AMNESTY INTERNATIONAL

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Via electronic submission to eRulemaking Portal

RE: Amnesty International USA Comment in Opposition to Proposed Rules on Procedures for Asylum and Withholding of Removal

Amnesty International USA submits the following comment in response to the September 23 notice of proposed rulemaking issued by the U.S. Department of Justice (DOJ), which creates insurmountable new bars to accessing asylum. If implemented, these changes will place asylum out of reach for nearly everyone seeking protection here by instituting draconian new deadlines and introducing barriers to due process in asylum proceedings. The proposed rule will lead to countless wrongful denials of protection and send asylum-seekers back to harm's way in violation of U.S. obligations under domestic and international law.

Amnesty International is the world's largest grassroots human rights organization, comprising a global support base of millions of individual members, supporters, and activists in more than 150 countries and territories. For years, a top priority of the U.S. section of Amnesty International has been the protection of the right to seek asylum; the organization even helped provide input in the drafting of the 1980 Refugee Act, which continues to serve as the backbone of domestic asylum law. Our opposition to the rule at hand is rooted in our expertise in the international human rights standards governing asylum law and our past engagement in research, policy, and litigation related to access to asylum in the United States and the wider region.

For the reasons described below, Amnesty International urges the administration to rescind this proposed rule in full and restore its commitment to a fair and just asylum system.

The Public Has Not Been Given a Meaningful Opportunity to Comment

As a preliminary matter, the agencies have not allowed the public sufficient opportunity to comment on this rule. If implemented, the rule would have a seismic impact on asylum access in the United States, making major changes to asylum procedures.

Typically, the administration should allow a comment period of *at least* 60 days following publication of the proposed rulemaking.[1] Here, despite the sweep and complexity of this new

[1] https://www.archives.gov/files/federal-%20register/executive-orders/pdf/12866.pdf.

rule, the agencies have afforded the public only 30 days to comment. This is especially unjustified considering that the border has been virtually shut to asylum-seekers since the imposition of the extralegal Title 42 processing regime in March, which has led to unlawful mass expulsions of nearly everyone seeking safety here without any process; it is also particularly unfair to members of the public, who are currently grappling with the myriad challenges of managing work and life during a global pandemic. Yet not only have the agencies imposed an abnormally short deadline without any compelling justification for doing so, they have also, to date, failed to respond to a request for extension of the deadline signed by several organizations.[2]

Furthermore, given the recent relentless hailstorm of rulemaking affecting every aspect of the asylum system, it is impossible to predict how this rule will interact with numerous others proposed just this year. The administration has issued a barrage of anti-asylum rules over the past several months, including a 181-page set of changes to every aspect of the asylum regime published in June and a sweeping new bar to asylum based on public health considerations published in July.[3] The administration has failed to explain how this proposed rule will be harmonized with these other sweeping changes, and the public should not be forced to engage in guesswork on the interplay among these unprecedented and unlawful changes. The Administrative Procedure Act explicitly requires a "meaningful opportunity" to comment on the effect of a proposed rule – an opportunity DOJ has deprived the public of here by failing to clarify how this proposed rule will intersect with myriad other changes. On this basis alone, the proposed rulemaking is unlawful and should be revoked.

The Proposed Rule Is Unlawful and Should Be Revoked in Full

Although the 30-day deadline is unfair and the administration has failed to provide a complete basis on which to comment, Amnesty International nevertheless submits this comment to express our grave concerns with its contents. If implemented, this rule will create a series of unfounded and unjust new barriers to asylum access. It must be rescinded in full.

- **15-Day Filing Deadline**

The proposed rule creates an impossible filing deadline for applicants in asylum- and withholding-only proceedings, requiring them to submit their asylum applications within just *15 days* of their first court appearance. Given that the June 15 rulemaking (85 Fed. Reg. 36264) proposes funneling nearly all asylum-seekers who pass initial fear screenings into these limited proceedings, effectively all asylum-seekers applying defensively would be subject to this arbitrary and utterly draconian deadline.

[2] Catholic Legal Immigration Network (CLINIC) et al., Letter to Justice Department Urging Extension of Comment Period to Respond to Proposed Changes to Asylum and Withholding of Removal Procedures, Oct. 8 2020, https://cliniclegal.org/resources/federal-administrative-advocacy/nearly-90-organizations-join-urge-justice-department.

[3] For Amnesty International's comment challenging that rule, see "Amnesty International Comment Opposing Sweeping Changes to the US Asylum System," July 15, 2020, https://www.amnestyusa.org/amnesty-international-comment-opposing-sweeping-changes-to-the-asylum-system/. For Amnesty International's comment challenging the July proposed rule weaponizing public health to unlawfully curtail access to asylum, see "Amnesty International Comments on Cruel and Unlawful New 'National Security'-Based Asylum Rule," Aug. 10, 2020, https://www.amnestyusa.org/amnesty-international-comments-on-cruel-and-unlawful-new-national-security-based-asylum-rule/.

In practice, this rule change would be seismic: in 2018, the Department of Homeland Security (DHS) determined that nearly 75,000 asylum-seekers had a credible fear of persecution.[4] Every single one of these asylum-seekers would be required to apply for asylum just 15 days after first appearing in court. Asylum applicants at initial hearings are often unrepresented and still in the process of locating legal counsel; these hearings are generally the first time the court advises them of their rights, including the right to be represented by legal counsel, and the possibility of applying for relief for removal, including the possibility of applying for asylum and other protection-based forms of relief.

A 15-day filing deadline would mean that asylum-seekers would have just two weeks to find legal counsel to prepare and submit an asylum application – an exceedingly complex and fact-intensive submission that frequently requires multiple rounds of interviews with asylum applicants and family members, collection and translation of documentary evidence that may be located in the applicant's home country, and compilation of country conditions evidence to corroborate the claim. This would pose an unfair and impossible burden on asylum applicants, as well as their legal counsel.

The insurmountable challenges proposed by this rule are compounded by the June 15 rulemaking, which would allow immigration judges to "pretermit," or prematurely deny, asylum applications that do not establish a "*prima facie* claim for relief."[5] Assuming this provision remains in the final version of that rulemaking, immigration judges could force asylum applicants to turn in their applications within an impossible and rushed 15-day deadline, then turn around and throw out those applications for failing to state a claim for relief. This deadline is wholly unnecessary and makes a mockery of due process in asylum adjudications.

- **Barriers to Consideration of Country Conditions Evidence**

The proposed rule would also unlawfully limit the consideration of certain types of country conditions evidence while unfairly privileging flawed and politically motivated reporting. This evidence, including reports from independent, non-governmental organizations like Amnesty International, are often critical in corroborating aspects of an asylum claim, including the possibility of persecutory harm, connections between feared harm and protected characteristics, and the existence of particular social groups in certain countries or regions.

Proposed 8 C.F.R 1208.12 would create a bifurcated standard for country conditions evidence: the immigration judge "may rely" on evidence that comes from U.S. government sources, but can *only* rely on the resources from non-governmental sources or foreign governments "if those sources are determined by the immigration judge to be credible and probative." In other words, U.S. State Department reports, which Amnesty International and other human rights organizations have criticized for excluding vital reporting about sexual and reproductive rights and LGBTI rights, would be taken at face value,[6] while independent reporting from Amnesty

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[4] See DHS, "Credible Fear Cases Completed and Referrals for Credible Fear Interview," www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview.

[5] 85 Fed. Reg. 59694.

[6] Amnesty International, March 11, 2020, "State Department's Human Rights Report Highlights Trump Administration's Anti-Human Rights Policies," https://www.amnestyusa.org/press-releases/state-departments-human-rights-report-highlights-trump-administrations-anti-human-rights-policies/ (noting that "The Trump administration's animosity towards the rights of women, girls, and the LGBTI

International and other NGOs based on documented evidence of human right violations could be thrown out if a judge subjectively determined that it was not "credible or probative." There is little guidance offered in the rule about how a judge would make this decision, meaning that, in practice, judges who felt disinclined to grant asylum claims could simply disregard country conditions reporting that failed to bolster their conclusions.

Given the State Department's recent politicized attempts to radically redefine what constitutes "human rights,"[7] as well as reports that DHS intelligence officials were ordered to bury evidence about "corruption, violence, and poor economic conditions" in Guatemala, El Salvador, and Honduras that would undermine the administration's "policy objectives with respect to asylum,"[8] there is simply no justification to conclude that these reports are presumptively reliable. A comprehensive analysis of recent State Department human rights reporting concluded that the reports omitted key information relating to the treatment of women, LGBTI people, and children and overstated or misrepresented improvements in human rights situations on the ground.[9] The undermining of U.S. human rights reporting demonstrates how essential the consideration of independent country conditions evidence is.

To make matters even worse, this rule would also allow judges to introduce their own evidence into the record, fundamentally altering their role in the proceedings. Judges could prepare their own country conditions evidence packets, find their own evidence "credible and probative," and disregard any conflicting evidence provided by the asylum-seeker. 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*," meaning the judge could supply this evidence on the day of the hearing. There is no mention made as to how a non-English speaker proceeding pro se would be able to understand the documents, nor does the rule contemplate allowing a continuance for the parties to respond to the newly introduced evidence.

While the proposed rulemaking likens this change to the immigration judge's existing duty to develop the record,[10] that comparison is inapt: the judge's duty to elicit testimony about their claims from unrepresented respondents is wholly consistent with the role of a fact-finding adjudicator. The role of the immigration judge is to weigh the facts that the parties put before the court, not to introduce their own facts into the record. Allowing the immigration judge to create their own record in the case would fundamentally alter their role in removal proceedings.

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community is evident as the State Department has, once again, omitted sexual and reproductive rights as if they are not fundamental to humanity").

[7] Amnesty International, "State Department's Flawed 'Unalienable Rights' Report Undermines International Law," July 16, 2020, https://www.amnesty.org/en/latest/news/2020/07/usa-state-department-report-undermines-international-law/.

[8] Susan Gzesh, "Whistleblower: DHS Suppressed Reports on Central America and Inflated Risk of Terrorist Border-Crossers," Sept. 16, 2020, https://www.justsecurity.org/72451/whistleblower-dhs-suppressed-reports-on-central-america-and-inflated-risk-of-terrorist-border-crossers/.

[9] Asylum Research Centre, Comparative Analysis: U.S. State Department Country Reports on Human Rights Practices (2016-2019), Oct. 2020, https://asylumresearchcentre.org/wp-content/uploads/2020/10/Executive-Summary_USDOS_ARC_21-October-2020.pdf.

[10] 85 Fed. Reg. 59695.

- **Arbitrary Case Completion Deadlines**

The proposed rules introduce arbitrary and unfair case completion deadlines that would rob asylum-seekers of due process.

Proposed sections 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 would require immigration judges to complete asylum cases within 180 days after the asylum application is filed in all cases, unless the asylum applicant demonstrates exceptional circumstances.

This timeframe is wholly unreasonable: there is currently a backlog of nearly 1.25 million asylum cases.[11] Courts are already overburdened and unable to adjudicate cases under the current system, and asylum-seekers already face significant barriers to accessing legal orientation and representation; a 180-day adjudication deadline is arbitrary to the point of cruelty.

The proposed rule does not explain whether the 180-day rule applies to all pending cases or whether it would apply the rule prospectively only; however, either option would raise serious due process concerns. Many cases in the current backlog have been pending for years. If, following publication of this rule, EOIR imposed a deadline on immigration judges to adjudicate these cases within 180 days of the rule's publication, the courts would be overwhelmed, and practitioners who have caseloads of, in some instances, hundreds of asylum cases with individual hearing dates scheduled years in advance, would be forced to choose between withdrawing from cases or providing inadequate representation. However, if the agency applied the rule prospectively, those who file asylum cases after the rule is published would have to go forward on their applications, in many cases before they are ready to do so, while asylum-seekers whose cases have been languishing in the backlog would be forced to wait even longer. Both instances – rushing asylum-seekers before they can adequately prepare or find legal counsel, or requiring them to wait so long that their evidence becomes outdated and their memories fade – create serious unfairness. [12]

The extraordinary circumstances exception contemplated in the proposed rule is simply too narrow to be meaningful – qualifying circumstances would include "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."[13] But there are several other reasons an asylum-seeker might not be able to proceed within 180 days of filing their asylum application that would not meet this definition. For example, the asylum-seeker may need mental health counseling in preparation to present their asylum claim, or they may be waiting to receive critical documentation from abroad. Though the proposed rule would generally allow for continuances for reasons such as these if an immigration judge finds there is "good cause,"[14] the immigration judge would be prohibited from granting a continuance for these reasons if doing so would push the hearing beyond the 180-day mark.

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

[12] *See* Southern Poverty Law Center and Innovation Law Lab, "The Attorney General's Judges: How The U.S. Immigration Courts Became A Deportation Tool," June 2019, www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf, at 20.

[13] Proposed 8 CFR § 1003.10(b).

[14] The attorney general has already substantially limited the definition of "good cause" for continuing cases in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) while DOJ has imposed performance metrics that give immigration judges a financial incentive to complete cases quickly. *See,* Judge A. Ashley Tabaddor, President National Association of Immigration Judges, *Testimony Before the*

Furthermore, this proposed rule is particularly unfair when considered in conjunction with the recently published asylum employment authorization document rules, which now prohibit asylum-seekers from applying for a work authorization document until 365 days after their asylum application has been pending.[15] Taken together, these rules would create a situation in which asylum-seekers who file defensive asylum applications would not be authorized to work until after there is a decision on their application, thereby making it much less likely that they could afford to retain counsel for their individual hearing.

- **Rejection of Applications Based on Minor, Technical Errors**

Finally, the proposed rule would unfairly allow adjudicators to reject asylum applications based on minor, technical errors, including if applicants accidentally leave a form field blank or cannot afford the unprecedented new filing fee the administration is levying on asylum claims.[16]

Since 2019, DHS has been rejecting affirmative asylum applications if any box on the Form I-589 is left blank – even boxes that have no legal relevance to the case, or questions that obviously do not apply, such as failure to include the name of a child when the applicant has no children.[17] The proposed rule would make these rejections official policy, requiring immigration judges to reject all applications that are not completely filled out. Under the rule, once the court rejects the application, asylum-seekers would have only 30 days to correct their applications or waive their ability to seek asylum altogether.

This rule change would have a devastating impact on *pro se* asylum seekers, particularly those in detention – who face significantly more hurdles to accessing legal orientation or counsel – as well as those marooned in Mexico under the so-called "Migrant Protection Protocols" (MPP), only 5 percent of whom have legal counsel.[18] These asylum-seekers could have their applications rejected for reasons they may not fully understand and may never be notified about; they could be barred from seeking safety for failure to include a middle initial or to write "N/A" in form fields that do not apply to them.

Equally troubling, this rule would require the court to reject the asylum application of any asylum seeker who cannot pay the unprecedented new $50 filing fee. Charging applicants for seeking safety runs afoul of U.S. obligations to asylum-seekers: the overwhelming majority of state parties to the 1951 Refugee Convention do not charge a fee, and until earlier this year, the United States had not contemplated doing so.[19]

While the final asylum fee rule has not been published, the proposed change here – allowing judges to throw out asylum applications where the fee has not been paid – will have devastatingly unfair results, slamming the door to asylum-seekers who cannot afford to pay. Through new

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Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System" (Apr. 18, 2018), www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf ("production quotas and time-based deadlines violate a fundamental canon of judicial ethics which requires a judge to recuse herself in any matter in which she has a financial interest that could be affected substantially by the outcome of the proceeding.")

[15] 8 CFR § 208.7(a)(ii).

[16] Proposed 8 CFR § 1208.3(c)(3).

[17] Catherine Rampell, "The Trump Administration's No-Blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration," Washington Post, Aug. 6, 2020, 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.

[18] *See* "Details on MPP (Remain in Mexico) Deportation Proceedings," https://trac.syr.edu/phptools/immigration/mpp/.

[19] 85 Fed. Reg. 11866 (Feb. 28, 2020).

restrictions on access to work authorization, asylum-seekers are being forced into penury, and through a patchwork of new policies, they are being forced into danger and precarity in Mexican border towns and subject to increasingly prolonged detention. Detained people, MPP returnees, and asylum applicants who are prevented from accessing work authorization will likely have an exceptionally difficult time paying the new asylum fee; yet under this new rule, they would have just a month to resubmit their asylum applications with the fee or waive their ability to seek asylum altogether. The rule is silent on the extreme logistical complications of posting a fee, particularly for detained applicants and asylum-seekers stuck in Mexico. While asylum-seekers should never have to pay to seek safety, this rule fails to articulate a process how many of them would even go about doing so.

For all these reasons, Amnesty International USA urges DOJ to immediately rescind this proposed rule, which will introduce serious unfairness into the asylum process and deny countless people access to protection, in violation of U.S. obligations towards asylum-seekers.

Sincerely,

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