

July 15, 2020

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RE: EOIR Docket No. 18-0002; A.G. Order No. 4714-2020, RIN: 1615-AC42, 1125-AA94, Joint Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review.

Dear Assistant Director Reid:

We, the undersigned Members of Congress, submit this comment in opposition to the Department of Homeland Security (DHS) and Department of Justice (DOJ) (hereinafter “the Departments”) joint notice of proposed rulemaking, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* (hereinafter “proposed rule”).¹ As Members of Congress, we are responsible for ensuring that the Departments exercise their authority to interpret and enforce the immigration laws in accordance with the statutory framework established by Congress.

For the reasons described herein, we are deeply troubled by the proposed rule, which would upend long-established substantive and procedural standards pertaining to asylum, withholding of removal, and protection under the Convention Against Torture (CAT).² As a threshold matter, the 30-day comment period is entirely insufficient to provide the public with a meaningful opportunity to comment on the sweeping changes proposed in this rule.³ Further, the proposed rule directly conflicts with the Refugee Act of 1980 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as well as the congressional intent underlying these Acts. The Departments selectively cite to legislative history to justify the proposed changes, which would prevent those seeking humanitarian protection in the United

¹ 85 Fed. Reg. 36264 (June 15, 2020).

² All citations to supporting evidence and authorities, including direct links and contents therein, are part of this comment and the formal administrative record for purposes of the Administrative Procedure Act (APA).

³ See Request for 60-Day Comment Period for DHS and DOJ Joint Notice of Proposed Rulemaking – EOIR Docket No. 18-0002; A.G. Order No. 4714-2020, RIN: 1615-AC42, 1125-AA94 from Representatives Jerrold Nadler, Chairman of the House Judiciary Committee and Zoe Lofgren, Chair of the Subcommittee on Immigration and Citizenship to the Acting Secretary of DHS and the Attorney General.

States from fully vindicating their rights. We therefore urge the Departments to withdraw the proposed rule.

I. The Proposed Rule Conflicts with the Refugee Act of 1980 and IIRIRA

More than four decades ago, Congress passed the Refugee Act of 1980, thus codifying portions of the United Nations Protocol Relating to the Status of Refugees (hereinafter “the Protocol”) and establishing the framework for our current U.S. asylum laws. Sixteen years later, Congress passed IIRIRA, ushering in significant changes to the processing of individuals seeking admission to the United States. As described below, many of the changes contemplated by this proposed rule are in direct conflict with both these Acts.

a. The proposed rule conflicts with the letter and intent of the Refugee Act of 1980 and the Immigration and Nationality Act.

Congress enacted the Refugee Act of 1980 to establish a fair, humane, and inclusive system for individuals fleeing persecution to request asylum or withholding of removal in the United States. Applicants for these forms of protection must undergo thorough vetting and must meet high evidentiary standards—as dictated by statute—at every stage of the application process. This requires applicants, who are often at their most vulnerable when they arrive in this country, to relive past trauma and produce exhaustive documentary evidence in support of their claims.⁴ Recognizing these unique challenges, Congress sought to establish comprehensive, uniform, and fair standards and procedures for individuals seeking protection on our shores.

As the Supreme Court recognized in *INS v. Cardoza-Fonseca* over 30 years ago, “If one thing is clear from the legislative history . . . of the [Refugee Act], it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol] to which the United States acceded in 1968.”⁵ By implementing international nonrefoulement obligations into domestic law, Congress thus created a “broad class of refugees who are eligible for a discretionary grant of asylum.”⁶ In the first section of the Act, Congress boldly “declar[ed] that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands[.]”⁷

The Departments’ proposed rule violates the Refugee Act and the Immigration and Nationality Act (INA) by adopting new standards for asylum and withholding eligibility that contradict Congress’ intent as recognized by the Supreme Court.⁸ For example, the proposed

⁴ See, e.g., Katrin Schock, Rita Rosner, and Christine Knaevelsrud, *Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers*, 6 EUR. J. PSYCHOTRAUMATOLOGY 26286 (Sept. 1, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4558273/>.

⁵ *I.N.S. v. Cardoza-Fonseca*, 40 U.S. 421, 436-37 (1987);

⁶ *Id.*, at 424; INA § 208(a)(2)(A).

⁷ Refugee Act of 1980 § 101(a), Pub. L. No. 96-212 (Mar. 17, 1980).

⁸ Although there are numerous examples of provisions in the proposed rule that are contrary to statute, we focus in this comment on only a few for the sake of brevity. Examples of other provisions with which we are equally

rule includes new restrictions on the definition of “particular social group” that will effectively exclude categories of individuals that have long been recognized under domestic and international law. The new definition provides that a particular social group “cannot be defined exclusively by the alleged harm.”⁹ This change, in combination with changes to the “nexus” requirement that effectively prohibit claims based on gender and other characteristics and circumstances,¹⁰ has the potential to disallow many groups cognizable within society from obtaining asylum, such as young women of the Tchamba-Kusuntu Tribe at risk of female genital mutilation, as recognized in *Matter of Kasinga* almost 25 years ago.¹¹

Further, the proposed definition sets forth nine types of social group claims that the Attorney General “in general, will not favorably adjudicate.”¹² This, however, is contrary to the INA which clearly articulates the groups of individuals who are barred from asylum or withholding of removal in INA section 208(b)(2)(A). These individuals include those who ordered, incited, assisted, or participated in the persecution of others; have been convicted of particularly serious crimes; have committed serious non-political crimes outside the United States; are a danger to the security of the United States; or were firmly resettled in another country. Congress also excluded individuals who have engaged in the persecution of others from the INA’s definition of “refugee.”¹³ By effectively barring additional categories of individuals from asylum eligibility—categories that Congress chose not to bar—the proposed rule is unlawful.

Moreover, by listing these limitations in the proposed definition of “particular social group,” the Departments are blatantly attempting to circumvent a judicial order preventing the Administration from adopting a definition that categorically excludes claims based on gender or gang violence. In *Grace v. Whitaker*, the U.S. District Court for the District of Columbia held that “[a] general rule that effectively bars [] claims based on general categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress’ intent to bring ‘United States refugee law into conformance with the [Protocol].’”¹⁴ And yet, the proposed rule does just that—proclaiming that “in general” social group claims will not be favorably adjudicated where, for example, such a social group consists

concerned include: the new definition of “political opinion” at 85 Fed. Reg. at 36280; the new definition of “persecution” at 85 Fed. Reg. at 36280; the new definition of “internal relocation” at 85 Fed. Reg. at 38282; new and dramatic restrictions related to asylum seekers’ travel and manner of entry at 85 Fed. Reg. at 36285 -86; and new restrictions related to “nexus” requirements at 85 Fed. Reg. at 36281.

⁹ 85 Fed. Reg. at 36278–79.

¹⁰ 85 Fed. Reg. at 36281 (“[T]he Secretary of Homeland Security and Attorney General, in general, will not favorably adjudicate asylum or statutory withholding of removal claims based on persecution . . . [on the basis of] gender[.]”).

¹¹ 21 I&N Dec. 357 (BIA 1996).

¹² Proposed 8 C.F.R. §§ 208.1(c), 1208.1(c).

¹³ INA § 101(a)(42); 8 U.S.C. 1101(a)(42).

¹⁴ 344 F.Supp.3d 96 (2018), citing *Cardoza-Fonseca*, 480 U.S. at 436-37, 107 S. Ct. 1207.

of or is defined by “[p]ast or present criminal activity or association (including gang membership); . . . interpersonal disputes of which governmental authorities were unaware or uninvolved, . . . [or] presence in a country with generalized violence or a high crime rate[.]”¹⁵

In enacting the Refugee Act, Congress purposefully refrained from narrowly defining “particular social group” because, as the Supreme Court recognized in *INS v. Cardoza-Fonseca*, Congress’ “primary purpose[.]” was to adopt the established definition of “refugee,” rather than fleshing out a new idea.¹⁶ Moreover, the concept of “particular social group” was intended to be flexible so that it could apply to new and varied circumstances that Congress could not fully anticipate. As such, the Departments and the courts have applied the definition flexibly, in a manner consistent with international norms and U.S. nonrefoulement obligations—the opposite of the approach now proposed by the Departments. Indeed, contrary to the proposed rule, *past* membership in or association with a gang has been recognized by several courts as a viable social group.¹⁷ Further, although it has long been held that generalized claims of civil unrest or political instability are insufficient to support an asylum claim, it is also well-established that fear based on a specific ground is not negated because of such unrest or instability.¹⁸ For this reason, the proposed rule’s categorical exclusion of social groups that may in part be defined by an environment rife with violence and crime is wholly inappropriate.

Beyond these discrete examples, it is clear that the proposed rule is generally aimed at furthering the Administration’s goal of restricting asylum eligibility, without regard to our nonrefoulement obligations under domestic and international law. While the plain text and legislative history of the Refugee Act of 1980 serve as evidence of Congress’ intent to make our asylum system fair and accessible,¹⁹ the proposed rule seeks to restrict relief by expanding the grounds under which adjudicators may deny asylum,²⁰ adopting extremely narrow interpretations

¹⁵ Proposed 8 C.F.R. §§ 208.1(c), 1208.1(c).

¹⁶ See 480 U.S. at 436-37.

¹⁷ See e.g., *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014); *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

¹⁸ See e.g., *Ordonez-Quino v. Holder*, 760 F.3d 80 (1st Cir. 2014); *Mengstu v. Holder*, 560 F. 3d 80 (9th Cir. 2009).

¹⁹ 125 Cong. Rec. 23231 (1979) (floor statement of Sen. Edward Kennedy, indicating that the Act “deals with one of the oldest and most important themes in our Nation’s history: Welcoming homeless refugees to our shores.”); *id.* at 23232 (“We have a proud record of accomplishment in offering a helping hand to refugees, and I believe our national policy of welcome to the homeless has served our country and our traditions well.”); *id.* at 23234 (letter from the American Council of Voluntary Agencies, noting that such agencies have “resettled over a million and a half refugees from all walks of life, with various religious convictions from all parts of the world, demonstrating a true national commitment on the part of the American people to provide a haven for the homeless.”); Statement of Rep. Elizabeth Holtzman, Hearing before Subcommittee on Immigration, Refugees, and International Law, 1 (May 3, 1979) (“In good measure, our country’s humanitarian tradition of extending a welcome to the world’s homeless has been accomplished in spite of, not because of, our laws relating to refugees.”).

²⁰ 85 Fed. Reg. at 36283 (defining “three specific but nonexhaustive factors” for adjudicators to consider when exercising discretion to grant or deny asylum).

of the standards for granting asylum,²¹ and making procedural changes intended to prevent lawful asylum seekers from appearing before an immigration judge or pursuing relief in removal proceedings under INA section 240.

b. *The proposed rule conflicts with the letter and intent of IIRIRA.*

In 1996, Congress enacted IIRIRA, making sweeping changes to our immigration laws. While IIRIRA upended decades of agency practice and continues to be the subject of litigation challenging its constitutionality,²² the drafters of the legislation made clear their intent to provide full due process protections to asylum seekers with viable claims by exempting them from summary removal through the expedited removal process.²³

Under IIRIRA, Congress created a new “expedited removal” process for individuals attempting to enter the United States who (1) committed fraud or willfully misrepresented a material fact in an effort to obtain an immigration benefit; (2) made a false claim to U.S. citizenship; or (3) lack valid travel documents.²⁴ As the Departments correctly note, “Congress intended the expedited removal process to be streamlined, efficient, and truly ‘expedited’” for individuals subject to it.²⁵ However, the Departments incorrectly claim that Congress intended these “streamlining” measures to apply to asylum seekers. In fact, the text and legislative history of IIRIRA make it clear that the opposite is true: most individuals who would otherwise be subject to expedited removal, but who are determined to have a credible fear of persecution are referred for removal proceedings under INA section 240, where they receive full consideration of their claims.²⁶ Congress created one exception to this general rule in INA section 235(a)(1)(2); stowaways who pass a credible fear screening are ineligible for a “hearing under section 240” and must instead pursue their claims in asylum- and withholding-only proceedings.²⁷ For all

²¹ See e.g. 85 Fed. Reg. at 36281 (setting forth “eight nonexhaustive situations” where the “nexus” requirement is not satisfied, including persecution on the basis of gender); 85 Fed. Reg. at 36287 (defining “rogue official” to exclude torture claims based on government officials who do not act under color of law when inflicting pain or suffering).

²² See e.g. *DHS v. Thuraissigiam*, 591 U.S. ____ (2020) (upholding IIRIRA’s limitations on habeas review as applied to an individual subject to expedited removal); *Make the Road New York v. Wolf*, No. 1:19-cv-02369 (D.C. Cir. June 23, 2020) (holding that IIRIRA’s jurisdiction stripping provisions did not preclude review of the decision to expand expedited removal proceedings to all individuals without documentation who have resided in the United States for less than two years); *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that IIRIRA’s jurisdiction stripping provisions did not extend to habeas petitions raising pure questions of law in light of the Suspension Clause).

²³ 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Orrin Hatch: “The [credible fear] standard adopted in the conference report is intended to be a low screening standard for admission into the *usual full asylum process*.”) (emphasis added).

²⁴ INA § 235(b) (expedited removal applies only to individuals deemed inadmissible under INA §§ 212(a)(6)(C) or (a)(7)).

²⁵ 85 Fed. Reg. at 36267.

²⁶ INA § 235(b)(1)(B)(ii).

²⁷ 8 C.F.R. § 208.2(c)(1) (DHS regulations concerning asylum- and withholding-only procedures); 8 C.F.R. § 1208.2(c)(1) (same for DOJ). Notably, there are a few other statutory provisions prohibiting section 240

others, regular section 240 proceedings apply. As the Supreme Court has previously held, “additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”²⁸ In this case, congressional intent is entirely consistent with the statute: As noted in the Conference Report accompanying IIRIRA, “[i]f the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under *normal non-expedited removal proceedings*.”²⁹

Having clearly preserved regular asylum processing in section 240 proceedings for individuals who pass the “low [credible fear] screening standard,”³⁰ it is astonishing that the Departments seek to strip these protections away under the guise of congressional intent. Under the proposed rule, individuals who pass the credible fear screening would no longer be allowed to have their claims heard in section 240 proceedings, which DHS and DOJ acknowledge are “more detailed and provide additional procedural protections, including greater administrative and judicial review[.]”³¹ Instead, all such asylum seekers would be placed in “asylum-and-withholding-only” proceedings.³² Clearly contrary to the plain language of the statute and congressional intent, this proposed regulation cannot stand.

Further, the Departments propose raising the evidentiary standard individuals must meet to raise claims for withholding of removal or protection under CAT at the initial credible fear screening stage. Under current law, asylum officers conducting credible fear screenings apply a single, uniform standard, to determine if there is a “significant possibility” of a claim for asylum, withholding of removal, or CAT.³³ DHS and the legacy Immigration and Naturalization Service (INS) have applied this “significant possibility” standard since 1997, when the INS concluded

proceedings for individuals who are otherwise eligible to apply for asylum. *See e.g.*, INA § 217(b)(2) (requiring Visa Waiver Program entrants to waive their right to a hearing under section 240, except “on the basis of an application for asylum”); INA § 212(l)(2) (same for the Guam and Northern Mariana Islands Visa Waiver Program).

²⁸ *United States v. Smith*, 499 U.S. 160, 167 (1991) (internal quotations marks omitted) (citing *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980)).

²⁹ H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.) (emphasis added).

³⁰ 142 Cong. Rec. S11491 (1996) (statement of Sen. Orrin Hatch).

³¹ 85 Fed. Reg. at 36266.

³² 85 Fed. Reg. at 36267; 8 C.F.R. § 208.2(c)(1); 8 C.F.R. § 1208.2(c)(1).

³³ 8 C.F.R. § 208.30(e)(2)-(3). While the Departments cite to legislative history acknowledging that Congress “intended [the “reasonable possibility” standard] to be a low screening standard for admission into the usual *full asylum process*,” 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Orrin Hatch) (emphasis added), the Departments erroneously suggest that this “process” was intended only to assess eligibility for asylum, excluding claims for withholding and CAT. The 104th Congress considered and debated IIRIRA in the shadow of other statutory requirements and legal obligations, including the INA’s withholding provisions introduced as part of the Refugee Act of 1980, *see* 8 U.S.C. 1231(b)(3); Refugee Act § 201(e) (amending then-section 243(h) of the INA), and the United States’ obligations under the Convention Against Torture, which became effective on November 20, 1994 and were later codified in regulations. *Regulations Concerning the Convention Against Torture*, 64 FR 8478 (Feb. 19, 1999). Congress legislated in full view of these other forms of legal protection under our asylum laws, setting a low, uniform evidentiary standard at the credible fear stage to allow for full consideration of these other forms of protection.

that it was sufficient to “provide[] for fair resolution of claims to protection . . . in the expedited removal context, without disrupting the streamlined process established by Congress to circumvent meritless claims.”³⁴ Current law also provides that if an individual establishes a credible fear of persecution but appears to be subject to a statutory bar to asylum or withholding, such individual is still placed in removal proceedings under section 240, during which an immigration judge will determine if any such bar actually applies.³⁵

The Departments now choose to break from more than two decades of agency practice, proposing to further “streamline” credible fear screenings by requiring asylum officers to apply *two* evidentiary standards: assessing eligibility for asylum under the well-established “significant possibility standard,” and assessing eligibility for withholding of removal or protection under CAT under the more restrictive “reasonable possibility” standard.³⁶ The Departments acknowledge that this will require officers “to spend additional time eliciting more detailed testimony from aliens to account for the higher standard of proof.”³⁷ Further still, the proposed rule would require asylum officers to assess during the screening process whether any of the mandatory bars to relief apply.³⁸

Defying all logic, the Departments claim, without citing any supporting evidence, that requiring asylum officers to evaluate an applicant’s eligibility under two legal standards and assess whether mandatory bars to relief apply will somehow allow them “to more efficiently and promptly distinguish between aliens whose claims are more likely or less likely to ultimately be meritorious.”³⁹ However, by blurring the line between the credible fear screening and full adjudication of an asylum claim, the Departments will instead create a burdensome screening procedure for *all* migrants—even those with clearly meritless claims—while simultaneously depriving potentially eligible applicants of the opportunity for full consideration of their claims.

³⁴ 64 Fed. Reg. at 8485; *see also Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10320 (Mar. 6, 1997) (“Once an alien establishes a credible fear of persecution, the purpose behind the expedited removal provisions of section 235 of the Act to screen out arriving aliens with fraudulent documents or no documents and with *no significant possibility of establishing a claim to asylum has been satisfied.*”) (emphasis added).

³⁵ 8 C.F.R. § 208.30(e)(5)(i).

³⁶ *See* 85 Fed. Reg. at 36268 (“Congress has not required that considerations of eligibility for asylum, statutory withholding of removal, and protection under the CAT regulations in the ‘credible fear’ screening process be considered in the same manner.”); *id.* at 36271 (selectively citing to legislative history regarding the credible fear screening standard); *see also id.* at 36271 (“The ‘reasonable possibility’ standard is equivalent to the ‘well-founded fear’ standard in section 101(a)(42) of the [INA], 8 U.S.C. § 1101(a)(42), which is used to determine ultimate eligibility for asylum.”)

³⁷ 85 Fed. Reg. at 36271.

³⁸ 85 Fed. Reg. at 36272 & n. 16. In a comment submitted in response to a prior rulemaking, Members of this body argued that the Departments’ interpretation of these bars is unreasonably broad, categorically denying asylum to individuals who pose no danger to our community. *Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Bars to Asylum Eligibility* (Jan. 21, 2020) (comment submitted in response to 84 Fed. Reg. 69640, EOIR Docket No. 18-002, A.G. Order No. 4592-2019; RIN 1125-AA87, 1615-AV41).

³⁹ 85 Fed. Reg. at 36271.

In other words, the Department’s convoluted proposal undermines clear congressional intent to streamline—and to exempt asylum seekers from—the expedited removal process.

II. Endangering Due Process Rights of Asylum Seekers

The Departments also propose a number of changes that are contrary to the principles of due process and fair procedure. Individuals seeking asylum are guaranteed certain procedural rights under our asylum laws. Under section 208(a)(1) of the INA, any person “physically present in the United States or who arrives in the United States . . . irrespective of such [person’s] status, may apply for asylum[.]”⁴⁰ Section 208(a)(2) outlines three narrow exceptions to this, and exempts unaccompanied minors from two such exceptions.⁴¹ While the Secretary of Homeland Security may “provide by regulation for any other conditions or limitations” on asylum procedures, such conditions or limitations must be consistent with the INA.⁴² However, the procedural changes proposed by the Departments are inconsistent with section 208 of the INA. Taken together, these changes will make it more difficult for asylum applicants to exercise their rights under our nation’s asylum laws and make it nearly impossible for individuals to present their claims for full consideration before an immigration judge.

For example, the proposed rule would require immigration judges to “prepermit and deny” applications for asylum, withholding, and CAT relief without a hearing, if the individual “has not established a prima facie claim for relief or protection under the applicable laws and regulations.”⁴³ To invoke this harsh provision, DHS need only make an “oral or written motion” before the judge.⁴⁴ This is entirely inconsistent with section 208(b)(1)(B)(ii) of the INA, which sets forth ways in which an applicant can sustain the burden of proving eligibility for asylum, including through credible testimony and “other evidence of record.”⁴⁵ In codifying this prepermission authority, applicants will be denied the opportunity to have their credibility assessed and their eligibility for relief determined on the basis of a complete record, including their own testimony.⁴⁶

Similarly, under current law, individuals who knowingly file frivolous asylum applications can be found permanently ineligible for any immigration benefit, provided such individual had notice of these consequences prior to filing.⁴⁷ For the last two decades, Congress’ intent has been embodied in the current regulation interpreting this statutory provision, which states that “an asylum application is frivolous *if any of its material elements is deliberately*

⁴⁰ 8 U.S.C. § 1158(a)(1).

⁴¹ 8 U.S.C. § 1158(a)(2).

⁴² INA § 208(d)(1); 8 U.S.C. § 1158(d)(5).

⁴³ 85 Fed. Reg. at 36277.

⁴⁴ Proposed 8 C.F.R. 1208.13(e).

⁴⁵ 8 U.S.C. § 1158(b)(1)(B)(ii).

⁴⁶ 8 U.S.C. § 1158(b)(1)(B)(iii).

⁴⁷ INA § 208(d)(4)(A) and (d)(6); 8 U.S.C. § 1158(d)(4)(A) and (d)(6).

*fabricated.*⁴⁸ Therefore, in assessing whether an application is frivolous, adjudicators make no judgment as to the merits of the asylum claim; instead, the inquiry focuses on the applicant’s intent and the presence of fabricated statements or evidence that is material to the claim.

The Departments propose to dramatically expand the definition of “frivolous” to include cases in which an asylum seeker files an application “without regard to the merits of the claim,” or including a claim that is “clearly foreclosed by applicable law.”⁴⁹ This proposed expansion would undoubtedly penalize newly-arrived asylum seekers, who are understandably ignorant of the nuances of our complex immigration laws, and are often forced to navigate the process without the benefit of representation. Further, the proposed rule broadens the statutory “knowledge” requirement to include “willful blindness,” such that an individual would be deemed to have “knowingly” filed a frivolous application if they were “aware of a high probability” that the application was frivolous, or “deliberately avoided learning otherwise.”⁵⁰ However, this expanded definition of “knowledge,” which is derived from a Supreme Court case concerning patent law, is wholly inappropriate for assessing asylum claims, where the consequences of dismissal can involve certain death.⁵¹

Finally, the proposed rule also weakens the statutory notice requirement, summarily concluding that “an alien is on notice at the time of filing the application that it may be deemed frivolous,” hence “there is no reason to require multiple opportunities for an alien to disavow or explain a knowingly frivolous application.”⁵² Individually and collectively, these changes would effectively nullify Congress’ intent in dissuading truly frivolous claims by unfairly punishing individuals for not having a full and complete understanding of U.S. asylum law.

III. Conclusion

The Departments should immediately withdraw the joint notice of proposed rulemaking as the legal defects contained therein cannot be addressed through simple modifications. The proposed rule upends congressional intent in establishing our nation’s asylum laws and distorts clear statutory standards in pursuit of unlawful policy goals.

In establishing U.S. asylum law, Congress recognized that individuals seeking our protection face significant obstacles, often arriving in the United States as “homeless refugees” with few resources.⁵³ The Refugee Act of 1980 is intended to guarantee that each of these individuals would have a full and fair opportunity to present a claim for asylum. Indeed, “[t]he objectives of [the] Act are to provide a *permanent and systematic* procedure for the admission to

⁴⁸ 8 C.F.R. § 1208.20 (emphasis added).

⁴⁹ 85 Fed. Reg. at 36295.

⁵⁰ 85 Fed. Reg. at 36273.

⁵¹ *Id.* (citing to *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769-70 (2011)).

⁵² 85 Fed. Reg. at 36276.

⁵³ *See supra* note 19.

this country of refugees of special humanitarian concern to the United States,”⁵⁴ based on a “uniform” process.”⁵⁵ The Departments’ proposal runs directly counter to these goals by creating a less inclusive, irregular, and inefficient asylum system that is inconsistent with “one of the oldest and most important themes in our nation’s history: [w]elcoming homeless refugees to our shores.”⁵⁶

Sincerely,

Rep. Jerrold Nadler

Rep. Zoe Lofgren

Rep. Peter Aguilar

Sen. Dianne Feinstein

Rep. Nanette Diaz Barragán

Sen. Richard Blumenthal

Rep. Suzanna Bonamici

Rep. Julia Brownley

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Rep. Madeleine Dean

Rep. Diana DeGette

Rep. Rosa L. DeLauro

Rep. Mark DeSaulnier

Rep. Veronica Escobar

Rep. Anna G. Eshoo

⁵⁴ Refugee Act of 1980 § 101(b), Pub. L. No. 96-212 (Mar. 17, 1980).

⁵⁵ S. Rep. No. 96-960, at 19 (1980) (Conf. Rep.); *see also* 126 Cong. Rec. 96th Cong. 2nd Session 3757 (Feb. 26, 1980) (statement of Senator Kennedy regarding submission of Conference Report of the Refugee Act of 1980, “It is the intention of the Conferees that the Attorney General should immediately create a uniform procedure for the treatment of asylum claims filed in the United States or at our ports of entry.”).

⁵⁶ 125 Cong. Rec. 23231 (1979) (floor statement of Sen. Edward Kennedy, indicating that the Act “deals with one of the oldest and most important themes in our Nation’s history: Welcoming homeless refugees to our shores.”).

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| Rep. Sheila Jackson-Lee | Rep. Pramila Jayapal |
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