changed this by imposing two critical restraints on RFRs. First, humanitarian relief seekers are now required to file their RFR either within seven days following the IJ Review where their negative fear determination was affirmed, or before they are deported, whichever comes first.[279] Second, it limited humanitarian relief seekers to only one RFR, meaning that USCIS is restricted from considering any subsequent RFRs submitted, regardless of whether they are in response to new evidence acquired or a change in the law.[280] The import of IJ Reviews as safeguards against the removal of humanitarian relief seekers with possible meritorious claims is amplified by these limitation on RFRs brought on by the Asylum Processing IFR.

Whether and how to reconsider a negative fear finding that has been affirmed by an immigration judge is within the discretion of USCIS.[281] In determining whether to exercise discretion, asylum officers are supposed to determine whether the humanitarian relief seeker "made a reasonable claim that compelling new information concerning the case exists and should be considered."[282] Upon a grant of the RFR, USCIS may decide to give the humanitarian relief seeker either a second interview or a positive fear determination.[283] Denial of the RFR results in the humanitarian relief seeker's deportation without the possibility of any further review.[284]

In practice, the prior process of allowing multiple RFRs served as a crucial mechanism to correct erroneous negative fear determinations that

277. *Id*. at 5, 34–35.
278. *Id.*
279. Asylum Processing IFR, *supra* note 24; *see also* GENDELMAN, *supra* note 16, at 34–37 (documenting the dangers of "imposing a new, unworkable seven-day deadline").
280. Asylum Processing IFR *supra* note 24; *see also* GENDELMAN, *supra* note 16, at 34, 38–39 (documenting the dangers of "barring the Asylum Office from considering more than one [RFR]").
281. 8 C.F.R. § 208.30(g)(1)(i).
282. Memorandum from Michael A. Benson, Exec. Assoc. Comm'r for Field Operations, Immigr. & Naturalization Servs., to Reg'l Dirs., Dist. Dirs. & Asylum Office Dirs. regarding Expedited Removal: Additional Policy Guidance (Dec. 30, 1997) [https://perma.cc/9FMX-ZZ66].
283. 8 C.F.R. § 208.30(g)(1)(i).
284. *Id.*

were affirmed by an immigration judge.[285] In a 2021 study, HRF documented instances of humanitarian relief seekers whose negative fear determinations "were wrongly affirmed after cursory review by an immigration judge" and who were only able to avoid "imminent deportation to persecution and torture through requests for reconsideration or reinterview."[286] For example, a humanitarian relief seeker from Burkina Faso, who was persecuted following his conversion to Christianity, received a "no credible fear" determination following a CFI conducted in French instead of his native language, Mossi, had the determination affirmed by an immigration judge, and was only able to successfully reverse his "no credible fear determination" after submitting multiple RFRs.[287]

The drafters of the Asylum Processing IFR clearly recognized the crucial role RFRs play in protecting humanitarian relief seekers from erroneous removals, as a previous rendition of the rule planned to do away with RFRs altogether.[288] The government's own data documented at least 569 instances between 2019 and 2021 where a negative fear determination was positively changed following an RFR. This means that at least 569 humanitarian relief seekers were saved from summary removal following an immigration judge's affirmation of their negative fear determination.[289] Although the Asylum Processing IFR preserved RFRs, its time and quantity limitations amplify the need for accuracy in IJ Review adjudications. The HRF report demonstrates this need for accuracy as it documents numerous cases of erroneous negative fear determinations that were only corrected after either multiple RFR submissions or RFR submissions outside the seven-day timeline.[290]

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285. HUMAN RIGHTS FIRST, BIDEN ADMINISTRATION MOVE TO ELIMINATE REQUESTS FOR RECONSIDERATION WOULD ENDANGER ASYLUM SEEKERS, DEPORT THEM TO PERSECUTION AND TORTURE (2021), https://humanrightsfirst.org/wp-content/uploads/2022/09/RequestsforReconsideration.pdf [https://perma.cc/D7JB-SMDT].

286. *Id.* at 3; *see also* GENDELMAN, *supra* note 16, 34–40 (detailing numerous instances where an RFR resulted in a positive fear determination despite an immigration judge affirming the original negative fear determination).

287. HUM. RTS. FIRST, *supra* note 285, at 3–7.

288. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT

Protection Claims by Asylum Officers, 86 Fed. Reg. 46906 (Mar. 29, 2022).

289. Asylum Processing IFR, *supra* note 24. The number of actual cases where an RFR resulted in a positive fear determination is unknown because USCIS does not track that data. The government relied upon data that was informally tracked by six of its offices: Houston, Los Angeles, New York, Newark, New Orleans, and San Francisco. The remaining three offices—Arlington, Chicago, and Miami—did not track any RFR data.

290. *See* HUM. RTS. FIRST, *supra* note 285, at 3–7 (providing case examples where humanitarian relief seekers "were wrongly affirmed after cursory review by an immigration judge" and only "avoided imminent deportation to persecution and torture

D) Access to Federal Courts for Review

Appellate review is severely restricted for noncitizens subject to expedited removal and reinstatement.[291] These restrictions are almost absolute when it comes to review of fear determinations for humanitarian relief seekers subject to fear screening.[292]

First, noncitizens are required to exhaust their administrative options. That is, in the case of humanitarian relief seekers in summary removal, they must have first sought an IJ Review—prior to pursuing any civil litigation to challenge a removal order.[293] Yet even if a humanitarian relief seeker exhausts those administrative measures, Congress further limits appellate review of these fear determinations. The INA dictates that a removal order effectuated under expedited removal "is not subject to administrative appeal."[294] The INA further strips the federal courts of jurisdiction to hear challenges to expedited removal.[295] Finally, the INA specifically restricts courts from reviewing the determination that an applicant lacks a credible fear of persecution[296] while regulations similarly prohibit the review of no reasonable fear determinations upheld by an immigration judge.[297]

These restrictions on the review of fear determinations leave humanitarian relief seekers with *habeas corpus* petitions as the principal avenue to seek review.[298] However, pursuits for this form of review are

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through requests for reconsideration or reinterview"); GENDELMAN, *supra* note 16, at 34–40 (documenting cases like that of a gay Togolese humanitarian relief seeker who, because of his sexuality, was violently attacked by a mob that later murdered his boyfriend and was only able to have his no credible fear determination reversed following multiple RFR submissions).

291. 8 U.S.C. § 1252(a)(2)(A)(iii) (2023); 8 C.F.R. § 1208.31(g)(1) (2023); *see also* Koh, *supra* note 38, at 196, 206 (describing the lack of procedural protections for expedited removal orders).

292. Koh, *supra* note 38, at 196, 206.

293. 8 U.S.C. § 1252(d)(1) (2023).

294. 8 U.S.C. § 1225(b)(1)(C) (2023).

295. 8 U.S.C. § 1252(e) (2023).

296. 8 U.S.C. § 1252(a)(2)(A)(iii) (2023).

297. 8 C.F.R. § 1208.31(g)(1) (2023) (stating that "[n]o appeal shall lie from the immigration judge's decision").

298. Koh, *supra* note 38, at 201. It is important to acknowledge that review options for humanitarian relief seekers in reinstatement vary slightly because their possible deportation is based on an underlying removal order that the government is seeking to reinstate. This act of reinstating the prior order grants these noncitizens access to the U.S. Circuit Court of Appeals. However, access is limited and does not allow for review of the underlying removal order nor the no reasonable fear determination. As such, this additional option for those in reinstatement falls outside the purview of this Article,

limited: the INA precludes substantive review of the fear determinations in habeas petitions.[299] This foreclosure of substantive review of fear determinations led to challenges to the constitutionality of section 1252(e)(2) of the INA[300] through the Suspension Clause, which grants a constitutional right of minimal review of the lawfulness of an individual's detention.[301] However, in 2020, the U.S. Supreme Court effectively ended this practice of seeking substantive review of fear determinations through habeas petitions when it upheld limited judicial review of expedited removal orders.[302]

III) SURVEY OF IMMIGRATION PRACTITIONERS & LEGAL SERVICE PROVIDERS REGARDING THE IMMIGRATION JUDGE REVIEW PROCESS FOR NEGATIVE FEAR DETERMINATIONS (SURVEY)

This Section discusses the Survey regarding the IJ Review process for negative fear determinations, undertaken for this Article. It begins by introducing the methodology. It then discusses the results of the Survey, which finds significant variation in the actual process afforded to humanitarian relief seekers by immigration judges and documents that variation in regard to the level of explanation of the process, duration, opportunity to present evidence and testimony, allowance of counsel participation, interaction with the asylum officer notes, explanation of the decision, and interpretation. The Section concludes by discussing the limitations of the Survey, its results, and its value.

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though a brief outline of the permissible questions for review can be found *supra* Section II.B.

299. 8 U.S.C. § 1252(e)(2) (2023).

300. Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422 (3d Cir. 2016); Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097 (9th Cir. 2019).

301. Neuman, *supra* note 70, at 541.

302. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) (holding in relevant part that "neither [Thuraissigiam] nor his amici have shown that the writ of habeas corpus was understood at the time of the [Constitution's] adoption…to permit a petitioner to claim the right to enter or remain in a county or to obtain administrative review potentially leading to that result"). Though further exploration of habeas review in this context is outside the purview of this Article, it is important to note that the decision in *Thuraissigiam* to uphold as constitutional the limitations on review placed by 8 U.S.C. § 1252(e)(2) was limited to the particular facts of Mr. Thuraissigiam's case. This is underscored by Justice Breyer's concurrence. *Id.* at 1988–1990 (Breyer J., concurring). However, the focus on when the Suspension Clause would apply and therefore render the statute unconstitutional, thereby allowing substantive review of the fear determination, demonstrates that the majority of humanitarian relief seekers in expedited removal will be foreclosed from seeking this type of review, as expedited removal mainly impacts noncitizens who have limited contacts within the United States.

The Survey was conducted by the author to accompany this Article's exploration of the IJ Review process. Motivated by the lack of published data on the way IJ Reviews are conducted and approached by immigration judges, the Survey aims to provide a window into this process by gathering data from immigration advocates who have personally observed humanitarian relief seekers' experiences or represented them in this process. Rather than simply exploring the available statistics on IJ Review vacatur rates and broader statistics demonstrating discrepancies in grant rates amongst adjudicators, the Survey explores *why* these variations exist. That is, it inquires into the actual processes that may account for diverging outcomes for similarly situated humanitarian relief seekers.

A) Methodology

The Survey was administered from June 22, 2022 until February 5, 2023 using QualtricsGU survey software, and responses were anonymized.[303] It was primarily distributed through various listservs, including national listservs for immigration advocates, Legal Orientation Program service providers, law school clinics, and Facebook groups. The Survey was open to any EOIR accredited representative, attorney, law student, legal assistant, or paralegal with experience either observing, consulting on, or representing someone in an IJ Review. Participants self-identified eligibility and are uniformly referred to as immigration advocates.

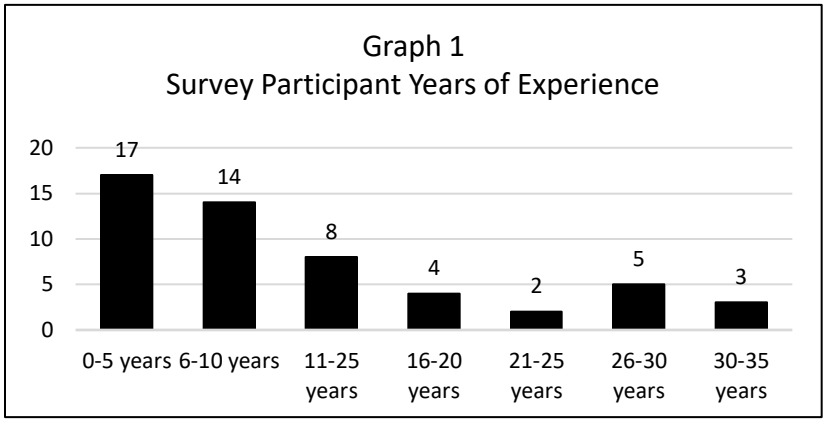
The Survey consisted of 43 questions, including numerous skip patterns that were triggered by the participants' experiences. To maximize participation, the Survey allowed participants to skip all but five screening questions and primarily consisted of "yes" or "no," short answer, and multiple-choice questions. The Survey was further tailored to gain information on advocates' experiences as either Observers, Representatives, or both. "Observers" were defined as individuals who were present at the IJ Review either as an unaffiliated party or a Legal Orientation Program (LOP) service provider who may have provided pro se assistance to the humanitarian relief seeker but did not participate in the actual IJ Review as a legal representative or consultant. "Representatives" were defined as

303. The Survey was developed through a series of focus studies with experts in the immigration field and a consultation with law professor and sociologist, Emily Ryo. The Author takes full responsibility in any shortcomings, oversights, or omissions in the qualitative survey; they are not reflective of the crucial wisdom and guidance imparted by the members of the focus studies and Dr. Ryo. The final version of the Survey was submitted to the Institutional Review Board within Georgetown University (IRB) for approval as Study 00005280. The Survey received initial IRB approval on June 22, 2022. A modification was submitted to IRB on June 23, 2022, reflecting minor updates to promotional materials and final approval was received on June 23, 2022.

individuals who were present at the IJ Review acting as the noncitizen's accredited representative, attorney, or consultant.

B) Results & Analysis

Seventy-three immigration advocates participated in the Survey. Survey participants had a range of experience as advocates in the immigration field from one to 35 years, though 20 participants were excluded after responding "No" to the filter question, "[h]ave you ever been involved in the IJ Review process in any capacity?" The analysis of the Survey is thus based on the remaining 53 participants.[304] Graph 1 provides a more detailed range of years of experience for these 53 participants.



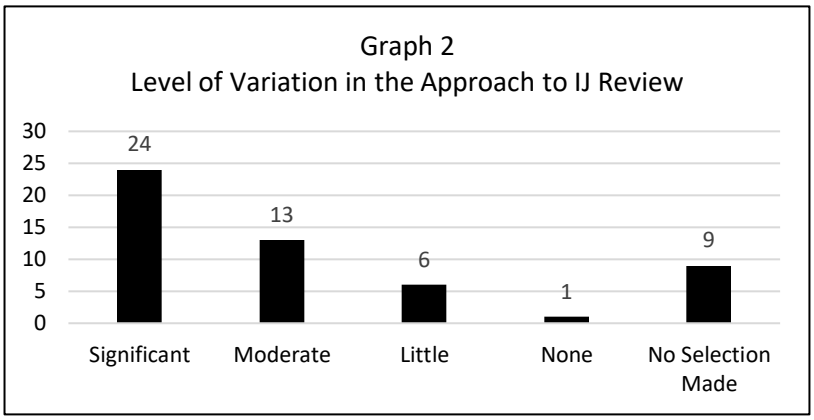
Participants reported a cumulative experience of over 1,460 IJ Reviews across 37 immigration courts and four ICE detention centers throughout the United States.[305] Notably, participants who experienced IJ Reviews at the detention centers reported that they were conducted through video teleconferencing with immigration judges appearing from throughout

304. Gender and race data were collected on a voluntary basis. Thirty-nine participants identified as female, 11 as male, and two did not disclose their gender identity. Thirty-six participants identified as White, seven as Hispanic/Latinx, two as Black, two as Asian, two as Asian and White, and one individual selected "Other" and self-identified as "Indian."

305. The following immigration courts were reflected in the Survey: Adelanto, Arlington, Artesia, Atlanta, Aurora, Baltimore, Batavia, Buffalo, Cleveland, Chicago, Dallas, El Paso, Elizabeth, Eloy, Florence, Fort Snelling, Fort Worth, Harlingen, Houston, Imperial, LaSalle, Miami, New Orleans, New York – Broadway, New York – Federal Plaza, New York – Varick, Oakdale, Omaha, Otay Mesa, Pearsall, Phoenix, Port Isabel, San Antonio, San Francisco, Seattle, Stewart, and Tacoma. The following detention centers were reflected in the Survey: El Valle, Berks, Dilley, and Karnes.

the country. The vast majority of participants—41—reported experience only as Representatives. Six reported being both an Observer and a Representative, and four reported being only an Observer.

Participants' responses coincide with reports documented in Section II.B, *supra*, demonstrating significant deviations in how immigration judges approached IJ Reviews—indicating that IJ Reviews are primarily consistent in their inconsistency. Survey responses provided drastically different accounts of the IJ Review process ranging from accounts of the IJ Review as a fair process to an arbitrary one. Despite the range of IJ Review sentiments reflected, the majority of participants selected either "Moderate" or "Significant" when asked to share the level of variation in immigration judges' approaches to IJ Reviews they experienced.[306] The Survey defined "approach" as explanations to noncitizens of the process; noncitizens' opportunity to present evidence including testimony; counsel participation; interaction with the Record of Determination/Credible Fear Worksheet, and reasoning provided for decision.[307] Only seven participants found that the variation was "Little" or "None" in how immigration judges approached IJ Reviews.[308] Graph 2 reflects the distribution of these characterizations in the approaches immigration judges took to the IJ Review process based on Survey participants' experiences.



306. Survey of Immigration Practitioners & Legal Service Providers Regarding the Immigration Judge Review Process for Negative Fear Determinations by Jocelyn B. Cazares Willingham (2022) (on file with *Columbia Human Rights Law Review*).

307. *Id.*

308. *Id.*

This Section breaks down the analysis of the responses into the following components: level of explanation of the process, duration, opportunity to present evidence and testimony, allowance of counsel participation, interaction with the asylum officer notes, explanation of the decision, and interpretation.

1) Level of Explanation of the Process: "Some Explained It Very Well, Others Failed to Explain It At All."

Survey participants echoed this sentiment when asked about the level of explanation of the process offered to humanitarian relief seekers. That is, from the commencement of the IJ Review, the immigration judge assignment can already place humanitarian relief seekers at substantially different starting points. Participants reported that some humanitarian relief seekers went through the IJ Review with "no explanation at all" while others receive "detailed" or "thorough explanation" that then arms them "with information about the process and procedural rights."[309]

The variation at the very first stage of the process is of great concern when viewed in context of the complexity of the law, the necessary precision in language required of humanitarian relief seekers when sharing their fears to meet the requisite legal standard, and documented concerns with the inaccessibility of legal information. How are humanitarian relief seekers able to demonstrate that they have a credible or reasonable fear when that legal jargon is not explained to them? How are they to even know that such a legal standard exists? Absent an explanation of the process, humanitarian relief seekers are left on their own to try and make sense of this legal proceeding that acts as their final barrier against removal.

2) Duration: "Quick to Thorough" IJ Reviews

Survey participants estimated the length of the IJ Review, including time taken for preliminary matters, based on the majority of their IJ Review experiences. Graph 3 illustrates participants' approximations of the duration of IJ Reviews, though three participants noted that they were unable to quantify such a length based on their experiences.[310] As seen in the graph, most participants noted an IJ Review duration of 10 minutes or fewer, with each 10-minute increment lessening in frequency.[311]

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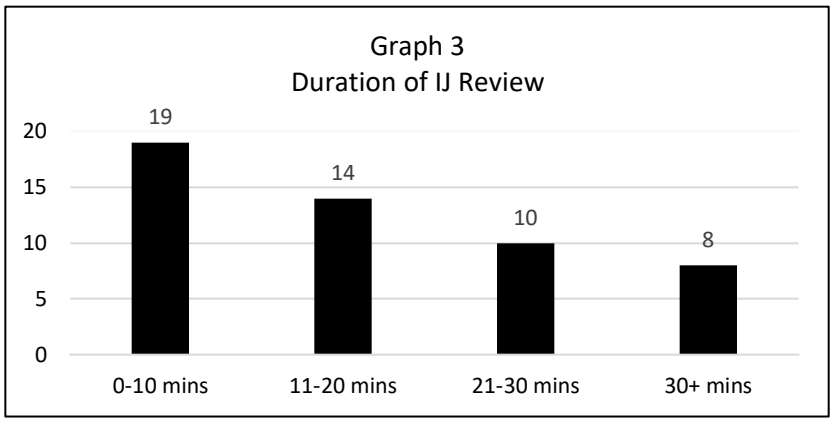
309. *Id.*
310. *Id.*
311. *Id.*



Additionally, participants were asked to expand in text on any variation in duration of the IJ Review. Results from those responses showed that the duration of the IJ Review varied broadly depending on the judge, participation of counsel, and introduction of evidence. Participant responses ranged from "the hearings can be quite quick" to a "full asylum hearing."[312] One participant noted that "[s]ome hearings can take 2 minutes ('do you have anything to add to what you said to the [asylum officer]?' 'No' 'OK I am affirming. . .') and some are like a full asylum hearing." Yet another participant shared that "[i]n Eloy and Harlingen, hearings took 30-60 seconds. In Arlington and Baltimore, up to ten minutes."[313]

Though the shorter duration of the IJ Review was often associated with an affirmed negative fear determination, it was not perfectly correlative. In cases where evidence was accepted and reviewed prior to the IJ Review, participants reported short IJ Reviews where the immigration judge vacated the negative fear determination based on their evidentiary filing. Thus, though a short IJ Review alone does not point to issues of fairness to humanitarian relief seekers, it is important to note that, according to the Survey results, these short proceedings can be indicators of other procedural issues, such as limited to no review of the fear claim, the absence of an explanation of the process, or a refusal of the admission of evidence.

312. *Id.*
313. *Id.*

3) Opportunity to Present Evidence and Testimony: "The Wild West"

The IJ Review is the humanitarian relief seeker's last and only opportunity to be heard and questioned by an immigration judge. Yet Survey results illustrate that what this right to be heard means in practice fluctuates with the immigration judge presiding over the IJ Review. When asked to share their experiences on the approach to the admission of testimony, participants responses' varied: testimony is "hurried and not listened to," "some judges will take testimony and some won't at all," "some give applicants very little time to provide testimony," "not all judges allow applicant to speak," "others will let client give testimony," and "some judges allow my clients to testify freely while others cut off opportunities to testify."[314]

Participants similarly present varying experiences with immigration judges' approaches to the admission of documentary evidence: "[e]vidence was allowed if submitted prior to hearing;" "[a]gain, some accept evidence/testimony/argument and some don't;" "[c]ountry conditions are not usually looked at;" "[o]ne IJ wouldn't allow evidence including testimony unless it had been already provided to the asylum officer, others accepted new evidence;" "[m]ost of the judges did not allow attorney[s] to provide additional evidence or illicit testimony from the [humanitarian relief seekers]."[315] One participant shared, "I clerked in El Paso from 2011-13, and the IJs there would not accept evidence. In Aurora, some IJs will accept evidence and one in particular is reluctant to do so and often rigorous advocacy is necessary, but even then[,] there is no way to determine whether the court considers the evidence filed in its ultimate determination."[316]

Responses document the issues that can arise when the introduction of testimony and evidence is done on a permissive standard at the sole discretion of the immigration judge. The results indicate inconsistency in the admission of evidence and document varying approaches to the admission of and interaction with testimony and evidence from the humanitarian relief seeker.

If these varied approaches documented in Survey responses are demonstrative of national trends, they point to a crucial failure of the IJ Review as a safeguard against unlawful removals of humanitarian relief seekers with possibly meritorious claims. Given the documented issues about CFIs and RFIs in practice, including erroneous interview notes,

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314. *Id.*
315. *Id.*
316. *Id.*

inadequate interpretation, lack of confidential spaces, language and legal information inaccessibility, and trauma,[317] any indication of instances of immigration judges refusing to allow testimony and evidence during the IJ Review point to serious procedural flaws. The failure to elicit or allow testimony and accept evidence limits the information the immigration judge has to make their decisions and makes it significantly harder for humanitarian relief seekers to demonstrate their credible or reasonable fear. Without this opportunity to introduce new evidence or testimony, the ability to identify issues that arose during the CFI or RFI, that formed the foundation of a humanitarian relief seeker's negative fear determination is significantly limited. This potential for such omissions at the discretion of the immigration judge is of particular concern, given the serious consequences of their decisions.

4) Allowance of Counsel Participation: "Some Judges Won't Even Allow Representation"

When asked about counsel participation allowed by immigration judges, yet again the Survey exposes a range of IJ Review experiences based on the immigration judge assignment: "[s]ome allowed, one in particular said no participation allowed;" "[s]ome judges let me participate and asked me to proffer testimony and explain how the client met the standards, others would not even let me speak and denied any participation;" "[o]ne just stated the decision and would not allow counsel participation. The other accepted doc[uments] previously submitted to the asylum office, but would not allow any closing argument or other counsel participation."[318] Yet another participant summed up these differing accounts on their own: "[t]hey are almost entirely a fa[ç]ade. [Immigration judges] and the clerks are confused as to an attorney's role and level of involvement[—] some allow direct testimony and evidence while others only allow you to observe. There is no mechanism within EOIR to lodge your E-28 for this proceeding."[319]

Survey responses illustrate the differing approaches that immigration judges take to the IJ Review process. Notably, participants in these responses did not express fluctuations on counsel participation based

317. *See supra* Section I.A.2 (detailing how the fear screening process conducted by CBP and USCIS functions on the ground, including numerous reports throughout the years of serious violations of the law and procedural protections in the summary removal process that result in the violation of the country's non-refoulement obligations).

318. Survey of Immigration Practitioners & Legal Service Providers Regarding the Immigration Judge Review Process for Negative Fear Determinations by Jocelyn B. Cazares Willingham (2022) (on file with *Columbia Human Rights Law Review*).

319. *Id.*

on the humanitarian relief seekers' claims. Rather, they focus on the immigration judge presiding over the IJ Review. Even though regulations make it clear that only humanitarian relief seekers in reinstatement may have counsel while those in expedited removal are only permitted a consultant, the responses did not denote a differing approach by immigration judges based on the summary removal process in which their clients were placed. Rather, participants' responses indicate that immigration judges generally have a uniform approach to counsel participation that does not vary with the individual fear claim nor circumstances of the humanitarian relief seeker. Results indicate that the utility of representation during the IJ Review process may be significantly dependent on the immigration judge's view of representatives' roles in the process.

5) Interaction with Asylum Officer Notes: "Some Judges Review the Entirety of the Record, Some Don't Review It At All … "

Immigration judges are required to make de novo determinations on the humanitarian relief seeker's fear, yet simultaneously, the IJ Review is also meant to be "simply a review of the USCIS asylum officer's decision."[320] Survey participants expose how these two requirements can at times create conflicting aims: "a big challenge in IJ Review hearings with most judges is when applicants want to add new information that they didn't mention in their CFI (because they were scared or didn't understand the process); "[c]redibility was often a factor—the person testified differently than what was in the CFI notes and although the individual/counsel provided reasonable and logical explanations for the disparities, the IJ found the individual to not be credible;" "[immigration judges] read the asylum officers closing paragraph and asks the individual if [it's] accurate or if they want to add more information."[321] Yet, other participants report vacated negative fear determinations after critical errors were uncovered at the IJ Review: "[u]sually vacated because the interview was not done properly or there were clear translation errors in the interview;" "the [asylum officer] made a serious factual error[;]" two clients "were LGBT and had not mentioned that in their CFIs[.]"[322] These two clients then shared this at their IJ Reviews and

320. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at 7.4(d)(4)(E).

321. Survey of Immigration Practitioners & Legal Service Providers Regarding the Immigration Judge Review Process for Negative Fear Determinations by Jocelyn B. Cazares Willingham (2022) (on file with *Columbia Human Rights Law Review*).

322. *Id.*

the immigration judge vacated the negative fear determinations because of their "claim[s] based on [their] LGBT identity."[323]

Mirroring other aspects of the IJ Review, Survey results indicate that different immigrant judges' levels of interaction and reliance upon the asylum officers' notes varies, as each comes to their own conclusion as to how much a humanitarian relief seeker is allowed to expand on the information shared at their fear interview. While some immigration judges were reported to not permit any evidence or testimony omitted at the CFI or RFI, others expressly allowed, and even solicited, additional evidence and testimony. The inconsistency in these approaches to the asylum officers' notes demonstrate how a de novo determination forming from "simply a review of the USCIS asylum officer's decision"[324] can present contradictory guidance for an immigration judge on how they are to conduct IJ Reviews.[325] The de novo determination seemingly pushes for a more thorough review of all available evidence while the Immigration Court Practice Manuals guidance seemingly limits the scope of review. Yet, these principles are not necessarily conflicting, particularly when contextualized in the purpose of the IJ Review as a safeguard for humanitarian relief seekers and the documented instances of flawed CFI and RFI records.

EOIR regulations noting IJ Reviews are meant to be "simply a review" of the asylum officer's decision does not prohibit an immigration judge to explore further evidence in making their de novo determination. Moreover, statutory and regulatory language noting the IJ Review as the humanitarian protection seeker's "opportunity to be heard and questioned" and the inclusion in EOIR regulations that "[e]vidence may be introduced at the discretion of the immigration judge," support the IJ Review as not limited to testimony and evidence presented to the asylum officer.[326] Still, a participant reported that an immigration judge specifically noted "he *had* to limit what he could consider only to what had been stated to the asylum

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323. *Id.*

324. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at §§ 7.4(d)(4)(E), 7.4(e)(4)(E).

325. 8 C.F.R. § 1003.42(d) (2023). Though the standard of review for IJ reviews of no reasonable fear determinations is not technically regulated, *see* 8 C.F.R. § 1208.31(g) (2023) (setting the appeal process for fear determinations without declaring a standard of review), agency policy has clarified that the reasonable fear determination must be made de novo. Memorandum from the Off. of the C.J. Immigr., U.S. Dep't of Just., to All Immigr. JJ., 6–8 (May 14, 1999), https://www.justice.gov/sites/default/files/eoir /legacy/1999/06/01/99_5.pdf [https://perma.cc/86ZY-PAQ2]; IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at §§ 7.4(d)(4)(E), 7.4(e)(4)(E).

326. 8 C.F.R. § 1208.30(g) (2023); IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at §§ 7.4(d)(4)(E), 7.4(e)(4)(E).

officer."[327] This statement indicates a lack of clear guidance and training for at least that immigration judge. At the same time, the vastly divergent approaches to evidence highlights an alarming disparity in process for humanitarian relief seekers.

6) Language Interpretation Services: "Available and Consistent"

Unlike the fear interview and IJ Review interpretation issues noted in Sections I.A.2 and II.B, *supra*, Survey results did not exhibit serious concerns with the accessibility and accuracy of adequate language interpretation services. Most participants noted that language interpretation was widely available without problems arising.[328] However, one participant with experience representing asylum seekers in ten IJ Reviews noted a contrary experience: "[t]here are often interpretation errors or omissions about key words critical to a hearing and protected ground, or the regional dialects of certain Spanish speaking countries."[329]

The results indicate that, at least for the Survey participants, interpretation did not prove to be an area where humanitarian relief seekers experience significant variation in quality and access. The absolute right to interpretation, rather than the permissive nature of other components of the IJ Review process covered above, may account for this more uniform response from participants. However, it is important to note that in instances of pro se humanitarian relief seekers, there is rarely anyone to monitor the quality of and access to interpretation.

7) Explanation of the Decision: "Some Judges Provide Reasoning and Others Don't."

Participants were asked to share any explanations the immigration judge gave for their decision to either affirm or vacate a negative fear determination. Most responses indicated, in like terms, that the explanations were "limited," "very little," or "none."[330] One participant who had observed around 30 to 40 IJ Reviews and represented a humanitarian relief seeker in eight, summed up this aspect as follows: "[r]arely is an explanation provided. Because there is no appellate process, IJs are pretty lazy regarding their legal

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327. Survey of Immigration Practitioners & Legal Service Providers Regarding the Immigration Judge Review Process for Negative Fear Determinations by Jocelyn B. Cazares Willingham (2022) (on file with *Columbia Human Rights Law Review*) (emphasis added).

328. *Id.*

329. *Id.*

330. *Id.*

reasoning."[331] Yet other participants noted conflicting experiences. One explained, for example, that "if vacating, [the immigration judge] usually pointed to country conditions and/or legal reasoning presented. If affirming, [there was] usually not much reasoning presented[,] simply [the immigration judge] affirmed the [asylum officer's] decision."[332] Most other participants noted that immigration judges rarely provided an explanation when affirming the negative fear determination. However, in instances of a vacated decision, most participants noted that immigration judges provided an explanation, even if brief.

Thus, this final step in the IJ Review results in inconsistent experiences yet again. However, whereas variations in other aspects of the IJ Review process seemed tied to the immigration judge exclusively, variation in the level of explanation offered for the immigration judge's decision to affirm or vacate the negative fear determination largely seemed dependent on the judge's ultimate decision. This means that, while immigration judges seemed to take the same approach in counsel participation or the admission of evidence regardless of the humanitarian relief seeker's fear claim or circumstances, when it came to rationale provided for the decision, immigration judges did alter the process they provided the humanitarian relief seeker based on the individual circumstances and the judge's ultimate decision. The variation described above, based on the decision to affirm or vacate, coupled with the national affirm rate of 68.9 percent, indicates that affirming a negative fear determination is the status quo result for IJ Reviews, therefore not requiring explanation.[333]

C) Limitations of the Survey

The Survey provides an important glimpse into a vastly opaque system; however, it is important to acknowledge its limited perspective as it only reflects the experience of immigration advocates—neither immigration judges nor DHS attorneys were invited to participate. Additionally, the participants reflect a very limited number of the immigration advocates throughout the country—particularly regarding advocates with experience as Observers who more accurately reflect the current state of the process afforded at IJ Reviews as most humanitarian relief seekers are unrepresented. Though the over 1,460 IJ Review experiences reflected still provide a crucial insight that underscores and furthers the documented shortcomings of IJ Reviews in Section II.B, *supra*, the fact that participants affirmatively chose to partake in the Survey may have resulted in higher

331. *Id.*
332. *Id.*
333. EOIR IJ Review Decisions, *supra* note 31.

responses of negative experiences with IJ Reviews as those most likely to participate are those with strong feelings about the process given the limited time most immigration advocates have to dedicate to matters outside their casework.

The Survey design further limited the type of data that could be gathered and the resulting analysis. The Survey was purposely designed to be quick and easy to complete to maximize participation. This design was at the cost of more detailed and nuanced questions, which limited the scope and depth of answers advocates provided. Additionally, the type of data that the Survey collected was primarily qualitative, documenting participants' experiences through descriptive responses rather than quantifiable selections. The Survey results provided limited opportunities to conduct quantitative analysis, meaning its statistical value is finite. In order to make a conclusion on the current national trends in immigration judges' approaches to IJ Reviews, an additional national survey would need to be conducted that collected additional data, including level of variation and quality for each element of the IJ Review.

Despite these limitations, through their shared accounts, participants still provide a window into a highly opaque system and bring to light the arbitrary lottery system of procedural protections that humanitarian relief seekers are afforded in their pursuits to apply for humanitarian protection. As one participant aptly summed up, "practice varies widely. Some [immigration judges] only review the documents, others question Respondents. Some allow attorneys to make extensive arguments, others do not. The process seems extremely arbitrary depending on the [immigration judge] involved."[334] The potential for significant variation in fair processes for humanitarian relief seekers is a product of the lack of standards, review, and process, and the next Section explores potential solutions.

IV) PROPOSALS FOR REFORM

The data surrounding the fear screening process demonstrates that at every stage of the process, a significant number of humanitarian relief seekers are prevented from moving forward with their claims for protection. The Biden Administration attributes the decline of humanitarian relief seekers to the fear screening, which is intended to "quickly identify potentially meritorious claims deserving of further consideration in a full

334. Survey of Immigration Practitioners & Legal Service Providers Regarding the Immigration Judge Review Process for Negative Fear Determinations by Jocelyn B. Cazares Willingham (2022) (on file with *Columbia Human Rights Law Review*).

merits hearing and to facilitate the rapid removal of individuals determined to lack a significant possibility of establishing eligibility for asylum, statutory withholding of removal, or protection under the CAT."[335] Previous administrations have gone further to indicate that the attrition is necessary to prevent rampant "fraud and abuse" in our humanitarian relief system.[336] Though DOJ disagrees with claims that "credible fear interviews are plagued with due process concerns,"[337] the reports detailed in the Survey and Sections I.A.2, II.A, and II.B, paint a much different picture. These reports, conducted by NGOs and government agencies, demonstrate that the large number of negative fear determinations are not solely a result of proper application of the "credible" or "reasonable" fear standard, but are rather a natural consequence of a summary removal system "designed to invite abuse by taking place in backroom settings, administered by front-line officers with few administrative mechanisms for oversight."[338]

The importance of an accurate system that ensures people like Diego are not sent back to dangerous situations is apparent given that a positive fear determination is the *only* recourse humanitarian relief seekers subject to expedited removal and reinstatement have to prevent their deportation to a country where they may face possible persecution or torture. These fear determinations are high stakes decisions that are meant to have a low screening standard. Yet, humanitarian relief seekers, like Diego, with 161 pages of evidence corroborating his fear claim, are being told that is not enough to gain *temporary* admission into the country to be placed in regular removal proceedings to have their claims properly adjudicated by EOIR.

Survey responses provide examples of the ongoing violation of the United States' humanitarian and legal obligations in this fear screening system that Congress and the executive branch continue to insulate by providing "negligible opportunities for the law to correct for abuse and error."[339] This Section considers a series of proposals, with an emphasis on introducing a uniform process for IJ Reviews, to reform the fear screening process for those subject to expedited removal and reinstatement in a way that better honors the obligation to ensure the United States is not deporting

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335. Asylum Processing IFR, *supra* note 24, at 18,135.

336. Nicole Lewis, *Sessions's Claim that 'Dirty Immigration Lawyers' Encourage Clients to Cite 'Credible Fear,'* WASH. POST (Oct. 26, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/10/26/sessionss-claim-that-dirty-immigration-lawyers-encourage-clients-to-cite-credible-fear/ (on file with the *Columbia Human Rights Law Review*).

337. Asylum Processing IFR, *supra* note 24, at 18,129.

338. Jennifer Lee Koh, *When Shadow Removals Collide*, 96 WASH. U. L. REV. 337, 361 (2018).

339. *Id.*

humanitarian relief seekers to countries where they are likely to face persecution, torture, or death.

A) Legislative Action to Repeal Summary Removals

As the United States has not seen any major immigration reform for decades, the likelihood of Congress passing any legislation to end the practice of summary removals is highly unlikely. However, the Article's failure to recommend the complete abolition of these summary removals for all noncitizens—whether they seek humanitarian relief or not—would be a glaring omission given the ample evidence of how the system is wrought with ample abuse, misapplications of the law, susceptibility to error, and minimal administrative or judicial oversight.[340] The need for a complete dissolution of this system is further brought on by the disparate impact it has on humanitarian relief seekers from African, Central and South American, and Asian countries.[341]

A system that has shown itself from its inception to be so susceptible to such due process concerns and violations should not continue to exist. However, the reality is there is not enough political resolve to even pass legislation to provide recipients of Deferred Action for Childhood Arrivals a pathway to citizenship even with widespread public support,[342] much less to undertake the work to undo a system that is already viewed as subject to abuse and fraud by noncitizens.[343] Thus, the next Sections turn on more realistic proposals for reform.

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340. *See* discussion *supra* Sections I.A.2, II.B, II.C, II.D, and III.B (documenting reports spanning almost three decades of how the summary removal process fails to accurately screen for fear for all humanitarian relief seekers as serious deprivations of rights and protections occur at every stage of the process from the initial fear screening with to the IJ review with minimal access to judicial review).

341. *See* GENDELMAN, *supra* note 16, at 24 (noting that the Trump Administration's "weaponiz[ation]" of the fear screening process led to erroneous no credible and no reasonable fear determinations, including alarming rates of these determinations for humanitarian relief seekers from Brazil, China, the Democratic Republic of Congo, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, and Venezuela between 2016 and 2020).

342. Priscilla Alvarez, *Biden Administration Takes New Steps to Preserve Obama-Era DACA Immigration Program*, CNN (Sept. 27, 2021), https://www.cnn.com/2021/09/27/politics/daca-biden-immigration/index.html [https://perma.cc/M9GZ-HJ3S].

343. *See* NPRM: Procedures for Credible Fear Screening, *supra* note 26 (internal citation omitted) (rationalizing that expeditious adjudications of fear claims are necessary to prevent "encourag[ing] abuse by those who will not qualify for protection and smugglers who exploit the delay for profit").

B) Modifications to the Fear Screening Process

In the absence of the complete abandonment of summary removals, there are a series of measures that the government can undertake to better the fear screening process to ensure that humanitarian relief seekers with meritorious claims are not deported in violation of the country's non-refoulement obligations. The following proposals seek to strengthen the safeguards in place for humanitarian relief seekers through a series of proposals, including regulatory changes to give humanitarian relief seekers the right to an attorney and the institution of minimum review standards and additional protections at the IJ Review stage to ensure all humanitarian relief seekers have fundamentally fair proceedings.

1) Access and Right to Counsel

The calls for increased access to counsel for noncitizens in immigration proceedings are not new.[344] Moreover, as the budget for CBP and ICE has grown and corresponded with a significant growth in deportations, the need for representation in removal proceedings has grown, too.[345] In their 2015 study, Ingrid Eagly and Steven Shaffer provided empirical data finding that noncitizens with legal representation are 3.5 times more likely to be granted bond and up to 10 times more likely to establish their right to remain in the United States than noncitizens without such representation.[346] Noting the impact representation can have, the movement for guaranteed representation has garnered support over the years and led to successful initiatives to fund representation in Baltimore

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344. *See* Manning & Hong, *supra* note 40, at 693-703 (outlining how the access to counsel supports a more efficient and accurate fear screening process); Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282 (2013) (detailing the calls for the right to counsel in immigration proceedings and outlining possible mechanisms to reach a universal representation system); Lucila Figueroa and Nina Siulc, *It's Time to Provide Government-Funded Lawyers to All Immigrants Facing Deportation*, VERA INST. OF JUST. (Jan. 14, 2021), https://www.vera.org/news/its-time-to-provide-government-funded-lawyers-to-all-immigrants-facing-deportation [https://perma.cc/DY37-RZYC] (arguing that "[u]niversal representation strengthens democracy by guaranteeing due process rights, ensures a more equitable process, and achieves outcomes that generally require the assistance of an attorney").

345. *See generally* AM. IMMIGR. COUNCIL, THE GROWTH OF THE U.S. DEPORTATION MACHINE, (Mar. 2014) https://www.americanimmigrationcouncil.org/sites/default/files/research/the_growth_of_the_us_deportation_machine.pdf [https://perma.cc/Q4D9-D4J2] (documenting the growth in immigration enforcement following increases to the DHS budget).

346. Ingrid V. Eagly & Steven Shaffer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 49–54 (2015).

City,[347] New York,[348] Oregon,[349] San Francisco,[350] and many other localities.[351] It has also led to court-appointed programs like the National Qualified Representative Program, which provides government-funded counsel for detained noncitizens found to be "mentally incompetent" by an immigration judge or the BIA.[352] This Article briefly adds to those calls for a representation model in immigration proceedings that mirrors the public defender system that bore out of the seminal 1963 U.S. Supreme Court decision in *Gideon v. Wainwright*.[353]

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347. As part of the Safe City Baltimore initiative, Baltimore City is providing funding for the representation for immigrants in removal proceedings. Press Release, City of Baltimore, Baltimore to Provide Support for Legal Representation to Immigrants in Deportation Proceedings (Nov. 9, 2017). https://content.govdelivery.com/accounts/MDBALT/bulletins/1c3805c **[**https://perma.cc/WX8R-2HX6**]**.

348. The New York Immigrant Family Unity Project is a state- and city-funded program that was the first in the nation to provide universal court-appointed deportation defense counsel in detained cases. *The New York Immigrant Family Unity Project: Universal Representation for Detained Immigrants Facing Deportation in New York State*, VERA INST. OF JUST., https://www.vera.org/projects/new-york-immigrant-family-unity-project [https://perma.cc/ZW3W-LKP8].

349. Equity Corps, a state-funded universal representation program for noncitizens in removal proceedings, launched in Portland in October 2018. Stephen Manning, *Equity Corps Launches in Portland, Oregon,* INNOVATION L. LAB (Nov. 14, 2018), https://innovationlawlab.org/blog/equity-corps-launches-in-portland-oregon/ [https://perma.cc/QY5N-ZEEQ].

350. The Immigration Unit of the San Francisco Public Defender provides representation to residents under ICE detention and in removal proceedings. *Immigration Unit*, S.F. PUB. DEF., https://sfpublicdefender.org/services/immigration-unit/ [https://perma.cc/68KQ-WMDY].

351. *Public Funding for Immigration Legal Services*, NAT'L IMMIGR. F. (Apr. 12, 2021), https://immigrationforum.org/article/public-funding-for-immigration-legal-services/ [https://perma.cc/HEL7-QCTN].

352. Mike Corradini, *National Qualified Representative Program*, VERA INST. JUST., https://www.vera.org/projects/national-qualified-representative-program/ [https://perma.cc/AN7H-XD38]. The National Qualified Representative Program is a nationwide policy by DOJ. It developed as a government response to a California district court decision. *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1061 (C.D. Cal. 2010) (ordering an injunction requiring the appointment of counsel for detained noncitizen plaintiffs with serious mental impairments); *see also* Press Release, U.S. Dep't Just., Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), http://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguardsunrepresented-immigration-detainees.pdf [https://perma.cc/6AN9-YPSH] (detailing the nationwide policy requiring competency hearings for detainees with serious mental disorders or conditions and the provision of representation to those deemed incompetent).

353. There is extensive scholarship concerning the benefits and costs of this model of representation for noncitizens. *See* Manning & Hong, *supra* note 40, at 693–703 (showing how the right to access to counsel for those in expedited removal should flow from the

As a nationwide universal representation method is unlikely to develop in the current political landscape for the same reasons covered in Section IV.A, *supra*, the proposal to provide a regulatory right to counsel for humanitarian relief seekers in summary removals should garner sufficient support in Congress given its limited scope and substantial benefits. Although seemingly inefficient, available data indicates that "attorney participation in the expedited removal proceedings has no meaningful impact on the pace of adjudication."[354] The UNHCR added to this in their comment to the Asylum Processing IFR, noting, "more robust access to legal assistance and representation as early as possible, including at the credible fear stage, will make the need for requests for reconsideration less acute and further advance the goal of implementing an efficient asylum procedure."[355] In modifying the regulations governing expedited removal and reinstatement to allow for an absolute right to counsel—rather than a discretionary grant by the adjudicator—throughout the fear screening process, the number of removals in violation of U.S. and international law would decrease. In particular, the participation of counsel in the fear interview and IJ Review stages is critical to help humanitarian relief seekers navigate the "credible" and "reasonable" fear standards they are expected to meet. This guidance is critical as humanitarian relief seekers often

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minimal procedural rights afforded to humanitarian relief seekers through a project analysis of more than 35,000 represented humanitarian relief seekers, of which 99 percent received a positive fear determination); Emily Ryo & Ian Peacock, *Represented but Unequal: The Contingent Effect of Legal Representation in Removal Proceedings*, 55 L. & SOC'Y REV. 634, 636, 652 (2021) (showing that the efficacy of representation varied depending on the gender and tenure of the immigration judge as well as the political and legal landscape of the immigration decisions, with higher success rates under Democratic administrations, in the Ninth Circuit, and during high caseload periods). *But see* Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407, 407 (2023) (challenging the use of universal representation as the solution to the mass deportation problem and arguing that universal representation instead inadvertently normalizes continued deportation). Consequently, this Article does not delve deeply into this issue here beyond explaining its unique benefits in the summary removal process. It is important to note, however, that one of the apt criticisms Professor Cházaro makes of the call for universal representation is that most deportations are effectuated outside the immigration court. Therefore, by recommending this right in the summary removal process, which primarily occurs outside the immigration court, the Article hopes to better dismantle the immigration enforcement system.

354. Manning & Hong, *supra* note 40, at 702 (citing Eagly & Shaffer, *supra* note 346, at 65 tbl.6).

355. U.N. High Comm'r of Refugees, Comment on the Proposed Rule for Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 19 (May 31, 2022), https://www.regulations.gov/comment/USCIS-2021-0012-5305 [https://perma.cc/R9WV-ZN9Z].

experience a series of obstacles to their participation in the process, including trauma, language barriers, detention fatigue, medical ailments, and the need to navigate one of the most complicated fields of law.[356] Critically, in granting the right of access and participation of counsel in the IJ Review process, the government would ensure that attorneys' roles are not denigrated as "purely ornamental" as in Diego's case, and rather seen as allies of the Court to ensure a more efficient and accurate process.

2) Instituting Minimum Standards in the IJ Review Process

In the absence of an overhaul to the expedited removal and reinstatement enforcement, the institution of minimal rights and standards in the IJ Review process is required to abide by the nation's laws and international obligations. As shown in Section III.A, *supra*, and the Survey, humanitarian relief seekers are afforded minimal protections in the IJ Review process; it is only at the immigration judge's discretion that those in reinstatement are able to be represented or those in expedited removal are allowed a consultant.[357] The opportunity to testify and introduce evidence is also left to the immigration judge's discretion, despite the IJ Review's purported purpose of being a humanitarian relief seeker's opportunity "to be heard and questioned by the immigration judge."[358] This highly discretionary approach to procedural protection at the sole discretion of the immigration judges creates the opportunity for variation in the utility of the IJ Review as a safeguard because, as a Survey participant notes, "there's no consistent process and [immigration judges] can take it as seriously or not as they want."[359]

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356. *See* Christina Wilkes, *Government-Funded Counsel for Children in Immigration Court?* BAR BULL. (Md. State Bar Ass'n, Baltimore, Md.), Aug. 15, 2016, at 9 (on file with the *Columbia Human Rights Law Review*) (referencing Judge Milan Smith's comment on a class action request for attorneys to represent children that "[a]mong the most complicated of all the laws I deal with is the immigration statute" (quoting Oral Argument, J.E.F.M. v. Holder, Case No. C-14-1026-TSZ)).

357. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at §§ 7.4(d)(4)(C), 7.4(e)(4)(C).

358. 8 C.F.R. § 208.30(g)(1) (2023); *see also* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 194, at §§ 7.4(d)(4)(E), 7.4(e)(4)(E) (declaring that evidence may be introduced during IJ reviews, for both reasonable and credible fears, at the discretion of the immigration judge); 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (declaring that the IJ review of a credible fear "shall include an opportunity . . . to be heard and questioned by the immigration judge").

359. Survey of Immigration Practitioners & Legal Service Providers Regarding the Immigration Judge Review Process for Negative Fear Determinations by Jocelyn B. Cazares Willingham (2022) (on file with *Columbia Human Rights Law Review*).

Survey participants expose how the wide latitude provided to immigration judges can lead to substantially different processes for humanitarian relief seekers. An evaluation of these results in the context of the available reports and data on the IJ Review process covered in Section II.B, *supra*, points to a disturbing connection between immigration judge assignment and the likelihood of a vacated negative fear determination. The existence of such variance in a decision that is subject to review by neither the BIA nor the federal courts demonstrates the need for greater, non-discretionary protections for humanitarian relief seekers in the process, particularly given that people going through the process must often do so pro se.[360] In *Quintero v. Garland*, the Fourth Circuit acknowledged the duty immigration judges have "to fully develop the record in *all* cases that come before them."[361] Moreover, the Fourth Circuit held that the duty is heightened in pro se cases as "[g]iven the sheer difficulty of 'navigating an unfamiliar legal system [without counsel] while facing the daunting prospect of deportation,' pro se individuals are deprived of adequate hearings when they are thrown into removal proceedings and left to sink or swim without adequate assistance from the immigration judge."[362] This duty should then naturally apply to the IJ Review process. After all, the IJ Review is a case before an immigration judge. This should require immigration judges to take a greater role in developing the fear claim for humanitarian relief seekers who often do not understand the intricacies of humanitarian law and the necessary vernacular and framing required to establish a "credible" or "reasonable" fear.

All circuits should similarly apply this duty given the particular vulnerabilities that humanitarian relief seekers face in expedited removal and reinstatement. In expressly applying this duty to the IJ Review process,

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360. *See* GENDELMAN, *supra* note 16, at 35 ("Few asylum seekers—the majority of whom are unrepresented during CFIs and immigration court reviews—will be able to secure legal counsel to assist them to submit a request for reconsideration within a single week.").

361. Quintero v. Garland, 998 F.3d 612, 627 (4th Cir. 2021) (emphasis added). Some circuits have also found that immigration judges have a duty to develop the record, though the extent of when that duty applies has been interpreted in various forms. *Compare* Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006) (deeming this duty to be generally applicable in all immigration court proceedings), *with* Jacinto v. INS, 208 F.3d 725, 734 (9th Cir. 2000) (recognizing an obligation to develop the record only in cases involving pro se respondents). Other circuits have not specified whether the duty applies generally or only in the pro se context. *See, e.g.*, Mekhoukh v. Ashcroft, 358 F.3d 118, 129–30, 129 n.14 (1st Cir. 2004) (finding the appellant's claim that the immigration judge failed to fully develop the record unpersuasive); Toure v. Att'y Gen. U.S., 443 F.3d 310, 325 (3d Cir. 2006) (confirming that an immigration judge has a duty to develop an applicant's testimony).

362. Quintero, 998 F.3d at 629 (quoting Diop v. Lynch, 807 F.3d 70, 76 (4th Cir. 2015)).

immigration judges would be required to help humanitarian relief seekers identify and develop possible protected grounds by explaining the law to them in plain language and soliciting relevant information through careful questioning.[363] At minimum, an immigration judge should be required to accept and consider all testimony and evidence that the humanitarian relief seeker has to offer and allow representation by counsel. In doing so, efficiency can be optimized as the inclusion of evidence and/or counsel can quickly highlight the relevant information for the immigration judge to allow for a more tailored review. Moreover, in cases where the immigration judge cannot vacate the negative fear determination based on the written record, they should be required to ask basic questions to appropriately evaluate humanitarian relief seekers' fear of return. In mandating questions for the IJ Review process, either through the issuance of an EOIR Director's Memorandum or a new rule by the executive branch, immigration judges must also keep in mind that this is a threshold screening and only the possibility, not certainty, of success in the claim is enough to continue their pursuit for protection.[364]

The following questions are recommended mandatory questions to be asked during all IJ Reviews, except for in two scenarios. First, in cases involving represented humanitarian relief seekers, the immigration judge may present them the option to waive Questions 2–7 following a satisfactory answer to Question 1. This exception is presented here in recognition of the fact that the humanitarian relief seeker and their representative may prefer to present their fear claim in a different manner. The second exception to these mandatory questions is for cases where the immigration judge finds that the written record is sufficient on its own to lead them to vacate the negative fear determination. This exception is presented to ensure neither the humanitarian relief seeker nor EOIR is subjected to a process for the sake of process. These questions are intended as safeguards against erroneous removals, they are therefore unnecessary in cases where an immigration judge has already decided a removal is not to occur. Informed by issues identified in the Survey data, these proposed questions can allow an immigration judge to quickly, yet meaningfully, identify the humanitarian

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363. *Id.* at 629 (noting that the duty to develop the record requires immigration judges to "provide respondents with sufficient guidance [on how to] prove the elements of their claims[,]" and that judges have "a duty to probe into, inquire of, and elicit all facts relevant to a respondent's claims," in the course of which "they 'must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited[.]'" (quoting Jacinto v. I.N.S., 208 F.3d 725, 733 (9th Cir. 2000).

364. CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 115 ; REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 52, at 8.

relief seeker's fear and whether there were any impediments to the humanitarian relief seeker's ability to share their story.

i) Do you know what we are doing here today?

Participants routinely reported that immigration judges did not provide any explanation of the purpose of nor standards for an IJ Review. Beginning with a question like this can help ensure there is a baseline of understanding of the process for humanitarian relief seekers who often are unable to meet with anyone to explain the fear screening process, or required fear standards, to them. Unless humanitarian relief seekers are able to answer the question in a way that makes it clear they understand the process, immigration judges should volunteer that information and inform humanitarian relief seekers what it means to have a "credible" or "reasonable" fear within the required context of persecution because of a protected ground or torture.

ii) Have you been able to review the notes of the interview?

Survey participants routinely reported lack of access to the interview notes, despite a statutory requirement that these notes be made available to humanitarian relief seekers in preparation for their IJ Reviews. This question serves as a mechanism to ensure compliance with this statutory requirement, not only by creating a verification system to further disincentivize unlawful withholding of these notes, but also by providing another opportunity for statutory compliance for humanitarian relief seekers who do not have these notes at their IJ Review. Additionally, in instances where the humanitarian relief seeker replies negatively to this question, the immigration judge should ensure that they are provided a copy of the interview notes and grant a continuance to provide the humanitarian relief seeker time to meaningfully review the notes.

iii) How did you feel during your fear interview?

Survey participants routinely reported lack of access to any information regarding the humanitarian relief seeker's CFI or RFI as well as overreliance on the interview notes by immigration judges. This question should then serve as reminders to immigration judges that the fear interview notes are not transcripts and should not be used as impeachment evidence, particularly when the humanitarian relief seeker is unable to meaningfully review them to challenge their reliability. Moreover, they can help the immigration judge identify experienced hostilities, skepticism, or traumas

that may have inhibited the humanitarian relief seeker's ability to express their fear during their CFI or RFI.

iv) Did you understand what was happening during the interview?

Similarly addressing reported lack of access to information for humanitarian relief seekers and immigration judges' overreliance on the interview notes, this question is meant to help the immigration judge identify any language barriers or competency issues. It is important to note that if any language barriers are detected, a crucial concern—that Survey participants also reported—arises. That is, the interview notes are only provided to the humanitarian relief seeker in English, which significantly limits non-English speaking humanitarian relief seekers' ability to meaningful participate in their IJ Review. Consequently, immigration judges should be particularly mindful to not rely on the interview notes to evaluate the humanitarian relief seekers' fear. Similarly, if competency issues are detected, as some Survey participants indicated, *Matter of M-A-M-* and its protections[365] should apply prior to any decision on the IJ Review. *Matter of M-A-M-* is the seminal Board of Immigration Appeals (BIA) case on mental competency in immigration proceedings.[366] It requires immigration judges to evaluate a person's competency if there are any indicators of possible incompetency and institute safeguards upon a finding of incompetence.[367]

V) Why are you afraid of returning to your country?

Survey participants reported varying levels of interactions by the immigration judge with the humanitarian relief seeker's fear claim. Some participants reported IJ Reviews where immigration judges did not ask a single question regarding the humanitarian relief seekers' fears, while other participants reported IJ Reviews where immigration judges delved into the humanitarian relief seekers' fear so deeply that the proceedings mirrored a full individual hearing where the decision to grant relief is being made. Question 5 and 6 are basic fear development questions to ensure a more uniform approach by immigration judges in their exploration and evaluation of the humanitarian relief seeker's fear. That is, these questions are meant to elicit information to allow immigration judges to properly answer the question, "Is it possible the feared harm can rise to persecution or torture?"

365. Matter of M-A-M-, 25 I. & N. Dec. 474 (B.I.A. 2011).
366. *Id.*
367. *Id.* at 480–83.

The expansive nature of this question is meant to capture all the factors contributing to the humanitarian relief seekers' fear of being deported to their country of return. Though its broadness may lead to lengthy responses, the finality of the IJ Review decision calls for an opportunity of this nature to ensure humanitarian relief seekers with possibly meritorious claims are not erroneously removed. The concern of lengthiness is further combatted by the limited number of questions.

vi) What do you think will happen to you if you have to return?

This question further addresses reported concerns about the level of attention immigration judges place on humanitarian relief seekers' fear claims. Recognizing that Question 5 may call for broader responses from humanitarian relief seekers, Question 6 is meant to ensure that any particular feared actions that humanitarian relief seekers may face are disclosed. Notably, for both questions, the immigration judge should be required to refrain from evaluating protected grounds at this stage given their nebulous and constantly evolving natures. This is particularly poignant when considering a humanitarian relief seeker's membership in a particular social group, the articulation of which is "a highly technical legal issue, and as '[e]ven experienced immigration attorneys have difficulty articulating the contours of a [cognizable social group].'"[368] Given that the majority of those in IJ Reviews are unrepresented and "suffer from the effects of trauma and lack literacy, English proficiency, formal education, and relevant legal knowledge[,]" it is "unreasonable and fundamentally unfair" to expect humanitarian relief seekers to articulate the nexus between their claims and a legally cognizable group at this stage of the process.[369]

vii) Is there anything else you think is important for me to know?

A broad question like this can help ensure that humanitarian relief seekers are provided an opportunity to share important information that does not directly answer more pointed questions. Many advocates, including the author, have experienced occasions where clients shared information in passing that the client thought was irrelevant to their legal claim, only to find out it was necessary context to establish a protected ground. The focus of the law is not on details that are most pressing for those who have survived

368. Quintero v. Garland, 998 F.3d 612, 632 (4th Cir. 2021) (quoting Cantarero-Lagos v. Barr, 924 F.3d 145, 154 (5th Cir. 2019) (Dennis, J., concurring)).

369. *Id.*

persecution, and clients may not understand what information is relevant to their cases.[370]

The proposed questions may seem simple, but the long history of abuses and misapplication of the law coupled with the impact that trauma, fatigue, and language barriers can have necessitates a prompt that is more comprehensible to a wider range of humanitarian relief seekers. The implementation of these mandatory questions—along with the rights to counsel and to present evidence (including testimony)—requires further measures to ensure compliance.

A possible measure to ensure compliance is to grant the authority to the BIA to review IJ Review decisions for the limited question of whether the immigration judge abided by the minimum protections. However, such a solution would require congressional action and is unlikely to come to fruition given the dynamics laid out in Section V.A. An alternative solution that only requires executive action is to make compliance with these protections part of the performance metrics for immigration judges in lieu of case completion. Fatma E. Marouf outlined how these metrics negatively influenced immigration judges' interaction with cases during the Trump Administration as case completions became critical measures in performance reviews.[371] Rather than utilizing these performance metrics to pressure immigration officials "to complete cases quickly at the expense of ensuring a fair process" like the Trump Administration,[372] these proposed modifications prioritize a fairer and more accurate process.

Fear determinations are high-stakes decisions that "*per se* implicate extremely weighty interests in life and liberty, as they involve individuals seeking protection from persecution, torture, or even death."[373] The Survey results and the substantial number of reports documenting error and abuse in these determinations make the need for greater oversight and review in the IJ Review process necessary. There is too much at stake to allow the mere possibility of an erroneous affirmation of a negative fear determination because of the lack of meaningful review by an immigration judge and/or opportunity for the humanitarian relief seekers to be heard. Expediency should not come at the cost of accuracy—the implementation of these

370. For example, the Second Circuit has noted that the U.S. removal system relies on immigration judges to explain the accurately to pro se noncitizens because, "[o]therwise, such [noncitizens] would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal." United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004).

371. Marouf, *supra* note 20, at 707, 733–35.

372. *Id.* at 734.

373. *Quintero*, 998 F.3d at 632.

minimum protections and rights prioritizes accuracy, recognizing that an erroneous removal can lead to the persecution, torture, or death of a person.

V) CONCLUSION

When a country's immigration procedures primarily focus on efficiency, humanitarian relief seekers' experiences will vary drastically due to the process' lack of meaningful protections, which grants immigration judges and government officials an incredible amount of discretion in the fear screening process. Efficiency cannot, and should not, justify the removal or limitation of substantive and procedural protections for incredibly vulnerable people like those seeking refuge in the United States. Thus, when a humanitarian system seeks to prioritize efficiency, these humanitarian relief seekers are sacrificed to accomplish it.[374]

In recent history, the focus and dialogue in maintaining a fear screening mechanism that abides by the nation's non-refoulement obligation revolves around preventing "clearly unmeritorious or frivolous claims[,]"[375] rather than ensuring all humanitarian relief seekers with possible meritorious claims receive an opportunity to continue forward with their case for protection. This Article seeks to shift the attention back to the latter to ensure that as a country we are not facilitating the persecution and torture of people by erroneously deporting them. In focusing on the IJ Review process, the Article highlights how dangerous the boundless discretion afforded to immigration judges can be—humanitarian relief seekers' fears are inconsistently evaluated, resulting in significantly inconsistent results. The drastically different outcomes and access to due process for

374. In addition, given the continuous onslaught on the access to humanitarian protection within the United States, it is important to recognize that the more asylum bars that are proposed and adopted by any administration, the more our country fails to abide by our international obligations, our own legal obligations, and ultimately our moral duties to protect humanitarian relief seekers from the dangers they face in their countries of return. *See e.g.* Saul Elbein, *5 Things to Know about the Border Bill at the Heart of GOP Shutdown Threats*, THE HILL (Jan. 4, 2024), https://thehill.com/homenews/house/4390204-5-things-to-know-about-border-bill-hr2-gop-shutdown-threats/ (on file with the *Columbia Human Rights Law Review*); Lawful Pathway Circumvention, *supra* note 5; *see also* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018). These humanitarian relief seekers not only deserve our welcoming and protection, but they should be entitled to it. Until that day though, the law requires our revisiting the IJ Review process and its accuracy.

375. CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS TRAINING COURSE, *supra* note 115; *see also* Regulations Concerning the Convention Against Torture, *supra* note 20 (stating the credible fear interview is designed to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch").

humanitarian relief seekers in similar situations is a symptom of a larger problem within the immigration adjudication system: the incredible level of discretion afforded to immigration judges coupled with limited judicial oversight. Until the immigration legal system reckons with this, the ability to have a fundamentally fair proceeding will remain a lottery system for humanitarian relief seekers like Diego, with those who do not fare well in their immigration judge assignment being more likely to face deportation regardless of the merits of their case.