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Office of Information and Regulatory Affairs,
Office of Management and Budget,
725 17th Street NW, Washington, DC 20503;
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

Our organization, Texas Impact, submits this comment urging the Department of Justice (DOJ) and Department of Homeland Security (DHS) to withdraw these proposed rules in their entirety. These proposed regulations violate the United States' duties under domestic law and international law. These rules would eliminate asylum for most asylum seekers and are morally wrong. They violate the faith traditions of our member organizations. We urge you not to allow that to happen.

Texas Impact is a statewide religious grassroots network whose members include individuals, congregations, and governing bodies of the Christian, Jewish and Muslim faiths. Texas Impact exists to advance public policies that are consistent with universally held social principles of the Abrahamic traditions. Texas Impact is Texas' oldest and largest interfaith organization. We have sponsored "Courts & Ports Faithful Witness in the Texas-Mexico Border" – a program where small groups from all over Texas traveled to Brownsville every week for court observation, ministry to asylum-seekers awaiting entry into the US, and volunteer shifts at direct-service sites. We work with Justice for Our Neighbors, a United Methodist Ministry, providing quality, affordable legal services to low-income immigrants, refugees and asylum-seekers. Our president is an attorney who has represented asylum-seekers pro bono in Immigration Court and before the Board of Immigration Appeals.

We are not able to comment on every proposed provision because these regulations cover so many topics. The absence of a comment about a particular provision does not mean that we agree with it. We oppose these regulations in their entirety. The agencies should withdraw them.

We Object to the Agencies Only Allowing 30 Days to Comment

These regulatory changes are an attempt to rewrite the laws adopted by Congress and would be the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act, Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). The Notice of Proposed Rulemaking (NPRM) is over 160 pages long with more than 60 of those

pages being the proposed regulations themselves. Each section of these regulations merits 60 days for the public to analyze, research, and respond appropriately. But the agencies have allowed only 30 days to respond. The 30-day response time is particularly unfair during the COVID-19 pandemic. For example, our entire staff has been forced to work from home, making a coordinated response especially challenging. Additionally, many of our staff have young children and spouses with full time jobs, which creates child care issues preventing them from a normal full day of work. We urge the administration to rescind the proposed rule for this procedural reason.

We Object to the Substance of the Proposed Rule

In addition to our objection to the proposed rule based on the procedural unfairness of the 30-day comment period, we object to the proposed regulations, which would eviscerate asylum protections. The proposed rules would result in virtually all asylum applications being denied, by removing due process protections, imposing new bars, heightening legal standards, changing established legal precedent, and creating sweeping categories of mandatory discretionary denials. We urge the administration to rescind it in its entirety.

8 CFR § 1208.13 (e)—The Proposed Rule Would Deprive Asylum Seekers of Due Process

Section 8 CFR § 1208.13 (e) would allow immigration judges to deny asylum to asylum-seekers without a hearing or chance to testify. Judges could determine, on their own initiative or at the request of a DHS attorney, that the application does not adequately make a claim. Judges could "pretermit" asylum claims, denying them due process.

Many asylum seekers are unrepresented, do not speak English, use unofficial translators, and have inadequate assistance in filling out the asylum application. Asylum seekers usually do not understand the U.S. asylum system or all of the elements of their asylum claims before their court hearing. Authorizing immigration judges to deny asylum cases without taking testimony or developing the record beyond the asylum application would deny due process. We oppose this proposed change.

Texas Impact's president handled a case where the asylum-seeker was claiming fear of persecution based on political opinion. The asylum-seeker was suffering from PTSD. His application had only cursory information about his political activities. When asked what he said at campaign rallies, he unexpectedly stood up in court and delivered a powerful campaign speech in support of the national candidate. When asked about his fear of persecution, he described how soldiers came to his home and executed all of his family members who were not able to hide from the soldiers. His testimony provided convincing evidence to support the grant of asylum. The application is not a substitute for the persuasive power of live testimony.

8 CFR § 208.1(c); 8 CFR § 1208.1(c)— The Proposed Rule Unfairly Limits Particular Social Group (PSG) Claims

The proposed rule requires that an asylum seeker state with exactness every PSG before the immigration judge or forever waive the opportunity to present the PSG.

An asylum seeker's life should not be dependent on an applicant's ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements; the asylum officer or immigration judge has a duty to help develop the record. It would be unconscionable to send an applicant back to persecution for failure to adequately craft PSG language. Applying this proposed regulation to asylum seekers, including unrepresented individuals, would raise serious due process issues.

8 CFR § 208.1(d); 8 CFR § 1208.1(d)—The Proposed Rule Redefines Political Opinion Contravening Long-Established Principles

The proposed rule redefines "political opinion" contrary to existing law. The proposed rule requires that political opinion claims be based on "furtherance of a discrete cause related to political control of a state or a unit thereof." It explicitly rejects the possibility that applicants' expression of opposition to terrorist or gang organizations can qualify as a political opinion, unless the asylum seeker's "expressive behavior" is "related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state." However, this restriction fails to recognize that many asylum seekers flee their homelands because the government of their country is unable or unwilling to control non-state actors such as international criminal organizations.

The proposed rule's redefinition of political opinion in the narrowest possible way contradicts existing case law. Rather than following precedent that recognizes political opinion in such circumstances, the agencies seek to erase all precedent that is favorable to asylum seekers through this rule.

8 CFR § 208.1(e); 8 CFR § 1208.1(e)— The Proposed Rule Narrowly Defines Persecution, Altering the Accepted Definition

The most fundamental aspect of asylum law is the obligation of countries to protect individuals with well-founded fears of persecution from being returned to harm. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428, (1987). The proposed rule would introduce a regulatory definition of persecution that would unduly restrict what qualifies as persecution. The rule emphasizes that the harm must be "extreme" and that threats must be "exigent." But the proposed rule fails to provide any guidance on adjudicating claims by children and fails to require adjudicators to consider cumulative harm. Applicants who have suffered multiple "minor" beatings or multiple short detentions would likely be disqualified under the proposed rule.

8 CFR § 208.1(f); 8 CFR § 1208.1(f)—The Proposed Rule Imposes a Laundry List of Anti-Asylum Measures Under the Guise of "Nexus"

Courts have held that each asylum application should be adjudicated on a case-by-case basis. But the proposed rules would allow blanket denials of claims that have long been found to meet the standard for asylum, under the guise of "Nexus."

The rule provides a further laundry list of harms that adjudicators generally should not consider in their nexus analysis. Among these harms is "criminal activity." But virtually all harm that rises to the level of persecution could be characterized as "criminal activity," since in virtually every country beatings, rape, and threatened murder is criminalized activity.

The rule runs contrary to the INA. INA § 208(b)(1)(B)(i) specifically states that a protected ground must be "at least one central reason" for the harm. Federal courts have explicitly held that the "one central reason" continues to allow for a mixed motive analysis. Under the proposed rule, asylum seekers who have been harmed, or fear harm, for more than one reason—"retribution" and a protected characteristic—will not be afforded asylum protection in direct violation of the INA.

8 CFR § 208.13(b)(3); 8 CFR § 1208.16—The Proposed Rule Redefines the Internal Relocation Standard, Greatly Increasing the Burden on Those Seeking Protection

The proposed rule lays out a standard for analyzing the reasonableness of internal relocation that almost no applicant for asylum, withholding of removal or Convention Against Torture (CAT) protection will be able to meet. Under the new rule, the adjudicator must take into consideration "the applicant's demonstrated ability to relocate to the United States in order to apply for asylum." 8 CFR § 208.13(3); 8 CFR § 1208.13(3). The clear implication of this language is that if an asylum seeker is able to travel to reach the United States, any testimony about the unreasonableness of relocating within their country of origin can be discounted.

The proposed rule also implies that if an asylum seeker comes from a large country, the applicant should be able to relocate internally. We strongly oppose this language. Asylum applications should be adjudicated on a case-by-case basis and the regulations should not suggest justifications to deny applications of bona fide asylum seekers.

The new rule would remove important considerations that adjudicators must currently take into account. Currently adjudicators must consider numerous factors, including, "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." Existing rule at 8 CFR § 208.13(3); 8 CFR § 1208.13(3). The new rule would force adjudicators to make decisions in a vacuum ignoring the overall context of an applicant's plight.

Texas Impact's president has handled two cases where asylum seekers were granted asylum, but would have been denied asylum under this proposed regulation. Both people reached the US legally; neither could have relocated anywhere in his home country. One was an unsuccessful presidential candidate known nationwide because of television debates and commercials. He was persecuted for his political opinion. There was no safe place for internal relocation. The other

was the curator of the national museum who also curated the private art collections of the leading politicians and army generals. He was persecuted for his religion. Again, there was no safe place for him to relocate in a country the size of Massachusetts. Under the proposed rule, both people may have been denied asylum and returned to their home countries to face death.

8 CFR § 208.13; 8 CFR § 1208.13—The Proposed Rule Imposes a Laundry List of Anti-Asylum Measures Under the Guise of "Discretion"

In addition to meeting the legal standard, asylum seekers must merit a favorable exercise of discretion. *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 423, (1987). For decades, the United States has recognized the unique situation of asylum seekers and found that "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987). The proposed rule would deny most asylum applications on discretionary grounds.

Under the proposed rules, any asylum seeker who enters or attempts to enter the United States without inspection could be denied asylum as a matter of discretion. Additionally, the rule would add another bar, preventing most refugees who spent 14 days in any country en route to the United States from qualifying for asylum. This change would conflict with the concept of firm resettlement, and would disqualify most asylum seekers who travel through Mexico where the administration blocks asylum seekers, forcing them to wait for months to request protection at ports of entry. These rules place asylum seekers in an impossible position where they will be denied asylum if they wait on the "metering" lists at a ports of entry but will also be denied asylum if they cross the border in order to make their requests for protection.

Similarly the rule would allow an immigration judge to deny asylum to a refugee who uses or attempts to use fraudulent documents to enter the United States, unless they are arriving to the United States directly from their country of origin.

The proposed rule also contradicts the plain language of INA § 208(a)(2)(d), which explicitly allows an exception to the one year filing deadline for asylum based on changed or extraordinary circumstances by barring any asylum seeker who has been in the United States for more than one year without lawful status. This rule change ignores the fact that some individuals are in the United States for many years with no need to seek asylum until there is a changed circumstance in their country of origin or personal circumstances. Likewise, many asylum seekers are prevented by extraordinary circumstances, including mental health issues such as post-traumatic stress disorder often as a result of the persecution they have fled, from filing for asylum within one year of arriving in the United States. The administration cannot eliminate these vital exceptions to the one-year-filing deadline in the guise of "discretion."

The proposed rule would further generally require denial of asylum applications if an asylum seeker did not file taxes prior to applying for asylum. Payment of taxes is in no way related to whether or not a person would suffer persecution in their home country.

The government makes many of these "discretionary" bars practically mandatory allowing for the possibility of a positive exercise of discretion only in narrow circumstances for reasons of

national security or foreign policy interests, or, if the asylum seeker can show by a preponderance of the evidence that they would suffer exceptional and extremely unusual hardship if denied asylum. Even this extremely limited exception only applies to some of the "discretionary" factors. The combination of the heightened evidentiary standard and the intentionally onerous legal standard will mean that virtually no asylum seeker will be able to qualify for asylum as a matter of discretion.

8 CFR § 208.15; 8 CFR § 1208.15— The Proposed Rule Redefines "Firm Resettlement" to Include Those Who Are Not Firmly Resettled

The proposed regulation would expand the definition of firm resettlement. Under the new rule, if the asylum seeker has resided in another country for a year or more, even if there is no offer or pathway to permanent status, the asylum seeker would be considered firmly resettled and barred from asylum. There is no exception based on the asylum seeker's inability to leave the third country based on being trafficked, based on being unable to leave for financial reasons, or based on fear of remaining in the third country.

8 CFR § 208.18; 8 CFR § 1208.18— The Proposed Rule Imposes a Nearly Impossible Evidentiary Burden on Those Seeking CAT Protection

The new rule would also put protection under the Convention Against Torture (CAT) out of reach for the vast majority of individuals fleeing torture or the threat of torture. Under the proposed regulation, an applicant would have to prove that a government official who has inflicted torture has done so "under color of law" and is not a "rogue official." The regulation ignores the actual circumstances under which people flee for their lives. Clearly, if an official claims to be acting in an official capacity, is wearing an official uniform, or otherwise makes it known to the applicant that they are a government official, a CAT applicant would have no reason to know whether the official is acting lawfully or as a "rogue" official. Requiring an applicant for protection to obtain this kind of detailed information from a government official who has tortured or threatened the applicant with torture is unreasonable and, in most cases, impossible.

8 CFR § 208.20; 8 CFR § 1208.20—The Proposed Rule Radically Redefines the Definition of Frivolous and May Prevent Asylum Seekers from Pursuing Meritorious Claims

The proposed rule would also redefine the meaning of a "frivolous" asylum application. Under the new rule an asylum seeker could be charged with filing a "frivolous" application, and thereby be subject to one of the harshest bars in immigration law (*see* INA § 208(d)(6)), and rendered ineligible for any form of immigration relief in the future, if the adjudicator determines that it lacks "merit" or is "foreclosed by existing law." However, as discussed above, "existing law" in asylum is in a state of constant flux. Moreover, 8 C.F.R. 1003.102(j)(1), specifically states that a filing is not frivolous if the applicant has "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose." Under the proposed rule, an asylum seeker whose application would likely be denied under a restrictive interpretation of asylum by the BIA or attorney general

precedent, who intends to challenge that precedent in federal court, must risk a finding that would forever bar any immigration relief if that appeal is unsuccessful.

8 CFR § 208.20; 8 CFR § 1208.20—The Proposed Rule Impermissibly Heightens the Legal Standards for Credible and Reasonable Fear Interviews and Will Turn Away Refugees Without Providing Them a Full Hearing

The proposed rule would also make it significantly more difficult for asylum seekers subject to expedited removal to have their request for asylum fully considered by an immigration judge. When Congress added expedited removal to the INA, it intentionally set the standard for the credible fear interview—significant possibility—low so that genuine refugees are not deported to persecution. Under this rule, the government redefines the broad "significant possibility" standard to mean "a substantial and realistic possibility of succeeding." This language contradicts the clear language of "significant possibility" that Congress set forth at INA § 235(b)(1)(B)(v) and is therefore *ultra vires*.

The proposed rule would also greatly increase the burden on those who would be eligible for only withholding of removal or protection under CAT to pass an initial interview and pursue their claim before an immigration judge. Under the proposed rule, asylum seekers who would be subject to a bar on asylum, presumably including those recently promulgated by the administration such as the "transit ban" found at 8 CFR § 208.13 (c)(4)(ii) that bar the vast majority of asylum seekers arriving at the southern border, would have to meet this significantly heightened requirement to even be permitted to have their case heard before an immigration judge. With these provisions in the proposed rules, the government would essentially eliminate the "significant possibility" legal standard adopted by Congress in the INA and replace it with a higher "reasonable possibility" standard, which is far more difficult for asylum seekers to meet.

Conclusion

These proposed rules represent a radical restructuring of the U.S. asylum system. Each section of these drastic proposed changes merits a full 60-day comment period for the public to adequately prepare comments. These proposed rules would eviscerate asylum protections that have been in place in the United States for decades. The vast majority of asylum seekers are likely to be denied asylum under these proposed rules even if they have well-founded fears of persecution. Further, it is difficult to imagine any asylum seeker arriving at the southern border who would not be subject to one of the bars imposed under these rules, or who would be able to meet the elevated evidentiary burdens, both in preliminary border fear screenings and in asylum interviews and proceedings before immigration judges.

These rules would require immigration officials to slam the door on those seeking fleeing danger and harm. We call upon the administration to withdraw these proposed rules in their entirety.

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