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Via Federal e-Rulemaking Portal

**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**

To Whom It May Concern:

The Harvard Immigration & Refugee Clinical Program (“HIRC”) and the HLS Immigration Project (“HIP”) submit this comment on the proposed rulemaking published September 23, 2020 by the Executive Office for Immigration Review (“EOIR”) of the U.S. Department of Justice (“DOJ”), entitled Procedures for Asylum and Withholding of Removal (the “Proposed Rule”), and recommend that the rulemaking be withdrawn in full for reasons including but not limited to those outlined below.

I. Statement of Interest

HIRC is one of the oldest clinical programs in the country that focuses on the advancement of immigrants’ rights while teaching students critical lawyering skills. HIRC includes two distinct clinics: (1) the Immigration & Refugee Advocacy Clinic, which represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts and (2) the Crimmigration Clinic, which focuses on the growing intersection of criminal law and immigration law. HIRC faculty and staff also teach a range of courses concerning immigration policy, refugees and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. HIRC faculty and staff regularly publish scholarship concerning asylum adjudication, due process protections in

removal proceedings, working with traumatized refugees, crimmigration, and immigration detention.

HIRC has worked with thousands of immigrants and refugees since its founding in 1984. Its advocacy includes representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants' rights. HIRC has an interest in the proper application and development of U.S. asylum law to ensure that the claims of individuals seeking asylum and related relief receive fair and proper consideration under standards consistent with U.S. law and treaty obligations.

HIP is a student-practice organization under the supervision of HIRC, which provides law students with the opportunity to gain practical, hands-on legal experience. HIP represents clients seeking release from detention in Massachusetts, promotes policy reform, and provides representation to refugees and asylees who are seeking family reunification and legal residency.

HIRC and HIP regard the Proposed Rule as contrary to both the Protocol to the Refugee Convention and domestic law. In addition, HIRC and HIP object to the Proposed Rule's thirty-day timeframe for public comments. Thirty days is an insufficient period of time for the public to have a meaningful opportunity to comment on the Proposed Rules, particularly in light of the myriad other regulatory changes to immigration proceedings proposed in recent months. Each of these regulations represents an effort by the current administration to erode due process and fairness in immigration proceedings. Further, each set of rules has been proposed—with only a short thirty-day window for public comment—during the Covid-19 crisis. Under the cover of the pandemic, DOJ and Department of Homeland Security (“DHS”) have sought to rewrite immigration laws and eliminate protection for those seeking refuge in the United States. Taken together, these regulations signify a full blown assault on the rights of asylum seekers and immigrants generally. Accordingly, we urge EOIR to withdraw its current proposal immediately.

II. The Accelerated Application Submission and Adjudication Timelines Violate U.S. Obligations under Domestic and International Law to Protect Individuals from Return to Persecution or Torture

The Proposed Rules contradict core principles of refugee law¹ —namely the principles that refugees should be afforded the benefit of the doubt and that adjudicators share the duty to develop the record²—by creating unreasonable timelines and evidentiary burdens that most

¹ See United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (recognizing that Congress enacted the Refugee Act of 1980 “to bring United State refugee law into conformance with the 1967 Protocol” and therefore the Refugee Convention).

² United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶¶ 203-04 (1979, Rev. 1992) (hereinafter UNHCR Handbook).

asylum seekers will find impossible to meet. If this Proposed Rule were to take effect, countless bona fide refugees would be at serious risk of forced return to persecution or torture because of the obstacles presented by this proposed rule to pursuing claims for protection.

First, the Proposed Rule would require immigration judges to complete asylum cases within 180 days after the asylum application is filed in all cases, unless the asylum seeker can demonstrate exceptional circumstances. Given the extreme backlog of cases in immigration court,³ this expedited schedule would mean that thousands of asylum seekers—many of whom had hearing dates previously scheduled years in advance—would suddenly be forced to prepare their entire cases and have those cases heard in only 180 days. As a result, many asylum seekers may not have the ability to gather relevant evidence before their cases are adjudicated.

This accelerated timeline undermines adjudicators' duty to develop the record in order to "ascertain and evaluate all the relevant facts."⁴ Enforcing the 180-day completion deadline⁵ prejudices asylum seekers and is wholly impractical. When Congress passed Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") in 1996, there were 231,649 cases pending before EOIR.⁶ Since that time, the immigration court backlog has ballooned to 1,246,164 cases.⁷ While it may have been sensible in 1996, the 180-day timeframe is entirely unreasonable today.

Second, the Proposed Rule would require immigration judges to deny protection to asylum seekers who made minor errors or left a box blank on the I-589 asylum application.⁸ This requirement is a clear violation of the benefit of the doubt principle and U.S. obligations under the Refugee Convention. It is unconscionable to deny protection to a bona fide refugee for the failure to check a box on an application, particularly considering that most asylum seekers complete these forms without the assistance of counsel, and many do not speak English. In accordance with the Refugee Convention, adjudicators must give applicants the benefit of the doubt in these cases and allow them a meaningful opportunity to correct these errors and present their cases in immigration court.

³ See TRAC, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.

⁴ UNHCR Handbook 196-97. *In re S-M-J-*, 21 I. & N. Dec. 722, 727-29 (B.I.A. 1997) (quoting the UNHCR Handbook and noting that "the government wins when justice is done As a general matter, therefore, we expect the Service to introduce into evidence current country reports, advisory opinions, or other information readily available from the Resource Information Center.").

⁵ 85 Fed. Reg. at 59694.

⁶ U.S. DOJ, EOIR, Statistical Yearbook 2000, at 6, <https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf>.

⁷ TRAC, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.

⁸ See 85 Fed. Reg. at 59694.

Third, the Proposed Rule’s introduction of the 15-day filing deadline after the Master Calendar Hearing⁹ for asylum-only proceedings is an incomprehensible divergence from the clear intent of Congress. Under the IIRIRA, individuals must apply for asylum within one year of their arrival in the United States—not within 15-days, as this rule proposes.¹⁰ Moreover, the legislative history of IIRIRA reveals that Congress intended the I-589 asylum application to function as “a short application that could be updated with more information over time and ‘generous[ly] ... amend[ed]’ throughout the asylum process.”¹¹ The proposed rule flies in the face of this legislative history by implementing an impossible 15-day filing deadline and requiring that an applicant “correct” any “deficiencies” in the “incomplete application and re-file it *within 30 days* of rejection,” or face abandoning or waiving their application.¹²

Moreover, with the imposition of a 15-day filing deadline, many asylum seekers—particularly those who are pro se and may not have previously known about the I-589 requirement—will not have an opportunity to properly fill out the application form and gather corroborating evidence to support their asylum application. Yet, under the REAL ID Act of 2005, such corroboration “must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”¹³

The accelerated 15-day filing deadline will exacerbate the difficulties asylum seekers often experience in opening about the past traumas they have suffered.¹⁴ Many asylum seekers lack access to counsel¹⁵ or interpretation or both.¹⁶ They are often forced to prepare I-589s without any assistance, regularly leading to the “omission of relevant information,”¹⁷ as traumatic memories may manifest in a story that is “incomplete...fragmented and chronologically fractured.”¹⁸ The effects of trauma and the absence of legal representation are particularly

⁹ See 8 C.F.R. § 1208.4.

¹⁰ 8 U.S.C. § 1158(a)(2)(B).

¹¹ *Ordonez-Azmen v. Barr*, 965F.3d 128, 138 (2d Cir. 2020) (quoting H.R. Rep. No. 104-469, pt. 1, at 176 (Mar. 4, 1996)).

¹² 8 C.F.R. § 1208.3(c)(3) (emphasis added).

¹³ 8 U.S.C. 1158 (b)(1)(B).

¹⁴ See, e.g., U.N. High Comm’r for Refugees (UNHCR), *Beyond Proof: Credibility Assessment in EU Asylum Systems*, 61 (May 2013), <https://www.unhcr.org/en-us/protection/operations/51a8a08a9/full-report-beyond-proofcredibility-assessment-eu-asylum-systems.html>.

¹⁵ Ingrid Eagly & Steven Schafer, *Access to Counsel in Immigration Court*, American Immigration Council- Special Report (September 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf (only 37% of immigrant in removal proceedings and 14% of detained immigrants secured representation).

¹⁶ See, e.g., Rachel Nolan, *A Translation Crisis at the Border*, THE NEW YORKER (Jan 6. 2020).

¹⁷ See UNHCR, *Beyond Proof* at 62.

¹⁸ See Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 487-88 (2016).

deleterious to detained asylum seekers' chances of prevailing in immigration court.¹⁹ While only 37 percent of all immigrants are able to secure representation, those in detention are “the least likely to” obtain counsel, with just 14 percent of detained immigrants obtaining legal representation, per a widely-cited 2016 study.²⁰ Detained immigrants with counsel were “*ten-and-a-half* times more likely to succeed” on their claims for relief as compared to detained applicants without counsel.²¹

The Proposed Rule's 15-day filing deadline for individuals in asylum only proceedings will severely worsen this disparity.²² While, at present, asylum only proceedings account for only one percent of cases before EOIR,²³ a prior set of rules, proposed on June 15, 2020, envision a significant increase in the number asylum only proceedings.²⁴ If the June 15th rules were to take effect, 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 thus be subject to asylum only proceedings and the 15-day deadline now proposed.²⁵ The Proposed Rules contains no analysis of how this deadline would affect asylum seekers, their counsel, or court operations given the potential increase in the number of asylum only proceedings; yet such data is necessary to properly assess the impact of the rule.

If the June 15th Rule is adopted as written, asylum seekers will be forced to fill out an even more complicated form than the one currently in effect under significant time pressure. The proposed changes to the I-589 form would, for example, require asylum seekers to delineate their particular social group(s) (“PSGs”)—a legally and factually complex analysis that confuses attorneys and adjudicators alike. Courts have repeatedly recognized that defining a PSG is an “unspeakably complex” process with “ever changing” requirements that “even experienced immigration attorneys have difficulty” navigating.²⁶ Requiring asylum seekers to submit a completed I-589 within 15 days of their master calendar hearing would thus severely limit their ability to make their case for asylum. The stakes for failing to submit a complete application will be even higher if the prior June 15th rule takes effect, as that rule proposed allowing immigration judges to pretermite asylum cases if the asylum seeker “has not established a prima facie claim for relief.”²⁷

¹⁹ See Eagly & Schafer, *Access to Counsel in Immigration Court*.

²⁰ See *id.* at 2.

²¹ *Id.* (emphasis added).

²² 85 Fed. Reg. 59692 at 59699.

²³ U.S. DOJ, EOIR, Statistical Yearbook 2000, at 13, www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf

²⁴ See 85 Fed. Reg. 36264.

²⁵ In 2018, DHS found a credible fear in 74,287 cases it heard. See DHS, *Credible Fear Cases Completed and Referrals for Credible Fear Interview*, www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview.

²⁶ *Cantarero-Lagos v. Barr*, 924 F.3d 145, 154 (5th Cir 2019) (Dennis, J., concurring in the judgment).

²⁷ 85 Fed. Reg. 36264 at 36277.

III. The Proposed Rules Reflect a Legally-Incorrect, Retrograde Conception of Asylum as a Discretionary Foreign Policy Determination, rather than a Protection Imperative Mandated by International Treaties and Domestic Statute.

If adopted, the Proposed Rules would create a bifurcated standard for supporting documentation about country conditions where the immigration judge “may rely” on evidence that comes from U.S. government sources but can only rely on resources from non-governmental sources or foreign governments “if those sources are determined by the immigration judge to be credible and probative.”²⁸ Such a proposal would make the executive branch not only the prosecutor (DHS) and the adjudicator (EOIR), but also the favored supplier of evidence (the Department of State). Granting this power to the executive would improperly politicize the asylum process²⁹ and turn back the clock to an era when foreign policy objectives dictated refugee determinations—in direct contravention of the 1980 Refugee Act, which aimed “to eliminate both the appearance and reality of political or foreign policy influence over asylum decisions.”³⁰

As the Department of Justice recognized in the *American Baptist Churches v. Thornburgh* Settlement Agreement:

[F]oreign policy and border enforcement considerations are *not* relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is *not* relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; whether or not the United States Government agrees with the political or ideological beliefs of the individual is *not* relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.³¹

Giving more evidentiary weight to Department of State reports directly violates these core tenets of U.S. asylum law. Indeed courts have firmly held that immigration judges have a duty not to

²⁸ 85 Fed. Reg. 59692 at 59695.

²⁹ Indeed, 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.” 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.

³⁰ Sabrineh Ardalan, Country Condition Evidence, Human Rights Experts, and Asylum-Seekers: Educating U.S. Adjudicators On Country Conditions In Asylum Cases, 13-09 Immigr. Briefings 1 (2013).

³¹ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (emphasis added).

“cherry pick evidence from State Department Country Conditions reports” in adjudicating asylum claims;³² yet, the Proposed Rule would mandate exactly that.

Additionally, under INA §240(b)(4)(B), individuals in removal proceedings have a statutory right both “to examine the evidence against” them and “to present evidence on [their] own behalf.”³³ By creating an asymmetrical standard that allows immigration judges to rely freely on any U.S. government report, while requiring a more exacting review of other sources of corroborating evidence, this rule tilts the already unfair scales even further away from the asylum seeker. Given the highly politicized nature of the Department of State Reports,³⁴ asylum seekers must often rely on non-governmental reports to detail conditions in their country of origin. The Proposed Rule would thus undermine individuals’ opportunity to present evidence on their behalf in direct contravention of the statute, and thus the Proposed Rule should be revoked.

Moreover, the Proposed Rule violates fundamental due process principles by allowing an immigration judge, “on his or her own authority” to “submit relevant evidence into the record”³⁵ without affording an asylum seeker a meaningful opportunity to review and respond to the evidence. While the Proposed Rule acknowledges that both parties must be given an “opportunity to comment on or object to the evidence *prior to the issuance of a decision*,”³⁶ it does not expound upon the timeline for this process or explain whether the evidence will be provided in the asylum seeker’s language. This means that a judge could theoretically introduce huge volumes of evidence on the very day of the hearing in a language that the asylum seeker does not understand, which could hardly be said to constitute “a reasonable opportunity to examine the evidence” as mandated under the INA.³⁷

³² See *Liem v. Attorney General United States*, 921 F.3d 388, 398 n.9 (3d Cir. 2019) (vacating and remanding where the court did not consider facts contained in a country conditions report on Indonesia which suggested “rising intolerance against Christians”); see also *Guang Lin v. Attorney General United States*, 783 Fed. Appx. 134, 135 (3d Cir. 2019) (holding that the BIA has “a duty to explicitly consider any country conditions evidence submitted by an applicant that materially bears on his claim” and vacating where the BIA failed to do so); *Fei Yan Zhu v. Attorney General U.S.*, 744 F.3d 268, 272 (3d Cir. 2014) (holding that the BIA must consider evidence in reports favourable to the applicant and, if it rejects such evidence, it must explain why the evidence was rejected).

³³ 8 U.S.C. 1229a.(b)(4)(B). This statute expressly contemplates its application in asylum proceedings. See 8 U.S.C. 1229a(c)(7)(C)(ii).

³⁴ 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-rights-reports; 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-critique-of-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca>.

³⁵ 8 C.F.R. § 1208.12.

³⁶ *Id.* (emphasis added).

³⁷ 8 U.S.C. 1229a(b)(4)(B).

We appreciate the opportunity to provide comments on this proposed rule. If you have questions, please contact us by phone at 617-384-8165 or by email at hirc@law.harvard.edu.

Sincerely,

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