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Submitted via: [www.regulations.gov](http://www.regulations.gov)

**Re: Interim Final Rule: Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection EOIR Docket No. 18-0501 (November 9, 2018)**

Dear Ms. Reid:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit the following comment in response to the Interim Final Rule “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations,” published in the Federal Register on November 9, 2018.<sup>1</sup>

### **Statements of Interests**

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Council is a non-profit organization that works to increase public understanding of immigration law and policy, advocate for the fair and just administration of U.S. immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants.

AILA and the Council have extensive experience providing critical services to noncitizens seeking humanitarian relief through the Dillely Pro Bono Project, or “DPBP” (formerly the CARA Project), and the Immigrant Justice Campaign, a joint project which connects unrepresented respondents with pro bono counsel. The DPBP has provided legal services

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<sup>1</sup> 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. §§ 208, 1003, 1208). The undersigned organizations thank Morgan, Lewis & Bockius LLP, and specifically Ms. Ella Foley Gannon, for their substantial contributions to this comment.

to tens of thousands of asylum-seeking mothers and their children detained in the South Texas Family Residential Center (STFRC) in Dilley, Texas, the country's largest family detention center with 2,400 beds. The vast majority of individuals detained at the STFRC are recent border arrivals who have fled persecution, including gang and domestic violence, in addition to regional instability in Mexico and Central America. Since 2015, DPBP has been representing families who have crossed the U.S.-Mexico border both at ports of entry (POEs) and between POEs.

AILA and the Council have grave concerns about the anticipated impact of the Interim Final Rule. As explained below, the rule is contrary to existing law and is based on demonstrably false premises. Implementation of the rule would strip fundamental protections from vulnerable individuals fleeing persecution. What is more, it would undermine America's legacy as a global leader in humanitarian protection. We appreciate the opportunity to comment on the rule and strongly urge the Department of Homeland Security (DHS) and Department of Justice (DOJ) (or, collectively, "the Departments") to rescind it.

### **Background and Procedural History**

On Thursday, November 9, 2018, DHS and DOJ promulgated an Interim Final Rule ("the Rule"), which became effective immediately upon publication. The Rule provides that all noncitizens who enter the United States in a manner that contravenes a presidential proclamation are ineligible for asylum, regardless of whether they have a well-founded fear of persecution in their countries of origin. The Departments claimed that the Rule was exempt from the notice and comment process of the Administrative Procedure Act (APA), as well as the requirement of a 30-day waiting period before a rule may take effect, because there was "good cause" to find that the delay would be impracticable and against public interest. The Departments further found these procedural requirements inapplicable because this Rule implicated "military or foreign affairs functions."<sup>2</sup>

The same day the Rule was published, President Trump issued a proclamation suspending the entry of any noncitizen into the United States from Mexico, except any noncitizen "who enters the United States at a port of entry and properly presents for inspection" or who is a U.S. lawful permanent resident.<sup>3</sup>

The combined effect of the Rule and Proclamation makes asylum unavailable to any noncitizen who enters the United States from Mexico outside a port of entry, creating what has widely been referred to as an "asylum ban." Individuals subject to the asylum ban retain the ability to apply for humanitarian protection in the form of withholding of removal or protection under the Convention Against Torture (CAT) if they meet a substantially higher burden of proof. Even if this higher standard could be met, however, individuals granted withholding of removal and CAT protection are not entitled to the

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<sup>2</sup> See *id.* at 55,949-51.

<sup>3</sup> Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,663 (Nov. 9, 2018) (Presidential Proclamation).

same rights as individuals granted asylum. For example, they cannot apply for adjustment of status or petition for family members to immigrate to the United States.

## I. THE INTERIM RULE IS SUBSTANTIVELY AND PROCEDURALLY UNLAWFUL.

On the same day the administration issued the asylum ban, several immigration organizations filed suit in the U.S. District Court for the Northern District of California in San Francisco to halt its implementation.<sup>4</sup> The complaint sought to vacate the Rule as inconsistent with the asylum provisions of the Immigration and Nationality Act (INA) and in violation of the APA's procedural requirements.

After holding a hearing on November 19, 2018, the district court issued a nationwide temporary restraining order, temporarily blocking the Rule's implementation.<sup>5</sup> The government sought to stay the injunction pending further appeal to the U.S. Court of Appeals for the Ninth Circuit. Significantly, however, the Ninth Circuit denied this request, finding that the plaintiffs had established a likelihood of success on the merits of their substantive claim.<sup>6</sup> On December 21, 2019, the U.S. Supreme Court declined to stay the District Court's order pending further review.<sup>7</sup>

### A. The Interim Rule conflicts with the INA.

The INA creates a statutory scheme regulating who may apply for asylum in the United States, what needs to be shown to qualify for asylum, and the procedures that must be followed. The statute creates limited bars to asylum and grants the Attorney General the authority to establish, by regulation, "additional limitations and conditions, **consistent with this section**, under which [a noncitizen] shall be ineligible for asylum" (emphasis added).<sup>8</sup>

In enacting this statutory scheme, Congress expressly indicated that the manner of a noncitizen's entry into the U.S. does not impact his or her ability to seek asylum. Section 208(a)(1) of the INA provides that "any [noncitizen] who is physically present in the United States or who arrives in the United States . . . **whether or not at a designated port of arrival** . . . may apply for asylum" (emphasis added). Since Congress' intent is clear, there is no gap for the executive branch to regulate and any regulation that attempts to do so is invalid.

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<sup>4</sup> *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-06810-JST (N.D. Cal., filed Nov. 9, 2018).

<sup>5</sup> *E. Bay Sanctuary Covenant v. Trump*, \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 6053140 (N.D. Cal., Nov. 19, 2018).

<sup>6</sup> *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018). Following the Ninth Circuit's denial of the stay, the district court granted a nationwide preliminary injunction on December 19, 2018. Order Granting Preliminary Injunction, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-06810-JST, 2018 WL 6660080 (N.D. Cal. Dec. 19, 2018).

<sup>7</sup> *Trump v. E. Bay Sanctuary Covenant*, No. 18A615, 2018 WL 6713079 (U.S. Dec. 21, 2018).

<sup>8</sup> 8 U.S.C. § 1158(b)(2)(C).

Despite this clear statutory directive, through this Rule the Departments and the President have attempted to use their authority to regulate immigration to categorically ban a group of noncitizens from seeking asylum based simply on the fact that they did not arrive at a designated port of entry. As both the district court and the Ninth Circuit explained, there is no way to rectify a statute expressly authorizing asylum eligibility notwithstanding manner of entry with a regulation expressly precluding noncitizens who enter between designated ports from seeking asylum. Given this conflict, the Departments must rescind the Rule.

**B. The Departments must comply with the APA’s procedural requirements.**

The Departments’ failure to adhere to the APA’s notice and comment and waiting period requirements denied the public the opportunity to meaningfully weigh in on the Rule before it took effect and thus renders the Rule arbitrary and capricious. These procedural requirements “are designed to assure due deliberation of agency regulations and foster the fairness and deliberation that should underlie a pronouncement of such force.”<sup>9</sup> Public participation allows affected parties to test an agency’s assumptions, the opportunity to impact the ultimate decision, and if not successful, to “develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”<sup>10</sup> Such opportunity to participate is particularly important where, as here, the proposed rule will fundamentally and irredeemably impact members of the public.

The Departments assert “good cause” for the absence of a public comment period in advance of implementation, claiming that it would be “impracticable” and “contrary to the public interest.”<sup>11</sup> The Departments maintain that this same argument justifies the decision to forego the mandatory 30-day waiting period before the Rule takes effect. This reasoning, however, is based on pure speculation that announcing a proposed rule related to enforcement of a presidential proclamation could result in a “surge” of border crossings.<sup>12</sup> “[T]he good cause exception is essentially an emergency procedure”<sup>13</sup> that must be “narrowly construed and only reluctantly countenanced.”<sup>14</sup> Failure to follow the public notice and comment procedures only are permissible in rare circumstances where delayed implementation would result in real, concrete harm.<sup>15</sup> The Departments have not met this high bar here as they have not offered *any* evidence of specific, concrete harm that would result by allowing for adequate public involvement.

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<sup>9</sup> *E. Bay Sanctuary Covenant*, 909 F.3d at 1251 (citations omitted).

<sup>10</sup> *Entl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

<sup>11</sup> 83 Fed. Reg. 55,950 (citing 5 U.S.C. § 553(b)(B)).

<sup>12</sup> *Id.*

<sup>13</sup> *United States v. Valverde*, 628 F.3d 1159, 1165 (9th Cir. 2010) (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)).

<sup>14</sup> *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (quoting *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992)).

<sup>15</sup> *Valverde*, 628 F.3d at 1164-65.

The Departments' attempts to justify the deviations from the procedural requirements given the Rule's "foreign affairs" implications fare no better.<sup>16</sup> The Departments' claim that "Presidential proclamations . . . at the southern border necessarily implicate our relations with Mexico, including sensitive and ongoing negotiations with Mexico on how to manage our shared border."<sup>17</sup> Simply "implicating" foreign relations, however, is not sufficient to invoke the foreign affairs exception; such a position would by necessity render almost every rule related to immigration exempt from the APA's procedural requirements, an approach which the Ninth Circuit has disapproved.<sup>18</sup> The exception is limited to cases where, as the Second Circuit stated, "the public rulemaking provisions [would] provoke definitively undesirable international consequences."<sup>19</sup> Without explaining, much less substantiating, what specific harmful consequences to the U.S.-Mexico relationship would result from the allowance of public comment on the Rule in advance of implementation, the Departments cannot rely on the foreign affairs exception.

## II. THERE IS NO FACTUAL BASIS FOR THE PURPORTED JUSTIFICATIONS FOR THE RULE.

### A. Contrary to the administration's assertion of "unchecked mass migration" at the southern border, border apprehensions are low by historical standards.

The Rule is purportedly designed to "address an urgent situation at our southern border" which, according to a document published by DHS in connection with the Rule's issuance, is characterized by "unchecked mass migration."<sup>20</sup> This claim is not supported by the facts. DHS itself recently concluded that "[a]vailable data indicate that the southwest land border is more difficult to illegally cross today than ever before."<sup>21</sup> In 2018, CBP estimated that it had successfully interdicted between 79-82% of all individuals attempting to cross the U.S.-Mexico border between Fiscal Year (FY) 2014 and FY 2017.<sup>22</sup>

Apprehensions at the U.S.-Mexico border are also at historic lows. Numbers from U.S. Custom and Border Protection (CBP) show that apprehensions of noncitizens at the U.S.-Mexico border in 2018 were under 400,000, the fifth-lowest total since 1973.<sup>23</sup> By

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<sup>16</sup> 5 U.S.C. 553(a)(1) (providing exception to the notice and comment requirements of the APA where there is a "military or foreign affairs function of the United States").

<sup>17</sup> 83 Fed. Reg. at 55,950.

<sup>18</sup> See *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (per curiam).

<sup>19</sup> *Id.* (citing S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945)); see also *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) ("[I]t would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law.").

<sup>20</sup> DHS Website, *DHS Myth vs. Fact: Asylum Proclamation and Rule* (Nov. 9, 2018), <https://www.dhs.gov/news/2018/11/09/dhs-myth-vs-fact-asylum-proclamation-and-rule>.

<sup>21</sup> DHS, *Efforts by DHS to Estimate Southwest Border Security between Ports of Entry* (Sept. 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0914\\_estimates-of-border-security.pdf](https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf).

<sup>22</sup> DHS, U.S. Customs and Border Protection, *Budget Overview, Fiscal Year 2019 Congressional Justification*, at 6 (2018),

<https://www.dhs.gov/sites/default/files/publications/U.S.%20Customs%20and%20Border%20Protection.pdf>.

<sup>23</sup> U.S. Customs & Border Protection, *Southwest Border Migration FY 2018*, <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

contrast, southwest border apprehensions regularly exceeded 1 million annually between the mid-1980s through the mid-2000s, peaking at over 1.6 million apprehensions in 1999.<sup>24</sup> In 2018, the average Border Patrol agent apprehended just 23 noncitizens—fewer than two per month, suggesting that crossings between points of entry are dramatically down.<sup>25</sup>

**B. Despite the administration’s assertions, legitimate asylum seekers fleeing for their lives enter the United States from Mexico.**

In the week prior to the asylum ban’s issuance, as members of the “migrant caravan” traveled north, President Trump declared, “[t]hese migrants are not legitimate asylum seekers. They’re not looking for protection.”<sup>26</sup> The Rule appears predicated in large measure on this false assertion. For instance, the Rule cites the substantial rise in credible fear claims made by Central Americans in recent years. It notes that some of these asylum seekers, after passing credible fear screenings, do not appear at immigration court hearings. The Rule states that in FY 2018, immigration judges granted asylum to 9% of Northern Triangle (El Salvador, Honduras, and Guatemala) nationals who received a positive credible fear finding and pursued their asylum claim in immigration court.<sup>27</sup>

Examined in context, none of these points call into question the legitimacy of Central Americans’ asylum claims. The ongoing humanitarian crisis in Mexico and the Northern Triangle marked by transnational gang violence, domestic abuse, and regional instability is well-documented. As would be anticipated, this situation has fueled a sharp increase in asylum seekers fleeing not only to the United States, but to countries throughout the Western Hemisphere.<sup>28</sup> The relationship between the humanitarian crisis and the growth in asylum claims supports the legitimacy of those claims rather than the reverse. Indeed, on November 9, 2018, following the issuance of the asylum ban, the United Nations emphasized that many of the individuals traveling through Central America and Mexico are escaping persecution and “in need of international protection.”<sup>29</sup>

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<sup>24</sup> Bipartisan Policy Center, *CBP 2017 Apprehensions May Be Historic, But They Are Not Dramatic* (Dec. 18, 2017), <https://bipartisanpolicy.org/blog/cbp-2017-apprehensions/>.

<sup>25</sup> Washington Office on Latin America, *The U.S. Government’s 2018 Border Data Clearly Shows Why the Trump Administration is on the Wrong Track* (Nov. 9, 2018), <https://www.wola.org/analysis/us-government-2018-borderdata-trump-immigration-asylum-policy/>.

<sup>26</sup> President Trump, *Remarks by President Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

<sup>27</sup> In fact, analysis conducted by the Transactional Records Access Clearinghouse (TRAC) of the denial and grant rates by immigration judges in FY 2018 suggest that case outcomes for nationals from Northern Triangle countries are higher than the Rule suggests: 23.5% grant rate for El Salvador; 21.2% grant rate for Honduras, and 18.8% grant rate for Guatemala. See TRAC, *Asylum Decisions and Denials Jump in 2018* (Nov. 29, 2018), <http://trac.syr.edu/immigration/reports/539/>.

<sup>28</sup> UNHCR, *UNHCR alarmed by sharp rise in forced displacement in North of Central America* (May 22, 2018), <https://www.unhcr.org/news/briefing/2018/5/5b03d89c4/unhcr-alarmed-sharp-rise-forced-displacement-north-central-america.html>.

<sup>29</sup> UNHCR statement on new US regulation on asylum, (Nov. 9, 2018), <https://www.unhcr.org/news/press/2018/11/5be5bfac4/unhcr-statement-new-regulation-asylum.html>.

According to a recent study by the American Immigration Council, which reviewed more than 18,000 immigration court hearings between 2001 and 2016, 86% of asylum-seeking families who were released from family residential centers attended their court hearings, rising to 96% for all families who submitted an asylum application.<sup>30</sup> Further, according to a recent study by the Transactional Records Access Clearinghouse (TRAC), in FY 2018, “only 573 or 1.4 percent [of decisions by immigration judges granting or denying asylum] were denied asylum because they failed to appear for their scheduled hearings.” In other words, in “98.6 percent of all grant or deny decisions, the immigrants were present in court.”<sup>31</sup>

FY 2018 statistics concerning asylum cases in immigration court reveal more about the current administration’s misguided policies than the validity of the asylum claims brought. Decisions by immigration judges on asylum cases that originated as credible fear claims appear to significantly reflect draconian policy shifts carried out by the Trump Administration’s Department of Justice. In FY 2017 and FY 2018, immigration judges’ denial rates of asylum cases that originated as credible fear claims—26.05% and 29.49%, respectively—mark, by a substantial margin, the highest denial rates for the entire period in which data is provided, from 2008 through 2018.<sup>32</sup> During FY 2017 and FY 2018, Attorney General Sessions, together with Executive Office of Immigration Review (EOIR) Director Patrick McHenry, instituted broad measures limiting immigration judges’ independent decision-making.<sup>33</sup> In addition, the former Attorney General Jeff Sessions’ issued a national precedent decision in June 2018 that restricted the ability of individuals fleeing domestic and gang violence to obtain asylum in immigration court. *See Matter of A-B-*, \* I&N. Dec. \* (A.G. 2018).<sup>34</sup>

In this way, the administration has cultivated conditions that make it more difficult for bona fide asylum claims to prevail. In the Rule, DHS and DOJ now hold up the consequences of those conditions as grounds for further restricting persecuted families’ and individuals’ access to protection, closing a self-fulfilling loop divorced from the facts on the ground and the merits of the cases in question.

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<sup>30</sup> “Detaining Families: A study of asylum adjudication in family detention,” Special Report, American Immigration Council (Aug 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining\\_families\\_a\\_study\\_of\\_asylum\\_adjudication\\_in\\_family\\_detention\\_final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining_families_a_study_of_asylum_adjudication_in_family_detention_final.pdf).

<sup>31</sup> See TRAC, *Asylum Decisions and Denials Jump in 2018*, <http://trac.syr.edu/immigration/reports/539/>. Furthermore, the approval rates do not account for the number of cases in which the immigration judge granted an application for relief other than asylum or withholding of removal, or cases in which the judge terminated or administratively closed the case.

<sup>32</sup> EOIR, *Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim* (generated Oct. 30, 2018), <https://www.justice.gov/eoir/page/file/1062976/download>.

<sup>33</sup> AILA, *Immigration Judges Spotlight DOJ Hijacking of Court Independence* (Aug. 8, 2018), <https://www.aila.org/advo-media/press-releases/2018/immigration-judges-spotlight-doj-hijacking> (regarding initiatives by the Executive Officer of Immigration Review to undermine judicial independence of immigration judges).

<sup>34</sup> AILA, *Attorney General Narrows Criteria for Asylum Seekers* (June 11, 2018), <https://www.aila.org/infonet/attorney-general-narrows-criteria-for-asylum-seek>.

**C. The Rule wrongfully claims that CBP processes asylum seekers at ports of entry in a “controlled, orderly, and lawful manner,” but in reality CBP often refuses to process them at all.**

The Departments erroneously claim that applying the Rule “would likely create significant overall efficiencies in the Departments’ operations”<sup>35</sup> by channeling asylum seekers to ports of entry, where CBP officers would process them in a “controlled, orderly, and lawful manner.”<sup>36</sup> They offer no evidence for this conclusion, however, and in fact recognize that asylum seekers presenting at designated ports of entry will likely be subject to long periods of delay. As addressed in more detail in Section III below, those delays stem from CBP’s routine practice of turning away asylum seekers at the border.<sup>37</sup> Such turnbacks—in addition to the high levels of violence and insecurity on the Mexican side of the border—have led many persecuted individuals to believe that they have no choice but to attempt entry to the United States between ports of entry in order to seek life-saving protection. Contrary to the Rule’s premise, then, it is CBP’s *failure* to lawfully and timely process asylum seekers that defines the agency’s operations at southern border ports of entry.

**D. The Department has presented no evidence that asylum seekers required to wait in Mexico will be safe.**

The Rule acknowledges that its implementation necessarily will require asylum seekers to “spend more time waiting in Mexico.” The accompanying proclamation makes clear the administration’s assumption that Mexico is a “safe third country,” noting the U.S. government’s recent efforts to forge a “safe third country” agreement with our southern neighbor.<sup>38</sup>

Under current U.S. law, a third country can only be deemed safe if it can be shown that an asylum seeker’s “life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion” and that the individual would have access to a full and fair procedure for seeking asylum.<sup>39</sup> The Rule does not include any evidence to substantiate a claim that Mexico can meet these requirements. The evidence available shows that asylum seekers in Mexico face significant

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<sup>35</sup> 83 Fed. Reg. at 55,948.

<sup>36</sup> *Id.* at 55,934.

<sup>37</sup> The asylum-seeking migrants who are turned away at the U.S.-Mexico border by CBP officers—and the practice of turning such individuals away—are commonly referred to as “turnbacks” or “turnaways.”

<sup>38</sup> See *U.S. and Mexico discussing a deal that could slash migration at the border*, Wash. Post, July 10, 2018, [https://www.washingtonpost.com/world/the-americas/us-and-mexico-discussing-a-deal-that-could-slash-migration-at-the-border/2018/07/10/34e68f72-7ef2-11e8-a63f-7b5d2aba7ac5\\_story.html](https://www.washingtonpost.com/world/the-americas/us-and-mexico-discussing-a-deal-that-could-slash-migration-at-the-border/2018/07/10/34e68f72-7ef2-11e8-a63f-7b5d2aba7ac5_story.html). In the summer of 2018, the U.S. and Mexican governments were reportedly negotiating a possible safe third country agreement. Under such an agreement, virtually all non-Mexican national asylum seekers who travel through Mexico would be denied asylum in the U.S. Advocates have voiced concerns that Mexico is not a safe option for many seeking humanitarian protection in the United States. See *Safe Third Countries for Asylum-Seekers: Why Mexico Does not Qualify as a Safe Third Country*, Women’s Refugee Commission, <https://www.womensrefugeecommission.org/rights/resources/1638-safe-third-countries-for-asylum-seekers>.

<sup>39</sup> INA § 208(a)(2)(A); 8 U.S.C. § 1158(a)(2)(A).



obstacles to protection, ongoing threats of sexual assault, kidnapping and other harm, and too often, forcible return to the nations—and persecutors—they fled.<sup>40</sup> Indeed, on December 19, 2018, two Honduran minors who had reached Tijuana as part of the “migrant caravan” were murdered while transiting to a different shelter.<sup>41</sup> The fate of these two Honduran boys is but one recent example of the dangers faced by asylum-seeking migrants in Mexican border towns and further demonstrates that Mexico is an unsafe country in which to remain.

### **III. IMPLEMENTATION OF THE INTERIM RULE WOULD HAVE CATASTROPHIC HUMANITARIAN CONSEQUENCES AND WOULD HARM OUR NATIONAL INTEREST.**

The Departments must recognize the impact that implementation of the Rule will have on persecuted families and individuals as well as on our nation’s standing as a global humanitarian leader. By imposing an extreme and likely insurmountable barrier to protection, the Rule places not just vulnerable lives, but American values and diplomacy, at risk. These destructive consequences counsel for the Rule’s prompt rescission.

#### **A. The Rule will prevent many asylum seekers from applying for asylum at all—whether at or between ports of entry.**

CBP’s practice of repeatedly turning away asylum seekers who lawfully present themselves at ports of entry along the U.S. southern border is well-documented.<sup>42</sup> The Rule would escalate these already widespread “turnbacks” of asylum seekers at ports of entry, leaving individuals denied access to the asylum process at ports of entry without any meaningful way to apply for asylum in the United States—whether at or between ports of entry—and exposing them to severe danger in Mexico.<sup>43</sup> Turnbacks often occur through a process known as “metering,” whereby arriving asylum seekers are told that they cannot be processed because the ports are at capacity and are denied access to the port of entry.<sup>44</sup> This practice prevents them from applying for asylum at designated checkpoints.

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<sup>40</sup> See AILA, *AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum* (June 1, 2018), <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>.

<sup>41</sup> *Honduran teenagers killed in Tijuana remembered as respectful, helpful friends*, The San Diego Union-Tribune (Jan. 6, 2019), <https://www.sandiegouniontribune.com/sd-me-letters-honduran-teens-20190103-story.html>.

<sup>42</sup> See Amended Complaint, *Al Otro Lado, Inc. v. Nielsen*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. 2018) (ECF No. 189); American Immigration Council, *Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers*, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-borderprotections-unlawful-practice-turning-away-asylum-seekers>; AILA, *AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum* (June 1, 2018), <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>.

<sup>43</sup> See Project on Government Oversight, *Asylum Seekers Being Turned Away No Matter Where They Cross the Border* (Nov. 20, 2018), <https://www.pogo.org/investigation/2018/11/asylum-seekers-being-turned-away-no-matter-where-they-cross-the-border/>.

<sup>44</sup> See *id.*

The government's failure to efficiently and fairly process these asylum seekers causes severe and unjust consequences. First, turnbacks at ports of entry contribute to precisely the type of between-port crossings penalized under the Rule. Repeatedly rebuffed at designated checkpoints, some individuals conclude that presentation at a port of entry is not a viable option for accessing life-saving protection. In fact, DHS's own Inspector General recently cited evidence that turnbacks have led some asylum seekers "who would otherwise seek legal entry into the United States" to instead enter between ports.<sup>45</sup>

Second, those individuals who persist in seeking asylum at ports of entry rather than between them often have no choice but to wait at length in Mexico, sometimes for well over a month.<sup>46</sup> There, as noted, these individuals face acute risks of rape, abduction, and other harm, as well as forcible repatriation to the countries where they previously suffered persecution.<sup>47</sup> Many of the families and children affected may also have limited access to vital shelter, food, and medical treatment.<sup>48</sup>

Even if CBP's claimed lack of processing capacity at ports of entry were true, while the administration has allocated an extreme level of resources toward border security—including approximately 5,900 active duty soldiers and 2,100 National Guard members,<sup>49</sup> as well as high numbers of CBP agents patrolling border regions—it has made no such commitment to enhancing processing of asylum seekers at ports of entry, whether by expanding those ports' spatial capacity or meaningfully increasing the ranks of processing personnel.

By driving increased numbers of arriving asylum seekers to ports of entry, the asylum ban would substantially increase CBP turnbacks and thereby the overall size of the asylum seeker population exposed to danger on the Mexican side of the border. Processing wait times would become even longer and more prohibitive, especially if additional resources are not allocated to facilitate the processing of increased numbers of asylum seekers at ports of entry, exacerbating an already challenging humanitarian situation on the Mexican side of the border. Altogether, while increased turnbacks could leave individuals unable to apply for asylum at ports of entry, the ban would preclude them from asylum upon entry between ports. Many impacted individuals would, in effect, be stripped of the ability to apply for asylum in the United States at all.

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<sup>45</sup> DHS Office of Inspector General, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, at 7 (Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

<sup>46</sup> See Human Rights First, *FAQ: Why do Asylum Seekers Cross the U.S. Border Between Ports of Entry?* (Nov. 27, 2018), <https://www.humanrightsfirst.org/blog/faq-why-do-asylum-seekers-cross-us-border-between-ports-entry>.

<sup>47</sup> See Human Rights First, *Mexico: Still Not Safe for Refugees and Migrants*, (Mar. 23, 2018), <https://www.humanrightsfirst.org/resource/mexico-still-not-safe-refugees-and-migrants>.

<sup>48</sup> See *id.*

<sup>49</sup> Tara Copp, *White House approves use of force, some law enforcement roles for border troops*, *Military Times* (Nov. 21, 2018), <https://www.militarytimes.com/news/your-military/2018/11/21/white-house-approves-use-of-force-some-law-enforcement-roles-for-border-troops/>.

**B. Many asylum seekers subject to the ban would face unfairly heightened legal standards resulting in their deportation and further persecution.**

Asylum seekers subject to the Rule would face elevated legal standards that could lead to their deportation and further persecution in their countries of origin, despite legitimate claims to asylum in the United States.

Individuals subject to the asylum ban may seek humanitarian protection only in the form of withholding of removal or protection under CAT—benefits substantially more difficult to qualify for than asylum. Withholding of removal requires an applicant to demonstrate a higher than 50% likelihood of persecution (that she is “more likely than not” to be persecuted) in her country of origin on account of a protected ground, and CAT protection requires demonstrating a more than 50% likelihood of torture.<sup>50</sup> In contrast, to qualify for asylum, even a 10% likelihood of persecution satisfies the individual’s burden to demonstrate a well-founded fear of persecution.<sup>51</sup>

Furthermore, for individuals who are subject to the Rule to even receive such a hearing before an immigration judge—the only way for them to fully present their claims for withholding of removal and/or CAT protection—they must first clear the heightened initial screening imposed under the Rule. The initial adjudicative step for individuals not subject to the Rule is a “credible fear” interview with a United States Citizenship and Immigration Services (USCIS) asylum officer—an interview designed by Congress to serve as a low-threshold, preliminary asylum screening. To advance beyond the interview, the asylum officer only must find a “significant possibility” that the person faces even a 10% likelihood of persecution.<sup>52</sup> If the asylum officer makes this finding, the person is entitled to a full asylum hearing before an immigration judge. By contrast, individuals subject to the Rule must demonstrate to a USCIS asylum officer a “reasonable possibility” of a more than 50% likelihood of persecution or torture in their countries of origin—an appreciably higher bar. As a result, many individuals who would have received and passed a credible fear screening and thereby obtained a full hearing before an immigration judge might instead fail the “reasonable fear” screening and undergo summary deportation.

In short, the Rule prevents bona fide asylum seekers who would have otherwise obtained permanent, life-saving protection from obtaining protection. Instead, they could face removal to the same countries—and persecutors—they fled, only to encounter further persecution, torture, and even death.

Finally, those individuals who manage to qualify for withholding of removal or CAT protection in the United States despite these barriers will suffer indefinite legal limbo. Under both forms of protection, DHS retains the authority to deport the individuals to third

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<sup>50</sup> See 8 C.F.R. § 208.16(b), (c)(2); see also *INS v. Stevic*, 467 U.S. 407 (1984); *Matter of M-B-A*, 23 I&N Dec. 474 (BIA 2002).

<sup>51</sup> See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>52</sup> INA § 235(b)(1)(B)(v); 8 U.S.C. § 1225(b)(1)(B)(v).

countries.<sup>53</sup> Moreover, they cannot obtain lawful permanent resident status. They also cannot file for overseas family members to join them in the United States, leaving their families separated—and possibly at risk abroad—on a potentially permanent basis.<sup>54</sup> Far from advancing America’s interests, such permanent separation directly undermines our nation’s interest in safeguarding family unity.

### **C. Implementation of the Rule will substantially prolong the inhumane detention of asylum seekers.**

The asylum ban could significantly extend the detention of many asylum seekers, lengthening their exposure to inhumane treatment and conditions in Immigration and Customs Enforcement (ICE) facilities. Under current law, detained noncitizens who pass a credible fear screening after entering the United States between ports of entry are entitled to an individualized custody hearing before an immigration judge.<sup>55</sup> The judge may permit those individuals to post bond, which triggers release from detention pending an asylum hearing in immigration court.<sup>56</sup> By contrast, detained individuals who pass credible fear screenings after presenting themselves at a port of entry do not receive custody hearings; they may gain release from detention only if ICE grants them “parole.”<sup>57</sup>

In our experience, ICE previously granted such individuals parole unless the agency made an individualized determination that a person posed a flight risk or danger to the community. However, under the Trump administration, ICE routinely denies release on parole, which results in needless and protracted detention of the overwhelming majority of asylum seekers processed at ports of entry.<sup>58</sup> This practice almost certainly has contributed to the record-high number of immigrants ICE now holds in detention on a daily basis: 44,631 as of as October 20, 2018.<sup>59</sup> These detained families and individuals frequently face harsh treatment and conditions, including verbal abuse by ICE agents, spoiled food, and lack of access to essential medical care and hygiene products. Immigrants in detention commonly face obstacles to obtaining counsel, as detention centers are often positioned in remote locations and impose procedures that make contact with counsel difficult.<sup>60</sup>

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<sup>53</sup> See Human Rights First, *Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk* (Nov. 2018), [https://www.humanrightsfirst.org/sites/default/files/CAT\\_Withholding.pdf](https://www.humanrightsfirst.org/sites/default/files/CAT_Withholding.pdf).

<sup>54</sup> See *id.*

<sup>55</sup> See *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).

<sup>56</sup> Human Rights First, *Parole vs. Bond in the Asylum System* (Sept. 5, 2018), <https://www.humanrightsfirst.org/resource/parole-vs-bond-asylum-system>.

<sup>57</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

<sup>58</sup> See AILA, *AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum* (June 1, 2018), <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>.

<sup>59</sup> Spencer Ackerman, *ICE Is Imprisoning a Record 44,000 People*, *The Daily Beast* (Nov. 18, 2018), <https://www.thedailybeast.com/ice-is-imprisoning-a-record-44000-people?ref=home>.

<sup>60</sup> American Immigration Council, *The Landscape of Immigration Detention in the United States* (Dec. 5, 2018), <https://americanimmigrationcouncil.org/research/landscape-immigration-detention-united-states>.

Critically, represented asylum seekers are “five times more likely” to win asylum than their unrepresented counterparts.<sup>61</sup>

By making asylum available exclusively to those who present themselves at ports of entry, and thereby driving individuals to those ports—leaving no subsequent opportunity for bond and little prospect of parole—the asylum ban could substantially raise the likelihood that asylum seekers would face long-term detention without release.

#### **D. The Rule undermines America’s moral leadership on the global stage.**

By eroding America’s humanitarian leadership in the world, the Rule threatens to encourage other nations’ desertion of key protection practices. President George Washington proclaimed, “May America be an Asylum to the persecuted of the earth.”<sup>62</sup> America long has been, as formalized in its accession to the 1967 Protocol that updated the 1951 U.N. Convention Relating to the Status of Refugees.<sup>63</sup> These instruments, to which over 140 nations are party, provide the global humanitarian framework for protecting refugees and asylum seekers.<sup>64</sup> The U.S. Refugee Act of 1980, signed into law after bipartisan Congressional passage, codified core Convention and Protocol obligations and created the modern American system for shielding the persecuted.<sup>65</sup>

Guided by its foundational values and the obligations enshrined in the Convention and Refugee Act, the United States became the world’s leader in humanitarian protection. Since 1980, our nation has resettled over 3 million refugees<sup>66</sup> and provided safe haven to scores of thousands of asylees.<sup>67</sup> This moral example endowed us with the diplomatic credibility to press other nations to meet their own humanitarian obligations. In 2011, David Robinson, then-Acting Assistant Secretary of the U.S. State Department’s Bureau of Population, Refugees, and Migration, observed that:

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<sup>61</sup> See American Immigration Council, *Access to Counsel in Immigration Court* (Sept. 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>; Samantha Balaban, Sophia Alvarez Boyd, *Without A Lawyer, Asylum-Seekers Struggle With Confusing Legal Processes*, NPR (Feb. 25, 2018), <https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes>.

<sup>62</sup> Michael Kazin, *The Origins of America’s Enduring Divisions*, The New Republic (Sept. 17, 2018), <https://newrepublic.com/article/151130/these-truths-book-review-jill-lepore-origins-americas-enduring-divisions>.

<sup>63</sup> Center for Migration Studies, *The Legal Responsibilities of the United States Toward Asylum Seekers* (Dec. 4, 2018), <http://cmsny.org/publications/barsky-us-legal-responsibilities-asylum-seekers/>.

<sup>64</sup> UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

<sup>65</sup> Center for Migration Studies, *The Legal Responsibilities of the United States Toward Asylum Seekers* (Dec. 4, 2018), <http://cmsny.org/publications/barsky-us-legal-responsibilities-asylum-seekers/>.

<sup>66</sup> Pew Research Center, *For the first time, U.S. resettles fewer refugees than the rest of the world* (July 5, 2018), <http://www.pewresearch.org/fact-tank/2018/07/05/for-the-first-time-u-s-resettles-fewer-refugees-than-the-rest-of-the-world/>.

<sup>67</sup> EOIR, *Adjudication Statistics: Asylum Decision Rates* (generated Oct. 30, 2018), <https://www.justice.gov/eoir/page/file/1104861/download>.

...the State Department aggressively engages in humanitarian diplomacy to encourage other governments to fulfill their obligations under international refugee law. The United States has been a strong leader in working to strengthen the international refugee system in a manner that promotes security, reconciliation, and durable solutions for affected populations...there can be no doubt that countless numbers of people throughout the world owe their survival to the refugee rights and State obligations articulated in the Convention and the Protocol.<sup>68</sup>

As this passage suggests, America's authority in the humanitarian sphere has ensured the protection not only of refugees and asylees on U.S. soil, but many others taken in by foreign nations influenced by U.S. diplomacy.

Implementation of the Rule—a measure that transparently blocks access to asylum—would weaken America's moral credibility, and, by extension, capacity to strengthen foreign nations' adherence to their responsibilities toward asylum seekers. As Acting Assistant Secretary Robinson noted, “We should strive to practice at home what we preach abroad.”<sup>69</sup> Far from putting our long-held principles into practice, the Rule abandons them. If implemented, it will embolden foreign governments to follow suit, driving gaps into the international protection system and jeopardizing the lives of asylum seekers around the world.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AMERICAN IMMIGRATION COUNCIL

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<sup>68</sup> Testimony of David M. Robinson, Acting Assistant Secretary, Bureau of Population, Refugees, and Migration, Tom Lantos Human Rights Commission, U.S. House of Representatives (Oct. 26, 2011), <https://20092017.state.gov/j/prm/releases/remarks/2011/181081.htm>.

<sup>69</sup> *Id.*