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Re: 84 FR 69640; EOIR Docket No. 18-0002, A.G. Order No. 4592-2019; RIN 1125-AA87, 1615-AC41; Comments in Response to Proposed Rulemaking Procedures for Asylum and Bars to Asylum Eligibility

Dear Ms. Reid and Ms. Dunn:

I am writing on behalf of Futures Without Violence (FUTURES), in response to the Department of Homeland Security (DHS) and Department of Justice's (DOJ) Joint Notice of Proposed Rulemaking Procedures for Asylum and Bars to Asylum Eligibility published in the Federal Register on December 19, 2019.

FUTURES strongly opposes the proposed changes to the asylum process and asylum eligibility. The changes in the proposed rule would be extremely harmful to immigrant survivors of domestic violence, sexual assault, and other gender-based abuses, leading to more women and children being beaten, raped and killed. We urge DHS and DOJ to withdraw the proposed rule in its entirety.

FUTURES is a national nonprofit organization that has worked for more than 35 years to prevent and end violence against women and children in the United States (U.S.) and around the world. We educate about and work to eliminate domestic violence, sexual assault, child abuse, and human trafficking through education and prevention campaigns; training and technical assistance to state agencies, public and private entities, judges and court systems,

colleges and universities, and global organizations; and we advance promising policies and practices at the state and federal level that prevent violence and help survivors and their children heal and thrive.

FUTURES staff are experts on family violence prevention, sexual assault, child trauma and human trafficking and the services and supports necessary for children and women to heal from violence and trauma. Based on that experience, we know that violence against women and children is a global pandemic, affecting one in three women in the world and up to ¾ of the world's children. Recent data from the World Health Organization reveals that up to 1 billion children aged 2–17 years, have experienced physical, sexual, or emotional violence or neglect in the past year. A report co-authored by FUTURES in partnership with the Civil Society Working Group on Women, Peace and Security, shows that women and children in the Northern Triangle – the countries of origin for the overwhelming majority of those seeking asylum at our southern border --- experience rates of sexual assault and violence higher than global averages. (cite:<https://www.futureswithoutviolence.org/wp-content/uploads/5th-US-CSWG-Policy-Brief-December-312c-2017-v7.pdf>)

I. Asylum Provides Critical Safety and Protection for Immigrant Survivors Fleeing Violence and Persecution.

Immigrant survivors who flee to the U.S. to seek asylum do not make the choice lightly. They must leave everything they know, brace themselves for the tremendous danger and peril that awaits them and their children during their journey, and traverse thousands of miles with very few possessions of their own. They do this because they have no choice. They know that they will be killed or seriously injured if they stay in their home countries where their governments do little to protect them from their abusers. “Domestic violence is reportedly the leading form of abuse against women and girls in El Salvador and Honduras...In Guatemala, every 46 minutes a new case of sexual violence is reported, but the number of incidents is likely much higher as many go unreported.”<sup>1</sup> Thus, for many immigrant survivors, asylum is their only pathway to safety and protection.

The DHS and DOJ proposed rule seeks to bar many of these vulnerable immigrant survivors of violence from qualifying for asylum. The proposed rule does this in at least three significant ways. First, it establishes *seven* (7) new bars that prevent individuals fleeing violence and persecution from being eligible for asylum. Second, it gives immigration adjudicators unprecedented authority to decide if a state criminal conviction related to domestic violence bars an individual from asylum consideration. Third, it removes the review of discretionary denials of asylum.

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<sup>1</sup> U.S. CSWG POLICYBrief, “Violence and Insecurity in the Northern Triangle of Central America: Dangerous Choices for Women and Girls,” December 31, 2016, <https://www.futureswithoutviolence.org/wp-content/uploads/5th-US-CSWG-Policy-Brief-December-312c-2017-v7.pdf>.

The proposed rule is completely unnecessary and constructs even more barriers for immigrant survivors seeking safety and protection. The laws, regulations, and process governing asylum adjudications are already exceedingly stringent and harsh. Asylum-seekers bear the evidentiary burden of establishing their eligibility for asylum in the face of complex laws and regulations, without the benefit of appointed counsel and often from a remote immigration jail or a tent erected at the border. New policies that mandate that asylum-seekers apply for asylum in a third country of transit and that they return to Mexico to wait for the adjudication of their cases have imposed additional and more imposing barriers. These new proposed changes create more impediments and prevent immigrant survivors from obtaining the asylum protections they desperately need. Rather than restricting access to protection, the Administration should expand opportunities for vulnerable immigrant survivors to access safety and protection.

## II. The Proposed Rule Violates U.S. Commitments Under the Refugee Convention and the Immigration and Nationality Act.

The U.S. has a long history of providing safety and protection for individuals and families forced to leave their home countries because of violence and persecution. As a party to the 1967 Protocol Relating to the Status of Refugees, which binds parties to the United Nations Convention Relating to the Status of Refugees (Refugee Convention), the U.S. developed section 208 of the Immigration and Nationality Act (“INA”), 8 U.S.C. 1158 to extend asylum protections to immigrants fleeing persecution. For over forty years, the United States has continued to uphold its commitment to helping and protecting those who are fleeing persecution, including gender-based persecution. However, the proposed rule, which creates new categorical bars from asylum protection and expands the serious crime bar beyond the Convention’s definition of “capital crime or a very grave punishable act,” violates U.S. obligations under the Refugee Convention and the INA to provide asylum-seekers with fair access to asylum protections. These increased and arbitrary barriers to protection are completely incongruent with the commitment the U.S. made in the Refugee Convention and the INA to protect vulnerable refugees fleeing persecution.

## III. The New Bars to Asylum Will Unjustly Exclude Many Immigrant Survivors with Meritorious Applications from Gaining Asylum Protection.

The proposed rule adds seven new criminal bars to asylum eligibility.<sup>2</sup> These new bars are expansive and will preclude immigrant survivors with meritorious applications from gaining the protection and safety they need through the asylum process.

### A. The Expansion of the “Smuggling or Harboring” Bar to Parents, Who Help Their Children Flee Violence, Harms Families and Punishes Parents for Protecting Their Children.

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<sup>2</sup> Individuals would be ineligible to seek asylum if they are convicted of a 1) felony offense; 2) “smuggling or harboring” under 8 U.S.C. Section 1324(a); 3) illegal entry under 8 U.S.C. Section 1326; 4) an offense involving “criminal street gangs”; (5) a second offense of driving while intoxicated or impaired; 6) conviction or *accusation of conduct* of acts of battery or extreme cruelty in the domestic context; 7) certain newly defined misdemeanor offenses.

The proposed rule expands the “smuggling and harboring” asylum eligibility bar to include immigrants who are convicted of assisting their spouse, children, or parents escaping persecution to come to the U.S. Under the proposed rule, parents’ efforts to bring children to safety will be considered “particularly serious crimes” and classified as aggravated felonies. This new bar means that immigrant survivors who are convicted of helping their children escape from an abuser or perpetrator of sexual violence and enter the U.S. will be deemed felons and ineligible for asylum. Thus, survivors who are protecting their children by fleeing to the U.S. will essentially be punished for seeking to build a life free from violence for themselves and their children. The proposed rule callously penalizes parents for doing what is only human – taking all necessary steps to protect their children from harm.

B. The Illegal Reentry Bar Violates the Refugee Convention, Ignores Immigrant Survivors Circumstances, and Criminalizes Immigrant Survivors Desperate for Protection.

The proposed rule bars all applicants convicted of illegal reentry from being eligible for asylum. Baring asylum based on the manner of entry violates the United Nations Convention Relating to the Status of Refugees’ prohibition on imposing penalties based on a refugee’s manner of entry or presence.<sup>3</sup> This prohibition is critical because it recognizes that individuals fleeing persecution often have little control over the place and manner in which they enter the country where they are seeking protection.

Additionally, the proposed rule completely ignores the reality that immigrant survivors of violence face – once they are sent back to their countries of nationality they are at risk of violent retaliation from their abusers or perpetrators and may even face death. Many survivors therefore make the perilous journey back to the U.S. after they are removed for the same exact reason they fled before – to escape horrific domestic and sexual violence, desperately hoping that this time, they will be granted asylum and finally be safe. By denying these immigrant survivors the opportunity to seek asylum, the proposed rule denies safety and protection to those with the greatest need.

C. The Bar for Conviction or an Accusation of Conduct of Battery or Extreme Cruelty Disregards the Complexity of Domestic Violence and Adversely Harms Survivors.

The proposed rule makes all applicants who have been convicted of domestic assault or battery, stalking, or child abuse in the domestic violence context ineligible for asylum. Additionally, it makes immigrants who are simply *accused of* engaging in battery and extreme cruelty ineligible for asylum. This proposed rule creates the **only** crime-related bar for which a conviction is not required. DHS and DOJ suggest that the proposed rule protects survivors. However, DHS and DOJ are mistaken and misunderstand the complexity of domestic violence as the proposed rule will cause harm to immigrant survivors of violence.

There are many cases in which immigrant survivors, not their abusers, are arrested and prosecuted for domestic violence offenses. Immigrant survivors who have limited English

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<sup>3</sup> Convention Relating to the Status of Refugees, July 28, 1951, 140 U.N.T.S. 1954.

proficiency (LEP) may not be able to fully describe the situation and the abuse they experienced to police officers. In many situations, police officers may then turn to the *abusers* or *perpetrators* to interpret.

FUTURES has been working on the front lines of domestic violence services and advocacy and we know from our work that many survivors are arrested in dual arrests because the police use perpetrators as interpreters. In other cases, survivors are arrested and face charges for domestic violence arising from acts of self-defense or because abusive partners or perpetrators manipulate the legal system by filing false claims of abuse. Indeed, it is common to see abusers make false allegations to police and the courts to have immigrant survivors arrested. Indeed, we know of multiple instances where victims who have been accused themselves of domestic violence by an abusive spouse will accept a conviction simply because it is the only way then can get home to children who may be left alone. The proposed rule lacks any understanding of how abusers and perpetrators manipulate the legal system to maintain their power and control. The proposed rule's reliance on an accusation rather than a conviction increases the likelihood that accusers and perpetrators will make false accusations to further harm immigrant survivors.

While there is a proposed waiver for survivors who are deemed to not be the primary aggressor, the waiver is insufficient to mitigate the harm that many survivors will experience. Not only will victim-defendants be swept in, but survivors and their families will be harmed in cases where the allegedly abusive family member has not engaged in a pattern of coercive, controlling behavior, or has demonstrated actual rehabilitation and accountability and is making a significant contribution to the health and well-being of the family.

#### D. The Misdemeanor Document Fraud Bar Ignores the Realities Faced by Immigrant Survivors of Domestic Violence.

Under the proposed rule, the use of fraudulent documents would prevent an immigrant from being eligible for asylum. This bar has the capacity to provide abusers with additional tools of control and coercion and unfairly penalizes immigrant survivors who have fallen victim to fraud. Abusers often hide or destroy survivors' documents in order to exert dominance and prevent survivors from being able to leave the relationship. As such, immigrant survivors who escape from violence must often search for other ways to obtain documentation. This reality leads survivors to be highly vulnerable to falling prey to fraud by individuals who falsely claim to have the ability to prepare legal documentation for them. Immigrant survivors who have fraudulent documents may therefore genuinely believe that they had taken the necessary steps to acquire legal documents.

Additionally, as FUTURES knows well, most survivors of violence have experienced financial abuse, where the abuser has limited their access to financial resources and forced survivors to depend on them for housing, food, health care, and other basic needs. Survivors who escape from abusive relationships therefore risk falling into poverty and homelessness. As such, survivors may be compelled to resort to any measure to obtain documentation so that they can work and sustain themselves and their children. Access to economic resources is absolutely

critical in supporting the safety of survivors who are fleeing domestic violence, sexual assault, and human trafficking. Barring immigrant survivors from asylum for taking measures to ensure that they could feed, clothe, and house themselves and their children is cruel and will only serve to render them even more vulnerable to exploitation.

#### IV. The Proposed Rule Creates Inconsistent Adjudications and Gives Immigration Adjudicators Unprecedented Authority in Complex Domestic Violence Circumstances.

The proposed rule allows immigration adjudicators to determine whether a conviction or conduct related to domestic violence or battery and extreme cruelty would prohibit an immigrant from being eligible for asylum. The proposed rule is seriously flawed and will likely lead to inconsistent adjudications. The definition of battery and extreme cruelty differs from state to state. These differing state definitions will create inconsistent adjudications about who is barred from seeking asylum. While such language is appropriate in providing protection for those seeking it, it is highly inappropriate in the context of barring individuals seeking protection against persecution.

The proposed rule also gives immigration adjudicators an unprecedented amount of authority to make determinations that involve the complex dynamics surrounding domestic violence. In order to properly and accurately assess domestic violence, battery, or extreme cruelty, a decision-maker must have experience and in-depth knowledge of the intricacies of abuser-survivor relationships and dynamics; the nuances of the tactics abusers and perpetrators use to control, intimidate, and manipulate survivors; understanding of the ongoing pattern of behavior in abusive relationships; specific vulnerabilities of immigrants to being victimized; and many other important analyses of the domestic nature of abusive conduct. Immigration adjudicators, in all likelihood, lack this expertise and intimate understanding. Putting the responsibility on immigration adjudicators to make these complex decisions about whether conduct amounts to a covered act of battery or extreme cruelty without court findings, following presentations of evidence under oath by adverse parties, is inappropriate, and will likely result in erroneous determinations that will strip immigrant survivors of their right to seek asylum.

The proposed rule also seeks to provide immigration adjudicators with the authority to determine whether a vacated, expunged, or modified conviction or sentence should be recognized in determining whether an immigrant is eligible for asylum. This proposed change undermines the authority of state courts that have experience and expertise and allows immigration adjudicators to essentially question and disbelieve the decisions of court judges. Providing immigration adjudicators with this broad and overextending authority will compromise the ability for immigrant survivors to have a fair and full proceeding.

#### V. Withholding of Removal and Protection Under the Convention Against Torture Fail to Adequately Protect Immigrant Survivors of Violence.

The proposed rule offers that immigrants who are ineligible for asylum under the seven new bars may still be able to qualify for Withholding of Removal or protection under the Convention

Against Torture (CAT). While immigrant survivors may not be categorically barred from applying, these forms of relief require a higher burden of proof than asylum. This means that many asylum-seekers excluded from eligibility under the proposed rule will face deportation back to harm if they cannot meet this higher burden. Moreover, the protections afforded by CAT and by statutory Withholding of Removal are limited in scope and duration. Withholding of Removal and CAT protection do not provide a path to lawful permanent residence and do not allow for freedom of travel or for family reunification. Limiting protections for immigrant survivors to Withholding of Removal and CAT will leave them in a continued state of limbo that precludes them from building a safe and secure life for themselves and their children.

VI. Removing Reconsiderations of Discretionary Denials of Asylum Deprives Immigrant Survivors of the Opportunity to Seek Safety Despite Having Viable Claims of Asylum.

The proposed rule removes the automatic review of a discretionary denial of an asylum seeker's application in the event that the immigrant is denied asylum solely in the exercise of discretion. Rescinding the review of discretionary denials is unjust and severely harms immigrant survivors of violence who often have limited English proficiency and lack the financial resources to retain an attorney. Immigrant survivors are forced to navigate an ever-changing immigration legal system that is incredibly complex and challenging. Thus, maintaining reconsiderations of discretionary denials of asylum is critical to ensure that immigrant survivors who are eligible for asylum have another opportunity to defend and prove their right to obtain asylum protections and remain in the U.S.

VII. Conclusion

For the reasons set forth above, Futures Without Violence strongly urges DOJ and DHS to rescind the proposed rule. It violates our nation's laws and moral obligations and cruelly prevents many survivors of domestic violence, sexual assault, and human trafficking who are fleeing persecution from obtaining the asylum protections they need and deserve. We instead urge DOJ and DHS to promote policies that account for the desperate reality that immigrant survivors face and seek to maximize their safety throughout the asylum process.

Thank you for the opportunity to submit comments on the Joint Notice of Proposed Rulemaking Procedures for Asylum and Bars to Asylum Eligibility. Please contact me if you have any questions or concerns relating to these comments

Respectfully submitted,

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