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RE: RIN 1125–AA93; EOIR Docket No. 19–0010; A.G. Order No. 4843–2020,
Public Comment Opposing Proposed Rules on Procedures for Asylum and Withholding of Removal

Our organization, the Immigrant Law Center of Minnesota (ILCM), submits this comment urging the Department of Justice (DOJ) to withdraw these proposed rules in their entirety. The Notice of Proposed Rulemaking (NPRM) would further eviscerate procedural protections for asylum seekers in removal proceedings, making it more difficult for bona fide asylum seekers to find safety in the United States.

The Immigrant Law Center of Minnesota ("ILCM") enhances opportunities for immigrants and refugees through legal representation for low-income individuals, and through education and advocacy with diverse communities. ILCM serves immigrants and refugees residing in the state of Minnesota who earn less than 187.5 percent of federal poverty guidelines. In 2019, ILCM served clients coming from 115 countries, with 36 percent of ILCM clients originating from Mexico, 21 percent from countries in Central and South America, 20 percent from countries in Asia, 20 percent from countries in Africa, and the remainder from countries in Europe, Oceania, and from Canada.

ILCM provides a wide range of legal services to low-income immigrants and refugees, including representation of families seeking reunification, of immigrants applying for naturalization, of refugees and asylum seekers and their families, and of unaccompanied children seeking Special Immigrant Juvenile Status.

The proposed rule would create a 15-day filing deadline for asylum applications for those in asylum-only proceedings, making it very difficult to obtain counsel or to fully develop their asylum claims. Likewise, the proposed rule would require immigration judges to adjudicate most asylum applications within 180 days of the date the application is filed, again making it more difficult for asylum seekers to find counsel or fully prepare their cases.

The rule would further require judges to reject asylum applications for minor errors in completing the form, or for failing to pay the asylum fee, potentially making the asylum seeker waive their ability to ever seek asylum.

The proposed rule would fundamentally alter the role of the immigration judge by allowing judges to submit their own evidence in asylum proceedings, and by privileging government submissions of evidence with a strong presumption of accuracy.

We strongly object to these proposed changes and we further object to the mere 30-day time period to respond to these changes.

Because these regulations would make multiple changes to established practices, we are not able to comment on every proposed change. The fact that we have not discussed a particular proposed change to the law in no way means that we agree with it; it simply means we did not have the resources or the time, as explained below, to respond to every proposed change.

The unprecedented frequency and scope of rulemaking during the past year, as well as ongoing litigation on these rules makes it impossible to adequately comment on any single rule. We cannot know which proposed rules will ultimately be published, how they might be altered in their final form, and what their aggregate effect may be.

One example illustrates how this affects comment on this currently-proposed rule. At present, asylum seekers pay no fee because of injunctions halting collection of the proposed $50 filing fee. (*See* 85 Fed. Reg. 11866; preliminary injunction in ILRC v. Wolf, filed 9/29/2020; and preliminary injunction in NWIRP v. USCIS, filed 10/8/2020.) Whether or not this fee is ultimately imposed on asylum seekers will have serious implications for the application of the rule considered here.

We Object to DOJ Allowing Only 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)

Especially during this time of COVID-19, our resources, and the resources of other legal representatives of immigrants, are stretched to the breaking point. We have less access to our offices and to the resources needed to comment on this NPRM. We have not had full access to our offices since early March.

The extensive changes being proposed through rapid-fire, staggered rulemaking make it impossible for the public to fully comprehend the interplay among the myriad proposed rules and therefore deny us our right to adequately comment on the effect of the proposed rules in this NPRM. Specifically,

1) The NPRM issued on June 15, 2020 titled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" 85 Fed. Reg. 36264 (June 15, 2020), proposed the most sweeping changes to asylum eligibility since the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Without knowing how the agencies may alter that proposed rule based on the 88,933 comments they received,[1] it is impossible to adequately comment on the current proposed rule.

2) The NPRM issued by the Executive Office for Immigration Review (EOIR) on August 6, 2020 titled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 52491 (Aug. 26, 2020), would dramatically alter procedures and rights before EOIR. This rule would significantly

[1] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, https://www.regulations.gov/document?D=EOIR-2020-0003-0001.

change procedural rights of asylum seekers who would also be affected by the current NPRM. Again, without knowing how the agencies may alter that proposed rule, it is impossible to adequately comment on the current proposed rule.

The Administrative Procedure Act requires agencies to give the public a meaningful opportunity to provide input on proposed regulatory changes. Over the past several months, the Department of Justice, and in some instances the Department of Homeland Security, have been furiously rewriting the rules on which noncitizens and their counsel have relied for decades without giving adequate opportunity for thoughtful comments, or considered review of those comments by the agencies. For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should wait until it has finalized (or withdrawn) overlapping proposed rules that are still pending, and then grant the public at least 60 days to have adequate time to provide comprehensive comments.

DOJ has provided no rationale for allowing only 30 days for the public to submit comments to these complicated proposed rules rather than the customary 60-day comment period. The shortened comment period presents particular challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public, including our staff, to work mostly from home and balance childcare with work activities. Collecting information from clients has become more difficult due to pandemic restrictions. Clients have also experienced difficulty in obtaining official documents necessary to their applications or to defense in removal proceedings. Continued immigration court closures and unscheduled, intermittent closure of other government offices due to COVID-19 have created other challenges and increased the time necessary to complete normal work.

We Strongly Object to the Substance of the Proposed Rule and Urge the Administration to Rescind It in Its Entirety

Although we object to the agency's unfair 30-day deadline in which to submit a comment to the proposed rule, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations which would greatly reduce the rights of asylum seekers[2] appearing before EOIR and would result in the wrongful removal of bona fide asylum seekers to the countries they fled where they would likely face further persecution or even death.

8 CFR § 1208.4—The Proposed Rule Would Create an Impossible Filing Deadline for Individuals in Asylum-only or Withholding-only Proceedings

Proposed 8 CFR § 1208.4(d) would require many asylum seekers to file their asylum applications within 15 days of their first master calendar hearing. When applied in conjunction with the proposed asylum rule from June 15, 2020 (*see* 85 Fed. Reg. 36264), this would mean that all asylum seekers who have gone through the credible fear process would have a severely time-limited ability to submit their asylum application.

[2] To the extent that this comment addresses issues that affect applicants for asylum, withholding of removal and protection under the Convention Against Torture, it will use the term "asylum seekers" to mean applicants for all of these forms of protection.

Under proposed 8 C.F.R. § 208.2(c)(3)(i); 8 C.F.R. § 1208.2(c)(3)(i), any asylum seeker who is put through expedited removal and passes a credible fear interview would be placed in asylum-only proceedings. Tens of thousands of asylum seekers would be subject to this 15-day time limit. In 2018, DHS found a credible fear in 74,287 cases it heard.[3] The NPRM fails to analyze how this incredibly short deadline would affect immigration courts or asylum seekers and their attorneys.

Again, with the staggered rulemaking that DOJ is using, it is impossible to adequately comment on the scope of this change since there is no way to know whether the June 15 rule will be published in the same form in which it was proposed. However, if tens of thousands of asylum seekers are placed into asylum-only proceedings, they would all have to file their asylum applications within 15 days of their first master calendar hearing.

The legal completeness of the application would only become more important if the June 15 asylum rule allowing immigration judges to pretermit asylum cases if the asylum seeker "has not established a prima facie claim for relief" (*see* proposed 8 CFR § 1208.13(e)) without holding a hearing goes into effect.

The NPRM does not analyze how this expedited process would affect their ability to find counsel. As asylum rules change on a nearly daily basis, through regulations and attorney general decisions restricting noncitizens' rights, it is critical that asylum seekers have legal representation to prepare their application for asylum.

Our office serves low-income immigrants, including asylum seekers. When someone calls for a first appointment, they may reasonably expect to wait a week or more for their first appointment with a legal representative. Most asylum seekers would be unable to find and meet with an attorney within the 15-day deadline for filing their asylum application.

Asylum seekers are not immigration attorneys. Even an experienced attorney requires time to complete the I-589 Application for Asylum and to assemble supporting documents, which one attorney in our office accurately describes as "a massive undertaking." While no asylum application is "typical," attorneys in our office find that preparation of a complete application package would normally require a minimum of four to eight weeks—not days. A 15-day deadline, from the time of the first master calendar hearing to filing a complete asylum application is next to impossible to meet.

The I-589 Application for Asylum form is 12 pages long and the instructions for completing it are another 14 pages. The I-589 requires complete information about residence and employment for the past five years, as well as complete information about all schools attended by the applicant, lists of family members, detailed information about membership or association with any organizations or groups in the home country, and much more. The application must be accompanied by certified copies of any arrest reports, which may well be unavailable to asylum applicants who have fled government persecution. The application must also include multiple copies of birth certificates, marriage and divorce records, passport-style photographs,

[3] See DHS, *Credible Fear Cases Completed and Referrals for Credible Fear Interview*, www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview.

identification documents, travel documents, translations of any documents that are in a foreign language, and documentary evidence supporting the claim for asylum. A 15-day deadline does not allow sufficient time for an asylum-seeker to find an attorney, much less time to complete the application and assemble supporting documents.

While the proposed rule would allow immigration judges to extend this filing deadline "for good cause," if the asylum seeker misses the newly set deadline, the proposed rule does not authorize the immigration judge to further extend the filing deadline; instead the proposed rule issues a mandate that if the deadline is missed, the immigration judge "shall" deem the ability to file waived and "the case shall be returned to the Department of Homeland Security for execution of an order of removal."

8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6—The Proposed Rule Would Prioritize Speed over Fairness in Asylum Adjudications

Proposed sections 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 would require immigration judges to complete asylum cases within 180 days after the asylum application is filed in all cases, unless the respondent can demonstrate exceptional circumstances. Given the huge and still-growing backlog of immigration court cases, this is an unreasonable and, indeed, impossible requirement. The EOIR backlog has grown from 231,649 pending cases in 1996,[4] when Congress originally imposed the 180-day completion deadline to the current backlog of 1,246,164 cases.[5] Implementing a 180-day deadline at this point—when immigration courts are already overwhelmed and when hearings are continued or delayed due to COVID-19 is neither reasonable nor humane.

Asylum seekers face serious due process concerns if their cases are scheduled too quickly for them to adequately prepare, and equally serious concerns if their cases languish so long that evidence becomes stale and memories fade. [6]

The NPRM does not explain whether EOIR's intent would be to apply the 180-day rule to all pending cases or whether it would apply the rule prospectively only; either option would raise serious due process concerns. Many cases in the current backlog have been pending for years. If, following publication of this rule, EOIR imposed a deadline on immigration judges to adjudicate these cases within 180 days of the rule's publication, the courts would be overwhelmed.

Similarly, immigration practitioners would be unable to adequately prepare for accelerated hearing dates for multiple clients. Preparation of asylum cases requires multiple interviews with clients, as well as collecting documents that are particularly difficult to obtain when a client's home country government is hostile or simply has inadequate infrastructure to produce birth,

[4] U.S. DOJ, EOIR, Statistical Yearbook 2000, at 6, https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf.
[5] TRAC, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.
[6] *See,* Southern Poverty Law Center and Innovation Law Lab, *The Attorney General's Judges How The U.S. Immigration Courts Became A Deportation Tool* at 20 (June 2019), www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf, ("'arbitrary prioritizations wreak havoc on case management,' giving so-called 'priority' cases inadequate time to prepare while further extending the backlog for pending cases that may have been waiting for years.'")

death, or marriage records. Attorneys who have large caseloads with hearing dates scheduled years in advance will not be able to handle a sudden acceleration of those hearings. That will mean choosing between inadequate representation or withdrawing from the case—leaving the asylum seeker with no legal representation at all.

On the other hand, if EOIR applies the rule prospectively, EOIR would essentially recreate the "Last In, First Out" policy that the Asylum Offices use. Those who would file asylum cases after the rule is published would have to go forward on their applications, in many cases before they are ready to do so. At the same time, asylum seekers whose cases have already been languishing in the EOIR backlog, would be pushed to the end of the line—a line they already may have waited in for years.

Although INA § 208(d)(5)(ii) does not define the term "exceptional circumstances," which might justify extended time for adjudication, EOIR here gives examples of qualifying circumstances that would almost never be met—"such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." Proposed 8 CFR § 1003.10(b).

Many other and compelling reasons may make it impossible to proceed to hearing within 180 days of filing an asylum application. Some asylum seekers have endured imprisonment and torture, and suffer the effects of Post Traumatic Stress Disorder. They may need mental health counseling and medical care for physical injuries, either of which may make it difficult to assist in preparing their case and in gathering documentation. Gathering documentation from abroad is particularly difficult and time-consuming, and often cannot be completed without continuances that would push the case beyond the rigid 180-day rule set by this NPRM.

8 CFR § 1208.3(c)(3)—The Proposed Rule Would Require Immigration Judges to Reject Asylum Applications Based on Minor, Technical Errors

The proposed rule at 8 CFR § 1208.3(c)(3) would extend the USCIS practice of rejecting affirmative asylum petitions if any box on the Form I-589 is left blank. This practice includes rejection if an applicant leaves blank a box with no application or relevance. The extension of this practice through the proposed rule would lead to even more of the absurd and Kafkaesque[7] results. Among such results already recorded[8]:

- A man who fled political persecution in Cuba and was rejected because his attorney did not list a middle name on his asylum application. The man does not have a middle name.

[7] Catherine Rampell, *The Trump Administration's No-Blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration*, THE WASHINGTON POST, Aug. 6, 2020, www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57dcc_story.html.

[8] Charles Davis, *Bureaucracy as a Weapon: How the Trump Administration is Slowing Asylum Cases.* THE GUARDIAN. Dec. 23, 2019, https://www.theguardian.com/us-news/2019/dec/23/us-immigration-trump-asylum-seekers

- An asylum seeker from the Democratic Republic of Congo put a dash in the space to list other names used, because they had never used another name. The application was rejected because of the dash.

- A child from El Salvador had two siblings. Their names were on the application and the spaces for a third and fourth sibling were blank. The application was rejected because of the blanks.

Under the proposed rule, immigration judges or EOIR support staff would be required to comb through the 12-page application form[9] to see whether any box is not completed and reject the application. Once the court rejects the application, the applicant would have 30 days to make the correction or their ability to seek asylum would be waived.

This is an unwarranted burden on overworked EOIR staff and judges as well as a nit-picking, absurd, and unnecessary abuse of authority against vulnerable people seeking safe haven.

This rule change would have a particularly devastating impact on pro se asylum seekers, who already struggle to complete lengthy and complicated forms in a language often not their own. Over the years, studies have confirmed that asylum seekers represented by counsel are far more likely to succeed in their claim than pro se applicants.[10] This proposed rule amplifies the inherent injustice of a legal system that does not provide appointed counsel despite the life or death consequences of immigration court adjudications.

The effects of the proposed rule would be especially profound on those in detention and those subjected to the "Migrant Protection Protocols" (MPP). For example, an asylum seeker with no middle name might leave that box blank rather than writing in the word "none." If the immigration judge rejected the application on that basis and the asylum seeker still did not understand the need to write the word "none" in the box, they would be denied any possibility of seeking asylum. Depriving asylum seekers of their right to pursue asylum because of a missing word on the application is cruel and completely unreasonable. This rule undermines the clear Congressional intent in passing U.S. asylum laws and the 1967 Protocol of the 1951 Convention Relating to the Status of Refugees.

Equally troubling, this rule would require the court to reject the asylum application of any asylum seeker who cannot pay the filing fee. This effectively conditions asylum on ability to pay. That requirement contravenes the intent and purpose of U.S. asylum laws. As we argued in our comment to EOIR Docket No. 18-0101, RIN 1125-AA90, the proposed imposition of a fee for asylum applications puts the United States out of step with the rest of the world, and

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[9] It is worth noting that pursuant to the Information Collection that accompanied the June 15, 2020 Procedures Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, NPRM, www.regulations.gov/document?D=EOIR-2020-0003-0001, the form I-589 would jump to 16 pages and would include complex questions calling for legal analysis by the applicant. The current NPRM makes no reference to the pending change in the asylum application form or how that might affect an asylum seeker's ability to fully complete the form.

[10] Andrew I. Schoenholz and Hamutal Bernstein. *Improving Immigration Adjudications Through Competent Counsel*. 21 Geo. J. Legal Ethics 55 (2008)
https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2916&context=facpub

contravenes the moral imperative to accept asylum seekers as well as obligations under domestic and international laws.

The rejection of applications for nonpayment of a filing fee would particularly disadvantage asylum seekers who are detained and those who are living in shelters or tent cities in Mexico because of the MPP. Most would be unable to pay a fee. Even if they were able to pay, they are not able to access a DHS office to make the payment. We strongly believe that asylum seekers should never have to pay to seek safety in the United States, but if EOIR begins charging a fee for asylum applications, it is critical that EOIR implement reasonable steps for asylum seekers who are detained or subjected to MPP easily obtain fee waivers or to pay their application fees.

8 CFR § 1208.12—The Proposed Rule Would Discriminate Against Asylum Seekers and Unfairly Favor the Government in Determining Admissibility of Evidence.

8 CFR § 1208.12 would impose new hurdles for asylum seekers to meet their burden of proving that they would face persecution if returned to their country.

Under the proposed rule, the immigration judge is given permission to "rely on" evidence presented by U.S. government sources. Evidence coming from non-U.S.-government sources may only be used as a basis for decision "if those sources are determined by the immigration judge to be credible and probative." In effect, this establishes a presumption that any evidence offered by the government is reliable and probative, while requiring the asylum seeker to make an affirmative showing of reliability of any non-governmental sources.

That gives an entirely undeserved weight to evidentiary statements presented by the prosecutor (DHS) and the Department of State. In fact, a DHS whistleblower recently filed a report accusing senior DHS officials of asking him to change reports about "corruption, violence, and poor economic conditions" in Guatemala, Honduras, and El Salvador that would "undermine President Donald J. Trump's ("President Trump") policy objectives with respect to asylum."[11] Non-governmental organizations—whose evidence the immigration judge could only consider after it has been found to be "credible and probative"—have likewise found that DOS reports are subject to political pressure.[12] This proposed rule leaves a politicized, anti-asylum administration holding all the power in asylum cases.

We strongly oppose these revised evidentiary standards. If the proposed rule is promulgated, immigration judges would have to first conduct an analysis of whether evidence submitted by the asylum seeker is "credible and probative" while being able to "rely" on potentially biased U.S. government reports with no comparable analysis.

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[11] *See* DHS, Office of the Inspector General, Matter of Brian Murphy, (Sep. 8, 2020) https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf.

[12] *See* Amanda Klasing & Elisa Epstein, Human Rights Watch *US Again Cuts Women from State Department's Human Rights Report*, (Mar. 13, 2019) www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rightsreports; Tarah Demant, Amnesty International *A Critique of the US Department of State 2017 Country Reports on Human Rights Practices*, (May 8, 2018) https://medium.com/@amnestyusa/a-critiqueof-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca.

Another provision of this section of the rule would allow judges to introduce their own evidence into the record. This further corrupts the role of judge as impartial finder of fact. Judges would be allowed by this rule to rely on their own "country reports," and would need only to give a copy of such a report to the asylum seeker prior to issuing a decision. There is no requirement to allow the asylum seeker time to read the judge's evidence, to have it translated, or to respond to it. This unprecedented provision completely undercuts the appearance of fairness, allowing the judge to form and rely on their own opinions about a particular country, prejudicing them against careful consideration of evidence submitted by the asylum seeker appearing before them.

Although the asylum seeker and DHS are required to submit evidence at least 15 days before the hearing,[13] the immigration judge need only do so before *issuing* a decision. Nothing in the regulation precludes this happening five minutes before the decision is issued. The regulation is silent as to how a non-English speaker would be able to understand the documents in English, nor is there any provision allowing for a continuance for the parties to respond to the newly introduced evidence.

The role of the immigration judge is to weigh the facts that the parties put before the court, not to introduce their own evidence into the record. Allowing the immigration judge to create their own record in the case would fundamentally alter the immigration judge's role in removal proceedings and even further erode the rights of respondents who appear in immigration court. In effect, this rule turns the judge into a second prosecutor, rather than a finder of fact.

Conclusion

The proposed rules would prioritize speed over fairness. They would create an impossible deadline for asylum seekers to meet. They would change the balance of power, giving preferential weight to evidence submitted by the government, and allowing judges to present and rely on their own evidence.

The proposed rules would impose unbelievable and entirely unnecessary burdens on an already-over-burdened immigration court system. Its deadlines are impossible not only for asylum seekers and their attorneys, but also for immigration judges and courts.

The far-reaching changes proposed through these rules do not account for the multiple, pending rulemakings that have been issued over the summer. By staggering its rulemaking in this way, the Department of Justice has made it impossible to fully consider the reach of these rules and how they might be affected by the proposed rules on which agencies are currently evaluating the comments that have been submitted.

Since World War II, the United States has been a beacon of hope for those fleeing danger and harm. These rules would require immigration officials to slam the door on those seeking safety. We call upon the administration to withdraw these proposed rules in their entirety.

Veena Iyer, Executive Director

[13] EOIR, Immigration Court Practice Manual, at 36 (Jul. 2, 2020), www.justice.gov/eoir/page/file/1258536/download.

Immigrant Law Center of Minnesota