



January 8, 2018

Lauren Alder Reid
Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

RE: EOIR Docket No. 18–0501, Interim Final Rule: “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims”

Dear Assistant Director Alder Reid:

The City of New York (“NYC”) through its Mayor’s Office of Immigrant Affairs (“MOIA”) submits this comment to oppose the U.S. Department of Justice’s (“DOJ”) and the Department of Homeland Security’s (“DHS”) joint interim final rule (“IFR”) governing asylum claims at the southern U.S. border with Mexico, entitled *Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims*. The IFR would prohibit those who cross our southern border between ports of entry from seeking asylum—regardless of the validity of their underlying claim to asylum. MOIA submits that the IFR is in plain contravention of law—specifically the Administrative Procedure Act and the Immigration and Nationality Act (“INA”). However, as the legality of this IFR is already being challenged in federal court, MOIA writes here to articulate its opposition to the IFR on policy grounds.

DOJ and DHS maintain that the IFR would “channel” such asylum-seekers to ports of entry, but the reality is much darker: the IFR is tantamount to eliminating access to asylum for many asylum-seekers at our southern border. It is rightly considered an asylum ban. The IFR will not contribute to a more “controlled, orderly, and lawful” process as the proposing agencies purport; to the contrary, it will unnecessarily and dramatically exacerbate human suffering. Cities will be among those entities left to address the fall-out from the IFR—specifically, the needs of a traumatized population that arrives in their jurisdictions with vastly curtailed legal options. As the ultimate city of immigrants and a regular destination of asylum-seekers, NYC and its residents would be significantly harmed by the implementation of the IFR. From a presidential administration that continues to curtail the rights of the foreign-born and shirk America’s humanitarian responsibilities and legal commitments, this IFR represents yet another new low. For all of these reasons NYC calls upon DOJ and DHS to rescind the IFR.

I. The Interim Final Rule

On November 9, 2018 DHS and DOJ published the IFR in the Federal Register, and issued corresponding internal policy memoranda. The same day, President Trump issued a Proclamation *Addressing Mass Migration Through the Southern Border of the United States*. Both the IFR and the Proclamation seek to limit access to asylum for persons who enter the

United States between ports of entry (without inspection) at the southern U.S. border with Mexico.

The IFR would amend the regulations interpreting the INA to bar anyone who enters the United States between ports of entry at the southern U.S. border from seeking asylum in the United States. Though not stated explicitly, it appears that both those apprehended at the border and those who are apprehended in the interior of the United States would be prohibited from applying for asylum; their only available forms of relief would be withholding of removal pursuant to the INA, or protection from removal pursuant to the Convention Against Torture (“CAT”) both of which present significantly higher bars to relief. Additionally, CAT is intended to address a significantly narrower set of humanitarian concerns (torture) than those addressed through asylum (persecution). The IFR ostensibly would not change the procedure for individuals who seek to enter the United States at ports of entry without entry documents, per the IFR, they would be subject to the same procedure that is already in place. Still, this IFR is effectively a ban on asylum for individuals entering through the U.S. border with Mexico, particularly given the “metering” policy in place at southern border ports of entry, discussed further below.

II. The Rule Will Exacerbate Inhumane Border Conditions, Cause Additional Trauma to Already Vulnerable Migrants, and Result in the Return of Migrants to Dangerous and Deadly Conditions.

The IFR largely ignores the humanitarian crisis that has sparked migration to the southern border and instead portrays—without evidence—those individuals as largely presenting frivolous asylum claims. Yet, the U.S. government’s own reporting indicates that asylum seekers entering the United States from the southern border are fleeing extreme violence and persecution in their home countries in Central America. The U.S. Department of State has documented that certain vulnerable populations—namely, women, people of African and indigenous descent, and LGBTQI people—suffer in particular from high rates of violence and discrimination in Central America.¹ Further, corruption and gang violence have plagued Central American countries, with gangs often targeting those aforementioned vulnerable populations. Indeed, the U.N. High Commissioner for Refugees has reported on the “significant increase in the number of people fleeing violence and persecution in the North of Central America.”² That the IFR would characterize asylum claims stemming from such extreme conditions as without merit is willfully blind to the obvious facts on the ground.

Moreover, the IFR is silent on the additional trauma it will inflict on asylum seekers by forcing them to remain indefinitely outside the U.S. border. The IFR is a de facto “wait in

¹ See U.S. Department of State, *Country Reports on Human Rights Practices for 2017: EL Salvador* (2017), available at: <https://www.state.gov/documents/organization/277575.pdf>; United States Department of State, *Country Reports on Human Rights Practices for 2017: Guatemala* (2017), available at: <https://www.state.gov/documents/organization/277579.pdf>; U.S. Department of State, *Country Reports on Human Rights Practices for 2017: Honduras* (2017), available at: <https://www.state.gov/documents/organization/277585.pdf> (The “most significant human rights issues” in each country included, violence against women, gang violence, racial violence and anti-LGBTQI violence.).

² UNHCR alarmed by sharp rise in forced displacement in North of Central America, UNHCR (May 22, 2018), available at: <https://www.unhcr.org/news/briefing/2018/5/5b03d89c4/unhcr-alarmed-sharp-rise-forced-displacement-north-central-america.html>.

Mexico” policy because DHS has since at least 2016 been using a policy of “metering,”³ under which CBP officials prevent the overwhelming majority asylum-seekers at U.S. ports of entry from entering the country and pursuing their claims. Thus, many asylum-seekers who have arrived at the southern border are forced to wait for increasingly long periods of time outside ports of entry until CBP officials allow them into the United States to claim asylum. The “metering” policy has created a bottleneck of individuals waiting at ports of entry to claim asylum, creating its own untenable humanitarian crisis on the other side of the southern border, adjacent to the United States. Individuals often sleep on bridges that traverse the U.S.-Mexico border as they await entry.⁴ Without ending this policy, the IFR will certainly exacerbate this bottleneck. Ironically, the “metering” policy has likely led to an increase in border crossings between ports of entry.⁵ Out of desperation, asylum seekers who originally intended to enter lawfully through a port of entry have attempted entry in between ports of entry.⁶ Thus, as DHS does not plan to cease “metering,” a consequence of the IFR could actually be an *increase* in unlawful border crossings by creating a tremendous queue of individuals waiting to enter the United States at ports of entry. DHS has failed to account for this possibility in the IFR.

Additionally, the IFR risks devastating humanitarian consequences by foreclosing the ability of individuals to apply for asylum if they have entered the United States outside of ports of entry. Under the IFR, individuals with valid asylum claims who have entered without inspection out of desperation will only have CAT or withholding of removal relief available to them in order to avoid removal to countries where they legitimately face persecution. CAT and withholding of removal are only granted in rare and extraordinary circumstances. To meet the statutory threshold required for CAT relief, an applicant must demonstrate a clear probability (more than a 50 percent chance) that they will be tortured either directly by or with the acquiescence of the government of their country of origin. This is an extremely difficult legal showing to make and consequently only a tiny percentage of all applications for CAT relief are granted across the country. According to DOJ Executive Office for Immigration Review (“EOIR”), data from FY17, out of a total of 51,758 applications for relief under CAT, only 935 were approved, or fewer than 2 percent of the total.⁷ Given the much higher showing required in order to qualify for either avenue of relief, people with well-founded fears of persecution in their home countries will be undoubtedly removed back to dangerous and deadly conditions.

III. The Rule Will Impede Access To Legal Services.

As NYC is a destination for many asylum seekers, the IFR will have a disproportionate impact on NYC, and specifically New Yorkers’ access to counsel and ultimately to relief because the IFR would dramatically narrow the percentage of the asylum-seeking population that

³ OIG, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018), <https://tinyurl.com/OIG-separation>.

⁴ See Simon Romero and Miriam Jordan, *On the Border, a Discouraging New Message for Asylum Seekers: Wait*, New York Times (June 12, 2018), <https://www.nytimes.com/2018/06/12/us/asylum-seekers-mexico-border.html>

⁵ See OIG, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018), <https://tinyurl.com/OIG-separation>.

⁶ Dara Lind, *The US Has Made Migrants At The Border Wait Months To Apply For Asylum. Now The Dam Is Breaking*, Vox (Nov 28, 2018, 7:00am), <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports>

⁷ DOJ Executive Office for Immigration Review (EOIR), *Statistics Yearbook Fiscal Year 2017* (2018), at 30, available at: <https://www.justice.gov/eoir/page/file/1107056/download>.

will be able to win relief for which they are eligible. As of this writing, over 66,000 individuals residing in the five boroughs of NYC have cases pending in immigration court.⁸ Thanks to NYC and private resources, these cases are overwhelmingly likely to be represented by an attorney.⁹ In fact, New York State’s (“NYS”) immigrants have the nation’s highest rate of legal representation,¹⁰ contributing significantly to the high rate of asylum case wins in NYS.¹¹ Since 1990, an average of over 22,000 individuals have been granted asylum annually in the United States.¹² At the immigration court in Manhattan, judges granted asylum in 85 percent of all cases, according to 2016 data from DOJ.¹³ A significant proportion of those individuals granted asylum in any given year reside in NYC and NYS. In FY16, 1,270 individuals granted affirmative asylum reside in NYS.¹⁴ In addition, NYS and NYC are major destinations for children asylum-seekers. In FY18, 2,837 unaccompanied immigrant children were released from federal custody to adult sponsors in NYS, more than the vast majority of other states.¹⁵

NYS has the highest rate of asylum approval in the country, thanks in large part to the incredibly high rate of immigrant representation. NYC has made substantial investments in legal services for its immigrant residents, totaling more than \$40 million dollars in city fiscal year 2019. The IFR would significantly reduce the reach of these investments.

As discussed above, the forms of relief that the IFR will leave available to would-be asylum seekers have radically lower approval rates. Additionally, these remaining channels—CAT and withholding of removal—are forms of immigration relief that are only available as a defense in removal proceedings. Thus, as opposed to affirmative asylum seekers, those applying for CAT or withholding of removal risk removal as an immediate consequence of denial of their applications. This will force NYC legal service providers to shift strategy when representing clients who would have otherwise qualified for asylum. The added complexity of litigating defensive applications will place time and financial strains on NYC providers. Further, the much higher burden of proof for both forms of relief, as compared with asylum, will necessarily drive up the costs of legal representation due to increased evidentiary requirements.

Taken together, these statistics indicate that this IFR, banning asylum for thousands of prospective applicants, will result in thousands fewer New Yorkers winning relief because the remaining channels of relief available to would-be asylum-seekers have much lower likelihood of success.

⁸ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Individuals in Immigration Court by Their Address*, <https://tinyurl.com/TRAC-Syr>.

⁹ *Id.*

¹⁰ Beth Fertig, *New York Immigrants Have the Nation’s Highest Rate of Legal Representation*, WNYC (Apr. 3, 2018), <https://www.wnyc.org/story/new-york-immigrants-have-nations-highest-rate-legal-representation>.

¹¹ Beth Fertig, *Will Jeff Sessions Make New York’s Immigration Courts Tougher for Asylum Seekers?*, WNYC (May 24, 2018), <https://www.wnyc.org/story/will-jeff-sessions-make-new-yorks-immigration-courts-tougher-asylum-seekers>.

¹² DHS, *Individuals Granted Asylum Affirmatively Or Defensively: Fiscal Years 1990 To 2016* (Jan. 8, 2018), <https://tinyurl.com/DHS-Asy-201>.

¹³ U.S. Dept. of Justice, *FY 2016 Statistics Yearbook*, Mar. 2017, p. 38, <https://www.justice.gov/eoir/page/file/fysb16/download>.

¹⁴ Nadwa Mossad and Ryan Baugh, *Refugees and Asylees: 2016*, DHS Off. of Immig. Statistics (Jan. 2018), <https://tinyurl.com/Mossad-Baugh>.

¹⁵ Off. of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors by State* (last updated Nov. 29, 2018), <https://tinyurl.com/UAC-state>. Only California, Florida, and Texas received more unaccompanied immigrant children released from federal custody in FY18.

IV. The IFR Fails to Justify the Policy Changes It Proposes by Misrepresenting Key Statistics.

The IFR discusses at length what it asserts is a “crisis” at the southern border, presenting several claims that are questionable at best.¹⁶ First, the IFR claims that there is a crisis at the southern border that has gotten worse over the past decade and that more individuals are in expedited removal proceedings. However, CBP’s own data reveal this trend has not gotten worse, but has actually alleviated: as of November 2018, the number of apprehensions between ports of entry and encounters with inadmissible immigrants at ports of entry during the duration of the Trump administration has not exceeded the number of apprehensions and encounters under the Obama administration.¹⁷ Further, a greater number of individuals were placed in expedited removal proceedings under the Obama administration than under the Trump administration, including expedited removal involving a credible fear interview.¹⁸

Additionally, among the “facts” that the IFR draws upon to manufacture the “crisis” at the southern border is the assertion that asylum seekers fail to appear for their court hearings. This is in bald contradiction with the empirical record. In reality, in FY18, only 1.4 percent of asylum seekers were denied asylum because they failed to appear for their scheduled hearing.¹⁹ In other words, for 98.6 percent of all asylum decisions (both grants and denials) the immigrant(s) were present in court.²⁰ Further, while the IFR singles out asylum seekers from Northern Triangle countries, the data from FY18 shows that over 98 percent of asylum seekers from El Salvador, Honduras, Guatemala, and Mexico appeared for their hearings.²¹ Similarly, in NYC during FY18, at the Manhattan immigration court, only 1.3 percent of asylum seekers were denied asylum because they failed to appear for their scheduled hearing.²² Indeed, these trends of incredibly low rates of asylum denials due to non-appearance extend historically and nationally: over the past decade, nationwide statistics show that over 97 percent of asylum seekers with scheduled hearings were present in court.²³ DHS and DOJ have dramatically misrepresented the rate of *in absentia* removal orders for asylum applicants in order to set the stage for their draconian and inhumane policy proposals.²⁴

Thus, DHS and DOJ have misrepresented data to draw a false narrative about asylum seekers, specifically those from Central American countries. The manipulative and misleading use of data in the IFR feeds the narrative that asylum seekers entering at the southern border are

¹⁶ 83 Fed. Reg. 55934–36, 55944–49.

¹⁷ *Southwest Border Migration FY 2019*, CBP (December 10, 2018), <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last accessed Jan. 4, 2019).

¹⁸ Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Border Patrol Arrests* (2018), <http://trac.syr.edu/phptools/immigration/cbparrest/> (Last accessed Jan. 4, 2019).

¹⁹ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Asylum Decisions and Denials Jump in 2018*, <http://trac.syr.edu/immigration/reports/539/>.

²⁰ *Id.*

²¹ Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Asylum Decisions* (2018), <http://trac.syr.edu/phptools/immigration/asylum/> (Last accessed Jan. 4, 2019).

²² *Id.*

²³ DOJ Executive Office for Immigration Review (EOIR), *EOIR Adjudication Statistics: Asylum Decision Rates* (October 2018), <https://www.justice.gov/eoir/page/file/1104861/download>.

²⁴ The Executive Office of Immigration Review (“EOIR”), an office of DOJ, recently redefined how it calculates asylum decision rates. EOIR now counts “abandoned” cases as *in absentia* removal orders. However, this is a highly misleading conflation, as “abandoned” cases are primarily those in which the immigrant found another form of relief.

presenting largely frivolous asylum claims and should thus be associated with criminality and even terrorism. Such claims have been repeated by the President without evidence.²⁵ These falsehoods, which vilify and criminalize people of color, attach a racialized stigma to Latinx, Black, and indigenous people entering the United States through the southern border and add to the trauma and suffering that asylum seekers and their families must endure.

V. Conclusion

In addition to being unlawful as the federal courts have consistently recognized over the fall of 2018, the IFR would inflict serious harm upon NYC, its residents, and its resources. It finds little support in the factual record. For all of the foregoing reasons, the IFR should be withdrawn.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Mostofi', with a stylized flourish at the end.

Bitta Mostofi, Commissioner
New York City Mayor's Office of Immigrant Affairs

²⁵ See, e.g., Donald J. Trump (@realDonaldTrump), Twitter (Oct. 22, 2018, 5:37 AM), <https://tinyurl.com/mid-easterners-tweet>.