UNITED STATES OF AMERICA
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DEPARTMENT, DEPARTMENT OF JUSTICE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, AND DEPARTMENT OF HOMELAND SECURITY

Interim Final Rule; Request for Comment (RFC): Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act	**:**	**8 CFR Parts 1003, 1208 and 1240 [EOIR Docket No. 19-0021 A.G. Order No. 4581-2019]**

Submitted via Federal eRulemaking Portal: http:// www.regulations.gov

COMMENTS OF WHITMAN-WALKER HEALTH

Whitman-Walker Health (WWH or Whitman-Walker) submits these comments in response to the Interim Final Rule "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act," EOIR Docket No. 19-0021, published by the Department of Justice (DOJ) and the Department of Homeland Security (DHS) on November 19, 2019, 84 Fed. Reg. 63994.

Whitman-Walker Health strongly opposes the Interim Final Rule (IFR) because it is inconsistent with the Immigration and Nationality Act, abrogates the United States' international treaty obligations, and will have particularly harsh effects on lesbian, gay, bisexual and transgender (LGBT) persons fleeing persecution and torture. We recommend that the DHS and DOJ rescind the IFR immediately.

EXPERTISE AND INTEREST OF WHITMAN-WALKER HEALTH

Whitman-Walker Health is a community-based, Federally Qualified Health Center offering primary medical care and HIV specialty care, community health services and legal services to residents of the greater Washington, DC metropolitan area. WWH has a special mission to the LGBT members of our community, as well as to all Washington-area residents of every gender and sexual orientation who are living with or otherwise affected by HIV. In

calendar year 2018, more than 20,700 individuals received health services from Whitman-Walker. In that year, 58% percent of our health care patients and clients who provided their sexual orientation identified as lesbian, gay, bisexual, or otherwise non-heterosexual, and 9% of our patients and clients—more than 1,800 individuals—identified as transgender or gender queer. We have a 42 year-long history of dedication to LGBT communities and are recognized experts on LGBT health and wellness. We routinely provide trainings and conduct research on the health impacts of stigma and discrimination on the LGBT community. We also provide trainings and do research on delivering healthcare to LGBT people and to other communities that are historically underserved by our medical system.

Since the mid-1980s, Whitman-Walker has had an in-house Legal Services Department. Our attorneys and legal assistants provide information, counseling, and representation to Whitman-Walker patients, and to others in the community who are LGBT or living with or affected by HIV, on a wide range of civil legal matters that relate directly or indirectly to health and wellness – including immigration and asylum cases. Our Legal Services Department, with the assistance of hundreds of volunteer attorneys throughout the area, has provided a wide range of immigration-related services to foreign-born LGBT individuals and families. Many come to the U.S. fleeing persecution in their countries of birth because of their sexual orientation or gender identity. In 2018, 52% of our legal services clients who provided their sexual orientation identified as lesbian, gay, bisexual or otherwise non-heterosexual; 20% identified as transgender or gender nonconforming.

THE INTERIM FINAL RULE IS INCONSISTENT WITH THE INA AND UNITED STATES TREATY OBLIGATIONS

The Interim Final Rule is inconsistent with the Immigration and Naturalization Act regarding the standard for returning an asylum seeker to a safe third country. As noted in the IFR, the bilateral Asylum Cooperative Agreements that the DOJ and DHS are implementing purport to be "safe third-country agreements" (84 Fed. Reg. 63994), but they fall far short of the statutory requirements. The INA establishes a framework for the requirements of a safe third country for removal of asylum seekers. The statute provides that

> the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which [1] 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 [2] where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection

8 U.S.C. 1158(b)(2).

These two conditions are not yet met in the Northern Triangle countries of El Salvador, Guatemala, and Honduras, especially, as noted below, for victims of domestic violence and anti-LGBT violence. Contrary to the Administration's attempt to create a presumption of safety and adequate process through its agreements, these countries cannot be made safe and procedurally equipped merely by declaration or signed agreement.

Another fatal defect in the IFR is that it puts a high burden on the asylum applicant to demonstrate that their life or freedom would be threatened in one of the countries in question. This is an abrogation of the government's responsibilities under the Refugee Act of 1980, in which the U.S. codified its international human rights obligations as a party to the Refugee Convention and the Convention Against Torture to ensure that the alien's life or freedom would

not be threatened. 8 U.S.C. § 1158 (a)(1), GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85. These international agreements came together in the aftermath of World War II in hopes of preventing another global travesty by ensuring that individuals fleeing crises and persecution are met with fair and safe procedures to seek asylum. The IFR accomplishes just the opposite by erecting higher barriers to seeking asylum in the United States and proposing to send displaced people to states incapable of safely receiving them. It is the state's responsibility to safeguard the asylum applicant. The Administration cannot, through administrative action, shift the burden to the asylum applicant.

Asylum applicants are required to demonstrate a well-founded fear to apply for asylum. The "well-founded fear" standard is a lower evidentiary burden than the "more likely than not" standard promulgated in the IFR. (84 Fed. Reg. at 63997). The regulation promulgated in the Interim Final Rule is inconsistent with the statute by placing a higher evidentiary requirement on asylum seekers to demonstrate that that they would suffer persecution or torture in another country or countries than the evidence needed to establish fear for the lives in their country of habitual residence. While asylum applicants are required to demonstrate a "well-founded fear" of persecution in order to qualify for asylum, the IFR requires that applicants demonstrate that it is "more likely than not" that they would experience persecution or torture to avoid summary removal to a third country (84 Fed. Reg. at 64009). The "more likely than not" standard promulgated in the IFR is a much higher evidentiary burden than "the well-founded fear" standard and is therefore incongruous with asylum law. The Supreme Court has held that a one-in-ten chance of persecution may result in a well-founded fear sufficient for asylum; contrasted with 51% likelihood of persecution required by the "more likely than not" standard, which is

consistent with the standard for Withholding of Removal, not asylum. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

The "more likely than not" standard is grossly unreasonable and unlawful, requiring asylum applicants to demonstrate, with a preponderance of the evidence, without access to counsel, that they are likely to be persecuted or tortured in another, likely unfamiliar, country.

The IFR's purported purpose is "to share the burden of asylum applicants" with the Northern Triangle Countries of El Salvador, Honduras, and Guatemala (84 Fed. Reg. at 63995). The asylum systems and supporting institutions in El Salvador, Guatemala, and Honduras are unprepared to share the burden of asylum seekers, and signing bilateral agreements will not make them so. Even more fundamentally, many of the asylum seekers affected by the IFR are fleeing persecution in those countries. The United States received over 500,000 asylum applications from, El Salvador, Guatemala, and Honduras from 2016 to 2018. (UNHCR, Population Statistics: Time Series *available at* http://popstats.unhcr.org/en/time_series). The citizens of El Salvador, Guatemala, and Honduras do not find those countries a safe place to adjudicate their asylum claims. In essence, the IFR is simply an attempt to close the door on asylum seekers from those countries, in defiance of our immigration laws and treaty obligations.

THE INTERIM FINAL RULE WILL HAVE A DISPROPORTIONATELY HARMFUL EFFECT ON SURVIVORS OF DOMESTIC VIOLENCE AND LGBT INDIVIDUALS AND FAMILIES

The Interim Final Rule is particularly dangerous for LGBT people and victims of domestic violence, who have suffered persecution based on misogyny, homophobia and transphobia in the very countries at issue. Under the INA and decades of precedential case law, many LGBT people and victims of domestic violence in the Northern Triangle Countries are eligible for asylum as members of particular social groups subject to persecution, and even threat

of death, in one or more of those countries. And given the conditions in all of those countries, including transnational gang violence and a dearth of legal protections for victims of violence, an LGBT person fleeing Honduras, for instance, cannot reasonably expect refuge in El Salvador or Guatemala. In El Salvador, for example, Human Rights researchers found that LGBT

> Salvadorans regularly experience discrimination and violence perpetrated by State actors. Members of the police and military have raped, beaten, stalked, arbitrarily searched, arbitrarily detained, extorted, intimidated, and threatened LGBT people. Police and soldiers initiate violence against people on the street whose nonconforming sexual orientation or gender identity is readily apparent. Police and soldiers escalate routine encounters (such as ID checks) into violent ones when they learn that a person is lesbian, gay, bisexual, and/or transgender. Police and military violence toward LGBT people is often sexual or gendered in nature.

Human Rights Institute, Uniformed Injustice: State Violence against LGBT People in El Salvador 10 (Apr. 17, 2017), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/2017-HRI-Report-Uniformed-Injustice.pdf.

The United Nations Human Rights Council's recent Country Reports on Honduras[1], and Guatemala[2] note the continuing lack of access to justice and vulnerability to state violence that results in a culture of corruption and impunity and contributes to the highest murder rates in the world. Even if it were safe for LGBT people and survivors of domestic violence in these countries, the nascent asylum systems in El Salvador, Honduras, and Guatemala are insufficient

[1] "According to various statistics, the homicide rate per 100,000 head of the population in Honduras was somewhere between 85.6 and 90.4 in 2012, and in 2014 it was about 68.8 A person who becomes a human rights defender in Honduras stands an increased risk of falling victim to violence." OHCHR Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras, 6, Jul. 21, 2016, A/HRC/33/42/Add.2 33th Sess.

[2] "Notwithstanding these efforts, [] people continue to experience serious difficulty, against a backdrop of extreme impunity, in obtaining access to the ordinary justice system in a way that meets the relevant international standards." OHCHR Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala, 15, Aug. 10, 2018, A/HRC/39/17/Add.2 39th Sess.

to handle the current asylum cases, are plagued by endemic anti-LGBT bias, and are drastically under-resourced to handle the potential influx of cases envisioned by the IFR.

The IFR is already sowing great fear and confusion in immigrant communities. While the primary target of the IFR appears to be recently arrived asylum applicants, the language of the IFR and the Asylum Cooperative Agreements are sufficiently broad to apply to people currently residing in the United States who may file claims for asylum. This ultimately will cause many individuals with meritorious asylum claims to be afraid to file for fear of being separated from their families via removal proceedings before their claims can be heard. It will increase the number of people who are unable to apply for benefits for which they are eligible for fear of removal to a hostile third country with which they are either unfamiliar, or all too familiar because of the persecution they already have suffered there.

CONCLUSION

We find it is extremely unlikely that a person who is removed from the United States to the Northern Triangle will be able to effectuate an asylum claim in an unfamiliar country. It is even more unlikely that they would be able to demonstrate, with a preponderance of the evidence, that they would be subject to persecution or torture in a country with which they have minimal or no contact. The IFR has sown fear and uncertainty among asylum applicants and their families. For these reasons, Whitman-Walker Health strongly opposes the IFR and recommends that the Administration promptly rescind it.

Respectfully submitted,

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