September 28, 2026

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Asylum Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: "Affirmative Asylum Referrals Without Interview," DHS Docket No. USCIS-2026-0199; RIN 1615-AD18

America First Legal Foundation ("AFL") submits this comment in support of the Department of Homeland Security's ("DHS") and U.S. Citizenship and Immigration Services ("USCIS") Interim Final Rule, Affirmative Asylum Referrals Without Interview, 91 Fed. Reg. 47,101 (July 28, 2026).[1] AFL supports this rule because it corrects a thirty-year misapprehension that affirmative asylum applicants possess a "right" to an interview before USCIS.[2]

Congress never created such a right, nor does the Constitution require it. The regulatory history and the text of the Immigration and Nationality Act ("INA")[3] both confirm that no such right has ever existed.[4] And the consequences of this misreading, measured in over 1.4 million pending cases and a 7.3-year average processing time,[5] demonstrate why this rule is not merely corrective but necessary.

This comment advances three main arguments. *First*, history shows that the 1994 drafting did not create a substantive right and that the misreading has cost the

[1] Affirmative Asylum Referrals Without Interview, 91 Fed. Reg. 47,101 (July 28, 2026) (to be codified at 8 C.F.R. pt. 208) (DHS Docket No., USCIS-2026-0199; RIN 1615-AD18), https://perma.cc/T7JE-ZDTQ.
[2] 8 C.F.R. §§ 208.10, 208.14(c) (2025).
[3] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537).
[4] *See* INA § 208, 8 U.S.C. § 1158; § 1158(d)(7). The phrase "right to an interview" appeared only in USCIS regulations, *see* 8 C.F.R. §§ 208.10, 208.14(c) (2025), and the INS recognized in 1994 that due process did not require it. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62,284, 62,285 (Dec. 5, 1994) (concluding that "the proposed rule fully recognized the due process rights of aliens[] [b]y preserving asylum and withholding of deportation proceedings before an immigration judge").
[5] 91 Fed. Reg. at 47,109.

asylum system. *Second*, the statutory text and structure confirm that Congress never required an affirmative asylum interview and deliberately chose not to mandate one. *Third*, the rule improves procedural fairness.

I. Interest of the Commenter

AFL submits this comment as an interested person under 5 U.S.C. § 553(c). AFL is a national, 501(c)(3) nonprofit organization working to promote the rule of law, protect civil rights and civil liberties, prevent executive and administrative overreach, ensure due process and equal protection for all Americans, and increase public understanding of the Constitution and the laws of the United States.

AFL regularly participates in administrative rulemaking on matters of significant public concern. AFL has consistently advocated in administrative and judicial proceedings for the faithful enforcement of immigration law. Among AFL's core institutional priorities are the security of American borders, the enforcement of immigration law, and the integrity of the immigration adjudication system.[6]

II. Background

On July 28, 2026, DHS published the Interim Final Rule, Affirmative Asylum Referrals Without Interview, effective immediately. The rule authorizes asylum officers to refer certain affirmative asylum applications directly to the Executive Office for Immigration Review ("EOIR") without conducting an interview, based on the written application, supporting documents, and background-check results.[7] Referral without interview applies when the applicant is not in lawful immigration status, has not already been interviewed, and the asylum officer determines that the applicant is barred from applying for asylum, barred from a grant of asylum, does not merit a favorable exercise of discretion, or is not eligible on the merits.[8] USCIS will continue to interview applicants whose cases it plans to adjudicate on the merits.[9] The rule also removes the prior requirement that referral letters include a credibility assessment and permits asylum officers to make discretionary referrals before completing an eligibility determination.[10]

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[6] *See, e.g.*, Press Release, *America First Legal Supports Trump Administration Efforts to Eliminate Asylum Fraud in the Immigration System*, AMERICA FIRST LEGAL FOUND. (Apr. 24, 2026), https://perma.cc/4EKH-PQ6U; Press Release, *America First Supports DHS Initiative to Stop the Widespread Issuance of Work Permits to Illegal Aliens*, AMERICA FIRST LEGAL FOUND. (Aug. 7, 2026), https://perma.cc/9VLZ-WG47.
[7] 91 Fed. Reg. at 47,106, 47,111.
[8] *Id.* at 47,103, 47,105–07.
[9] *Id.* at 47,102.
[10] *Id.*

DHS issued the rule to address the mounting affirmative asylum backlog.[11] The scope and composition of that backlog—and the systemic costs of the mandatory-interview requirement—are discussed in Part III, *infra.*

III. The Regulatory History and Consequences of the Mandatory-Interview Requirement Demonstrate Why the Interim Final Rule Is Necessary.

The mandatory-interview requirement rests not on a deliberate statutory or regulatory judgment, but on an accident of administrative drafting whose consequences have grown more severe with time. Language introduced in 1994 to address an applicant's failure to appear—not to confer a substantive procedural entitlement—was repeated in later regulations until it hardened into a perceived right to an interview in every affirmative asylum case. Whatever the practical effect of that language in an era of comparatively manageable caseloads, its continued application now forces an overwhelmed system to expend scarce adjudicative resources on interviews that, in many cases, cannot alter the ultimate disposition. The history of the requirement and the costs it now imposes thus point to the same conclusion: the Interim Final Rule does not discard a considered legal safeguard, but corrects a longstanding regulatory misapprehension that has become increasingly incompatible with the fair and efficient administration of the asylum system.

A. The "Right to an Interview" Arose from a Nonappearance Provision and Was Never Intended to Create a Substantive Right.

In 1994, the Immigration and Naturalization Service ("INS") proposed a comprehensive overhaul of the asylum regulations, including a proposal to make asylum interviews discretionary.[12] The agency ultimately chose not to finalize that change, concluding that the "goal of streamlining asylum adjudications could be met without changing the present rule,"[13] but that was a policy choice about resource allocation. With a backlog of approximately 340,000 cases,[14] INS determined that the administrative burden of interviews remained manageable—a decision made in a system with less than one-quarter of today's backlog. In responding to public comments raising due process concerns, the agency concluded that "the proposed rule fully recognized the due process rights of aliens[] [b]y preserving asylum and withholding deportation proceedings before an [immigration judge]."[15]

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[11] *Id.* at 47,109.
[12] *See generally* Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14,779 (Mar. 30, 1994).
[13] 59 Fed. Reg. at 62,292.
[14] 59 Fed. Reg. at 14,780 ("On October 1, 1990, the INS had a backlog of approximately 90,000 asylum claims. Since that date, approximately 250,000 cases have been added to that backlog.").
[15] 59 Fed. Reg. at 62,285.

But something else happened in the 1994 final rule that would prove far more consequential: the phrase "right to an interview" entered 8 C.F.R. Section 208.10,[16] even though the notice for proposed rulemaking never proposed it.[17] The language appeared in a provision addressing the consequences of nonappearance.[18] Over time, that incidental drafting language took on significance beyond the provision in which it first appeared and came to be read as describing a substantive "right." Subsequent rulemakings compounded it: the 1997 interim rule retained the "right to" language,[19] and the 2000 rule re-added "in an interview" to Section 208.4(a).[20] The regulation thus accumulated interview-related language that applicants and their attorneys came to treat as establishing a right, so much so that a complaint challenging this very rule characterizes the elimination of interviews as stripping a "right,"[21] while also admitting that an interview is merely a "tool."[22]

The 1994 final rule also created a built-in waiver mechanism, permitting referral after an interview or nonappearance.[23]

B. The Mandatory Interview Requirement Has Imposed Enormous Costs on the Asylum System.

The cost of this misapprehension is great. At the close of fiscal year 2025, USCIS had over 1.4 million pending affirmative asylum cases, with an average processing time for case resolution reaching 7.3 years.[24] Annual applications reached a high of 465,810 in FY 2023.[25] Thus, the system that the 1994 agency could sustain has been overtaken by the scale of the current immigration crisis.

The composition of that backlog tells an even starker story. Approximately 31 percent of all pending applications were filed more than one year after the applicant's final entry into the United States.[26] Of those, nearly 130,000 were filed more than ten years after the last entry.[27] The mandatory-interview requirement means that each

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[16] *Id.* at 62,292.
[17] *See generally* 59 Fed. Reg. at 14,779.
[18] 59 Fed. Reg. at 62,292 ("the failure without good cause of an applicant to appear for a scheduled interview under § 208.9(a) may be deemed to constitute a waiver of the right to an interview with an asylum officer or, in the case of an applicant who is a stowaway . . . .").
[19] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,341 (Mar. 6, 1997).
[20] Asylum Procedures, 65 Fed. Reg. 76,121, 76,134 (Dec. 6, 2000).
[21] *Immigration Equality, et al., v. Mullin*, No. 1:26-cv-02921, ECF No. 1, at 21 (D.D.C. filed Aug. 19, 2026).
[22] *Id.* at 1.
[23] 59 Fed. Reg. at 62,293.
[24] 91 Fed. Reg. at 47,108.
[25] *Id.*
[26] *Id.* at 47,103.
[27] *Id.* at 47,105 (Table 1).

of these applicants is scheduled to consume an asylum officer's time[28] for a non-adversarial interview—regardless of whether the case has any prospect of success.

The empirical evidence confirms the waste. Over the past five fiscal years, approximately 77 percent of untimely-filed asylum applications were referred to EOIR for failure to meet the one-year filing deadline.[29] Meanwhile, 94 percent of untimely-filed applications are still pending an interview or adjudication.[30] In other words, for three-quarters of the untimely cases that actually reached an interview, the interview contributed little or no adjudicative value: the asylum officer conducted the interview, identified the filing-deadline bar that was almost always ascertainable from the written record, and referred the case to EOIR—exactly what the rule would accomplish without the interview.

IV. The Statutory Text and Structure Confirm No Interview Requirement.

Congress has never required an interview on an affirmative asylum application.

When Congress enacted Section 208 in 1980, it directed the Attorney General to "establish a procedure" for considering asylum applications and said nothing about interviews.[31] The INS adopted an interview practice by regulation in 1994. Two years later, Congress comprehensively rewrote Section 208 through the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), and again said nothing that would require an affirmative interview.[32] The amendments authorized the Attorney General to establish, by regulation, "any other conditions or limitations on the consideration of an application for asylum," and added a timing provision that uses the phrase "initial interview *or* hearing" (emphasis added).[33] The authority to set conditions is not a requirement that every applicant be interviewed.

IIRIRA also added a timing rule. Absent exceptional circumstances, "the initial interview or hearing on the asylum application shall commence not later than 45 days after the date the application is filed."[34] Congress used both words because some asylum applications proceed before an asylum officer and some proceed before an immigration judge. Congress's decision to mention an interview in a deadline is not a decision to require one in every affirmative case.

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[28] *Id.* at 47,123.
[29] *Id.* at 47,109.
[30] *Id.*
[31] Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (Mar. 17, 1980).
[32] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, div. C, 110 Stat. 3009–546.
[33] INA § 208(d)(5)(A)(ii), (d)(5)(B); 8 U.S.C. § 1158(d)(5)(A)(ii), (d)(5)(B).
[34] 8 U.S.C. §1158(d)(5)(A)(ii).

In IIRIRA, Congress required a credible fear interview for certain aliens.[35] It imposed no such requirement in Section 208. "[W]here Congress includes particular language in one section but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Congress expressly mandated interviews in four other INA provisions: conditional permanent resident interviews,[36] immigrant investor interviews,[37] visa interviews,[38] and credible fear interviews.[39] Thus, Congress knew how to require interviews, yet it chose not to for affirmative asylum applicants.

The Homeland Security Act of 2002 ("HSA") reinforces this conclusion. When Congress transferred the affirmative asylum adjudication function from the Attorney General to the Secretary of Homeland Security, it transferred the entire apparatus.[40] Nothing in the transfer provision conditioned DHS's authority on maintaining any procedural requirement, and DHS did not inherit a statutory obligation to continue it.[41]

V. The Interim Final Rule Improves Procedural Fairness.

Opponents of this Interim Final Rule will frame it as a reduction in process. The opposite is true. The blanket interview requirement does not protect applicants. It harms them by forcing every case, regardless of the merits, through the same procedural channel. Part A explains how that one-size-fits-all requirement injures the very applicants it purports to protect. Part B shows how the rule replaces that rigid requirement with case-specific procedures that match process to need. And Part C

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[35] *Id.* §1225(b)(1)(B).

[36] INA § 216(c)(1)(B), 8 U.S.C. § 1186a(c)(1)(B) (as added by Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(a), 100 Stat. 3537).

[37] INA § 216A(c)(1)(B), 8 U.S.C. § 1186b(c)(1)(B) (as added by Immigration Act of 1990, Pub. L. No. 101-649, § 121(b)(1), 104 Stat. 4990).

[38] INA § 222(h)(1), 8 U.S.C. § 1202(h)(1) (as added by Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5301(a), 118 Stat. 3736).

[39] INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) (as added by IIRIRA § 302(a), 110 Stat. 3009-579).

[40] Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2135, 2195 (codified at 6 U.S.C. § 271(b)) (transferring from the Commissioner of INS to the Director of USCIS "[a]djudications of asylum and refugee applications" along with "all personnel, infrastructure, and funding" supporting those functions).

[41] *See also* INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (as amended by REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 101(a), 119 Stat. 303, vesting "the Secretary of Homeland Security or the Attorney General" with authority over asylum adjudication); 6 U.S.C. § 271(a)(3) (conferring authority on the Director of USCIS to establish "policies for performing [immigration adjudication] functions").

demonstrates that referral to an immigration judge is not the end of the road but the beginning of an adversarial proceeding with broader remedial authority.

A. The Interview Requirement Harms the Applicants It Purports to Protect.

The interview requirement treats every affirmative asylum application as though it presents the same procedural need. The Due Process Clause does not demand identical procedures for every claimant; it demands that procedures align with the nature of the claim and the risk of erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

When the question is whether an application was filed within the statutory deadline—a record-based determination—an interview adds very little. The same is true where the record discloses a mandatory criminal bar or where the applicant's own submissions establish ineligibility or the written record[42] already contains what the asylum officer needs to make those determinations. Giving these cases the same interview as a case in which credibility is genuinely contested does not ensure equal procedural protection but dilutes it. The costs of that dilution are documented in Part III.[43]

B. The Rule Tailors Procedure to Each Case.

Procedural fairness does not require every applicant to receive the same procedure; it requires the agency to use procedures that fit the case and protect against erroneous decisions. *Mathews*, 424 U.S. at 335. By replacing a blanket interview mandate with officer discretion, the rule preserves live testimony where it can clarify disputed facts while avoiding interviews that add little to record-based determinations of statutory bars or other threshold ineligibility. That flexibility improves fairness in two ways: it prevents applicants with no viable path to relief from being delayed by a formality that cannot change the outcome, and it allows USCIS to devote officer time to cases in which an interview may materially assist adjudication. The rule does not eliminate the tools needed to make that judgment. Indeed, USCIS retains discretion to issue a request for evidence, schedule an interview whenever appropriate, and grant asylum after an interview where the record supports it. The rule therefore replaces uniformity for its own sake with case-specific process—more appropriate procedures for cases that require an interview and a faster path to the proper forum for cases that do not.

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[42] 8 C.F.R. § 208.9(f)(1).

[43] *See* 91 Fed. Reg. at 47,109; Part III, *supra.*

C. Referral Provides More Process, Not Less.

For the applicant who is referred, the procedural protections do not end. Referral is not a denial of asylum. Once DHS files the charging document, the immigration judge obtains jurisdiction to consider the asylum application anew. In removal proceedings before an immigration judge, the applicant may testify under oath, be represented by counsel, present and challenge evidence in an adversarial setting, and receive a written decision subject to appellate review by the Board of Immigration Appeals ("BIA").[44] Depending on the applicant's circumstances, the immigration judge may also consider forms of relief that USCIS has no authority to grant—withholding of removal under INA § 241(b)(3) and cancellation of removal under INA § 240A. The referred applicant receives a fuller proceeding before an immigration judge who has broader remedial authority.

VI. Conclusion

Congress has never required an affirmative asylum interview. The INA's text, its structure, and the deliberate omission of any interview mandate confirm as much. What existed was a regulatory practice that over three decades calcified into a perceived entitlement the statute does not support, and the Constitution does not demand.

More than 1.4 million cases sit in a backlog that grows with each year the interview requirement remains in place. For the vast majority of those cases, the interview changes nothing: the asylum officer conducts it, identifies a statutory bar, and refers the applicant to the very forum that will decide the claim. The Interim Final Rule directs scarce resources toward cases in which an interview serves a genuine purpose and strengthens the procedural protections available to every applicant through the adversarial system.

AFL urges DHS to finalize this rule without delay.

Dated: September 28, 2026

Respectfully submitted,

/s/ *Amelia A. Gradick*
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave SE #231
Washington, D.C. 20003

[44] INA § 240, 8 U.S.C. § 1229a.