human rights first

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Submitted via www.regulations.gov

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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

Human Rights First submits this comment urging the Department of Justice (DOJ) to withdraw these proposed rules in their entirety. The Notice of Proposed Rulemaking (NPRM) would further eviscerate procedural protections for asylum seekers[1] in removal proceedings, making it more difficult for refugees to find safety in the United States.

The proposed rule would create a 15-day filing deadline for asylum applications for those in asylum-only proceedings, making it virtually impossible for many refugees to obtain counsel or fully develop their asylum claims. The proposed rule would require immigration judges to adjudicate most asylum applications within 180 days of filing with very limited exceptions for continuances, which could block asylum seekers from finding counsel or fully preparing their cases. Further, the rule would require immigration judges to reject asylum applications for even minor errors in completing the application form or for failing to pay an unprecedented $50 asylum fee with no exceptions for detained or indigent persons. Many asylum seekers arrive in the United States with limited financial resources. Finally, the proposed rule would allow immigration judges to submit evidence in asylum proceedings – further undermining their role in fairly developing the record and serving as neutral decision makers – and it instructs judges to consider U.S. government reports as credible evidence while downgrading the weight accorded to reports from independent human rights groups and journalists.

We strongly object to these proposed regulations, which would substantially impair due process protections for refugees seeking protection in U.S. immigration courts and will likely result in the wrongful deportation of refugees to the countries they have fled and where they fear persecution or death in violation of U.S. law and treaty obligations.

Human Rights First and Its Interest in This Issue

For over 40 years, Human Rights First has provided pro bono legal representation to refugees seeking asylum in the United States and advocated for the protection of the human rights of

[1] To the extent this comment addresses issues affecting applicants for asylum, withholding of removal and protection under the Convention Against Torture, it uses the term "asylum seekers" to mean applicants for all of these forms of protection.

refugees. Human Rights First grounds its work in the legal standards of the 1951 Refugee Convention, its Protocol, and other international human rights instruments, and we advocate adherence to these standards in U.S. law and policy. Human Rights First operates one of the largest and most successful pro bono asylum representation programs in the country. Working in partnership with volunteer attorneys at many of the nation's leading law firms, we provide legal representation, without charge, to hundreds of refugees each year through our offices in California, New York, and Washington D.C. This extensive experience dealing directly with refugees seeking protection in the United States is the foundation for our advocacy and informs the comments that follow.

Through our pro bono refugee representation program, Human Rights First and our volunteer lawyers know how difficult it already is for asylum seekers to find quality legal representation and to be granted protection in the United States. This rule would substantially limit the due process protections of the refugees we represent and gravely undermine those of the many asylum seekers who are unable to find or afford to retain competent legal counsel. By imposing shortened application filing deadlines and fees, and by limiting continuances, the rule will multiply the barriers asylum seekers face in applying for protection and in their ability to retain representation. The rule will also make it more difficult for legal service providers like Human Rights First to locate pro bono attorneys able to take on these cases. Had the provisions of the proposed rules been in place, many of our clients would have been denied the lifesaving protection provided by U.S. asylum law.

8 C.F.R. § 1208.4—The Proposed Rule Would Create an Impossible Filing Deadline for Individuals in Asylum-Only Proceedings

Proposed 8 C.F.R. § 1208.4(d) would require asylum seekers in "asylum-only" proceedings to file their asylum applications within fifteen days of their first master calendar hearing. This proposed rule, when coupled with the proposed June 15, 2020 asylum rule[2] (funneling all asylum seekers placed in expedited removal proceedings and who pass a credible fear screening[3] into asylum-only proceedings), would subject the vast majority of asylum seekers in the United States to this impossible 15-day filing deadline. Many refugees with genuine international protection needs will be deported to persecution and torture as a result.

The 15-day deadline for asylum applications would impede many refugees from seeking protection in the United States. For unrepresented asylum seekers, succeeding in filing a complete I-589 form is a daunting obstacle, and a nearly impossible one to surmount within the proposed 15-day deadline. Many asylum seekers do not speak or write in English, are detained, and may be suffering the effects of traumatic experiences in their home countries, the dangerous

[2] Dep't of Homeland Security & Executive Office for Immigration Review, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 FR 36264 (June 15, 2020), *available at* https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review

[3] In FY 2019, 75,252 asylum seekers passed credible fear screenings. USCIS, "Credible Fear Workload Report Summary," *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf . By comparison in 2018, there were only 726 asylum-only proceedings pending before EOIR. DOJ, EOIR, Statistical Yearbook 2019, p.12, *available at* https://www.justice.gov/eoir/file/1198896/download.

journey to the United States, and the conditions of detention, which already make filling out an asylum application difficult. Some have limited literacy even in their native languages. Many detained asylum seekers are unable to secure assistance, including translators, to complete the application, and the U.S. government provides them with none. In addition, this proposed rule creates new stringent and technical obstacles, discussed below, to successful completion of the form.

In Human Rights First's experience, from decades of assisting lawyers at major U.S. law firms in completing this form as volunteer counsel to asylum-seeking clients, some of the questions on the form are opaque even to many otherwise highly skilled attorneys, and that the way to use this form to effectively present an asylum seeker's case is also not obvious to all. Asylum seekers who lack such assistance frequently misunderstand key questions on the form, do not realize the level of detail expected from them in response, and are, in many cases, attempting to reduce some of the most painful experiences of their lives to writing in a foreign language.

Requiring asylum seekers to complete this process within 15 days of a first master calendar hearing is a transparent attempt by this administration to bar refugees from protection through insurmountable procedural barriers and make it impossible for immigration and other pro bono lawyers to ethically provide assistance in many asylum cases. This unmeetable deadline will preclude many asylum seekers from securing legal counsel in time to submit their applications. Immigrants in removal proceedings are not guaranteed a lawyer, and pro bono legal assistance is limited for the many asylum seekers who cannot afford to hire an attorney. Non-profits such as Human Rights First often place cases with law firms and provides its expertise on immigration law throughout the case. In Human Rights First's experience, it takes a significant amount of time to conduct a full legal intake of an asylum seeker, prepare a detailed case write-up of the asylum claim, find a pro bono attorney to accept the case, and mentor that attorney through completion of the I-589 application. This can take weeks or months depending on the complexity of the matter. Throughout the pandemic, this process has been even more difficult and delayed, in part, because of unreliable mail service as well as restrictions in detention center visitation and limited telephonic communication with detained asylum seekers.

The rule is unforgiving to asylum seekers who cannot meet the 15-day deadline, subjecting them to deportation should they fail to timely submit the application. Proposed 8 C.F.R. § 1208.4(d) states that if the deadline is missed, the immigration judge must deem the ability to file waived and "the case shall be returned to the Department of Homeland Security (DHS) for execution of an order of removal."[4] While the rule would allow immigration judges to extend the filing deadline for "good cause," placing the burden on asylum seekers to make a showing of good cause, if the asylum seeker misses the newly set deadline, the immigration judge is not authorized to further extend the filing deadline.

The NPRM fails to engage in any analysis of the harms of this proposed rule, including the deadline's effect on asylum seekers, legal counsel, or the immigration courts. The agency briefly mentions the concern that the deadline "may alter the manner in which attorneys organize their caseloads" and speciously concludes that "the proposed rule would not be expected to increase

[4] 85 FR 59699

any burdens on practitioners."[5] It fails to address or analyze the fact that lawyers will not be able to effectively represent many asylum seekers within the impossible time frames created by the rule. Moreover, DOJ notes that there is already a comparable filing deadline for crewmembers, indicating that attorneys "may be familiar" with the crewmember deadline and implying that, as a result, the newly proposed 15-day filing deadline would not pose a problem for counsel.[6] But this analysis disregards the fact that tens of thousands of asylum seekers would be placed into these proceedings under the June 15 proposed rule,[7] overwhelming attorneys and preventing them from representing people subject to the deadline. Moreover, the NPRM disingenuously conflates credible fear screenings with full asylum proceedings. While it indicates that those who have gone through the credible fear process have "no reason not to expect to" present their protection claim quickly, the NPRM does not discuss the very different statutory legal standard between establishing a "significant possibility" of succeeding on an asylum claim that is required to pass a credible fear screening, and the much higher burden of proof required to merit a grant of asylum.[8] The proposed 15-day deadline for a complex and technical asylum application cannot be justified by the fact that applicants have already been screened for credible fear.

Publishing a final version of this rule without according the public additional opportunities to comment would effectively deprive the public of its right to comment on proposed rulemaking under the Administrative Procedure Act (APA). The consequences of the 15-day filing deadline depend on multiple proposed rules that DHS and DOJ published in quick succession during the COVID-19 pandemic, giving the public no opportunity to comment meaningfully on how these rules would intersect. It is impossible to speculate about the scope of the interconnected barriers and bars to asylum created by this slew of proposed rules. The 15-day filing deadline, for example, would be affected by multiple provisions of the proposed asylum rule from June 15, 2020, which places all asylum seekers who pass a credible fear interview into asylum-only proceedings and permits immigration judges for the first time in U.S. history to deny an asylum claim based solely on a I-589 application[9] (and which applicants would now have to complete within an impossible timeframe). It also unclear how the proposed rule would interact with a July 9, 2020 proposed rule that would drastically transform credible fear screenings.[10]

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[5] Executive Office for Immigration Review, "Procedures for Asylum and Withholding of Removal," 85 FR 59692, 59698 (September 23, 2020), *available at* https://www.federalregister.gov/documents/2020/09/23/2020-21027/procedures-for-asylum-and-withholding-of-removal.

[6] *Id.*

[7] As noted above, in FY 2019, 75,252 asylum seekers passed credible fear screenings. USCIS, "Credible Fear Workload Report Summary," *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf.

[8] *See Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020).

[9] 85 FR 36264.

[10] Dep't of Homeland Security and Dep't of Justice, "Security Bars and Processing," 85 FR 41201 (July 9, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-07-09/pdf/2020-14758.pdf.

The Proposed Rule Would Require Immigration Judges to Reject Asylum Applications if Applicants Cannot Afford the Proposed Asylum Fee or Leave Inapplicable Application Boxes Blank

The proposed rule at 8 C.F.R. § 1208.3(c)(3) would require immigration judges to bar asylum seekers from relief if an applicant cannot afford the unprecedented asylum application filing fee (without any possibility of a fee waiver for indigent or detained asylum seekers) or if she leaves a box blank on her asylum application, either by accident or because the question does not apply to her.

This rule expressly conditions the right to apply for asylum, for the first time, on the ability to pay a $50 filing fee,[11] a sum that many arriving asylum seekers do not possess and would require immigration courts to automatically reject the application of any asylum seeker who has not filed the fee.

While the implementation of the asylum fee rule has been stayed pending litigation,[12] were the asylum fee go into effect, it would disproportionately block refugees in detention or subjected to Migrant Protection Protocols (MPP) from asylum protection, as these populations do not have access to work authorization and are cut off from family contacts in the United States and other assistance. The rule lays out the steps an asylum seeker must take to "fee in" or pay for the application with DHS, but does not clarify how an unrepresented detained person, for example, would be able to accomplish these steps. Moreover, asylum seekers forced to remain in Mexico under MPP are physically blocked by the program from entering the United States let alone going to a DHS office in the United States to "fee in" an asylum application. The rule does not specify how these individuals would be able to pay the application fee. Moreover, many asylum seekers subject to MPP are homeless or living in migrant shelters or tent encampments in Mexico, do not have legal authorization to work in Mexico, and would be unable to afford this fee.

Refugees should never have to pay to request life-saving asylum protection in the United States. Conditioning access to asylum protections provided under U.S. law and treaty obligations on the payment of a fee while making it near-impossible for the fee to actually be submitted is fundamentally unfair and would result in many refugees being denied protection and deported to persecution.

Further, the proposed rule's requirement that all boxes on the Form I-589 must be filled in, regardless of relevance, serves no legitimate purpose, and will result in bona fide refugees being denied asylum protection in the United States. Since 2019, U.S. Citizenship and Immigration Services (USCIS) has been rejecting affirmative asylum applications if any box on the Form I-

[11] While there is not currently a filing fee for defensive asylum applications, U.S. Citizenship and Immigration Services (USCIS) published a final fee schedule that includes an unprecedented fee for affirmative asylum applications. *See* Dep't of Homeland Security, "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 FR 46788 (Aug. 3, 2020).
[12] *Immigration Legal Resource Center v. Wolf*, 20-cv-05883-JWS (N.D. Cal., Sep. 29, 2020), *available at* https://www.balglobal.com/wp-content/uploads/2020/09/Fee-Order.pdf.

589 is left blank, even boxes that have no legal relevance to the case.[13] For instance, an asylum applicant who has no children will be automatically rejected because he left the box for "name of children" blank. It is facially unfair for life-or-death asylum relief to turn on such technicalities, especially where the asylum applicant does not have proper notice that the success of their application depends on these criteria. The proposed rule would codify this "Kafkaesque"[14] practice by requiring immigration judges to reject applications deemed incomplete because of such irrelevant requirements.

This proposed rule would also unnecessarily overburden immigration judges and EOIR staff with minute review of asylum applications, which runs counter to the rule's alleged "efficiency" and "speed" rationales. Immigration judges, or the under-staffed EOIR support staff, would be required to comb through the 12-page application form[15] to locate empty boxes and reject the application, even if the application makes out an asylum claim. Once the court rejects the application, the applicant would have 30 days to make corrections or waive her ability to seek asylum. This short time period to resolve "errors" may prove insufficient for asylum seekers to be notified and to remedy their application, particularly those asylum seekers in MPP for which EOIR does not maintain accurate mailing addresses in Mexico or who are experiencing homelessness or reside in a shelter that does not accept mail for its residents. Further, the 30-day revision period needlessly clogs the already overburdened asylum process with delays that will add to the already significant asylum processing backlog.

This rule change would have a devastating impact on pro se asylum seekers who already struggle to understand how to complete the I-589 asylum application. In FY 2020, fifty percent of detained asylum seekers did not have a lawyer to represent them in court,[16] and 94 percent of asylum seekers subjected to MPP do not have an attorney.[17] Many asylum seekers are forced to turn to other detainees or asylum seekers with minimal English-language skills to explain and fill in their asylum applications in English. For example, an asylum seeker with no middle name might leave that box blank rather than writing in "none" or "N/A." Under the proposed rule, the immigration court would be required to reject the application on that ridiculous basis. Without counsel, the asylum seeker might well not understand the need to write "none" or "N/A" in the

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[13] *See* American Immigration Lawyers Association, "USCIS's 'No Blank Space' Policy Leads to Capricious Rejections of Benefits Requests," (Oct. 22, 2020), *available at* https://www.aila.org/advo-media/aila-policy-briefs/uscis-no-blank-space ("[o]f the 189 rejected applications analyzed, 28 were rejected for leaving blank the middle name").

[14] Catherine Rampell, *The Trump Administration's No-Blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration*, THE WASHINGTON POST, Aug. 6, 2020, *available at* www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57dcc_story.html.

[15] According to the Information Collection that accompanied the June 15, 2020 proposed asylum rule the form I-589 asylum application would jump to 16 pages and would include complex questions calling for legal analysis by the applicant. *See* "I-589, Application for Asylum and for Withholding of Removal," OMB No. 1615-0067 (Expires 09/30/2022), *available at* https://www.aila.org/File/Related/20062090c.pdf. The current NPRM makes no reference to the pending change in the asylum application form or how that might affect an asylum seeker's ability to fully complete the form.

[16] TRAC, "Asylum Decisions," *available at* https://trac.syr.edu/phptools/immigration/asylum/ (in 6,906 out of 13,743 asylum cases decided in FY 2020, the asylum seeker was not represented).

[17] University of Syracuse, Transactional Records Access Clearinghouse, "Details on MPP (Remain in Mexico) Deportation Proceedings," *available at* https://trac.syr.edu/phptools/immigration/mpp/.

box and could be needlessly blocked from even requesting asylum. Not only is depriving asylum seekers of their right to pursue asylum because of a missing word on the application cruel and arbitrary, it violates U.S. treaty obligations and the Refugee Act of 1980.

8 C.F.R. §§ 1003.10(b), 1003.29, 1003.31, and 1240.6—The Proposed Rule Would Deny Continuances to Many Asylum Seekers, Violating Due Process Rights and Worsening the Immigration Court Backlog

Proposed Sections 1003.10(b), 1003.29, 1003.31, and 1240.6 would require immigration judges to complete asylum cases within 180 days after an asylum application is filed unless the applicant can demonstrate "exceptional circumstances," an impossibly high bar that does not cover the majority of obstacles and emergencies that asylum seekers face. This rule would require immigration judges to deny continuances to many asylum seekers who need more time to find legal counsel, are awaiting adjudication of an immigration benefit by another government agency, or are facing a serious medical problem or family emergency.

Implementing the 180-day case completion requirement without meaningful exceptions would further limit the discretion immigration judges have to manage their dockets. It would overburden immigration courts, forcing judges to adjudicate cases where an asylum seeker has alternative relief pending before USCIS such as derivative asylum through a qualifying relative, a T visa (for survivors of trafficking) or a U visa (for victims of significant crimes in the United States). Postponing adjudication of these cases would be the most efficient strategy for immigration courts, as a grant of an immigration benefit by USCIS would foreclose the need for an immigration court hearing. Additionally, granting an asylum seeker more time to find a lawyer or prepare evidence allows for more efficient presentation and adjudication of asylum claims, in addition to being fair, humane, and in line with due process obligations.

In addition to worsening the immigration court backlog, the proposed rule would harm asylum seekers and violate their due process rights. Under current regulations, immigration judges may grant a continuance for "good cause shown," a less onerous requirement than "exceptional circumstances."[18] Barring a continuance beyond the 180-day adjudication deadline except upon a showing of exceptional circumstances will result in many asylum seekers being unable to secure more time to prepare when needed, increasing the likelihood they will be ordered deported despite being eligible for U.S. humanitarian protection. The agency defines exceptional circumstances at proposed 8 C.F.R. § 1003.10(b) as covering only the most extreme, life-threatening situations, "such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances."[19] This does not include medical or mental health situations not deemed to be sufficiently "serious" by the immigration judge, pending relief before USCIS, unexpected loss of an attorney, death of a sibling, or delayed receipt of critical documentation from abroad. Failing to account for these and other circumstances will prevent many asylum seekers from receiving a full and fair hearing in immigration court. Barring an extension to obtain legal counsel or search for new counsel in the

[18] 8 C.F.R. § 1003.29.
[19] 85 FR 59699.

event of an attorney withdrawing from a case not only violates due process but also the statutory right to representation in immigration proceedings.[20]

The NPRM does not specify whether EOIR would apply the 180-day rule prospectively or to all pending cases. Either option would exacerbate the backlog, harm asylum seekers, and violate due process. Many cases in the current backlog have been pending for years. If, following publication of a final rule, EOIR imposes a deadline on immigration judges to adjudicate cases within 180 days, the courts would be overwhelmed. Practitioners, many of whom have dozens or hundreds of immigration court cases with hearings scheduled years in advance, would be forced to choose between withdrawing from cases or providing inadequate representation. On the other hand, if EOIR applies the rule prospectively, it would essentially recreate a "Last In, First Out" policy. In this scenario, asylum seekers who file applications after the rule is published would have to present their asylum claims and supporting evidence within the shortened timeframe. At the same time, asylum seekers whose cases have already been languishing in the EOIR backlog for years would be pushed to the end of the line, as immigration judges struggle to comply with the newly imposed requirement. Asylum seekers face serious due process concerns if their cases are scheduled too quickly to adequately prepare, and equally serious concerns if their cases languish so long that they spend years without permanent status.[21]

The Proposed Rules Alter Evidentiary Rules in Ways that Undermine the Fairness of Immigration Court Proceedings

Proposed 8 C.F.R. § 1208.12 would limit the ability of asylum seekers to have credible country conditions evidence they submit in immigration court be fairly assessed. Asylum seekers bear the burden of proving that they would be at risk of serious harm, persecution, or torture if returned to their country of origin; yet, the proposed rule limits the ability of asylum seekers to make their case before an immigration judge. The NPRM creates a bifurcated standard for country conditions evidence in which an immigration judge "may rely" on evidence from U.S. government sources but subjects reports from independent, non-governmental organizations, human rights groups, and foreign governments or international organizations to a separate, more restrictive standard of scrutiny.[22]

Without providing any supporting evidence, the proposed rule asserts that non-US government country conditions sources are not necessarily "probative" or "credible."[23] Indeed, the federal circuit courts of appeal have all relied upon non-governmental human rights reports as substantive evidence, as has the Supreme Court.[24] Whether an independent report (or a State

[20] *See* 8 U.S.C. § 1362.
[21] *See*, Southern Poverty Law Center and Innovation Law Lab, *The Attorney General's Judges How The U.S. Immigration Courts Became A Deportation Tool*, p. 20 (June 2019), *available at* www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf ("'arbitrary prioritizations wreak havoc on case management,' giving so-called 'priority' cases inadequate time to prepare while further extending the backlog for pending cases that may have been waiting for years'").
[22] 85 FR 59699.
[23] 85 FR 59695.
[24] *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 81 (2010) (favorably citing an Amnesty International and Human Rights Watch Report); *Ceribashi v. Gonzalez*, 188 Fed. Appx. 1, 4-5 (1st Cir. 2006) (supplementing a State

Department report for that matter) is credible or probative is within the discretion of the immigration judge overseeing the particular case and will depend on the circumstances of the asylum seeker, her country of origin, and the documentary evidence in question. DOJ has not put forth any evidence to establish why non-governmental sources should be treated as categorically less credible or probative.

Indeed, the credibility and reliability of U.S. government human rights reports is very much in question. A recent whistleblower complaint accused senior DHS officials of demanding changes to reports on "corruption, violence, and poor economic conditions" in Guatemala, Honduras, and El Salvador that would have "undermine[d] President Donald J. Trump's [] policy objectives with respect to asylum."[25] Human Rights Watch has also found that U.S. State Department reports are subject to political pressure.[26] U.S. State Department human rights reports have recently reduced coverage of certain issues including abortion, LGBTQ rights, and the rights of women and children.[27] For instance, these reports no longer use the phrase "reproductive rights," which had been used since 2012, and now omit information on contraceptives and abortion.[28] Further, the U.S. State Department human rights reports have reduced coverage of gender discrimination and domestic abuse in ways that are not "consistent with the situation on the

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Department Human Rights Report with additional details from a Human Rights Watch Report and an Amnesty International Report); *Maung v. Gonzalez*, 151 Fed. Appx. 42, 43 (2d. Cir. 2005) (overturning an asylum denial based on an Amnesty International Report, a Human Rights Watch report, and the State Department report included in the asylum seekers application); *Zubeda v. Ashcroft*, 333 F.3d 463 (3d. Cir. 2003) (quoting extensively from Amnesty International and Human Rights Watch Reports); *Selgeka v. Carroll*, 184 F.3d 337, 340 (4th Cir. 1999) (citing a Human Rights Watch report on Kosovo alongside a State Department Report); *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 346-47 (5th Cir. 2006) (supplementing a State Department Report with substantive evidence from Human Rights Watch and Amnesty International reports); *Coriolan v. INS*, 599 F.2d 993, 1003 (5th Cir. 1977) (specifically remanding the case of two Haitian citizens to the BIA for consideration of an Amnesty International report, concluding that "the evaluation in this report is certainly relevant"); *Faustino v. INS*, 772 F.2d 223, 227 (6th Cir. 1985) (finding an Amnesty International report established generalized hardship in the Philippines, but not particularized hardship for the respondent's particular social group); *Lian v. Ashcroft*, 379 F.3d 457 (7th Cir. 2004) (citing a British Home Office report, a Human Rights Watch report, a Human Rights in China report, news articles from Chinese reporters, a Laogai Research Foundation report, and an Amnesty International report as substantive evidence of prison conditions, forced labor, and the likelihood of torture upon return to China); *Karim v. Holder*, 596 F.3d 893, 895 (8th Cir. 2010) (citing an "NGO Report" as substantive evidence of country conditions alongside State Department reports); *Almaghzar v. Gonzales*, 457 F.3d 915, 925 (9th Cir. 2006) (supplementing the State Department report on Yemen with findings from a Human Rights Watch and an Amnesty International report); *Kalule v. Gonzales*, 213 Fed. Appx. 657, 659-60 (10th Cir. 2007) (citing a Human Rights Watch report and a British Broadcasting Company report as substantive evidence, and alluding to the BIA's extensive reliance on these reports); *Loggins v. Thomas*, 654 F.3d 1204, 1225 (11th Cir. 2011) (citing to an Amnesty International and Human Rights Watch Report).

[25] *See* DHS, Office of the Inspector General, Matter of Brian Murphy, (Sep. 8, 2020), *available at* https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf.

[26] *See* Amanda Klasing & Elisa Epstein, *US Again Cuts Women from State Department's Human Rights Report*, Human Rights Watch (Mar. 13, 2019), *available at* www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rightsreports; Tarah Demant, *A Critique of the US Department of State 2017 Country Reports on Human Rights Practices*, Amnesty International (May 8, 2018), *available at* https://medium.com/@amnestyusa/a-critiqueof-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca.

[27] *See* Michael K. Lavers, *State Department human rights commission largely omits LGBTQ issues* Washington Blade, (Jul. 17, 2020), *available at* https://www.washingtonblade.com/2020/07/17/state-department-human-rights-commission-report-largely-omits-lgbtq-issues/.

[28] Robbie Gramer, *Human Rights Groups Bristling at State Department Report*, Foreign Policy, (Apr. 21, 2018), *available at* https://foreignpolicy.com/2018/04/21/human-rights-groups-bristling-at-state-human-rights-report/.

ground as documented by other reliable sources of information."[29] Such information is often crucial in asylum claims to establish the scope of persecution and whether a government is willing and able to protect individuals at risk of persecution – components of asylum eligibility that generally fall to an applicant to establish. In the absence of accurate human rights reporting from the U.S. State Department, asylum seekers will understandably seek to supplement the record with independent reports, but the proposed rule would make it more difficult for the asylum seeker to rely on such information to meet their evidentiary burden.

Given the often-limited breadth and depth of coverage in U.S. State Department human rights reports, these reports often are not the most probative sources of information in asylum cases. For example, the persecution of the Garifuna people, an afro-indigenous racial and ethnic group in Honduras, is not extensively reported in U.S. State Department human rights reports, and is mentioned only three times in the 2019 Honduras country report despite widespread persecution of Garifuna people.[30] Limiting the ability of asylum seekers to supplement government country conditions reports with news sources, non-governmental human rights reports, and other independent sources, will impact the quality of evidence admitted in immigration courts and limit the ability of asylum seekers to present a holistic and accurate picture of their experiences.

In addition, the proposed rule at 8 C.F.R. § 1208.12 introduces a concerning provision that allows immigration judges to introduce evidence into the record. Coupled with the other procedural changes in this rule, this rule would position immigration judges, many of whom have been appointed under this administration through a highly politicized hiring process,[31] to submit and rely on their own pre-prepared country conditions documents, effectively ignoring evidence introduced by asylum seekers.

The only procedural safeguard the proposed rule would provide is that the immigration judge would have to provide "a copy of the evidence . . . to both parties and both parties have had an opportunity to comment on or object to the evidence *prior to the issuance of the immigration judge's decision*."[32] This creates a double standard – the asylum seeker and DHS are required by the Immigration Court Procedures Manual to submit evidence at least 15 days before the hearing,[33] but an immigration judge under these rules would be required to introduce evidence only just before *issuing* a decision. The immigration judge could presumably hand both parties a copy of the judge's evidence the day of the final hearing or just prior to issuing a decision after testimony has already been taken. For *pro se* asylum seekers and non-English speakers, this would mean the country conditions evidence relied upon by an immigration judge would be unreadable, and asylum seekers would not have a fair opportunity to review or challenge this

[29] Diane Taylor, *Trump administration alters and downplays human rights abuses in reports*, The Guardian, (Oct. 21, 2020), *available at* https://www.theguardian.com/us-news/2020/oct/21/trump-administration-human-rights-annual-reports?CMP=Share_iOSApp_Other.
[30] U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, 2019 Country Reports on Human Rights Practices, Honduras, *available at* https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/honduras/.
[31] *See* Human Rights First, "Immigration Court Hiring Politicization," (2018), *available at* https://www.humanrightsfirst.org/sites/default/files/DOJ-FOIA-Immigration-Judges.pdf.
[32] 85 FR 59700 (emphasis added).
[33] EOIR, Immigration Court Practice Manual, p. 36 (Jul. 2, 2020), *available at* www.justice.gov/eoir/page/file/1258536/download.

evidence. There is also no provision for parties to request a continuance to respond to the newly introduced evidence or a right to file additional evidence to rebut documents entered into the record by the immigration judge.

The immigration judge's existing duty to develop the record cannot in good faith be read to mean the judge has absolute authority over all country conditions evidence.[34] Rather, the immigration judge has a duty to elicit testimony from asylum seekers about their claims, which can be done while also maintaining the role of a fact-finding adjudicator. Inviting the immigration judge to introduce their own facts into the record transforms the judge from a neutral adjudicator and fact finder into effectively a DHS attorney litigating the case – far beyond the role of the immigration judge established under the regulations.[35] This proposed rule would further erode the procedural rights and protections for asylum seekers in immigration court.

The Agencies Have Not Allowed a Sufficient Period for Comment on the Proposed Rule

By providing only a limited 30-day comment period, DOJ is effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act (APA). Significant agency revisions to established practice should be well-thought out and allow the public the opportunity to fully comment. Instead, DOJ has used the pandemic to rush through proposed rules, which would radically undermine due process for protections for asylum seekers and potentially return thousands of refugees to persecution and torture. The shortened comment period also presents particular challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public, including our organization, to work from home and balance childcare with work activities.

Moreover, the extensive changes being proposed through rapid-fire, staggered rulemaking make it impossible for the public to fully comprehend the interplay among the myriad proposed rules and therefore effectively deny the public the right to comment on the effects of the proposed rules. The precise effects and final form of this proposed rule will depend upon at least three proposed rules that have not yet been published in a final form: (1) a proposed rule issued on June 15, 2020[36] putting forward sweeping changes to asylum eligibility and potentially placing large numbers of asylum seekers in asylum-only proceedings;[37] (2) a July 9, 2020 proposed rule that would radically alter the credible fear process;[38] and (3) an August 6, 2020 NPRM that would substantially reduce the procedural rights of asylum seekers in removal proceedings and during appellate review of their cases.[39] In these circumstances, it is impossible to provide well-informed and specific comments on the current proposed rule without an opportunity to review this rule in the context of whatever regulatory changes are ultimately adopted through the myriad of pending proposed asylum regulations.

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[34] 85 FR 59695.
[35] *See* 8 C.F.R. § 1003.10(b) ("Immigration judges shall administer oaths, *receive evidence*, and interrogate, examine, and cross-examine aliens and any witnesses.") (emphasis added).
[36] 85 FR 36264.
[37] The proposed rule received 88,933 comments. *See* "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," *available at* https://beta.regulations.gov/docket/EOIR-2020-0003.
[38] 85 FR 41201.
[39] 85 FR 52491.

For these procedural reasons, we urge the administration to rescind the proposed rules. If it wishes to reissue the proposed regulations, it should wait until it has finalized (or withdrawn) overlapping proposed rules that are still pending, and grant the public at least 60 days to have adequate time to provide comprehensive comments.

Conclusion

For these reasons, Human Rights First strongly urges that the proposed rules be withdrawn in their entirety, that refugees' access to asylum in the United States be preserved and strengthened, and that the United States' tradition, consistent with the Refugee Convention, of fostering family unity and refugee integration be pursued.