Comments Submitted by American Gateways RE: Joint Notice of Proposed Rulemaking (NPRM) by the Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1125-AA94 / 1615-AC42 / EOIR Docket No. 18-0002/ A.G. Order No. 4714-2020 (published in the Federal Register on June 15, 2020).

American Gateways provides much needed legal representation for indigent immigrants in Central Texas. Our mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking through exceptional legal services at low or no cost, education, and advocacy. Our agency began in 1987 as the Political Asylum Project of Austin and was founded to provide legal representation to Central American immigrants fleeing persecution and seeking asylum in the U.S. Over the past thirty-three years, American Gateways has become an indispensable legal services provider for low-income asylum seekers and immigrants in Central Texas.

American Gateways opposes the joint notice of proposed rulemaking regarding Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (the "Proposed Rule"), published by the Department of Homeland Security (DHS) and Department of Justice (DOJ) (collectively, the "Departments") on June 15, 2020, and requests that the Departments promptly withdraw the Proposed Rule. American Gateways describes below how some of the proposed changes will impact our organization and our clients, and the reasons for our opposition. Omission of any proposed change from these comments should not be interpreted as tacit approval. American Gateways opposes all aspects of the Proposed Rule that would erode the due process rights of asylum seekers or otherwise impede—in any way—the ability of individuals who have suffered persecution to access humanitarian protection in the United States. At the same time, American Gateways expresses heightened concern regarding the disproportionate harms that will befall certain refugees if the Proposed Rule is not withdrawn. The Departments propose to implement a complex vetting scheme that will make it virtually impossible for any *pro se* applicant to obtain asylum (or lesser form of humanitarian protection). Moreover, given that only 30% of detained immigrants are represented by counsel, detention will, in most instances, guarantee rapid deportation. Where applicable, American Gateways highlights the particularly devastating impact the Proposed Rule would have on *pro se* applicants and other particularly vulnerable asylum seekers, including but not limited to women, LGBTQ persons, and children.

I. INTRODUCTION

As a signatory to the 1967 Protocol of the 1951 Convention Relating to the Status of Refugees (the "1967 Protocol"),[1] the United States has obligations under international law to afford protections

[1] The 1967 Protocol incorporates Articles 2 through 34 of the 1951 Refugee Convention, making those provisions binding on countries that have acceded to the 1967 Protocol, including countries like the United States that have not acceded to the Convention itself. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, https://www.refworld.org/docid/3ae6b3ae4.html (hereinafter the *1967 Protocol*); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, https://www.refworld.org/docid/3be01b964.html (hereinafter the *1951 Refugee Convention*).

to individuals who have a well-founded fear of being persecuted in their home country. Furthermore, when Congress passed the Refugee Act in 1980, thereby incorporating those obligations into domestic law, it made its intentions abundantly clear: The purpose was to enforce the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[2] The Proposed Rule, in its totality, contravenes this congressional intent. In an opening salvo, the Departments describe the "laws and policies surrounding asylum" as "an assertion of a government's right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm." 85 Fed. Reg. 36264, 36265 (proposed June 15, 2020). In purporting to protect the United States *from* asylum seekers, who are not-so-impliedly likened to "foreign encroachments and dangers," the Proposed Rule turns the presumption in favor of extending protections to asylum seekers on its head. *Id.* (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)).[3] The Departments' bald attempt to dismantle the asylum system is unlawful and indefensible.

II. GENERAL COMMENTS

A. The Proposed Rule, if made final, would violate the Administrative Procedure Act.

Under the Administrative Procedure Act (APA) (5 U.S.C. §§ 551-559), courts are authorized to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 5 U.S.C. § 706(2)(A)-(C). The Proposed Rule contravenes or is otherwise inconsistent with several provisions of the governing statute, infringes upon due process rights, is not the product of reasoned decision-making, and is otherwise arbitrary and capricious. The Proposed Rule, therefore, will be subject to judicial invalidation.

First, several provisions of the Proposed Rule exceed the Departments' statutory authority and are contrary to existing law.[4] For example, the Departments propose that an alien's unlawful entry or attempted unlawful entry into the United States shall be a "significant adverse discretionary factor" that a decision maker *must* consider in determining whether an individual merits a grant of asylum. 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13 (d)(1)(i)), 36302 (proposed 8 C.F.R. §

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[2] Refugee Act of 1980, § 101(a), Pub. L. No. 96–212, 94 Stat. 102 (1980) (hereinafter the *1980 Refugee Act*).

[3] The anti-immigrant sentiment animating the Proposed Rule is underscored by the Departments' reliance on case law that embodies the ideological and exclusionary provisions of the INA that pre-dated passage of the 1980 Refugee Act. *Kleindienst* involved a challenge to the denial of a non-immigrant visa to a Belgian socialist newspaper editor under section 212(a)(28) of the Immigration and Nationality Act of 1952—a repressive holdover of the McCarthy era that barred admission to those who advocated or published "the economic, international, and governmental doctrines of world communism." Moreover, the specific language quoted in the Proposed Rule traces back to The Chinese Exclusion Case and its progeny. *See Kleindienst*, 408 U.S. at 765 (citing *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889)).

[4] When a challenger asserts that agency action conflicts with the language of a statute, the reviewing court generally applies the *Chevron* framework, giving unambiguous statutes their full effect, but deferring to the "the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) (citing *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)). As discussed in these comments, no deference is due where agency judgments are unreasonable.

1208.13 (d)(1)(i)).[5] The Immigration and Nationality Act (INA), however, plainly states: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival. . .), irrespective of such alien's status, may apply for asylum . . . ." 8 U.S.C. § 1158(a)(1). Because the Proposed Rule *requires* decision makers to deem a method of entry explicitly authorized by Congress in 8 U.S.C. § 1158(a) to be significantly adverse to a grant of asylum, the Proposed Rule cannot be reconciled with the INA. As American Gateways further explains in its comments regarding specific provisions, *see infra* Part III, several other proposed changes are so onerous that they run afoul of existing law, thereby violating the APA.

Second, several provisions of the Proposed Rule are contrary to constitutional rights because they infringe upon the due process rights of asylum seekers. The Proposed Rule, for instance, would substantially interfere with asylum seekers' right to a full and fair hearing and so restrict access to the asylum process itself so as to render the entire process fundamentally unfair. Throughout its comments, American Gateways highlights some of the constitutional violations that would flow from the Proposed Rule.

Third, the Proposed Rule, as well as the separate provisions thereof, is arbitrary and capricious. The arbitrary-and-capricious standard requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). When reviewing an agency's proffered explanation, courts "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). Further, courts require that an agency provide the "essential facts upon which the administrative decision was based," *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)), and explain the justification for its determinations with actual evidence beyond a "conclusory statement," *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993). In general, an agency decision is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. In other words, agency actions are subject to invalidation where an agency fails to adequately explain its decision, fails to consider relevant factors, including the policy effects of its decisions,

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[5] To the extent the proposed changes to 8 C.F.R. Part 208 and 8 C.F.R. Part 1208 are identical across multiple provisions, objections citing to 8 C.F.R. Part 208 apply equally to 8 C.F.R. Part 1208. Where applicable and not otherwise indicated, a citation of a proposed provision of 8 C.F.R. Part 208 incorporates a citation of the parallel provision of 8 C.F.R. Part 1208. Similarly, where the Departments propose to modify or "clarify" a statutory term or scheme that affects multiple provisions, any objection to the proposed change applies equally to all such provisions.

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