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July 13, 2020

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Re: Docket ID RIN 615-AC42 / 1125-AA94 or EOIR Docket No. 18-0002 – Public Comment  
Opposing Proposed Changes to Procedures for Asylum and Withholding of Removal; Credible  
Fear and Reasonable Fear Review, FR Foc. 2020-12575 Filed 6/15/20; 85 FR 36264

Dear Ms. Reid,

I am writing on behalf of the Children's Defense Fund of Texas in response to the Department of Justice (DOJ) and the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking to express our strong opposition to the Proposed Changes to Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review published in the Federal Register on June 15, 2020. The proposed rule would remove protections essential to families and children that come to our country in search of safety, security, and stability. The Children's Defense Fund of Texas urges that the rule be withdrawn in its entirety.

For over 15 years, the Children's Defense Fund-Texas has worked to ensure that every child has a Healthy Start, a Safe Start, and a Fair Start in life, as well as a successful passage to adulthood. CDF provides a strong, effective and independent voice for *all* the children of America who cannot vote, lobby, or speak for themselves. We are committed to raising awareness about the challenges facing children in Texas, connecting children and families to resources that help to meet their needs, and working with partners statewide to coordinate broad support for legislative action on behalf of Texas children and families. Since 2016, we have responded to the call to protect vulnerable immigrant families. The issues that affect this group are of particular concern in the state of Texas due to our location in the U.S.-Mexico border and the large number of immigrant and refugee families in this state.

For the reasons detailed in the comments that follow, DHS and the Department of Justice should immediately withdraw their current proposal. Instead, these departments should dedicate their efforts to advancing policies that safeguard the asylum proceedings that support the health, safety, and best interests of children and their families.

As we write, asylum-seekers are escaping torture and danger, waiting in dangerous Mexican border cities, and risking their lives in COVID-19 infested detention centers. While the United States should be providing relief to these groups in accordance to domestic and international law, this country is instead



violating the human rights of asylum-seekers, ignoring the treaties and conventions it has signed and ratified, and disregarding the moral commitments we have committed to as a nation. The proposed regulations would severely limit who is eligible for asylum, redefine torture and persecution to a standard nearly impossible to meet, and erode the due process and confidentiality asylum seekers currently rely on.

As written, the NPRM would eliminate asylum for all but the very few by narrowing the social groups and situations that are eligible for asylum. Currently, individuals can apply for asylum by demonstrating that they will face persecution in their home country due to race, religion, nationality, membership of a particular social group (PSG), and political opinion. The new regulation would narrow the definition of “membership of a particular social group” and describes eight situations that would not qualify for asylum, which include gender and fleeing persecution from a criminal or terrorist group. These changes will be particularly harmful for LGBTQ+ individuals, women and girls fleeing gender-based violence, and those resisting recruitment or coercion from gangs. This rule would rewrite long-standing legal precedent, namely the 1985 *Matter of Acosta* decision. In *Re Acosta*, the Board of Immigration Appeals explained that a PSG refers to a group that “share[s] a common immutable characteristic,” which the members of the group “either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>1</sup> For women, LGBTQ+ individuals, and those that resist gang activity, the proposed regulations would ignore characteristics that are crucial to their identities and to their lives.

Beyond redefining eligible groups and situations, the NPRM would change the meaning of persecution and torture. Persecution is currently defined as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” The proposed change seeks to narrow this definition, describing it as “an extreme concept of severe legal harm”. This would exclude situations such as repeated threats that have yet to be carried out, harm that arises from conflict in a country, and harassment.<sup>2</sup> This regulation would ensure that asylum-seekers facing threats of death or torture have no protection until these threats are actually carried out. At this point, it would be far too late for these asylum-seekers to be protected from harm.

The proposed regulation seeks to redefine torture to exclude harms committed by a “rogue official” from an asylum-seeker’s protection claim. Currently, pain or suffering inflicted by or with the consent of a public official constitutes torture - this includes so-called rogue officials. Circuit Courts have determined that rogue officials are still public officials and that acts of torture committed by these officials count

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<sup>1</sup> Connor Cory, “The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities,” *The Georgetown Journal of Gender and the Law* 20, no. 577 (2019): 577-603, <https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2019/05/CONNOR-CORY.pdf>

<sup>2</sup> Anam Rahman, “Summary of Notice of Proposed Rulemaking on Procedures for Asylum, Withholding of Removal, and Protections Under CAT,” *Calderón Seguin*, June 11, 2020, [https://pennstatelaw.psu.edu/sites/default/files/PROPOSED%20RULE%20ON%20ASYLUM\\_WH\\_CAT\\_SUMMARY.pdf](https://pennstatelaw.psu.edu/sites/default/files/PROPOSED%20RULE%20ON%20ASYLUM_WH_CAT_SUMMARY.pdf)



towards an individual's protection claim under the Convention Against Torture (CAT).<sup>3</sup> This regulation would ignore the claims of those who have been tortured by corrupt government officials, leaving them without protection from these and other dangers.

Under the new proposal, the U.S. asylum system would narrow the pathways for protection currently available to asylum-seekers by putting those that establish a credible fear of persecution or torture into asylum-and-withholding proceedings only. This differs from current regulation that allows individuals to be placed into section 240 removal proceedings, which provide eligible individuals with further protections.<sup>4</sup> As individuals move forward in their asylum proceedings, their circumstances may change along with their eligibility for certain forms of relief, such as the U non-immigrant visa for victims of crime.<sup>5</sup> For this reason, it is important that those that establish a credible fear of persecution or torture have full access to the protections guaranteed to them under Section 240 of the Immigration and Nationality Act.

Further removing protections for asylum-seekers, the proposed rule would make it easier for an asylum claim to be considered "frivolous". Currently, an asylum claim is considered frivolous if an immigration judge determines that an applicant had an intent to mislead in their application. The new regulation would expand the definition of a frivolous claim to include applications that "have no substance", along with other vague grounds and poorly-defined standards. The new rule would also allow for asylum officials to determine whether a claim is frivolous, a task currently reserved for immigration judges.<sup>6</sup> Considering a claim "frivolous" is particularly damaging for applicants because those with "frivolous" claims are no longer eligible for future humanitarian protections, visas, or status of any kind. Vague wording or subjective judgements cannot determine the futures of asylum-seekers, particularly when the stakes associated with frivolous claims are so high.

Another proposed regulation would deprive asylum-seekers from their time in court by allowing immigration judges to deny an asylum claim based solely on an asylum-seeker's written application. Currently, asylum-seekers are promised a hearing which allows them to make a case for themselves beyond their application. According to Lawfare contributor Sherizaan Minwalla, in-person testimonies

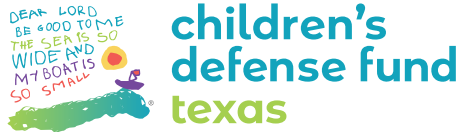
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<sup>3</sup> Anam Rahman, "Summary of Notice of Proposed Rulemaking on Procedures for Asylum, Withholding of Removal, and Protections Under CAT," *Calderón Seguin*, June 11, 2020, [https://pennstatelaw.psu.edu/sites/default/files/PROPOSED%20RULE%20ON%20ASYLUM\\_WH\\_CAT\\_SUMMARY.pdf](https://pennstatelaw.psu.edu/sites/default/files/PROPOSED%20RULE%20ON%20ASYLUM_WH_CAT_SUMMARY.pdf)

<sup>4</sup> Anam Rahman, "Summary of Notice of Proposed Rulemaking on Procedures for Asylum, Withholding of Removal, and Protections Under CAT," *Calderón Seguin*, June 11, 2020, [https://pennstatelaw.psu.edu/sites/default/files/PROPOSED%20RULE%20ON%20ASYLUM\\_WH\\_CAT\\_SUMMARY.pdf](https://pennstatelaw.psu.edu/sites/default/files/PROPOSED%20RULE%20ON%20ASYLUM_WH_CAT_SUMMARY.pdf)

<sup>5</sup> Sherizaan Minwalla, "New Proposed Asylum Regulations Would Endanger Women's Lives," *Lawfare*, July 7, 2020, <https://www.lawfareblog.com/new-proposed-asylum-regulations-would-endanger-womens-lives>

<sup>6</sup> Danilo Zak, "The Trump Administration's Proposed Changes to the Asylum System," *National Immigration Forum*, June 18, 2020, <https://immigrationforum.org/article/the-trump-administrations-proposed-changes-to-the-u-s-asylum-system/>



are often the most compelling part of an individual's asylum case.<sup>7</sup> To remove this testimony leaves asylum-seekers with only a complicated 12-page form to make their case, a case that is less likely to succeed without a lawyer. Data shows that those with a lawyer are five times more likely to win than those without - this is data under current regulations.<sup>8</sup> The proposed regulation would put asylum-seekers without legal representation at an even larger disadvantage, unfairly punishing those without resources as they seek a better future for themselves and their children.

To create additional barriers for asylum-seekers, the proposed regulations force immigration judges to stack "adverse factors" against asylum-seekers. Under the proposed rule, immigration judges would have to weigh circumstances that include: passing through at least two countries before arriving to the United States, missing an asylum hearing, being unlawfully present in the U.S. for at least one year, or failing to pay even one penny on their taxes.<sup>9</sup> Current regulations allow immigration judges to determine an asylum case based on the totality of the circumstances, emphasizing that past persecution should outweigh most adverse factors.<sup>10</sup> Many asylum-seekers are unable to pay for direct flights to the U.S. and are unable to go without working to feed their families. Beyond contradicting current regulation, the Trump administration is willfully ignoring the lived reality of most asylum-seekers and creating a system hostile to their situations. At the same time, this administration continues to show favoritism towards those with more financial resources and unfairly punishes those without means.

Asylum is a core human right that the United States is bound to protect by both international and national law. As described, the proposed rule would violate the 1951 Refugee Convention, the 1967 Protocol, and the U.S. Immigration and Nationality Act. The proposed amendments go against even the most minimum standards presented in these laws, conventions, and treaties, making the Trump administration's actions illegal as well as immoral. By withdrawing the proposed rule, the United States would uphold the obligations we are held to on an international and national basis.

Texas is uniquely situated to protect the best interests of asylum-seekers due to the large number of immigrants and refugees located in the state. As of 2015, there were about 177,719 refugees in Texas.<sup>11</sup> In

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<sup>7</sup> Sherizaan Minwalla, "New Proposed Asylum Regulations Would Endanger Women's Lives," *Lawfare*, July 7, 2020, <https://www.lawfareblog.com/new-proposed-asylum-regulations-would-endanger-womens-lives>

<sup>8</sup> "Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality," TRAC Immigration, accessed July 10, 2020, <https://trac.syr.edu/immigration/reports/448/>

<sup>9</sup> Nickole Miller, "Trump's new rules against asylum seekers are dire. They must be challenged.," *The Washington Post*, June 19, 2020, <https://www.washingtonpost.com/opinions/2020/06/19/we-cannot-let-trump-administration-turn-this-countrys-back-asylum-seekers/>

<sup>10</sup> Anam Rahman, "Summary of Notice of Proposed Rulemaking on Procedures for Asylum, Withholding of Removal, and Protections Under CAT," *Calderón Seguin*, June 11, 2020, [https://pennstatelaw.psu.edu/sites/default/files/PROPOSED%20RULE%20ON%20ASYLUM\\_WH\\_CAT\\_SUMMARY.pdf](https://pennstatelaw.psu.edu/sites/default/files/PROPOSED%20RULE%20ON%20ASYLUM_WH_CAT_SUMMARY.pdf)

<sup>11</sup> "Refugees in Texas," *New American Economy*, accessed July 10, 2020, [https://www.newamericaneconomy.org/wp-content/uploads/2019/11/Texas\\_refugee\\_MTI.pdf](https://www.newamericaneconomy.org/wp-content/uploads/2019/11/Texas_refugee_MTI.pdf)



2018, Texas resettled 1,692 refugees - the highest number of all 50 states.<sup>12</sup> These refugees and their families have made meaningful contributions to the state. While they require assistance as they first integrate into their communities, refugees end up contributing much more than this initial cost. A 2018 report from the New American Economy found that refugees paid \$422.3 million in state and local taxes and had a spending power of \$4.6 billion.<sup>13</sup> As a Texas-based organization, we stand with asylum seekers for all of their great contributions to the state and for the moral obligation we hold to help these vulnerable populations. When we allow asylum-seekers to seek refuge in this country and in this state, we are strengthening our economy, our communities, and our commitment to protect those who have escaped from danger.

The United States benefits from welcoming refugees and asylum-seekers into our land. Asylum-seekers are people who have faced dire and traumatic circumstances in their countries of origin, including violence, abuse, and hunger. Even in the face of these scarring events, they still have the strength and perseverance to travel, more than likely thousands of miles, to create a new life for themselves and their children. Our country has long upheld a commitment to welcome those that have suffered great tragedy, a commitment that has resulted in a nation full of resilient, innovative, and empathetic people. To close our doors to these very people would be to rob our nation of the values and ideals that *truly* make it great.

Thank you for the opportunity to submit comments on the proposed rule.

Sincerely,

**Cheasty Anderson, M.A., Ph.D.**

**Director of Immigration Policy and Advocacy**

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<sup>12</sup> “Fact Sheet: U.S. Refugee Resettlement,” National Immigration Forum, accessed July 10, 2020, <https://immigrationforum.org/article/fact-sheet-u-s-refugee-resettlement/>

<sup>13</sup> “Refugees in Texas,” New American Economy, accessed July 10, 2020, [https://www.newamericaneconomy.org/wp-content/uploads/2019/11/Texas\\_refugee\\_MTI.pdf](https://www.newamericaneconomy.org/wp-content/uploads/2019/11/Texas_refugee_MTI.pdf)