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Opposition to Federal Rule “Asylum Eligibility and Procedural Modifications” EOIR Docket No. 19-0504

Submitted via portal: <http://www.regulations.gov>

[Name of organization] is a non-profit organization that [state mission of organization]. [Name of organization] submits these comments in opposition to the July 16, 2019 Interim Final Rule EOIR Docket Number 19-0504 (the “IFR” or the “Rule”).

The Rule bars asylum for any asylum applicant (including an unaccompanied child) who seeks protection at the southern U.S. border and has transited through a third country, unless she meets certain very limited exceptions. The limited exceptions to the Rule are: a) applicants who can demonstrate that they applied for but were denied protection in at least one country of transit; b) applicants who can demonstrate that they are victims of a severe form of trafficking; or c) applicants who did not pass through any country that is a signatory to the 1951 United Nations Convention and Protocol Relating to the Status of Refugees (the “Convention”). Guatemala and Mexico are signatories.

The Rule is unlawful, contradicts international laws and standards, and will keep asylum seekers, including survivors of gender-based violence, from life-saving protections.

- 1) The Rule is unlawful: it exceeds the authority given to the executive branch by Congress in the Immigration and Nationality Act (“INA”). And it violates the Administrative Procedure Act (“APA”) by providing an arbitrary and capricious explanation for its sweeping changes to asylum law.
 - a. The IFR claims to rest on the provision of the INA allowing the executive branch to “establish additional limitations and conditions... under which an [individual] shall be eligible for asylum.” 8 U.S.C. § 1158(b)(2)(C). Those limitations and conditions, however, must be “consistent with” the other provisions of § 1158. *Id.* And the IFR is inconsistent with § 1158. In particular, it cannot be squared with either Congress’s carefully crafted statements describing the circumstance in which asylum seekers must seek relief from other countries or the provisions of § 1158 dealing with unaccompanied children.
 - b. The IFR states that it is designed to do three things: (1) “ensure that the ever-growing influx of meritless asylum claims do[es] not further overwhelm the country’s immigration system”; (2) “aid U.S. negotiations on migration issues with foreign countries”; and (3) “promote the humanitarian purposes of asylum by speeding relief to those who need it most.” However, there is no “influx of meritless asylum claims”; just because a claim ultimately does not succeed does not mean it was “meritless”. There are many factors that dictate whether a claim is ultimately successful, such as the availability of legal counsel. There is no evidence that the IFR aids migration negotiations with any other country. And the Rule does not get help to those who need it most. Asylum seekers who arrive at the southern border may be unable to apply for asylum in Mexico or Guatemala first, precisely because they are in such grave danger. They would have to await adjudication of their asylum claims in these countries, where

persecutors could find and harm them. The Rule categorially bars asylum for such individuals, without consideration of the risks they face both at home and in transit. Some of the people who need protection the most would, in fact, be entirely blocked from protection under the Rule.

- 2) The Rule contradicts international laws and standards
 - a. The [principle of non-refoulement](#) prohibits state parties to the Convention from returning asylum seekers or refugees to a country where they may face persecution. By barring individuals from asylum, the Rule automatically converts the Credible Fear Interview into a Reasonable Fear Interview. This raises the standard of review for refugees and increases the likelihood of refoulement in violation of the Convention.
 - b. The international body tasked with overseeing the international treaty governing asylum and refugee determinations, UNHCR, states: “As a precondition to return or transfer of an asylum-seeker or refugee to another country, it is crucial to establish that s/he has access in that country to standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards. While protection from refoulement is at the center of refugee protection principles, the standards of treatment to which refugees and asylum-seekers have a right under the 1951 Convention, its 1967 Protocol and international human rights law go beyond protection from refoulement.” The asylum system in Mexico is overwhelmed, and applicants face long delays and unfair procedures. In addition, conditions may not be safe for many asylum seekers who are at risk of experiencing violence while living in Mexico and awaiting adjudication of their claims. This is especially true for homosexual and transgender migrants, women, and children, who may be targeted and vulnerable to sexual assault, trafficking, and other violence.
- 3) The Rule will keep asylum seekers, including survivors of gender-based violence, from life-saving protections.
 - a. At the southern border, asylum seekers are coming from all over the world and may be fleeing forced marriage, female genital mutilation, rape, domestic violence, honor violence, or human trafficking. While there are no official statistics available, reports indicate that a majority of the asylum seekers approaching the southern border are fleeing some form of gender-based violence.
 - b. Survivors of gender-based violence may meet other criteria for asylum protection yet be unable to recognize their treatment as persecution or recount the facts of their cases until they feel safe and secure. For these survivors, applying for asylum while in Mexico or Guatemala in possibly unsafe, unstable conditions and without social support or access to safe shelter is not practical. Yet without proof that they applied and were rejected, they will be barred from asylum in the U.S.

The Rule is unlawful under the INA and APA, does not comport with international standards for the protection of asylum seekers and refugees, and will prevent survivors of gender-based violence in particular from obtaining protection.