Office of the General Counsel
3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

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Submitted Electronically via Regulations.gov

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

Re: "Asylum Eligibility and Procedural Modifications" Interim Final Rule; EOIR Docket No. 19-0504, EOIR RIN 1125-AA91 and DHS RIN 1615-AC44

Dear Ms. Alder Reid,

The United States Conference of Catholic Bishops ("USCCB") appreciates the opportunity to provide public comment and share our grave concerns with the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS") regarding the above-referenced Interim Final Rule ("IFR" or "Rule") concerning eligibility for asylum, published in the Federal Register on July 16, 2019 (84 Fed. Reg. 33,829).[1]

The U.S. Catholic Church holds a strong and pervasive pastoral interest in the welfare of migrants, including asylum seekers, and welcomes newcomers from around the world. For decades, USCCB has collaborated with the U.S. government to welcome and manage the provision of services to asylees, unaccompanied immigrant children, domestic and foreign-born victims of human trafficking, and refugees. USCCB's Migration and Refugee Services provides services and advocacy on behalf of these and other immigrant populations to advance the migration policy priorities of USCCB's Committee on Migration.

The Catholic Church's work of assisting immigrants stems from the belief that every person is created in God's image and all are deserving of human dignity. In the New Testament, the image of the migrant is grounded in the life and teachings of Jesus Christ. In his own life and work, Jesus identified himself with newcomers and with other marginalized persons, stating: "I was a stranger and you welcomed me."[2] Furthermore, while the Catholic Church recognizes the right of sovereign nations to control their borders, it also believes that nations have an obligation to respect the human rights of migrants and to protect the right to life for those fleeing violence and persecution. USCCB has therefore affirmed a person's right to seek asylum and has been deeply troubled by recent administrative policy changes that undermine that right, including this Rule.

[1] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019).

[2] Mt. 25:35.

We believe this Rule, which attempts to curtail our nation's long-standing commitment to providing individuals with humanitarian protection, is not only unlawful but also contrary to the public interest. Specifically, we are concerned that the Rule:

- Conflicts with explicit provisions of the Immigration and Nationality Act ("INA");
- Violates our nation's obligations under international law;
- Is arbitrary and based on a false premise that qualifying countries are "safe" for asylum seekers; and
- Not only fails to consider the root causes of migration, but also threatens vulnerable individuals and family unity, and violates the U.S.'s tradition of being a global leader providing and being a catalyst for others to provide humanitarian protection to those in need.

For these reasons, we strongly urge DOJ and DHS to rescind this Rule.

I. The Rule Is Contrary to Multiple Provisions of Domestic Asylum Law.

The Rule is unlawful[3] and should be withdrawn, as it is inconsistent with several asylum-related provisions of the INA. Congress explicitly addresses in the INA the limited instances in which an individual's relationship or ability to be returned to a third country will act as a bar to asylum in the U.S. – via the "safe third country"[4] and "firm resettlement"[5] provisions. The Rule, however, establishes a broad, new bar to asylum that is fundamentally at odds with the system Congress created.

Through the statute's safe third country provision, Congress clearly contemplated the narrow circumstances in which an individual would be prohibited from applying for asylum in the U.S. and instead returned and forced to seek protection in a third country. Specifically, it provided that individuals could be returned to a safe third country, other than the individual's country of nationality, "pursuant to a bilateral or multilateral agreement."[6] Congress also specified that the safe third country has to be one "in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."[7] Up until a few weeks ago, the lone country with which the United States had a safe third country agreement was Canada.[8] And, while the Administration has recently executed a yet-to-be-implemented safe third country agreement with

[3] 5 U.S.C. § 706 (stating that courts must set aside agency actions as unlawful when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

[4] 8 U.S.C. § 1158(a)(2)(A).

[5] 8 U.S.C. § 1158(b)(2)(A)(vi).

[6] 8 U.S.C. § 1158(a)(2)(A).

[7] *Id.*

[8] *See Canada – U.S. Safe Third Country Agreement*, GOVERNMENT OF CANADA (June 23, 2016), https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html.

Guatemala, the legality of this agreement has been called into question both under U.S. and Guatemalan law.[9]

Similarly, Congress has also expressly addressed when an individual's preexisting relationship with a third country would be sufficient to bar their access to asylum in the U.S. – specifically and narrowly, when the individual "was firmly resettled in another country prior to arriving in the United States."[10] This has been interpreted to mean that the individual must have received from that country an offer of citizenship, permanent residency, or other form of permanent resettlement.[11] Mere travel through a country is not sufficient to invoke this "firm resettlement" bar.[12]

The Rule goes far beyond these explicit and limited bars to asylum that Congress established. It would broadly prohibit individuals arriving at our southern border from applying for asylum in the U.S. in any instance in which they have merely transited through a country (other than the country of which they are a national) that is party to the 1951 Convention Relating to the Status of Refugees ("1951 Convention"), the corresponding 1967 Protocol Related to the Status of Refugees ("1967 Protocol"), or the Convention Against Torture ("the CAT").[13] The Rule has three narrow exceptions to this bar for the following individuals: (1) those who transited only through countries that are nonparties to all three international agreements, (2) those who are victims of "severe" human trafficking, or (3) those who applied and received a final judgment denying an application for asylum in at least one of the qualifying countries through which he or she transited.[14] The Rule fails to meet the statutory requirement necessitating a bilateral or multilateral agreement before allowing for such individuals' return, as well as the requirement for safeguards ensuring the ability of individuals to access a full and fair asylum proceeding in the qualifying third country. Further, it ignores the rigors of the "firm resettlement" bar and would allow an individual's mere temporary and transient relationship to a country to act as a bar to asylum.

DOJ and DHS appear to base their perceived authority to implement the new Rule on an overly broad reading of an INA provision in which Congress authorized the Attorney General to add additional restrictions on eligibility for asylum.[15] Congress, however, explicitly noted that such additional limitations must be "consistent with this section."[16] It is unreasonable to assume

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[9] Chris Mills Rodrigo, *U.S. Still Negotiating 'Safe Third Country' Agreement with Guatemala*, THE HILL (July 31, 2019), https://thehill.com/latino/455402-us-still-negotiating-safe-third-country-agreement-with-guatemala-report ("DHS officials also reportedly recognize that the agreement would need to be ratified by the Guatemalan Congress. The country's Constitutional Court previously blocked similar deals with the U.S."); Adolfo Flores and Hamed Aleaziz, *Trump Says the U.S. and Guatemala Have Signed a 'Safe Third Country' Agreement to Restrict Asylum-Seekers*, BUZZFEED NEWS (July 26, 2019), https://www.buzzfeednews.com/article/adolfoflores/trump-guatemala-safe-third-country-asylum-agreement (noting that advocates have stated that the agreement violates U.S. law).

[10] 8 U.S.C. § 1158(b)(2)(A)(vi).

[11] 8 C.F.R. § 208.15.

[12] *Id.*

[13] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,843.

[14] *Id.*

[15] *See id.* at 33,833.

[16] 8 U.S.C. § 1158(b)(2)(C).

that Congress, through this catch-all provision, intended to allow the Attorney General to override unilaterally and dismantle the asylum scheme lawmakers created. In fact, courts have repeatedly rejected such strained readings, refusing to find that the core purpose of a statute can be changed by "vague terms or ancillary provisions."[17] Congress "does not, one might say, hide elephants in mouseholes."[18] Consequently, DOJ and DHS's assertion that the catch-all provision provides them authority to all but eliminate our current asylum system is untenable.

II. The Rule Violates the United States' Obligations Under International Law.

Not only does the Rule conflict with domestic law, but it also falls short of the United States' international legal obligations under the 1951 Convention and 1967 Protocol. The United States is obliged to adhere to the 1951 Convention by virtue of it having acceded to the 1967 Protocol, which broadened the geographical limits that the Convention had in place.[19]

The United Nations High Commissioner for Refugees (UNHCR), in its oversight of the 1951 Convention and the 1967 Protocol, has issued guidance on the "safe third country" concept under those treaties. It has explained that the "primary responsibility to provide protection rests with the State where asylum is sought," and that "[t]here is no obligation for asylum-seekers to seek asylum at the first effective opportunity."[20] In fact, neither the 1951 Convention nor the 1967 Protocol require refugees to apply for protection in the first country available, nor do they require refugees to be returned to a country that was crossed in transit. Moreover, the UNHCR has stated that asylum should not be refused only on the basis that it could have been sought in another country,[21] and it has made clear that an asylum seeker should not be required to seek protection in a country in which he or she has not established any relevant links.[22]

In addition, both Article 33 of the 1951 Convention[23] as well as customary international law[24] prohibit refoulment. The UNHCR has noted the importance of non-refoulement, stating that

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[17] *E.g.*, *Whitman v. American Trucking*, 531 U.S. 457, 468 (2001) (holding that key functions of the Clean Air Act were not changed by a few "modest words").

[18] *Id.*

[19] *See* Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137; *see also* Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 606 U.N.T.S 267.

[20] Div. of Int'l Protection, U.N. High Comm'r for Refugees, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-seekers* 1 (2013), https://www.refworld.org/pdfid/51af82794.pdf. (noting that while "there is no unfettered right to choose one's country of asylum . . . [t]he intentions of an asylum-seeker, however, ought to be taken into account to the extent possible.").

[21] U.N. High Comm'r for Refugees, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* 2 (2018), https://www.refworld.org/pdfid/5acb33ad4.pdf.

[22] U.N. High Comm'r for Refugees, *Note on Asylum*, EC/SCP/12 (Aug. 30, 1979), https://www.refworld.org/docid/3ae68cd44.html.

[23] Convention Relating to the Status of Refugees, *supra* note 19, at art. 33.

[24] U.N. High Comm'n for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* 7 (Jan. 26, 2007), https://www.unhcr.org/4d9486929.pdf; *see also* U.N. High Comm'n for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (Jan. 31, 1994),

is it at "the centre of refugee protection principles." [25] This Rule, however, greatly increases the risk of refoulement for those refugees who, barred from seeking asylum in the U.S., will face significant hurdles to accessing and attaining protection from removal. It therefore puts the United States at risk of failing to meet its international obligations regarding non-refoulement.

III. The Rule's Premise That Qualifying Third Countries Are "Safe" Is Inaccurate and Arbitrary.

Even if the INA's provisions could be reasonably read to be ambiguous on this issue – which they cannot – the Rule is nonetheless arbitrary and capricious, and therefore unlawful, under the Administrative Procedure Act. The Rule is based on a false and unsubstantiated premise that most asylum seekers arriving to the U.S. could have obtained sufficient protection in another country through which they transited if that country is party to the 1951 Convention, 1967 Protocol, *or* the CAT.[26] Notably, only 17 countries worldwide are not party to any of these treaties.[27] With over 90% of the countries in the world party to at least one of these three international agreements,[28] this Rule assumes that an asylum seeker can be safely returned to almost any country on earth. Yet, as noted below, being a party to these treaties does not mean that a country is indeed safe or able to provide asylum seekers with adequate due process and protection.

The Rule, for example, assumes that Mexico, which is party to the three international agreements, has "a functioning asylum system."[29] This is not the case. While some improvements to the country's asylum system have been made, a recent 2018 study found that Mexican authorities still routinely violate the principle of non-refoulement and had not informed a majority of migrants of their right to seek asylum.[30] Reports also indicate that Mexican immigration officials continue to use threats and abuse as a means to deter migrants from claiming asylum and instead force them into accepting voluntary departure.[31] Further, migrant children face high rates of

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https://www.refworld.org/docid/437b6db64.html; GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 346 (3rd ed. 2007) ("The evidence relating to the meaning and scope of non-refoulement in its treaty sense amply supports the conclusion that today the principle forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding on all States, independently of specific assent.").

[25] U.N. High Comm'r for Refugees, *Legal Considerations*, *supra* note 21, at 3.

[26] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,831.

[27] Human Rights Watch, *New Rule Flouts Asylum Rules, Says Human Rights Watch*, YUBANET.COM (July 16, 2019), *available at* https://yubanet.com/usa/new-rule-flouts-asylum-rules-says-human-rights-watch/.

[28] *Id.*; *see also The World Fact Book*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html (last visited Aug. 2, 2019) (showing the total number of countries in the world as 195).

[29] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,838.

[30] AMNESTY INTERNATIONAL, OVERLOOKED, UNDER-PROTECTED MEXICO'S DEADLY REFOULEMENT OF CENTRAL AMERICANS SEEKING ASYLUM 5 (2018), *available at* https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf.

[31] U.S. DEP'T OF STATE, MEXICO 2018 HUMAN RIGHTS REPORT 20 (2019), *available at* https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf.

detention by Mexican authorities,[32] coupled with low asylum grant rates and long processing delays.[33]

Beyond these concerns, it also bears noting that Mexico's refugee agency, the Comisión Mexicana de Ayuda a Refugiados ("COMAR"), is severely underfunded with an annual budget of only $1.3 million dollars, despite an expectation that it will receive 60,000 asylum applications this year – a sharp increase from previous years.[34] COMAR is also significantly understaffed, with only 48 core staff members[35] and four offices nationwide.[36] In fact, even prior to this Rule, the agency had to call on the UNHCR for assistance in addressing its staffing shortage.[37] DOJ and DHS provide no evidence or justification in the Rule to suggest that, in light of these issues, Mexico's asylum system is or will be sufficient to provide individuals impacted by the Rule with adequate due process and protection.

Furthermore, asylum seekers and migrants in Mexico are particularly vulnerable to kidnapping, disappearance, sexual assault, human trafficking, and other violence.[38] In addition to Mexico reporting its highest ever homicide rate in 2018, [39] the U.S. Department of State (DOS) reported 5,824 crimes against migrants in 2017, 99 percent of which were unresolved.[40] The Department also reported the presence of Central American gangs in the Mexican interior that continued to pose threats to migrants.[41] The Rule, however, ignores these threats to asylum seekers in Mexico and fails to address the fact that many would likely be unable to safely wait for an asylum decision or even find security if they are granted protection.

The inaccuracy of the Rule's premise about the safety of qualifying third countries extends to many countries beyond just Mexico. Guatemala, for example, is also ill-equipped to process and

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[32] Maryanne Buechner, *A Path to Protection for Uprooted Kids in Mexico*, UNICEF (June 18, 2019), https://www.unicefusa.org/stories/path-protection-uprooted-kids-mexico/36079 (noting that in 2018, 30,000 immigrant children from the Northern Triangle were temporarily placed in detention centers and that 21,000 have been detained so far in 2019).

[33] COMISIÓN MEXICANA DE AYUDA A REFUGIADOS (COMAR), ESTADÍSTICAS (2017), *available at* https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS_2013_A_4TO_TRIMESTRE_2017.pdf (showing that in 2017, of the 227 unaccompanied children who had applied for asylum, only 36 received refugee status, with 15 receiving complementary protection and 123 still waiting to be processed).

[34] Susan Fratzke**,** *International Experience Suggests Safe Third-Country Agreement Would Not Solve the U.S.-Mexico Border Crisis***,** MIGRATION POLICY INSTITUTE (June 2019), https://www.migrationpolicy.org/news/safe-third-country-agreement-would-not-solve-us-mexico-border-crisis.

[35] Lizbeth Diaz & Delphone Schrank, *Mexico's Refugee Agency Turn to U.N. Amid Asylum Surge, Funding Cuts*, REUTERS (May 21, 2019), https://www.reuters.com/article/us-usa-immigration-mexico/mexicos-refugee-agency-turns-to-u-n-amid-asylum-surge-funding-cuts-idUSKCN1SS06N.

[36]Comisión Mexicana de Ayuda a Refugiados (COMAR), *¿Donde Esta COMAR?* (June 11, 2019), https://www.gob.mx/comar/articulos/donde-esta-comar?idiom=es.

[37] Lizbeth Diaz & Delphone Schrank, *supra* n. 35.

[38] *Id*.

[39] SECRETARIADO EJECUTIVO, VÍCTIMAS DE DELITOS DEL FUERO COMÚN 2018 (Jan. 20, 2019) *available at* http://secretariadoejecutivo.gob.mx/docs/pdfs/nueva-metodologia/CNSP-V%C3%ADctimas-2018_dic18.pdf.

[40] U.S. DEP'T OF STATE, MEXICO 2018 REPORT, *supra* note 31, at 20.

[41] *Id*. at 19.

provide protection to asylum seekers, despite meeting the Rule's criteria. In fact, DOS in its 2018 Human Rights report noted that while Guatemala has established a system for the protection of asylum seekers and refugees, the system is "inadequate" and fails to provide adequate training to officials.[42] In addition to insufficient training, as of 2018, the Guatemalan offices charged with processing asylum applications were also severely understaffed with only twelve officers working on asylum processing, of which only three actually conducted interviews with asylum seekers.[43] Further, Somalia, Yemen, and Egypt are also all party to each of the international agreements listed in the Rule.[44] Nevertheless, DOS has found none of these countries to possess a formal asylum regime. In the case of Yemen, for example, the State Department provided in 2019 that "[n]o law addresses the granting of refugee status or asylum, and there [is] no system for providing protection to asylum seekers."[45]

Accordingly, contrary to the Rule's assumption, being party to any one of the agreements cited by the Rule—or even all of them—is not indicative of a country's commitment or capacity to provide relief to asylum seekers in accordance with international law.

IV. The Rule Presents Grave Public Policy Concerns.

Finally, the Rule also presents a myriad of serious public policy concerns. Not only does it fail to address and take into account the root causes of migration that are forcing individuals to seek protection in the U.S., but it also jeopardizes the well-being of vulnerable individuals fleeing persecution, including those seeking both safety and family unity, and the role of our nation as a traditional global leader in providing humanitarian protection.

A. It fails to address the root causes that are driving individuals to flee to the U.S.

The Rule attempts to frame individuals' "hope of a lengthy asylum process" as an "incentive" for migration to our southern border.[46] The reality, however, is that violence and forced internal displacement continue unabated within the Northern Triangle countries (El Salvador, Guatemala, and Honduras) and that much of the violence is targeted at the vulnerable families and

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[42] U.S. DEP'T OF STATE, GUATEMALA 2018 HUMAN RIGHTS REPORT 13 (2019), *available at* https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf.

[43] HUMAN RIGHTS FIRST, IS GUATEMALA SAFE FOR REFUGEES AND ASYLUM SEEKERS 2 (2019), available at https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf.

[44] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,835.

[45] U.S. DEP'T OF STATE, YEMEN 2018 HUMAN RIGHTS REPORT 26 (2019), *available at* https://www.state.gov/wp-content/uploads/2019/03/YEMEN-2018.pdf; *see also* U.S. DEP'T OF STATE, SOMALIA 2018 HUMAN RIGHTS REPORT 22 (2019), *available at* https://www.state.gov/wp-content/uploads/2019/03/Somalia-2018.pdf ("[T]he [Federal Government of Somalia] ha[s] yet to implement a legal framework and system to provide protection to refugees on a consistent basis"); U.S. DEP'T OF STATE, EGYPT 2018 HUMAN RIGHTS REPORT 34 (2019), *available at* https://www.state.gov/wp-content/uploads/2019/03/EGYPT-2018.pdf ("[T]he laws do not provide for granting asylum or refugee status, and the government has not established a comprehensive legal regime for providing protection to refugees").

[46] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,831.

children who are subsequently forced to flee for safety.[47] In fact, the Northern Triangle is one of the most dangerous regions in the world, with El Salvador, Honduras, and Guatemala consistently ranking among the top 20 most dangerous countries in the world.[48] Through our work on the ground with Catholic partners, we know that entire families are currently facing targeted violence and displacement. These realities – gang and domestic violence, impunity, and lack of opportunity related to displacement and violence – are the primary factors driving families to flee north for protection.

The Rule ignores this larger interrelated migration context. Rather than attempting to undermine our current asylum commitment through administrative fiat, the U.S. should look to address the root causes of migration at a regional level. It should invest in expanded programming to address the needs of vulnerable families and children in the Northern Triangle, help build capacity of the Mexican and other regional asylum systems, and support additional avenues for seeking protection in the U.S.

B. It would result in thousands of vulnerable individuals being returned to situations of persecution and danger.

The Rule will jeopardize the safety and well-being of thousands of children and families seeking protection by all but eliminating their ability to claim asylum in the U.S. Most of the transit countries through which these individuals will pass on their way to the U.S. are places where they are required to apply for asylum under the Rule and yet are also places that have inadequate asylum processes and protection, as explained in Section III, *supra*. As a result, the Rule would lead to unacceptable and inhumane results – individuals and families being returned to situations of persecution, danger, or even death.

While the Rule makes limited exceptions, they are so narrow that very few asylum seekers would be able to qualify under them. For example, as noted in Section III, *supra*, the exception for individuals who only travel through countries not party to any one of the three international agreements is almost nominal because only 17 of 195 countries fall into the exception. And, in Central and South America every country is party to the CAT, aside from Suriname, which is party to both the 1951 Convention and the 1967 Protocol, and therefore all would qualify as a "safe" transit country under the Rule's requirements.[49]

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[47] *E.g.*, U.S. CONFERENCE OF CATHOLIC BISHOPS/MIGRATION AND REFUGEE SERV., TEMPORARY PROTECTED STATUS: A VITAL PIECE OF THE CENTRAL

AMERICAN PROTECTION AND PROSPERITY PUZZLE 6 (2017), *available at* http://www.usccb.org/about/migration-policy/fact-finding-mission-

reports/upload/el-salvador-honduras-report-20171016.pdf.

[48] Rocio Cara Labrador & Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle; *see also Travel and Tourism Competitiveness Report 2017*, WORLD ECONOMIC FORUM, http://reports.weforum.org/travel-and-tourism-competitiveness-report-2017/ranking/#series=TTCI.A.02 (last visited Aug. 2, 2019).

[49] *See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en (last visited July 29, 2019); *Convention relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang

One must also question how effective the exception for victims of severe forms of human trafficking will be. There are well-documented concerns regarding the ability of DHS to screen unaccompanied children for instances of human trafficking. In its 2015 report, the Government Accountability Office (GAO) found that 95% of Mexican unaccompanied children from fiscal years 2009-2014 were returned to Mexico despite frequent indicators of trafficking or fear of return.[50] The GAO report also found that Customs and Border Protection (CBP) officers often did not correctly apply trafficking indicators, routinely did not ask follow-up questions to rule out all trafficking concerns, and did not ask questions pertaining to the risk of trafficking upon return to Mexico.[51] We greatly respect the work of CBP agents and recognize their contributions to defend our borders and make us safe. However, they are law enforcement officers – not highly trained experts in human trafficking or in interviewing traumatized children and families.

Notably, the Rule contains no exception for unaccompanied children fleeing persecution. It simply assumes that if a country is party to any one of the three designated international agreements, it can offer adequate care and protection to these children. Unfortunately, we know that this is often not the case and that many of the countries lack adequate child welfare and protections systems.[52] In the Northern Triangle, for example, thousands of children have been forced to abandon their education because the state is unable to protect them from gang threats and harassment as they travel to school.[53]

Given these concerns, we do not doubt that the Rule will leave many fleeing persecution with inadequate protection options. Further, we fear that the Rule will disproportionately impact those who are poor and fleeing on foot, as the bars do not apply to those who are wealthy enough to fly to the U.S. to claim protection.[54]

C. It would lead to unnecessary family separation.

The Rule unnecessarily threatens family unity, a core principle of U.S. immigration and asylum law. The importance of family unity as a core principle for U.S. asylum is evidenced by

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=_en (last visited July 29, 2019); *Protocol relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/ Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en (last visited July 29, 2019). Additionally, every country in Europe is party to CAT, and every country in Africa not party to CAT is party to the 1951 Convention, the 1967 Protocol, or both.

[50] *See* GOVERNMENT ACCOUNTABILITY OFFICE, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY 24, 27-36 (JULY 2015), *available at* https://www.gao.gov/assets/680/671393.pdf.

[51] *Id.*

[52] *See, e.g.*, UNICEF, UPROOTED IN CENTRAL AMERICA AND MEXICO 3 (2018), *available at* https://www.unicef.org/publications/files/UNICEF_Child_Alert_2018_Central_America_and_Mexico.pdf ("[W]hile UNICEF-supported [child protection] programmes in northern Central America and Mexico are benefiting many young migrants, refugees and returnees, many other such initiatives are needed – and all of these efforts would have to be scaled up enormously to meet the challenges facing the region's children at risk.").

[53] *Id.* at 6.

[54] *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,843 (stating that the Rule applies to those who enter or attempt to enter the U.S. "across the southern land border").

the U.S-Canada Safe Country Agreement, which includes a provision to assure a broad family unity exception to the Safe Third Country obligation.[55] Further, it is telling that UNHCR guidance warns against requiring an asylum seeker to apply for protection in countries where he or she "has not established any relevant links."[56] For refugees, the most "relevant links" are often family members who have already sought asylum in the United States. Nonetheless, the Rule contains no exception for those who would be separated from family if not permitted to seek asylum in the U.S.

The Rule would require, for example, that an unaccompanied child fleeing the Northern Triangle seek asylum in Central America or Mexico even though the child's parent was already living in or had found protection in the United States. As service providers, we have seen cases of families that would have been torn apart if this Rule had been in effect at the time of the children's arrival. These are children like Manuel and Lucas,[57] 9- and 11-year-old brothers from Honduras, who were forced to flee their home in search of safety due to gang threats. The boys were targeted after a gang killed their father, a local police officer who was working to combat gang violence in the community. Had this Rule been in effect at the time of their arrival, however, they would not have been able to reunify with their mother in the United States and receive asylum.

The needless family separation that this Rule will cause is inhumane and unacceptable.

D. It undermines the role of the United States as a traditional leading provider of humanitarian protection in the global community.

The U.S. has a long and proud history of providing humanitarian protection to asylum seekers and refugees. George Washington envisioned the special global humanitarian role of the United States even in the early days of the Republic, stating in a welcoming letter to Francis Adrian Van Der Kamp, who was seeking asylum in our nation: "I take the speediest occasion to well-come your arrival on the American shore. I had always hoped that this land might become a safe & agreeable Asylum to the virtuous & persecuted part of mankind, to whatever nation they might belong…".[58] Further, as the years passed, the Statue of Liberty has become a lasting American symbol, not only signifying that the United States is a land of liberty but that our nation is seen by the world as a place that welcomes and provides liberty and new life for "those yearning to be free."[59]

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[55] U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), PRESS RELEASE: UNITED STATES AND CANADA IMPLEMENT SAFE THIRD COUNTRY AGREEMENT ON ASYLUM 2 (Dec. 29, 2004), *available at* https://www.uscis.gov/sites/default/files/files/pressrelease/Safe-12-29-94.pdf; *see also* WOMEN'S REFUGEE COMMISSION, SAFE THIRD COUNTRIES FOR ASYLUM-SEEKERS WHY MEXICO DOES NOT QUALIFY AS A SAFE THIRD COUNTRY (2018), *available at*

https://www.womensrefugeecommission.org/images/zdocs/Safe-Third-Countries---May-2018.pdf.

[56] *See* U.N. High Comm'r for Refugees, *Note on Asylum*, *supra* note 22.

[57] Names changed to protect client confidentiality.

[58] *Letter from George Washington to Francis Adrian Van der Kemp* (May 28, 1788), *available at*

https://founders.archives.gov/documents/Washington/04-06-02-0266.

[59] Emma Lazarus, *New Colossus* (1883).

In current times, the crowning manifestation of the American role as a nation that welcomes those fleeing persecution has been seen in how we have lived out our commitment to and obligations under the 1967 Protocol, as operationalized by the U.S. refugee resettlement and asylum programs. Since 1980, the United States has resettled over 3 million refugees,[60] more than three times as many refugees as the rest of the world combined.[61] The United States has also contributed greatly to global refugee protection through asylum grants, including over 683,163 asylum grants from 1980 to 2017.[62]

This Rule undermines the U.S. global role in refugee protection by reducing access to U.S. asylum. As described above, the Rule amounts to a virtual bar to asylum for anyone seeking asylum at the U.S. southern border. This Rule follows the pattern established by the Administration of reducing protection for the persecuted, as evidenced by recent reductions in access to U.S. resettlement. Over the last three years, through administrative actions, refugee resettlement goals have fallen from 110,000 in 2017[63] to 30,000 in 2019, with reports that the administration is seeking to zero out the program in 2020. [64] Further, actual admissions have fallen from 84,994 in 2016 to under 22,491 in 2018.[65]

The Rule also undermines the U.S. global role in refugee protection because it attempts to avoid international and domestic asylum obligations through unlawful regulations. The U.S. will therefore lose its moral authority to challenge other countries that seeking to avoid their protection obligations. Coupled with the drastically reduced commitment to refugee resettlement, the United States is no longer leading by positive example in the community of nations and has lost considerable authority to positively influence refugee protection by other nations.

Conclusion

For the reasons discussed above, this Rule is unlawful, unjust, and unwise. We ask DOJ and DHS to withdraw it immediately.

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[60] U.S. DEP'T OF STATE ET AL., REPORT TO CONGRESS: PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2019 (2018), *available at* https://www.state.gov/wp-content/uploads/2018/12/Proposed-Refugee-Admissions-for-Fiscal-Year-2019.pdf.

[61] Phillip Connor et al., *For the First Time the U.S. Resettles Fewer Refugees than the Rest of the World*, PEW RESEARCH CENTER (July 5, 2018), https://www.pewresearch.org/fact-tank/2018/07/05/for-the-first-time-u-s-resettles-fewer-refugees-than-the-rest-of-the-world/.

[62] *See* U.S. DEP'T OF STATE ET AL., REPORT TO CONGRESS, *supra* note 60, at 9.

[63] See U.S. DEP'T OF STATE ET AL., REPORT TO CONGRESS: PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2018 6 (2017), *available at* https://www.state.gov/remarks-and-releases-bureau-of-population-refugees-and-migration/proposed-refugee-admissions-for-fiscal-year-2018/.

[64] Ted Hesson, *Trump Officials Pressing to Slash Refugee Admissions to Zero Next Year*, POLITICO (July 18, 2019), https://www.politico.com/story/2019/07/18/trump-officials-refugee-zero-1603503.

[65] Statistics are derived from data provided by the U.S. Department of State. *See Interactive Reporting: Admissions and Arrivals*, REFUGEE PROCESSING CENTER, *available at* http://ireports.wrapsnet.org/Interactive-Reporting/EnumType/Report?ItemPath=/rpt_WebArrivalsReports/Map%20-%20Arrivals%20by%20State%20and%20Nationality (last visited Aug. 5, 2019).

How we respond to asylum seekers arriving at our border is a test of our moral character. As Pope Francis has encouraged: "If we want security, let us give security; if we want life, let us give life; if we want opportunity, we must give opportunity. The yardstick we use for others will be the yardstick which time will use for us."[66] Given their vulnerability, asylum seekers arriving at our border deserve and need our protection and our compassion. We must remember that they are fellow children of God.

Respectfully submitted,

Anthony R. Picarello, Jr.
Associate General Secretary and General Counsel
United States Conference of Catholic Bishops

[66] Speech of His Holiness Pope Francis to the U.S. Congress (September 24, 2015).