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Submitted via: www.regulations.gov

Re: Interim Final Rule: Asylum Eligibility and Procedural Modifications; EOIR Docket No. 19-0504; A.G. Order No. 4488-2019; DHS RIN 1615-AC44; DOJ RIN 1125-AA91 (July 16, 2019).

Dear Ms. Reid:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit the following comment in response to the Interim Final Rule “Asylum Eligibility and Procedural Modifications,” published in the Federal Register on July 16, 2019.¹

Statements of Interests

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization that works to increase public understanding of immigration law and policy, advocate for the fair and just administration of U.S. immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants.

AILA and the Council have extensive experience providing critical services to noncitizens seeking humanitarian relief through the Dilley Pro Bono Project, or “DPBP” (formerly the CARA Project), and the Immigration Justice Campaign, a joint project which connects unrepresented respondents with pro bono counsel. The DPBP has provided legal services to tens of thousands of asylum-

¹ 84 Fed. Reg. 33829 (July 16, 2019) (to be codified at 8 C.F.R. §§ 208, 1003, 1208). The undersigned organizations thank the American Immigration Lawyers Association’s Asylum Committee for their contributions to this comment.

seeking mothers and their children detained in the South Texas Family Residential Center (STFRC) in Dilley, Texas. Most individuals detained at the STFRC are recent border arrivals who have fled persecution, including gang and domestic violence, in addition to regional instability in Mexico and Central America. Since 2015, DPBP has been representing families who have crossed the U.S.-Mexico border.

AILA and the Council have grave concerns about the anticipated impact of the Interim Final Rule. As explained below, the Rule undermines domestic asylum laws and international treaty obligations. Implementation would strip fundamental protections from vulnerable individuals fleeing persecution and would return bona fide asylum seekers to harm. We strongly urge the Department of Homeland Security (DHS) and Department of Justice (DOJ) (collectively “the Departments”) to rescind the Rule.

Background

On July 16, 2019, the Departments promulgated an interim final rule on Asylum Eligibility and Procedural Modification, which became effective immediately upon publication.² The Rule would revise long-standing law by creating a new, mandatory bar to asylum for noncitizens who enter or attempt to enter the United States through the southern border and who have not applied for protection from persecution or torture in at least one country through which they transited.³ Prior to its issuance, noncitizens who had traveled through a third country before arriving in the United States were eligible to seek asylum unless the United States had entered into a safe third country agreement with that country or unless the person was firmly resettled in that country prior to coming to the United States.

Under the Rule, there are only three exceptions to this new asylum bar: (1) those who applied for protection from persecution or torture in a third country but were subsequently denied; (2) those who meet the definition of victims of “severe forms of trafficking” under 8 C.F.R. § 214.11 and; (3) those who transited only through countries which are not parties to the 1951 Refugee Convention, the 1967 Protocols, or the Convention Against Torture.⁴

AILA and the Council are opposed to this Rule because it undermines the very purpose of the U.S. asylum statute and would return bona fide asylum seekers to danger. The Departments have inadequately defended the radical change, relying on inaccurate or misleading statements to justify its implementation. Because the Rule is merely another attempt to effectively suspend the availability of asylum at the southern border, the Departments should withdraw it immediately.

I. THE INTERIM RULE UNDERMINES BOTH OUR DOMESTIC AND INTERNATIONAL LEGAL OBLIGATIONS

Both domestic and international law requires that the United States protect individuals fleeing persecution. As a signatory to the 1951 Refugee Convention, the 1967 Protocols, and the Convention Against Torture, the United States is prohibited by the principle of *non-refoulement*

² 84 Fed. Reg. at 33840-42. The Departments state that that Rule was exempt from notice and comment and a delayed effective date under the “good cause exception” and the “foreign affairs exemption” of the Administrative Procedures Act (APA).

³ *See id.* at 33829.

⁴ *See id.*

from returning someone seeking humanitarian protection to a country where they could face persecution.⁵ Domestic law also requires the United States to protect asylum seekers. The Immigration and Nationality Act (“INA”) states that, subject to certain exceptions, anyone “who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival ...), irrespective of [their] status, may apply for asylum.”⁶

In 8 U.S.C. § 1158, Congress established a comprehensive asylum procedure, which includes specific exceptions to noncitizens’ ability to apply for and be granted asylum. The Rule relies on 8 U.S.C. § 1158(b)(2)(C), which allows the Attorney General to establish regulations with additional limitations, to justify its ability to implement a new bar to asylum.⁷ However, 8 U.S.C. § 1158(b)(2)(C) also mandates that any additional limitations be “consistent with” the statute.⁸ In two separate statutory provisions, Congress already explicitly addressed exclusions for people who have traveled through third countries, the very subject of the Rule. Under 8 U.S.C. § 1158(a)(2)(A), anyone who can be removed to a country that has a safe third country agreement with the United States—specifically a country where that person’s life or freedom would not be threatened and where they would have “access to a full and fair procedure” for accessing humanitarian protection—generally cannot apply for asylum. Under 8 U.S.C. § 1158(b)(2)(A)(vi), anyone who was firmly resettled in another country is generally not eligible for asylum.

This Rule fully undermines the statute. If implemented, it would render ineligible for asylum virtually all asylum seekers who have transited through a third country. Although it exempts individuals who have transited through countries that are not signatories to the 1951 Refugee Convention, 1967 Protocols, or the Convention Against Torture, all seven countries from Central America, as well as Mexico, are signatories to all three conventions.⁹ As a result, all individuals with the exception of Mexican nationals who arrive by land at the southern border would be ineligible for asylum in the United States because—by necessity—they would have transited through a country that is a signatory to the refugee conventions. Additionally, nearly every country in the world is a signatory to one of the conventions or the Protocols.¹⁰ Thus, this Rule will adversely impact not only asylum seekers from Central and South America, but asylum seekers from the rest of the world, as well.

⁵ See UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)*, Aug. 1977, available at <https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>.

⁶ 8 U.S.C. § 1158(a)(1).

⁷ The Departments also use their own Interim Final Rule issued in November 2018 as an example of additional limitations on asylum under 8 U.S.C. § 1158(b)(2)(C). A federal court prevented this rule from going into effect, because it violated both the INA and the Administrative Procedure Act (APA). See *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d1094, 1115, 1121 (N.D. Cal. 2018). Therefore, it should not be used to justify the current Interim Final Rule.

⁸ 8 U.S.C. § 1158(b)(2)(C) (“The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).”)

⁹ See States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, available at <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>; States Parties to the Convention Against Torture, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en. See also 84 Fed. Reg. 33833.

¹⁰ See *id.*

The Rule also ostensibly exempts people who have applied for protection in a third country and been denied. However, Mexico and Guatemala have deficient asylum systems, lacking the capacity, infrastructure, and rule of law that would be required to process the volume of protection claims presented and provide meaningful safety to the number of refugees in need.¹¹ For example, according to Human Rights First, Guatemala has only twelve officials who work on asylum in Guatemala, and only three people who interview applicants.¹² In 2018, around 260 people applied for asylum in Guatemala (an increase of 75% from previous years), and only twenty cases were approved.¹³ It is also well documented that the Mexican asylum system does not have adequate funding and remains deeply flawed.¹⁴ Officials often turn back Central Americans seeking protection and do not regularly inform migrants of their rights.¹⁵ Given that its exceptions are so narrow, the Rule is an effective ban on asylum for virtually all individuals, other than Mexicans, arriving to the United States by land at the southern border. Such a ban undermines congressional mandates regarding our domestic humanitarian protection system and betrays our international treaty obligations.

II. THE INTERIM RULE WOULD RETURN BONA FIDE ASYLUM SEEKERS TO DANGER

The Rule will return numerous bona fide asylum seekers to danger and persecution abroad. Under the new regulations, those subject to the asylum ban can still qualify for lesser forms of protection, including withholding of removal and protection under the Convention Against Torture. Once asylum officers determine that an applicant is not eligible for asylum under the new bar, they should conduct an interview under the heightened standard generally applicable in reasonable fear proceedings.¹⁶ Given the higher standard required for these forms of relief, this Rule will require the same resources to process asylum seekers but will result in fewer individuals obtaining potentially life-saving permanent relief.

Those who do meet the higher standard and are granted relief will be relegated to a second-class refugee status, forced to continue living their life in a state of limbo and uncertainty, and potentially prevented from seeing their loved ones indefinitely. Those who do not meet the heightened standard will be forced to seek humanitarian protection in a third country—likely

¹¹ See Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers*, June 2019, available at https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf. See also Human Rights First, *Is Mexico Safe for Refugees and Asylum Seekers*, November 2019, available at https://www.humanrightsfirst.org/sites/default/files/MEXICO_FACT_SHEET_PDF.pdf.

¹² Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers*, June 2019, available at https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf.

¹³ See *id.*

¹⁴ The Rule also fails to account for technical requirements that may render the opportunity to receive protection in a country an asylum seeker transited through a nullity. For example, potential asylum seekers in Mexico are often denied protection because of Mexico's unattainable 30-day filing deadline. See The New York Times, *A Flawed Asylum System in Mexico, Strained by U.S. Changes*, Aug. 2017, Kirk Semple, available at <https://www.nytimes.com/2017/08/05/world/americas/mexico-central-america-migrants-refugees-asylum-comar.html>. See also Human Rights First, *Is Mexico Safe for Refugees and Asylum Seekers*, November 2019, available at https://www.humanrightsfirst.org/sites/default/files/MEXICO_FACT_SHEET_PDF.pdf.

¹⁵ Human Rights First, *Is Mexico Safe for Refugees and Asylum Seekers*, November 2019, available at https://www.humanrightsfirst.org/sites/default/files/MEXICO_FACT_SHEET_PDF.pdf.

¹⁶ 84 Fed. Reg. at 33843.

Mexico or Guatemala—or return to their home country even if they have a well-founded fear of persecution.¹⁷

Mexico and Guatemala are deeply affected by violence and instability. Asylum seekers have been subjected to extortion, kidnapping, rape, and other violent crime while in Mexico, especially following implementation of the “Migrant Protection Protocols.”¹⁸ The State Department has also documented numerous risks to Central American migrants in Mexico. In the 2017 Country Report on Human Rights Practices for Mexico, the State Department listed “violence against migrants by government officers and organized criminal groups” as one of the “most significant human rights issues” in Mexico.¹⁹ Because the countries are porous and lack sufficient law enforcement resources, transnational criminal organizations like MS-13 and M-18 and other bad actors can also easily find and persecute their victims.²⁰

Guatemala is affected by systemic violence, instability, and corruption.²¹ The Department of State has reported that Guatemala “remains among the most dangerous countries in the world,” due to “endemic poverty, an abundance of weapons, a legacy of societal violence, and the presence of organized criminal gangs.”²² It also notes that “Guatemala’s alarmingly high murder rate appears driven by narco-trafficking activity, gang-related violence, a heavily armed population, and police/judicial system unable to hold many criminals accountable.”²³

The Rule makes clear that unaccompanied minors will be subject to the ban and sent back if they do not qualify for CAT or withholding.²⁴ This skirts the congressional directives of the Trafficking Victims Reauthorization Act (TVPRA), which provides certain protections to unaccompanied children—including exemptions from the third country bar to asylum and the one-year filing deadline for asylum claims—in recognition of the particularly vulnerable situation of children fleeing persecution.²⁵ In so doing, the Rule disregards Congress’ unambiguous conclusion that unaccompanied children should be provided *heightened* access to asylum.

¹⁷ See Customs and Border Protections Southwest Border Apprehension by Country, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>.

¹⁸ Letter Urges Sec. Nielsen to End the Migrant Protection Protocols Policy, American Immigration Council, available at <https://www.americanimmigrationcouncil.org/advocacy/letter-urges-sec-nielsen-end-migrant-protection-protocols-policy>. See also, Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process*, Aug. 2019, available at <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>.

¹⁹ U.S. Dep’t of State, Country Reports on Human Rights Practices for 2017: Mexico (2018), available at <https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/mexico/>.

²⁰ See *id.*

²¹ Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers*, June 2019, available at https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf.

²² U.S. Dep’t of State, Overseas Security Advisory Council, Crime & Safety Report (2019), available at <https://www.osac.gov/Content/Report/5f31517e-62bb-4f2c-8956-15f4aeaab930>.

²³ See *id.*

²⁴ 84 Fed. Reg. at 33839, footnote 7.

²⁵ See *What are the TVPRA Procedural Protections for Unaccompanied Children*, April 2019, KIND, available at <https://supportkind.org/resources/what-are-the-tvpra-procedural-protections-for-unaccompanied-children/>.

III. THE GOVERNMENT RELIED ON INACCURATE OR MISLEADING STATEMENTS TO JUSTIFY THE RULE

Throughout the Rule, the Departments rely on inaccurate or misleading statements to justify substantially changing current law. They frequently assert that many asylum claims are “meritless,” but attempt to substantiate this statement with little more than assumptions and prejudicial statements. Asylum seekers at the southern border are fleeing some of the highest levels of violence in the world.²⁶ The Rule itself states that 36% of asylum cases that are tried on the merits are granted.²⁷ This statistic shows that a significant portion of asylum claims not only have merit, but are granted.

Additionally, asylum grants vary widely around the country. It is very difficult to compare similarly situated individuals due to external factors such as varying wait times for hearings at different immigration courts²⁸, availability of and access to counsel²⁹, and changing patterns of migration that have necessitated the evolution of case law.³⁰ In fact, in certain areas of the country—sometimes referred to as “asylum free zones”—data shows that virtually all asylum claims are denied.³¹ In these jurisdictions, individuals are routinely asked to prove higher evidentiary standards to qualify for asylum than are established by law.³²

Furthermore, claims that may not ultimately be approved are not necessarily fraudulent or meritless. Individuals that have pending asylum applications could end up qualifying for, and receiving, other immigration benefits, meaning there is not ever a final adjudication on the merits of their asylum application. Cases that are denied on their merits may be denied only because of recent, drastic changes in the interpretation of longstanding asylum law, which limit asylum eligibility and appear in many cases to target families from Central America. For example, the Attorney General’s decisions in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) and *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) severely restricted asylum claims based on family ties and gang and domestic violence claims, respectively. To call these newly disqualified cases “meritless” seems disingenuous at best.

In addition, many asylum seekers fail to win asylum for procedural reasons unrelated to the merits of their claim for protection. Others abandon their meritorious cases because of the psychological and physical stresses of immigration detention. Still more fail to even file an asylum application because they are unable to obtain an attorney who can complete Form I-589

²⁶ See The Migration Policy Institute, *The U.S. Asylum System in Crisis: Charting a Way Forward*, Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, Sep. 2018, available at <https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward>.

²⁷ 84 Fed. Reg. at 33839.

²⁸ See AILA Policy Brief, Facts About the State of Our Nation’s Immigration Courts, May 2019 available at <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-facts-about-the-state-of-our>.

²⁹ See American Immigration Council, Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court, Sep. 2016, available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

³⁰ See The Migration Policy Institute, *The U.S. Asylum System in Crisis: Charting a Way Forward*, Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, Sep. 2018, available at <https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward>.

³¹ See The Nation, *These Jurisdictions Have Become “Asylum Free Zones”*, Jan. 2017, John Washington, available at <https://www.thenation.com/article/these-jurisdictions-have-become-asylum-free-zones/>.

³² See *id.*

in English as required. For this reason, asylum grant rates are not an accurate measure of the percent of individuals who have meritorious asylum claims.

The Departments refer to asylum seekers at the southern border as individuals “ostensibly fleeing persecution” and state that their journeys “raise[] questions about the validity and urgency” of their asylum claim.³³ They say that asylum seekers who transit through a third country and do not apply for protection therein, “are simply economic migrants seeking to exploit our overburdened immigration system.”³⁴ For these statements, the Departments do not offer any evidence that this is a frequent or even recurrent problem. In fact, the footnotes cited for these propositions merely explain that economic migration is not recognized as a protected ground for asylum. Because the justifications for this sweeping legal change are inadequate and misleading, the Departments should withdraw the rule.

IV. CONCLUSION

This Rule undermines domestic and international legal obligations, strips fundamental protections from vulnerable individuals fleeing persecution, and would return bona fide asylum seekers to danger. AILA and the Council strongly urge the Departments to withdraw the Rule.

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AMERICAN IMMIGRATION COUNCIL

³³ 84 Fed. Reg. at 33839-33840.

³⁴ *See id.*