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Office of Immigrant and
Refugee Affairs
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Attention: Desk Officer, U.S. Citizenship and Immigration Services, Department of Homeland Security

RE: OMB Control Number 1615-0067; RIN 1125-AA94 and 1615-AC42; EOIR Docket No. 18-0002: Public Comment Opposing the Entirety of the Proposed Rule "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review"

The City of Seattle ("the City") submits this comment urging the Department of Justice (DOJ) and Department of Homeland Security (DHS) to **withdraw their Proposed Rule on Asylum, and Collection of Information OMB Control Number 1615-0067 in its entirety**.

Seattle is a self-designated Welcoming City[1] with a longstanding commitment to protecting the rights of immigrant and refugee residents, workers, business owners, and students, which the City considers as integral members of the community. In 2012, the City created the Office of Immigrant and Refugee Affairs (OIRA) to improve the lives of Seattle's immigrant and refugee families. One aspect of this mission focuses on persons living or working in Seattle who are accused of immigration law violations, but are unable to afford legal counsel and who are often deprived of their Constitutional rights to due process and equal protection. In order to fully afford them these rights, the City has appropriated public funding to provide access to legal counsel for indigent persons who cannot afford an attorney. Thus, the City of Seattle, through OIRA, funds and coordinates the Expanded

[1] https://www.seattle.gov/iandraffairs/issues-and-policies/how-we-are-a-welcoming-city

Legal Defense Network (ELDN)[2] that provides removal defense to low-income residents of Seattle and King County, Washington, the county where Seattle is situated.

Together with King County, the City contracts with community nonprofit partners to fund and support legal services for low-income immigrants and refugees who are in detention, or are facing removal, or are at risk of harm due to their immigration status. Through our ELDN program, we were able to provide removal defense and related legal services to 1,130 people, including direct representation to 503 people from October 2017 through the end of 2019. ELDN program partners assist clients with various legal matters, including asylum, both defensive and affirmative. Our comments are based on the legal experience of our partners and the City's commitment to protecting all immigrants and refugees. In funding and coordinating this program, the City and King County value due process rights, as well as the lawmaking function of Congress to provide a legislative solution for comprehensive immigration policy reform.[3]

Additionally, since 2010, King County has experienced the third biggest increase in foreign-born residents (121,648 new immigrant residents) among all U.S. counties, with a number of those being asylees and refugees[4]. Lastly, from 2010 to 2016, Washington State received a total of 16,504 refugees from 46 countries, ranking our state in the top 10 of all states in number of refugees received[5]. These individuals have become permanent residents who have contributed greatly to the resilient economy and vibrant culture of Seattle and other municipalities across the state.

We strongly oppose the 161-page Proposed Rules on Asylum as it will bring about a series of changes that would pose incredible challenges to people seeking asylum in the U.S., and their family members, and their advocates. Asylum is a lifeline for tens of thousands of vulnerable people, and these proposed regulations violate the United States' duties under domestic law and international law, effectively cutting off that lifeline. If implemented as proposed, the above-referenced rule would break from decades of U.S. policy and practice and usher in both sweeping and likely unlawful changes to the asylum process.

1. **<u>We Object to the Agencies Only Allowing 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)</u>**

We request that the Department of Homeland Security (DHS) and Department of Justice (DOJ) (hereinafter "the Departments") immediately extend the 30-day comment period for

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[2] https://www.seattle.gov/iandraffairs/programs-and-services/legal-defense-fund-and-network

[3] http://clerk.seattle.gov/search/results?s5=&s1=immigrant&s7=&s6=&s2=&s8=&Sect4=AND&l=200&Sect2=THESON&Sect3=PLURON&Sect5=RESNY&Sect6=HITOFF&d=RESF&p=1&u=%2Fsearch%2Fresolutions%2F&r=5&f=G

[4] https://www.seattletimes.com/seattle-news/data/new-milestone-in-king-county-immigrant-population-tops-500000/

[5] http://archive.kuow.org/post/where-seattles-refugees-come-and-other-things-you-should-know

the above-referenced NPRM and provide the public with at least 60 days to meaningfully participate in the rulemaking process.

The NPRM dismantles beyond recognition the criteria under which traumatized and vulnerable individuals seek asylum. As a result, under this rule, the United States will unlawfully return asylum seekers to grave danger or even death. The human cost of the rule is beyond measure and demands the most careful research, analysis, and public consultation. It is highly inappropriate to afford the public a mere 30 days for comment on a proposal that violates our domestic laws and international obligations on its face. The rule proposes a number of significant changes to the well-established standards for asylum eligibility. One such change would narrow the definition of "particular social group" in a manner that has been expressly rejected by the federal courts as contrary to Congressional intent.

Another change would redefine the term "firm resettlement" to mean that any asylum applicant who has ever resided in a third country for a year or more has firmly resettled in that third country, regardless of whether there was a legal pathway to residency in that country or whether they tried to resettle in the third country.

These aforementioned examples represent only a portion of the significant legal and policy changes detailed in the proposed rule. A rule implementing just one of these changes would warrant at least the standard 60-day comment period. To demand that the public review, analyze, and provide meaningful comments on this sweeping rule in half that period is unreasonable, especially during an unprecedented global crisis such as COVID-19.

As we write these comments, the country is in the midst of the worst public health crisis in recent history due to the COVID-19 pandemic. Many of the stakeholders who would be directly impacted by this rule must currently balance work with concerns about health and safety, caring for children and family members, and providing emergency assistance to those affected by the pandemic and economic recession. Under these circumstances, it is simply wrong for the government to give such a short time period to comment.

The Departments' decision to press forward with this rule during the pandemic and with a shortened comment period is not justified. The rule does not refer to or relate to any emergency or any legitimately urgent matter. The rule's extensive proposed changes to the credible/reasonable fear interview process are hardly needed at a time when the border is closed to asylum seekers indefinitely. Eviscerating humanitarian protection for the most vulnerable among us should hardly be a priority at any time, least of all during this extraordinary crisis. There is no reasonable justification for refusing to provide the public with the maximum amount of time to engage in careful review and analysis of the rule. **To honor the public's right to a meaningful and fair opportunity to respond to the NPRM, a comment period of at least 60 days must be provided.**

2. 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 agencies' unfair 30-day comment period, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations which would gut asylum protections. Overall, 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.

Below are some of the reasons we strongly oppose the Proposed Rule on Asylum, and Collection of Information OMB Control Number 1615-0067 in its entirety. For the reasons stated above, we cannot sufficiently cover every topic, which we would like to have covered due to the constricted timeframe provided for comments.

3. The Proposed Rule Would Deprive Asylum Seekers of Due Process

Fundamental to the American system of justice is the guarantee of due process. But under this rule, thousands of asylum seekers would be denied the most basic right to a fair day in court. The regulation would give immigration judges and asylum officers greater leeway to throw out requests for asylum as "frivolous," and to deny applications without so much as a hearing. Because eligibility for asylum is a complicated legal question, the impact of this rule would fall most harshly on unrepresented asylum seekers, limiting asylum only to those with substantial financial means or lucky enough to obtain legal counsel.

Allowing judges to "pretermit" claims and deprive asylum seekers, many of whom do not have lawyers and do not speak English fluently, their right to a hearing denies them due process. It would be an abrupt change from decades of precedent and practice before the immigration court, and it would happen at the same time that the administration again changes and further restricts the eligibility criteria for asylum through this proposed rule and prior rules and decisions.

According to advocates, immigration attorneys, and asylum seekers themselves, many applicants especially those who are unrepresented and those who are detained, struggle to complete the 12-page asylum application form. They may have to use the assistance of unofficial translators with whom they fear sharing intimate details of their past experiences and present fears. Asylum seekers who are detained and who do not speak English fluently may be unable to secure any assistance in detention. The vast majority of asylum seekers are not well-versed in the complexities of the U.S. asylum system and cannot be expected to lay out every element of their asylum claims in the application before arriving in court.

Allowing immigration judges to deny asylum cases based on the information provided in the application form alone, without even taking any testimony, would inevitably lead to

meritorious cases being denied and vulnerable asylum seekers being returned to harm. This proposal is even more absurd amid the rampant spread of COVID-19 at immigration detention centers[6]. Detention conditions do not allow asylum applicants access to basic safety and hygiene, yet this rule expects applicants to craft a detailed legal claim while suffering ongoing insecurity and danger from inhumane conditions.

4. **The Proposed Rule Redefines "Firm Resettlement" to Include Those Who Are in Actuality 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. Additionally, recent border closures triggered by the COVID-19 pandemic would potentially cause many asylum applicants staying in a third country for quite a long time due to the inability to leave that country. This new quantitative provision essentially ignores the qualitative realities of one's lived experience when forced to reside in a country away from their home country due to fleeing war, violence, and persecution.

Even more arbitrarily, an asylum seeker who flies to the United States with two or more layovers in different countries would be banned from asylum, while an asylum seeker who flies to the United States with just one layover in a different country would be eligible for asylum. This alienates asylum seekers from countries for which there are no fewer than two layovers to the United States, and those who do not have the financial ability to purchase more direct flights. It truly seems absurd that the government of the United States would base someone's ability to access safety and asylum on whether airline companies are able to fly directly from a certain country to the U.S. This seems even more absurd during this global pandemic, as airline companies are reducing flights all over the world because of decreased demand.

5. **The Proposed Rule Will Eliminate Gender as a Ground for Asylum and Make it Virtually Impossible to Prevail on a Particular Social Group Claim**

Applicants for asylum and withholding of removal are legally required to demonstrate that the persecution they fear is on account of a protected characteristic: race, religion, nationality, membership in a particular social group (PSG), or political opinion, INA § 101(a)(42). Membership in a particular social group in this list was designed to allow the

[6] https://www.humanrightsfirst.org/resource/immigration-detention-and-covid-19-timeline-administration-fails-heed-warnings-worsens

refugee definition to be flexible and to capture those who do not fall within the other listed characteristics.

This rule creates nine "nonexhaustive bases" that would be insufficient to claim asylum on the grounds of membership of a particular social group. So-called "private criminal acts" such as domestic and gang violence would no longer be recognized as viable claims, despite generations of domestic and international law affirming that refugee status is available on those grounds. This rule would essentially make it impossible for asylum seekers, especially those from Central America and Mexico, to win protection based on particular social group membership. The section on PSG prohibits a favorable adjudication of a PSG asylum claim based on issues such as "presence in a country with generalized violence or a high crime rate"—restrictions that appear calculated to target individuals from these countries.

The proposed rule would also virtually categorically eliminate gender as a ground for asylum. The NPRM does not explain why gender is listed under nexus rather than under particular social group—maybe because it is clear that gender satisfies the three-prong test for PSG of immutability, particularity, and social distinction. In any event, a categorical denial of all cases where gender is part of the nexus is contrary to the case-by-case analysis required under asylum law. Gender is similar to other protected characteristics like race and nationality, and adjudicators should determine on an individual basis whether the facts of a given case meet the standard.

6. **<u>The Proposed Rule Narrowly Defines Persecution</u>**

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, for the first time, provide a regulatory definition of persecution — a definition 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 who may experience harm differently from adults. It also does not require adjudicators to consider cumulative harm. As a result, applicants who have suffered multiple "minor" beatings or multiple short detentions — despite a reasonable fear that such incidents would continue — would likely be disqualified under the proposed rule.

This narrow definition would especially harm children who, due to the nature of their development, experience the trauma of persecution in fundamentally different ways than adults. In addition, both international and U.S. law acknowledges that children perceive and experience harm differently than adults. A child's age, maturity, vulnerability, and stage of development all impact how a child experiences and fears harm. For example, the proposed rule states that "repeated threats with no actions taken to carry out the threats,"

does nor rise to the level of persecution. This absurdly implies that children and minors seeking protection would have to wait for a persecutor or persecutors to follow through on their threat or threats before being eligible for asylum. The proposed rules' explicit exclusion of certain acts as persecution does not allow adjudicators to take these particularities of children's cases into account.

7. **The Proposed Rule Would Weaponize "Discretion" to Deny Otherwise Legitimate Asylum Applications**

In addition to meeting the legal standard, asylum seekers must merit a favorable exercise of discretion. The proposed rule would deny most asylum applications on discretionary grounds and severely limit the actual discretion adjudicators exercise.

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. The hardship and violence many asylum seekers face in their home countries or on the way to United States, as well as their being turned away from legal ports of entry, might make them enter the U.S. without admission. Using "discretion" to deny their otherwise qualified asylum requests would run contrary to the spirit of current international and national asylum laws.

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. This rule change would deny many legitimate asylum seekers the ability to seek protection. Often those fleeing harm are unable to obtain travel documents because they fear their government. In some countries, women cannot apply for passports unless a male family member signs off on the application. Traveling to the United States requires documents that are accepted by airlines or other travel carriers. Short of applying for a U.S. visa and getting it granted, which is almost always not possible for asylum seekers, there is often no way to physically come to the U.S., unless the asylum seeker uses fraudulent documents. The safety of these asylum seekers would now depend on whether the individual was able to obtain a direct flight to the United States, which again, would entirely exclude asylum seekers from countries from which there are no direct flights to the U.S.

The proposed rule seeks to **ban asylum for all persons who have ever failed to timely file a tax return or who have ever worked without employment authorization**. This rule would impose draconian consequences on individuals who lack actual knowledge of tax and immigration law. It is absolutely astounding to see DHS trying to promulgate a rule which forever prevents vulnerable refugees from applying for or being granted asylum simply because they missed a filing deadline for their taxes. It should be noted that payment of taxes is in no way related to whether or not a person would suffer persecution in their home country. The proposed rule is also problematic because it puts immigration

authorities in the position of making tax determinations, which they are not qualified to make.

The proposed rule would also not allow for any exceptions to the one-year filing requirement. This would contradict the 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."

8. **The Proposed Rule Would Put Protection Under the Convention Against Torture (CAT) Out of Reach for the Vast Majority of Individuals Fleeing Torture or the Threat of Torture**

The proposed rule seeks to unreasonably eliminate protection under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") to persons who were tortured, physically or mentally, by the police or members of the military who are deemed "rogue" officials not acting "not under color of law." This proposed rule seeks to drastically narrow the following key concepts, central to relief that:

(1) pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torturing unless it is done while the official is acting in his or her official capacity (i.e., under "color of law"); and
(2) pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law (i.e., a "rogue official") does not constitute a "pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Thus, the proposed rule essentially dismisses and invalidates the entire concept of "color of law" in spite of a consistent federal and state jurisprudence describing and defining the term "color of law" in a manner that is synonymous with "acting in his or her official capacity."

Additionally, if the ludicrous "rogue" officer definition were to go into effect, it would leave victims in a place of uncertainty and unable to seek the end to suffering. It would most

likely require the victim to report “rogue” officers to their colleagues, who might be just as “rogue.” How can a victim distinguish between a “roque” officer and an officer who is “acting under color of law,” if their uniforms, weapons, badges, police cars, etc. indicates the officer is acting in his or her official capacity? This limitation creates chaos and a never-ending cycle that can either hide or shift blame until the victims are too exhausted or scared to fight back, which is exactly what "rogue" officers would hope to accomplish.

9. Conclusion

This proposed rule attempts to completely dismantle nearly every aspect of our asylum laws and seeks to eliminate critical pathways to humanitarian relief that our laws were designed to protect. The rule strikes at the very heart of our historic commitment to providing safe haven to people fleeing persecution and calls into question our integrity as a country. Taken together, 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.

Based on the above stated arguments, the City of Seattle and OIRA call upon the Departments to withdraw this proposed rule in its entirety.

Sincerely,

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