

Congress of the United States

Washington, DC 20515

September 28, 2026

Brett H. Lassen
Chief, Asylum Division
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: DHS Docket No. USCIS-2026-0199; RIN 1615-AD18; Comment in Response to Interim Final Rule, *Affirmative Asylum Referrals Without Interview*, 91 Fed. Reg. 47101 (July 28, 2026)

Dear Chief Lassen:

We, the Members of the Congressional Hispanic Caucus (CHC) and the Congressional Asian Pacific American Caucus (CAPAC) and the undersigned Members of Congress, submit this comment regarding the Department of Homeland Security's (DHS) interim final rule, *Affirmative Asylum Referrals Without Interview* (the Rule), published in the Federal Register on July 28, 2026.¹

We are deeply concerned that the Rule exceeds DHS's authority, conflicts with statutory requirements enacted by Congress, and was implemented without the procedural safeguards required by the Administrative Procedure Act (APA). We write to offer our views on the Rule and to urge its rescission.

This comment sets out four independent grounds for rescission. First, the Rule is incompatible with the statutory framework Congress built around asylum adjudication, including the credibility and corroboration standards Congress enacted in 2005 and the jurisdictional protections Congress enacted for unaccompanied children in 2008. Second, DHS unlawfully dispensed with notice-and-comment rulemaking on the basis of two exceptions, neither of which applies. Third, the Rule is arbitrary and capricious: it reverses reasoned agency positions without confronting them, rests on an affected-population estimate drawn from a different population, quantifies neither costs nor benefits, and rejects the only alternatives that would have addressed its stated problem for reasons that indict the Rule itself. Fourth, the single safeguard on which the Rule's fairness purportedly depends — de novo review before an immigration judge — is one DHS's own preamble disclaims.

Background

Through U.S. Citizenship and Immigration Services (USCIS), DHS issued this interim final rule to upend more than three decades of asylum processing. The Rule dispenses with the interview requirement for affirmative asylum applicants, including children, and permits USCIS to send certain applicants directly to the Executive Office for Immigration Review (EOIR) without an interview.

¹*Affirmative Asylum Referrals Without Interview*, 91 Fed. Reg. 47101 (July 28, 2026) (codified at 8 C.F.R. pt. 208) (hereinafter "IFR" or "Rule"), *corrected by* 91 Fed. Reg. 55735 (Aug. 31, 2026).

The affirmative asylum interview has long served as the cornerstone of the affirmative asylum process administered by USCIS. For decades, USCIS regulations have guaranteed affirmative asylum applicants an interview before an asylum officer prior to adjudication or referral of their claims, unless the applicant waived it. The Rule makes five regulatory changes to 8 C.F.R. part 208: it deletes the requirement that an asylum officer review prohibitions on filing "in an interview" at § 208.4(a); it adds a new § 208.9(a)(2) authorizing referral to an immigration judge without an interview; it removes references to the "right to an" interview at §§ 208.10 and 208.14(c); it confirms at § 208.14(c) that an officer may refer without conducting an interview; and it eliminates the requirement that a letter communicating the basis for a referral include an assessment of the applicant's credibility at § 208.19.² DHS separately announces a change in agency practice, effected without any regulatory amendment, permitting an asylum officer to refer an application as a negative exercise of discretion without first determining whether the applicant is a refugee at all.³

The scale is substantial. DHS estimates that up to 444,724 of the 1,434,145 affirmative asylum applications pending at the end of Fiscal Year 2025 — roughly 31 percent of the backlog — may be affected, and that approximately 132,167 future applicants annually may be referred without an interview.⁴ Of the pending applications, 129,525 were filed ten or more years after the applicant's last entry or carry a blank entry date.⁵ These are, overwhelmingly, long-resident members of our communities. DHS reports an average processing time of 7.3 years.⁶ Unaccompanied children are not exempt: while DHS states that a child will not be referred without an interview on one-year filing deadline grounds, it confirms that "a UAC may still be referred under the rule if an AO determines the UAC is ineligible for asylum."⁷

The Rule took effect on the day it was published, without prior notice and comment and without a delayed effective date, and applies immediately to pending applications.⁸ DHS has therefore reversed a long-established agency practice, and altered the legal position of hundreds of thousands of people, before reviewing a single word of stakeholder input.

I. The Rule Is Inconsistent With the Statutory Framework Congress Built.

Over four decades, Congress built an asylum system that presumes the applicant will be heard: in the standards it wrote for evaluating asylum claims, in the jurisdiction it assigned over children's claims, and in the fees it has required applicants to pay. The Rule is incompatible with each.

A. Congress wrote oral testimony into the statutory standards governing credibility and corroboration.

When Congress last legislated in detail about how asylum claims are to be evaluated, in the REAL ID Act of 2005, it made oral testimony an element of the governing standard.⁹ Congress directed that a credibility determination may rest on "the demeanor, candor, or responsiveness of the applicant or witness," and on "the consistency between the applicant's or witness's written and oral statements."¹⁰ Congress further provided that

²IFR, 91 Fed. Reg. at 47128 (amending 8 C.F.R. §§ 208.4(a), 208.9, 208.10, 208.14(c), 208.19).

³*Id.* at 47102.

⁴*Id.* at 47103.

⁵*Id.* at 47105-06 (Table 1).

⁶*Id.* at 47108, 47122 (Table 5).

⁷*Id.* at 47113.

⁸*Id.* at 47101 ("Effective date: This interim final rule (IFR) is effective July 28, 2026.").

⁹REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 101, 119 Stat. 231, 302-03.

¹⁰INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii).

where no adverse credibility determination is explicitly made, the applicant "shall have a rebuttable presumption of credibility on appeal."¹¹

A paper-only adjudication cannot apply these standards. Demeanor, candor, and responsiveness cannot be assessed from a written filing. The written-versus-oral consistency factor has no referent when the applicant makes no oral statements. Congress did not enact a menu of optional factors that an agency may render inoperable by declining to generate the evidence they require.

The corroboration provision reflects the same premise. Congress provided that "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration," and that where corroborating evidence is required, "such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."¹² Congress thus contemplated a process in which testimony alone could carry an applicant's burden, and in which the adjudicator would determine whether missing evidence could reasonably be obtained. Neither inquiry is possible without asking the applicant during their asylum interview.

The Rule compounds the problem by eliminating the credibility assessment from referral decision letters altogether.¹³ DHS is plainly aware of the statutory credibility provision; it cites the rebuttable-presumption clause in its own preamble.¹⁴ It never asks whether an adjudication that generates no oral statements, and that produces a decision document containing no credibility finding, is consistent with the standards Congress enacted.

Finally, the amended text of 8 C.F.R. § 208.4(a) is internally incoherent. DHS deleted the words "in an interview" while preserving the command that the asylum officer "give the applicant the opportunity to present any relevant and useful information bearing on any prohibitions on filing." The parallel obligation of the immigration judge remains expressly tethered to "a hearing."¹⁵ DHS has retained a guarantee of an opportunity to be heard while eliminating the only forum in which that opportunity was ever provided, and has done so only on the side of the adjudicator with initial jurisdiction.

B. Congress gave asylum officers initial jurisdiction over children's claims so that children would be heard in a non-adversarial setting.

Our concerns are especially acute with respect to unaccompanied children. Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) on a bipartisan basis to address the unique vulnerabilities of children navigating the immigration system. Congress provided that "[a]n asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child," and specified that this jurisdiction applies "regardless of whether filed in accordance with this section or section 235(b)."¹⁶ Congress separately exempted unaccompanied children from the one-year filing deadline.¹⁷

¹¹*Id.*

¹²INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

¹³IFR, 91 Fed. Reg. at 47128 (revising 8 C.F.R. § 208.19).

¹⁴*Id.* at 47105 n.9 (quoting INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii)).

¹⁵*Id.* at 47128 (revising 8 C.F.R. § 208.4(a)).

¹⁶William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(7), 122 Stat. 5044, 5079-80 (codified at INA § 208(b)(3)(C), 8 U.S.C. § 1158(b)(3)(C)).

¹⁷INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E).

That jurisdictional grant is unusual and deliberate. It takes a case that may already be pending before an immigration judge and routes it to USCIS. The only functional reason for Congress's decision to send such cases to USCIS is the non-adversarial interview, which regulation defines as an interview conducted "in a nonadversarial manner" for the purpose of eliciting "all relevant and useful information bearing on the applicant's eligibility for asylum."¹⁸ Congress recognized that children often struggle to articulate persecution claims, gather supporting evidence, or navigate complex proceedings, and it responded by guaranteeing them a specially trained officer in a non-adversarial setting.

The Rule empties that guarantee. A child's application may now be referred on the papers if an asylum officer determines the child is ineligible.¹⁹ DHS acknowledges that USCIS retains jurisdiction over applications filed by unaccompanied children who are already in removal proceedings.²⁰ The result is that a child whose case is already before EOIR may have the USCIS adjudication Congress guaranteed reduced to a file review, and then be returned to an adversarial courtroom to face a DHS attorney and judge — having never spoken to the asylum officer Congress placed in the case for that very purpose.

DHS devotes a single footnote to this. That is not reasoned consideration of a statutory command. At minimum, DHS must explain what a "referral" means mechanically for a child already before an immigration judge, and how a paper-only adjudication can satisfy a jurisdictional grant whose sole operative function is to secure a non-adversarial hearing for children.

C. Congress requires applicants to pay for an adjudication the Rule hollows out, and DHS never examines the staffing Congress funds.

In 2025, Congress imposed a \$100 fee to file Form I-589 and a \$100 annual asylum fee for each year an application remains pending.²¹ DHS invokes those fees twice in support of this Rule: once to argue the change is "consistent with overall efficiency efforts, particularly considering that aliens now need to pay an asylum fee for each calendar year the application is pending," and once to claim as a benefit that "faster processing times could result in saving applicants money."²²

Congress charged applicants for the pendency of an adjudication. DHS's answer to pendency is to eliminate the adjudicatory step for which the charge is levied. Under this Rule, an applicant may pay an annual fee for a process that consists of an electronic scan of the entry date on the Form I-589 followed by a referral letter.²³ DHS nowhere asks whether the revenue Congress authorized supports adjudicatory capacity, or whether it is appropriate to charge applicants annually for a process the agency is simultaneously hollowing out.

Relatedly, and remarkably, the Rule contains no staffing analysis of any kind. DHS does not state the asylum officer capacity required to interview the affected population, what it has requested from Congress, or what Congress has appropriated. DHS evaluated three regulatory alternatives; hiring asylum officers was not among

¹⁸8 C.F.R. § 208.9(b).

¹⁹IFR, 91 Fed. Reg. at 47113.

²⁰*Id.* at 47121 n.79 ("USCIS continues to have jurisdiction over asylum applications filed by aliens who are not in removal proceedings as well as UACs who are in removal proceedings.").

²¹One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025) (codified in relevant part at 8 U.S.C. §§ 1802, 1808); *see* 90 Fed. Reg. 34511 (July 22, 2025).

²²IFR, 91 Fed. Reg. at 47110; *see also id.* at 47124 & n.87.

²³*Id.* at 47111.

them.²⁴ An agency that tells Congress interviewing applicants is no longer possible, while never analyzing the resource Congress controls and funds, has not made its case to the branch that would have to act on it.

II. DHS Unlawfully Bypassed Notice-and-Comment Rulemaking.

The APA requires notice and comment for substantive rules and a 30-day delayed effective date.²⁵ DHS invoked two exceptions: the exception for rules of "agency organization, procedure, or practice," and the exception for rulemaking involving "a military or foreign affairs function of the United States."²⁶ Neither applies.

A. The Rule is substantive, not a rule of agency procedure or practice.

The procedural exception reaches only agency actions that "do not themselves alter the rights or interests of parties," even if they alter "the manner in which the parties present themselves or their viewpoints to the agency."²⁷ A rule is substantive where it encodes a substantive value judgment or substantially alters the rights or interests of regulated parties.²⁸ Three features of this Rule place it on the substantive side of that line.

First, the Rule does not relocate a case between forums; it initiates removal proceedings against people who are not in them. Affirmative asylum applicants are, by definition, individuals not already in removal proceedings.²⁹ A referral is the service of a Notice to Appear, and DHS is explicit that under the Rule "USCIS does not need to wait for ICE to issue the Notice to Appear, but rather USCIS can issue the NTA."³⁰ The Rule thus converts a humanitarian benefits adjudication into a charging decision, made on a paper record, reaching up to 444,724 people with pending applications.³¹ That is not an adjustment to how parties present themselves to the agency. It is the commencement of enforcement proceedings against them.

Second, DHS's own reliance discussion concedes the substantive effect. DHS states that applicants "may have personal interests in sharing sensitive elements of an asylum claim face-to-face with an asylum officer, where for example, someone may be more comfortable and elaborative in a non-adversarial interview setting," and that DHS "recognizes that this element may be important in certain cases."³² If the interview affects how fully and accurately a claim is presented, its elimination affects outcomes, and the change is substantive. DHS cannot simultaneously maintain, in the same section of the same preamble, that the Rule "does not alter their rights or interests."³³

Third, the Rule operates retroactively on pending applications. DHS concedes that an applicant "may have relied on USCIS' practice of interviewing in every case when filing the Form I-589."³⁴ It further acknowledges that applicants who received interview waiver notices stating "that failure to sign the waiver will result in an

²⁴*Id.* at 47125-26.

²⁵ 5 U.S.C. § 553(b), (d).

²⁶ IFR, 91 Fed. Reg. at 47115-16.

²⁷ *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994), *quoted in* IFR, 91 Fed. Reg. at 47115.

²⁸ *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

²⁹ 8 C.F.R. § 208.2(a).

³⁰ IFR, 91 Fed. Reg. at 47110.

³¹ *Id.* at 47103.

³² *Id.* at 47116.

³³ *Id.*

³⁴ *Id.* at 47112.

interview" are nonetheless covered by the Rule.³⁵ A rule that retroactively falsifies a written representation on which applicants ordered their conduct is not a housekeeping measure.³⁶

DHS's analogies to other interview waivers do not hold. DHS points to adjustment of status, Special Immigrant Juvenile petitions, and petitions to remove conditions on residence.³⁷ None of those adjudications involves a claim that removal would expose the applicant to persecution, torture, or death. In none of them does the waiver of the interview itself place the applicant into removal proceedings. A waived adjustment interview produces a decision the applicant may contest from a position of relative stability; a waived asylum interview produces a Notice to Appear.

Finally, the post-promulgation comment period DHS has provided does not cure the defect. An agency may not adopt a rule first and solicit comment afterward, because comments submitted against a rule already in force cannot receive the open-minded consideration the APA contemplates.³⁸

B. The foreign affairs exception does not apply.

DHS invokes the exception for rulemaking involving "a military or foreign affairs function of the United States."³⁹ Its sole support is a February 21, 2025 determination by the Secretary of State, published in March 2025, that "all efforts conducted by any agency of the federal government to control the status, entry and exit of people, and the transfer of goods, services, data, technology, and other items across the borders of the United States, constitutes a foreign affairs function of the United States under the Administrative Procedure Act."⁴⁰

A blanket determination of that breadth is not sufficient. That is not the law. Courts have construed the foreign affairs exception narrowly and required an agency to show that ordinary rulemaking procedures would provoke undesirable international consequences.⁴¹ DHS makes no such showing and does not attempt one.

Nor could it. This Rule governs the internal scheduling of interviews for people already physically present in the United States, many of them for a decade or more. DHS's own data identify 129,525 pending applications filed ten or more years after the applicant's last entry.⁴² Nothing about how USCIS schedules interviews for long-resident applicants implicates relations with foreign governments. The authority DHS cites confirms the point: that case arose from a direct presidential directive during the Iranian hostage crisis.⁴³ Nothing comparable is present here.

³⁵ *Id.* at 47113.

³⁶ *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

³⁷ IFR, 91 Fed. Reg. at 47116 (citing 8 C.F.R. § 245.6).

³⁸ *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002).

³⁹ 5 U.S.C. § 553(a)(1).

⁴⁰ IFR, 91 Fed. Reg. at 47116 (quoting 90 Fed. Reg. 12200 (Mar. 14, 2025)).

⁴¹ *See, e.g., E. Bay Sanctuary Covenant v. Trump*, 993 F.3d 640, 670-71 (9th Cir. 2021); *Zhang v. Slattery*, 55 F.3d 732, 744-45 (2d Cir. 1995).

⁴² IFR, 91 Fed. Reg. at 47105-06 (Table 1).

⁴³ *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980), *cited in* IFR, 91 Fed. Reg. at 47116 n.70.

C. The Rule's Paperwork Reduction Act and Regulatory Flexibility Act treatment compounds the procedural defect.

DHS classifies the accompanying revisions to Form I-589 as "No material or non-substantive change to a currently approved collection," processed through an abbreviated change worksheet rather than full review.⁴⁴ But the substance of the revision is to inform applicants that their initial filing and supporting documentation "may be the only opportunity to meet his or her burden of proof."⁴⁵ Advising respondents that the stakes of an information collection have fundamentally changed, and that no further opportunity to supplement may be provided, is not a non-substantive edit.⁴⁶

DHS likewise certifies that the Rule will not have a significant economic impact on a substantial number of small entities, on the ground that it regulates individuals rather than entities.⁴⁷ DHS acknowledges in the same passage that "there might be indirect impacts to entities that represent the aliens impacted by the rule," and expressly "welcomes comments regarding potential impacts on small entities."⁴⁸ Nonprofit legal service providers and small immigration practices will absorb the shift of hundreds of thousands of matters out of a non-adversarial USCIS process and into removal defense, on compressed and unpredictable timelines. DHS made no attempt to assess that impact.

III. The Rule Is Arbitrary and Capricious.

Independent of the procedural defects, the Rule fails the APA's requirement of reasoned decision-making. An agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.⁴⁹ This Rule does not.

A. DHS reverses the positions it adopted in 1994 and 2000 without confronting them.

In 1994, the agency proposed to amend 8 C.F.R. § 208.9(a) to make asylum interviews discretionary.⁵⁰ After receiving comments, it declined to finalize that change.⁵¹ DHS quotes the disposition in its own preamble: "Accordingly, the present rule is retained and there is no provision for immediate referral of cases, without an interview, to an immigration judge."⁵² DHS further acknowledges that commenters in 1994 raised precisely the concern presented here — that denying an interview "would deprive an alien of the opportunity to verbally articulate his or her claim in a non-adversarial setting."⁵³ The agency considered this policy, heard from the public, and rejected it.

In 2000, the agency moved in the opposite direction, adding the words "in an interview" to 8 C.F.R. § 208.4(a) because it determined that the decision on an untimely filing "could best be made after" the applicant had been given the opportunity, in an interview or a hearing, to present relevant and useful information bearing on the

⁴⁴IFR, 91 Fed. Reg. at 47127 (Table 6) (OMB Control No. 1615-0067).

⁴⁵*Id.* at 47127; *see also id.* at 47112.

⁴⁶44 U.S.C. §§ 3506-3507.

⁴⁷5 U.S.C. § 605(b); IFR, 91 Fed. Reg. at 47126.

⁴⁸IFR, 91 Fed. Reg. at 47126.

⁴⁹5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁰59 Fed. Reg. 14779 (Mar. 30, 1994).

⁵¹59 Fed. Reg. 62284 (Dec. 5, 1994).

⁵²IFR, 91 Fed. Reg. at 47116 n.63 (quoting 59 Fed. Reg. at 62292).

⁵³*Id.* at 47108.

prohibitions on filing.⁵⁴ That was a reasoned finding tied specifically to the one-year filing deadline — the very ground on which DHS expects to refer the largest share of cases under this Rule.⁵⁵

In the current Rule, DHS's entire response to this history is a single sentence: "over 30 years have passed, and DHS now believes that streamlining asylum adjudications is no longer possible while interviewing every asylum applicant."⁵⁶ An agency changing course must display awareness that it is doing so and provide a reasoned explanation, and must give a more detailed justification where its new policy rests on factual findings that contradict those underlying its prior policy, or where its prior policy engendered serious reliance interests.⁵⁷ Both conditions are present. DHS satisfies neither.

B. DHS's estimate of the affected population rests on data drawn from a different population.

DHS estimates that 132,167 future applicants annually may be referred without an interview, a figure composed of 104,932 untimely filings plus 27,235 cases involving a potential bar or adverse discretion.⁵⁸ The 27,235 figure is derived by taking 8.45 percent — described as the share of *negative credible fear determinations* in which asylum officers flagged a potential mandatory bar — and applying it to the 322,312 average annual affirmative filings.⁵⁹

That methodology is indefensible on three independent grounds. The denominator is negative credible fear determinations, a population selected for claims that asylum officers have found are unlikely to succeed and materially different from affirmative filers; DHS concedes the populations differ, noting that credible fear cases involve people "recently arriving at a land border" who receive screening that "may not incorporate full background checks."⁶⁰ A flagged potential bar is not an applicable bar; DHS treats a screening signal as an adjudicated outcome. And DHS's stated concern is that its figure "might be an underestimate," which is the wrong direction of caution when the estimate determines how many people will lose the opportunity to be heard.

Separately, DHS provides no disaggregation of the affected population by nationality, language, age, or any other characteristic. For a rule reaching 444,724 pending applications, that omission is itself a failure of reasoned analysis, and it forecloses any assessment of whether the Rule's burdens fall disproportionately on particular communities.

DHS's premise that untimely filings are unlikely to succeed is also unsupported by its own data. Among untimely-filed applications from Fiscal Years 2021 through 2025 that were actually decided, 14,254 resulted in grants of asylum and 16,870 in referrals.⁶¹ Nearly half of all decided applications in the category DHS treats as presumptively unworthy of an interview resulted in a grant of protection.

⁵⁴*Id.* (citing 65 Fed. Reg. 76121, 76123 (Dec. 6, 2000)).

⁵⁵*Id.* at 47109 (Table 2).

⁵⁶*Id.* at 47116. The same passage attributes the 1994 rulemaking to DHS, which was not created until 2002. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

⁵⁷*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016).

⁵⁸IFR, 91 Fed. Reg. at 47123 & n.85.

⁵⁹*Id.* at 47122 & n.84 (citing 89 Fed. Reg. 103370, 103408 (Dec. 18, 2024)).

⁶⁰*Id.* at 47122.

⁶¹ IFR, 91 Fed. Reg. at 47109 (Table 2)

C. DHS quantifies neither costs nor benefits, and its own data undercuts the premise of urgency.

The accounting statement DHS prepared under OMB Circular A-4 reports "N/A" for monetized benefits, for annualized quantified but unmonetized benefits, and for annualized monetized costs.⁶² Every entry on both sides of the ledger is qualitative narrative. DHS states that it is "unable to quantify" savings to applicants and offers no estimate of the rate at which grantable applications will be erroneously referred.⁶³ OMB designated this Rule significant under Executive Order 12866.⁶⁴ An agency may not assert efficiency gains it declines to measure, against harms it declines to measure, and declare the balance favorable.

DHS's own trend data also undercuts the urgency on which the Rule rests. Affirmative asylum receipts declined in each of the last three fiscal years, from 465,810 in FY 2023 to 423,110 in FY 2024 to 408,181 in FY 2025, and the growth rate of the pending inventory fell from 78 percent in FY 2023 to 7 percent in FY 2025.⁶⁵ DHS nonetheless characterizes the situation as "more than a decade of continuous growth" and an "unprecedented crisis," without acknowledging that its own table shows the curve flattening.⁶⁶

D. DHS rejected alternatives without adequate justification

DHS considered a short-form screening interview of approximately thirty minutes to verify identity, clarify the basic claim and any prohibitions on filing, and ask mandatory bar questions. It rejected that alternative in part on the reasoning that "if an AO determined before the short-form, targeted interview that an alien should be referred to EOIR, there is likely nothing that could have been said in testimony during an interview that would have changed the expected outcome of ineligibility."⁶⁷ That reasoning is circular. The purpose of a screening interview is to test the conclusion drawn from the paper file. DHS rejects the test by assuming the conclusion is correct.

DHS also considered enhanced completeness screening and expanded rejection authority for incomplete filings, allowing applicants to refile with missing information. It rejected that alternative because it "could have inadvertently led to the rejection of filings from vulnerable aliens who face literacy or language challenges, and/or lack access to legal aid," and because it "could have been perceived as reducing access to the asylum process."⁶⁸

DHS declined such a measure out of express concern for applicants with literacy barriers, language barriers, and no access to counsel, and then adopted a measure that makes the written filing potentially dispositive for those same applicants, with no interview and no guaranteed request for evidence. An agency may not identify a vulnerability as disqualifying for one option and disregard it entirely for the option it selects.⁶⁹ If DHS's concern for unrepresented applicants with limited English proficiency was genuine when it rejected that alternative, it cannot be absent from its evaluation of the Rule it chose.

⁶²*Id.* at 47120 (Table 4).

⁶³*Id.* at 47123, 47125.

⁶⁴*Id.* at 47117.

⁶⁵*Id.* at 47122 (Table 5).

⁶⁶*Id.* at 47108.

⁶⁷*Id.* at 47125.

⁶⁸*Id.* at 47125-26.

⁶⁹*State Farm*, 463 U.S. at 43.

E. DHS does not meaningfully address the reliance interests of 444,724 pending applicants.

When an agency changes a policy on which the public has relied, it must assess whether there were reliance interests, consider them, and weigh any competing policy concerns.⁷⁰ DHS concedes the reliance: applicants "have become accustomed to presenting their claims to an asylum officer at a scheduled interview"; the face-to-face setting "may be important in certain cases"; applicants "may have relied on USCIS' practice of interviewing in every case when filing the Form I-589"; and the change to the sequence of discretionary analysis is "a significant departure from its previous long-standing use of discretion."⁷¹

The mitigations DHS identifies are thin to the point of illusory. Requests for evidence are discretionary: DHS "emphasizes . . . that it is not required to issue an RFE in every case," and states that for applications filed after the effective date, "RFEs may be used less frequently."⁷² The stated alternative is a "public web alert" that "will not request or require information from a specific asylum applicant." And the carve-out for applicants who "maintain a lawful basis to remain in the United States" is qualified by the very footnote DHS appended to it, which cites authority for asylum offices to terminate parole by serving a charging document once the asylum application has been adjudicated.⁷³ For a parolee, DHS has asserted authority to dissolve the status that makes the applicant exempt and then refer the applicant. DHS should state plainly whether it will terminate parole in order to render an applicant referable, and at what point in the process the carve-out is assessed.

By placing more individuals in removal proceedings, the IFR will subject many more individuals to mandatory detention. The human cost of detention extends far beyond the individuals detained. When a parent, spouse, or caregiver is detained, families lose their primary source of income, children are separated from a parent for months, and entire households can be pushed into financial and emotional crisis. The IFR will have the effect of creating fear, instability, and trauma in families and communities, which can persist long after detention ends.

DHS's family assessment is unsupported on this record. Section 654 of the Treasury and General Government Appropriations Act, 1999 requires agencies to assess effects on family well-being.⁷⁴ DHS states that it "has no data that indicates that this rule has any impact on family well-being."⁷⁵ Yet Form I-589 covers derivative spouses and children; the regulations contain a dedicated provision governing the treatment of dependents; and DHS's own preamble acknowledges the *Ms. L* settlement class of separated families and their accommodations regarding the one-year filing deadline.⁷⁶ A finding of no family impact on that record is not a reasoned analysis.

IV. The Rule Rests on a Guarantee of Immigration Court Review That DHS's Own Preamble Disclaims.

Every assurance in the Rule that applicants will not be harmed depends on a single premise: that a referred applicant receives de novo review before an immigration judge. DHS states, for example, that even where an applicant who qualifies for an exception to the one-year filing deadline is erroneously referred, "the alien will retain the opportunity to present his or her claim to an IJ de novo."⁷⁷ That premise does not hold, and DHS knows it does not.

⁷⁰*Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020).

⁷¹IFR, 91 Fed. Reg. at 47116, 47115, 47112.

⁷²*Id.* at 47112.

⁷³*Id.* at 47102 & n.2 (citing 8 C.F.R. § 212.5(e)(2)(i)).

⁷⁴Section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681.

⁷⁵IFR, 91 Fed. Reg. at 47127.

⁷⁶8 C.F.R. §§ 208.3(a), 208.9(i); IFR, 91 Fed. Reg. at 47105 n.12 (citing *Ms. L v. ICE*, No. 18-cv-00428 (S.D. Cal.)).

⁷⁷IFR, 91 Fed. Reg. at 47113.

In its own footnote, DHS acknowledges that the Acting Director of EOIR has interpreted Department of Justice regulations to permit immigration judges to pretermite legally deficient asylum applications "without a hearing."⁷⁸ DHS further acknowledges that the Board of Immigration Appeals has confirmed that immigration judges need not conduct "a full evidentiary hearing" on the merits of an asylum application where the factual allegations, viewed in the light most favorable to the applicant, do not establish prima facie eligibility for relief.⁷⁹ DHS then states that "while aliens who are not offered an interview with USCIS are still referred to EOIR, the length and nature of any hearing is determined by the IJ."⁸⁰ In its cost analysis, DHS repeats the point, noting that "some number may be decided by EOIR without a full merits hearing."⁸¹

The consequence is stated plainly in DHS's own document: under this Rule, an applicant may proceed from the filing of an asylum application to a final order of removal without ever being heard by any adjudicator. No interview before an asylum officer. No evidentiary hearing before an immigration judge. DHS has documented that possibility and has not reconciled it with the safeguard on which the Rule's entire fairness rationale depends. That failure is independently disqualifying, and it also provides additional evidence that the Rule does not meet the procedural-rule exception.

Two structural features compound the problem. DHS amended only its own regulations at 8 C.F.R. part 208 and left the Department of Justice's parallel regulations at 8 C.F.R. part 1208 untouched; DOJ neither joined this rulemaking nor is recorded as having concurred in it. And DHS concedes that the Rule "will initially increase the volume of USCIS referrals to EOIR annually, which could then increase EOIR's pending cases backlog," while characterizing the resulting burden as "a redistribution of responsibilities from USCIS to EOIR."⁸² An agency does not discharge its obligation to consider the consequences of its rule by assigning them to a department that did not participate in the rulemaking and has no opportunity to respond in this docket.

V. Conclusion

We, Members of the Congressional Hispanic Caucus and the Congressional Asian Pacific American Caucus (CAPAC) and the undersigned Members of Congress, urge DHS to rescind this interim final rule in its entirety.

Our objections go to the Rule as a whole, not to any individual provision of it. The defects identified in this comment are not confined to particular amendments. The Rule was promulgated without the process the APA requires, on a record that does not support it, in tension with statutes Congress enacted to ensure that asylum seekers and children are heard.

We welcome genuine efforts to address the affirmative asylum backlog. But DHS may not pursue efficiency at the expense of the statutory framework Congress built, the procedural safeguards the APA requires, or this country's decades-long commitment to providing refuge to those fleeing persecution. The Department has ample resources to address the backlog lawfully. The Administration should redirect resources away from expanding detention and removal operations and toward hiring and training the asylum officers necessary to give applicants of all ages a fair opportunity to present their claims, as Congress intended.

⁷⁸*Id.* at 47107 n.22 (citing Memorandum from Sirce E. Owen, Acting Dir., EOIR, *Pretermision of Legally Insufficient Applications for Asylum* (Apr. 11, 2025)).

⁷⁹*Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025), *cited in* IFR, 91 Fed. Reg. at 47107 n.22.

⁸⁰IFR, 91 Fed. Reg. at 47107 n.22.

⁸¹*Id.* at 47125.

⁸²*Id.* at 47103-04.

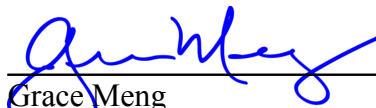
In furtherance of our oversight responsibilities, we further request that the Department provide the following information to Congress: (1) the number of applications referred to EOIR without interview since July 28, 2026, disaggregated by the statutory or discretionary basis for referral and by country of nationality; (2) the number of requests for evidence issued in connection with such referrals, and the number of referrals issued without any request for evidence; (3) the rate at which applications referred without interview have subsequently been granted asylum or other relief by an immigration judge; (4) current asylum officer staffing levels, together with the staffing that USCIS has determined would be necessary to interview the affected population and any related budget requests transmitted to Congress; and (5) any subregulatory guidance issued or planned to implement the Rule, including guidance defining which categories of cases will be referred without interview. We note that DHS has submitted this Rule to Congress and to the Comptroller General pursuant to the Congressional Review Act.⁸³

Thank you for your attention to these concerns.

Sincerely,



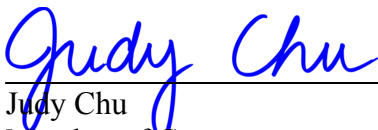
Adriano Espaillat
Chair
Congressional Hispanic Caucus



Grace Meng
Chair, Congressional Asian Pacific
American Caucus



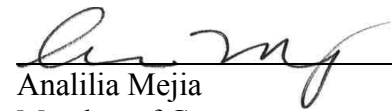
Yvette D. Clarke
Member of Congress



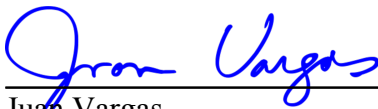
Judy Chu
Member of Congress



Stephen F. Lynch
Member of Congress



Analilia Mejia
Member of Congress



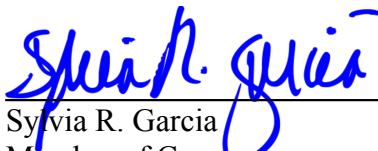
Juan Vargas
Member of Congress



Eleanor Holmes Norton
Member of Congress



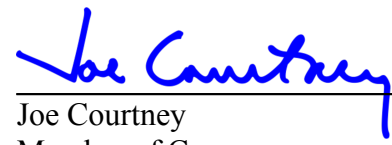
Rashida Tlaib
Member of Congress



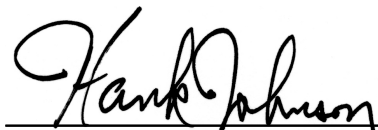
Sylvia R. Garcia
Member of Congress



Greg Casar
Member of Congress



Joe Courtney
Member of Congress



Henry C. "Hank" Johnson, Jr.
Member of Congress



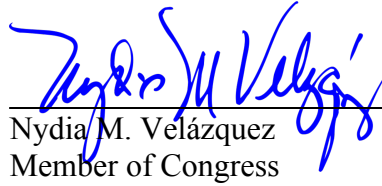
J. Luis Correa
Member of Congress

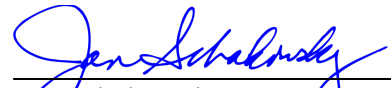


Delia C. Ramirez
Member of Congress

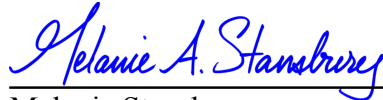
⁸³*Id.* at 47126; 5 U.S.C. §§ 801-808.

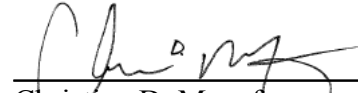

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Melanie Stansbury
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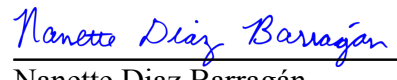

Jesús G. "Chuy" García
Member of Congress


Diana DeGette
Member of Congress


Yassamin Ansari
Member of Congress


Seth Moulton
Member of Congress

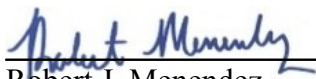

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