

## DECLARATION OF AARON REICHLIN-MELNICK

1. I, Aaron Reichlin-Melnick, make the following declaration based on my personal knowledge and declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct.
2. I am a policy analyst at the American Immigration Council (“Immigration Council”), a nonprofit and non-partisan organization whose mission includes the use of facts to educate the public on the important and enduring contributions that immigrants make to America. At the Immigration Council, I track and analyze immigration-related statistics produced by the Department of Homeland Security (“DHS”) and the Executive Office for Immigration Review (“EOIR”), including trends in the processing of asylum seekers at the border and their outcomes once placed in removal proceedings.
3. I am familiar with the universe of relevant public statistics published by DHS and EOIR. Although not formally trained in statistics, I am familiar with the methodology that DHS and EOIR use to produce statistics relating to the processing of asylum seekers at the border and to the outcomes of immigration court proceedings. I am also the author of a forthcoming Immigration Council publication on appearance rates of asylum seekers.
4. In preparation for this declaration I have extensively reviewed all public material produced by DHS in support of the Migration Protection Protocols (“MPP”). In my professional opinion, DHS makes several claims about asylum seekers in support of the MPP which are not supported by the government’s own data.
5. First, DHS repeatedly claims that asylum seekers are highly likely to abscond once admitted into the United States. *See Secretary Kirstjen M. Nielsen Announces Historic Action to Confront*

*Illegal Immigration*, DHS.GOV, Dec. 20, 2018, <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> (“Dec. 20 Nielsen Statement”) (statement by Nielsen that under the MPP, asylum seekers “will no longer be able to disappear into the United States, where many skip their court dates.”); *Migration Protection Protocols*, DHS.GOV, Jan 24, 2019, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> (“Jan. 24 Announcement”) (asylum seekers “will no longer be released into the country, where they often ... disappear before an immigration judge can determine the merits of any claim”).

6. As laid out below, these claims from DHS are not supported by the government’s own data. EOIR’s own data show that less than 15 percent of asylum seekers referred to immigration court through the credible fear process between 2008 and 2018 were issued an order of removal for failure to appear. In addition, independent research by Professor Ingrid Eagly (and published by the Immigration Council) on asylum-seeking families released from detention between 2001 and 2016 shows that families—who constitute the majority of recent asylum seekers—were *more* likely to appear in court than others individuals released from ICE detention.

7. Second, DHS characterizes most recent asylum seekers as having non-meritorious or fraudulent claims. *See id.* (alleging a “dramatic increase” in “fraudulent asylum claims”); *id.* (claiming that “[i]n fact, approximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious by federal immigration judges”); Dec. 20 Nielsen Statement (claiming that, “in fact, *nine out of ten asylum claims are not granted by a federal immigration judge.*”) (emphasis in original). Indeed, DHS listed a “decline” in “false asylum claims” as one of five “anticipated benefits” of the MPP. *Id.*

8. Data produced by both EOIR and DHS demonstrate that there is no evidentiary basis for this claim. As discussed below, asylum seekers from Northern Triangle countries (El Salvador,

Guatemala, and Honduras) win asylum or are granted an alternative form of relief at rates more than double what DHS claims. Many others are unable to win asylum due to exogenous factors such as lack of counsel that are unrelated to the merits of their claim for asylum. In addition, lengthy backlogs in immigration court mean that the ultimate success rate of current asylum seekers will not be known for years to come.

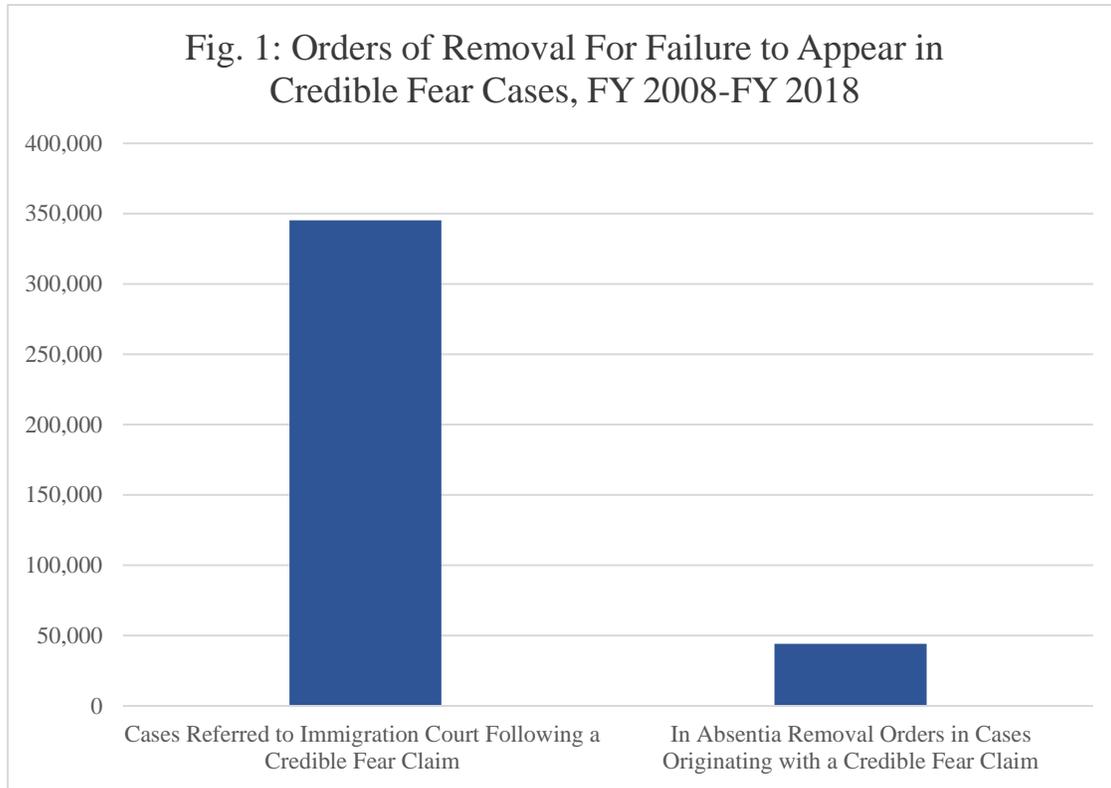
### **A Significant Majority of Asylum Seekers Appear in Court**

9. When a respondent in immigration court fails to appear, an immigration judge will generally order the respondent removed for failure to appear.<sup>1</sup> Over the last decade, an order of removal for failure to appear was issued in an estimated 12.5 percent of cases originating with a credible fear claim. From Fiscal Year (FY) 2008 through FY 2018, a total of 345,356 cases were referred to the immigration courts following a credible fear claim (see Fig. 1). *See EOIR, Rates of Asylum Filings in Cases Originating with a Credible Fear Claim* (Nov. 2, 2018), available at <https://www.justice.gov/eoir/page/file/1062971/download>. Over the same time period, immigration judges issued 44,269 orders of removal in absentia for failure to appear in cases originating with a credible fear claim (see Fig. 1). *See EOIR, In Absentia Removal Orders in Cases Originating with a Credible Fear Claim* (Nov. 28, 2018), available at <https://www.justice.gov/eoir/page/file/1116666/download>. Thus, over the past decade, evidence suggests that at least 87.5 percent of asylum seekers who went through the credible fear process appeared in immigration court for their scheduled removal proceedings.<sup>2</sup>

---

<sup>1</sup> 8 C.F.R. 1003.26(c) provides that when a respondent “fails to appear, the Immigration Judge shall order the alien removed in absentia if” the government proves by clear and convincing evidence that the respondent is removable and that the respondent received notice of the hearing.

<sup>2</sup> It is possible—though rare—that a respondent in immigration court can be ordered removed in absentia more than once. Similarly, it is possible—though rare—that a respondent may have a case terminated without prejudice which is then filed a second time. As a result, the 345,356 cases originating with a credible fear claim and 44,269 orders of



10. Importantly, even the issuance of a removal order for failure to appear does not mean that the asylum seeker absconded. Many immigrants fail to appear in court through no fault of their own, either because they were not properly served with a hearing notice or because an extraordinary circumstance prevented their appearance. In those situations, individuals may file a motion to reopen, *see* 8 C.F.R. § 1003.23(b)(4); *see generally* Beth Werlin, *Practice Advisory: Rescinding An In Absentia Order of Removal* (2010), available at [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/lac\\_pa\\_092104.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_092104.pdf).

11. Research suggests that a significant number of respondents successfully overturn an order of removal for failure to appear. According to an analysis by the Transactional Records Access

---

removal for failure to appear do not *necessarily* correspond one to one with individual respondents. Nevertheless, given the rarity of both of those circumstances, it is extremely likely that the appearance rate is near 87.5 percent.

Clearinghouse (TRAC), a research center which analyzes immigration court data, failure to appear rates drop when taking into account whether an immigrant successfully reopens a removal proceeding following an order of removal for failure to appear. Accounting for cases in which a removal order for failure to appear is overturned “significantly impacts and reduces the [failure to appear] rates.” *See* TRAC, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?*, at fn 7 (Sept. 14, 2016), available at <https://trac.syr.edu/immigration/reports/438/>. Unfortunately, as TRAC notes, EOIR does not account for such cases; instead, EOIR only tracks the “initial case completion” and does not account for subsequent actions such as a motion to reopen. *Id.*

12. Importantly, not every asylum seeker who arrives at the border and requests humanitarian protection completes the credible fear process. Some asylum seekers who arrive at the U.S.-Mexico border are issued a Notice to Appear and released into the United States without going through the credible fear process. Therefore, these individuals are not included in the 87.5 percent statistic provided above. Because EOIR does not publish data specific to this group of asylum-seekers,<sup>3</sup> alternative estimates are necessary to determine appearance rates.

---

<sup>3</sup> EOIR does publish a figure labeled “in absentia rates” which includes a sub-total for asylum-seekers. But this figure does not actually represent the rate at which immigrants fail to appear in removal proceedings. *See* EOIR, *Statistics Yearbook: Fiscal Year 2017*, at 34 (2018) (hereinafter “2017 Statistics Yearbook”), available at <https://www.justice.gov/eoir/page/file/1107056/download>. Instead, EOIR’s figure is the number of orders of removal for failure to appear divided by the number of initial case completions—either a grant of relief or a removal order—in the relevant fiscal year. For asylum seekers specifically, EOIR calculates the “in absentia rate” by dividing the number of orders of removal for failure to appeal by the number of case completions where an asylum application was filed. EOIR’s use of initial case completions as the denominator in these equations yields a misleading result. By examining only *initial case completions*, EOIR neglects to account for the many immigrants who appeared in court in ongoing cases that have not yet reached completion. Because tens of thousands of immigrants appear in court each year but do not have a case completed, EOIR’s “in absentia” number does not represent the actual rate at which immigrants missed court. However, the EOIR case completion methodology is not entirely without benefit. One argument DHS made in support of the MPP is that asylum-seekers “disappear into the U.S. before a court issues a final decision on whether they will be ... provided protection.” *See* Jan. 24 Announcement. But orders of removal for failure to appear were issued in only 8.2 percent of initial case completions between FY 2013 to FY 2017 with an asylum application; the vast majority of asylum seekers appeared in court for a final decision on their application. *See* 2017 Statistics Yearbook at 34.

13. In a groundbreaking report analyzing EOIR data from 2001-2016, the Immigration Council found that 86 percent of all families released from immigration detention had a perfect court attendance rate. Ingrid Eagly, Steven Shafer, & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention* (2018), available at <https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention>. For families who managed to obtain counsel, the attendance rate rose to 96 percent. *Id.* at 23. This finding is particularly relevant given the rise in families seeking asylum in 2018.

**Asylum Seekers from Northern Triangle Countries are Granted Asylum or Otherwise Permitted to Remain at More Than Twice the Rate Suggested by DHS**

14. In the DHS FAQ accompanying the January 24th rollout of the MPP at the San Ysidro port of entry (“POE”), DHS declares that the MPP is necessary due to an “unprecedented number of [] fraudulent asylum claims.” DHS’s sole support for this serious accusation is a claim that “[A]pproximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious by federal immigration judges.”<sup>4</sup> See January 24 Announcement. However, the government’s own data shows no such thing.<sup>5</sup> As detailed below, statistics

---

<sup>4</sup> In the Dec. 20 Nielsen Statement, DHS made another false claim: that “nine out of ten asylum claims are not granted by a federal immigration judge.” In FY 2017, immigration judges decided 43,136 cases in which an asylum application had been filed, granting 24.7 percent, denying 41.0 percent, and resolving the remaining 34.3 percent without issuing decision on merits of the asylum application. 2017 Statistics Yearbook, *supra* at 26.

<sup>5</sup> Although the government provides no source for this assertion in the MPP FAQ, a related statistic was provided in the interim final regulation (IFR) implementing the ban on asylum for individuals subject to a Presidential Proclamation barring entry. See *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov 9, 2018). In the Federal Register notice implementing the IFR, the government noted that there were 20,784 initial case completions in immigration court in FY 2018 for cases originating with a credible fear claim from a Northern Triangle national, and only nine percent of those initial case completions involved a grant of asylum. See *id.* at 55,946. That calculation is flawed for at least two reasons. First, 62,609 Northern Triangle nationals went through the credible fear process in FY 2018 alone. See USCIS, Monthly Credible and Reasonable Fear Nationality Reports (Nov. 16, 2018), available at [https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED\\_CFandRFstats09302018.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf). Considering only the

produced by EOIR show that in FY 2018 over 25 percent of Northern Triangle nationals were granted asylum or otherwise permitted to remain in the United States.

15. In FY 2018, out of 20,524 decisions issued for asylum seekers from the Northern Triangle, asylum was granted in 23.5 percent of cases of individuals from El Salvador, 21.2 percent of Hondurans, and 18.8 percent of Guatemalans. *See* Syracuse University, TRAC, *Asylum Decisions and Denials Jump in 2018*, at Table 1 (Nov. 29, 2018), available at <https://trac.syr.edu/immigration/reports/539/> (see Table 1). Many more individuals were granted some alternative form of relief (such as statutory withholding of removal or protection under the Convention Against Torture) or were otherwise permitted to remain in the United States. In total, 31.1 percent of individuals from El Salvador were granted asylum or otherwise permitted to remain, compared to 23.9 percent of Hondurans, and 24.9 percent of Guatemalans. (See Table 1).

**Table 1: FY 2018 Grant Rates in Cases with An Asylum Application**

	<b>Granted Asylum</b>	<b>Granted Asylum or Otherwise Permitted to Remain</b>
<b>El Salvador</b>	23.5 percent	31.1 percent
<b>Honduras</b>	21.2 percent	23.9 percent
<b>Guatemala</b>	18.8 percent	24.9 percent

16. Moreover, DHS's claim that immigration judges *denied* 9 out of 10 asylum applications from Northern Triangle nationals is completely inaccurate. *See* January 24 Announcement; Dec. 20 Nielsen Statement. In reality, the rates of denials on the merits for Northern Triangle nationals

---

results from the 20,784 initial case completions in FY 2018—which include cases begun in previous years—thus paints a distorted picture of the true asylum grant rate, because it does not account for the *tens of thousands* of asylum cases that have not yet concluded. *See* ¶ 18 *supra*. Second, the cases the government relied on for its calculation—the cases decided in FY 2018—are disproportionately removals because the immigration courts are able to issue removal orders quickly but often take years to grant relief. That, in turn, is because removal orders can be issued without individual hearings, and because detained cases move more quickly than nondetained cases and are disproportionately more likely to result in removal. *See* ¶¶ 22-24 *supra*. Thus, when substantially more cases enter the system than can be completed in a single year, any snapshot of case completions is disproportionately—and misleadingly—tilted towards removals.

are barely above a majority. In FY 2018, denials on the merits were issued in only 52.8 percent of cases from Northern Triangle nationals (15,695 out of 27,032 total completed cases). *See* EOIR, *Asylum Decision Rates by Nationality* (Oct. 24, 2018), available at <https://www.justice.gov/eoir/page/file/1107366/download>. In the remaining 47.2 percent of cases, the respondent was either granted asylum, denied asylum but granted withholding of removal or protection under the Convention Against Torture, or the case was resolved without a merits decision on the application—for example, because the respondent was granted an alternate form of relief and abandoned the asylum application. *Id.*

17. Finally, due to the size of the immigration court backlogs, it will take years to determine the ultimate asylum grant rate for current families seeking asylum. In 2018, DHS examined enforcement outcomes for each person who arrived at the U.S.-Mexico border in 2014, determining their status at the end of FY 2017. *See* Office of Immigration Statistics, *2014 Southwest Border Encounters: Three-Year Cohort Outcomes Analysis* (2018) (hereinafter “2014 Cohort Analysis”), available at [https://www.dhs.gov/sites/default/files/publications/18\\_0918\\_DHS\\_Cohort\\_Outcomes\\_Report.pdf](https://www.dhs.gov/sites/default/files/publications/18_0918_DHS_Cohort_Outcomes_Report.pdf). Because the majority of FY 2014 asylum seekers’ cases—51 percent of nearly 60,000 cases—were still pending by the end of FY 2017, *id.* at 7, it was impossible to determine what percent of cases would eventually be found meritorious.<sup>6</sup>

18. More than 210,000 cases originating with a credible fear claim are still pending in immigration court. *See* EOIR, *Pending I-862 Proceedings Originating With a Credible Fear*

---

<sup>6</sup> The backlog has a similar effect on EOIR’s calculated “in absentia rate.” *See* note 3. Cases involving removals for failure to appear will generally be completed years earlier than in cases where relief is sought. *See* note 5. Because the vast majority of current cases are not completed within a year, this front-loading greatly distorts EOIR’s reported “in absentia rate.” In FY 2017, there were 291,258 new cases filed and 149,581 initial case completions, including 41,384 orders of removal for failure to appear. *See* 2017 Statistics Yearbook, at 10, 34. Despite those 41,384 orders of removal representing only 14.2 percent of new cases filed, by relying on initial case completions alone EOIR reported an “in absentia rate” of 28 percent. *Id.* at 33. A similar effect likely occurs with asylum grant rates.

*Claim and All Pending I-862s* (Jan. 6, 2019), available at

<https://www.justice.gov/eoir/page/file/1112996/download>. Given the current size of the backlog, any DHS claims that the families currently arriving at the border are more likely to be denied asylum than families in the past are pure speculation; we will likely not know the overall asylum grant rate of the current wave of families arriving at the border for years to come.

**Grant Rates Do Not Reflect Whether Asylum Seekers Have a Genuine Fear of Persecution**

19. In support of the MPP, DHS claimed that a low asylum grant rate for Northern Triangle nationals indicates that most asylum seekers are “fraudulent” or exploiting “asylum loopholes.” *See* Dec. 20 Nielsen Statement. However, asylum grant rates are an imperfect metric for determining how many asylum seekers have meritorious claims.<sup>7</sup>

20. Many exogenous factors have a significant impact on an asylum seeker’s ability to win asylum. The two most powerful such factors are (1) access to counsel, and (2) whether the individual was detained at the time of their removal proceedings.

21. Asylum grant rates for Northern Triangle nationals differ significantly between represented and unrepresented individuals. From FY 2012 to FY 2017, immigration judges decided 37,670 cases asylum applications from Northern Triangle nationals. TRAC, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, at Table 2 (Nov. 28, 2017). Out of those cases, 10,192 applicants (27.1 percent) were forced to proceed pro se. *Id.* Disparities in asylum grant rates were significant between those two groups. For example, out of 10,983 asylum applications

---

<sup>7</sup> Asylum grant rates are also an imperfect metric for determining whether individuals asking for asylum have a genuine fear of harm in their home countries, despite DHS’s unsupported claim that many individuals seeking humanitarian protection are “fraudsters” who “exploit[] asylum loopholes” by claiming a fear of return. *See, e.g.,* Dec. 20 Nielsen Statement. Many individuals are denied asylum and ordered removed despite an immigration judge’s acknowledgement that the person has a genuine fear of return and may indeed suffer harm upon return. This is because even asylum-seekers with a well-founded fear of persecution may nevertheless be unable to win asylum if the persecutor’s motive does not fall within the statutory grounds for asylum. *See generally* 8 U.S.C. § 1182.

adjudicated for Guatemalans between FY 2012 and FY 2017, pro se respondents were denied asylum in 95.1 percent of cases, compared to 68.4 percent of cases where the respondent had counsel. *Id.* Lack of representation continues to be a problem for asylum-seekers; in FY 2018, respondents went unrepresented in 20.2 percent of all completed asylum cases. EOIR, *Current Representation Rates* (Oct. 31, 2018), available at <https://www.justice.gov/eoir/page/file/1062991/download> (last accessed Feb. 13, 2019).

22. Detention is another serious impediment to asylum seekers. To request asylum, an individual must submit in English a copy of Form I-589, Application for Asylum. This may be an insurmountable obstacle to individuals without counsel who don't speak English or who are illiterate. Many pro se respondents in detention are unable to submit an asylum application solely because of language barriers. Even when a pro se respondent manages to complete Form I-589 with the assistance of a fellow detainee who speaks English, translation errors or legal mistakes made by the fellow detainee may end up prejudicing the asylum seeker's case and lead to a denial.

23. Detention also presents serious obstacles to obtaining counsel. A study of 1.2 million removal proceedings between FY 2007 and FY 2012 found that only 14 percent of detained immigrants acquired counsel, compared to roughly two-thirds of immigrants outside of detention. *Id.* Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court 2* (2016), available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>. During that time period, only three percent of unrepresented detainees applied for relief from removal such as asylum, compared to 32 percent of those with counsel. *Id.*

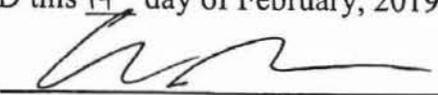
24. Detention also presents other difficulties to winning asylum, including the difficulties of detention itself. Many asylum seekers abandon their claim to asylum and accept an order of

deportation just to get out of detention. *See, e.g., Tina Vasquez, A Diabetic Migrant Was Taken Into ICE Custody—Then They Trashed Her Medication*, REWIRE NEWS (Jul. 10, 2017) (profiling an asylum seeker who chose to accept deportation following deplorable conditions in ICE detention). Even where asylum seekers persist in their cases, detention makes obtaining evidence more difficult. These structural issues likely have a significant effect in lowering asylum grant rates for all asylum seekers, not just those from Northern Triangle countries. For these reasons alone, DHS’s claim that high asylum denial rates indicate an “unprecedented” level of asylum fraud are without merit.

### Conclusion

25. The MPP represents the largest change in the processing of asylum seekers since the 1980 Refugee Act was passed. To justify such a radical change from prior practice, DHS offered a series of claims about asylum seekers who have recently arrived at the U.S.-Mexico border. However, these claims are largely incorrect. As immigration court data shows, over the past decade respondents processed through the credible fear process appeared in court at least 87.5 percent of the time, and asylum seekers from Northern Triangle countries were granted asylum or otherwise permitted to remain in the United States at more than twice the rate suggested by DHS. Finally, the DHS claim that low asylum grant rates correspond to high asylum fraud rates is not supported by any evidence.

EXECUTED this 17<sup>th</sup> day of February, 2019.

  
AARON REICHLIN-MELNICK