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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY *et al.*,

Defendants.

Case No. 3:20-cv-09253-JD

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Assigned to Hon. Judge James Donato

RELIEF REQUESTED BY 5:00 P.M., JANUARY 10, 2021

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PLEASE TAKE NOTICE that Plaintiffs Pangea Legal Services ("Pangea"), Dolores Street Community Services, Inc. ("DSCS"), Catholic Legal Immigration Network, Inc. ("CLINIC"), and Capital Area Immigrants' Rights Coalition ("CAIR Coalition") (collectively "Plaintiffs") will, and do, move the Court under Federal Rule of Civil Procedure 65 for a temporary restraining order ("TRO") and order to show cause why a preliminary injunction should not issue against Defendants U.S. Department of Homeland Security ("DHS"); Chad F. Wolf, in his purported official capacity as Acting Secretary of the DHS; U.S. Citizenship and Immigration Services ("USCIS"); Kenneth T. Cuccinelli, in his official capacity as the Senior Official Performing the Duties of the Director, USCIS; U.S. Immigration and Customs Enforcement ("ICE"); Tony H. Pham, in his official capacity as the Senior Official Performing the Duties of the Director of ICE; U.S. Customs and Border Protection ("CBP"); Mark A. Morgan, in his official capacity as Acting Commissioner of CBP; U.S. Department of Justice ("DOJ"); William P. Barr, in his official capacity as U.S. Attorney General; Executive Office for Immigration Review ("EOIR"); and James R. McHenry III, in his official capacity as Director of the EOIR (collectively "Defendants").

Plaintiffs respectfully move the Court to enter a nationwide TRO and preliminary injunction maintaining the *status quo* and enjoining Defendants from implementing or enforcing the rule titled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020) ("the Rule") and any related policies or procedures, including the Policy Memorandum entitled *Guidance Regarding New Regulations Governing Procedures For Asylum and Withholding of Removal and Credible Fear Reviews* issued by Defendants EOIR and McHenry on December 11, 2020, pending final judicial resolution of this action. This motion is based on this Motion, the accompanying Complaint for Declaratory and Injunctive Relief, the accompanying Memorandum of Points and Authorities, the accompanying proposed Order to Show Cause and Temporary Restraining Order, the accompanying supporting declarations of Naomi A. Igra ("Igra Dec."), Adina Appelbaum ("CAIR Dec."), Victoria Neilson ("CLINIC Dec."), Katherine Mahoney ("DSCS Dec."), Etan Newman ("Pangea Dec."), as well as the papers, evidence, and records on file in this action, and any other written or oral evidence or argument presented at or before the time this motion is heard by the Court.

As set forth in the accompanying Memorandum of Points and Authorities, a temporary restraining order is necessary by **5:00 p.m. PT on January 10, 2021** to prevent immediate and irreparable harm to the Plaintiffs and the populations they serve. The Final Rule is scheduled to take effect on **January 11, 2021**. Because Defendants set the final rule to take effect 30 days after publication—an unusually short period—Plaintiffs are unable to seek a preliminary injunction on this judicial district's ordinary schedule.

Accordingly, Plaintiffs seek an expedited briefing and hearing schedule that will permit a TRO and preliminary injunction to preserve the *status quo* and prevent Defendants from implementing or enforcing the Rule.

Plaintiffs' counsel have consulted with Defendants' counsel about this briefing schedule and come to agreement, as described in Plaintiffs' Unopposed Motion for an Order Entering Briefing Schedule and Setting Hearing Date, filed along with this motion. The parties propose that Defendants' opposition and any amicus briefs be due by December 31, 2020 and that Plaintiffs' reply and Defendants' sur-reply, if any, to the amicus briefs be due by January 5, 2021. The parties jointly request that this Court schedule a hearing on January 7, 2021.

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I. INTRODUCTION

This action challenges a sweeping final rule issued by DHS and DOJ (collectively the "Agencies") that would prevent the vast majority of applicants from establishing their claims for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"), *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*,[1] 85 Fed. Reg. 80274 (Dec. 11, 2020) ("the Rule").[2] The Rule so narrows the availability of asylum that the United States will effectively cease to provide humanitarian protections required under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ("Refugee Act"). The Court should immediately enjoin the Rule because it is unlawful under the Administrative Procedure Act ("APA"), it irreparably harms Plaintiffs, and the balance of harms and public interest tip sharply in favor of an injunction.

II. BACKGROUND

A. The Refugee Act

The Refugee Act amended the Immigration and Nationality Act ("INA"), "to respond to the urgent needs of persons subject to persecution in their homelands." Pub. L. No. 96-212, 94 Stat. 102 § 101(a). When it enacted the Refugee Act, "Congress sought to bring United States refugee law into conformity with the 1967 . . . Protocol," which in turn "incorporates the substantive provisions" of the Refugee Convention. *Barapind v. Reno*, 225 F.3d 1100, 1106 (9th Cir. 2000). Congress codified the Refugee Act "so that U.S. statutory law clearly reflects our legal obligations under international agreements." H.R. Rep. No. 96-608, at 18 (1979).

B. The Rule

Defendants published the Notice of Proposed Rulemaking ("NPRM") for the Rule in June 2020, with a 30 day comment period. 85 Fed. Reg. 36264 (June 15, 2020). The NPRM included

[1] The Rule affects withholding of removal and protection under the CAT as well as asylum, but for ease of reference, Plaintiffs' references "asylum" may include all three forms of protection.

[2] In addition to the Rule, Declaration of Naomi A. Igra ("Igra Dec."), Ex. 1, Plaintiffs seek to enjoin all agency action to implement the Rule, including through a related policy memorandum, Igra Dec., Ex. 3, and revisions to the Form I-589 Application for Asylum and for Withholding of Removal, Igra Dec., Ex. 12, and the instructions for its use. *See* Complaint for Declaratory and Injunctive Relief ("Comp.") ¶¶ 1 n.2, 52-53.

sweeping changes to almost every aspect of the asylum process.[3] According to Defendants, the NPRM aimed to "'protect its own resources and citizens, while aiding those in true need of protection from harm.'" 85 Fed. Reg. 80274 (quoting 85 Fed. Reg. 36265).

Contrary to Defendants' stated dual purpose, no proposal in the NPRM protected refugees. Rather, the NPRM substantially narrowed asylum eligibility, erected procedural barriers to seeking asylum, increased the evidentiary burden on asylum seekers, and removed procedural protections for them. For example, provisions of the NPRM:

- Redirect many refugees into proceedings that lack basic procedural protections[4]
- Allow immigration judges to pretermit proceedings without holding an evidentiary hearing, even for unrepresented asylum seekers[5]
- Restrict the favorable evidence and authorities an immigration judge can consider[6]
- Redefine statutory terms in ways that substantially narrow who may be a "refugee"[7]
- Mandate denial of asylum in nearly all cases where the applicant spent more than 14 days in any country of transit, and in many other common circumstances[8]

Many of the changes seek to reverse longstanding precedents established to carry out the purpose of the Refugee Act. *See, e.g.* Comp. ¶¶ 41-43, 85-89, 141-42, 186-193. Many changes also take the United States out of compliance with U.S. and international law. *See, e.g.*, Comp. ¶¶81-82, 124, 183, 208.

Despite the scope of the NPRM, the Agencies provided for just a 30-day comment period in the midst of the COVID pandemic when many stakeholders faced unprecedented upheaval.[9] Defendants ignored numerous requests to extend the comment period, *see, e.g.*, Igra Dec., Ex. 4 at 7–9; Ex.

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[3] *See generally* Igra Dec., Ex. 2; Pangea Dec. ¶¶ 11, 52; DSCS Dec. ¶¶ 9, 76; CAIR Dec. ¶¶ 12, 45; CLINIC Dec. ¶¶ 22, 68.

[4] *See, e.g.* 85 Fed. at 36265-66 (placing applicants in asylum-and-withholding-only proceedings).

[5] *Id*. at 36277.

[6] *See, e.g. id*. at 36282 (barring evidence "promoting cultural stereotypes").

[7] *See, e.g. id*. at 36281 (listing "nonexhaustive situations," including gender, where nexus will not generally be found); *id*. at 36280–81 (defining "persecution" and enumerating six forms of harm that will not constitute persecution); *id*. at 36282 (broadening definition of internal relocation); *id*. at 36285 (broadening applicability of firm resettlement bar).

[8] *See, e.g. id*. at 36282–86 (describing "adverse factors").

[9] Pangea Dec. ¶10; DSCS Dec. ¶ 83; CAIR Dec. ¶12; CLINIC Dec. ¶ 22.

5 at 2; Ex. 21 at 5–6. Notwithstanding these obstacles, the Agencies received nearly 88,000 comments; many stated that the brief comment period hindered their ability to meaningfully comment. 85 Fed. Reg. 80373; *see, e.g.*, Igra Dec., Ex. 4 at 8–9; Ex. 5 at 2; Ex. 11 at 11; Ex. 21 at 5–6.

The Agencies sent the final rule for review just three months after the NPRM was published. Comp. ¶ 14. The Rule, essentially unchanged from the NPRM, failed to offer meaningful responses to comments identifying serious problems. 85 Fed. Reg. 80274-76. For example, the Rule failed to mention the letter filed by 22 state Attorneys General describing the impact of the Rule on states. Igra Dec., Ex. 9. It did not include a complete economic impact analysis reflecting the data the Attorneys General provided, *see* 85 Fed. Reg. 80377-78, or meaningfully assess the impact of the Rule on small entities including legal service providers pursuant to the Regulatory Flexibility Act ("RFA"). 85 Fed. Reg. 80378.

C. The Purported Acting Secretary of DHS

The Rule aims to transform the asylum system at a time when Defendant Wolf leads DHS without lawful authority. Wolf purportedly "reviewed and approved" the NPRM and the Rule as the "Acting Secretary of DHS." 85 Fed. Reg. 80381, 80385. He "delegated the authority to electronically sign" them to Chad Mizelle, the "Senior Official Performing the Duties of the General Counsel for DHS."[10] 85 Fed. Reg. 36290.

Numerous commenters objected that Wolf had no authority to take these actions under the Homeland Security Act ("HSA") or the Federal Vacancies Reform Act ("FVRA").[11] DHS responded that Secretary Kirstjen Nielsen designated Kevin McAleenan as her successor before she resigned on April 10, 2019, and McAleenan designated Wolf as his successor before he resigned on November 13, 2019. 85 Fed. Reg. 80381. That contradicts a conclusion of the Government Accountability Office ("GAO"), Igra Dec., Ex. 19, and every court to have considered the question. *See Immigrant Legal Res. Ctr. v. Wolf*, Case No. 20-CV-05883-JSW, 2020 WL 5798269, at *8 (N.D. Cal. Sept. 29,

[10] Mizelle is not lawfully serving as General Counsel of DHS. The position, which has been vacant since September 2019, requires appointment by the President and Senate confirmation. 6 U.S.C. § 113(a)(1)(J). Mizelle was never nominated or confirmed. The FVRA does not allow officers in an acting capacity where a position has been vacant for more than 210 days. 5 U.S.C. § 3346.

[11] *See, e.g.*, Igra Dec., Ex. 25 at 53-55; Ex. 29 at 13.

2020) ("*ILRC*"); *Casa de Md., Inc., v. Wolf*, Civil Action No. 8:20-cv-02118-PX, — F. Supp. 3d ——, 2020 WL 5500165, at *20–*23 (D. Md. Sept. 11, 2020); *Batalla Vidal v. Wolf*, 16-CV-4756 (NGG) (VMS), 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020).

DHS maintains "in the alternative" that Peter Gaynor would be the Acting Secretary if McAleenan's accession was unlawful.[12] 85 Fed. Reg. 80382; Igra Dec., Ex. 15. On September 10, 2020—519 days after Secretary Nielsen resigned—the President nominated Wolf to be Secretary of DHS. In DHS's view, this nomination restarted the 210-day clock under the FVRA and made it possible for Gaynor to accede to the position of Acting DHS Secretary. Igra Dec., Ex. 14 ("Gaynor Order"). That same day, Gaynor purported to simultaneously exercise authority as DHS Secretary to revise the order of succession *and* also terminate his own authority so that Wolf was again in line to assume the Acting Secretary role. *Id.* On September 17, 2020, Wolf purported to ratify his prior actions as Acting Secretary. Igra Dec., Ex. 15.

DHS later disclosed that the Gaynor Order may have been executed before the President nominated Wolf. *See* Igra Dec., Ex. 16. Although DHS maintains that Gaynor's delegation was valid, *id.*, on November 14, 2020, Gaynor repeated the exercise of terminating his authority and designating a new order of succession, with Wolf first in line. *See* 85 Fed. Reg. 75223, at 75225 (Nov. 25, 2020); Igra Dec., Ex. 17. Wolf issued a re-ratification which DHS published November 16, 2020. *Id.* Ex. 18.

III. LEGAL STANDARD

A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1271 (9th Cir. 2020) ("*EBSC II*"). These factors operate on sliding scale so an injunction may issue if "the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [the requesting party's] favor.'" *All. for the Wild Rockies v. Cottrell*, 623 F.3d 1127, 1132 (9th Cir. 2011).

[12] DHS argues this even though Gaynor was not the Federal Emergency Management Agency Administrator at the time of Secretary Nielsen's resignation. Chris Krebs, who recently resigned as Director of Cybersecurity and Infrastructure, would have been next in the line of succession at that time. Igra Dec., Ex. 19 at 8 n.11.

IV. ARGUMENT

A. Plaintiffs are likely to succeed on the merits.

The APA requires a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious," "not in accordance with law," "contrary to constitutional right," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2). The Rule is invalid on all of these grounds.

1. The Rule should be set aside because Chad Wolf lacks valid authority.

The Rule asserts that Wolf is "validly acting as Secretary of Homeland Security" because he succeeded McAleenan. 85 Fed. Reg. 80381. This assertion flies in the face of multiple federal court decisions holding that McAleenan was never validly designated as Acting Secretary, and so could not have validly designated Wolf as his successor.[13]

The Gaynor Order is ineffective for several reasons. DHS has not pointed to any authority that would allow it "to take administrative action in the alternative" or "allow[] two different people—Mr. Wolf and Administrator Gaynor—to simultaneously exercise the Secretary's power." *Batalla Vidal*, 2020 WL 6695076, at *9. Also, DHS still has not noticed a vacancy as required under the FVRA. *Id*.; Igra Dec. Ex. 22. If DHS had noticed the vacancy when Secretary Nielsen resigned, Chris Krebs would have acceded to the position of DHS Secretary. Igra Dec., Ex. 19 at 8 n.11. And "[e]ven if Administrator Gaynor should be Acting Secretary, DHS cannot recognize his authority only for the sham purpose of abdicating his authority to DHS's preferred choice, and only in the alternative." *Batalla Vidal*, 2020 WL 6695076, at *9. Moreover, Gaynor had no authority to designate Wolf his successor because 6 U.S.C. § 113(g) only authorizes a Secretary of DHS to change the order of succession.[14] *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs.*, No. CV 19-

[13] *See, e.g. ILRC*, 2020 WL 5798269, at *8; *Casa de Md.*, 2020 WL 5500165, at *23; *Batalla Vidal*, 2020 WL 6695076, at *9; *see also La Clinica de la Raza v. Trump*, Case No. 19-CV-04980-PJH, 2020 WL 6940934, at *14 (N.D. Cal. Nov. 25, 2020) (finding McAleenan not validly designated under Neilsen's April 10, 2019 designation); *Bullock v. U.S. Bureau of Land Mgmt.*, No. 4:20-CV-00062-BMM, 2020 WL 5746836 (D. Mont. Sept. 25, 2020) ("The President cannot shelter unconstitutional 'temporary' appointments for the duration of his presidency through a matryoshka doll of delegated authorities.").

[14] 6 U.S.C § 113(g) is simply an alternative "means" for designating someone to serve in an acting capacity; that person still "serve[s] as an acting officer," 5 U.S.C. § 3345(b), and is therefore subject

3283 (RDM), 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020) ("Because the Court holds that an Acting Secretary may not amend the Department's order of succession under § 113(g)(2), neither appointment of Wolf was effective."). Gaynor was also not eligible to act as DHS Secretary because the office had been vacant for more than 210 days, which is the limit under the FVRA. 5 U.S.C. § 3345(a)(2). The Rule asserts that "Mr. Wolf's nomination to the Senate would have restarted the FVRA's time limits," 85 Fed. Reg. 80382, but the FVRA only allows a nomination to extend service beyond 210 days for the person "serving . . . as described under section 3345" of the FVRA. 5 U.S.C. §3346. Mr. Gaynor was not actually serving in that role at the time of Wolf's nomination.[15]

In all events, Mr. Wolf cannot serve as an acting official while his nomination is pending. 5 U.S.C. § 3345(b)(1)(B). Defendants have argued in other cases that 5 U.S.C. § 3345 does not apply because Mr. Wolf assumed his position under 6 U.S.C. § 113(g). *See, e.g. Nw. Immigrant Rights Project*, 2020 WL 5995206, at *24. But only the Senate-confirmed Secretary can designate a successor pursuant to that provision. Because Wolf has never properly been designated under 6 U.S.C. § 113(g), he is subject to the FVRA's nomination bar. *Id.*

Defendants' promulgation of the Rule absent lawful authority was "in excess of . . . authority" and "not in accordance with law" under the APA. 5 U.S.C. § 706(2).[16] As the Rule explains, "the DHS and DOJ regulations are inextricably intertwined," 85 Fed. Reg. 80286; the entire Rule must therefore be set aside.

2. The Rule's evisceration of the asylum system is unlawful.

No provision of the INA gives the executive branch the authority to "rewrite the immigration

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to the nomination bar. *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017) ("Subsection (b)(1) addresses nominations *generally*, prohibiting any person who has been nominated to fill any vacant office from performing that office's duties in an acting capacity.") (emphasis in original). Moreover, 5 U.S.C. § 3345(b)(2) specifically identifies exceptions to the nomination bar; none apply here.

[15] The clock is "toll[ed]" for a person already serving during a nomination but only "reject[ion], withdraw[al], or return[]" "starts a new . . . clock." *NLRB*, 137 S. Ct. at 936.

[16] Moreover, "action[s] taken by a person who [was] not acting under section 3345, 3346 or 3347," of the FVRA have "no force or effect" and "may not be ratified." 5 U.S.C. §§ 3348(d)(1), (2). An "action" includes an "agency action." 5 U.S.C. § 3348(a)(1). And even if ratification were permitted, Mr. Wolf cannot ratify his own actions because he is not a Senate-confirmed officer. *Cf. Guedes v. ATF*, 920 F.3d 1, 16 (D.C. Cir. 2019), *judgment entered*, 762 F. App'x 7 (D.C. Cir. 2019), *and cert. denied*, 140 S. Ct. 789 (2020) (permitting ratification "only because it was undertaken" by a Senate-confirmed officer whose "authority to act" the plaintiff did not challenge).

laws." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018) ("*EBSC I*"). Fundamentally, the Rule cannot stand because it is "contrary to the asylum statute and contravene[s] clear congressional intent to give effect to our international treaty obligations." *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 855 (9th Cir. 2020) ("*EBSC III*"). "[I]f one thing is clear from the . . . entire 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nation Protocol Relating to the Status of Refugees, to which the United States acceded in 1968." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citations omitted). Yet the Rule improperly attempts to rewrite the asylum statute in direct contravention of the international obligations incorporated into U.S. law.[17] As just one example, the Rule changes the firm resettlement bar to asylum eligibility such that a person with no chance of obtaining permanent legal status in a third country would nonetheless be deemed "firmly resettled" in that country and therefore ineligible for asylum. 85 Fed. Reg. 80364. The Agencies recognize that this interpretation cannot be reconciled with the Refugee Convention or 1967 Protocol, 85 Fed. Reg. 80364, which bind the United States, yet chose to adopt the change anyway. Because Congress enacted the Refugee Act to align the United States with international standards, Defendants' unreasoned decision to reject those standards usurps legislative power and exceeds the permissible scope of delegated authority.[18]

The sheer breadth of the Rule exposes it as an unlawful attempt at wholesale revision of the asylum laws. Notably, the Ninth Circuit considered the effect of the Administration's last transit ban[19] "staggering" for its impact on more than 70,000 people a year. *EBSC II*, 950 F.3d at 1260. For most applicants, the Rule effectively reinstitutes the transit ban, 85 Fed. Reg. 80387; Igra Dec., Ex.

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[17] *See, e.g.* Comp. ¶¶81–82, 124, 183, 208; *see also* Igra Dec., Ex. 4 at 67–68; Ex. 5 at 16–17; Ex. 7 at 5–7; Ex. 23 at 6-9, 17–19.

[18] *See Arizona v. United States*, 567 U.S. 387, 409 (2012) ("Policies pertaining to the entry of [noncitizens] . . . [is left] exclusively to Congress.") (citation omitted). *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (courts "read significant limitations into . . . immigration statutes in order to avoid their constitutional invalidation.").

[19] "Transit ban" refers to the rules at issue in *EBSC, III*, which barred asylum applicants based on "countries through which the noncitizen transited en route to the United States." 964 F.3d at 847.

24 at 14, and it also effects dozens of other fundamental changes to asylum law, including the re-definition of nearly every term that establishes who is a "refugee." 85 Fed. Reg. 80394-95; Igra Dec., Exs. 4-11, 20-21, 23-27, 29. Defendants are not free to force such tectonic shifts in asylum law without clear direction from Congress.[20]

The Rule as a whole is also arbitrary and capricious. Reasonable agency action "ordinarily requires paying attention to the advantages and disadvantages of agency decisions." *Michigan v. E.P.A*, 576 U.S. 743, 753 (2015). The Rule does not meet this standard. Defendants contend that the Rule will help "maintain a streamlined and efficient adjudication process," 85 Fed. Reg. 80371, yet they made no attempt to show how this "efficient" process will still protect asylum seekers consistent with the Refugee Act. *See EBSC III*, 964 F.3d at 850 (finding agency regulations must be "consistent with the core regulatory purpose" of asylum, to "protect refugees with nowhere to turn"). It clearly will not. Nor did they quantify the harm that would result from the cumulative effect of all the Rule's restrictions on the availability of asylum.[21] Instead, Defendants waved off commenters who emphasized the risks to *refoulement*[22] by suggesting that the United States satisfies its international obligations with "withholding of removal and CAT protection." 85 Fed. Reg. 80287. But these are not adequate alternatives to asylum. The burden of proof for withholding of removal or CAT protection is higher than for asylum, *EBSC II*, 950 F.3d at 1277, and asylum affords greater benefits, including a pathway to citizenship and family reunification. *Id.*

Finally, when a rule departs from the agency's previous position, the agency must offer "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); *see also*

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[20] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000) ("[T]he court must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."); *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (Congress speaks clearly when it intends to delegate power to make "decisions of vast economic and political significance") (citation and internal quotation marks omitted).

[21] *Pub. Citizen v. Fed. Motor Carrier Safety Admin*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("[T]he mere fact that the magnitude of [an effect] is *uncertain* is no justification for *disregarding* the effect entirely.").

[22] *Refoulement* "occurs when a government returns [noncitizens] to a country where their lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion." *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1087–88 (9th Cir. 2020).

California by & through Becerra v. U.S. Dep't of the Interior, 381 F. Supp. 3d 1153, 1166-68 (N.D. Cal. 2019) (agency must "explain the inconsistencies between its prior findings . . . and its decision"). The agency must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken in to account." *DHS v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1913 (2020) (citations omitted). The Rule utterly fails this test. Before overhauling the asylum system, overruling precedential decisions, and rescinding regulations, Defendants were required to give a reasoned explanation, and consider reliance interests and the detrimental impact on small entities like Plaintiffs. They did not. 85 Fed. Reg. 80377-78, 80384. This too renders the Rule invalid under the APA.

3. Core components of the Rule illustrate that it is unlawful.

While Plaintiffs cannot in a single 20-page motion fully explain all of the ways in which the Rule's many changes violate the APA, a few examples demonstrate that the core provisions of the Rule are contrary to law and arbitrary and capricious. Taken together, the Rule's provisions would effectively eliminate the possibility of asylum for the vast majority of applicants.

a. Unlawful expansion of the firm resettlement bar

The Rule dramatically expands the firm resettlement bar far beyond the statutory language without a reasoned explanation. Comp. ¶¶ 130-146. Under 8 U.S.C. § 1158(b)(2)(A)(vi), an individual who was "firmly resettled" elsewhere is ineligible for asylum in this country. Permanency is key to the analysis. *Camposeco–Montejo v. Ashcroft*, 384 F.3d 814, 820–21 (9th Cir. 2004) (petitioner had not firmly resettled despite living in Mexico for sixteen years because he was never offered permanent status and his movements were restricted).[23]

Contrary to the statutory language and established precedent, the Rule redefines "firm resettlement" to include an individual who "could have applied for and obtained any *non-permanent* but indefinitely renewable legal immigration status in that county." 85 Fed. Reg. 80388. That change means the bar could apply to a person who passes through a third county even if she has no pathway

[23] *See also Mengstu v. Holder*, 560 F.3d 1055, 1059 (9th Cir. 2009) (similar, where plaintiff was never offered citizenship or permanent residence in Sudan despite residing there two years); *Sall v. Gonzales*, 437 F.3d 229, 235 (2d Cir. 2006) (question is whether person enjoyed the same legal rights "that permanently settled persons can expect to have").

to permanent status there. Applying the bar to those whose presence in another country is not permanent conflicts with the plain language of the statute, which applies only to "firm" resettlement.

The Rule justifies expansion of the firm resettlement bar by asserting that there has been an "increased availability of resettlement opportunities," but does not provide evidentiary support. 85 Fed. Reg. 80282–83. In a lengthy footnote, the Rule intimates that firm resettlement may be available in Mexico. 85 Fed. Reg. 80282–83 n.10. Yet the sources cited in the footnote document increases in the *filing of claims* for asylum in Mexico, not increases in the *rate or number of asylum grants*. *See id.* Also, numerous reports have documented the threats to the lives of asylum seekers in Mexico awaiting adjudication of their claims. Igra Dec., Ex. 4 at 55–58; Ex. 5 at 10–11; Ex. 6 at 13–14; Ex. 29 at 49–50. The Rule fails to consider these serious problems.

Finally, the Rule cites a need for clarity in the firm resettlement analysis, 85 Fed. Reg. 80363, but does not explain why the solution to that purported problem is a wholesale departure from the existing definition and exceptions. Nor do the Agencies explain how the dramatic step of eliminating the exceptions in current 8 C.F.R. § 208.15(a) and (b) and 8 C.F.R. § 1208.15(a) and (b) including where an individual is unable to live safely or freely in the third country even if they had "firm" status—is the appropriate solution for the "confusion," as opposed to a more clear explanation of what the statute actually requires.

b. Purported "discretionary factors"

The Rule establishes nine "adverse factors" whereby the Attorney General "*will not* favorably exercise discretion" to grant asylum in nine enumerated scenarios, absent "extraordinary circumstances" or in "cases in which [a noncitizen], by clear and convincing evidence, demonstrates that" denial would result in "exceptional and extremely unusual hardship" to the applicant. 85 Fed. Reg. 80387-88; Comp. ¶¶ 85-129. The Rule suggests extraordinary circumstances could be "those involving national security or foreign policy considerations." 85 Fed. Reg. 80388. By definition, the "extraordinary circumstances" requirement means that the vast majority of applicants will be barred by these so-called discretionary factors. Even a showing of extraordinary circumstances will not automatically "warrant a favorable exercise of discretion." *Id.*

This provision is a dramatic and arbitrary reversal of precedent, inconsistent with the Refugee Act, and ignores the substantial reliance interests at stake. Forty years ago, *Matter of Pula* held, consistent with the INA and international law, that a showing of past persecution or a strong likelihood of future persecution should outweigh all but the most egregious factors and lead to a discretionary grant of asylum. *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987). The Rule provides no adequate basis for upending the presumption.

Moreover, many of the "adverse discretionary factors" are inconsistent with the text of the INA. For example:

- The Rule mandates two "adverse discretionary factors" against an applicant who traveled through more than one country or spent more than 14 days in another country before arriving in the United States, unless narrow exceptions apply. 85 Fed Reg. 80387–88. This provision disregards precedent finding similar third-country transit bars unlawful and concluding that "the failure to apply for asylum in a country through which [a noncitizen] has traveled has no bearing on the validity of [a noncitizen's] claim for asylum in the United States." *EBSC III*, 964 F.3d at 852.

- The Rule mandates an "adverse discretionary factor" against an applicant who was convicted of a crime even where the criminal conviction was subsequently reversed, vacated, expunged, or modified. 85 Fed Reg 80388. That is contrary to law because the INA includes only narrow ineligibility grounds where an applicant, "having been *convicted by a final judgment* of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii) (emphasis added). There is no basis for a *de facto* bar based on a criminal conviction that has been reversed or modified. *See Pangea Legal Servs. v. U.S. Dept. of Homeland Sec.*, Case No. 20-CV-07721-SI, 2020 WL 6802474, at *14–*15 (N.D. Cal. Nov. 19, 2020) (finding similar rule provision contrary to statute and arbitrary and capricious).

- The Rule mandates an "adverse discretionary factor" based on the filing of a motion to reopen more than a year after changed country conditions occur. This provision conflicts with the INA, which provides that "there is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 208 or 241(b)(3) of this title and is based on changed country conditions . . . ." INA § 240(c)(7)(C)(ii); .8 U.S.C. § 1229a(c)(7)(C)(ii).

- The Rule mandates an "adverse discretionary factor" against an applicant who "accrued more than one year of unlawful presence" in the United States before applying for asylum. 85 Fed. Reg. 80397. This bar is not in accordance with the INA, which recognizes exceptions to the one-year statute of limitations for asylum claims. *See* 8 U.S.C. §§ 1158(a)(2)(B), (D).

The Agencies' narrow view of what constitutes "extraordinary circumstances" render these and other purported "discretionary factors" insurmountable barriers for the vast majority of asylum applicants. Pangea Dec. ¶¶ 28-31; DSCS Dec. ¶¶ 55-62; CAIR Dec. ¶¶ 30-35; CLINIC Dec. ¶ 42. The Agencies assert these changes will increase efficiency.[24] But efficiently denying asylum applications to vast swaths of people who have qualified under the statutory scheme and forcibly returning them to persecution or torture is not a valid purpose consistent with the INA. Moreover, the Agencies have not considered any alternatives or consider whether the Rule "visit[s] substantial hardship on those the agency claims to protect." *Casa de Md.*, 2020 WL 5500165, at *29. They simply assert that withholding of removal and CAT might still apply, without acknowledging the changes the Rule makes affecting eligibility for those protections. Moreover, asylum, withholding of removal, and CAT protection are not equivalent. *See supra* at 8–9. *EBSC II*, 950 F.3d at 1277. It is arbitrary and capricious to treat withholding and CAT as equivalent despite the critical differences for applicants.

c. Pretermission

The Rule's pretermission provision is also contrary to law and arbitrary and capricious. It requires immigration judges to pretermit and deny asylum, withholding of removal, and protection under CAT at any point, without a hearing, if the applicant "has not established a prima facie claim for relief." 85 Fed. Reg. 80397. Pretermission conflicts with the plain language of 8 U.S.C. § 1229a(b)(1), which provides that "[a]n immigration judge *shall conduct proceedings* for deciding the admissibility or deportability" of a non-citizen. § 1229a(a)(1) (emphasis added). The statute provides that proceedings may take place in person, through video conference, or through telephone conference by consent. *Id.* §§ 1229a(b)(2)(A)(i)–(iv). Immigration judges "shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the [applicant] and any witnesses." *Id.* § 1229a(b)(1). At the proceeding, the non-citizen, among other rights, "shall have a reasonable opportunity to examine the evidence against [her], to present evidence on [her] own behalf, and to cross-examine witnesses . . . ." *Id.* § 1229a(c)(4).[25]

[24] *See, e.g.*, 85 Fed. Reg. 80342, 80351.

[25] Current regulations and BIA precedent also require an evidentiary hearing before adjudication of applications for protection. *See* 8 C.F.R. § 1240.1(c), 1240.11(c)(3)(iii); *Matter of Fefe*, 20 I. & N. Dec. 116 (BIA 1989).

This unambiguous statutory language requiring a hearing during which an applicant is entitled to testify, present evidence, and conduct cross-examination would be rendered a nullity if an immigration judge could declare an application meritless before conducting the type of proceeding required by 8 U.S.C. § 1229a. The Agencies cannot introduce procedures that override clear statutory language setting forth the minimum process required before an immigration judge can deny a claim.

The Rule also fails to address an important aspect of the problem—the harm to *pro se* applicants with limited resources or limited English proficiency. *Cf. EBSC III*, 964 F.3d at 849 (finding agencies acted arbitrarily and capriciously in failing to consider effect of rule on minors); *State Farm*, 463 U.S. at 43.[26] These applicants will face significant challenges if they are forced to defend their prima facie eligibility in written English, with no description of the deficiencies in their applications and with no opportunity to testify and respond to the immigration judge's questioning.[27] And a ten-day response period is inadequate for an applicant, especially a detained applicant, to gather any necessary evidence and prepare a written brief that may also need to be translated.

The Rule's purported justifications for the pretermission provision only expose the serious problems that the Agencies failed to consider. For example, the Agencies liken the pretermission provision to summary judgment in civil litigation. 85 Fed. Reg. 80307. But civil litigants are entitled to conduct discovery before a court may enter summary judgment, and Fed. R. Civ. P. 56(d) enables a litigant to obtain additional time to gather evidence before being required to defend against summary judgment.[28] In contrast, there are no provisions in the Rule that ensure applicants receive a full and fair opportunity to present their case before an immigration judge orders pretermission, only the patently inadequate ten-day notice requirement.

[26] *See e.g.*, Igra Dec., Ex. 4 at 15-18; Ex. 5 at 4-6; Ex. 6 at 4-7; Ex. 7 at 37.

[27] *Jacinto v. INS*, 208 F.3d 725, 732–33 (9th Cir. 2000) ("immigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel"). The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979, Rev'd 1992) similarly places a burden to ascertain and evaluate relevant facts in part on the examiner: "[I]n some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application." *Id.* ¶ 196, https://tinyurl.com/yazjzmdk (as accessed Dec. 23, 2020).

[28] Similar procedural protections exist for a summary judgment proceeding before an administrative law judge, including a requirement of a hearing if there is a material issue of fact. 28 C.F.R. § 68.38(e).

The pretermission provision is another dramatic change in agency policy without an adequate explanation. At best, Defendants rely on cases that do not support their rulemaking.[29] Moreover, the Agencies made no attempt to quantify how pretermission would impact asylum seekers, or address how pretermission intersects with other rules to cut off relief before applicants have an opportunity to be heard. Igra Dec., Ex. 4 at 7; *Casa de Md.*, 2020 WL 5500165, at *26 (finding agency action arbitrary and capricious where agency failed to address interaction of separately proposed rules).[30] Each of these defects violations the APA.

d. Redefinition of "Frivolousness"

The Rule arbitrarily expands the grounds on which an asylum application can be deemed frivolous despite the grave consequences for asylum seekers. Comp. ¶¶ 165-185. An applicant who "knowingly" makes a frivolous application for asylum is forever barred from receiving any immigration benefit under the INA, provided the applicant has received notice of the consequences of filing a frivolous application. 8 U.S.C. § 1158(d)(6). While the INA does not define the terms "knowingly" or "frivolous," the Agencies previously gave a narrow construction to § 208(d)(6), requiring deliberate fabrication of material elements. 8 C.F.R. §§ 208.20, 1208.20. That narrow construction recognized the severe consequences of a frivolousness finding. Likewise, existing law requires that an applicant receive notice and an opportunity to address discrepancies or implausible aspects of her claim before an immigration judge can make a frivolousness determination and deny asylum. *See, e.g.*, *Matter of Y-L-*, 24 I. & N. Dec. 151, 158 (BIA 2007); 8 C.F.R. § 1208.20 (current).

The Rule expands the grounds on which an asylum application can be deemed frivolous[31] and provides that the notice requirement is satisfied by the English written warning on Form I-589.

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[29] The Rule cites an unpublished decision, *Zhu v. Gonzalez*, 218 F. App'x 21 (2d Cir. 2007), but there the immigration judge pretermitted the case after giving the applicant 30 days to submit a brief addressing specifically identified deficiencies in his case, which the applicant failed to do. *Id.* at 23. *INS v. Abudu*, 485 U.S. 94 (1988), explicitly *declined* to address "what constitutes a prima facie case for establishing eligibility for asylum" and discussed only the proper standards of review for circuit courts addressing a BIA denial of a motion to reopen. 485 U.S. at 104. Several commenters objected that the NPRM relied selectively and misleadingly on these authorities, Igra Dec., Ex. 25 at 19, 22–23; Ex. 26 at 8–9; Ex. 27 at 17, but Defendants continued to rely on them.

[30] *See also* fn. 35, *infra*.

[31] For applications filed on or after January 11, 2021, an immigration judge may deem an application frivolous without additional notice if she finds that the application (1) contains a fabricated material element, (2) is premised upon false or fabricated evidence unless the application would have been

85 Fed. Reg. 80300. The Rule would allow an immigration judge to make a frivolousness determination and deny asylum without notice or an evidentiary proceeding. For these reasons, it exceeds statutory authority and is contrary to law under the same provisions of the INA that make pretermission unlawful.

Defendants attempt to justify the change on the ground that the current framework has not "been successful in preventing the filing of frivolous applications." 85 Fed. Reg. 80301. But they provide no reasoned basis for that assertion. They also failed to adequately weigh the harmful impact of including applications that are "foreclosed by applicable law" within the definition of "frivolous" applications. As commenters observed, the chilling effect of these provisions will deter applicants from bringing meritorious claims, including those based on good-faith arguments that may seek to clarify, overturn, or limit an unfavorable precedent.[32] It will also be particularly harsh for *pro se* applicants who are poorly positioned to evaluate whether their claim is foreclosed by precedent.[33] Defendants suggest that this is not a serious problem because an overwhelming majority of applicants are represented. 85 Fed. Reg. 80299. But their calculation is wrong.[34] And even if a majority of applicants are represented, the Agencies must still weigh the risk that *pro se* applicants will be returned to persecution under the new definition. *See Michigan v. E.P.A*, 576 U.S. at 753 (agencies must "pay[] attention to the advantages and disadvantages" of their decisions).

The Agencies assert that because the overall number of asylum applications has increased, there has "almost certainly" been an increase in frivolous applications. 85 Fed. Reg. 80301. This is pure speculation. *See ILRC*, 2020 WL 5798269, at *13 (finding rule arbitrary and capricious where agency speculated based on minimal data and failed to consider important aspects of the problem). Defendants have failed to balance this speculative harm against the grave consequence of a frivolousness finding, which results in permanent ineligibility and risks *refoulement*.

4. Defendants did not satisfy basic procedural requirements of the APA.

granted without that evidence, (3) was filed without regard to the merits of the claim, or (4) is clearly foreclosed by applicable law. 8 C.F.R. §§ 208.20(c)(1)–(4) (proposed), 1208.20(c)(1)–(4) (proposed).

[32] *See, e.g.*, Igra Dec., Ex. 4 at 87–88; Ex. 11 at 4; Ex. 23 at 17.

[33] *See, e.g.*, Igra Dec., Ex. 4 at 86–88; Ex. 6 at 3; Ex. 11 at 4; Ex. 13 at 32–33; Ex. 23 at 16.

[34] *See, e.g.*, Igra Dec., Ex. 4 at 16.

The Rule was also issued "without observance of procedure required by law" in violation of the APA. 5 U.S.C. § 706(2). Defendants rushed through the rulemaking process without regard for the basic principles of administrative procedure. In light of the number of "serious violations" of the APA, vacatur of the Rule is warranted. *Becerra*, 381 F. Supp. 3d at 1178–79.

As an initial matter, the Agencies pushed through the NPRM and the Rule under Defendant Wolf even though courts have concluded that he lacks authority to promulgate regulations. Defendants stated that they "disagree" with that conclusion, *id*. at 80382, n.90, but that disagreement does not justify promulgating the Rule without lawful authority. And Defendants apparently failed to consider a reasonable alternative: that they wait until the Senate acts upon Wolf's nomination.

The notice period was also deficient. "The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process." *Idaho Farm Bureau Federal v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). To that end, most rules "should include a comment period of not less than 60 days." Exec. Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993). *See also* Exec. Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (same). The NPRM made sweeping changes to well-established asylum law, and was over 160 pages long with more than 60 pages of proposed regulations with dense, technical language. The Agencies offered no explanation for why they only allowed 30 days for comment. 85 Fed. Reg.at 80373. Nor did they acknowledge the problems they created for commenters by engaging in staggered rulemaking.[35] A 30-day comment period would have been insufficient in any case, but it was wholly insufficient for a comment period conducted over a federal holiday and during a pandemic.[36] *See Becerra*, 381 F. Supp. 3d at 1176–77 (observing that at least one

[35] CLINIC Dec. ¶ 22; Igra Dec., Ex. 4 at 7; *Casa de Md.*, 2020 WL 5500165, at *26 (agency failed to address interplay of rules and adverse impact of rules in combination). Another rule proposed after the comment period for the Rule closed and published as a final rule on December 16, 2020, establishes a 15-day filing deadline for asylum applicant in asylum-and-withholding only-proceedings (a new procedure set up by the Rule in this case). Comp. ¶ 78. Staggered rulemaking prevented a consideration of the combined effect of these rules. *Id.* ¶¶ 153, 161.

[36] Many commenters noted the challenges posed by the ongoing COVID-19 pandemic in timely submitting comments. Igra Dec., Ex. 4 at 8-9; Ex. 5 at 2. The Agencies refusal to extend the comment period in light of these extraordinary circumstances was contrary to the prevailing approach. Even the U.S. Supreme Court extended filing deadlines in light of COVID. https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf (extending the deadline to file any petition for writ of certiorari to 150 days in light of COVID).

circuit has recognized that 90 days is "usual" time allotted for comment period and that 30-day comment period at issue failed to provide meaningful opportunity to comment).

The Agencies took just three months to consider over 88,000 comments before forwarding the Rule to the Office of Information and Regulatory Affairs for review. Such a speedy process could not have allowed time for serious consideration of commenters' concerns. As one indication of the hasty process, the Rule does not mention the letter submitted by the Attorneys General of 22 States, nor does it address the economic impact of the Rule that the letter describes. Igra Dec., Ex. 9. Specifically, the State Attorneys General identified harm to state economies and referenced a draft 2017 report by the U.S. Department of Health and Human Services that concluded that refugees, including asylees, contributed $63 billion more in tax revenues than they cost in public benefits over the past decade. *Id.*

Defendants' failure to consider this "important aspect of the problem." *State Farm,* 463 U.S. at 43, resulted in the Agencies failing to meet other procedural requirements too. "Major rules" must be published at least 60 days before their effective date. 5 U.S.C. § 801(a)(3). Defendants claimed this was not a "major rule," because they did not think it had an annual effect on the economy of $100 million or more. 85 Fed. Reg. 80383. But the Agencies estimated an annual economic impact of more than $70 million just for the time and cost of completing the expanded I-589 Form. Igra Dec., Ex. 28 at 1-2. If the changes to the form result in an annual cost of more than $70 million, the additional impact commenters identified surely should have resulted in a finding that this was as "major rule," requiring at least a 60-day effective date.

The Agencies likewise failed to analyze the effect of the Rule on "small entities," as required by the RFA. 5 U.S.C. §§ 603-604. The Agencies asserted that the Rule would not have a significant impact on small entities because the Rule applies to individual asylum applicants. 85 Fed. Reg. 80378. But courts have held that rules such as this one irreparably harm legal service providers.[37] Moreover, 8 C.F.R. § 1003.61 requires EOIR to maintain a list of Pro Bono Legal Service Providers that is provided to asylum applicants.[38] And the Agencies acknowledge that the new form "increases the time

[37] *EBSC III*, 964 F.3d at 854; *EBSC II*, 950 F.3d at 1280.

[38] The EOIR List of Pro Bono Legal Service Providers includes CAIR Coalition and CLINIC affiliate Catholic Charities of the East Bay in Oakland, California. CAIR Dec.¶ 3; CLINIC Dec. ¶ 6.

and cost burdens for . . . legal services providers." Igra Dec., Ex. 28 at 6-8. By taking an unreasonably narrow view of who is affected by the Rule, the Agencies failed to undertake the required regulatory flexibility analysis. For this reason too, the Rule should be set aside. 5 U.S.C. § 706(2)(D).

B. The Rule will irreparably harm Plaintiffs and the people they serve.

The Rule is scheduled to take effect on January 11, 2021. Plaintiffs are already suffering irreparable harm because they have been forced to "divert resources away from [their] core programs to address the new policy." *EBSC II*, 950 F.3d at 1280. Unless the Rule is enjoined, Plaintiffs will be compelled to devote even greater resources to analyzing and interpreting the Rule,[39] completely rewriting existing trainings materials and forms,[40] creating new materials and resources,[41] and retraining thousands of practitioners, who not only represent clients but also advise other attorneys in affiliate groups.[42] The Rule will also require Plaintiffs to expend significantly more resources on each individual case[43] and force Plaintiffs to move each case far more rapidly in order to avoid pretermission, at great expense to both staff and clients many of whom are traumatized and unable to recount all of the details of their harm so quickly.[44] The Rule will compel Plaintiffs to completely change their intake procedures and spend significant time and resources updating intake forms and databases.[45] The Rule will also require Plaintiffs to submit multiple applications for families rather than one application with children and family members receiving asylum protection derivatively[46] and will force Plaintiffs to hire staff or retain experts in almost every case in areas of law, like tax laws implicated by the Rule, unfamiliar to Plaintiffs.[47]

[39] Pangea Dec. ¶ 53; DSCS Dec. ¶ 84; CAIR Dec. ¶ 12; CLINIC Dec. ¶¶ 22, 23, 73.
[40] Pangea Dec. ¶¶ 11, 52; DSCS Dec. ¶ 84; CAIR Dec. ¶ 51; CLINIC Dec. ¶¶ 12, 24, 28, 30, 31, 73.
[41] CLINIC Dec. at ¶¶ 23, 27, 31; Pangea Dec. ¶ 54.
[42] Pangea Dec. ¶ 53; DSCS Dec. ¶ 84; CAIR Dec. at ¶¶ 45, 48; CLINIC Dec. ¶ 27, 67.
[43] Pangea Dec. ¶¶ 47, 49-50; DSCS Dec. ¶¶ 17, 77-78; CAIR Dec. ¶¶ 37-44; CLINIC Dec. ¶¶ 67-68.
[44] CAIR Dec. ¶ 15; Pangea Dec. ¶ 47; DSCS Dec. ¶ 78.
[45] Pangea Dec. ¶¶ 46-47; DSCS Dec. at ¶¶ 17, 83; CAIR Dec. at ¶¶ 46-49;
[46] Pangea Dec. ¶ 51; DSCS Dec ¶ 82; CLINIC Dec. ¶ 71.
[47] Pangea Dec. ¶50; DSCS Dec. ¶ 61; CAIR Dec. ¶ 35; CLINIC Dec. ¶ 62.

All Plaintiffs expended significant time to comment on the rule in the incredibly short 30-day window.[48] Some are redirecting their resources and rushing to get asylum applications submitted in advance of the Rule's effective date.[49] And given the complete sea-change in the law, Plaintiffs are already having to alter their processes and expend resources in advance of the deadline.[50] Some of Plaintiff CLINIC's affiliates will no longer be able to take asylum cases due to the increased costs imposed by the Rule.[51]

The Rule will also cause "ongoing harms to [Plaintiffs'] organizational missions," *EBSC III*, 964 F.3d at 854, to support and provide legal services to as many low income and vulnerable noncitizens as possible. By requiring significantly more resources per case and completely altering the timelines of asylum cases, requiring Plaintiffs to gather significantly more information from their clients earlier, the cumulative effect is that Plaintiffs would "provid[e] fewer services to fewer individuals," frustrating their missions. *EBSC III*, 964 F.3d at 854.[52] And the Rule will force advocates to pit their ethical obligation of zealous representation of their clients, including obligations to make creative arguments to expand the law, against the client's interest in avoiding the radically expanded frivolousness bar, which can permanently bar a client from any immigration benefit, if an immigration judge decides that an argument is foreclosed by law.[53]

The Rule will also harm Plaintiffs' funding. Plaintiffs rely in part on grants and donations related to their ability to achieve certain numerical targets, such as total clients served or applications filed.[54] By shrinking the pool of eligible applicants, requiring significantly more work per case, and reducing Plaintiffs' capacity, the Rule "directly threatens their standard caseload, and consequently, their caseload[] dependent funding." *EBSC III*, 964 F.3d at 854. Worsening this budget impact, by

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[48] CLINIC Dec. ¶ 22; CAIR Dec. ¶ 12; DSCS Dec. ¶ 83; Pangea Dec. ¶ 10. CLINIC submitted over 20 comments in a 16 month period. The number and timing of the rules prevented CLINIC from fully analyzing the interactions of the rules and their combined effects. CLINIC Dec. ¶22.

[49] CLINIC Dec. ¶ 72; CAIR Dec. ¶ 12. To the extent the Rule may be retroactively applied, this will impose additional costs on Plaintiffs. CLINIC Dec. ¶ 26; Pangea Dec. ¶ 44; DSCS Dec. ¶ 83.

[50] CAIR Dec. ¶ 51; DSCS Dec. ¶ 84; Pangea Dec. ¶¶ 45, 53.

[51] CLINIC Dec. ¶ 70.

[52] Pangea Dec. ¶¶ 49, 51, 54, 56; DSCS Dec. ¶¶ 10, 86; CAIR Dec. ¶¶ 37-42, 56; CLINIC Dec. ¶¶ 71, 75, 77.

[53] CLINIC Dec. ¶ 66; CAIR Dec. ¶ 29; DSCS Dec. ¶ 13; Pangea Dec. ¶ 42.

[54] Pangea Dec. ¶¶ 56-58; DSCS Dec. ¶¶ 10, 86; CAIR Dec. ¶¶ 53-54; CLINIC Dec. ¶¶ 73-75, 77;

making everything more complex and increasing the downside for errors made due to inexperience, Plaintiffs will be able to refer far fewer cases to volunteers and pro bono counsel, forcing them to either decline the client or take them on themselves.[55]

C. The equities and the public interest favor injunctive relief.

Finally, the equities and the public interest favor universal injunctive relief.[56] *See EBSC I*, 932 F.3d at 779 ("In immigration matters," the Ninth Circuit has "consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis."). "Relevant equitable factors include the value of complying with the APA, the public interest in preventing the deaths and wrongful removal of asylum-seekers, preserving congressional intent, and promoting the efficient administration of our immigration laws . . . ." *EBSC II*, 950 F.3d at 1280. These interests all weigh in Plaintiffs' favor. Most obviously, "the public has an interest in 'ensuring that we do not deliver [refugees] into the hands of their persecutors,' and 'preventing [refugees] from being wrongfully removed, particularly to countries where they are likely to face substantial harm.'" *Id*. at 1281 (citation omitted); *see EBSC III*, 964 F.3d at 854 (district court properly "found that there was a public interest in not returning refugees to their persecutors or to a country where they would be endangered"). Further, "maintaining the *status quo*" serves the important interest in "a stable immigration system." *Doe #1 v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020). Allowing the Rule to take effect will also harm immigrant communities, cities,[57] and states.[58] And "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

V. CONCLUSION

The Court should enjoin or stay the Rule's national implementation before January 11, 2021.

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[55] DSCS Dec. ¶ 79; CAIR Dec. ¶¶ 43-44, 52; CLINIC Dec. ¶¶ 19, 70, 73; Igra Dec., Ex. 8 at 2–4 (describing that Rule "would have serious, adverse effects" on ability of pro bono counsel from private sector to assist asylum seekers).

[56] Here, Plaintiffs work with asylum applicants across the country. CLINIC Dec. ¶ 6; CAIR Dec. ¶ 3.

[57] Igra Dec., Ex. 11 at 3, 6, 15; Ex. 20 at 1, 2.

[58] Igra Dec., Ex. 9 at 2, 18-26, 28-29; Ex. 10 at 2.

Respectfully submitted,

DATE: December 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of for the Northern District of California by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES; DOLORES STREET COMMUNITY SERVICES, INC.; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; and CAPITAL AREA IMMIGRANTS' RIGHTS COALITION,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY;
CHAD F. WOLF, *under the title of Acting Secretary of Homeland Security*;
KENNETH T. CUCCINELLI, *under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security;*
U.S. CITIZENSHIP AND IMMIGRATION SERVICES;
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;

Case No. _____

Hon. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND ADMINISTRATIVE PROCEDURE ACT CASE

DEMAND FOR JURY TRIAL

TONY H. PHAM, *under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement*;
U.S. CUSTOMS AND BORDER PROTECTION;
MARK A. MORGAN, *under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection*;
U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, *under the title of U.S. Attorney General*;
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and
JAMES MCHENRY, *under the title of Director of the Executive Office for Immigration Review*,

Defendants.

INTRODUCTION

1. This action challenges a final rule issued by the Departments of Justice and Homeland Security (the "Rule"). *See* Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020). The Rule imposes several vague and sweeping new bars to asylum eligibility, frustrates the purpose of state criminal dispositions, and strips asylum-seekers of protections set forth in the Immigration and Nationality Act ("INA"). These changes will dramatically curtail the availability of asylum to people fleeing persecution, in contravention of the INA's plain language and the United States' international commitments. The Rule will thus have a devastating impact on asylum-seekers and immigration legal services providers—including Plaintiffs and the communities they serve.

2. The toll the Rule will take is best illustrated by the stories of real clients represented by Plaintiffs. For example, Dolores Street Community Services, Inc.'s ("DSCS") client, Bryan*, has been a lawful permanent resident for many years.[1] Bryan suffers from psychotic disorder and related substance abuse issues; as a result of these mental health challenges, he was arrested multiple times and sustained several convictions that threatened his lawful permanent resident status. Bryan was placed in removal proceedings, where he sought asylum, among other forms of relief. With DSCS's help, Bryan has been able to access—for the first time—substance abuse and mental health treatment. DSCS has also helped Bryan vacate some of his prior convictions, because he did not understand the nature or immigration consequences of the proceedings at the time. Under current law, these vacaturs carry legal weight even though they were obtained after Bryan was placed in removal proceedings, as they should: Bryan's constitutional rights were violated at the time of his criminal cases, and he should not now suffer immigration consequences as a result of those unlawful convictions. The Rule, however, would severely prejudice respondents like Bryan by requiring him to demonstrate these illegalities yet again in immigration court.

3. At least six aspects of the Rule are unlawful. *First*, the Rule would create several new categorical bars to asylum eligibility that conflict with the INA's text and structure and the United

[1] This name has been changed to protect the client's safety and preserve confidentiality.

States' international treaty obligations, which Congress has directly incorporated into U.S. law. These bars would categorically exclude from asylum eligibility any person with:

- any conviction for bringing in or harboring certain aliens under 8 U.S.C. § 1324(a)—even if the asylum-seeker was just bringing their own spouse, child, or parent to safety;
- any conviction for illegal reentry under 8 U.S.C. § 1326;
- any conviction for an offense the adjudicator knows or has some unspecified "*reason to believe* was committed in support, promotion, or furtherance of the activity of a criminal street gang";
- any conviction for an offense involving driving while intoxicated or impaired that results in serious bodily injury or death, or any second offense for driving while impaired, even if there is no injury to any person or property;
- any felony conviction under federal, state, or local law;
- any conviction under several newly defined categories of misdemeanor offenses, including any controlled substance-related offense except for a first-time marijuana simple possession offense, any offense involving possession or use of a false identification document, and any offense involving the receipt of public benefits without lawful authority;
- any conviction for an offense involving domestic violence; and
- any *accusation* of battery or extreme cruelty involving a domestic relationship, even if it does not result in a conviction.

4. The Rule asserts that these new categorical bars are proper exercises of the Attorney General's power to "establish additional limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). But the Rule's new bars are *not* "consistent with" the statutory eligibility scheme, which is narrowly drawn to exclude people "who pose a threat to society." *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 846 (9th Cir. 2020). The Rule sweeps in everything from a second misdemeanor conviction for marijuana possession, to a misdemeanor conviction for using a fake ID to enter a bar, to unlawfully exporting fish—a federal felony. The Rule's bars thus bear no resemblance to those Congress wrote into the statute, which in turn reflect our international treaty obligations. The Rule also ignores Congress's

careful drafting, for example by treating *every* illegal reentry conviction under § 1326 as a categorical bar, even though Congress specified that such a conviction bars asylum eligibility *only* when "committed by an alien who was previously deported" based on an aggravated-felony conviction. 8 U.S.C. § 1101(a)(43)(O). The Rule's categorical bars thus exceed Defendants' authority and conflict with the governing statute.

5. *Second*, the Rule adopts a novel presumption: a criminal conviction still triggers asylum ineligibility even if vacated, expunged, or modified—and even if the vacatur or modification was *to correct constitutional or substantive defects*—so long as (i) the vacatur or modification order was entered after removal proceedings began, or (ii) the applicant moved for the order more than a year after conviction or sentencing. 85 Fed. Reg. at 67259–60 (to be codified at 8 C.F.R. §§ 208.13(c)(7)–(8), 1208.13(c)(7)–(8)). The asylum-seeker must try to rebut this presumption by showing that any modification was not made (i) for rehabilitative reasons or (ii) "for purposes of ameliorating the immigration consequences." *Id.* But Congress nowhere authorized Defendants to disregard state court orders curing constitutional errors based purely on their assumptions about judges' subjective reasons for ruling. This aspect of the Rule thus clashes with the text of the INA and with basic federalism principles.

6. *Third*, the Rule violates the Administrative Procedure Act ("APA") in at least three respects. First, the Rule departs dramatically from decades of consistent agency precedent without adequate explanation. For example, the Rule discards the agency's longstanding practice of treating criminal convictions (or conduct) beyond the statutory eligibility bars as merely part of "the totality of the circumstances" that "should be examined in determining whether a favorable exercise of discretion is warranted," and not a basis "to deny relief in [ ] all cases." *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987). Yet the Rule fails to explain why the agencies' good reasons for that approach no longer hold true. This unexplained departure is a textbook example of arbitrary and capricious rulemaking. Second, in issuing the Rule, Defendants entirely failed to consider important aspects of the problem, repeatedly dismissing comments and data about the Rule's harmful effects as "outside the scope of [the] rulemaking." *See, e.g.*, 85 Fed. Reg. at 67226. Third, Defendants did not provide sufficient opportunity for public comment. They provided just 30 days, spanning the 2019 end-of-

year holidays, to comment on this major overhaul of the asylum system. That is not long enough for the public to digest and comment on a sweeping proposal with such significant impacts. The Rule was also part of an improperly staggered rulemaking process, which prevented the public from seeing and commenting on the whole picture at once.

7. *Fourth*, the Rule is procedurally invalid for another three reasons. First, Defendant Chad Wolf—who purported to issue the proposed and final Rule in conjunction with Defendant William Barr—unlawfully assumed the role of Acting Secretary of Homeland Security in violation of the Appointments Clause of the U.S. Constitution, the Homeland Security Act of 2002 ("HSA"), and the Federal Vacancies Reform Act of 1998 ("FVRA"). Wolf thus lacked the authority to propose or issue the Rule. Second, the Rule violates the Regulatory Flexibility Act ("RFA"), which requires federal agencies to analyze the effects of their rules on "small entities." 5 U.S.C. §§ 603–604. Here, the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") failed to do so, stating only that the Rule "will not have a significant economic impact on a substantial number of small entities" because "[o]nly individuals, rather than entities, are eligible to apply for asylum." 85 Fed. Reg. at 67255. This conclusory statement entirely fails to acknowledge the impact the Rule will have on immigration legal services providers like Plaintiffs. Third, the Rule fails to comply with the federalism certification requirement set forth in Executive Order 13132, notwithstanding the significant federalism concerns the Rule raises. *See* 64 Fed. Reg. 43255 §1(a) (Aug. 4, 1999).

8. *Fifth*, the Rule is unconstitutionally vague, in violation of the Due Process Clause, because it fails to "give ordinary people fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). For example, the Rule bars asylum based on a conviction of *any* offense the adjudicator "has reason to believe" was committed "in support, promotion, or furtherance" of the activity of a criminal street gang. 85 Fed. Reg. at 67258–59 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii)). The Rule does not describe what behaviors, associations, or statuses might meet this standard. Nor does it provide any guidance on the types of offenses or circumstances that may trigger such an inquiry, or the sorts of evidence that might be considered. These vague standards fail to provide fair notice and invite arbitrary and discriminatory enforcement.

9. *Sixth*, the Rule violates the equal protection component of the Fifth Amendment because it was motivated by discriminatory animus toward certain racial and ethnic groups and people of certain national origins. The discriminatory intent underlying this Rule is evinced by two primary factors. First, the Rule will disproportionately harm non-white immigrants relative to their counterparts from predominantly white countries—a concern that Defendants acknowledged, but did not seek to mitigate or resolve, in issuing the Rule. Second, the Rule was promulgated in the context of years of repeated, racist statements by members of the Trump Administration casting non-white immigrants as dangerous criminals, including statements made in the days and weeks immediately surrounding the publication of the proposed Rule in December 2019 and the final Rule in October 2020.

10. In short, the Rule is inconsistent with the INA; is arbitrary, capricious, and procedurally invalid under the APA, the HSA, the FVRA, and the RFA; and violates (i) the Appointments Clause and (ii) the Fifth Amendment's Due Process Clause, including its equal protection component. It also conflicts with the international law obligations that Congress directly incorporated into U.S. law and on which our asylum system is founded. The Rule thus threatens to send bona fide asylum-seekers to countries where they will likely face violence, torture, and even death. The Court should hold the Rule unlawful, set it aside, and enjoin its enforcement.

JURISDICTION AND VENUE

11. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the Constitution and federal statutes, including the INA, 8 U.S.C. § 1101 *et seq*., and the APA, 5 U.S.C. § 551 *et seq*. This Court also has subject matter jurisdiction under 5 U.S.C. § 702. Additionally, the Court has remedial authority under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

12. Defendants' promulgation of the final Rule in the Federal Register on October 21, 2020 constitutes final agency action and is therefore subject to judicial review. 5 U.S.C. §§ 704, 706.

13. Plaintiffs have standing to challenge the Rule under 5 U.S.C. § 702 because they have been and will be injured by the Rule's operation. Plaintiffs are also within the zone of interest of the INA, which establishes asylum eligibility requirements. *See, e.g., E. Bay Sanctuary Covenant v.*

Trump, 950 F.3d 1242, 1270 (9th Cir. 2020); *La Clinica de la Raza v. Trump*, No. 19-cv-04980-PJH, 2020 WL 4569462, at *9–11 (N.D. Cal. Aug. 7, 2020).

14. Venue is proper in this District because Defendants are officers or employees of the United States or agencies thereof acting in their official capacity or under color of legal authority, or are federal agencies of the United States. 28 U.S.C. § 1391(e)(1). Venue is also proper because both Pangea Legal Services and DSCS have their principal place of business in San Francisco, California. Consequently, both reside in this judicial district under 28 U.S.C. § 1391(c)(2).

PARTIES

15. Plaintiff Pangea Legal Services ("Pangea") is a non-profit organization based in California's Bay Area with offices in San Francisco and San Jose. Pangea's mission is to stand with immigrant communities and to provide services through direct legal representation. Pangea serves the immigrant community in the Bay Area by providing direct legal services, including filing both affirmative and defensive asylum applications, engaging in policy advocacy, and providing educational programs aimed at legal empowerment. The publication and impending effective date of the Rule has required Pangea to divert resources from its core activities to address the impact of the Rule on the communities it serves.

16. Plaintiff DSCS is a non-profit organization based in San Francisco, California, that provides a variety of services to low-income and immigrant communities in San Francisco, including through its Deportation Defense & Legal Advocacy Program. DSCS's mission is to cultivate collective power among low-income and migrant communities to create a more just society. DSCS serves San Francisco's immigrant community in part by providing direct legal services—including filing both affirmative and defensive asylum applications—and by partnering with other organizations to carry out local and national advocacy. The publication and impending effective date of the Rule has required DSCS to divert resources from its core activities to address the impact of the Rule on the communities it serves.

17. Plaintiff Catholic Legal Immigration Network, Inc. ("CLINIC") promotes the dignity and protects the rights of immigrants in partnership with its network organizations. CLINIC implements its mission by providing substantive legal and program management training and support for

organizations within its network, including organizations engaged in completing affirmative and defensive applications for asylum; providing direct representation and legal orientation to asylum-seekers; and engaging in advocacy and providing advocacy support to network organizations at state, local, and national levels. CLINIC is the largest charitable legal immigration network in the United States, with almost 400 nonprofit organizations spanning 48 states, including the state of California. Many of its affiliates appear on the List of Pro Bono Legal Service Providers maintained by the Executive Office for Immigration Review ("EOIR") as required by 8 C.F.R. § 1003.61. CLINIC maintains an office with three staff members in Oakland, California, and has staff in a dozen states around the country. The publication and impending effective date of the Rule has required CLINIC to divert resources from its core activities to address the impact of the Rule on the communities it serves.

18. Plaintiff Capital Area Immigrants' Rights Coalition ("CAIR Coalition") is a non-profit organization serving the Washington, D.C. region. It appears on the List of Pro Bono Legal Service Providers maintained by the EOIR as required by 8 C.F.R. § 1003.61. CAIR Coalition's mission is to ensure equal justice for all immigrant adults and children at risk of detention and deportation in the Washington, D.C. region and beyond. CAIR Coalition implements its mission by providing direct legal representation to children and adults in immigration proceedings, including representing unaccompanied alien children ("UACs") in interviews before the Asylum Office; conducting educational programming, including know your rights presentations and training of attorneys to defend immigrants; and engaging in impact litigation and advocacy on key policy issues. The publication and impending effective date of the Rule has required CAIR Coalition to divert resources from its core activities to address the impact of the Rule on the communities it serves.

19. Defendant DHS is a cabinet-level department that enforces the immigration laws of the United States.

20. Defendant Chad F. Wolf is purportedly the Acting Secretary of DHS. He is being sued in his official capacity. In this capacity, he directs each of the component agencies within DHS, including United States Immigration and Customs Enforcement ("ICE"), United States Citizenship and Immigration Services ("USCIS"), and United States Customs and Border Protection ("CBP"). The

Secretary of DHS is responsible for the administration and enforcement of immigration laws under 8 U.S.C. § 1103(a).

21. Defendant Kenneth T. Cuccinelli is the Senior Official Performing the Duties of the Deputy Secretary for DHS. He is being sued in his official capacity.

22. Defendant USCIS is the agency within DHS responsible for adjudicating affirmatively filed asylum applications and conducting credible and reasonable fear interviews.

23. Defendant ICE is the agency within DHS responsible for carrying out removal orders and overseeing immigration enforcement and detention.

24. Defendant Tony H. Pham is the Senior Official Performing the Duties of the Director of ICE. He is being sued in his official capacity.

25. Defendant CBP is the agency within DHS responsible for the initial processing and detention of noncitizens who are apprehended at or near the border and placed in expedited removal or reinstatement of removal proceedings.

26. Defendant Mark A. Morgan is the Senior Official Performing the Duties of the Commissioner of CBP. He is being sued in his official capacity.

27. Defendant DOJ is a cabinet-level department of the federal government.

28. Defendant William P. Barr is the U.S. Attorney General. He is being sued in his official capacity. Under 8 U.S.C. § 1103(g), the Attorney General is responsible for the administration of immigration law.

29. Defendant EOIR is a sub-agency of DOJ responsible for adjudicating administrative claims concerning federal immigration laws, including asylum applications filed in immigration court.

30. Defendant James McHenry is the Director of EOIR. He is being sued in his official capacity.

GENERAL ALLEGATIONS

I. Background on the INA

31. Federal law affords several humanitarian protections for non-citizens who fear persecution and violence in their home countries. Congress incorporated international humanitarian principles into U.S. law through the INA, which ensures that asylum and related protections are accessible

to asylum-seekers who fear returning to their home country because of the persecution, torture, or other harm they would endure.

32. The U.S. asylum system was founded on its international obligations under the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") and the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"). Opened for signature in 1951, the Refugee Convention was designed to avoid the horrors experienced by refugees during World War II. The 1967 Protocol, which the United States ratified in 1968, expanded the Convention's protections, allowing them to be applied universally.

33. Congress incorporated the 1967 Protocol into U.S. law with the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The Refugee Act amended the INA to include a formal process for people fearing persecution in their home country to apply for asylum. *Id.* § 101(a) (codified at 8 U.S.C. § 1521 Note).

34. The Refugee Act thus codified the United States' longstanding tradition of "welcoming the oppressed of other nations." H.R. Rep. No. 96-781, at 17–18 (1980) (Conf. Rep.). Congress deliberately sought to bring the United States into compliance with its international obligations under the 1967 Protocol and the Refugee Convention. *See* H.R. Rep. No. 96-608, at 17 (1979) (noting that proposed asylum and withholding provisions were designed to "conform[] United States statutory law to our obligations under Article 33 [of the Refugee Convention]"); S. Rep. No. 96-256, at 4 (1979) (same). "Congress imbued these international commitments with the force of law when it enacted the Refugee Act . . ." *R-S-C- v. Sessions*, 869 F.3d 1176, 1178 (10th Cir. 2017); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (explaining that Congress enacted the Refugee Act of 1980 "to bring United States refugee law into conformance with the [1967 Protocol]").

35. Today, asylum may be granted to a person who has suffered persecution or who has a "well-founded fear of persecution" on account of one of five enumerated protected grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(1)(B); *id.* § 1101(a)(42)(A). Among other requirements, to be eligible for asylum, a person must not fall within any mandatory bars to asylum. Specifically, they must not (i) have participated in the persecution of others; (ii) have been convicted of a "particularly serious crime" that makes them

a danger to the United States; (iii) have committed a "serious nonpolitical crime outside the United States"; (iv) represent a danger to the security of the United States; (v) have engaged in "terrorist activity"; or (vi) have resettled in a third country prior to arriving in the United States. *See id.* § 1158(b)(2)(A)(i)–(vi).

II. Criminal Bars to Asylum Eligibility under the INA

36. The INA specifies two crime-related bars to asylum eligibility: (i) the particularly serious crime ("PSC") bar, and (ii) the serious nonpolitical crime bar. *See id.* § 1158(b)(2)(A)(ii) (PSC bar); *id.* § 1158(b)(2)(A)(iii) (serious nonpolitical crime bar). Both bars have specific definitions and scopes of application.

37. Like most of the asylum provisions in the INA, the PSC bar closely mirrors the language of the same bar in the Refugee Convention. The Refugee Convention's bar was designed to be narrow, so as not to preclude a bona fide refugee from protection unless they had been convicted of a very serious criminal offense and thus posed a danger to the community. The INA PSC bar thus requires a conviction for a "*particularly* serious crime" that renders the applicant "a danger to the community of the United States." *Id.* § 1158(b)(2)(A)(ii) (emphasis added).

38. The United Nations High Commissioner for Refugees (UNHCR) has noted that, to be considered a serious crime, an offense must generally be a "capital crime or a very grave punishable act," such as murder, arson, rape, or armed robbery. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/4/IP/Eng/REV. ¶¶ 154–155 (1979, reissued 2019) ("*UNHCR Handbook*"). The danger to the community must be both serious and posed by the asylum-seeker themselves. Convention Relating to the Status of Refugees art. 33(2), Apr. 22, 1954, 189 U.N.T.S. 150.

39. Under the Refugee Convention, adjudicators determining whether an offense is a PSC must conduct an individualized analysis, considering the nature of the act, the actual harm inflicted, how the offense is prosecuted, and whether most jurisdictions would consider the act a serious crime. UNHCR, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 10 (July 2007), http://www.unhcr.org/en-us/576d237f7.pdf. Adjudicators must also consider

mitigating or extenuating factors in their determinations. UNHCR, *The Nationality, Immigration and Asylum Act 2002: UNHCR Comments on the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004* 4 (2004).

40. Adjudicators in the United States similarly apply a fact-specific analysis to determine whether an offense is a PSC under the INA (except for aggravated felonies, *see* 8 U.S.C. § 1158(b)(2)(B)(i)). This analysis considers, among other things, the nature of the offense, the criminal sentence imposed, and whether the offense itself indicates that the person is likely to be a danger to the community. *See Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982), *superseded on other grounds by statute*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, *as recognized in Matter of N-A-M-*, 24 I. & N. Dec. 336, 339 (BIA 2007).

41. Moreover, the INA PSC bar requires a "convict[ion] by a final judgment" of a PSC. 8 U.S.C. § 1158(b)(2)(A)(ii). Accusations of criminal activity, or reasonable suspicion of criminal activity, do not trigger the PSC bar.

42. The "serious nonpolitical crime" bar requires a showing that "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." *Id.* § 1158(b)(2)(A)(iii). This provision also corresponds to an exclusion clause in the 1951 Refugee Convention: Article 1F(b) provides that the Convention does not apply to "any person with respect to whom there are serious reasons for considering that . . . [h]e has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." Convention Relating to the Status of Refugees art. 1F(b).

43. This treaty provision serves a dual purpose: (i) "to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime," and (ii) "to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence." UNHCR Handbook ¶ 151. Under the treaty, reconciliation of these twin purposes demands an individualized analysis that accounts for all factors relating to "the nature of the offence presumed to have been committed"—including all aggravating or mitigating circumstances—balanced against "the degree of persecution feared," such that "[i]f a person

has well-founded fear of very severe persecution . . . a crime must be very grave in order to exclude him." *Id.* ¶¶ 155–157.

44. Adjudicators in the United States similarly apply an individualized, fact-specific analysis in determining whether an offense qualifies as a serious nonpolitical crime. That analysis requires judges to assess in each case whether the "political aspect of his offense may not fairly be said to predominate over its criminal character." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 429–30 (1999); *see also McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986) (noting that "a balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity makes good sense"), *overruled on other grounds by Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2000).

III. The Rule

A. The Rulemaking Process

45. Defendants DOJ and DHS jointly published the proposed Rule in the Federal Register on December 19, 2019. *See* Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (Dec. 19, 2019). The Rule proposed parallel amendments to the immigration regulations administered by DHS (8 C.F.R. pt. 208) and those administered by EOIR, a sub-agency of DOJ (8 C.F.R. pt. 1208). Defendants' stated purposes in issuing the proposed Rule were to (i) amend regulations governing the bars to asylum eligibility; (ii) clarify the effect of criminal convictions; and (iii) remove regulations governing the automatic reconsideration of discretionary denials of asylum. *Id.* at 69640.

46. Although the RFA requires federal agencies to analyze the effects of their rules on "small entities," the proposed Rule disposed of this requirement by stating that "[the] rule will not have a significant economic impact on a substantial number of small entities" because "[o]nly individuals, rather than entities, are eligible to apply for asylum." *Id.* at 69657.

47. Defendants gave the public just 30 days to comment on the proposed Rule, ending January 21, 2020. This already-brief period included multiple federal and religious holidays, including Hanukkah, Christmas Eve, Christmas Day, New Year's Day, and the Birthday of Martin Luther King, Jr., leaving just 15 business days for comment. Even so, Defendants ignored requests to extend the comment period.

48. On October 21, 2020, the final Rule was published in the Federal Register. *See* Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020). Despite 581 comments on the proposed Rule, most of which opposed it—including 78 comments from organizations such as legal advocacy groups, non-profit organizations, and religious organizations, *all* of which opposed it—the final Rule is nearly identical to the proposed text published ten months earlier.

49. The proposed Rule cited two purported sources of authority for the new bars to asylum eligibility: 8 U.S.C. § 1158(b)(2)(B)(ii), which allows the Attorney General to "designate by regulation offenses that will be considered" particularly serious crimes that trigger the PSC bar, and § 1158(b)(2)(C), which allows the Attorney General to "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." The final Rule reflects that commenters raised numerous concerns about the invocation of the PSC bar:

> In general, commenters alleged that the [notice of proposed rulemaking] was untethered to the approach set out by Congress regarding particularly serious crimes and that if Congress had sought to sweepingly bar individuals from asylum eligibility based on their conduct or felony convictions, as outlined in the [notice of proposed rulemaking], it would have done so in the Act. Commenters stated that adding seven new categories of barred conduct rendered the language of section 208(b)(2) of the Act (8 U.S.C. 1158(b)(2)) essentially meaningless and drained the term "particularly serious crime" of any sensible meaning because the Departments were effectively considering all offenses, regardless of seriousness, as falling under the particularly serious crime bar to asylum.

85 Fed. Reg. at 67206. Rather than revising the scope of the Rule to address these concerns, Defendants simply disclaimed reliance on the Attorney General's power to designate PSCs in the final Rule. Although the final Rule repeatedly draws analogies to the PSC bar, stating that the new bars are "similar to" PSCs, Defendants dismissed commenters' concerns by stating that the rule "does not designate any offenses . . . as specific particularly serious crimes," rather, it "sets out seven new 'additional limitations' . . . on asylum eligibility." *Id.* at 67207.

50. On many other issues raised by commenters—including issues that go to the heart of the Rule—Defendants failed to provide a meaningful response, stating that various comments and concerns were "beyond the scope of" the rulemaking. Supposedly "outside the scope" were comments and data showing the Rule "will exacerbate harms caused by racially disparate policing practices or that the result of this rule will disproportionately affect people of color," *id*. at 67226, "barriers" that

prevent domestic violence victims from seeking waivers that would prevent the Rule's bars from applying to them, *id*. at 67230, "how the rule might affect working conditions of aliens," *id*. at 67233, "issues involving evidence gathering" under the Rule's vacatur presumption, *id*. at 67239, "humanitarian concerns for asylum seekers," *id*. at 67243, "treatment, support, and services for children who have experienced trauma," *id*. at 67244, the "complex 'web' of asylum laws and regulations," *id*., "dangerous conditions in Mexico, the effects of the ['migrant protection protocol'], and the third-country transit bar," *id*. at 67245, "access to healthcare, food, and housing," *id*. at 67246, "increased likelihood of convictions for minor offenses for certain vulnerable groups," *id*. at 67247, and "representation in immigration proceedings or during asylum adjudications," *id*. at 67249. On most of these points, Defendants just "reiterate[d] their statutory authority to limit and condition asylum eligibility." *Id*. at 67239.

51. Moreover, like the proposed Rule, the final Rule did not analyze the effects of the Rule on "small entities" as required by the RFA. Rather, the final Rule concluded without analysis that "[the] rule will not have a significant economic impact on a substantial number of small entities" because "[o]nly individuals, rather than entities, are eligible to apply for asylum." *Id*. at 67255.

52. The Rule is currently scheduled to take effect on November 20, 2020.

B. Additional Categorical Bars to Asylum Eligibility

53. Although the Attorney General may impose additional "limitations and conditions" on asylum eligibility, those limitations must be "consistent with" the INA's asylum provisions. *See* 8 U.S.C. § 1158(b)(2)(C). None of the Rule's new asylum eligibility bars pass this test.

54. The Rule purports to establish several new categorical bars to asylum eligibility, regardless of the circumstances of the crime, the punishment imposed, or whether the offense indicates dangerousness to the community—in direct contravention of Congress's intent in establishing asylum protection. While the Rule asserts similarities between these new bars and the PSC bar, *see* 85 Fed. Reg. at 67216 & n. 16, the new bars are not tailored to address the touchstone of the statutory eligibility bars, including the PSC bar: dangerousness to the community or the nation. The Rule thus attempts to add new criminal bars that ignore the boundaries Congress articulated in the statute.

55. The Rule radically expands the list of offenses triggering a categorical bar to asylum eligibility to include:

- any conviction for bringing in or harboring certain aliens under 8 U.S.C. § 1324(a);
- any conviction for illegal reentry under 8 U.S.C. § 1326;
- any conviction for an offense the asylum officer knows or has some unspecified "*reason to believe* was committed in support, promotion, or furtherance of the activity of a criminal street gang";
- any conviction for an offense involving driving while intoxicated or impaired that results in serious bodily injury or death, or any second offense for driving while impaired, even if no injury results;
- any felony conviction under federal, state, or local law;
- any conviction under several newly defined categories of misdemeanor offenses, including any controlled substance-related offense except for a first-time marijuana possession offense, any offense involving possession or use of a false identification document, or any offense involving the receipt of public benefits without lawful authority;
- any conviction for an offense involving domestic violence; and
- any *accusation* of battery or extreme cruelty involving a domestic relationship, even if it does not result in a conviction.

56. These new bars are inconsistent with the INA's asylum provisions because they (i) involve offenses (or alleged conduct) far less serious, and less dangerous, than Congress deemed necessary to deny asylum eligibility; (ii) allow people to be barred from asylum eligibility based on mere accusation or suspicion of misconduct; and (iii) seek to impose *categorical* eligibility bars, with no individualized analysis (for example, to determine whether the asylum-seeker constitutes a danger to the community).

57. Nor can this inconsistency be remedied by vague references to the Attorney General's authority to "designate by regulation offenses that will be considered" PSCs. 8 U.S.C. § 1158(b)(2)(B)(ii). The PSC bar applies only where the person (i) is "convicted by final judgment" (ii) of a "*particularly* serious crime" and (iii) "constitutes a danger to the community of the United

States." 8 U.S.C. § 1158(b)(2)(A)(ii). The Rule's categorical bars involve crimes that are not serious, let alone *particularly* serious; they are largely unrelated to whether the asylum-seeker poses a danger to the community; and some of them apply even absent a conviction.

58. Some of these new categorical bars also fail to provide fair notice of what convictions—or what suspicions, based on which materials—will trigger them. For example, the Rule says that an asylum-seeker is barred if they are convicted of *any* crime the adjudicator "knows or has reason to believe" was committed in "support, promotion, or furtherance" of the activity of a criminal street gang. The Rule does not explain these nebulous standards or otherwise cabin adjudicators' discretion in a way that would provide fair notice to asylum-seekers or stave off discriminatory or arbitrary enforcement.

C. Change in the Effect of Vacated, Modified, and Expunged Criminal Convictions

59. The Rule presumes that criminal convictions remain effective (and thus trigger the asylum bars) despite any vacatur, expungement, or modification, if (i) the vacatur or modification order was entered after removal proceedings began or (ii) the applicant moved for the order more than a year after conviction or sentencing, even if the modification was made to correct constitutional or legal defects. 85 Fed. Reg. at 67259–60 (to be codified at 8 C.F.R. §§ 208.13(c)(7)–(8), 1208.13(c)(7)–(8)). The Rule places the burden on the asylum-seeker to establish that any modification to their underlying criminal conviction or sentence was not made for rehabilitative purposes or "for purposes of ameliorating the immigration consequences of the [underlying] conviction or sentence." *Id.* Moreover, the Rule empowers immigration adjudicators to consider evidence beyond the face of the court order itself to determine the ruling state judge's "purposes." *Id.* at 67259–60 (to be codified at 8 C.F.R. §§ 208.13(c)(9), 1208.13(c)(9)).

60. This portion of the Rule does not reflect a permissible interpretation of the INA. Treating as valid a conviction vacated to correct a constitutional error is "so foreign, so antithetical, to the long-standing principles underlying our criminal justice system and our notions of due process that we would expect Congress to have spoken very clearly if it intended to effect such results." *Alim v. Gonzales*, 446 F.3d 1239, 1249 (11th Cir. 2006). Yet Congress nowhere authorized defendants to do

so. Nor does the INA contain the clear statement that courts require before they allow federal agencies to upset the federal–state balance. Indeed, this novel regime may violate the Full Faith and Credit Act, 28 U.S.C. § 1738, and the underlying constitutional guarantees thereof, U.S. Const. art. IV, § 1.

D. Elimination of Automatic Review of Discretionary Denials of Asylum

61. Finally, the Rule eliminates 8 C.F.R. §§ 208.16(e) and 1208.16(e), which provide for automatic review of a discretionary denial of asylum where an asylum-seeker is denied asylum but granted withholding of removal under 8 U.S.C. § 1231(b)(3), and the refugee is thereby precluded from reuniting with their spouse and/or children and from obtaining permanent residence or citizenship.

62. If asylum is granted to an applicant, they may petition to have their spouse and/or minor children admitted as derivative asylees. 8 U.S.C. § 1158(b)(3). Recipients of withholding of removal are not able to do the same. *Id.*; *see also id.* § 1231. As a result of the Rule, an asylum applicant who is denied asylum solely in the exercise of discretion, but who is then granted withholding of removal, will not receive automatic review of that decision, even if it results in the inability to petition for their spouse and/or minor children.

63. Defendants have failed to offer any satisfactory justification for this fundamental change in policy. The Rule relies primarily on unsubstantiated assertions that §§ 208.16(e) and 1208.16(e) are "inefficient, unclear, and unnecessary," 85 Fed. Reg. 67251; however, instead of adding detail or clarifying language to resolve any such confusion, Defendants have eliminated these regulatory provisions entirely. In so doing, Defendants have not articulated any explanation for the provisions' alleged inefficiency. Nor have they articulated a basis for depriving applicants who are not granted asylum solely in the exercise of discretion but who later win withholding of removal the opportunity to achieve family unity. Family unity has been a cornerstone of U.S. immigration policy for decades, and this change would prevent spouses and children from finding safety in the United States.

IV. Defendant Chad Wolf Lacked Authority to Propose or Issue the Rule

64. The Rule was jointly issued by DHS and DOJ and sets forth parallel provisions to amend 8 C.F.R. pt. 208, which operationalizes immigration laws administered by DHS (including

those that govern affirmative asylum applications), and 8 C.F.R. pt. 1208, which operationalizes immigration laws administered by the EOIR, a sub-agency of DOJ.

65. Insofar as the Rule relies on authority from DHS—including to implement amendments to 8 C.F.R. pt. 208—the Rule was not validly issued because Defendant Chad Wolf lacked authority under the Appointments Clause of the U.S. Constitution, the HSA, and/or the FVRA to propose or issue the Rule.

66. On August 14, 2020, the U.S. Government Accountability Office ("GAO") issued a decision stating that the "incorrect official assumed the title of Acting Secretary" when former DHS Secretary Kirstjen Nielsen resigned in April 2019 and that "subsequent amendments to the order of succession made by [Kevin McAleenan] were invalid and officials who assumed their positions under such amendments, including Chad Wolf and Kenneth Cuccinelli, were named by reference to an invalid order of succession." GAO, *Decision in the Matter of Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security* 1 (Aug. 14, 2020), https://www.gao.gov/assets/710/708830.pdf ("GAO Decision").

67. While the GAO decision focused primarily on the validity of Wolf's appointment pursuant to the HSA, Wolf's claim to the role of Acting Secretary fares no better under the FVRA. The FVRA states that a person serving as an acting officer may serve in the office "for no longer than 210 days *beginning on the date the vacancy occurs*," except under narrow circumstances. 5 U.S.C. § 3346(a)(1) (emphasis added).

68. The relevant vacancy occurred, at the latest, by April 10, 2019, the purported effective date of former DHS Secretary Kirstjen Nielsen's resignation.

69. Kevin McAleenan resigned, and Wolf purported to assume the role of Acting Secretary of DHS, on November 13, 2019—217 days after April 10, 2019, and thus beyond the 210-day period set forth in the FVRA. Accordingly, Wolf's assumption of the role of Acting Secretary was not lawful pursuant to the FVRA.

70. On December 19, 2019, DOJ and DHS jointly released the proposed Rule. *See* 84 Fed. Reg. 69640. Wolf signed the proposal, notwithstanding that—as the GAO Decision explained—he lacked the authority to do so.

71. On October 21, 2020, the Departments jointly released the final Rule. Defendant Wolf signed the final Rule under his purported authority as Acting Secretary of DHS. Specifically, Wolf, "having reviewed and approved" the Rule, "delegated the authority to electronically sign" the Rule to Chad R. Mizelle (the Senior Official Performing the Duties of the General Counsel for DHS).

72. Because Defendant Wolf is not validly serving as Acting Secretary of DHS, he could not lawfully exercise the authority of that office, including by proposing or issuing the Rule. To the extent the Rule relies on authority from DHS, including to amend the procedures for asylum and withholding of removal set forth at 8 C.F.R. pt. 208, the Rule must be set aside.

V. The Rule Is Motivated by Racial Animus

73. Additionally, the Rule is motivated by racial, ethnic, and national origin-based animus. As a threshold matter, the Rule reflects that DHS and DOJ received a number of comments expressing concern about the ways in which it would disproportionately harm non-white immigrants. *See, e.g.*, 85 Fed. Reg. at 67223 (describing comments about the disparate racial impact that a bar based on allegations that an offense was committed in "furtherance of criminal street gang activity" may have). The Departments did not refute these comments, did not meaningfully engage with them, and did not revise the Rule to address these concerns. Rather, the Rule includes only a hollow assertion that "[t]o the extent that the rule disproportionally affects any group referenced by the commenters, any such impact is beyond the scope of this rule, as this rule was not drafted with discriminatory intent toward any group, and the provisions of the rule apply equally to all applicants for asylum." *Id.* at 67226. This statement is belied by countless racist, xenophobic comments made by members of the Trump Administration and by the outsized impact that the Rule will have—and that DHS and DOJ were made aware the Rule will have—on non-white immigrants.

74. Statements by President Trump and others lay bare the Trump Administration's discriminatory motives against non-white, non-European immigrants, especially those accused or convicted of criminal conduct. The statements below are just a few examples; there are many more.

75. President Trump launched his 2016 campaign by raising the specter of violence from supposedly criminal immigrants. When he announced his presidential bid, he infamously said: "When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with [*sic*] us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." *Donald Trump Announces a Presidential Bid*, Wash. Post (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/. Three days later, he repeated a variation of the same statement on Twitter, writing, "Druggies, drug dealers, rapists and killers are coming across the southern border. When will the U.S. get smart and stop this travesty?" President Donald Trump (@realDonaldTrump), Twitter (June 19, 2015, 10:22 PM), https://twitter.com/realdonaldtrump/status/612083064945180672.

76. President Trump has continued to make similar remarks throughout his presidency. For example, in 2018, reports circulated that a group of several thousand asylum-seekers were approaching the U.S.-Mexico border seeking refuge. President Trump tweeted about the event repeatedly over the next several weeks, writing:

- "I am watching the Democrat Party led . . . assault on our country by Guatemala, Honduras and El Salvador, whose leaders are doing little to stop this large flow of people, INCLUDING MANY CRIMINALS, from entering Mexico to U.S....." President Donald Trump (@realDonaldTrump), Twitter (Oct. 18, 2018, 7:25 AM), https://twitter.com/realdonaldtrump/status/1052883467430694912.
- "Sadly, it looks like Mexico's Police and Military are unable to stop the Caravan heading to the Southern Border of the United States. Criminals and unknown Middle Easterners are mixed in. I have alerted Border Patrol and Military that this is a National Emergy [*sic*]. Must change laws!" President Donald Trump (@realDonaldTrump), Twitter (Oct. 22, 2018, 8:37 AM), https://twitter.com/realdonaldtrump/status/1054351078328885248.
- "There are a lot of CRIMINALS in the Caravan. We will stop them. Catch and Detain! Judicial Activism, by people who know nothing about security and the safety of our citizens,

is putting our country in great danger. Not good!" President Donald Trump (@realDonaldTrump), Twitter (Nov. 21, 2018, 4:42 PM), https://twitter.com/realdonaldtrump/status/1065359825654169600.

77. Around the same time, President Trump aired a midterm campaign ad that featured footage of an undocumented Mexican immigrant, Luis Bracamontes, bragging about his murder of two police officers in California. It juxtaposed footage of Bracamontes with images of the so-called "migrant caravan" moving toward the United States border—even though Bracamontes had nothing to do with the caravan—and stated: "Dangerous illegal criminals like cop-killer Luis Bracamontes don't care about our laws." Michael M. Grynbaum & Niraj Chokshi, *Even Fox News Stops Running Trump Caravan Ad Criticized as Racist*, N.Y. Times (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/us/politics/nbc-caravan-advertisement.html.

78. President Trump's attempts to paint immigrants (particularly those from Central America) as gang members and dangerous people continued into the weeks surrounding the publication of the proposed Rule in 2019. Less than two weeks before the proposed Rule was published in the Federal Register, President Trump posted a tweet reading in part, "Without the horror show that is the Radical Left . . . the Border would be closed to the evil of Drugs, Gangs and all other problems!" President Donald Trump (@realDonaldTrump), Twitter (Dec. 6, 2019, 11:00 AM), https://twitter.com/realdonaldtrump/status/1202981139155210241. The day after the proposed Rule was published, President Trump took to Twitter to share a link to an article about a number of purported gang-related arrests in New York, writing, "We are getting MS-13 gang members, and many other people that shouldn't be here, out of our Country!" President Donald Trump (@realDonaldTrump), Twitter (Dec. 20, 2019, 5:41 PM), https://twitter.com/realDonaldTrump/status/1208155412962447360.

79. Similarly, during a presidential debate held on October 22, 2020—the day after the final Rule was published—President Trump described noncitizen children separated from their parents at the U.S. border as having been brought to the United States "through cartels and through coyotes and through gangs." ABC News, *Biden and Trump Discuss Their Views on Immigration Policy*, YouTube (Oct. 22, 2020), https://www.youtube.com/watch?v=DZ9vIzVZjS4. In criticizing "catch

and release" (the practice of allowing asylum-seekers to await their immigration hearings in the community rather than detaining them), President Trump further stated, "Catch and release is a disaster. A murderer would come in, a rapist would come in, a very bad person would come in . . . we [would] have to release them into *our* country." *Id.* (emphasis added).

80. These comments are part of a broader pattern of racist and xenophobic remarks made by members of the Trump Administration. For example, in 2017, at the height of litigation surrounding the Administration's travel bans, President Trump tweeted, "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" President Donald Trump (@realDonaldTrump), Twitter (June 5, 2017, 9:20 PM), https://twitter.com/realdonaldtrump/status/871899511525961728. A few months later, he tweeted again, "The travel ban into the United States should be far larger, tougher and more specific – but stupidly, that would not be politically correct!" President Donald Trump (@realDonaldTrump), Twitter (Sept. 15, 2017, 6:54 AM), https://twitter.com/realdonaldtrump/status/908645126146265090.

81. Around January 2018, President Trump met with lawmakers to discuss protections for immigrants from Haiti, El Salvador, and African countries. According to those present at the meeting, the President asked, "Why are we having all these people from shithole countries come here?" Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html. He also suggested that the United States should allow more people from countries like Norway instead. Alan Fram & Jonathan Lemire, *Trump: Why Allow Immigrants from 'Shithole Countries'?*, AP News (Jan. 12, 2018), https://apnews.com/fdda2ff0b877416c8ae1c1a77a3cc425/Trump:-Why-allow-immigrants-from-'shithole-countries'.

82. Similarly, Defendant Kenneth Cuccinelli has made a number of troubling comments about immigrants and their families. During a radio interview in 2012, Cuccinelli criticized Washington, D.C.'s pest control policy, stating that "it is worse than our immigration policy," and noting, "You can't break up rat families. Or raccoons, and all the rest, and you can't even kill 'em." Nick Wing,

Ken Cuccinelli Once Compared Immigration Policy to Pest Control, Exterminating Rats, Huffington Post (July 26, 2013), https://www.huffpost.com/entry/ken-cuccinelli-immigration-rats_n_3658064?guccounter=1.

83. More recently, in August 2019, Cuccinelli was asked whether he agreed that the words of Emma Lazarus appearing on the Statue of Liberty, "Give me your tired, your poor," are part of the American ethos. Devan Cole & Caroline Kelly, *Cuccinelli Rewrites Statue of Liberty Poem to Make Case for Limiting Immigration*, CNN (Aug. 13, 2019), https://www.cnn.com/2019/08/13/politics/ken-cuccinelli-statue-of-liberty/index.html. He responded, "They certainly are: 'Give me your tired and your poor who can stand on their own two feet and who will not become a public charge.'" *Id.* He later noted that Lazarus's poem "was referring back to people coming from Europe." *Id.*

84. The Trump Administration has repeatedly used racist rhetoric to cast non-white immigrants as dangerous and to curb their entry into the United States. These statements leave no doubt about the racial, ethnic, and national origin-based animus driving the new Rule, which will dramatically expand bars to asylum eligibility for people convicted—or simply *accused*—of various relatively minor offenses. The Rule will cause significant harm to non-white immigrants.

85. It is well documented that current law enforcement policies harm immigrants of color. For example, as a result of racially biased policing practices, Black people are disproportionately likely to be arrested, convicted, and imprisoned in the United States. *See* NYU Law Immigrant Rights Clinic, *The State of Black Immigrants Part II: Black Immigrants in the Mass Criminalization System* at 15, https://www.immigrationresearch.org/system/files/sobi-fullreport-jan22.pdf (last visited Nov. 1, 2020) (noting in part, "These disparities exist even when crime rates are the same; for example, although Blacks and whites use marijuana at roughly equal rates, Black people are 3.7 times more likely than whites to be arrested for marijuana possession.").

86. The harm caused by racial bias in policing is further compounded by the immigration consequences that often accompany arrests and convictions. *See, e.g.*, Elizabeth Aranda & Elizabeth Vaquera, *Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults*, Soc. of Race and Ethnicity 88 (2015) ("[W]ith the exception of Salvadorans, Latino and black immigrants are disproportionately represented among those being

apprehended, detained, and deported from the country when compared with their shares of the undocumented population"); *see also* Refugee and Immigrant Ctr. for Educ. and Legal Servs., *Black Immigrant Lives Are Under Attack*, https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/ (last visited Nov. 1, 2020) ("While 7% of non-citizens in the U.S. are Black, they make up a full 20% of those facing deportation on criminal grounds[.]").

87. The specific nature of several of the newly imposed bars to asylum eligibility is likely to augment these harms. For example, the use of convictions for bringing in or harboring certain aliens as a bar to asylum eligibility will be particularly harmful to people entering the country through the Southwest border of the United States. In fiscal year 2019, 3,487 convictions for "alien smuggling" offenses were reported to the United States Sentencing Commission. *See* U.S. Sentencing Comm'n, *Quick Facts: Alien Smuggling Offenses* (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Alien_Smuggling_FY19.pdf. A staggering 94% of those convictions were brought in districts along the Southwest border. *Id.* Data from CBP reflects that in the same year, nearly 88% of single adults apprehended at the Southwest border—i.e., the population of people statistically most likely to be convicted for smuggling or harboring illegal aliens—came from the same four countries: El Salvador, Guatemala, Honduras, and Mexico. *See* U.S. Customs and Border Prot., *U.S. Border Patrol Southwest Border Apprehensions by Sector: Fiscal Year 2019* (Nov. 14, 2019), https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019.

88. Similarly, barring asylum where a person is convicted of a crime that the adjudicator knows or "has reason to believe" was committed in furtherance of gang activity—an extremely low standard—will harm asylum-seekers from communities of color.[2] *See* 85 Fed. Reg. at 67258–59 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii)). For example, the Boston Regional Intelligence Center ("BRIC") maintains a "Gang Assessment Database" that tracks suspected gang members. *See* Bos. Police Dep't, *Rule 335 – Gang Assessment Database* (Mar. 23, 2017),

[2] This harm will only be exacerbated by the Executive Order on Combating Race and Sex Stereotyping issued by President Trump on September 22, 2020. The Executive Order prohibits, in part, training on implicit bias for certain federal employees, characterizing such training—perplexingly—as "promot[ing] race or sex stereotyping or scapegoating." As a result of the interplay between the Rule and this Executive Order, adjudicators will now be empowered to make a subjective determination about whether an offense was committed in furtherance of gang activity without the benefit of any training on the impacts of implicit bias on such determinations.

https://bpdnews.com/rules-and-procedures. People are added to the BRIC Gang Assessment Database based on a highly flawed point system, pursuant to which law enforcement officers assign people a "score" based on various purported markers for gang involvement. *Id.* at 2 (describing the "10 Point Verification System"). The point system allows law enforcement officers to assign points to a person even where there is no allegation that the person has engaged in criminal activity. For example, a person may receive points against them based on nicknames, attire, "drawings," tattoos, or "[w]alking, eating, recreating, communicating, or otherwise associating with" a purported gang member—even if that person is a friend, neighbor, or family member. *Id.* at 3, 5–6. Data from the Boston Police Department reflects that 66% of the people tracked in the BRIC Gang Assessment Database are Black, 24% are Latino, and just 2% are white, notwithstanding that Black and Latino residents make up 25% and 20% of the Boston population, respectively. Phillip Marcelo, *Inside The Boston Police Gang Database*, WGBH (July 30, 2019), https://www.wgbh.org/news/local-news/2019/07/30/inside-the-boston-police-gang-database.

89. Moreover, available data suggest that empowering immigration adjudicators to determine whether there is "reason to believe" that a crime was gang-related is likely to result in harm to people from communities of color, who are often labeled by police as gang-involved even when they are not. Government audits of gang databases have routinely found significant error rates. *See, e.g.*, Cal. State Auditor, The CalGang Criminal Intelligence System 2 (Aug. 2016), https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf (finding that 23% of the CalGang designations reviewed lacked adequate support); City of Chi. Office of Inspector Gen., Review of the Chicago Police Department's "Gang Database" 2 (Apr. 2019), https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf (finding that over 15,000 people designated as gang members in Chicago's gang database "had no specific gang membership listed and no reason provided for why the individual was listed as a gang member").

90. By way of additional example, in April 2016, officers in New York arrested 120 people in the Bronx (the "Bronx 120") in what was then-described as the "largest gang takedown in New York City history." Babe Howell & Priscilla Bustamante, CUNY Sch. Of Law, *Report on the Bronx*

120 Mass "Gang" Prosecution 4 (Apr. 2019), https://bronx120.report/. Notwithstanding this characterization, approximately half of those arrested were not ultimately alleged to be gang members in the indictment. *Id.* at 9. 88% of those arrested were Black, and not one was identified as white. *Id.* at 13. The outcome of the Bronx 120 incident is emblematic of both the impact that a bar to asylum eligibility based on purported gang activity will have on non-white immigrants and the unreliable nature of subjective determinations of whether conduct is gang-related.

91. The Rule does not articulate a standard to be applied in determining whether an offense was committed in furtherance of gang activity, nor even criteria for what should prompt such an inquiry. Under the Rule, a conviction for something minor, like disorderly conduct, could lead to deportation of a young person to a country where they face persecution when paired with even minimal evidence or a mere allegation of gang involvement. This outcome is manifestly unjust and exemplifies the harm the Rule will cause asylum-seekers from low-income communities and communities of color.

VI. The Rule's Harm to Plaintiffs

92. Plaintiffs are non-profit organizations that provide direct representation to, and advocate on behalf of, immigrant communities, and provide training and educational programming to immigration practitioners and/or immigrant communities. The significant changes the Rule will impose—including by creating several new categorical bars to asylum eligibility and eroding protections set forth in the INA—will harm Plaintiffs in a number of ways.

A. The Rule Frustrates Plaintiffs' Missions

93. Each of the Plaintiffs shares a mission to support and provide legal services to as many low income and vulnerable noncitizens as possible, including to asylum-seekers. For example, CLINIC operates the nation's largest network of nonprofit legal immigration services programs as part of its mission to embrace the Gospel value of welcoming the stranger by promoting the dignity and protecting the rights of immigrants. The Rule frustrates Plaintiffs' missions by establishing a number of new barriers to asylum eligibility that will make it far more difficult for Plaintiffs to serve their clients—many of whom the Rule will render ineligible for asylum.

94. For CLINIC (and the nearly 400 affiliated immigration programs in its network), the Rule will impede its core aims of "welcoming the stranger" and protecting the rights of immigrants by

categorically excluding many from asylum eligibility, leaving CLINIC and its affiliates without a means of securing a pathway to permanent residency for many of the people it serves.

95. Moreover, the Rule allows immigration adjudicators to undertake a number of subjective inquiries, including determining whether an offense was committed in furtherance of the activity of a criminal street gang, whether a person engaged in battery or extreme cruelty involving a domestic relationship (even if it did not result in a conviction), and the purposes for which a prior conviction was vacated or modified. These changes will increase the proportion of resource-intensive cases arising within the communities Plaintiffs serve, necessarily reducing the number of asylum-seekers Plaintiffs are able to assist and causing ripple effects felt throughout Plaintiffs' organizations.

96. For example, in 2019 alone, CAIR Coalition was able to provide 4,090 individual consultations for adults and children in detention to ascertain their asylum options, spending 4,000 hours conducting jail visits. As a result of the sweeping impact of the new Rule, each consultation is likely to take significantly more time—indeed, CAIR Coalition estimates that the number of adults its staff could prepare during each jail visit will be reduced by a third.

97. Similarly, the number of intake interviews CAIR Coalition has traditionally been able to provide is driven in part by its ability to rely on appropriately supervised legal assistants and law student volunteers to conduct such interviews. Given the increased complexity resulting from the new Rule (including the need to assess the applicability of a number of new categorical bars to asylum eligibility and the impact of any prior convictions an asylum-seeker may have), CAIR Coalition anticipates that it will no longer be able to staff client intake interviews with legal assistant or law student volunteers. The new need to staff such interviews with CAIR Coalition staff members and volunteer lawyers will (i) significantly reduce the overall amount of intake interviews CAIR Coalition is able to conduct and (ii) reduce CAIR Coalition's capacity to assist as many clients as possible in other aspects of the asylum process, including in trial-stage proceedings.

98. The Rule will significantly reduce the amount of cases in which Plaintiffs can support and represent asylum-seekers going forward, as their attorneys will need to expend an increased amount of time and resources on each client's case to establish eligibility under the Rule (including, among other things, the time and resources required to obtain and assess criminal conviction and arrest

records, prepare for and put on a "mini-trial" in immigration court regarding whether there is a "reason to believe" an offense was committed in furtherance of gang activity or is a domestic violence offense, and engage expert witnesses). The Plaintiffs will also need to expend an increased amount of time and resources on the cases of applicants who are barred from asylum by the Rule and bear the burden to meet a higher standard under withholding of removal than asylum.

99. The ability of the Plaintiffs to take on new clients will also be harmed by the Rule's impact on family members of the asylum-seekers the Plaintiffs serve, many of whom are parents who fled their home countries with their young children. If a parent who flees to the United States is subject to one of the Rule's new eligibility bars, and thereby forced to seek withholding of removal, they will no longer be able to ensure that their child or spouse can also obtain protection in the United States, regardless of whether the parent is granted withholding of removal. The de facto decoupling of family cases contemplated by the new Rule will likely result in increased family separation, as family members who no longer qualify for asylum are removed, but will also have a significant impact on the Plaintiffs, who will be faced with an increased number of cases where they must assist each family member in seeking asylum as a principal, rather than being able to rely on derivative status, at the same time as they face a decrease in the number of resources they have available.

100. The resulting reduction in the number of people Plaintiffs are able to support will frustrate their missions, including by directly conflicting with CAIR Coalition's mission to expand access to counsel within the population it serves.

B. The Rule Diverts Resources from Plaintiffs' Core Programs

101. The Rule is also causing and will continue to cause Plaintiffs to divert resources from their core programs. Before the effective date of the Rule, each Plaintiff will need to expend significant resources—including by diverting resources from its core programs—to analyze and interpret the Rule, create new informational materials and resources to address the Rule, and provide training to its staff and, in the case of CLINIC, its large network of affiliates, almost half of whom provide asylum representation. For example, CAIR Coalition will need to update its client database and intake process to add questions and responses relevant to the new Rule's asylum eligibility bars, a process that will

take days of staff member time and require deferring previously planned updates due to cost and timing reasons.

102. Additionally, several of the Plaintiffs provide training and support to other practitioners and/or directly to immigrant communities, which will require them to expend substantial resources in the near term on tasks such as drafting client alerts, designing and hosting webinars, and updating any website content concerning asylum eligibility. For example, Pangea provides Know Your Rights presentations to hundreds of immigrants each year, and DSCS conducts advocacy work for ICE detainees and assists undocumented youth with DACA registrations. In 2020, Pangea piloted a program that provides in-depth assistance to *pro se* asylum applicants that has already served ten clients, while CAIR Coalition hosted 182 workshops for *pro se* asylum-seekers and provided *pro se* assistance to 241 individuals in 2019 alone. To continue offering these programs, Pangea, CAIR Coalition, and DSCS will need to analyze the new Rule, revise their training materials, and create new curricula promptly. They will also need to spend more staff time on each workshop to explain the complexities of the rule to *pro se* asylum-seekers.

103. Likewise, all Plaintiffs anticipate needing to rework their existing training materials to ensure their staff understand the Rule's new eligibility and processing framework requirements, and especially on the complexities of criminal law, which will take a tremendous amount of time and workforce effort that the Plaintiffs cannot afford to spare.

104. Moreover, because CLINIC is the hub of the largest network of immigration legal services providers in the nation, its affiliate programs will look to it to provide real-time guidance regarding the new Rule, including through in-depth articles and news alerts and multi-platform social media announcements. Among other tools, CLINIC provides its affiliates with access to the "Ask-the-Experts" portal on its website, which allows attorneys and accredited representatives at its affiliates to submit inquiries regarding individual immigration matters. In order to ensure that it is adequately prepared to field questions from affiliate legal staff about the impact of the Rule on asylum-seeking clients, CLINIC will need to devote substantial resources to training its legal staff. If a submitted question is broadly applicable, CLINIC staff may also spend additional weeks developing trainings or written resources designed to answer it. Indeed, due to the substantial number of questions CLINIC

has already received from its affiliates regarding the intersection of criminal law and immigration law, CLINIC hired a consulting attorney who specializes in this area to respond specifically to such inquiries. Because the attorney charges CLINIC an hourly rate, CLINIC expects to realize a negative impact to its budget, especially given the number of queries the organization will continue to receive regarding the implications of the new Rule alone.

105. Each of the tasks and expenses necessary to respond to the new Rule—including those described above—requires Plaintiffs to divert their finite resources from other aspects of the programs they provide. As a result of the Rule, Plaintiffs anticipate the need to make changes including reallocating staffing, devoting less time to advocacy projects and community initiatives, and taking on fewer cases.

C. The Rule Jeopardizes Plaintiffs' Funding

106. The Rule will also jeopardize Plaintiffs' funding. Plaintiffs rely in part on grants from sources such as states, counties, and foundations. Such grants are often conditioned on Plaintiffs' ability to achieve certain targets, such as a total number of clients served or asylum applications filed each year. In 2020, grants of this nature constituted approximately 65% of Pangea's budget and approximately 95% of the budget for DSCS's Deportation Defense & Legal Advocacy Project. CAIR Coalition, too, receives funding from grants and foundations tied to the number of adults CAIR Coalition is able to represent each year. Because the Rule will necessarily reduce the number of Plaintiffs' clients eligible for asylum, and will require Plaintiffs to spend significantly more time on each client's case, Plaintiffs are unlikely to be able to comply with existing funding requirements—and thus expect to lose a substantial amount of their funding once this Rule goes into effect.

107. Similarly, CAIR Coalition has established pro bono partnerships with a number of law firms with which it places asylum cases. In addition to providing pro bono legal services, many of these law firms donate money to CAIR Coalition, often in exchange for opportunities to provide direct assistance with and staffing of asylum matters. Currently, law firm donations of this kind account for close to 5% of CAIR Coalition's annual budget. Under the new Rule, fewer of CAIR Coalition's clients will be eligible for asylum, as a result of which it will necessarily have fewer asylum cases to place with partner law firms. CAIR Coalition expects that this shift could result in a decrease in the

amount of law firm donations it receives. CLINIC expects to see a similar decrease in law firm donations in connection with the impact the Rule may have on its BIA Pro Bono Project, through which CLINIC matches vulnerable immigrants with pro bono counsel to defend their cases before the Board of Immigration Appeals ("BIA").

108. Even under the best of circumstances, the loss of a significant source of funding could have devastating impacts for the Plaintiffs. With respect to the new Rule, the harm caused by the loss of funding will be further exacerbated by the concomitant increase in demands on Plaintiffs' resources.

D. The Rule Harms the Populations Plaintiffs Serve

109. In addition to the harmful outcomes described above, if permitted to take effect, the Rule will cause serious harm to the populations Plaintiffs serve.

110. To start, the harm caused by the Rule will be exacerbated by the manner in which it intersects with other rules recently issued by DHS. For example: the Rule will impose a categorical bar against asylum-seekers convicted of "possession or use of an identification document, authentication feature, or false identification document without lawful authority." 85 Fed. Reg. at 67258–60 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(vi), 1208.13(c)(6)(vi)). However, this Rule follows close behind a separate rule entitled Asylum Application, Interview, and Employment Authorization for Applicants, published on June 26, 2020, which prohibits asylum-seekers from applying for work authorization until at least one year after submission of an asylum application. *See* 85 Fed. Reg. 38532, 38626 (June 26, 2020) ("EAD Rule"). At the same time, asylum-seekers are generally not eligible to receive federal public benefits until they are granted asylum. *Id.* at 38566. As a result of the EAD Rule, asylum-seekers will be unable to work *or* to receive federal public benefits for a prolonged period of time, which may drive some to seek and/or use false identification out of necessity. This harm will be further exacerbated by the ongoing unemployment and health impacts of the coronavirus pandemic. Under the Rule, even people seeking false identification as a means of survival (due to the impacts of the EAD Rule) may be barred from asylum eligibility as a result.

111. Moreover, the Rule will summarily exclude many people from asylum eligibility in violation of U.S. asylum laws, decades of asylum jurisprudence, and international treaty obligations. As a direct result of the Rule, thousands of people fleeing persecution, violence, and even death in

their countries of origin will be ineligible for the life-saving relief asylum is meant to provide, in direct contravention of the Refugee Convention and the Refugee Act of 1980. The Rule will also impact their family members, who will be rendered ineligible for derivative asylum and family reunification. Moreover, the Rule will leave thousands ineligible for adjustment of status based on asylum, as a result of which—even if they are permitted to remain in the United States—they will no longer have a pathway to citizenship.

112. The Rule will disproportionately impact the most vulnerable people who are fleeing persecution and seeking asylum. Asylum-seekers are often impacted by the trauma of persecution, ranging from torture, rape, and severe bodily injury to death threats, pervasive discrimination, imprisonment, and subjugation of their beliefs and identities. These populations have also often suffered the additional traumas of witnessing the persecution of family members and friends; harrowing journeys from their countries of origin to the United States; and even facing additional discrimination and hardship once they arrive here.

113. The trauma refugees and asylum-seekers have faced frequently manifests as mental illness, and studies suggest that more than one out of every three asylum-seekers struggles with depression, anxiety, and/or post-traumatic stress disorder. Giulia Turrini et al., *Common Mental Disorders in Asylum Seekers and Refugees: Umbrella Review of Prevalence and Intervention Studies*, 11 Int'l J. Mental Health Sys. 51 (Aug. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5571637/. In many cases, the behavior that serves as the basis for criminal convictions is a direct result of these traumatic experiences. For example, asylum-seekers, and even asylum-seeking unaccompanied children, often have little or no access to mental health care and may turn to self-medication through drugs or alcohol.[3] This behavior, in turn, places them at high risk for substance-related convictions; *e.g.*, convictions for drug possession or driving under the influence. Under the new Rule, any such conviction could bar someone from eligibility for asylum, even if it were a one-time offense and the applicant demonstrated extensive evidence of rehabilitation. The Rule eliminates

[3] Moreover, many may refrain from seeking help due to concerns about the applicability of the Inadmissibility on Public Charge Grounds Rule (the "Public Charge Rule"). *See* 84 Fed. Reg. 41292 (Aug. 14, 2019). Under the Public Charge Rule, a person may be rendered inadmissible to the United States if they are "likely at any time to become a public charge." *Id.* at 41294; *see also* 8 U.S.C. § 1182(a)(4).

immigration adjudicators' discretion to consider the underlying circumstances of these types of offenses and thus to treat these asylum-seekers with the compassion that trauma-related addiction issues deserve.

114. The Rule's categorical bar against asylum-seekers convicted or accused of acts of domestic violence will similarly impact the most vulnerable applicants. While plaintiffs unequivocally condemn domestic violence in all of its forms, the Rule as drafted fails to account for the complex dynamics of such violence and its treatment under criminal law—a failure that puts even survivors of domestic violence at risk. For example, in many states, any incident involving intimate partners, or parents and children, is treated as a domestic violence case from the outset, regardless of circumstance. *See* Kari Hong & Philip L. Torrey, *What* Matter of Soram *Got Wrong: "Child Abuse" Crimes that May Trigger Deportation Are Constantly Evolving and Even Target Good Parents*, Harv. Civ. Rts. Civ. L. Rev. (Oct. 15, 2019) ("In 1999, Minnesota enacted legislation requiring a child's exposure and proximity to domestic violence to be 'a statutorily specified form of reportable child abuse and neglect.' . . . 'Parents, primarily mothers, who themselves were victims of domestic violence thus became the subjects of neglect reports based on their alleged failure to protect their children from exposure to the violence.'"). Additionally, instances of domestic violence often result in the arrest of *both* the victim and the perpetrator, and victims may face criminal charges for harming perpetrators in self-defense. Even if these charges are eventually dropped, the sweeping language of the Rule could render these people ineligible for asylum simply as a result of having been charged in the first instance.

115. As the Rule reflects, commenters noted that this portion of the Rule could be particularly harmful for populations with overlapping vulnerabilities, such as members of the LGBTQ community (who are prone to experience inaction by law enforcement in response to domestic violence and may be more likely to have both partners arrested) and people with limited English proficiency, who may be unable to describe the abuse to police officers. 85 Fed. Reg. at 67228. Critically, the Rule permits immigration adjudicators to determine that a person is ineligible for asylum if the adjudicator "knows or has reason to believe" that the applicant engaged in battery or extreme cruelty involving a domestic relationship even if the alleged conduct did not result in a conviction. *Id*. at 67258–60. The Rule does not articulate a standard to be applied in making such determinations, nor even

criteria for what should prompt such an inquiry. The end result is that any asylum-seeker arrested for any offense, whether convicted or not, could be subject to a nebulous, subjective inquiry—without fair notice as to what such an inquiry may entail—and could be barred from asylum eligibility as a result. The exceptionally far reach of this portion of the Rule harms asylum-seekers by leaving them vulnerable to assessments of their culpability by an immigration adjudicator without the same level of due process protection they would receive in court. Moreover, such assessments may involve the adjudicator's consideration of alleged conduct that is years old and that never resulted in a conviction.

116. Although the Rule purportedly provides an exception from the domestic violence bar for survivors who "have been battered or subjected to extreme cruelty and aliens who were not the primary perpetrators of violence in the relationship," *id.* at 67230, this weak exemption does not mitigate the damage done by the Rule. Even for those who may seek to avail themselves of this exception, the reality is that many abusers isolate, intimidate, and control their victims in ways that will make it very difficult for survivors to produce evidence of being "battered or subjected to extreme cruelty" such that they can successfully rely upon the exception.

117. Similarly, using convictions for "harboring certain aliens" as a bar to asylum eligibility disproportionately targets the most vulnerable. When asylum-seekers flee, their family members are often also in danger and being persecuted; thus, asylum-seekers may help their relatives seek safety in the United States as well. Under the new Rule, asylum-seekers will be rendered ineligible for asylum if they assist loved ones in dire circumstances. For example, parents who are trying to help their minor children escape life-threatening situations—something virtually every parent would feel compelled to do—will be barred from asylum eligibility. *Id.* at 67258–59 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(i), 1208.13(c)(6)(i)).

118. The Rule's provision on conviction and sentence vacaturs and modifications will also lead to the expulsion of countless people. The Rule will bar many people who no longer have convictions at all by creating a temporally-based presumption that orders vacating, expunging, or modifying criminal convictions were entered "for the purpose of ameliorating immigration consequences" if the relevant order was entered (i) after the initiation of removal proceedings or (ii) more than one year after the date of the original order of conviction or sentencing. *Id.* at 67259–60 (to be codified at 8

C.F.R. §§ 208.13(c)(7)–(8), 1208.13(c)(7)–(8)). The Rule will thus preclude from asylum eligibility countless people who have appropriately had their sentences modified because of their rehabilitation and/or their efforts to overcome addiction or escape from domestic violence or gang pressure—people who have turned their lives around and who do not pose any danger to their community.

119. This provision will also impact those immigrants whose convictions and sentences are procedurally or substantively defective, but who only realized that fact (i) more than one year after they were convicted or sentenced and/or (ii) at the time of their immigration proceedings, or those who lack the legal resources and evidence to ensure that the change to their criminal record conforms to this contorted interpretation of the law. As with other provisions of the Rule, this provision will disproportionately impact the most vulnerable asylum-seekers: those who are low income, who speak the least English, or who have limited education and resources. Moreover, the Rule will unlawfully deny essential protection to asylum-seekers by refusing to give full faith and credit to valid criminal court decisions and allowing an adjudicator to "look beyond the face of" any such court order to determine the purpose for which it was issued. *Id*. at 67259–60.

120. The Rule's rescission of automatic review of discretionary asylum denials under 8 C.F.R. §§ 208.16(e) and § 1208.16(e) will also have a devastating impact on the families of asylum-seekers. People will face the impossible choice of either abandoning their spouse and children or risking return to a country where their lives or freedom would be threatened in order to reunite. Those spouses and children may also face persecution themselves. This provision—like all the others set forth in the Rule—will thus leave more vulnerable people unprotected, particularly if those spouses and children lack the resources or are otherwise unable to travel to the United States and apply for asylum independently. The Rule contravenes the principles of family cohesion and unification that underpin United States immigration law, that have been part of our country's tradition since its founding, and that were first codified more than fifty years ago in 1965 and later expanded in 1980. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

121. Jointly, the three provisions of this Rule will upend the United States' entire regime for asylum protection. It will place thousands of bona fide refugees in peril of persecution, bodily harm,

and even death. The Rule violates our country's obligations under international and domestic law and runs counter to our country's proud history and tradition of providing refuge for the oppressed.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Rule is not in accordance with law, or is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right under the INA and the APA

122. Plaintiffs incorporate and reallege the allegations above.

123. The APA requires a court to set aside agency action that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C).

124. The Rule's new categorical eligibility bars exceed the Attorney General's authority to set further conditions and limitations on asylum eligibility and conflict with the text, structure, and history of the INA's asylum provisions. The only domestic crimes that render a refugee ineligible for asylum under Section 1158 are "particularly serious crimes"—that is, those crimes that (i) correspond to an actual conviction, rather than suspicions or accusations; (ii) are "*particularly* serious"; and (iii) reflect a danger to the community. *See* 8 U.S.C. § 1158(b)(2)(A)(ii) (emphasis added). Likewise, the other statutory eligibility bars (apart from the firm-resettlement bar, which is irrelevant here) involve serious conduct that renders someone a danger to others or to the nation.

125. The Rule's new categorical bars, by contrast, sweep in offenses that are not serious—let alone particularly serious—and do not suggest a danger to others or to the community. Some of them are also triggered by mere "reason to believe" that domestic criminal conduct occurred or had certain characteristics, a dynamic found nowhere in the asylum statute. The bars are thus not "consistent with" the statutory scheme, as required by the sole provision on which the Rule relies for its authority. *Id.* § 1158(b)(2)(C). For the same reasons, they conflict with the governing statutory language.

126. The Rule also conflicts with Section 1158 because categorical bars to asylum eligibility are inconsistent with the Refugee Convention, as incorporated by the INA. "Where fairly possible, a United States statute is to be construed as not to conflict with international law or with an international

agreement with the U.S." *Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) (alteration omitted) (quoting *Munoz v. Ashcroft*, 339 F.3d 950, 958 (9th Cir. 2003)). The Refugee Convention—relevant portions of which are incorporated into the INA—requires an individualized analysis of whether a particular crime disqualifies an asylum applicant, no matter which of the criminal bars is at issue. The government's proposed categorical bars simply ignore that requirement, and raise concerns about compliance with the United States' non-refoulement obligation. The bars are accordingly in conflict with the INA and the treaty obligations it effectuates.

127. The Rule's presumption that criminal convictions vacated to cure substantive or constitutional errors remain valid based purely on when they were vacated has no basis in the INA, conflicts with basic due process principles, and fails to give full faith and credit to state court rulings.

SECOND CLAIM FOR RELIEF

The Rule is arbitrary, capricious, or an abuse of discretion under the APA

128. Plaintiffs incorporate and reallege the allegations above.

129. Under the APA, an agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

130. The agency's broad shift away from individualized, multi-factor asylum determinations and toward categorical bars—in violation of the Refugee Convention—represents a dramatic and unexplained break. In *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987), the BIA concluded that asylum determinations call for an examination of "the totality of the circumstances" in which no one factor "should be considered in such a way that the practical effect is to deny relief in virtually all cases," *id.* at 473, and "the danger of persecution should generally outweigh all but the most egregious of adverse factors," *id.* at 474; *see also In re Kasinga*, 21 I. & N. Dec. 357, 367–68 (BIA 1996) (applying *Matter of Pula* and holding same); *Hussam F. v. Sessions*, 897 F.3d 707, 718–19 (6th Cir. 2018) (per curiam) (summarizing BIA precedent and concluding that "failure to disclose that . . . passport was not obtained in the usual manner" could not "be reasonably termed the 'most egregious' of adverse factors"). Nevertheless, the agency has departed from this precedent by determining that the conditions that are the subject of each of its categorical bars are the only factors of importance in any circumstance in which

one of those conditions is satisfied. The agency explanation does not account for the sudden unimportance of the expressed considerations that drove its prior policy for decades, does not provide a reasoned explanation for disregarding such policy, does not meaningfully discuss the consequences of this shift on populations relevant to Congress's statutory purpose, and does not adequately explain what statutorily grounded objectives would be achieved by the shift. The agency's failure to consider these and other significant factors renders the Rule arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–27 (2016).

131. The Rule is also arbitrary and capricious because DHS and DOJ have failed to "examine[ ] [the] relevant data" in issuing it. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 311–12 (D.C. Cir. 2018) (alterations in original) (quoting *Carus Chem. Co. v. EPA*, 395 F.3d 434, 441 (D.C. Cir. 2005)). The agencies do not fully consider the effects of the Rule on asylum-seekers, as they fail to give any kind of estimate of the additional number or percentage of asylum-seekers who would be barred from asylum based on the mandatory bars and their serious reliance interests in the agencies' prior position.[4] *See Encino Motorcars*, 136 S. Ct. at 2125–27. DHS and DOJ instead unhelpfully note that "[t]he [proposed] expansion of the mandatory bars for asylum would likely result in fewer asylum grants annually" and allege that they are unable to provide any estimates of "the expected decrease" "because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application." 85 Fed. Reg. at 67256. The Departments further admit that "the full extent of the impacts [of the Rule] . . . is unclear." *Id.* at 67257.

132. The Rule also fails to offer any substantial evidence or reasoned explanation to support how its provisions will serve the stated purposes of more predictable results and judicial efficiency. *See* 85 Fed. Reg. at 67209 (asserting that the Rule will "create a more streamlined and predictable approach that will increase efficiency in immigration adjudications" (citing 84 Fed. Reg. at 69647)). In the absence of evidence to the contrary, it is difficult to see how proposing a categorical bar based

[4] *See* 84 Fed. Reg. at 69658. DHS and DOJ provide an estimate of the number of cases that will be impacted by a section of the proposed Rule that removes the provisions at 8 CFR §§ 208.16(e), 1208.16(e) regarding reconsideration of discretionary denials of asylum but do not provide any estimate for the number of cases affected by these other changes. *See also* 85 Fed. Reg. at 67256–57 (noting the absence of data).

on circumstances described in unreliable documents—including police reports, rap sheets, and probation reports—rather than actual convictions could avoid creating additional burdens for the already overwhelmed immigration court system by tasking adjudicators with additional, highly nuanced, resource-intensive assessments. The agency's failure to provide any evidence or explanation addressing how efficiency would be improved by a requirement for adjudicators to engage in mini-trials on the applicability of categorical criminal bars is arbitrary and capricious. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, 1690 (2013) (describing how the avoidance of "minitrials" "promotes judicial and administrative efficiency").

133. The Rule fails to offer any substantial evidence or reasoned explanation to support its conclusions relating to the "seriousness" or "dangerousness" of the offenses (or conduct) that are the subject of its automatic bars. For instance, the Rule's reliance on criminal history, recidivism, and their connection to "dangerousness" in general establishes nothing about the danger to the community associated with the specific offense of illegal reentry. *See* 84 Fed. Reg. at 69648; 85 Fed. Reg. at 67243. The same is true of the Rule's reliance on decade-old, non-targeted studies to support its bar on offenses involving criminal street gangs. 84 Fed. Reg. at 69649–50; 85 Fed. Reg. at 67225. This absence of substantial evidence or reasoned explanation renders the rule arbitrary and capricious.

134. Finally, the Rule also entirely fails to consider numerous important aspects of the problem. The Rule repeatedly states that material and foreseeable impacts associated with its novel constraints on asylum eligibility were "outside the scope of the rulemaking"—including the effect of the rule on the asylum system itself. *See* 85 Fed. Reg. 67244–45. The agency's failure to acknowledge and consider these matters renders the rule arbitrary and capricious.

THIRD CLAIM FOR RELIEF

Defendants failed to provide adequate notice and opportunity to comment under the APA

135. Plaintiffs incorporate and reallege the allegations above.

136. The APA requires a court to hold unlawful and set aside agency action that is arbitrary, capricious, or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

137. The APA also requires an agency proposing a new rule to provide public notice and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

138. The 30-day notice-and-comment period provided was inadequate in light of the proposed rule's evident complexity and potential for far-reaching impact. The Rule was also part of an improperly staggered rulemaking process, which prevented the public from understanding and commenting on the final regulatory regime. Further, the Agency did not respond adequately to public comments, repeatedly declaring that foreseeable impacts of the Rule—including "humanitarian concerns for asylum seekers" facing deportation to countries in which they face persecution—were "outside of the scope of this rulemaking." 85 Fed. Reg. at 67243. The Rule is therefore invalid.

FOURTH CLAIM FOR RELIEF

Defendant Wolf lacked the authority to issue the Rule under the Appointments Clause of the U.S. Constitution, the Homeland Security Act, and the Federal Vacancies Reform Act

139. Plaintiffs incorporate and reallege the allegations above.

140. The Secretary of Homeland Security is a principal officer of the United States whose appointment requires Presidential nomination and Senate confirmation. *See* 6 U.S.C. § 112(a)(1); *see also* U.S. Const. art. II, § 2, cl. 2.

141. Defendant Chad Wolf purports to serve as the Acting Secretary of DHS; however, he has not been confirmed by the Senate to hold that office and has no valid legal claim to the role.

142. The HSA mandates that, in the event of the "absence, disability, or vacancy in office" of the DHS Secretary, the Deputy DHS Secretary is first in the order of succession, followed by the Under Secretary for Management. 6 U.S.C. § 113(g)(1). After the Deputy Secretary and the Under Secretary for Management, the HSA allows the Secretary to "designate such other officers of the Department in further order of succession to serve as acting secretary." *Id.* § 113(g)(2).

143. Although Wolf's predecessor, Kevin McAleenan, attempted to invoke § 113(g)(2) to amend the order of succession on November 8, 2019, the GAO has since issued a decision concluding that the "incorrect official assumed the title of Acting Secretary at [the time of former Secretary Nielsen's resignation]" and that "subsequent amendments to the order of succession made by [McAleenan]

were invalid and officials who assumed their positions under such amendments, including Chad Wolf and Kenneth Cuccinelli, were named by reference to an invalid order of succession." *See* GAO Decision 1. The GAO's interpretation is correct.

144. Wolf's claim to the role of Acting Secretary fares no better under the FVRA. The FVRA states that a person serving as an acting officer may serve in the office "for no longer than 210 days *beginning on the date the vacancy occurs*," except under narrow circumstances. 5 U.S.C. § 3346(a)(1) (emphasis added).

145. The relevant vacancy occurred, at the latest, by April 10, 2019, the purported effective date of former Secretary Kirstjen Nielsen's resignation.

146. Wolf purported to assume the role of Acting Secretary of DHS on November 13, 2019, after the 210-day period set forth in the FVRA had passed. Both the proposed and final Rule were also issued well beyond the statutory time limit.

147. Because Defendant Wolf is performing the functions and duties of the Secretary of DHS without having been confirmed by the Senate, in reliance on invalid orders of succession, and far past the 210-day period set forth in the FVRA, he did not have valid authority to issue the Rule under the Appointments Clause of the U.S. Constitution, the HSA, and/or the FVRA.

148. The Rule, to the extent it relies on authority from DHS and/or Defendant Wolf, is thus invalid and should not be permitted to take effect.

FIFTH CLAIM FOR RELIEF

The Rule violates the Regulatory Flexibility Act

149. Plaintiffs incorporate and reallege the allegations above.

150. The RFA requires federal administrative agencies to analyze the effects on "small entities" of rules they promulgate, and to publish initial and final versions of those analyses. *See* 5 U.S.C. §§ 603–604.

151. Under the RFA, the court may set aside, stay, or grant other relief for agency action in violation of the RFA, *id.* §§ 601, 604, 605(b), 608(b), and 610. *Id.* 5 U.S.C. § 611.

152. The Rule is a "rule" within the meaning of the RFA. *Id.* § 601(2).

153. The RFA defines "small entities" to include small businesses, small nonprofit organizations, and small governmental jurisdictions. *Id.* § 601(6). Each of the Plaintiffs is a "small entity" within the meaning of the RFA and is directly affected by the Rule, which, among other things, will require them to devote substantial resources to addressing the new restrictions on asylum eligibility imposed by the Rule and will jeopardize their funding.

154. DOJ and DHS's regulatory flexibility analysis does not comply with the RFA because DOJ and DHS concluded that the Rule will not have a significant impact on small entities. In lieu of an adequate explanation, the Rule simply asserts that "[o]nly individuals, rather than entities, are eligible to apply for asylum," a statement that wholly ignores the impact of the Rule on Plaintiffs and other organizations that serve asylum-seekers. 85 Fed. Reg. at 67255.

155. The RFA requires DOJ and DHS to describe and estimate the number of small entities that would be affected by the Rule. 5 U.S.C. § 604(a)(4). DOJ and DHS did not do so and refused to include small nonprofit organizations affected by the Rule. 85 Fed. Reg. at 67255.

156. The RFA requires DOJ and DHS to describe "the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the [Rule] and why each one of the other significant alternatives to the [Rule] considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(6). Again, DOJ and DHS failed to describe any such steps and failed to consider the "stated objectives of applicable statutes," *id.*, including the INA, the Refugee Act, and the HSA. 85 Fed. Reg. at 67255.

157. As a result of the foregoing, the Rule's regulatory flexibility analysis does not comply with the RFA.

158. The Rule's regulatory flexibility analysis is also arbitrary and capricious because it does not reflect reasoned decision-making and fails to support its conclusions with substantial evidence.

159. The Rule is therefore unlawful and must be set aside. *See* 5 U.S.C. § 611; *id.* § 706.

SIXTH CLAIM FOR RELIEF

The Rule violates the Fifth Amendment's Due Process Clause

160. Plaintiffs incorporate and reallege the allegations above.

161. The Due Process Clause of the Fifth Amendment prohibits laws and regulations that fail to "give ordinary people fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). The requirement of fair notice applies in civil contexts just as in criminal. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212–13 (2018) (plurality opinion). Given the "grave nature of deportation," the "most exacting vagueness standard" applies in the immigration context." *Id*. at 1213.

162. The Rule is unconstitutionally vague. It fails to provide fair notice of the conduct that may result in a bar to asylum eligibility and invites arbitrary enforcement by immigration adjudicators.

163. For example, the Rule suggests that an asylum-seeker may be barred from eligibility if they are convicted of *any* crime the adjudicator "knows or has reason to believe" was committed in support, promotion, or furtherance of the activity of a criminal street gang. 85 Fed. Reg. at 67258–59 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii)). The Rule provides no description of what behaviors, associations, or statuses could lead an adjudicator to find that an asylum-seeker was involved in gang activity or that their conduct was in furtherance of the activity of a criminal street gang. Nor does it provide any guidance on the types of offenses or circumstances that may trigger such an inquiry, or any limitation on the evidence to which an adjudicator may look to make such a determination.

164. Similarly, the Rule allows adjudicators to determine whether a conviction amounts to a domestic violence offense (for purposes of triggering an asylum eligibility bar) and, even where the asylum-seeker has *not* been convicted, allows the adjudicator to determine that an asylum-seeker is barred from eligibility if the adjudicator "knows or has reason to believe" that the person engaged in battery or extreme cruelty involving a domestic relationship. *Id*. at 67258–60 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(vii), 1208.13(c)(6)(vii)). The Rule again provides no guidance for this assessment, including when such an assessment is appropriate; what factors should be considered in determining whether conduct amounts to domestic violence; and what standard should be applied.

SEVENTH CLAIM FOR RELIEF

The Rule violates the Fifth Amendment's Equal Protection Component

165. Plaintiffs incorporate and reallege the allegations above.

166. The equal protection component of the Fifth Amendment prohibits Defendants from denying equal protection of laws to persons residing in the United States. Official actions that reflect a racially discriminatory intent or purpose thus violate the Fifth Amendment's equal protection component. *See Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954), *supplemented sub. nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Even facially neutral policies and practices are unconstitutional if they reflect racial animus or discrimination. *Id*. at 266.

167. In the instant case, Defendants violated the Fifth Amendment because they acted with a discriminatory purpose based on race, ethnicity, and national origin in issuing the Rule. The Rule thus violates the guarantee of equal protection under the Fifth Amendment.

168. Defendants' discriminatory intent in promulgating this Rule is evinced by, among other things, the Rule's impact on non-white immigrants and DHS and DOJ's complete dismissal of and failure to contend with this disproportionate impact as falling "beyond the scope of [the] rule." 85 Fed. Reg. at 67226.

169. Moreover, the Rule was promulgated following years of repeated comments by President Trump and others within the Trump Administration reflecting racial, ethnic, and national origin-based animus, including referring to immigrants as "rapists," "druggies," and "killers" and comparing immigrants to rats and other pests.

170. Defendants have failed to articulate a compelling governmental interest justifying the promulgation of the Rule, and they have not tailored the Rule to address any legitimate interest.

171. Plaintiffs and the communities they serve will suffer severe harm as a result of the implementation of the Rule.

JURY DEMAND

172. Plaintiffs demand a jury trial on all counts triable by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

A. Hold unlawful and set aside the Rule under 5 U.S.C. § 706(2);

B. Declare the Rule arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedure as required by law, in violation of the APA, INA, and RFA;

C. Declare the Rule invalid for being co-issued by Defendant Chad Wolf, who lacked the authority to do so pursuant to the Appointments Clause of the United States Constitution, the HSA, and the FVRA;

D. Declare the Rule unconstitutional for violating the Due Process and Equal Protection guarantees of the Fifth Amendment of the United States Constitution;

E. Enter a preliminary and permanent nationwide injunction, without bond, enjoining Defendants, their officials, agents, employees, and assigns from implementing or enforcing the Rule;

F. Stay the implementation or enforcement of the Rule;

G. Award Plaintiffs reasonable attorneys' fees and costs pursuant to 28 U.S.C. § 2412; and

H. Grant any other and further relief this Court may deem just and proper.

Respectfully submitted,

DATE: November 2, 2020

/s/ Naomi A. Igra

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY et al.,

Defendants.

Case No. 20-cv-09253-JD

DECLARATION OF ETAN NEWMAN

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I, Etan Newman, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction.

2. I serve as an Immigration Attorney and Co-Director at Pangea Legal Services ("Pangea"), where I conduct intake consultations and represent individuals facing removal proceedings, in addition to coordinating Pangea's appellate and federal litigation efforts. I have worked at Pangea since 2016.

I. Pangea and Our Mission

3. Pangea is a 501(c)(3) non-profit corporation, with its main office in San Francisco, California, and an office in San Jose, California. Pangea is a small nonprofit with gross receipts of less than $1.5 million for 2019. Pangea's mission is to stand with immigrant communities and to provide services to those communities through direct legal representation, especially in the area of deportation defense. Pangea is dedicated to protecting the fundamental right to move, by providing direct legal representation, policy advocacy, education, and legal and community empowerment. In addition to direct legal services, Pangea is committed to advocating on behalf of the community it serves through policy advocacy, education, and legal empowerment efforts. Pangea's efforts focus primarily on Northern California's Bay Area; however, Pangea collaborates with other immigration services organizations around the country and has represented clients in immigration court in other states in some instances.

4. Pangea was founded to help address the critical need for the representation of detained and non-detained individuals in the San Francisco immigration court system. That need arises from a number of factors, including (but not limited to) the complexity of immigration law, the grave negative consequences that may result from deportation, and the fact that many immigrants in removal proceedings are eligible for relief or protection under the law. Pangea knows that large numbers of asylum seekers, particularly early in the application process for asylum, are unrepresented. These *pro se* applicants – many of whom do not speak English or even another common language such as Spanish where there are available translators – have very difficult times

filling out the I-589 Form in English. We have also seen that people representing themselves *pro se* have a much lower success rate on their applications than those who are represented or have the assistance of counsel. This is part of the reason that Pangea's mission is to provide legal services to as many immigrants and asylum seekers as possible.

5. Pangea provides a number of immigration legal services to its clients, including: representing noncitizens completing affirmative asylum applications and other applications for relief; conducting intake consultations and referrals for noncitizens who need attorneys; representing noncitizens in immigration court removal proceedings; providing on-call, same-day legal assistance to noncitizens who are arrested by U.S. Immigration and Customs Enforcement ("ICE") in the Bay Area; representing noncitizens in federal litigation, including in habeas corpus petitions and appeals; and, recently, representing individuals in post-conviction relief petitions in state criminal court.

6. Pangea provides direct legal services to over 400 clients annually. The focus of our direct representation is deportation defense, and nearly all of our clients are in removal proceedings. At present, almost 250 of Pangea's clients have asylum applications pending in either immigration court or at United States Citizenship and Immigration Services ("USCIS"), and dozens of others are either eligible for asylum, but have yet to submit an application, or have been denied asylum and are on appeal. Pangea represents these clients, both detained and non-detained, in their bond proceedings, removal hearings, before ICE and USCIS officials, and in related legal actions in state and federal court. Pangea also provides in-depth assistance to *pro se* asylum applicants, a newly launched program that has already served approximately 10 clients since its inception in 2020. We seek to empower our clients in their communities to become immigration advocates themselves and share their stories. Pangea also advocates for policy change on behalf of migrants at the local, state, national, and international levels.

7. In addition to providing direct legal services and *pro se* assistance, Pangea advocates for and works to empower noncitizens by engaging in policy advocacy, education, and legal empowerment efforts. Pangea's community education efforts include, among others, providing Know-Your-Rights ("KYR") presentations to immigrant communities, which were attended by hundreds of individuals annually prior to such gatherings being stopped by the COVID-19

pandemic.

8. Pangea also provides training to other attorneys to equip them to provide further services to noncitizen communities. Pangea works closely with at least one other similarly situated non-profit organization, providing case supervision and assistance as needed. Pangea's attorneys also frequently participate in trainings hosted by organizations such as the Public Law Institute, which are open to other attorneys and to the public.

9. Pangea also participates in local and statewide advocacy for immigrants' rights. This includes partnering with coalitions to advocate for the enactment of legislation that protects immigrant communities from detention and deportation. As part of these efforts, Pangea's Community Forum Project focuses on creating forums for clients to share experiences and common fears without feeling targeted or exposed.

10. As part of our advocacy work, Pangea submitted a comment during the comment period on the Rule challenged in the Complaint, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (December 11, 2020) ("Rule"). Pangea did so despite the egregiously unrealistic 30-day window the agency allowed for comment submissions due to the exceedingly detrimental effects on the access of the migrants, immigrants, and refugees that Pangea serves to asylum. This took significant resources for Pangea to respond to particularly in light of the ongoing COVID-19 pandemic when Pangea's staff had been working from home since the pandemic began, which presented unprecedented difficulties in our immigration advocacy and direct representation work, particularly in advocacy for detained clients. Staff faced losses in productivity and increased childcare and similar burdens as they attempted to provide competent representation to clients without access to office technology. Jails and ICE detention facilities are COVID-19 hotspots, which caused Pangea to invest significant resources in advocating for clients' immediate release, including filing federal litigation, to prevent loss of life. In short, the global pandemic had a significantly deleterious impact on Pangea's ability to respond to the proposed regulations on the incredibly short notice. Yet, despite all of the other pressing needs, because of the enormous impact the then-proposed Rule would have on our work and our clients, Pangea staff and law student interns spent approximately 35 hours or more researching, preparing,

and submitting a fourteen page comment. This was time that our staff and interns would otherwise have spent on direct client representation. Even so, because of the multiple and conflicting pressures on staff time and the overwhelming nature of the changes in the Rule, Pangea's staff was unable to fully and comprehensively address every aspect of the Rule in its comment, particularly given incredibly abbreviated comment period.

II. The Rule

11. The Rule challenged in the Complaint, Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (October 21, 2020) ("Rule"), would irreparably harm Pangea in multiple ways, including by frustrating Pangea's mission to serve as many immigrants lawfully seeking asylum as possible. The Rule is a vast, sweeping revision of the entire asylum framework as it has existed for the past forty years, and Pangea has only thirty days – over the holidays – to respond to it. Pangea cannot wait for the Rule's effective date to start rewriting and updating our materials as the changes are so large and so deleterious to our clients, we need to be ready on Day One, and to the extent the administration starts applying the Rule before its effective date, Pangea will have to respond even sooner. This would require some of our staff to give up their holiday time off – richly earned in light of the pandemic and the strains in still representing our clients through the pandemic – to prepare for this new Rule.

12. As described in the paragraphs below, the Rule would significantly limit the overall number of clients Pangea is able to serve, placing the organization in an impossible position: it would need to divert staff time and resources towards raising more funds to serve the same number of clients, or reduce the total number of clients it serves to fit within the organization's current budget. Both of these take valuable resources and staff time away from our mission of serving immigrants and asylum seekers.

A. Pretermission

13. Under the new Rule, Immigration Judges have the ability to "pretermit" an asylum application if they decide that the asylum seeker has no claim on the face of their asylum application. The asylum seeker then has ten days – a woefully insufficient time for people who do not understand immigration law and, often, do not speak English – to appeal a decision that may be unclear and that

they will likely not understand. As a result of the Rule, Immigration Judges could effectively deny migrants their right to seek humanitarian protection in the United States without ever having their day in court.

14. For many migrants, English is not their first language; they lack access to an attorney and are forced to represent themselves *pro se*. Additionally, asylum law is a thicket of highly complex legal concepts that are challenging for any layperson or even non-specialist lawyers. In our experience as immigration attorneys, asylum seekers who attempt to complete the I-589 application *pro se*—especially when they are detained—have extreme difficulty overcoming these barriers. First, only an English-language version of the I-589 is accepted in immigration court. For those who are not literate in English or are learning the language, completing a legal document in a manner acceptable to a court is incredibly challenging, and the new version of the I-589 implemented by the Rule has twenty pages of instructions, nineteen pages of form, and a long series of convoluted questions. Often the best option for asylum seekers in detention is obtaining the assistance of a bilingual fellow detainee, a complete stranger with no duty to keep personal life details confidential. Second, asylum law is a complex web of regulations, statutes, and case law, such that it is incredibly difficult for a non-attorney to present a coherent claim without adequate time and assistance. For example, without legal assistance, our experience is that many *pro se* applicants list on the I-589 form only the most recent harm that happened to them, or only the events that they feel comfortable sharing, even though other events or forms of harm they have experienced are more relevant to their claim. We have frequently met asylum seekers who had viable asylum claims—some of whom ended up winning with Pangea's representation—who struggled initially to articulate what had happened to them using the legal terminology appropriate to the immigration court.

15. Moreover, among the thousands of asylum seekers that Pangea's staff has represented, screened, provided advice to, and conducted workshops for, it is our experience that the majority have typically endured severe trauma, including child abuse, beatings, detention, rape, torture, death threats, and witnessing the abuse and murder of others. The clinical research shows, and our experience bears out, that it is an incredibly challenging task for these individuals to share delicate and personal past traumas without adequate support. Indeed, without a supportive client-

centered, trauma-informed approach, the process of an applicant sharing their story may be nearly impossible, if not at the very least, deeply retraumatizing. This Rule will certainly result not only in the denial of worthy claims for protection, but will also victimize asylum seekers, returning them to countries where many will face severe abuse, beatings, rape, kidnappings, and even death. Pangea has partnered with immigration attorneys whose clients were killed by the persecutors they fled after they were denied asylum, withholding of removal, and protection under the Convention Against Torture and deported back to the countries from which they escaped. Indeed, reports by non-governmental organizations have documented hundreds of cases in which deportees were killed or tortured after being deported. This is not a so-called "parade of horribles;" it is the actual lives of actual refugees and asylum seekers.

16. Many Pangea clients who have successfully won asylum would have instead been deported to the countries where they fear severe persecution were the Rule's provisions regarding pretermission in place when they filed their asylum application. For example, one of Pangea's clients submitted her I-589 application before she found Pangea, when she was still *pro se*. On the application, she responded "no" to the question whether she had ever experienced threats or harm from anyone in the past. In fact, the client had been gang-raped by multiple perpetrators, but she was too scared and traumatized to report this experience on the form. She was so traumatized that once Pangea began representing her, her attorney had to meet with her at the hospital in the presence of her therapist in order to draft her declaration. At her asylum hearing, the immigration judge ruled that her mental health condition, including severe post-traumatic stress disorder, required safeguards to allow her to testify. The judge ultimately granted asylum after only five minutes of testimony and the attorney for the Department of Homeland Security waived appeal.

17. Another client of ours experienced years of sexual abuse at the hands of her father. As incest is a particularly painful and shame-inducing type of persecution, our client was not comfortable telling anyone about her trauma until well over a year into our representation of her. Therefore, this claim was not part of her initially submitted I-589 application or her first declaration submitted to court. Our client received a year of intensive therapy before she was emotionally and psychologically prepared to discuss the details of what had happened, which were integral to her

ultimately providing the testimony needed to show she qualified for asylum.

18. A third client of ours had been persecuted as an indigenous woman in her home country, which was the claim proffered on her initially submitted I-589 application. After she began having regular meetings with a Pangea attorney to discuss her life story in preparation for her hearings, and after she began to be able to trust our attorney, she revealed several more forms of persecution she had suffered on account of other protected grounds: she had endured physical and sexual abuse by her father as a child and rape as a minor by a former partner. She also revealed that she was a lesbian who hid her sexuality and relationship with her partner for fear of harm. This targeted violence constituted severe persecution under existing case law, and formed the basis of additional grounds of protection.

19. A fourth client was also an indigenous woman who fled gang-based persecution in Guatemala. In her first interviews with her Pangea legal representative, she had to cut meetings short as she was extremely traumatized by the violence she had experienced and could only attest to threats she endured by a gang leader in her initial I-589 filing. After more than a year and a half of intensive psychotherapy and dozens of meetings with her attorney, was she was able to trust her attorney enough to detail the severe physical and sexual violence she suffered as a child and young adult because of her race. At her individual hearing, she submitted a detailed declaration explaining additional details and claims that she had not been psychologically able to present on her I-589. Her claim was so strong that the immigration judge granted asylum after approximately 30 minutes of testimony and the attorney for the Department of Homeland Security waived appeal.

20. Under the Rule, it is likely that none of these clients would have had the opportunity to process their trauma, access mental health services, feel comfortable telling these formidable truths to their legal representatives, and ultimately present their testimony to the immigration court.

B. Nexus

21. Under the guise of simplifying the "nexus" requirement of asylum eligibility, the Rule essentially mandates the categorical rejection of certain claims. While the rule is written to say that "the Attorney General, in general, will not favorably adjudicate the claims of aliens who claim persecution based on" a list of bars, the Rule provides no guidance as to what claims would be the

exception or any way for an asylum seeker to prove that they qualify. Thus, this section of the Rule *de facto* categorically excludes certain acts of persecution from being "on account of" a protected ground. The categories the Rule describes include: ones where "interpersonal animus" is present; claims that deal with resistance to gangs or terrorists; claims in which the wealth or perceived wealth of the victim is a reason for persecution; perceived, present, or past gang membership; and persecution based on gender. This last category would exclude claims for fear of honor killings or Female Genital Mutilation, two categories that years of precedent have recognized as valid grounds for granting asylum.

22. Pangea has represented clients who were persecuted for reasons that appeared to include "interpersonal animus" but were in reality part of a larger pattern of persecution on account of a protected ground. For example, one client from Haiti was a health care provider who gave out free exams through an NGO program after an earthquake devastated his country. He had a dispute with another professional over that professional's theft of NGO funding. Our client brought this issue to the attention of a local court, but the other professional paid a bribe to the court to dispose of the case. Pangea's client went on the radio to denounce the other professional and the corruption in the judiciary, and was subsequently threatened and beaten by police. Although the original dispute was an interpersonal one, Pangea's client was targeted and beaten for expressing his anti-corruption political opinion, which has long been recognized as a valid asylum claim under binding case law.

23. Pangea also represented an indigenous Guatemalan family who was involved in a land rights dispute in Guatemala. In Guatemala, there is a long history of discrimination and violence against indigenous people that continues to this day, including many instances of *Ladinos* (people of European descent) violently forcing indigenous people off their land. In our clients' case, as part of the effort to take the land, *Ladinos* beat and killed many indigenous people in the town, and attacked one of our clients and injured both of his arms. Although the persecutors' motivations could have been perceived as desiring "wealth" or "interpersonal animus," in reality our clients were targeted *because* they were indigenous. An immigration judge granted them asylum.

24. Many of Pangea's clients have also experienced gender-specific persecution that constituted the basis for their successful applications for asylum, claims that the Rule's redefinition

of nexus would foreclose. One of our clients suffered decades of harsh abuse at the hands of two different male domestic partners. She tried to do many things to escape the violence, including going to the local family court and seeking a restraining order. The restraining order was completely ignored by her partner and not enforced by the police, due to the well-documented reality that the judicial and law enforcement system in her country did not take familial gender-based violence seriously, and that the state was unable and unwilling to protect her. Despite it all, she made her way to the United States on her own and presented herself at the border for protection. She won asylum a few years later.

25. Another client was subject to years of physical and sexual abuse at the hands of her father, with all five of her children being a product of incest. Her daughter, who was also an asylum seeker, had also been sexually abused by her father/grandfather. Again, due to pervasive and widely documented patriarchal attitudes among state actors in their country of origin, these clients could not receive protection from their government despite this extremely severe harm. Both received grants of asylum in the United States. Under the new Rule, because of the ban on gender-specific nexus framing and related barriers to protection, these women would be barred from asylum in spite of the extreme suffering they experienced and their governments' manifest unwillingness to aid or protect them.

C. Particular Social Group

26. The Rule radically restricts what groups are cognizable as "particular social groups" under asylum law. It prohibits a favorable adjudication of a particular social group asylum claim, based on issues wholly unrelated to that particular social group's cognizability, such as: "presence in a country with generalized violence or a high crime rate," and "interpersonal disputes of which [the government is]…unaware or uninvolved," among others. In so doing, the Rule gives adjudicators the power to use irrelevant facts to deny asylum claims, facts that have no bearing on whether a person is a member of a socially distinct group as understood in case law, or whether they have suffered persecution on account of their membership in that group. Singling out migrants fleeing persecution from "a country with a generalized violence or high crime rate" as prohibited from favorable adjudication on the basis of their valid particular social group asylum claim seems to

directly target Central American and Mexican asylum seekers.

27. The Rule also requires asylum seekers to list their particular social group on the I-589 form. Asylum seekers are very unlikely to understand what this complicated area of law means. Moreover, under the Rule a particular social group must be immutable, "socially distinct," and "particular," legal terms which require evaluation of country conditions evidence. In Pangea's experience, it often takes months or years of learning the specific facts of a client's case, researching the country conditions of the country in question, and in some cases obtaining opinions and reports from country conditions experts, to adequately identify and explain the relevant particular social group in terms that meet the requirements and match the facts in a client's case. Yet under the Rule, an asylum seeker – with no legal training and with limited ability to speak English – who fails to adequately identify a particular social group may find their valid asylum claim prematurely pretermitted.

D. *De Facto* Bars under the Guise of Discretion

28. The Rule also imposes new *de facto* bars to asylum by suggesting or requiring that Immigration Judges deny qualified asylum applicants based on discretion—often for reasons that are understandable or unavoidable for the typical asylum seeker.

29. First, under the Rule, an adjudicator would have the discretion to deny asylum to any applicant who enters or tries to enter the United States without inspection. In addition, any applicant who spends more than 14 days in a third country while *en route* to the United States could be barred from asylum. As a corollary, the Rule gives adjudicators the ability to reject an asylum claim if an applicant used or attempted to use false documents to come into the United States, unless they did not pass through any other country other than their country of origin in their journey to the United States. The effect of these rules is to deny asylum to individuals who often cannot access valid travel documents because they rightfully fear an oppressive government. Essentially, the Rule makes it virtually impossible for many asylum seekers to actually win asylum, by virtue of how they fled persecution in their country of origin, unless they have the significant money and simple luck of being able to afford to fly directly to the United States from their country, something most of Pangea's clients do not have.

30. Through its redefinition of discretion, the Rule practically eliminates exceptions to the one-year filing deadline. The ramifications of eviscerating these exceptions to the one-year bar would be devastating to many asylum seekers; numerous individuals face formidable, extraordinary circumstances that prevent them from pursing their asylum applications earlier, including trauma-induced post-traumatic stress disorder, poverty, ineffective assistance of counsel, lack of notice, and affirmative mis-advice from others. Additionally, the Rule would prevent asylum applicants from presenting legally recognized valid changed circumstances, including changed country conditions in their nation of origin or a "coming out" experience for LGBT asylum seekers, to overcome the one-year bar.

31. Further, the Rule mandates the rejection of asylum claims, absent exceptional circumstances, if an applicant did not file taxes before seeking asylum. This is an unreasonable and undue burden to place on applicants; moreover, there is no correlation between the likelihood that a person experienced persecution in their country of origin and the payment of taxes. Additionally, many asylum seekers have no choice but to work in the informal economy, because they cannot obtain work authorization, especially now, in a climate where the Administration continues to further restrict migrants' eligibility for this benefit. Indeed, the government recently enacted new restrictions on asylum seekers' ability to obtain work authorization. For migrants who are still eligible, the regulations delay their ability to file an application for employment authorization for a year after applying for asylum. Since they are unable to obtain work authorization and yet are often desperately poor and need to feed their families, it makes sense that many would work in the informal economy, where taxes were not withheld or paid on their income. Moreover, in Pangea's experience, most *pro se* asylum seekers without representation do not know how to file the complicated tax forms that are required.

E. Political Opinion

32. The Rule also radically changes the definition of "political opinion" as a protected ground. The Rule states that political opinion claims can only succeed when the asylum applicant has acted in "furtherance of a discrete cause related to political control of a state or a unit thereof." By redefining political opinion so narrowly, the Rule forecloses the claims of feminist political

activists and any civil society activists who participate in liberation movements that are not directly related to "political control of a state." Some of the most powerful and integral past and ongoing social movements would not fall within this restrictive definition of political opinion, including the past and present United States civil rights movements for racial equality, the gay and trans liberation movement, labor movements, the ongoing climate justice movement, and many others.

33. This new definition of "political opinion," had it been in place at the time they applied for asylum, would have resulted in several Pangea clients being removed to a country in which they would have been persecuted for reasons clearly political in nature.

34. One Pangea client worked in the Ministry of Education in Afghanistan and was targeted by the Taliban for his perceived promotion of Western education and science. Armed Taliban loyalists followed him and sent a letter to his family threatening to kill him. Although he had undertaken no efforts related to "political control of a state or a unit thereof," his perceived pro-Western views were clearly seen by Taliban officials as politically threatening. He was granted asylum by the Asylum Office on the basis of his imputed political opinion.

35. Other Pangea clients have been targeted for their involvement in LGBTQ and gay-rights movements. One Pangea client who is transgender went to LGBT pride marches where she was insulted, had items thrown at her, and was beaten by police. Although she suffered persecution on account of her pro-LGBT activism, the Rule would deny her relief on the basis that her actions had nothing to do with "political control of a state."

F. Persecution

36. The Rule sets forth such a narrow definition of persecution as to exclude many cases in which a person is likely to have their life or freedom threatened if they are forced to return to their home country. The Rule does not discuss the long-standing principle of cumulative harm, and gives the impression that applicants who have suffered several discrete beatings or detentions would likely fail to meet the new requisite showing for persecution. This would defeat deserving asylum claims, sending people with legitimate fear of future prosecution back to places where they will suffer harm and possibly torture.

37. One Pangea client from Nigeria was told she would have to undergo Female Genital

Mutilation ("FGM"), and was threatened, shoved, and told she would have to have a forced female circumcision when she became pregnant. She went into labor in the second trimester as a result of the psychological impact of these threats, and lost her baby. Given the nature of FGM and forced abortion and the severe psychological impact these threats had on our client, an immigration judge found she had suffered past persecution and granted asylum. The attorney from the Department of Homeland Security waived appeal. Yet the new Rule, in significantly limiting the standard for "persecution," would likely result in an asylum denial for a similarly-situated applicant in the future.

G. Internal Relocation

38. The Rule's new internal relocation standard is so high that any migrant seeking asylum, withholding of removal, or Convention Against Torture relief will find its threshold impossible to satisfy. The Rule mandates that an immigration judge consider "the applicant's demonstrated ability to relocate to the United States in order to apply for asylum," and places the burden on an asylum applicant to show they cannot internally relocate if they have suffered past persecution by a non-state actor. Long-standing principles for analyzing the internal relocation requirement—which are undone by this Rule—emphasize the reasonableness of internal relocation in light of the social and economic circumstances of the applicant and the country, for the precise reason that safe internal relocation is irrevocably tied to a person's ability to safely reside long-term in their new location. The Rule, by eliminating the requirement that an adjudicator consider social circumstances such as health and family ties and instead highlighting an applicant's ability to reach the United States, shifts the focus to whether a person can immediately reach a temporarily safe location while completely ignoring the question of whether they can remain there. The Rule also ignores that most asylum applicants make an arduous and dangerous journey to the United States precisely because they do not believe there is anywhere in their home country that they could permanently and safely reside. This Rule in practice would deny claims for asylum, withholding of removal, or protection under the Convention Against Torture because an asylum seeker cannot prove a negative: that is, that there is not a location, however remote, in their home country in which they could potentially find safety, regardless of their continued instability and fear for their lives. This result is inhumane.

39. In practice, the Rule's new burden on internal relocation would require attorneys at Pangea to spend dozens of additional hours of research in each case. While the longstanding rule on internal relocation correctly recognized the presumption that individuals who have suffered severe past persecution by forces the government is unable or unwilling to control are unlikely to find permanent safety elsewhere in a country controlled by the same government, the new Rule turns that presumption on its head. In almost every case, therefore, Pangea attorneys will have to research and present extensive country conditions evidence that would not have previously been required. A related rule makes this even more difficult, since Immigration Judges would, under that rule, be allowed to disregard country condition evidence that is not from the Department of State including reports by Human Rights Watch, Amnesty International, and other similar non-governmental organizations.

H. Firm Resettlement

40. The Rule mandates that the firm resettlement bar be redefined to include those who are not firmly resettled and shift its burden of proof from the government to the applicant; if a migrant lived or could have lived in permanent or non-permanent legal status in a different country for a year or longer, the applicant qualifies as being firmly resettled, despite their continued displacement, creating a permanent bar to their asylum application. The Rule also creates a new *de facto* bar which prevents the majority of migrants who spent two weeks in any other country on their way to the United States from asylum eligibility even if they were delayed by kidnapping, helping their children or sick relatives, or if they had to walk long distances through dangerous areas. The reality on the ground in Mexico shows how unsafe it can be for immigrants. As of May 13, 2020, there are at least 1,114 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to return to Mexico by the Trump Administration's Remain in Mexico policy. Among these reported attacks are 265 cases of children returned to Mexico who were kidnapped or nearly kidnapped.

I. Frivolousness

41. The Rule radically redefines frivolousness, stating that "if knowingly made, an asylum application would be properly considered frivolous if the adjudicator were to determine that

it included a fabricated material element; that it was premised on false or fabricated evidence; that it was filed without regard to the merits of the claim; or that it was clearly foreclosed by applicable law." Once a finding of frivolousness is made, it may not be waived. The complexities of asylum law make it impossible for many of these individuals to self-assess their own *prima facie* eligibility for a meritorious asylum claim or to know if their claim might be foreclosed by applicable law such as a regulation or precedential decision, in English, that they may not be able to read or find. Asylum seekers should not be penalized for the very real fear of potential harm if they are returned to their country based on their inability to understand the increasingly opaque U.S. asylum system.

42. Under this new definition, Pangea may also be forced to choose between our ethical obligations and our clients' interests. The existing regulations covering professional conduct state that a representative is subject to disciplinary sanctions if they "engage in frivolous behaviors" by submitting applications that have no merit. Representatives are permitted to put forth a "good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." The model rules of professional conduct permit advocates to make good faith arguments in support of their client's position, even if the advocate believes the client would not prevail under existing law. Threatening to impose a permanent bar on applicants who put forth claims that challenge existing law – those claims that are foreclosed under current law – deters representatives from putting forth creative and untested arguments. These regulations place representatives in the untenable position of needing to fulfill their ethical obligations to zealously represent a client by making creative arguments on their behalf, including for the purpose of arguing to expand the law, but risking potentially subjecting their client to the permanent bar. Pangea will also have to explain to our clients, in detail, the frivolousness ban and the risks of making arguments to extend the law. This is a detailed and complex area of law, and forcing Pangea to make these explanations will take a significant amount of the time and may foreclose our ability to make arguments for expansion of the law since, practically, it may be difficult for a client to understand the legal principles involved and make a fully-informed decision about whether to make those arguments.

43. Pangea has done hundreds of consultations with noncitizens who—because of funding or staff resource limitations—we have been unable to take on as clients. Nevertheless, we

have given these individuals advice about the strength of their asylum claim, the process for applying for asylum, and how to protect their rights. If this new Rule is allowed to come into effect with its radical changes, that advice is in some cases now erroneous and may actually prejudice the noncitizen, but it is practically impossible and would take hundreds of hours for Pangea to comb through the hundreds of consultations we have done, identify the ones in which our advice, under the new Rule, could prejudice the client, and try to contact them to re-advise them based on the change.

44. To the extent any of the Rule is retroactive – and a recent memorandum from the head of EOIR to all immigration judges urges them to apply unidentified portions of the Rule to currently-filed cases on the assertion (with which Pangea stringently disagrees) that they are just clarifications of existing law[1] – Pangea will have to expend significant unexpected resources on service to clients it has already accepted to revise or conform their asylum applications, applications for withholding of removal, and protection under the Convention Against Torture to this current Rule. For example, in some cases Pangea has already spent dozens of hours preparing and submitting detailed declarations, briefs, and supporting evidence in pending cases where hearings have been rescheduled or postponed due to COVID-19. Pangea already has obligations to these clients, and Pangea had relied on the current state of the law not completely changing when it accepted these clients. The work of revising and supplementing, often extensively, our clients' applications or the supporting materials in response to this Rule will take resources that cannot be recouped and that, absent this sweeping change, could otherwise have been spent serving additional clients.

IV. Harm to Pangea

45. It is hard to overstate the impact of this Rule on Pangea, our staff, our work, and our finances. In short, the Rule will completely upend our work and frustrate our mission; indeed, the

[1] Memorandum from James R. McHenry III, Director to All of EOIR, "GUIDANCE REGARDING NEW REGULATIONS GOVERNING PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL AND CREDIBLE FEAR AND REASONABLE FEAR REVIEWS" Dec. 11, 2020 available at: https://www.justice.gov/eoir/page/file/1344511/download ("As detailed in the NPRM and the final rule, many parts of the rule merely incorporate established principles of existing statutory or case law into the regulations applicable to EOIR. Accordingly, nothing in the rule precludes the appropriate application of existing law—independently of the rule—to cases with pending asylum applications").

Rule has already begun to impact our staff and resources. The non-exhaustive list below provides a sample of the ways this Rule has already begun—and will continue—to harm Pangea.

46. Under the new Rule, Pangea will have to greatly expand our intake process. Since a client's case can be pretermitted if their I-589 does not set forth a *prima facie* case, we will have to obtain all of the information needed for such a case quickly and up front. We will have to revise our intake forms and attorney notes sheets. This in itself will take dozens of hours.

47. Pangea attorneys will also have to completely alter the way we obtain information from clients. Our staff undergo frequent trainings from experienced mental health professionals on working with traumatized clients. Those trainings universally emphasize the importance of building trust over a period of time with a client before addressing the most sensitive aspects of their past. Accordingly, Pangea's practice has been to obtain only the limited biographic and other information necessary to decide the viability of a client's claim in the first few meetings, and to wait until a strong attorney-client bond is formed before delving into the detailed facts of a client's case. The new Rule makes this trauma-informed approach to representation impossible. Instead, Pangea attorneys will be forced to obtain much more detailed and sensitive information in the first meetings. This will be particularly difficult for our clients who are children, and for clients who have suffered trauma, particularly sexual trauma, and who may be suffering from mental illness such as Post Traumatic Stress Disorder. Yet, the stakes for doing so are incredibly high because if the application is insufficient it could be pretermitted and if it is found to be frivolous, the client could face a permanent ban. Pangea's attorneys will be forced to re-traumatize our clients before a secure and trusting attorney-client relationship is developed in an effort to make sure they are not deported to persecution.

48. This new approach to case development will not only harm our relationships with our clients, but will also negatively impact the mental health of our own staff. Pangea currently spends thousands of dollars each year contracting with mental health professionals to run trainings and group therapy sessions for our staff, in order to support staff in dealing with the vicarious trauma that is inherent in working with asylum seekers. Yet if Pangea attorneys are forced to talk about extremely traumatic past experiences even earlier in the representation—before clients or attorneys

are ready to do so—we can expect even more secondary trauma and burnout among our staff. To support our staff's well-being, we will have to increase the number of trainings and mental health resources available, costing the organization additional thousands of dollars annually.

49. Spending this much time developing each case at the outset will also limit the number of people that we can serve, frustrating our mission of providing high-quality deportation defense services to as many immigrants as possible. This Rule will force Pangea to spend at least double the time and resources on each case. Given current extreme backlog in immigration court cases, we will need to fully work up the case once when the I-589 is filed and then work up the case again with new country conditions information, declarations, and potentially new particular social groups in advance of a future hearing, which could be years down the line. This doubling of effort – and cost – is not something Pangea can readily recoup.

50. Under the new Rule, the number of individuals potentially subject to the various new bars to asylum eligibility would increase dramatically. Consequently, Pangea's staff would have to expend more time and resources at the outset of each case to determine whether any of the asylum bars could be triggered and to assess the potential impact. For example, the new I-589 form now asks questions about taxes and Pangea would have to help some clients amend and file tax returns prior to filing the I-589 so that our clients can truthfully answer the question about taxes without damaging their chances for asylum. We will also have to spend hours obtaining tax and employment records and ascertain whether clients who did not file taxes in the past were actually obligated to do so, or were excused from doing so based on their income or for some other reason. Tax advice is far afield from Pangea's area of expertise and so Pangea would either have to train someone on staff on taxation law or expend scarce resources to hire a tax law expert, expenditures that are unnecessary under current law.

51. Moreover, the new Rule's bars to asylum eligibility would adversely impact Pangea's ability to represent families. Pangea's current clients include many individuals seeking asylum as a family unit. At present, if an individual is granted asylum, their spouse and children already in the United States who they included on their asylum application may also be granted asylum, and they can file a petition to bring remaining eligible family members not in the United States to the United

States. Unlike asylum, withholding of removal does not provide any relief for an eligible individual's family members, whether they are in the United States or in another country. If a parent is suddenly subject to one of the Rule's expanded asylum bars, and thus forced to seek withholding of removal only, they will no longer be able to ensure that their children will be able to obtain protection in the United States, regardless of whether they are granted withholding of removal. Instead, if their children are still in their home country, they will have to come to the United States and seek asylum on their own, likely as unaccompanied children. If their children fled to the United States with them, they will need to establish their own eligibility for protection, regardless of their age. Often, Pangea is able to present a single case on behalf of such families, because the children's claims are treated as derivative of their parents' claims. However, if parents were rendered ineligible for asylum under the new Rule, their children would no longer have a derivative claim and their cases could not be combined. Pangea would thus have to expend its already-limited resources to handle all such newly individualized cases for current clients and/or apply for additional grants and funding. This decoupling of Pangea's current cases would also impact its ability to take on new clients.

52. This Rule is a complete rewriting of decades of precedent related to asylum and immigration law. Fundamental concepts such as nexus, persecution, discretion, particular social group, and political opinion are being drastically changed. This is the largest change in this area of law in almost twenty-five years since Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) in 1996. The added complexities posed by the new Rule will require the Pangea staff to revise – and in many cases completely rewrite – all current training materials, including in connection with recent programming launched by Pangea to provide assistance to *pro se* asylum applicants. The Rule will also require Pangea to revise – and in many cases rewrite – its training templates and spend more time educating *pro se* applicants on the nuances of the Rule's many different requirements. All of the previous training materials and Know Your Rights materials will have to be changed as well. Given the breadth of the changes, Pangea estimates it will take months to complete the revisions.

53. Pangea has already begun to divert substantial time and resources to training its staff

and attorneys on the many provisions of this new Rule, particularly given all of the areas of law that have been changed. Pangea attorneys have already spent hours reading through the hundreds of pages of the proposed and final Rule, and have written summaries of its provisions to share within our staff. Once the Rule goes into effect, our attorneys will have to completely relearn fundamental areas of the law and reevaluate their instincts honed by years of practice. Our attorneys will have to spend dozens of hours in trainings and webinars on how the new Rule is being implemented and interpreted by adjudicators, to ensure that we can properly advise and represent our clients.

54. All form briefs and templates will need to change. For example, Pangea's practice in the past has been to submit an extensive annotated table of contents ("ATOC") in each asylum case, in order to highlight the most important passages in corroborating evidence and country conditions submissions for the adjudicator. Compiling and annotating each ATOC takes at least 10-15 hours. In the past, Pangea has been able to reuse or make minimal updates to ATOCs used in past cases that raise claims substantially similar to the one at hand. Under the new Rule, each ATOC will have to be drafted anew to specifically address the new requirements of the Rule regarding, for example, nexus, persecution, political opinion, particular social groups, and internal relocation. This will take Pangea attorneys dozens of hours that could have been spent representing additional clients. Furthermore, given the sea change in asylum law, every I-589 form and declaration submitted to immigration court or the asylum office will require multiple rounds of reviews by other attorneys in order to ensure that it satisfies the new Rule. Pangea will also have to spend significant resources briefing and litigating issues that had been settled by precedent for decades that are now unclear due to the changes wrought by this Rule, something that Pangea estimates will significantly slow all of the immigration hearings Pangea participates in.

55. Additionally, the Rule will force Pangea to divert resources away from other initiatives to compensate for the time and staffing resources required to respond to it. For example, Pangea is a member of formal rapid response networks in the California counties of Santa Clara, San Mateo, and San Francisco. The aim of these rapid response networks is to provide attorney response and consultations to newly-detained individuals from those counties. As part of these networks, Pangea attorneys take shifts in which they are on-call to provide consultation and representation to

detained individuals, including on weekends. Pangea's ability to contribute to this and other important initiatives will likely be hampered if it is forced to reallocate already-scarce resources in light of the Rule. In addition, Pangea's ability to contribute constructively will be greatly reduced while our staff, the Immigration Courts, and the Board of Immigration Appeals have to determine what all the revised standards mean in light of the new Rule. To the extent the value of Pangea's expertise is diminished by the sea-change in the law, the effectiveness of our contributions to these efforts is reduced.

56. The Rule would also jeopardize Pangea's funding and budget. In 2020, sixty-five percent of the organization's funding was tied to grants requiring some form of deliverables (e.g., a specific number of asylum applications filed or clients represented). If permitted to take effect, the Rule would necessarily reduce the number of Pangea's clients eligible for asylum. Moreover, the increased hours Pangea would be required to spend both assessing the impact of the Rule on its current clients and representing those impacted by the Rule would reduce the overall number of clients served. In addition, by greatly increasing the amount of time spent per client, the number of clients able to be served with the hours available from our current staff is greatly reduced. As a result, it is unclear whether Pangea could continue to comply with existing funding conditions.

57. Pangea generates approximately nine percent of its income through the low-cost services it provides to asylum-seekers who are not eligible for government or foundational grants due to prior convictions, certain geographic restrictions, or because of income or their ability to pay. Under the new Rule some of these clients may no longer be eligible for asylum. For any current clients rendered ineligible for asylum by the new Rule, Pangea would forfeit future payments on collateral matters for which the clients would no longer be eligible, such as applications for employment authorization or obtaining a refugee travel document (both items Pangea charges for separately from court representation). This, too, would have a significant detrimental effect on Pangea's budget.

58. Pangea also generates income through services it provides to former clients who successfully obtain asylum and want to adjust their status (e.g., those who become eligible for permanent residency). Pangea typically handles approximately fifteen or twenty such cases a year,

and may handle more, depending on how many derivative claims there are (for which Pangea generally charges separately). If the rule decreases the number of adults and children eligible for asylum – which it will likely do and appears intended to – it will necessarily decrease Pangea's revenue stream tied to these post-asylum status changes.

59. Finally, the constant barrage of new rules and changes designed to slam shut the door of asylum coupled with baseless insinuations of fraudulent asylum applications has had a deleterious effect on Pangea's staff and our volunteers. Pangea's staff and our volunteers interact with our clients, see their trauma, understand the suffering and often torture they have endured. To hear those people belittled as rapists, or not the best people, or as people trying to cheat the system is galling to those of us and our staff who know these people and their horrible stories of suffering. Pangea screens our clients and identifies those who have legitimate cases. Pangea's staff pours our lives into this work, and yet the Rule brushes this away, falsely saying that the changes it wreaks on the fundament of asylum law are minor and will be easily handled. Facing this constant barrage has led to higher turnover, requiring us to divert effort and resources to locate and train staff, when we are able to do so. If the positions cannot be filled, then we simply have to serve fewer clients, in detriment to our mission.

60. The relief requested in the Plaintiffs' Complaint would properly address the injuries to Pangea described above. If Plaintiffs prevail in this action, Pangea would be able to devote its staff time and resources to more clients than it would be able to if the Rule were permitted to take effect.

61. Pangea is unaware of any way it can recover the increased costs that the Rule will impose on Pangea as an organization, and would suffer immediate and irreparable injury under the Rule if the rule were permitted to take effect.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: December 21, 2020

Berkeley, CA

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY et al.,

Defendants.

Case No. 20-cv-09253-JD

DECLARATION OF KATHERINE MAHONEY

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I, Katherine Mahoney, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction.

2. I serve as the Litigation Director at Dolores Street Community Services, Inc. ("DSCS"), where I have worked since 2019. DSCS, established in 1982, is a 501(c)(3) non-profit organization that serves low-income and unstably housed individuals in and around San Francisco, California. DSCS is a small nonprofit that had less than $10 million in revenue in 2019.

I. DSCS and Our Work in the Community

3. DSCS is a multi-issue, multi-strategy organization focused on improving the lives of low-income individuals in San Francisco, CA, and the surrounding Bay Area, by providing free services spanning four interconnected areas: (i) housing and shelter; (ii) immigrants' rights; (iii) workers' rights; and (iv) community organizing and advocacy. DSCS provides immigration legal services and direct legal representation to its clients, but also partners with local and national organizations to further its mission of helping obtain protection for people who meet the definition of refugee and others fleeing persecution in their home countries and carry out larger-scale advocacy initiatives.

4. DSCS's first program, the Dolores Housing Program, was established to provide basic services to refugees fleeing war and famine in Central America. DSCS's immigration-focused services fall into two main programs: the Deportation Defense & Legal Advocacy Program ("DDLAP"), which was founded in 2008, and the Immigrant Rights and Community Empowerment Program ("IRCE"), which was founded in 2018.

5. The Deportation Defense & Legal Advocacy Program was founded in response to immigration enforcement raids in San Francisco's Mission District in 2008. Through DDLAP, DSCS provides direct legal representation to individuals facing deportation, including individuals detained by U.S. Immigration and Customs Enforcement ("ICE"), many of whom are seeking asylum, and individuals—primarily survivors of labor trafficking—filing affirmative asylum applications. DDLAP also provides limited immigration-related legal services to members of the

community, including free immigration consultations and regular clinics, assistance with time-sensitive legal filings, and filing Deferred Action for Childhood Arrivals ("DACA") applications and renewals, as well as undertaking significant advocacy work through partnerships with local and national organizations and coalitions. DDLAP works with regional collaboratives, including the San Francisco Immigrant Legal Defense Collaborative ("SFILDC") and the California Collaborative for Immigrant Justice ("CCIJ") to expand pro bono representation to individuals facing removal in Northern California.

6. IRCE was founded in 2018. Through this project, DSCS supports individuals who, among other obstacles, are navigating the asylum process *pro se*. Particularly in recent years, the volume of asylum seekers has far outpaced the availability of quality and affordable legal representation, and DSCS seeks to fill that gap through a variety of programs. Through free community-based consults and clinics, our team helps individuals assess the validity of their claims, prepare Forms I-589, and prepare evidence for merits hearings. ICRE works primarily in partnership with other local collaboratives—the San Francisco Immigrant Legal and Education Network ("SFILEN"), the San Francisco Rapid Response Network ("SFRRN"), and the Northern California Rapid Response and Immigrant Defense Network ("NCRRIDIN") for the Bay Area region—to amplify the impact of DSCS's immigrant rights work in San Francisco and Northern California. DSCS is the lead organization for SFILEN and the fiscal lead for SFRRN. Through these collaboratives, DSCS works with other advocacy and legal organizations to provide legal representation and advocacy to community members throughout Northern California. This year, in partnership with Pangea Legal Services, DSCS piloted a six-part course to train asylum seekers to prepare and present their own claims in court, when no attorney is available to represent them. We are preparing to relaunch the course with adjustments to make it safe during the COVID-19 pandemic.

7. Since 2008, our team has successfully represented hundreds of individuals and families pursuing claims for asylum. Our clients are survivors of community and domestic violence; workplace exploitation and human trafficking; and homelessness or housing instability. They have suffered severe trauma that touches every aspect of their lives. The process of fleeing their home

countries and seeking asylum here compounds that trauma, but for those who are successful, offers a modicum of stability that allows our clients to finally heal.

8. DSCS provides full-scope direct legal services to roughly 150 clients annually, a number that includes filing approximately 25 new asylum applications, including affirmative applications, per year. DSCS provides other immigration services, such as free clinics, consultations, and limited-scope representation, to roughly 240 individuals annually.

II. The Rule

9. The Rule challenged in the Complaint, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (December 11, 2020) ("Rule"), would irreparably harm DSCS in multiple ways absent enjoinder of the Rule. Whatever the intent of the Rule, the impact is clear: by radically defining and restricting asylum law, imposing new *de facto* categorical bars to asylum eligibility, and greatly increasing consequences for *bona fide* asylum seekers who do not understand the full complexities of American immigration law, the Rule disproportionately impacts some of DSCS's most vulnerable clients and frustrates the DSCS mission of helping obtain protection for people who meet the definition of refugee and others fleeing persecution in their home countries. As a result of this Rule, asylum eligibility will become even more limited and the immigrants served by DSCS who are subject to these revisions of the law and new *de facto* bars will face continued instability and uncertainty, and the possibility of removal to countries where they face severe harm, torture, rape, or even death. Far from just words, DSCS knows that when our vulnerable clients are sent back to the countries they came from, they can face horrible, brutal consequences and sometimes be killed by those they fled.

10. The Rule would significantly limit the overall number of clients DSCS is able to serve, placing the organization in an impossible position: it would need to raise more funds and hire more staff to serve the same number of clients, or reduce the number of clients it serves to fit within its current budget. The numerous recent changes to asylum eligibility and processing, including this Rule, further frustrate DSCS's ability to carry out its mission, as the organization is forced to expend significant time and its limited resources on making adjustments to its internal processes to keep up-to-date with the frequency and scope of changes to the legal asylum framework.

11. This Rule is one of the largest rewritings of immigration and asylum law in decades, and many of its provisions will harm DSCS and hamper our ability to fulfill our mission.

A. Frivolousness

12. The Immigration and Nationality Act (INA) has long imposed grave consequences when an Immigration Judge determines an asylum application is "frivolous": not only is the instant application automatically denied, the individual is rendered permanently ineligible for asylum benefits. The Rule dramatically lowers the bar for findings of frivolous applications, subjecting a wide array of asylum seekers to summary denials, including if the adjudicator simply determines the claim is without merit or foreclosed by applicable law. The Rule removes the existing requirements that a fabrication be "deliberate" and "material" and strikes the requirement that asylum seekers be provided with the opportunity to explain any discrepancy or inconsistency in their submissions or arguments. Thus, if an asylum applicant submits an application that appears to not be allowed under applicable law, that applicant can be permanently barred without the opportunity to explain how their claim is not, in fact frivolous.

13. This new standard will conflict with DSCS's ethical obligations in representing our clients. Ethically we must put forward the arguments that we can in favor of our clients, even arguments that seek for a change in or extension of the law. Yet under the Rule, DSCS could risk having our client permanently barred if we file an argument on their behalf that, while foreclosed by current law, is an argument to expand that law. It would take significant time and resources for DSCS to explain the risks inherent in making such an argument to our clients and could lead to such meritorious claims being left out, contrary to our ethical obligations.

14. However difficult this Rule is for DSCS, the profound consequences of these new frivolity standards in the Rule will be most damaging to *pro se* asylum seekers, who often lack the language capacity, education, legal background, and access to evidence to prepare complete asylum applications on their own. Asylum law is already highly complex and often confounds even the most experienced attorneys, particularly given how often the current Administration has changed the rules regarding asylum; the obstacles faced by *pro se* litigants are already nearly insurmountable. Through DSCS's training program for *pro se* asylum seekers, we regularly see that applicants--who

are often deeply traumatized and have little education or English-language ability--often do not understand the intricate requirements for asylum and the subtleties of making out a viable claim. The Rule would gravely penalize *pro se* applicants who have a legitimate fear of being returned to their country of origin but may not be able to spell out a case that meets the legal requirements for asylum, or may not understand the nuances of the law sufficiently to demonstrate their eligibility. The bars to seeking relief that result from a frivolous finding are disproportionate to the types of errors and misunderstandings that such a finding would penalize.

15. The Rule's lowered frivolity standard will impact applicants who, through no fault of their own, fall victim to Notario Fraud. Notarios, non-attorneys who purport to represent litigants or prepare immigration applications for a fee, take advantage of vulnerable asylum seekers by filing fraudulent applications containing false information, without the applicant's knowledge, simply to collect their fee. The applicants themselves lack the understanding of the law or the facility in English to detect the falsehood. Notario fraud is so pernicious and rampant that EOIR itself has a "Fraud & Abuse Prevention Program" specifically designed to prevent and combat this abuse. Under the Rule's revised frivolity standard, individuals who are victims of Notario Fraud could be penalized for filing a "frivolous" application, since the Rule has diluted the knowledge and intent requirements, even though they did not know the information was false. Notario Fraud is likely to become even more pervasive under the Rule, since the I-589 has grown significantly under the Rule, now comprising 20 pages of instructions and 19 pages of form all in dense legal language. *Pro se* applicants now have even less chance to fill out the I-589 on their own and so are more likely to seek help and be conned by notarios.

16. Finally, this new frivolousness standard would be particularly damaging to unaccompanied minors and other child asylum seekers. Even more so than adult applicants, child asylum seekers face unique challenges to communication, obtaining evidence, and articulating their claims in court. Under the Rule's frivolousness standard, a child who is so deeply traumatized that she cannot tell her story would not only lose her case, but would be penalized and prevented from ever seeking immigration relief in the future.

17. Given the grave and permanent harm to our clients if their applications are found to

be frivolous, DSCS will have to expend significantly more resources on each client to make sure that their full story is clear on the I-589 and to make sure that there is nothing that could be read as foreclosing their claim under law. This is particularly concerning to DSCS since fully 45% of our clients have had interactions with the criminal justice system, and so DSCS will have to spend significant time investigating those interactions to ensure they do not foreclose an asylum claim. This will also greatly expand the intake process that DSCS must undergo, forcing us to expend significant staff time early in the process to make sure our clients do not have any bars.

B. Pretermission

18. The Rule vastly expands the circumstances under which summary pretermissions are permitted. Specifically, the Rule allows an Immigration Judge to pretermit an application for asylum, withholding of removal, or relief under the Convention Against Torture (CAT) upon finding that the asylum seeker failed to establish a *prima facie* claim for relief based solely on what is alleged in the I-589 application form itself, without hearing live testimony from the applicant or any witnesses. The applicant would only be given ten-days' notice prior to dismissal of their application—hardly enough time to cure any defects and certainly not enough time for a full evidentiary asylum hearing.

19. Implementation of pretermission would again greatly disadvantage respondents without counsel. Ten days is a woefully inadequate window for unrepresented respondents to respond. The only time period where a party is made to respond under such a short time frame is in the context of a reply brief in support of a motion; in that scenario, however, the litigant has already made her primary arguments in the original motion and is anticipating a response. In contrast, if a *pro se* litigant is notified that their application is incomplete, ten days (or significantly less, as such notice will presumably be sent by mail, shortening the time even further) is far too short a time to gather the evidence necessary to correct an alleged deficiency in the massive I-589. The agencies impose no such time frame in any other context: for example, USCIS allows 90 days to respond to Requests for Evidence and 30 days for Notices of Intent to Deny. For its part, EOIR allows all litigants to file supporting documents as late as 15 days before a merits hearing. There is no way that asylum seekers, particularly *pro se*, can contest pretermission in ten days.

20. Allowance of pretermission under the Rule is a direct attack on lawful policies that

allow unrepresented respondents to submit I-589s, Applications for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture, that are skeletal or not completed. Doing so is no reflection of the applicant's credibility. The form – expanded by this Rule – is extensive, complex, and asks questions in ways difficult for a legal practitioner to understand and impossible for someone with no legal training or facility in English. There are not enough legal service providers to meet the numbers of unrepresented respondents.

21. In addition, often, applicants are too traumatized to initially assist their attorneys in full development of their claims. Immigration attorneys, once retained, often serve as a door for applicants to secure additional wraparound services such as job access, housing, and an access to education. After securing valid work authorization and housing, our attorneys have often witnessed a transformation in our clients where they are able to re-enter the attorney-client relationship from a place of safety and confidence, better resourced – potentially having been able to seek professional help to address the trauma they have suffered – and having had time to at least partially heal from the traumas they fled their home countries to escape.

22. It takes countless hours over the space of many months to develop a thorough asylum case, particularly for applicants who are severely traumatized and may never have told their story before. The effects of trauma on our memory and functioning in the world are biological and well-documented--indeed, the agencies themselves have settled policies and practices designed to accommodate the challenges that traumatized applicants face in recalling and presenting their stories (for example, trauma-related exception to the one-year filing deadline for asylum; psychological trauma as a basis to reopen an in absentia removal order; and recognition of psychological harm as a form of "hardship" across many forms of relief). We regularly represent clients who are disclosing their past harm for the first time in their legal meetings, and even then only after repeated interactions that develop a sense of comfort and rapport. For example, survivors of sexual violence are often afraid or ashamed to disclose their experiences, and this critical information is often not revealed until case preparations are well under way. Similarly, abused children whose cries for help were ignored, disregarded, or punished in their countries of origin will often hide their experiences, fearing similar reprisals from counsel or their caregivers here in the U.S. Under the Rule, all of

these applicants would be vulnerable to pretermission.

23. This is particularly true for certain individuals under yet a different rule that was recently released requiring those asylum seekers in asylum-and-withholding-only proceedings (of which, due to this Rule, contested here, there will be thousands) file their I-589 within fifteen days of their first hearing. Asylum seekers unable to overcome trauma in that short period of time – as many are not – will face pretermission as their I-589 cannot, due to their trauma, be fully complete.

24. In other words, the Rule would deprive many applicants of the opportunity to fully supplement their I-589 application with evidence and live testimony through a typical asylum hearing as currently regularly happens. Existing asylum law specifically recognizes that an asylum applicant will often face insurmountable challenges in obtaining corroborating evidence. Many refugees are forced to flee their home countries in a rush, with little or no time to gather evidence that might later be necessary to prove their claims. Others may not be able to access such evidence in their home countries, often because of the very status or situation that exposed them to persecution in the first place. For these reasons, the law provides that an applicant can meet her burden through credible testimony alone, and thus a hearing is required to provide an opportunity to present that testimony. Under the Rule, such applicants would face possible pretermission if an immigration judge determines that their initial evidence is not sufficient to state a claim, even if they could likely develop and obtain the evidence if given more time or if given a chance to explain the persecution they have suffered to an Immigration Judge.

25. In one case, an attorney at DSCS represented an indigenous woman, Jane (a pseudonym), who was brutally raped and beaten by her town's mayor. She woke up in the hospital and immediately fled with her oldest daughter, leaving her younger children behind--along with any proof of the devastating harm she had suffered. Once in the U.S., Jane contacted family members to help her obtain police reports and medical records, but the family was too afraid to take any action, fearing retaliation from the mayor or his associates. As a result, Jane had no evidence other than her own word. Fortunately, through her credible testimony, Jane was able to establish her eligibility for asylum and was granted, allowing her and her daughter a measure of security and safety for the first time in many years. Under the Rule, however, given her inability to provide documentation, her

application may have been pretermitted without an opportunity to tell her tragic story, one that ultimately satisfied the immigration court.

26. The Rule would also have devastating consequences for mentally ill applicants or applicants with cognitive challenges. For example, DSCS currently represents a young girl, Sara (a pseudonym), who was a victim of sex trafficking in her home country. Sara has filed her asylum application, but due to severe cognitive deficits (which are exacerbated by the extreme trauma she suffered), she struggles to tell her story in her own words. Instead, DSCS staff is working diligently to obtain information and corroborating evidence from family members, both in the U.S. and in her home country, to help explain to the court her reasons for seeking asylum. Under the Rule, however, Sara's application would likely be pretermitted, because she could not provide this information in her initial filing.

27. In the Rule, the Departments argue that the vast expansion of pretermission is permissible because current regulations require hearings only to resolve factual issues in dispute and not for legally deficient asylum applications. However, DSCS's experience is that the majority of issues or questions facing an Immigration Judge assessing an I-589 application are inherently mixed questions of fact and law that require credibility determinations and detailed fact finding allowed only in a full asylum hearing.

28. As an example, whether an applicant is subject to the one-year filing deadline, or qualifies for an exception, is a mixed question of fact and law that cannot be fairly adjudicated without testimony. For example, our client, Angela (a pseudonym), did not apply for asylum until more than two years after arriving in the U.S. Angela was still suffering the psychological consequences of having been raped as a child, and during her first years here she struggled to find stable housing for herself and her toddler-aged son. DSCS attorneys argued that evidence of Angela's mental health diagnoses and unstable housing constituted "exceptional circumstances" excusing her failure to timely file. She was able to prove to an Immigration Judge that she did qualify, but under the Rule, this assessment likely never would have happened both due to pretermission and the one year *de facto* bar described in more depth below.

29. Already, many asylum seekers are detained and unrepresented when they file their I-

589s. Many of our clients report that, when they first arrive in the U.S., they are suffering from illness, malnutrition, or fatigue as a result of their journey; and they are traumatized from both the harm they suffered in their home country and on their journey to the U.S., including rape, kidnapping, and trafficking. We have clients who were far along in pregnancy at the time of their filing, or who had just recently been separated from their family. We have clients who had to fill out the form in a language they do not fully understand because no interpreter was available to translate into their rare indigenous dialect and so they had to work with someone in a more common language to help them fill out the form in English. We have LGBTQI clients who have to fill out their paperwork in detention centers, where they are afraid to reveal their sexuality or gender identity where other detainees may find out. Others of our clients often receive misinformation en route to the U.S., so that they fear they cannot tell their whole story when filing the form. All of these are very real and serious obstacles that already exist for asylum seekers; the Rule makes these even more insurmountable.

30. If the Rule is allowed to go into effect, the new rules on pretermission will be deeply harmful to DSCS. We will have to devote significant staff time very early on in a case to fully work up the I-589 to make sure it states a *prima facie* case and to avoid pretermission (or a frivolousness finding). The Rule ignores the many psychological, economic, and medical challenges our clients face in their early months in the United States which make it difficult if not impossible to fully work up the case. This will force DSCS to race to find more evidence from our client's family – evidence that they may be scared to provide so shortly after their family member has fled. In those cases where family members are willing to assist right away, they may face insurmountable burdens to gather the documents in time. For example, for clients whose families live in rural areas of Guatemala, family members may need to take a bus several hours to the closest municipality just to request a document, will possibly be refused or told to satisfy convoluted bureaucratic requirements in order to get that document, and be instructed to return again later – via another several hour bus ride each way – to retrieve the document. Obtaining things like police reports or identity documents will in many cases be impossible under the new deadline, regardless of how much time DSCS staff devotes to the effort. In addition, with the requirement for many asylum seekers in asylum-and-

withholding-only proceedings – scheduled to go into effect on January 15, 2021 – to file the I-589 within fifteen days, there will be no way for DSCS to complete the significantly longer form for our clients, and we will have to dedicate staff members to single cases during these sprints. This will limit the number of clients we can serve, to the detriment of our mission, and prejudice our existing clients whose cases may also require attention during those "sprint" periods. It will also mean that more asylum seekers will have to apply *pro se*, and they will have almost no way to understand how to make out a *prima facie* case on their own given the complexity of the I-589 Form, the law, and the language used.

C. Particular Social Group

31. This Rule codifies the requirements of social distinction and particularity to the definition of Particular Social Group under the statute. These newly articulated social distinction and particularity requirements have been incredibly harmful in their application, leaving applicants, attorneys, and Immigration Judges alike confused and resulting in the return to harm, persecution, torture, and murder of countless asylum seekers. Specifically, these new standards seek to disqualify women and LBGTQI people fleeing domestic- and gender-based violence, and to read those fleeing gang-related violence entirely out of the refugee definition. In DSCS's experience, abused women, LGBTQI people, and those fleeing gang violence are among the vulnerable populations in greatest need for asylum protections.

32. The Rule details a "nonexhaustive" list of characteristics that it states would generally be insufficient to establish a particular social group: past or present criminal activity or associations thereof; past or present terrorist activity or association; past or present persecutory activity or association; presence in a country with generalized violence or a high crime rate; the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; and status as an immigrant returning from the United States.

33. The Rule's "nonexhaustive" list of ineligible particular social groups risks

adjudicators erroneously placing claims with certain fact patterns or applicants with certain characteristics into one of the "prohibited" categories without sufficient regard for the particular circumstances of the case. For example, a claim that may superficially resemble a "wealth-based" particular social group may, upon deeper investigation, actually constitute a political-opinion claim, but because of its appearance may be disregarded, or worse pretermitted, by an adjudicator who has been told by this Rule to exclude that particular category of applicants.

34. The Rule's list of "generally" ineligible characteristics forming a particular social group would be devastating for many adult applicants, but would be exponentially worse for children who have been forcibly recruited by criminal organizations. We have worked with several such individuals, who were vulnerable to recruitment because of intellectual disabilities, unstable home lives, or political opinions, but who always opposed and pushed back against the gang, despite their forced "membership." These children, often as young as 12 or 13 when recruited, suffer devastating psychological and physical consequences that stay with them forever. Their cases require a nuanced analysis to address their unique circumstances and the applicability of the already stringent bars to asylum. Under the Rule, these children would almost certainly be barred from relief based on a blanket rule, and they would be denied the detailed and case-sensitive analysis that would demonstrate their eligibility under the statute.

35. The Rule also requires a particular social group to be listed on the I-589 application. For DSCS's clients, this will require DSCS to undergo intensive work with the client to identify all of the aspects of the persecution they have suffered to identify a group that will pass muster and not be subject to one of the "generally" ineligible characteristics. This adds a significant burden to our intakes and early interviews with our clients who are unfamiliar with the concept of a particular social group and thus often do not think to tell us things that would demonstrate their eligibility. Rather than being able to work with our clients over time to understand their story, we will be forced into a much more confrontational posture due to the need to fill out the I-589 quickly and completely to avoid pretermission.

36. This requirement of listing a particular social group on an I-589 will be almost impossible for *pro se* applicants. The term is a legal term of art that has no real meaning to most of

the immigrants that DSCS serves. It is an area of law that has fast changed under this administration and one that does not translate well outside of legalese, let alone outside of English. Forcing this onto the I-589, particularly with the threat of pretermission and frivolousness will serve to deny many deserving *pro se* asylum applicants of the opportunity to prove through their testimony that they are, in fact, eligible for asylum. This is made significantly worse because while many of the applicants in the communities DSCS serves have been able to speak with counsel in advance of an asylum hearing, a very small percentage are able to do so in advance of filing an I-589. Thus this Rule will force DSCS to redeploy its resources and staff in an effort to rapidly identify asylum seekers in advance of the I-589 filing, work that will pull our staff and the coalition's staffs away from other work that they would otherwise be able to do.

D. Political Opinion

37. The Rule redefines "political opinion" as "an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof." This definition will cripple the United States asylum system by shutting off asylum access for women, survivors of gender-based harm, and victims of gang violence. The Rule's new definition of political opinion is far more restrictive than longstanding interpretations of that ground. In *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1986), the Board of Immigration Appeals required that a political opinion be "antithetical to [the views] of the government," but did not take the additional, drastic step of requiring that a political opinion be tied to "political or state control." This additional requirement would bar relief for many political opinions that are central to human and political identity today.

38. For example, here in the United States, abortion access is perhaps the most divisive political issue in our society today. Politicians are not taken seriously unless they take a firm stand on the question; legislators battle over the issue constantly and publicly; and protestors on both sides regularly demonstrate on behalf of their position, engaging their constitutional right to free speech. Few would argue that one's position on abortion access is not a "political opinion," and yet it would not pass muster under the new definition in the Rule because it does not relate to "political or state control." Advocates for or against abortion access who are targeted for persecution in their home countries would be barred from asylum under this definition.

39. Similarly, advocates for LGBTQI rights would also be barred under the Rule, even after fleeing countries where the government takes an explicit position against their rights. For example, DSCS represents a transgender woman, Elizabeth (a pseudonym), who was active in an LGBTQI organization in her country which advocated for better LGBTQI healthcare and protection from the government. The organization's headquarters were burned down, and our client suffered threats and physical harm in part because she spoke out on behalf of her community. Under the Rule, her activities would not qualify as a "political opinion" because they did not oppose a particular political party or government official, and she would be barred from relief.

40. Going even further, the Rule defines political opinion to almost categorically exclude those fleeing gang-related violence and other harms by non-state actors. Toward this end, the Rule admonishes immigration adjudicators against the favorable adjudication of asylum claims brought by those fleeing persecution on account of a political opinion "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations . . . ." These specific instructions constitute a retrogressive view of political opinion. In today's reality, non-state actors such as gangs or drug cartels often have significant control over neighborhoods. State actors are often unable or unwilling to intervene, and the geopolitical landscape often renders distinctions between opposition to the state and views regarding culture meaningless.

41. The Rule's redefinition of political opinion will require DSCS to expend significantly more effort to brief and prepare each clients' political opinion claims to make clear they are not foreclosed by what are essentially bars to asylum.

E. Persecution

42. The Rule further restricts asylum eligibility by establishing, for the first time ever, a regulatory definition of "persecution" that excludes fact-specific analysis. Under the new definition, "persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization the government was unable or unwilling to control." The Rule further defines persecution as needing to include "actions so severe that they constitute an exigent threat," but not including

"generalized harm that arises out of civil, criminal or military strife . . . intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or non-severe economic harm or property damage." Finally, the Rule asserts that "the existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally." Asylum cases are inherently fact-specific and perhaps no part of an asylum claim is more individualized than the specific way in which one person has been or may be harmed by another.

43. Moreover, the Rule's new definition undercuts widespread, longstanding precedent that adjudicators must consider the cumulative effect of harms when determining if persecution has occurred. For example, an individual who suffers a single brief detention, or who loses their job once, may not have suffered persecution, but the cumulative effect of repeated detentions, threats, and economic harms over a prolonged period would generally meet the current standard in most circuits. Under the new standard, many asylum seekers would be foreclosed from gaining asylum despite suffering lifetimes of persistent, substantial harms just because no single one of them was sufficiently severe to satisfy the definition.

44. The Rule also undermines years of settled precedent that threats can rise to the level of persecution when accompanied by some evidence that the threat is serious and credible. Instead – except for certain death threats – it requires some action to have been taken to carry out the threat. This new obstacle effectively means that if an asylum seeker is somehow able to escape her persecutors before suffering severe and potentially fatal harm, she will not qualify for protection because the persecutor's threats were never carried out. For example, a DSCS attorney represented two unaccompanied-minor brothers, who had suffered repeated threats in their home country because gang members believed they were collaborating with law enforcement. Fortunately, the brothers were able to flee to the United States before these threats were acted upon, but months after their arrival, their parents were brutally attacked, requiring hospitalization, because of the gang members' belief that the brothers had collaborated with the police. The brothers were granted asylum, and are now both enrolled in college in the United States. Under the Rule, however, these

brothers would not have qualified for asylum because they were able to flee before suffering the severe physical harm that ultimately befell their parents.

45. Persecution is one of the most difficult topics for DSCS's clients to discuss with our staff. It requires them to relive the trauma and suffering that they and their loved ones experienced. The redefinition of persecution contained in the Rule will make this even harder and require even more staff time to develop the details necessary to show that the applicant is eligible. This is a drain on DSCS's resources, pulling staff away from serving others, with no benefit except to deny asylum to legitimate applicants, particularly applicants from Mexico and Central America who suffer the persecution the Rule tries to define away.

F. Nexus

46. The Rule lists eight specific types of claims that categorically preclude, as a general matter, a finding of nexus. This list of disqualifying claims includes those based on: 1) "personal animus or retribution;" 2) "interpersonal animus;" 3) "generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;" 4) "resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations"; 5) "the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;" 6) "criminal activity;" 7) "perceived, past or present, gang affiliation;" and 8) "gender."

47. This is a radical rewriting of the law on nexus and will have devastating effects for women and children who have suffered domestic violence in countries where such violence is widely accepted or condoned. Because this type of harm is perpetrated by a relative or intimate partner, it would be characterized as "personal animus" or retribution and therefore barred from asylum.

48. The Rule further undermines the ability of applicants to demonstrate the nexus requirement by stating that "machismo" and "pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis

of the claim." This provision is a dangerous restriction on asylum adjudicators' ability to consider some of the most important evidence in any asylum claim—the societal norms informing a persecutor's intent. This Rule is particularly concerning in light of the codification of the "social distinction" requirement for particular social groups, discussed above: prevailing social and cultural norms in the society in question, such as attitudes regarding gender, sexuality, and race, are often the most critical evidence for establishing that a particular social group is recognized as distinct in that society.

49. For example, DSCS recently represented a gender nonbinary person, Alex (a pseudonym), who suffered constant harassment, discrimination, and abuse throughout their life. Alex's family rejected them because of their gender identity, subjecting Alex to beatings, verbal abuse, and even sexual abuse throughout Alex's childhood. Outside the home, Alex faced similar abuse from neighbors, classmates, and teachers, who called Alex names and refused to protect them out of a pervasive disapproval for their nonbinary identity. Even Alex's supposed friends, who loved and supported Alex, felt unsafe speaking out or protecting Alex out of fear that they themselves would be harmed. Anti-LGBTQI sentiment and prevailing cultural norms about gender and sexuality are so deeply engrained in Alex's society, that there was nowhere they could turn to for support or protection. Leaving this critical evidence out of the record would have made it nearly impossible for Alex to establish that, as a gender nonbinary person, they were a member of a socially distinct group in that society. Alex is just one of many clients that DSCS has helped that would have been denied protection under the Rule.

50. The Rule's change to nexus makes clear that even claims based on persecution such as Female Genital Mutilation and honor killing would no longer meet the standard, even though for many years it has been generally agreed that they do. Given the sea-change in this area of the law, DSCS will have to devote significantly more time to each asylum case to work up and brief the nexus element and show how our client's claims do not fit into one of the eight new *de facto* bars.

G. Internal Relocation

51. Under previous law, it was presumed that if an asylum applicant suffered persecution, they could not safely relocate within their home country. Flipping this presumption on its head, the

Rule essentially converts the internal relocation rule into a nearly universal bar to asylum for anyone fleeing non-state actors by presuming that internal relocation is reasonable for those fleeing persecutors who are not state or state-sponsored. The Rule also excludes gangs, officials acting outside their official capacity, family members who are not themselves government officials, and neighbors who are not themselves government officials from the category of government-sponsored persecutors and revises the list of factors for reasonableness determinations. Disturbingly, the Rule further modifies the current regulations by requiring adjudicators to consider the asylum seeker's ability to flee to the United States to seek asylum when determining the asylum seeker's ability to relocate within his or her home country.

52. The Rule places asylum seekers in the untenable position of having to essentially prove a negative (*i.e.* that there is nowhere in their home country safe for them), which completely ignores the realities of many of our clients' lives in their home countries. This Rule is particularly devastating for unaccompanied minors and other child asylum seekers. If a 13-year-old child manages to escape her home country and seek asylum in the U.S., how can she be expected to demonstrate that she could not relocate to any other part of her country? Prior to fleeing, many such children have never even left their hometown, let alone attempted to live or survive in another city or town. Many children--particularly those who cannot obtain counsel--will lack the tools and awareness to articulate why they could not relocate safely within their country under this new standard.

53. Moreover, the suggestion that "ability to flee" is relevant to one's ability to relocate in one's home country discounts completely the many financial, cultural, social, and political factors that would make it impossible for, for example, a single woman or a member of a racial minority to live safely in their home country, particularly in places with no social support or as a member of an obvious out-group.

54. This aspect of the Rule will require DSCS attorneys to have to pull significantly more information on country conditions to demonstrate that there is nowhere in various countries for our clients to relocate. This is particularly difficult when the Rule seems to bar evidence based on gangs, cartels, etc. forcing DSCS to go beyond the United States Department of State country

surveys, many of which suggest avoiding travel to many parts of Central America precisely because of these gangs and cartels. Moreover, the agencies have announced yet another rule that allows Immigration Judges to discount or discredit reports from organizations other than the Department of State such as reports from Amnesty or Human Rights Watch that detail the conditions suffered by people like our clients in their countries of origin. These rules together will make it nearly impossible for applicants to show that they cannot reasonably relocate in their home countries.

H. *De Facto* Bars under the Guise of Discretion

55. Under current law, once an asylum seeker has demonstrated that they are eligible for asylum, an Immigration Judge will then weigh, in their discretion, whether to grant asylum. However, the factor they are to weigh most heavily is whether the seeker has a well-founded fear of persecution if they are sent back or whether they have suffered persecution. The Rule, however, completely rewrites this precedent by creating two lists of discretionary factors, the first of which are presumptively "significantly adverse" to an exercise of discretion and the second of which preclude entirely a grant of asylum absent exceptional circumstances. As a preliminary matter, the framing of these factors as presumptively significantly adverse makes them *de facto* bars to asylum, essentially taking away what little remains of Immigration Judges' discretion to grant or deny asylum.

56. The Rule first lists three factors that, if present, adjudicators are required to consider as "significantly adverse" for purposes of the discretionary determination: 1) unauthorized entry or attempted unauthorized entry, unless "made in immediate flight from persecution or torture in a contiguous country"; 2) failure to seek asylum in a country through which the applicant transited, and 3) the use of fraudulent documents to enter the United States, unless the person arrived in the United States without transiting through another country. This three-factor test quite simply sets asylum seekers up to be denied protection and deported back to harm because they were able to successfully navigate an escape route from persecution to the United States.

57. The first and third of these factors penalize asylum seekers who enter the United States either without inspection or with fraudulent documents, failing to recognize that these manners of entry are often the only options for many asylum seekers. For example, DSCS has seen countless examples of asylum seekers from non-contiguous countries who had no choice but to flee

their home countries using fake identity or travel documents. Women fleeing certain countries may not be able to obtain a passport or purchase a plane ticket without their father's or husband's consent. But if seeking her father's consent would place the woman in greater danger, she may have no choice but to obtain fake documents in order to circumvent this consent requirement. Under the Rule, this requirement would have the perverse effect of condemning a woman in that situation to continued persecution since she would undercut her asylum claim by fleeing the only way she safely can.

58. Separately but equally disturbing, the United States' own recently enacted policies of forcing asylum seekers to remain in Mexico leave many applicants with no choice but to enter unlawfully. By now it is well known that makeshift refugee camps along the Mexico-U.S. border are hotbeds for crime, sexual violence, exploitation and trafficking, not to mention illness and lack of sanitation. Under the MPP and metering policies, asylum seekers--including pregnant women, children, and the elderly--are being forced to wait in Mexico for months. The Mexican government is ill-equipped and unmotivated to improve conditions or safety in these camps. These inhumane policies have forced many asylum seekers to attempt to cross between ports of entry because they were denied the opportunity to present their claim through "regular" admission procedures. This Rule essentially erases asylum completely by cutting off all access points for asylum seekers.

59. In addition to the "significantly adverse" criteria, the Rule lists nine factors that entirely preclude the adjudicator from favorably exercising asylum (absent some undefined extraordinary circumstances that, due to pretermission, the applicant may have not opportunity to present). These *de facto* bars would eliminate access to asylum for asylum seekers who: 1) spent more than 14 days in any one country immediately prior to her arrival in the United States or en route to the United States; 2) transited through more than one country en route to the United States; 3) would otherwise be subject to one of the criminal conviction-based asylum bars at 8 C.F.R. § 208.13(c) but for the reversal, vacatur, expungement, or modification of the conviction or sentence; 4) accrued more than one year of unlawful presence prior to applying for asylum; 5) failed to timely file or request an extension of the time to file any required income tax returns, failed to satisfy any outstanding tax obligations, or has failed to report income that would result in a tax liability; 6) has

had two or more asylum applications denied for any reason; 7) has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application; 8) failed to attend an asylum interview, with limited exceptions; or 9) did not file a motion to reopen of a final order of removal based on changed country conditions within one year of those changes.

60. Taking one of these – the fourteen day transit time – as an example, the results of this *de facto* bar are significant and devastating. For example, our client Elizabeth (a pseudonym), whose case is also described above in paragraph 39, traveled through Mexico en route to the U.S. En route, she became a victim of sex trafficking and was forced to remain in Mexico City under threats of physical harm and death for several months. Even after she escaped her traffickers, she remained in Mexico for longer than two weeks while she recovered and gathered the resources she needed to get to the U.S. safely. Under the new rules, Elizabeth would also be barred from asylum because of her extended presence in Mexico. Elizabeth is just one of many, many of our clients for whom these factors would have devastating consequences.

61. Another of these *de facto* bars shows the immense cost of the new Rule to DSCS. The new requirement of our clients to file tax returns and to sign under penalty of perjury that they have done so in the I-589 will cost significant resources from DSCS. Our clients are often poor. They often work at jobs that are paid in cash. In addition, given the barriers that have been put in place for work authorizations, our clients may have to work in the gray economy. They do not know if their employers have reported their earnings or withheld taxes. Often they will not have been required to file tax returns, given their low earnings. Even where clients may try to pay taxes, the lack of information or cooperation from their employers (for example not filing W-2s, not providing information on withholdings) is a significant additional barrier to doing so. Tax law is a specific specialty, and DSCS does not have that capacity. Either DSCS will have to train a staff member in the intricacies of tax law or hire someone with that knowledge, which is not a cheap specialty. With the new I-589, this will have to be done for every single client, and DSCS cannot leave that question blank while the research is ongoing due to the risk of pretermission and frivolousness.

62. Overall, the I-589 has been expanded significantly due to the *de facto* bars in the Rule, and DSCS will have to carefully vet each of these new bans, and then brief them after the I-

589 has been filed. For *pro se* applicants, including those assisted by DSCS, there is almost no way they can do the research necessary for all of these *de facto* bars on their own.

I. Convention Against Torture

63. Protection known as withholding or deferral of removal under the Convention Against Torture provides critical protections for individuals who face torture in their country of origin and would be otherwise barred from asylum protections. The Rule modifies the standard for protection under the Convention Against Torture to limit the accountability of foreign governments as to the torturous conduct inflicted either at the hand of government actors directly or by private individuals, acting with the government's acquiescence. Part of how it does this is to deny claims if the torture suffered was against the law in that country.

64. In today's world, most countries technically have laws on the books that prohibit torture, and yet torturous practices go unchecked due to corruption, powerful organized crime, and lack of resources, infrastructure, and transparency in government. For example, many of our clients come from rural areas where gangs and vigilante groups practice torture as a means of controlling, intimidating, or even eliminating communities altogether. Institutional and historical racism and misogyny are just two of the many factors that may allow torture to take place with impunity, even where local officials may not be specifically "aware of a high probability of" torture. The Rule completely ignores these realities that exist in many countries.

65. This will disproportionately impact applicants for protection under the Convention Against Torture who are fleeing violence based on their gender or sexual orientation. It is not unusual for local law enforcement to turn away in cases where it is known that a person is being tortured. For example, DSCS has represented many men and women who have been victims of sexual violence at the hands of government officials or powerful private citizens including leaders of drug cartels; even though these acts are not "state sanctioned," local governments often turn a blind eye to such torture, sometimes even egging it on or colluding with the torturers. Although many of these clients have obtained protection under the Convention Against Torture, their claims may be denied under the Rule for not meeting the unreasonably high new standard for government "acquiescence."

J. Confidentiality

66. The Rule includes changes to expressly allow the disclosure of information in an asylum application "as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the asylum seeker's immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse." Thus, the Rule makes changes that will allow the government to use a person's fear-based claim against them, in ways that could prevent them from obtaining other benefits or concessions, and hinder them from seeking asylum due to fear of reprisal.

67. When DSCS begins to prepare an asylum case with clients, inevitably the client always asks us, "Who will find out what is in my application?" This question is borne out of a deep and very reasonable fear that seeking asylum could expose one to even further harm if confidence is not maintained. Our clients fear that their claims could be exposed, either intentionally or inadvertently, to violent intimate partners, gang members, local government officials or police officers in their home countries, or others who could use the information to locate or harm them. Many of our clients have been explicitly threatened that if they ever report what has happened to them, they will be tortured or killed. Under existing law, we can at least offer our clients the small comfort that the U.S. government will maintain their confidentiality and protect them against disclosure, even if they are not ultimately granted protection. The Rule will shatter this confidence and deter many *bona fide* applicants from seeking protection.

68. For example, DSCS attorneys represent survivors of sexual violence who have never shared their experiences with spouses or other family out of fear, shame, and deep-rooted cultural stigmatization. For example, a client, Susana (a pseudonym), who is indigenous Mayan, was brutally raped by non-indigenous men who called her racial slurs and threatened to kill her if she ever disclosed the rape. Before retaining counsel, Susana never told anyone about the rape--including her husband or extended family--out of fear that her rapists would kill her, or that her family would reject her. With the assurance that her asylum application would remain confidential,

Susana was able to tell her story in court and was granted protection for herself and her family. Had Susana not had this assurance, however, she may not have felt safe enough to tell her story, which could have put her and her family at serious risk.

69. As another example, DSCS clients have often been victimized by powerful individuals in their home countries whom they fear will retaliate against them if they tell their stories. Our client, Michael (a pseudonym), is an indigenous man. Michael served as a police officer in his home country, and he vocally opposed the rampant police corruption he observed around him. As a result, he was subject to a pretextual arrest, prosecuted, and brutally tortured while in prison. Even in the United States, Michael feared that the corrupt government officials who had persecuted him would track him down if he testified about his experiences. With this assurance that his application would remain confidential, however, Michael was able to tell his story in court and was granted protection.

70. This change to confidentiality will require DSCS to expend significantly more staff time and resources with each asylum applicant to discuss confidentiality with them and explain their options and the pros and cons of filing an application given that it will no longer be confidential. By having to spend more time on each individual application, DSCS will be able to serve fewer clients overall, in detriment to our mission.

K. Limitation to Asylum-Only Proceedings

71. The Rule limits certain asylum seekers to "asylum-and-withholding-only proceedings," where they are prohibited from seeking any form of relief other than asylum, withholding of removal, and protection under the Convention Against Torture.

72. Asylum seekers in particular are often vulnerable to crime and human trafficking, due to poverty, unfamiliarity with their new communities, and mental health issues stemming from past trauma. Preventing them from seeking alternative forms of relief simply because they first arrived here seeking asylum is devastating not only for the applicants themselves but for their families and communities as well.

73. For example, DSCS currently represents a young mother, Ana (a pseudonym), who fled her home country after suffering years of domestic violence there. In the United States, Ana

became a victim of human trafficking, being forced to work as a housecleaner under threats of harm or deportation to herself and her children for many months. With DSCS's help, Ana has been able to pursue a T visa and help bring her trafficker to justice. Under the Rule, however, she would be effectively barred from doing so. Our staff has represented countless individuals in similar situations: individuals who have fled violence in their home country, only to be trafficked in the U.S. due to their extreme vulnerability. If these clients were limited to asylum and withholding only proceedings, they likely would have been removed before they could complete the process for receiving a T visa, and the consequences for them, their families, and their larger community would have been devastating.

74. The Rule's changes to the expedited removal process also have the consequence of eliminating entirely the ability of asylum seekers to seek release from detention on bond during their court proceedings. Asylum-seekers who are forced to pursue relief in detention face substantial obstacles to preparing their cases. Most ICE detention centers are located in rural areas where access to legal counsel is extremely limited. Detainees have little or no access to law libraries where they can gather country conditions evidence or learn the law, and are often unable to communicate with family abroad who could gather critical evidence for their cases. These obstacles often prevent them from adequately presenting their cases, resulting in asylum denials despite bona fide bases for relief.

75. For example, DSCS represents Alicia (a pseudonym), who was brutally tortured and threatened when she rejected a forced marriage and attempted to enter a mixed-religion marriage in her home country. When Alicia arrived in the United States, she was detained and never had a chance to consult with an attorney before her asylum hearing. Without legal advice, Alicia did not realize that she had a right to testify in her native dialect, so instead she testified in French, which she does not speak fluently. She also left out critical aspects of her personal history, because she did not realize that they were relevant to asylum. With our office's help, Alicia successfully reopened her case and was provided a second merits hearing at which she presented her full case in her native language. Being detained during her initial proceedings was highly prejudicial to Alicia's case, and created substantial judicial waste. Detaining all asylum seekers without the possibility of release

will not only prevent applicants from presenting their cases fairly, but will waste massive government resources.

III. Harm to DSCS

76. As the foregoing makes clear, the Rule represents a complete sea-change in asylum law, rewriting many of the most fundamental parts of that law including persecution, nexus, discretion, and particular social group. In addition it creates many new *de facto* bars to asylum. And it raises the stakes by making it possible that a client's case could be pretermitted or found to be frivolous. All of these changes will cause DSCS substantial harm.

77. First, the Rule will significantly increase the amount of DSCS staff time and resources each asylum-seeker's case requires, including time spent on analyzing and briefing eligibility issues; time and resources spent on filling out the substantially expanded I-589 form to address all the new *de facto* bars; time interviewing the client to ensure that the client's entire case can be put forward in their I-589 to avoid pretermission; time researching and re-briefing all of the factors in a case given the complete rewriting of immigration law; and resources spent on finding and preparing witnesses and experts.

78. Second, the Rule will force DSCS to front-load significant staff time and resources in each case. Because of the pretermission standard, all of the work that can normally be done over months and years while a client receives treatment for PTSD or other issues, must be crammed into the time (which for some clients is reduced to fifteen days) before the I-589 is filed. This will put substantial mental, emotional, and psychological strain on our clients and also force staff to spend large amounts of time at the start of a case, to the detriment of other clients. Perversely this will also double the amount of time taken to prepare each case. Previously, initial I-589s would be filed and the substance of the case would be filed in a pre-hearing submission, in part to lessen the burden on courts by presenting a single, thorough, complete record; this Rule requires the case to be worked up prior to the I-589 on order to avoid pretermission and then be worked up again several years later for a hearing when the prior work will have become stale.

79. Third, due to the complexity of all of the changes, DSCS will have a difficult time referring cases to pro bono counsel. They are not generally immigration experts and are likely to not

be willing to take these cases, particularly at the risk of the client's case being pretermitted or leading to a permanent bar. This will require DSCS to use staff for cases that otherwise would have been staffed by pro bono attorneys or volunteers.

80. If permitted to take effect, the Rule would also dramatically increase the number of individuals potentially barred from obtaining asylum. Consequently, DSCS's staff would have to expend more time and resources at both the outset of each case, and throughout the pendency of each case, to determine whether any of the new asylum bars could be triggered and to assess the potential impact of all of the bars on the clients' eligibility.

81. This Rule will also have a significant negative impact on the families DSCS serves, many of whom are mothers and fathers who fled their home countries with their young children. At present, if an individual is granted asylum, any of their family members already in the United States whom they included on their asylum application may also be granted asylum, and they can file a petition to bring remaining eligible family members not in the United States to the United States. Unlike asylum, however, withholding of removal does not provide any relief for an eligible individual's family members, whether they are in the United States or in another country. Moreover, although withholding of removal is available to those individuals who can establish that being removed to the proposed countries would "more likely than not" result in persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, the individual still can be removed to a third country if doing so would not threaten their life or freedom.

82. Thus, under the new Rule, if a mother who flees to the United States is suddenly subject to one of the Rule's expanded asylum bars or otherwise made ineligible by one of the many changes wrought by the Rule, and thus forced to seek withholding of removal only, she will no longer be able to ensure that her children can also obtain protection in the United States, regardless of whether she is granted withholding of removal. Instead, if her children are still in her home country, they would have to come to the United States and seek asylum on their own, likely as unaccompanied children. If her children fled to the United States with her, they would need to establish their own eligibility for protection, regardless of their age. In some cases, a child's reasons for fearing return may be derivative of their parent's fear, and thus too attenuated to meet the asylum

requirements independently. Because separation from one's parents is not, standing alone, generally considered a basis for asylum, this de facto decoupling of family cases is likely to result in increased family separation, where some family members qualify for asylum and others do not, so are removed. The practical impact for organizations like DSCS is that the organization will see an increase in cases where it must seek relief for every member of a family as a principal, rather than being able to rely on derivative status, alongside a decrease in the number of resources the organization actually has available. This decoupling of DSCS's current cases would also impact its ability to take on new clients.

83. DSCS has already had to devote significant resources because of this rule and, despite the incredibly short thirty-day period of time allowed to comment on such a gigantic change, we raised the above concerns and others in the comment we submitted in opposition to the then-proposed Rule. It took DSCS weeks, including significant work on nights and weekends, to respond to this Rule, and the numerous other rules that were pending before, after, and at the same time. However, in response to those comments, noting the extreme difficulty with complying with the Rule, the final Rule says only that "any costs imposed on attorneys or representatives for asylum seekers will be minimal and limited to the time it will take to become familiar with the rule," a response which ultimately ignores the realities faced by immigration attorneys, like the staff at DSCS. To the contrary, DSCS estimates it will take months to research and understand all of the various changes instantiated by this giant rule (the notice of proposed rulemaking was one hundred sixty pages long). Each of our cases will have to be evaluated, all of our intake forms will have to be changed, and our data management system will have to be updated to capture all of the new information required by the Rule. In addition, to the extent any of the provisions of the Rule are applied retroactively, which guidance given to adjudicators from EOIR suggests they might be, our cases may have to be re-briefed to address the facets of this Rule.

84. In response to this Rule, DSCS has already begun to divert substantial time and resources to train its staff and legal assistants on the changes to asylum eligibility, as well as to undertake a review of all of its training materials and templates, to ensure their accuracy. Because of the change to so many of the most fundamental areas of asylum law, almost all of our resources,

including the trainings that we do for *pro se* applicants will have to be edited or completely rewritten. DSCS estimates that this will take at least a month if not more of dedicated staff time, further diverting resources away from DSCS's mission. Likewise, DSCS staff has begun to spend more time providing consultations on the nuances of the Rule's eligibility requirements and expects to expend more time and resources on consultations in the near future.

85. Additionally, the Rule is forcing DSCS to divert resources away from other initiatives to compensate for the time and staffing resources required to respond to the Rule. For example, the DSCS team conducts significant advocacy work around conditions for detainees in ICE, and also assists undocumented youth in applying for and renewing their DACA registration. DSCS's legal team also provides consultations and representation to participants in the organization's other programs, such as shelter residents and members of the organization's worker's collaborative. DSCS's ability to continue supporting these communities will be significantly impeded if it is forced to reallocate its already scarce resources in light of the new Rule.

86. The Rule would also jeopardize DSCS's funding and budget. In 2019, roughly ninety-five percent of DSCS's legal team's funding was tied to state or local funding or grants requiring some form of deliverable (e.g., a specific number of asylum applications filed or clients represented). If permitted to take effect, the Rule would necessarily reduce the number of DSCS's clients eligible for asylum and exponentially increase the amount of time it takes for DSCS to represent each individual asylum applicant. The increased hours DSCS would be required to spend both assessing the impact of the Rule on its current clients and representing those impacted by the Rule would reduce the overall number of clients served. As a result, DSCS could not comply with existing funding conditions and would likely lose funding.

87. Finally, the constant barrage of new rules and changes designed to slam shut the door of asylum coupled with baseless insinuations of fraudulent asylum applications has had a deleterious effect on DSCS's attorneys, staff, and our volunteers – beyond that inflicted on the communities we serve. Constantly being diverted from our mission in order to address change after change after change of regulations and rulings from this Administration, all of which seemed designed to slam shut the door of this country on those most in need of protection, has proved disheartening, to say the

least. DSCS's staff and our volunteers interact with our clients, see their trauma, and understand the suffering and often torture they have endured. To hear those people belittled as rapists, or not the best people, or as people trying to cheat the system is galling to those of us and our staff who know these people and their horrible stories of suffering. DSCS screens our clients and identifies those who have legitimate cases. We pour our lives into this work, and yet the Rule brushes this away, falsely saying that the changes it wreaks on the fundament of asylum law are minor and will be easily handled. Facing this constant barrage has led to higher turnover, requiring us to divert effort and resources to locate and train staff. It has also led to increased stress and other mental health issues among our staff which often require resources or treatment that DSCS, as a small nonprofit, cannot offer. This has deprived DSCS of needed resources at our direst hour as our staff is most exhausted from all of the extra work done in response to this Rule and the others that have been recently published.

88. The relief requested in the Plaintiffs' Complaint would properly address the injuries to DSCS described above and in the public comment submitted by DSCS in opposition to the Rule. If Plaintiffs prevail in this action, DSCS would be able to devote its staff time and resources to more clients than it would be able to if the Rule were permitted to take effect.

89. DSCS is unaware of any way we can recover the increased costs that the Rule will impose on us as an organization, and would suffer immediate and irreparable injury under the Rule if the rule were permitted to take effect.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: December 21, 2020

San Francisco, CA

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY et al.,

Defendants.

Case No. 20-cv-09253-JD

DECLARATION OF VICTORIA NEILSON

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I, Victoria Neilson, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction.

2. I am the Managing Attorney of the Defending Vulnerable Populations Program at the Catholic Legal Immigration Network, Inc. ("CLINIC" or the "Organization"), whose main office is located in Silver Spring, Maryland. I have worked at CLINIC since February 2018.

I. CLINIC and Our Mission

3. CLINIC is a 501(c)(3) non-profit organization, with a national office in Silver Spring, Maryland, an office in Oakland, California, and attorneys and other staff who work remotely across the United States and in Ciudad Juarez Mexico where two CLINIC staff members assist asylum seekers who have been subjected to the "Migrant Protection Protocols." Three attorneys with CLINIC's Training and Legal Support ("TLS") team work from the Oakland, California office, providing technical assistance to CLINIC's *entire* network of immigration legal services providers and other nonprofit agency staff throughout the United States, conducting web-based trainings on a variety of immigration matters, and issuing written resources for practitioners on immigration matters. CLINIC's attorneys' work—including the work of our colleagues in Oakland—will be directly impacted by the new Rule issued in this case, as discussed below.

4. CLINIC is the nation's largest network of nonprofit legal immigration services programs. Despite this, CLINIC is still a small nonprofit with revenues of $10.28 million in 2019 and $9.72 million in 2018, and many of CLINIC's affiliates are small organizations that have total revenues of less than $10 million. CLINIC's mission is to provide immigration legal services to low income and vulnerable populations through our network. This mission is part of CLINIC's broader purpose of embracing the Gospel value of welcoming the stranger, and promoting the dignity and protecting the rights of immigrants. Catholic social teaching identifies the Holy Family, in their flight to Egypt in the gospels, as the archetype of every refugee family. In the gospel

of Matthew, Jesus blesses those who welcome strangers proclaiming that in so doing they have welcomed Christ himself. Matthew 25:35-40 ("I was…a stranger and you welcomed me…whatever you did for one of these least brothers of mine, you did for me"). His Holiness Pope Francis, has said "I ask leaders and legislators and the entire international community to confront the reality of those who have been displaced by force, with effective projects and new approaches in order to protect their dignity, to improve the quality of their life and to face the challenges that are emerging from modern forms of persecution, oppression and slavery." Pope Francis, *Address to Participants in the Plenary of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People*, (May 24, 2013). As a Catholic organization, guided by our faith and the teachings of Jesus and His Church, CLINIC believes the United States has a moral imperative to accept asylum seekers in addition to the obligations our country has to do so under domestic and international law. We bear witness to these teachings through our work on behalf of the migrant and asylum-seeking clients we serve directly as well as to the clients served through the vast CLINIC network of legal service providers; providing these legal services is critical to our mission both as a matter of fact and an article of faith.

5. Asylum seekers come to the United States fleeing persecution and many arrive with nothing more than the clothes on their back. Many do not speak or read English. Many arriving at the Southern border do not speak or read Spanish—or do not have fluency in Spanish. These people come from indigenous communities in Central America and Mexico, and are marked for persecution by Government actors in their hometowns or the brutal narco-cartels that control their regions. Often fleeing in the dead of night, pursued by their rapists and torturers, they come to the United States without documentation, without any legal training or knowledge, and without the tools such as computers or even phones that would help them fill out paperwork. CLINIC's files contain hundreds of people who, due to the severity of past harm suffered, often of the most extreme kind, endure ongoing trauma-related mental health issues and lack adequate support and mental health treatment. However, this Rule places them further away from the support and treatment they need and instead will result in rapid asylum denial, a permanent ban, and deportation to

the country they fled, often into the arms of those seeking to torture and kill them. Far too often, when applications for asylum, withholding of removal, or protection under the Convention Against Torture are denied, CLINIC learns that our clients or clients of our affiliates, once deported, have in fact been raped, tortured, maimed, or killed by their persecutors. This harm happens often enough that it has been documented by public articles. It is this knowledge, and our faith in witnessing to the gospel through service that drives our mission to serve low income and vulnerable people with immigration law services.

6. The CLINIC network includes almost 400 affiliated immigration programs, which operate in 49 states and the District of Columbia. The network includes faith-based institutions, farmworker programs, domestic violence shelters, ethnic community-focused organizations, libraries, and other entities that serve immigrants and refugees including asylum seekers, people seeking withholding of removal, and people seeking protection under the Convention Against Torture. Many of these organizations focus on providing sustenance to the whole person, mental, physical, and spiritual, and CLINIC serves to protect their legal rights through our training and assistance with immigration law services. In total, CLINIC's network employs more than 2,300 attorneys, accredited representatives, and paralegals who, in turn, serve hundreds of thousands of low-income immigrants each year. Many CLINIC affiliates are on the "List of Pro Bono Service Providers" that the Executive Office for Immigration Review ("EOIR") provides to asylum seekers and people in removal proceedings. This list is provided to all such persons pursuant to regulation. 8 C.F.R. § 1003.61(b). For example, Catholic Charities of the East Bay in Oakland, California, is on the EOIR list and is a CLINIC affiliate. Providing free and low-cost legal services to asylum seekers, people seeking withholding of removal, and people seeking protection under the Convention Against Torture is a critical part of the mission of CLINIC and our affiliates and is how we serve Christ present in our community in the person of the least fortunate among us.

7. In addition to employing attorneys, members of CLINIC's network, which we refer to as "affiliates," employ United States Department of Justice ("DOJ") "accredited representatives." Accredited representatives are non-attorney staff or volunteers who are approved by the

DOJ to represent noncitizens before the Department of Homeland Security ("DHS"), and, in some instances, in removal proceedings before the immigration court and the Board of Immigration Appeals ("BIA"). An accredited representative must work for a non-profit religious, charitable, social service, or similar organization that provides low- or no-cost immigration legal services. The use of accredited representatives allows CLINIC's network to serve more people and to serve them more efficiently. Accredited representatives can handle many immigration matters or cases, and as they are volunteers or, if staff, are paid less than attorneys, allow CLINIC's affiliates to expand their reach, covering more cases with their limited budgets. Also, as the immigration bar has a limited number of counsel available, and an even more limited number able and willing to serve clients for low or no cost, until that number increases, using accredited representatives allows CLINIC's affiliates to provide legal services to more people.

II. The Importance of Counsel

8. CLINIC's work is so important because increasing numbers of asylum seekers are unrepresented. In writing CLINIC's comment opposing this proposed rule, I conducted extensive research. As part of that research, I identified data showing that more than half of all individuals in removal proceedings in South Carolina, Oklahoma, North Carolina, South Dakota, Georgia, and Maine are unrepresented. In Texas, data show that 46.3 percent of individuals in removal proceedings, or 48,952 individuals, are currently unrepresented. I am aware of data showing that individuals with cases filed within the past three months are even more likely to be unrepresented—in every state except New Hampshire, over half of these individuals are unrepresented. Data show that individuals who are detained are five times less likely to be represented than non-detained individuals, and individuals in rural areas or small cities are four times less likely to be represented than individuals in large cities. By March 2020, data show that 22.5 percent of asylum seekers who had a merits hearing on their applications for asylum, lacked legal representation during their immigration court proceedings. For people subject to the Migrant Protection Protocols Program ("MPP") which requires certain people in removal proceedings to remain in Mexico, data show that only 224 of those people, out of 32,188, are represented, leaving 31,964 unrepresented.

As explained below the Rule challenged in this case both makes legal representation far more critical for these asylum seekers and makes it more difficult for CLINIC and our affiliates to provide that representation effectively.

9. The rate of representation cited in the Rule's preamble is misleading because it does not account for variations in levels of representation based on location and stage of the process. As explained in more detail below, at the time that most applications would be pretermitted under the Rule, rates of representation would be much lower. That an asylum seeker is more likely to eventually be able to obtain counsel before a merits hearing under the existing regime does not mean that the same number of asylum seekers are represented at the time they submit their initial asylum application, which becomes a critical barrier and gateway under the Rule. In CLINIC's experience, asylum seekers are less likely to have found representation by the time they must submit their asylum application than by the time the case is scheduled for an individual hearing. Through pretermission, as explained below, the critical time for an asylum case is moved much sooner and CLINIC will have to scramble and significantly reroute its resources to find and serve asylum seekers much earlier in the process. This situation is made far worse by another rule recently released that will require all asylum seekers in asylum-and-withholding-only proceedings to submit their Form I-589 application within 15 days of the asylum seeker's first hearing before an immigration judge.

10. CLINIC is aware that gaining asylum in the United States is highly dependent on access to competent counsel. I am aware of a study showing that respondents with counsel were ten-and-a-half times more likely to succeed in their asylum case when compared with *pro se* applicants. Similarly, I am aware of one extensive study of 1.2 million removal cases which found that the odds were five-and-a half times greater that represented immigrants were able to prove their eligibility for relief from removal compared to unrepresented immigrants.

III. The Work that CLINIC Has Done to Support Asylum Seekers

11. CLINIC provides critical training and mentorship to the attorneys and DOJ-accredited representatives who work at our affiliates. CLINIC's trainings encompass topics such as

courtroom skills, fundamentals of asylum law, trainings on nexus, discretion, political opinion, and particular social group, trainings on internal relocation and firm resettlement, training on how to fill out the I-589 and how to draft asylum declarations, updates to asylum law, and changes to removal proceedings. Additionally, CLINIC staff write in-depth practice advisories to assist affiliates and other immigration practitioners to stay abreast of rapidly changing rules. At least eight of these practice advisories would be affected by the Rule challenged in this litigation and require substantial revision.[1]

12. In addition to providing direct legal services, CLINIC—including our colleagues in Oakland—provides technical support to our affiliates through the "Ask-the-Experts" portal on our website. Attorneys and accredited representatives at affiliate organizations submit inquiries regarding individual immigration matters that are particularly complex, and CLINIC staff provide expert consultations. If a submitted question is broadly applicable, CLINIC's staff may determine that we should create a written resource or webinar on the topic, and spend weeks developing the training materials. Developing a practice advisory, depending on the complexity of the subject, could take over 100 attorney hours. Creating practice advisories or webinars allows all of CLINIC's affiliates to benefit from the learning simultaneously, but if CLINIC's staff is not able to spend the time to draft these answers, trainings, and resources, many different CLINIC affiliates may well have to spend their limited time and resources to address the same questions. Additionally, with the rapid-fire changes in immigration law, especially through this Rule and other asylum regulations, CLINIC staff will have to monitor answers we have given to questions about asylum law and potentially revise the responses we have given several times to ensure that advice we gave previously has not been rendered incorrect based on the new Rule and the many other rules coming out changing asylum law.

[1] The eight affected practice advisories are: 1) Practice Advisory: LGBTI DACA Recipients and Options for Relief under Asylum Law (updated), 2) Practice Advisory: Overcoming the Asylum One-Year Filing Deadline for DACA Recipients (updated), 3) I-730 Refugee/Asylee Family Reunification Practice Manual, 4) Preparing an Applicant's Declaration In Support of Asylum (And Related Relief), 5) CLINIC/AILA Resource on CFI Lesson Plan Changes, 6) Practice Pointer: Matter of L-E- CLINIC/AILA Resource on CFI Lesson Plan Changes, 7) A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders (updated), 8) Practice Advisory: Asylum Seekers Stranded in Mexico Because of the Trump Administration's Restrictive Policies: Firm Resettlement Considerations.

13. CLINIC's affiliates provide pro bono or low-cost immigration-related services using materials, training, education, best practices, and sometimes, funding provided by CLINIC. A significant percentage of CLINIC affiliates provide legal services related to asylum claims, withholding of removal claims, and claims seeking protection under the Convention Against Torture, and CLINIC's affiliate network assists with thousands of asylum applications per year, including providing direct legal representation. The vast majority of the defensive asylum cases filed by CLINIC's affiliates simultaneously apply for withholding of removal and protection under the Convention Against Torture.

14. CLINIC's Defending Vulnerable Populations Program's staff leverages the organization's substantial asylum expertise, gathered over many years of practice, to provide support to CLINIC's affiliates on asylum matters, including through trial skills trainings on representing asylum seekers in immigration court, practice advisories, on the requirements of asylum law including the nexus, political opinion, particular social group, and discretion requirements, and technical assistance. The Defending Vulnerable Populations Program also works to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings through specialized curricula and training programs on immigration law and immigration court trial skills. The curriculum includes training based on complicated asylum scenarios, such as how to handle an asylum case file involving a Latino youth with false gang allegations. Since October 2016, we have trained over 800 participants using this curriculum.

15. The Defending Vulnerable Populations Program has created several in-depth written resources on asylum over the past two years. These include practice advisories such as: Practice Advisory: LGBTI DACA Recipients and Options for Relief under Asylum Law (June 25, 2020); Practice Advisory: Overcoming the Asylum One-Year Filing Deadline for DACA Recipients (June 25, 2020); Practice Pointer: *Matter of L-E-A-* (Updated April 20, 2020); A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders (July 10, 2019); Practice Advisory: Asylum Seekers Stranded in Mexico Because of the Trump Administration's Restrictive Policies: Firm Resettlement Considerations (April 24, 2019). CLINIC staff members spent hundreds of

hours on putting together these resources. CLINIC's Defending Vulnerable Populations Program has also conducted webinars on, among other topics: changes to particular social group case law; writing asylum declarations; and motions to reopen based on changed country conditions. CLINIC staff members spent a significant amount of time on putting together these webinars and has given the webinars to hundreds of people (229 for changes to particular social group case law, 267 for writing asylum declarations, and 89 for motions to reopen based on changed country conditions).

16. In addition to the support provided to organizational affiliates, CLINIC's Defending Vulnerable Populations Program provides guidance and orientation to families separated pursuant to the Trump administration's "Zero Tolerance Policy" that resulted in families being separated at the border. CLINIC assists those who are pursuing asylum in the United States to locate counsel; provides mentorship to the formerly separated families' legal counsel; provides representation on the initial I-765 employment authorization applications; and assists asylum seekers to complete their applications for those formerly separated families who lack legal counsel.

17. CLINIC's Defending Vulnerable Populations Program also has a Remote Motion to Reopen Project, which has provided representation to formerly separated families, families released from family detention, asylum seekers, and other vulnerable people around the country, in filing motions to reopen before the immigration courts and the Board of Immigration Appeals. CLINIC has provided motion to reopen assistance since 2016. Through this project, CLINIC partners with pro bono attorneys to provide high quality representation on motions to reopen, and once the case is successfully reopened, CLINIC places the case with competent local counsel, providing further mentorship assistance as needed.

18. CLINIC's Defending Vulnerable Populations Program provides pro bono legal counsel to asylum seekers appealing to the BIA and the U.S. courts of appeals through our BIA Pro Bono Project, and, to a lesser extent, direct representation for asylum seekers in immigration court on a pro bono basis. If CLINIC is unable to assign pro bono matters, such as asylum applications, to a member of our network of affiliates, CLINIC staff—working individually or as part of a larger team—will often undertake the direct representation themselves.

19. CLINIC and our affiliates do extensive work with pro bono counsel in private practice around the country, including large firms, smaller firms, and solo practitioners. CLINIC and our affiliates are often able to screen clients and refer individuals with straightforward asylum claims to these pro bono counsel. Most of these pro bono counsel do not focus on immigration law in their ordinary practice. However, with support from CLINIC and our training materials, pro bono counsel have been able to represent these clients with great success. CLINIC's BIA Pro Bono Project has provided representation before the BIA to over 1600 noncitizens, more than 80 percent of whom have sought asylum or related relief. Through the use of pro bono counsel, CLINIC is able to broaden its reach and serve more clients, fulfilling our mission.

20. CLINIC has established a program, *Estamos Unidos*, in Ciudad Juarez Mexico, aimed at providing Know Your Rights information to asylum seekers who are stranded in Mexico as a result of MPP and asylum metering. CLINIC's *Estamos Unidos* legal team has provided mass community education presentations that could have up to 100 participants. In these conversations CLINIC staff talk about the importance of providing details in the oral testimony that asylum seekers would provide at their hearings. A large majority of the individuals for whom CLINIC provides these presentations are trauma survivors who face extreme difficulties in prioritizing which traumatic experience to highlight. Even with the Know Your Rights model that CLINIC employs in Juarez, it often takes multiple meetings with asylum seekers suffering the ongoing effects of trauma, for CLINIC staff to begin to understand what happened in the asylum seeker's country of origin and to help the asylum seeker understand what portions of their story are relevant to their claim for asylum.

IV. The Rule and Its Radical Rewriting of Asylum Law

21. The Rule challenged in the Complaint, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (December 11, 2020) ("Rule"), would irreparably harm CLINIC in multiple ways unless it is enjoined, including by frustrating CLINIC's mission to serve and support as many immigrants—and affiliate organizations providing immigration law services—as possible.

22. The Rule is a radical rewriting of multitudinous areas of asylum, withholding of removal, and Convention Against Torture law upending decades of settled precedent. The Notice of Proposed Rulemaking for the Rule was over one hundred and sixty pages long, with the proposed rules themselves comprising over sixty pages of text, much of which was unsupported and required extensive research to understand and appropriately comment on. Yet, the Government only gave a mere thirty days to comment. Consequently, in the thirty day comment period for this Rule, the staff at CLINIC had to immediately divert our resources and expend well over 100 hours of staff time to research, draft, and submit a one hundred and one page comment to the Proposed Rule during the notice and comment period. This is in addition to the other comments on related rules that would negatively affect asylum seekers that CLINIC has had to submit comments on as well, some of which were proposed and pending *at the same time* requiring CLINIC's staff to race to comment on multiple rules in short periods of time simultaneously. In total, in the past 16 months CLINIC has had to submit over 20 comments on proposed changes to asylum law and immigration court procedures that will affect asylum seekers, taking hundreds of hours of dedicated staff time. This has required significant work not only to research and detail the deleterious effects of this Rule but also to analyze the substantial overlap and consequences between this then-proposed Rule and the various other proposed rules, including those that came out during the comment period. The vast quantities of time dedicated to this work including work over weekends and late into many nights is time that otherwise could have been spent providing services to our clients and support to our affiliates. Yet, as noted in our comment to this Rule, it was impossible for CLINIC even within one hundred and one pages to come close to adequately analyzing or even discussing every element of asylum law that this Rule seeks to rewrite. The time provided was far too short, forcing CLINIC to triage and comment only briefly on some portions of the Proposed Rule and not comment on other parts at all. If CLINIC had a reasonable amount of time—sixty days, or longer, as rules with such a radical departure from long-established law and precedent generally receive—we would have been able to further expand our comment and explain further all of the ways the Proposed Rule would harm asylum seekers, provide more data that CLINIC did

not have time to gather, provide examples of how the various provisions would harm specific individuals or categories of individuals that CLINIC is serving, and study the interactions between this Rule and the other Proposed Rules. With multiple, overlapping rulemakings occurring simultaneously, CLINIC had to triage which staff would work on which comment. It would have been physically impossible for any one person to fully understand every pending rule over the summer and beyond, and so we could not consider and comment on every aspect of how the rules overlap and how the cumulative effect of all of the rules is even greater than each of the rules individually. Not having time to comment fully—despite our Herculean efforts to provide as much information as we could—deprived CLINIC of our opportunity to explain all of the harms this Proposed Rule would cause. And in the Rule, the agencies did not adequately respond to—or often even address—the various flaws, problems, and contradictions in the proposed rule that CLINIC was able to raise in the short time we had to comment.

23. As the hub of the largest network of immigration legal service providers in the United States, CLINIC is tasked with analyzing every significant change to immigration law and policy and creating digestible information to hundreds of organizations and thousands of practitioners nationwide. The Rule will require this analysis and creation of training materials, but at a much larger scale because asylum-related services (including the filing of affirmative asylum applications) account for a large percentage of the services provided by CLINIC and our affiliates, approximately 45 percent of which provide asylum representation. Approximately 32 percent of CLINIC affiliates provide representation to asylum seekers in removal proceedings, and virtually all of these applications also include applications for withholding of removal and protection under the Convention Against Torture.

24. The Rule is an utter and complete rewriting of many of the core concepts of asylum law including (but not limited to) nexus, particular social group, political opinion, who a persecutor can be, how to calculate harm, the right of an individual to testify, ability to relocate within a country of origin, firm settlement, discretion exercised by an asylum officer or Immigration Judge, and frivolousness. This Rule is a paradigm shift that far from requiring practitioners to devote a

"certain, albeit small, amount of time" to address as the Rule claims will instead require a significant use of many of CLINIC's staff members' time as we remove from circulation and completely rewrite all of our asylum-related resources. 85 Fed. Reg. 80378. Rather than requiring an update of a few materials or an editing of certain trainings, this sea change in the law would require a complete rewriting of all of CLINIC's asylum-related training materials. I estimate we would have to update at least eight written practice advisories or templates in addition to creating new practice advisories, templates, and webinars to provide trainings on the new Rule, all of which would take hundreds of hours of Staff time. As described below, and contrary to the statement in the Rule, the time CLINIC spends responding to this Rule will not be offset by any future benefits of the rule; indeed, CLINIC expects that the Rule will require extensive further expenditure of resources and require our affiliates to provide representation in more appeals than in the past, including appeals to federal courts of appeals.

25. As a result of the Rule, CLINIC will need to divert significant resources, prior even to the Rule's effective date, as many asylum seekers may rush to file before the new requirements take effect. Additionally, CLINIC will continue to devote significant time and resources to informing the communities it serves, participating in further advocacy, and rushing to extensively update all of the relevant resources in a hope of being able to address this completely new paradigm when and if it takes effect.

26. To the extent any of the Rule is retroactive—and it is unclear based on recent guidance issued by the DOJ's Executive Office of Immigration Review[2] whether any of the provisions of the Rule, including, for example, the potential for pretermission will be applied retroactively—CLINIC and our affiliates will have to expend significant unexpected resources on service to cli-

[2] Memorandum from James R. McHenry III, Director to All of EOIR, "GUIDANCE REGARDING NEW REGULATIONS GOVERNING PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL AND CREDIBLE FEAR AND REASONABLE FEAR REVIEWS" Dec. 11, 2020 *available at:* https://www.justice.gov/eoir/page/file/1344511/download ("As detailed in the NPRM and the final rule, many parts of the rule merely incorporate established principles of existing statutory or case law into the regulations applicable to EOIR. Accordingly, nothing in the rule precludes the appropriate application of existing law—independently of the rule—to cases with pending asylum applications").

ents it has already accepted to revise or conform their asylum applications, applications for withholding of removal, and protection under the Convention Against Torture to this current Rule. CLINIC and our affiliates already have obligations to these clients, and CLINIC and our affiliates had relied on the current state of the law not completely changing when it accepted these clients. The work of rushing to file before the effective date, determining whether the asylum seeker that the affiliate has already agreed to represent will still have a viable case in light of the Rule, or responding to attempts to implement the Rule's provisions, such as pretermission in advance of the effective date, will take resources that cannot be recouped and that, absent this sweeping change, could otherwise have been spent serving additional clients.

27. The Rule will have an immediate and tangible impact on the day-to-day work of CLINIC and our affiliates. Each practitioner will immediately need to know how to assist clients under the new Rule and CLINIC's job will be to provide this information. All 2,000-plus affiliate legal staff and their volunteers will need to be trained on all of the many aspects of the Rule's impact on clients and prospective clients seeking asylum, withholding of removal, and protection under the Convention Against Torture. CLINIC has already allocated considerable staff time to reviewing, analyzing, and commenting on the proposed Rule and anticipates based on the work already done incurring significant additional expenses if this Rule goes into effect, as the organization will have to develop new training and legal support resources for, and respond to, technical support inquiries from our affiliate network which will likely be substantial as such a large portion of asylum law will have changed due to this Rule, wiping out decades of precedent.

28. CLINIC's affiliates depend on CLINIC to provide real-time and up-to-date guidance on immigration law and policy, a service which has become both increasingly critical and increasingly difficult in light of the volume and scope of changes to the asylum process—and the resulting interplay between these regulatory changes—that have occurred even just over the last two years. CLINIC delivers this guidance via emails, webinars, and our website. All of the guidance pertaining to asylum will have to be completely rewritten if this Rule goes into effect.

29. CLINIC's Training and Legal Support program recently hired a new attorney with

substantial asylum experience to be able to respond to the increase in asylum-related questions CLINIC anticipates as a result of the new Rule.

30. In the past year alone, CLINIC has had to create numerous substantive trainings and publish practice alerts in response to changes to the asylum framework, including a fact sheet for practitioners navigating immigration court proceedings for unaccompanied child clients pursuing initial asylum jurisdiction with USCIS; an in-depth analysis and year-to-year comparison of both the annual Human Rights Report published by the U.S. Department of State on Honduras and the USCIS Asylum Office's Credible Fear Lesson Plan, which is designed to train asylum officers and set forth standards to be followed when conducting credible fear interviews; answers to FAQs regarding multiple changes to the employment authorization rules for asylum seekers; practical guidance regarding representation of asylum seekers with family-based claims; and a practice manual containing an overview of applicable laws, regulations, and guidance concerning the I-730 petition process for asylees and refugees to petition for family members, as well as practical information on how to navigate the application process from completing the form I-730, to compiling evidence, to troubleshooting with government agencies. Putting together all of these resources has taken months of staff time, and many will now have to be revised or even completely rewritten if this Rule comes into effect taking still more staff time. In addition, CLINIC filed numerous comments on proposed rules impacting the asylum process, as well as filing several amicus briefs in matters concerning asylum. These have taken hundreds of hours of staff time as well.

31. As a result of the new Rule, in addition to providing the above-mentioned practice alerts and updates, CLINIC will have to re-work our core existing trainings and materials to account for the numerous and far-reaching changes from all the many aspects of this rule. For example, CLINIC would have to re-work our asylum e-learning course, our legal practitioner toolkit and removal defense toolkit, and the "Representing Clients in Immigration Court" publication issued by the American Immigration Lawyers Association. Additionally, CLINIC will have to rewrite significant portions of existing written materials, which will need to be reviewed for potential changes in light of the new Rule, and it is likely that many will need to be fully rewritten. CLINIC

will also need to write an in-depth article, or perhaps several articles given the breadth of otherwise unrelated topics covered, on the final Rule.

32. In general, the Rule will result in a significant expenditure of staff resources to respond to the various changes to the asylum eligibility guidelines, the requirements for withholding of removal, and the requirements for protection under the Convention Against Torture. This diversion of resources will take staff away from other CLINIC initiatives. CLINIC has already had to divert resources to respond to numerous changes to immigration regulations including changes to public charge determinations, fee waivers and increases, newly proposed bars to asylum based on prior convictions or alleged criminal activity, responding to Requests for Evidence in cases pending before USCIS, and additional near-constant changes to long-established immigration practice. These changes are detrimental to immigrant clients and have resulted in CLINIC having to significantly increase the staffing levels in our Defending Vulnerable Populations Program. CLINIC anticipates that the need to continue increasing staffing and diverting existing resources will only intensify due to the Rule, although the organization's actual ability to hire such staff may not be commensurate with demand. Much of the work that CLINIC will have to initiate in response to the changes in the Rule will be brand new work. But for the need to respond to the changes in the Rule, CLINIC staff would otherwise be devoting time to helping affiliates tackle difficult legal problems under existing law, or training and teaching on other important issues including removal defense, naturalization, adjustment of status, Special Immigrant Juvenile Status, Violence Against Women Act ("VAWA") self-petitions, T and U visas, Temporary Protected Status, Deferred Action for Childhood Arrivals ("DACA"), and Liberian Refugee Immigration Fairness ("LRIF").

33. As discussed above, CLINIC expects that the Rule will increase the number of queries submitted through our ask-the-expert website portal concerning all aspects of how immigration law is changed by this Rule. Indeed, while recent regulatory changes have made it more difficult to assess asylum eligibility, this new Rule imposes substantial—and previously untested—challenges for any immigration law practitioner, including CLINIC and our affiliates.

This radical change in the law has several consequences, discussed below.

34. First and foremost, this Rule would undermine the value of CLINIC's expertise. Many members of CLINIC's staff have over ten years of experience in immigration law matters, combining for hundreds of years across the staff. CLINIC's staff is able to respond relatively quickly to complicated questions based on their experience with multiple cases over the years and a ready facility with the complex precedents in immigration law. This Rule so drastically changes everything including overruling bedrock principles of immigration and asylum law (often contrary to Circuit Court precedent and the requirements of the Immigration and Naturalization Act) that CLINIC, our staff, and our affiliates—and the asylum officers and Immigration Judges whom we will appear before—are starting in many areas from scratch including on such basic questions as the definition of persecution, political opinion, particular social group, nexus, discretion, and frivolousness as described below. Contrary to the statement in the Rule that "any costs imposed on attorneys or representatives for asylum seekers will be minimal and limited to the time it will take to become familiar with the rule," 85 Fed. Reg. 80378, CLINIC estimates that it will take months for practitioners and the immigration courts to become familiar with the new Rule, and that new law will have to develop over the course of years interpreting these dramatic changes. Practitioners and Immigration Judges will have to refine their instincts and understandings that have grown out of the current law which this Rule washes wholly away in many areas without cause or explanation.

35. CLINIC has strong reliance interests in the basic parameters of the law not being fundamentally changed without sufficient warning as this Rule does. CLINIC has relied on existing definitions and standards that are upended by the Rule. CLINIC's model with a central expertise node supporting hundreds of affiliates serving thousands of asylum seekers relies on the ability to leverage our expertise. This Rule, with its massive paradigm shift changing virtually all aspects of the law on asylum, withholding of removal, and protection under the Convention Against Torture upsets this model by robbing CLINIC of the necessary expertise at the hub of our organization. We have poured resources into existing cases that may no longer be meritorious in light of the new Rule. We likely could not have accepted the same number of cases as we already have if the Rule

were in effect when we were screening the matters, and we may have decided to decline some matters that we have since accepted if the Rule had been in effect. Now that CLINIC attorneys have appearances on file in matters, we cannot end the representations without permission.

A. Pretermission

36. Critically, the Rule would require an immigration judge to pretermit and deny asylum, withholding of removal, and Convention Against Torture application without a hearing if the immigration judge determines the applicant has not established a *prima facie* claim for relief. This means that applicants can have their claims denied without being able to testify and build a record in their own words and will be forced to rely on what they are able to put into the I-589. CLINIC staff at our *Estamos Unidos* project in Juarez have described the ability of a *pro se* asylum seeker to fully complete a Form I-589, Application for Asylum and for Withholding of Removal, in English, as "a miracle." The barriers imposed by lack of access to counsel, lack of access to competent translators, lack of access to printers and copiers, lack of access to the technology necessary to research necessary law and country conditions, and lack of access to funds to pay for any of these necessities even if they do exist, combine to make it nearly impossible for *pro se* asylum seekers, especially those stranded in Mexico, to fully and accurately complete their I-589 application.

37. Pretermission of asylum applications is also likely to increase the number of applicants who are unrepresented. Many applicants for asylum, withholding of removal, and protection under the Convention Against Torture are unrepresented when they file their I-589—a situation likely to be made much worse by a subsequently published rule requiring every asylum seeker in asylum-and-withholding-only proceedings to file a I-589 within fifteen days of their first hearing. It is not unusual for an asylum applicant to file a *pro se* I-589 application that is then amended by counsel when the applicant is finally able to secure counsel, often much closer to a merits hearing, several months or even years after the initial application is filed. Under this Rule, an Immigration Judge could *sua sponte* pretermit an application before the applicant has an opportunity to secure counsel, which denies the applicant of the opportunity to testify and tell their story. Under the current system, asylum seekers are able to present testimony before the immigration judge, even

if the I-589 is not well-developed. Under the new Rule, immigration judges may deny applications for asylum based on under-developed I-589 written applications before an asylum seeker can even meet with counsel to discuss the complex contours of asylum law and how the facts of their case would fit in to existing law.

38. This Rule also substantially increases the information that has to be put into the I-589 application. Prior law required applications to contain facts similar to a notice pleading. Then, prior to an asylum interview or a hearing, the asylum seeker—who would be much more likely to be represented—would file a more fulsome application. In part, this process is necessitated by the time difference between filing the application and an interview or hearing, which in the past has been several years. Information on country conditions, for example, may become stale several years after the application is filed, and so the pre-hearing or pre-interview submission would have the timely information. In contrast to this, the Rule requires the I-589 to have information similar to what is required in summary judgment in Federal Court. 85 Fed. Reg. 80303. Moving the requirements from notice pleading to summary judgment will place a large burden on CLINIC's affiliates to develop the information in the short time between meeting a client and filing an I-589 and will put an almost impossible burden on any *pro se* litigant, particularly one with language difficulties, Post Traumatic Stress Disorder or other mental health concerns, or any of the pantheon of issues faced by asylum seekers. Many asylum seekers struggle to file sufficient information under the current I-589 regime; requiring even more information would place an extreme burden on them.

39. These concerns about pro se asylum seekers having their applications pretermitted despite having a valid claim are further magnified for indigenous language speakers where it is often impossible to find competent assistance to translate from the asylum seeker's first (or only) language into English. Often indigenous language speakers must attempt to communicate in Spanish even when they are not fluent in Spanish. For example, CLINIC's *Estamos Unidos* staff has assisted a 21-year-old Guatemalan asylum seeker who speaks Mam, who has continued to attempt to share her testimony with immigration officials at the ports of entry to receive a fear screening

to be removed from MPP. Although she expressed that she is fluent in Mam and is not comfortable in Spanish, she was interviewed by an immigration official in Spanish and a decision to keep her in the program was reached through her testimony in a non-native language in which she lacks fluency. During Court proceedings she has continued to proceed with interpretation in Spanish, despite that not being the language in which she is fluent. It is very unlikely that she would understand what was happening in court if DHS or the Immigration Judge voiced an intent to pretermit the case based on her inability to make out a *prima facie* asylum case. Under the Rule, this asylum seeker, and hundreds of other rare language speakers, could be removed without ever receiving a full court hearing.

40. The language barriers are compounded by the fact that so many of the people applying for asylum, withholding of removal, and protection under the Convention Against Torture—including, for example, the clients that CLINIC sees in Juarez—are suffering from post-traumatic stress disorder and other trauma-related mental health problems due to the persecution they have suffered, making it difficult—while still in the stressful and highly dangerous situation in Juarez—to fully describe and prioritize all of the various trauma and persecution they have suffered, particularly under the very real threat of being pursued by their persecutors to Juarez or of being deported back to their persecutors in their home countries. Under the Rule's pretermission regime, these people could have their applications denied before they have any reasonable chance of telling their story or finding counsel (as noted above, only 224 of people under MPP in Mexico, out of 32,188, are represented, leaving 31,964 unrepresented).

41. CLINIC represented a rare-language speaking family from Guatemala on appeal before the BIA after their claim for asylum was denied by the Immigration Judge. The family fled their country after receiving death threats, being extorted, being chased with machetes, having stones thrown at them, and ultimately having their family home confiscated, by a criminal organization. In all, the family suffered over 20 incidents of terrifying harm. Although they reported this harm to the police, the police did nothing to investigate, in part because of their animus towards indigenous people. The family was placed in MPP and, after conducting a cursory "hearing" in

which all he did was ask whether the information they had written on the I-589 was accurate, the Immigration Judge denied the family's application for relief. On appeal, the BIA remanded the case, agreeing with our argument that the Immigration Judge had failed to adequately develop the record. Under the new Rule, the immigration judge could have pretermitted the case based on his own review of the I-589 and the family would not have had the opportunity to present their case with the assistance of an Immigration Judge asking questions to determine whether their claim meets the elements of asylum, withholding, and/or protection under the Convention Against Torture.

B. Discretion

42. In addition to the burdens for showing eligibility for asylum, the Rule, if it is allowed to go into effect, would require adjudicators to consider factors and deny applications for people who have already shown that they are eligible for asylum (*i.e.* that they have suffered persecution or have a well-founded fear of future persecution based on race, religion, political opinion, or membership in a particular social group) under the guise of discretion. The Rule requires Immigration Judges to consider certain factors as "significantly adverse" and thus strongly urges denial of applications as a matter of "discretion" for a number of factors, including the asylum seeker's unlawful entry into the United States unless that individual enters during an immediate flight from persecution in a contiguous country (*i.e.* blocking everyone but Mexicans and Canadians). And the Rule also requires immigration judges to consider as "significantly adverse" and thus strongly urges denial for qualified asylum seekers if they have failed to apply for protection in a country they passed through on the way to the United States (*i.e.* seeking asylum in Mexico or Central America, despite those countries' limited and ineffective asylum systems). DHS and DOJ attempted to implement this transit ban by a final interim rule in 2019, but that final interim rule was struck down by courts. In spite of the fact that this requirement was already struck down, DHS and DOJ are re-imposing this requirement through this rule and through another final rule, *Asylum Eligibility and Procedural Modifications*, that was published on December 16, 2020 and is scheduled to take effect on January 19, 2021. Beyond this requirement having already been

struck down by other Courts, CLINIC's staff have seen countless examples of why asylum seekers—particularly those too poor to pay to fly to the United States—have to pass through Mexico and other countries and do so without documents and without seeking asylum there. And the Rule requires immigration judges to consider as "significantly adverse" asylum seekers' use of fraudulent documents unless they arrived directly from their home country, which is likely to result in the denial of asylum.

C. Resettlement

43. CLINIC's *Estamos Unidos* project staff has heard first-hand of the extreme dangers that asylum seekers face in Mexico as they are forced to await their U.S. immigration hearings there. These dangers make those asylum seekers deeply fearful of staying in or applying for asylum in Mexico. For example, a 50-year-old Venezuelan woman became visibly upset when CLINIC staff asked about her experience in Mexico. She had already requested a fear interview with U.S. immigration authorities in November 2019. Despite telling them about the xenophobic treatment and assaults she experienced in Mexico, she was returned to Ciudad Juarez. She expressed fear of being in Mexico because she, like many, was targeted for being a foreigner. Since she was returned to Mexico, she was targeted by local law enforcement as she asked for directions to a market in downtown Ciudad Juarez. The officers heard her accent, identified her as a foreigner and requested to see her permit to be in Mexico. She was calm and confident that she had everything in order. She showed them her papers proving her legal status in Mexico, and they accused her of having false documents. They threatened to detain her unless she paid them. She did not have the money they demanded. The two local police officers in broad daylight forced her onto their official truck and told her to provide payment in-kind, and sexually assaulted her. She tried to fight but could not; after some time, she started vomiting and the officers pushed her out. She has no faith that the Mexican government would give fair consideration to an asylum application nor would she feel safe remaining in Mexico even if she were granted permanent status there.

44. CLINIC's *Estamos Unidos* project worked with another young woman fleeing from El Salvador who arrived in Chihuahua, Mexico, in August 2019 and was kidnapped before making

it to the U.S. border. She was kept locked up in a warehouse for a month. Those responsible beat her until she gave them her father's phone number, who paid the ransom. After weeks, she was dumped in a ditch near the Rio Grande. It took all her might to walk, as she had no idea where she was. Men on horseback helped her. She later realized they were U.S. officials. They asked her what happened to her, and she explained. They asked her questions about herself and handed her papers she did not understand. After a couple of days, she was told by one of the officers to come back on the date the paper said and to tell her story when she came back. U.S. immigration authorities returned her to Ciudad Juarez under MPP. She was returned to Mexico after dark and with nowhere to go, leaving her vulnerable to the violence and insecurity from which she had just escaped. She was kidnapped a second time. This time there were three other women and two children with her. Her father was again contacted, but he was not able to pay. Tears streamed down her face as she told them her family had nothing to exchange for her release… for her life. The perpetrators forced her to repeatedly watch a video of a woman being tortured. She believed she was going to end up the same. Fortunately for her, a woman helped her escape. However, she has no reason to believe that she could remain safely in Mexico even if she were granted permanent status there.

45. CLINIC's *Estamos Unidos* staff have also worked with a young woman from Guatemala who is seeking asylum in the United States and has been subjected to MPP. She is a survivor of gender-based violence who fled gang violence with her mother and younger brother. She suffers from frequent nightmares and night sweats. Though she started receiving some psychological support at the shelter where she was staying, a gang member from Guatemala recently approached her and threatened her, plunging her back into a state of constant fear. The gang member threatened to "make her suffer" if she told anyone he was in a gang. She was brave and told someone about the threats, and the gang member was eventually removed from the shelter but now she lives in constant fear that the gang will seek her out in Mexico, and she has no faith that the Mexican police would be able to protect her.

46. In another example, CLINIC's staff worked with an elderly woman who fled her

home country in Central America due to gang violence. On her journey north, she was kidnapped by a cartel in Mexico. Her family was able to pay her ransom, but money did not save her from the beatings and assault. The men took all her documents and her cellphone, along with all her personal information. After she was placed under MPP in December 2019, her family members were contacted and told she was detained in the United States and on her way out, which was a lie. When the family became suspicious and confronted the caller, the man openly identified himself as the one responsible for her previous kidnapping. He knew exactly where she was in Mexico and threatened to harm her if he did not receive the sum of money he demanded. She is terrified of remaining in Mexico and fears that even if she were to be granted asylum there, she would not be safe.

47. Similarly, CLINIC's *Estamos Unidos* staff worked with a Honduran woman who fled gang-based violence along with her teenage daughter. She was a teacher for more than 15 years. Gang members had threatened to harm her and her colleagues many times at school. The threats and attacks against her colleagues became so severe that most teachers requested extended leaves and moved to other places to keep safe. The threats reached a tipping point when they were no longer directed at her, but at her teenage daughter. The family decided to flee so she and her daughter traveled to seek protection in the United States. However, once they entered the United States, CBP officials placed them under MPP and returned them to Ciudad Juarez, Mexico, to wait for their initial master calendar hearing in January 2020. In Ciudad Juarez, members of organized crime kidnapped the mother and daughter for five days and six nights. They were forced to stay in a small room in a house where people came and went, music always played loudly and drugs were strewn in plain sight. The daughter remembers seeing a man snorting white powder. She said she saw very bad things — things she never had imagined before. They were able to escape, but had nowhere to go or any idea where they were. They crawled through desert-like empty lots and hid in a ditch before reaching a public area where they sought help. They are now staying in a shelter, but rarely leave out of fear that they could be kidnapped again. They do not know what will become of them — but understand that they are easy prey and never safe while being stuck in

Mexico.

48. CLINIC's *Estamos Unidos* project staff have witnessed firsthand the effects of MPP on asylum seekers. CLINIC worked with a young married couple who left Cuba a year ago and were subjected to the metering system at the border for six months. The metering system in Ciudad Juarez forced them to sign up on a Mexican government-run list to await their turn to present themselves at the El Paso port of entry. When Mexican officials finally called their names, they were allowed into the United States, processed and placed under MPP to be returned to Ciudad Juarez. As they tried to move around Juarez, they received threats from a cartel whose members followed them constantly. The couple reached out to Mexican authorities, but were told nothing could be done because there was no way to track who was threatening them. The couple has lived in constant fear since their return to Ciudad Juarez. They have now been forced to survive and be in hiding in Mexico for close to a year, terrified and in danger throughout. Their experience shows that the Rule's assertion that Mexico is safe for asylum applicants is untrue.

49. These dangers faced in Mexico would only be made worse by the portion of the Rule that would force many asylum seekers to remain in Mexico if they have been there for a year, claiming that they are firmly settled. The Rule, if allowed to go into effect, would redefine firm settlement to cover people the United States Government has forced to stay in Mexico, even though they are far from being safely resettled. This new Rule redefines firm resettlement to allow resettlement that is unstable or temporary. In addition, people are subject to a *de facto* bar if it took them more than 14 days in Mexico before they entered MPP even though asylum seekers crossing Mexico often are doing so by foot, weak, tired, lost, slowed by young or sick relatives, and unable to move quickly.

50. In researching its comment to the Rule, CLINIC has found information showing that Mexico's asylum system is restrictive, severely underfunded and underdeveloped, and faces significant staffing and infrastructure limitations. In June 2019, the Guatemalan Institute for Migration had not processed any asylum cases in more than a year. Furthermore, Guatemala's Office of International Migration Relations, a specialized unit for the processing of asylum claims, had a

staff of three caseworkers, three investigators, and one supervisor. Honduras's asylum system has been described as nascent. In fact, from January 2008 to July 2019, only 299 requests for asylum were registered with the Honduran National Institute for Migration, and only 50 were recognized as refugees. El Salvador's asylum system is also underdeveloped and its President has acknowledged that the country does not have asylum capacities. Along with rudimentary asylum systems, asylum seekers in Mexico and the Northern Triangle face targeted violence at the hands of government and transnational criminal organizations. This research is confirmed by the experiences of the asylum seekers that CLINIC has worked with. It is unreasonable—and indeed counterfactual—to claim that asylum seekers can find safe resettlement in the countries they pass through on the way to the United States. Even if the UNHCR is making improvements to the asylum process in Mexico, there is a long way to go, and it is cruel and un-Christian to leave people subject to rape, kidnapping, violence, and torture in Mexico.

51. CLINIC also worked with a family of three—father, son and daughter—who fled Venezuela to Panama due to political persecution, after they opposed the ruling party. Upon arrival in Panama, they applied for protection, but were harassed, abused and constantly targeted because of increased xenophobia against Venezuelan nationals. Local residents threatened the son and beat him badly. In addition, officials denied the family access to education and health care. As a result, they fled Panama, traveling through Central America and Mexico to seek asylum in the United States. Upon arrival, Mexican authorities mistreated and extorted them by unlawfully retaining their passports. Both father and son survived beatings, abuse, and attempted kidnapping in Mexico. The teenaged daughter experienced an attempted sexual assault, from which she suffers continued signs of trauma and possible mental health complications. Eventually, the family crossed the border to the United States, and immigration authorities placed them under MPP. Fearing more persecution and violence, they now spend all their time at a shelter in Ciudad Juarez. This family's experience shows why asylum seekers cannot remain safely or under asylum in the countries they pass through. Yet the Rule would deny this family asylum based on their not having sought asylum in Mexico, even though they still have not found safety in any country.

52. CLINIC's *Estamos Unidos* project staff have worked with bona fide asylum seekers who would not be eligible for asylum under the Rule. For example, CLINIC worked with an asylum-seeking couple from Honduras who fled with their seven-year-old child after being persecuted by organized crime. The mother's father was recently murdered and most of their family is either dead or fleeing for their lives. The family was placed into MPP and have been awaiting a U.S. immigration hearing in Ciudad Juarez. Over the course of several meetings, CLINIC staff have witnessed the asylum-seeking mother break into tears when describing her fear of being in Mexico. The men that have been hunting down her family have tried to find the family in Mexico as well. They have tried to find a safe place to wait for their hearing, but she knows they would never be safe in Mexico where organized crime exerts extraordinary control over every part of daily life. The family has already escaped two kidnapping attempts in Mexico. In the most recent attempt, the mother fell trying to escape one of the men and suffered a miscarriage. She prays for her family to stay alive and be able to appear before a U.S. immigration court once MPP hearings resume.

53. It is under these circumstances of dodging kidnapping and ransom attempts and violent gangs, that asylum seekers will need to fill out their I-589, without legal training, without the ability to research law or gather country conditions information, without the ability to speak or write English (or even Spanish). Under the Rule, if asylum seekers are not able to make out a *prima facie* case, their case may be pretermitted and denied without them having a chance to testify and explain all that has happened to them, which would plainly make out cases for asylum, withholding of removal, and protection under the Convention Against Torture. The fact that the Rule would provide them a ten-day opportunity to contest the ruling is not helpful as the asylum seekers CLINIC works with would not be able to put together a packet of information necessary to contest the pretermission in that time, or any time, without adequate legal advice.

54. The Rule's justifications for several of these changes, including the change regarding entering the United States with false paperwork, ignores that an asylum seeker cannot be granted asylum until they have undergone a background check and their identity "has been checked

against all appropriate records or databases." This background check is mandatory for every applicant, regardless of whether they entered with real or fraudulent documents.

D. Particular Social Group

55. The Rule's changes to the definition of a Particular Social Group add to the already tremendous difficulty faced by the asylum seekers CLINIC serves and hopes to serve. The refugees CLINIC works with do not understand the concept of a particular social group, which is a legal term of art and has been a rapidly changing area of the law under the current administration. The Rule would require that an asylum seeker state with exactness every particular social group as part of the asylum application and then before the immigration judge, and that: "A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel." 85 Fed. Reg. 80385. This draconian result robs these asylum seekers of their opportunity to explain the persecution they have suffered to an Immigration Judge and is particularly harsh for people with mental illness, trauma, or children.

56. Having to identify a particular social group in the I-589—at a time when many asylum seekers and refugees seeking withholding of removal or protection under the Convention Against Torture are unrepresented and would not know what groups would suffice under U.S. Immigration law—would result in many asylum seekers who merit asylum being denied simply by not understanding or having any way to learn what the meaning of the question on the form is.

57. Setting forth a viable particular social group is also quite difficult given the state of flux in the law. Asylum seekers often have to fill out their I-589 years before their cases are heard. By the time the case comes before an Immigration Judge, the particular social group law is likely to have changed and the asylum seeker—not having the ability to predict the future—will not have

articulated their social group in a way that matches the law five or six years down the road.[3] The risks of pretermission and waiver will require CLINIC and our affiliates to pose and work up every potential particular social group in every I-589, taking a significantly greater amount of resources per case. Adding to this burden, the Rule does away with decades of law on particular social groups, making it impossible to use particular social groups that have long been understood as appropriate under the law, such as people fleeing honor killings or Female Genital Mutilation (due to the link of both to gender, which the new Rule would require an Immigration Judge to reject under its revised nexus definition that discounts gender). These changes force CLINIC and our affiliates to guess at what particular social groups will ultimately be found sufficient and include many more than necessary in order to inoculate an application against changes in the law.

E. Political Opinion

58. Similarly the Rule severely limits the definition of political opinion. This change would remove anti-gang opinions as political opinions and require that the asylum seeker have engaged in expressive behavior related to a discrete cause related to political control of the State or unit thereof in order to be eligible. The new definition of "political opinion" contradicts many agency and circuit court precedents. Feminism, for example, has long been considered to be a political opinion. Because this part of the rule may apply retroactively (to the extent the government views this portion of the rule to be a clarification, not a revision), this part of the Rule may affect many of our affiliates' clients with pending applications who already have submitted their application and had a hearing date assigned.

F. Persecution

59. The Rule also narrowly defines persecution, excluding, for example, "threats with no actual effort to carry out the threats." Yet if the threat is death that would mean that asylum seekers could not qualify unless the persecutor made a concrete effort toward killing them. And

[3] A new rule, published December 16, 2020, different from the Rule challenged in this case, suggests that EOIR intends to adjudicate all asylum applications within 180 days of filing the I-589. But, it remains to be seen whether this timeframe would be logistically possible given the ever-increasing backlog of immigration court cases and the due process rights of the asylum applicants.

while some exceptions specifically for death threats have been included in the Rule, if the threat is "merely" rape, torture, maiming one's children, or something less than death, the Rule would still require putting one's body in significant danger to show that the threat was real. No one should have to put themselves at that risk, and if someone runs before letting their body be defiled or their children be slaughtered, the United States should not hold that against them. There is also no provision to address cumulative harm or the particular harm suffered by children or other vulnerable asylum seekers. CLINIC's *Estamos Unidos* project staff have likewise seen the importance of assessing cumulative harm in asylum cases. For example, CLINIC worked with a 49-year-old Cuban asylum seeker currently in Juarez because of MPP while facing removal proceedings in the El Paso immigration court. He has suffered extensive, cumulative "minor harm" and should be granted protection under the current definition of persecution but might struggle to meet the new standard. This individual and his family have been targeted by the government for almost 20 years. His political views have resulted in being fired from his job in 2001, detained for a couple of days in 2006, fired from another job in 2014, as well as extensive other harm, where each individual incident to himself and his family could be characterized as "minor." As a result, he and his family were ostracized and could no longer continue to live in Cuba. This family is terrified of returning to Cuba, but would likely lose their application for asylum under this new Rule if it is allowed to come into effect.

G. Nexus

60. The Rule also grafts large numbers of anti-asylum measures into the definition of nexus, instructing adjudicators to usually deny common asylum fact patterns on nexus grounds. One of these is requiring denials, as a general matter, in cases based on interpersonal animus or retribution, despite the requirement under law that private actor harm can constitute persecution if the government is unable or unwilling to control the private actor. The Rule would generally require denials of asylum applications if the applicant cannot prove other members of the group suffered the same harm. And it would generally require denial in cases that do not involve the applicant's desire to change control of the State even though in many parts of Central America,

gangs act as quasi governments. It would generally require denial where the applicant is targeted for financial gain or subject to criminal activity—including the types of harm like murder, rape, and severe beatings that have been found to be persecution. It would generally require denial in cases based on gender, even for types of harm that have previously been well-established, such as Female Genital Mutilation cases. It would generally require denial where the applicant is persecuted for perceived gang membership. It also fails to require a mixed motive analysis. These are sea changes in the law that CLINIC would have to address in our materials and in all of the cases in which we are providing direct representation or mentorship going forward. To the extent Immigration Judges view the Rule as clarifications of existing law rather than new law—which, based on EOIR's memorandum cited in note two above, it appears EOIR is instructing them to do—CLINIC and our affiliates may have to address these changes in cases that have already been filed in reliance on the law in that Circuit which an Immigration Judge could now view as preempted by a BIA case as stated in the Rule.

61. In November 2019, CLINIC won a pro bono case for a Honduran woman who had been abused, assaulted, and had her life threatened based, in part, on her gender. Under the new Rule, that asylee's case would have been summarily denied—likely pretermitted without a hearing—because the Rule completely forecloses the possibility that gender can be the nexus to harm in most cases.

H. Internal Relocation

62. Similarly, the Rule changes the internal relocation standard and shifts the burdens of proof for those who establish that they have already suffered persecution if the persecutor is deemed non-governmental. This section of the Rule targets Central American and Mexican asylum seekers in particular as most of the listed non-state actors are prototypical persecutors in Central American or Mexican asylum cases. This shift in burden requires significantly more work for CLINIC's attorneys and our affiliate's attorneys who can no longer benefit from the rebuttable presumptions that currently apply where an applicant has demonstrated past persecution. It will take significant resources to prove the negative that there is nowhere in a country that someone

could relocate, even though they would have no support, no knowledge of the community, and would likely be in fear that their persecutor—particularly if that is a gang or cartel—could find them. This Rule change would require asylum seekers to retain expert witnesses in virtually every case, an impossible requirement given the cost of expert witnesses, and extraordinary demand for experts who will provide their services pro bono.

I. Convention Against Torture

63. The Rule also places a nearly impossible evidentiary burden on those seeking protection based on the Convention Against Torture. It would exclude people tortured by non-state actors such as the drug gangs and cartels that control significant portions of Central America. Under the Rule, should it come into effect, applicants would now not only have to show that the government turned a blind eye to the torture, the applicant must additionally show that the government official had an official duty to act and breached that duty.

64. A CLINIC staff member recalls the case of a former client who suffered horrendous torture, and would not be eligible for CAT protection under the Rule. The torture survivor is a transgender woman from Mexico. She was frequently harassed by local Mexican police when she exited nightclubs and bars in the state of Quintana Roo. She tried to avoid them, and did not know who they were but remembered that they wore police uniforms on occasion. She did not know if they worked in the local area or if they were from a different part of the state or country or if they were even on duty. On more than one occasion, sometimes while dressed in a uniform and sometimes not, several of the police officers raped her while others watched. She was granted deferral of removal under the Convention Against Torture in 2012, but under this Rule she would not be granted such protection because it would be impossible for her to prove whether the rapists were a "public official who is not acting under color of law" or whether the officers who watched were under a legal duty to provide protection. In short, this Rule would eliminate Convention Against Torture protection in virtually all cases.

J. Frivolousness

65. The Rule radically redefines frivolousness. Once a finding of frivolousness is

made, it may not be waived, and Courts have described it as "the veritable death sentence of immigration proceedings." *Yousif v. Lynch*, 796 F.3d 622, 627 (6th Cir. 2015) (internal quotations omitted). Under current law, such a finding can only be made by an Immigration Judge or the BIA after making explicit findings and giving the applicant an opportunity to explain the discrepancies. This Rule holds *pro se* asylum seekers to a willful blindness standard developed for large corporations in the patent law context. CLINIC'S *Estamos Unidos* project in Juarez frequently meets with individuals and families who have fled generalized violence in their countries, many, but not all, of whom also have a fear of persecution based on a protected ground. The complexities of asylum law make it impossible for many of these individuals to self-assess their own *prima facie* eligibility for a meritorious asylum claim. Asylum seekers should not be penalized for the very real fear of potential harm if they are returned to their country based on their inability to understand the increasingly opaque U.S. asylum system. CLINIC has significant concerns that asylum seekers filing cases like these would be punished and have their cases categorized as frivolous when the intent was never to "game" the asylum system but rather to pursue a form of protection because they believe that they qualify. Individuals who do not present a strong case should not be considered as filing *de facto* frivolous claims as the result in practice would be that meritorious asylum seekers would be afraid to come forward due to the consequences of losing their case and the potential of being accused of submitting a frivolous application.

66. CLINIC and our affiliates may also face direct threat and a choice between our ethical obligations and our clients' interests. The existing regulations covering professional conduct state that a representative is subject to disciplinary sanctions if they "engage in frivolous behaviors" by submitting applications that have no merit. Representatives are permitted to put forth a "good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." 8 CFR § 1003.12(j) (1). The model rules of professional conduct permit advocates to make good faith arguments in support of their client's position, even if the advocate believes the client would ultimately not prevail. Threatening to impose a permanent bar on applicants who put forth claims that challenge existing law deters representatives from putting

forth nuanced arguments. These regulations place representatives in the untenable position of needing to fulfill their ethical obligations to make every argument on their client's behalf, including for the purpose of arguing to expand the law, and potentially subjecting their client to the permanent bar.

V. Harm to CLINIC

67. The portions of the Rule relating to Particular Social Group, persecution, firm resettlement, nexus, frivolousness, and pretermission would significantly increase the amount of time and resources each asylum seeker's case would require. CLINIC and our affiliates would have to identify asylum seekers and get involved in the case much earlier than we currently do. Due to the possibility of a case being decided without a hearing through pretermission, the potential permanent bar through a finding of frivolousness, and the need to articulate all of the Particular Social Groups that might be in effect, even in the future, filing the I-589 and making sure that the full packet is assembled correctly up front becomes critical. This increased and expedited use of resources is made even more pressing by the other rule requiring the I-589 be filed within fifteen days of the first hearing for applicants in asylum-and-withholding-only proceedings. CLINIC would have to redeploy and retrain our staff to conduct all of this work up front, which often requires multiple meetings with clients who are exhausted, in medical and mental trauma, and in the throes of Post-Traumatic Stress Disorder.

68. Given the vast, broad, and fundamental change in the law this Rule effects, the Rule would significantly increase the amount of time and resources each asylum seeker's case would require, including time spent on briefing all of the issues and resources spent on finding and preparing witnesses and experts. Particular social group, nexus, persecution, discretion, and all the other aspects of asylum law changed by the Rule will have to be researched and briefed afresh given the decades of precedent that have been swept away by the Rule. The Rule will also impact and extend the length of the adjudication process itself. The Rule eliminates rebuttable presumptions that asylum applicants who demonstrate past persecution currently enjoy. Moreover, as a result of recent decisions, even if the parties stipulate to a particular issue before the immigration

judge, the asylum seeker will still have to present evidence and arguments to prove that element of asylum in order to prevent reversal by the BIA in the event of an appeal. Specifically, *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) decided by the Attorney General in September essentially eliminates the ability for the parties to stipulate on any aspect of the case and requires the BIA to consider whether the asylum seeker has met every element of the asylum case even if DHS agrees that certain issues are not in dispute. In addition, as each new aspect of this Rule is worked out and tried, Immigration Judges, advocates, and the BIA will each have to fully consider and reconsider each issue in light of the departures made, often without significant citation, by the Rule, unable to rely on the decades of precedent and requiring all of the issues to be tried afresh across the country.

69. For example, the Rule provides that the "Attorney General, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of non-exhaustive circumstances: … (8) Gender. …" The Rule provides no answer for what that means for claims based on honor killings, Female Genital Mutilation, forced marriage and other forms of gender-based persecution, or even LGBTI claims. The preamble of the Rule says that the regulation "implicitly allows for those rare circumstances in which the specified circumstances could in fact be the basis for finding nexus given the fact-intensive nature of nexus determinations." 85 Fed Reg 80329. Contrary to the Rule's assertion that the revisions add clarity, they will in practice reduce clarity by upending precedent and introducing new inquiries. What "rare circumstances" permit gender to serve as a "circumstance" in which nexus may be found?

70. Based on the wide-ranging and fundamental changes in asylum law effected by this Rule, CLINIC and our affiliates will likely no longer be able to refer nearly as many cases to pro bono counsel. Pro bono counsel may be wary to take cases outside of their area of expertise where any error could lead to pretermission of an applicant's case or a permanent bar to any immigration benefits for the asylum seeker based on the expanded definition of frivolousness based on an error in the I-589. Indeed, I believe that many of CLINIC's affiliates would have to stop taking asylum cases altogether because they require so much work and under all of the regulations and decisions

by this Administration, especially with the addition of this Rule, it will be nearly impossible to win cases, even with the most egregious facts. As a result, CLINIC's attorneys will have to staff a greater percentage of the cases directly, to the detriment of CLINIC's mission. To the extent pro bono counsel is able to take on some cases, CLINIC will have to provide them significantly greater assistance throughout the process and field far more ask-the-expert queries due to how much everything has changed.

71. The current clients of CLINIC, our affiliates, and our pro bono partners include many individuals seeking asylum as a family unit. Often, CLINIC and our affiliates are able to present a single case on behalf of such families, because the children's claims are treated as derivative of their parents' claims. However, if parents were rendered ineligible for asylum under the new Rule, their children would no longer have a derivative claim and each child would have to independently prove eligibility for asylum. The Rule will likely lead to some parents winning withholding of removal, but not asylum, for example if the parent is found to be barred from asylum based on failure to pay taxes because their employer did not report their income. With no ability to seek derivative benefits under withholding, children who do not have independent persecution-based claims would be ordered removed, forcing parents to choose between being returned to countries where they will be persecuted or being permanently separated from their children who will be returned to the danger their parents fled. CLINIC would have to explain these more complicated procedural postures, as well as the ethical concerns they raise, to affiliates who may have to either accept fewer cases as each family's case involves more preparation time, or figure out how to stretch their already-limited resources to handle such cases for current clients.

72. In addition CLINIC's project working with Formerly Separated Families—people whose children, sometimes infants, were taken from them as they crossed the border as part of the Administration's family separation policy, which has since been ruled unconstitutional—has been scrambling to provide these families with direct representation or assist them to file applications *pro se* to ensure that their Forms I-589 are filed before January 11, 2021 so that the Rule does not deprive these families who have already suffered so much of asylum eligibility. This frantic rush

requires CLINIC to divert resources to filing Forms I-589, even if they are not due for many months. The Rule, and its drastic changes to asylum eligibility, also requires CLINIC to rush to gather all of the information necessary to prepare the Form I-589 in an extraordinarily short period of time when, due to the holidays and the global pandemic, many sources of information are difficult to access or closed. Absent the dash necessitated by this Rule, these resources—CLINIC's staff and the pro bono attorneys that they are working with—could have been redirected to other pressing needs.

73. In summary, at a minimum, the new Rule will require CLINIC to do the following: analyze the Rule for consequences to our affiliates and their client base; write a legal analysis of all of the various provisions of the Rule for practitioners; write an update about the Rule and all the changes it has made for our mass communications; create a webinar—or several webinars—on the changes; update website content in all the many places where asylum application language exists; update numerous relevant toolkits and/or other documents; field extensive affiliate inquiries to our portals; provide program management consultations to affiliates struggling to serve low-income immigrants due to policy changes resulting in a lower number of people served and declining revenue, if not also staff reductions; relearn all of the major, fundamental aspects of asylum law changed by the Rule; shoulder a larger portion of the burden of cases pro bono counsel are unable to take them; and provide technical support to affiliates needing to fundraise more through grant applications due to declining numbers of open cases.

74. The Rule could also jeopardize CLINIC's funding and budget. CLINIC receives funding from a variety of sources, including funding in exchange for services such as trainings, written resources, and technical assistance. This Rule will force CLINIC to spend more time than previously planned for on asylum services. If CLINIC has to spend more time on asylum services, our funding will not extend as far, thus forcing CLINIC to seek new funding to cover this gap. However, seeking such new funding takes time and *bona fide* attempts to find new funding are often futile.

75. Similarly, loss of, or even reduced, funding may cause CLINIC affiliates to reduce

the number of full-time staff positions available. Loss of staff time or positions altogether, in turn, will create a longer wait for one-on-one appointments and mean that those affiliates will be able to serve fewer clients. That reduced output will, in turn, give funders less cause to use their money to support CLINIC affiliates as funders seek to maximize the outcomes of their donations.

76. Finally, the constant barrage of new rules and changes designed to slam shut the door of asylum coupled with baseless insinuations of fraudulent asylum applications has had a deleterious effect on CLINIC's staff and our affiliates' staff. Constantly being diverted from our mission in order to address change after change after change of regulations and rulings from this Administration, all of which seemed designed to slam shut the door of this country on those most in need of aid and mercy, *bona fide* refugees who—with a little assistance to understand the complexities of law—could prove themselves deserving of asylum, has been disheartening. In addition, CLINIC's staff and our affiliates interact with our clients, see their trauma, understand the suffering and often torture they have endured. To hear those people—the people our laws, based on international obligations entered into in the wake of the Holocaust were meant to protect—belittled as rapists, or not the best people, or as people trying to cheat the system is galling to those of us and our staff who know these people and their horrible stories of suffering. CLINIC does good work, each day trying to build the Kingdom of God here, by serving God's children. We screen our clients and identify those who have legitimate cases. CLINIC's and our affiliates' staffs pour our lives and souls into this work, and yet the Rule brushes this away, falsely saying that the changes it wreaks on the fundamentals of asylum law are minor and will be easily handled.

77. The changes to immigration and asylum law implemented by the Rule will undermine CLINIC's and our affiliates' ability to fulfill one of our central functions of providing asylum-related assistance, thereby dramatically disrupting CLINIC's broader mission of providing immigration legal services to low-income and vulnerable populations. As described above, if the Rule is permitted to take effect, CLINIC and our affiliates will be required to divert significant resources to address the Rule. This diversion of existing resources, combined with a concomitant loss in funding, will further exacerbate the harm to CLINIC caused by the Rule.

78. The relief requested in the Plaintiffs' Complaint would properly address the injuries to CLINIC described above, and in the public comment CLINIC submitted in opposition to the Rule. If Plaintiffs prevail in this action, CLINIC would not have to divert our resources to redo training materials on asylum and to provide substantial technical assistance to our affiliates.

79. CLINIC is unaware of any way it can recover the increased costs that the Rule will impose on CLINIC as an organization, and would suffer immediate and irreparable injury under the Rule if the rule were permitted to take effect.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: December 21, 2020

Pleasantville, NY

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY et al,

Defendants.

Case No. 20-cv-09253-JD

DECLARATION OF ADINA APPELBAUM

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I, Adina Appelbaum, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction.

2. I serve as the Program Director for Immigration Impact Lab for the Capital Area Immigrants' Rights Coalition ("CAIR Coalition"), an organizational plaintiff in this action. Prior to serving as Director for the Immigration Impact Lab, I was a Senior Attorney and before then a Staff Attorney and Equal Justice Works Fellow at CAIR Coalition. I have worked for CAIR Coalition since 2015, and was an intern assisting the Detained Adult Program in 2014. I manage and coordinate litigation in federal district courts and circuit courts of appeal involving issues related to access to justice, detention, and eligibility for relief for adults and children who are detained by U.S. Immigration and Customs Enforcement ("ICE") and the Office of Refugee and Resettlement ("ORR"). I have also served as an Adjunct Professor, co-teaching a seminar on the intersection of criminal and immigration law at the University of the District of Columbia David A. Clarke School of Law. I have a Certificate in Refugees and Humanitarian Emergencies from Georgetown University Law Center. Prior to law school, I was awarded a Fulbright Scholar Fellowship to study asylum law at the Center for Migration and Refugee Studies and provide legal protection to refugees in Egypt.

I. CAIR Coalition

3. CAIR Coalition is a 501(c)(3) nonprofit organization headquartered in Washington, D.C., with an additional office in Baltimore, Maryland, and is listed on the Executive Office for Immigration Review's list of Pro Bono Legal Service Providers. This list is provided to asylum seekers and people in removal proceedings pursuant to regulation. 8 C.F.R. § 1003.61(b). CAIR Coalition is a small nonprofit with 2019 revenues of less than $6 million and with total revenue in 2018 of less than $5 million. We represent clients primarily before the two local immigration courts in our region: the Arlington Immigration Court in Arlington, Virginia and the Baltimore

Immigration Court in Baltimore, Maryland. We also have a number of clients who are detained or live in other parts of the country, specifically the states of California, Florida, Georgia, Louisiana, and North Carolina. Many of these clients have been transferred by ICE to different parts of the country, and CAIR Coalition has stayed on as their counsel after they have been transferred, representing them in district court cases, appeals, or petitions for *habeas corpus*.

4. CAIR Coalition is the only organization solely dedicated to providing legal services to immigrant adults and children who are detained by ICE or the ORR in Virginia and Maryland. CAIR Coalition strives to ensure equal justice for all migrant adults and children at risk of detention and deportation in the Washington, D.C. metropolitan area and beyond.

5. CAIR Coalition is comprised of three main programs: the Detained Adult Program, the Detained Children's Program, and the Immigration Impact Lab. The Detained Adult and Children's programs are the backbone of the organization and are focused on providing direct services to clients, including clients seeking asylum, withholding of removal, and protection under the Convention Against Torture; the Impact Lab program is focused on impact and federal court work. As part of my work overseeing the Lab program I often liaise and I or my staff in Lab provide technical assistance to our other program staff about novel or complicated legal issues arising out of their individual immigration cases. The Lab also obtains clients for our impact cases from adults and children who we are either assisting *pro se* or have screened and are representing in a different capacity through our children and adults programs. Additionally, as a Program Director at the organization, I am a member of the organization's management team and assist in the decision making of the organization in terms of internal and external policies and operations. This means I am involved in the organization's strategic planning, policymaking, and budgeting processes, and in the yearly management review of all programs and their components to assure their work aligns with CAIR Coalition's mission and that they are meeting their stated objectives.

6. The Detained Adult Program has four main work components: (1) providing educational services in the form of "know your rights" presentations, conducting individual consultations (intakes), and conducting *pro se* workshops with unrepresented detained noncitizens in the

custody of ICE at facilities located in Virginia and Maryland; (2) connecting unrepresented detained migrants who cannot afford a lawyer with pro bono attorneys from CAIR Coalition's various pro bono partners; (3) representing detained immigrants found legally incompetent while appearing *pro se* before an immigration judge as part of the National Qualified Representative Program ("NQRP"); and the newest component, (4) providing in-house direct representation to indigent immigrants from various local regions throughout the course of their removal proceedings applying a universal representation model (*i.e.*, representation is offered irrespective of any perceived likelihood of case success, or the client's previous contact with the criminal justice system). Through our Detained Adult Program, we help detained immigrants navigate the credible fear and reasonable fear interview processes, understand their rights through the removal process and as they put forth their cases in Immigration Court, and learn about and apply for various forms of immigration relief, including asylum, withholding of removal, and protection under the Convention Against Torture.

7. The Detained Children's Program has three main work components: (1) providing educational services in the form of "know your rights" presentations and conducting individual consultations (intakes) with unrepresented detained noncitizens in the custody of ORR at facilities located in Virginia and Maryland; (2) connecting unrepresented detained immigrants who cannot afford a lawyer with pro bono attorneys from CAIR Coalition's various pro bono partners; and, (3) providing in-house direct legal representation to immigrant children throughout the course of their removal proceedings.

8. Our Immigration Impact Lab has been involved in judicial appeals and federal court challenges that have established significant precedent on several issues raised by the Rule challenged in the Complaint, including asylum and credibility findings, CAT acquiescence, eligibility bars to asylum, and the significance of an applicant's membership in a particularized social group. We have poured resources into these existing cases that may no longer be meritorious in light of the new Rule and have strong reliance interests in using these precedents to benefit our clients and the broader immigrant community.

9. Asylum applications represent a vital component of CAIR Coalition's organizational mission and account for much of the legal services we provide. CAIR Coalition also works with clients to seek withholding of removal and protection under the Convention Against Torture. Indeed, approximately seventy five percent or more of our work with immigrants involves assisting adults and children applying for asylum, withholding of removal under INA § 241(b)(3), and protection under the Convention Against Torture. While a majority of CAIR Coalition's work focuses on assistance and representation of people before the two local immigration courts in the region, the organization also represents unaccompanied immigrant children ("UACs") in interviews before U.S. Citizenship and Immigration Services ("USCIS") Asylum Offices which are the initial asylum interviews for child applicants.

10. CAIR Coalition works with the thousands of adults and children detained by ICE in the Washington, D.C. and Virginia areas to provide information, support, and representation during Immigration Court proceedings. In 2019, CAIR Coalition helped represent 477 individuals (eleven percent of CAIR Coalition's total intake) in such proceedings, and provided *pro se* assistance to an additional 241 people. Also in 2019, CAIR Coalition conducted 4,090 individual consultations with children and adults in detention, and provided pro bono representation or significant *pro se* assistance to eighteen percent of people we met in detention.

II. The Rule

11. The Rule challenged in the Complaint, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (December 11, 2020) ("Rule"), would irreparably harm CAIR Coalition in multiple ways absent enjoinder of the Rule, including by frustrating CAIR Coalition's mission to serve as many detained immigrants lawfully seeking asylum as possible.

12. The Rule represents a sea-change in the law, rewriting multiple fundamental areas of immigration and asylum law and overturning decades of precedent both in regulations and case law from the Board of Immigration Appeals and Circuit Courts of Appeal. Despite the massive changes enacted by the Rule – the Notice of Proposed Rulemaking covered one hundred sixty

pages of the Federal Register – the Departments only provided thirty days to comment. In that time, despite redirecting multiple staff resources in an attempt to comment on the proposed regulation in the allotted time, and ultimately submitting a forty-six page comment that took two staff members 50-60 hours each over the course of a month plus approximately 70 hours of pro bono work from two attorneys from a pro bono partner firm, CAIR Coalition was not able to address all of the issues or address each issue in the depth warranted. CAIR Coalition believes that the thirty-day comment period here was inadequate, and that a longer time frame would have allowed for more robust discussion of the wide range of issues presented, especially as to the significant reliance interests and problems that the Departments failed to account for, addressed inadequately, or ignored in promulgating the final rule that they have now published. Beyond the short amount of time allotted to comment, CAIR Coalition now has less than a month to change and update all of its resources and systems to comply with a completely new immigration and asylum law regime, as described in more depth below. This short time to comply would irreparably harm CAIR Coalition in multiple ways absent enjoinder of the Rule, including by forcing CAIR Coalition to expend significant resources to comply in such a short period of time. CAIR Coalition is very unlikely to be able to recoup these resources. This will also force some of CAIR Coalition's staff to forego their holiday plans in order to address the Rule as they rush to file asylum applications before the effective date of the Rule, spend early January remaking systems and retraining, and cancel any additional vacation they had planned to take beyond the week-long closure we traditionally take. Particularly in light of the global pandemic, the onslaught of rules affecting almost every aspect of what we do as an organization, and the difficulty of working remotely for most of the year, asking CAIR Coalition's dedicated staff to rally yet again and rush to get even more done over the holidays is a heavy lift.

13. The Rule would significantly limit the overall number of clients CAIR Coalition is able to service. In 2019, CAIR Coalition provided direct representation to, and/or obtained pro bono representation for, approximately 477 immigrants, and as of the date of this declaration, for the year 2020, has connected 386 people to in-house or pro bono attorneys. Several different

aspects of the Rule will prevent CAIR Coalition from serving as many clients as it has in the past.

A. Pretermission

14. One major way the Rule will harm CAIR Coalition and its ability to take on clients is the way that the Rule front-loads significant amounts of work. The first way the Rule does this is through pretermission. The rule would allow pretermission based entirely on material in the applicant's Form I-589, denying the asylum seeker the opportunity for a hearing before an Immigration Judge if their I-589 does not present a *prima facie* case for relief.

15. Even before this Rule, applicants already face high barriers in explaining their background and asserting their legal grounds for asylum or withholding of removal. At the early juncture in the process when the I-589 is filled out, applicants are often dealing with trauma and subject to various limitations that severely inhibit them from setting forth their best cases. Asylum seekers often travel long distances, leaving their homes with little or no notice at all, and bringing with them little more than the clothes they were wearing at the moment it became apparent they needed to escape. They are thus often unable to take anything with them, including records and documentation. Indeed that is our experience in assisting people prepare their applications. Rare is the case where our staff have encountered asylum seekers with various pieces of evidence available to submit in support of their cases. In addition, these asylum seekers may be experiencing significant physical, emotional, and psychological effects of the trauma that they are fleeing, making it extremely difficult if not impossible for them to accurately recall on the spot the details of the events they experienced in past sufficiently to describe them in response to the technical legalistic questions of the Form I-589. Many CAIR Coalition clients, in fact, have reported that they were unable to give a complete and accurate account of their experiences on the I-589 because they were paralyzed by fear and anxiety. Indeed, several years ago we assisted a Coptic Egyptian woman who had attempted to commit suicide early on in her asylum process. She became terribly upset and confused throughout the interview recalling torture in her country on account of her political opinion and religious belief; this proved too much for her and despite having received some college education in her country she became easily overwhelmed early on in the process when faced with

needing to complete a 9-page form in a language she did not understand very well and working on brainstorming pieces of evidence she needed to request from home. This very bright woman tried to commit suicide while detained and so we rushed to connect her with a pro bono attorney who could do this for her, afraid she would attempt to harm herself again. This specific example reflects the common experiences CAIR Coalition staff witness firsthand how, especially in the context of sexual violence, shame and trauma compound and leave asylum seekers unable to readily express their very real fears. Often, it takes months of building a trusting relationship before such clients feel comfortable detailing their experiences. Making matters worse, applicants often must fill out the Form I-589 without the aid of either an interpreter or legal counsel. These factors together mean that the information on the form often reflects only a truncated, incomplete recitation of the relevant facts, which may fail to support an asylum grant on their own, even when the applicant's circumstances will ultimately be shown to warrant relief.

16. CAIR Coalition has witnessed how, oftentimes, the traumas faced by asylum seekers result in injuries that prevent a full initial recounting of legitimate persecution. This can occur in the context of mental health, such as clinically diagnosable post-traumatic stress disorder, and even as the result of direct injuries. For example, one recent CAIR Coalition client was suffering from a traumatic brain injury ("TBI") inflicted by a violent transnational gang in his home country that affected his ability to place events chronologically and even, at times, recall them at all. As a result, he was initially given a negative finding of reasonable fear, a finding that was later vacated by an immigration judge based on the strength of his testimony and supporting evidence that he was only able to develop fully before an immigration judge with counsel. This client, suffering from a TBI, would be very unlikely to have been able to fill out the I-589 clearly and successfully enough to escape pretermission under the Rule.

17. Importantly, applicants at the Form I-589 completion stage, where the Rule would insert this new method of pretermission, often do not have legal representation. The presence of counsel is a strong predictor of whether an applicant will ultimately be successful in their application. New arrivals are especially unlikely to be familiar with the intricacies of American asylum

law, including the relevant grounds for relief, applicable standards of proof, evidentiary requirements, and other matters that could make the difference between a positive and negative assessment, even on the very same underlying facts. The expedited removal process does not even provide counsel for people who are struggling with mental illness or disability, placing such individuals at an even greater disadvantage. Without access to counsel, a *pro se* respondent is on her own to develop her legal arguments for relief eligibility, gather evidence that is often located in her country of origin and accessible only there, complete application forms and court filings in English, and present a thorough and compelling case to the Immigration Judge. This process can be particularly difficult for applicants whose native language is not English, who are detained, who are without the ability to access or pay for phones or internet research, or who suffer from physical or mental disabilities and/or psychological trauma. In addition a new, separate rule requires that asylum seekers in asylum-and-withholding-only proceedings complete their Form I-589 applications within fifteen days, which is a difficult task for a seasoned immigration attorney, and nearly impossible for an asylum seeker who does not speak English or have legal training. The Rule would place substantial burdens on the applicant when filling out the Form I-589 and attempting to respond to either a DHS motion or *sua sponte* decision by the Immigration Judge to pretermit.

18. CAIR Coalition has witnessed how education levels, adequacy and availability of interpreters, and the absence of medical professionals prevent bona fide refugees from fully describing and conveying the persecution they have suffered. Staff members at CAIR Coalition had a client who never went to school and therefore did not understand how the calendar worked. This client received a positive credible fear assessment, but was denied asylum because her testimony was deemed not credible based on her inability to describe her story in a chronological manner that adhered to an understanding of the Gregorian calendar, mainly because she did not understand the concept of a month. This decision was only later overturned when these circumstances were pointed out on appeal. Asking someone who has difficulty understanding the calendar to fill out a twenty page legal form unrepresented is well-nigh impossible.

19. For many, especially for asylum seekers whose first (and likely only) fluent native

language is an indigenous language, interpreters are often unavailable. Asking them to fill out a complex form in English is an insurmountable barrier to them, particularly as many cannot fluently speak Spanish or other more common languages, and thus are unlikely to be able to find someone in the community who can translate for them. In our experience, approximately ninety percent of asylum applicants in the early stages of the asylum process do not speak English as a first language. From that number, approximately one fifth of applicants speak a third language, that is not Arabic, French, or Spanish and lack access to or have difficulty getting an interpreter competent in their primary language.

20. Previously the I-589 form had been similar to notice pleading. The form would outline the parameters of a claim for relief. Then, prior to an asylum interview or a hearing, the asylum seeker – who would then be much more likely to be represented – would file a more fulsome submission in support of her asylum claim. In part this is necessitated by the time difference between filing the I-589 application and an interview or hearing, which in the detained context can occur several months after. This allows, especially in a detained representation context, the applicant necessary time to gather evidence from abroad, obtain expert declarations and other corroborative information that is almost impossible to obtain in 15 days when the applicant is limited to communications by phone or mail, and may not have contact information for corroborative witnesses easily at their disposal. So the pre-hearing or pre-interview submission would have the timely information and state, more fully, the case for asylum, withholding of removal, or protection under the Convention Against Torture. In contrast to this, the Rule describes the standard to be applied to the information in the I-589 in order to survive pretermission as akin to what is required in summary judgment in Federal Court. 85 Fed. Reg. 80303. Moving the requirements from notice pleading to summary judgment will place a large burden on CAIR Coalition to develop the information in the short time between meeting a client and filing an I-589 and will put an almost impossible burden on any *pro se* litigant, particularly one with language difficulties, PTSD, mental health concerns, or any of the pantheon of issues faced by asylum seekers. A companion rule

limits the time in which to do this to fifteen days for asylum seekers who are in asylum-and-withholding-only proceedings.

21. CAIR Coalition's experience demonstrates the importance of the merits hearing in developing an applicant's factual record, which will then inform the applicant's legal strategy and the Immigration Judge's assessment. For instance, we assisted a former police officer from a Central American country in his application for withholding of removal. Despite completing high school and the equivalent of a master's degree, the former officer provided only a part of his story on the I-589, explaining that while working the border inspecting dairy products, he had learned of drug trafficking schemes and had warned his higher-ranking officer of this activity. The officer proceeded on his asylum application to explain that he feared retaliation and harm by the gangs and narco-trafficking groups involved. At first glance, the basis for his claim was unclear. Only when he had the benefit of our instruction and we asked him to write out a detailed 20-page declaration and when he answered questions from the Immigration Judge did it become clear that his case was a "whistleblower" former police officer case. During the hearing, he made clear that when he had registered this tip with his unit, he had stated that the gangs were working with someone "inside," but his supervisor had not registered this tip, and that is how he had learned that his supervisor was working with these criminal groups. The facts in this person's case were nuanced, involved him explaining a lot of internal government specific information, something that only came out during testimony. Under the Rule, his claim could have been pretermitted and his meritorious case would have never been heard.

22. In another case, CAIR Coalition had a client who tersely stated on his I-589 (which he completed *pro se*) that he was afraid of the gangs because they wanted money from him. Only after careful probing questions made by counsel prior to and at the merits hearing did the client explain that the last time the gang had hurt him and extorted him they had called him by a childhood nickname, which in his language referred to the fact that he was "slow" and "child-like" – a reference to his visibly apparent mental health disability. In this case, especially given the client's cognitive disability, there would have been no way for him to have provided a precise account of

his story and articulated a particular social group, which is exactly what the new Rule would require if not enjoined, even of people with severe disabilities.

23. These are only a handful of examples where human complexities and dynamics were not completely captured by a two-dimensional form. Indeed, they could not have been captured, because the form does not account for factors such as the length of one's story, trauma and deceit to which the applicant has been subjected on their way to the United States, or the applicant's lack of education or understanding. Moreover, at thirty-nine pages, including twenty pages of small-print instructions, the Form I-589 is an intimidating document even if the individuals filling the form out were not especially vulnerable or using an unfamiliar language. Indeed, the instructions admit that "[i]mmigration law concerning asylum, statutory withholding of removal and protection under the CAT regulations is complex." To assist asylum seekers in completing the I-589 application CAIR Coalition has a translated Spanish version of the current I-589 form, but even that is insufficient to truly provide people with an idea of what the form is asking. Our staff often still get questions about what information a question is seeking even when working with the Spanish version of the form, and many people do not speak English or Spanish, and CAIR Coalition cannot translate forms for every possible language. Allowing Immigration Judges to pretermit and deny applications on the basis of a labyrinthine intake form is a recipe for ensuring that arriving immigrants with well-founded fears of persecution will be sent back to their home countries to face that persecution.

24. Moreover, adoption of the Rule upsets the well-founded reliance interests of thousands of current applicants, who have completed their I-589s under a regime in which they could expect to present a more fulsome submission to an Immigration Judge, perhaps with the benefit of counsel, or at the very least more time to gather evidence from abroad. Having acted on the reasonable understanding that they would be able to supplement their initial showings at statutorily mandated hearings at which they would be able to provide testimony and other evidence, these applicants cannot now be subjected to a "bait and switch" in which the Form I-589 is treated as though it reflected the entirety of their case.

B. Particular Social Groups

25. A second major way that the Rule would front-load large amounts of work is that the Rule also requires asylum seekers to articulate all particular social group claims on the Form I-589. Forcing an applicant, who could face pretermission, to articulate all particular social groups claims at the application stage – when she is unlikely to have any knowledge of the complex and quickly evolving law surrounding particular social groups and therefore might not even realize that her membership in a particular social groups could entitle her to asylum – would again punish the applicant for errors outside of her control. The particular social groups jurisprudence has, during this administration, been subject to rapid change. It would be manifestly unfair to penalize applicants because they arrived in the United States without mastery of particular social groups law, or because their legal strategy was based on good law when submitted, only for the law to change after critical filings had been submitted. In CAIR Coalition's experience, many *pro se* applicants do not understand the concept of a particular social group; much less are they able to read or understand the constantly evolving case law written in complicated legal jargon, in English. Requiring a *pro se* individual to articulate a fully formed particular social group in their asylum application is an impossible hurdle.

26. CAIR Coalition represented a client whose story makes this problem particularly clear; his case is on appeal to the Fourth Circuit.[1] CAIR Coalition assisted this young man in submitting his *pro se* asylum application and then represented him at the BIA and placed his case with a pro bono attorney for the Petition for Review. In this case the client, in broken hand-written English, indicated that he fears he will be tortured and killed if he returns to El Salvador because he left MS-13 and because MS-13 killed his cousin. He wrote "[MS-13] wan[ts] to fi[nd] any body [who] desert of the gangster [sic]" and that MS-13 "told me already ... they want me 'in' or / 'dead.'' The Immigration Judge denied asylum saying the client was a gang member. But, he was claiming asylum because after admitting to have been a gang member he had left the gang and

[1] The case is *Arevalo-Quintero v. Barr*, No. 19-1904 (4th Cir.). Oral argument in the case was December 8, 2020.

so was afraid of retributions because of that. He appealed the case arguing the Immigration Judge had not developed the record or analyzed his case in the particular social group he put forward. The government alleged in the case he had not put forward a PSG even though on his application he checked the boxes to indicate that he sought asylum and withholding of removal based on his membership in a particular social group and was seeking protection under the Convention Against Torture. He had put forward a particular social group in his own handwritten words, one that was cognizable under Fourth Circuit law in the case *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014), where the Court found former MS-13 gang members to be a cognizable particular social group. But the Immigration Judge did not ask him questions to clarify his handwritten submission, and since he was not an attorney he did not understand the concept of a particular social group to argue his description of his circumstances exactly in conformity with the *Martinez* case *sua sponte* to the Immigration Judge. Forcing such a client to come up with a fully formed particular social group in English *pro se* is impossible, particularly for vulnerable detained immigrants such as the children and mentally incompetent people that CAIR Coalition represents every year.

27. The Rule's forcing an asylum seeker to put forward a particular social group so early in the process and then not letting them appeal on the basis of a particular social group not presented at a hearing damages asylum seekers' reliance interests. An applicant can put forward a particular social group based on governing precedent, but that precedent can later be overruled, and the Rule would subject them to pretermission. Alternatively, if an applicant has had their hearing on the particular social group already, failure to articulate further social groups at the hearing beyond the successful one later overturned would foreclose the Board of Immigration Appeals from considering new or revised particular social group claims, which are equally valid and simply reformulations due to a change in precedent, even though the change in law had dramatically altered the applicant's evidentiary burden, through no fault of her own. The Rule would thus exclude the critical issue of whether the applicant is a member of a relevant particular social group, as recognized by the updated law, and would deny the applicant the opportunity to respond to the

shift in governing standards. A well-informed applicant would surely craft her case differently if she had known that a change in law would change the requisite factual showing. Instead, the Rule would deny the applicant the opportunity to conform to the new law, wasting resources by forcing applicants to continue with an unexpectedly non-meritorious claim, continue to update their cases even after they have submitted their evidentiary filing with a list of PSGs – or, worse, forcing applicants to disregard meritorious claims their facts may support. In light of the complexity of particular social groups jurisprudence and the various access-to-justice barriers that applicants must navigate in immigration court generally, it is essential that the asylum seekers be allowed to clarify and modify proposed particular social groups designations at stages beyond the hearing stage, including on appeal.

C. Frivolousness

28. A third way that the Rule front-loads significant amounts of work is through its change in the law regarding frivolous applications. The Rule radically redefines frivolousness stating that "if knowingly made, an asylum application would be properly considered frivolous if the adjudicator were to determine that it included a fabricated material element; that it was premised on false or fabricated evidence; that it was filed without regard to the merits of the claim; or that it was clearly foreclosed by applicable law." Once a finding of frivolousness is made, it may not be waived. Under current law, such a finding can only be made by an Immigration Judge or the BIA after making explicit findings and giving the applicant an opportunity to explain the discrepancies. By contrast, this Rule as applied assumes a standard of knowledge or volition that *pro se* asylum seekers because of their lack of understanding or even access to case law are incapable of having. The complexities of asylum law make it impossible for many of these individuals to self-assess their own *prima facie* eligibility for a meritorious asylum claim or to know if their claim might be foreclosed by applicable law such as a regulation or precedential decision, in English, that they may not be able to read or find. Rare is the case where an asylum seeker knows enough English to be able to research case law in the law library at a detention center, even more so to understand how the case applies to them. In some instances, our staff have printed and provided

copies of important cases or summarized these cases to people to help orient them about the law only to learn the person still does not understand how this applies to them.

29. Under this new definition, CAIR Coalition may also face direct threat and a choice between our ethical obligations and our clients' interests. The existing regulations covering professional conduct state that a representative is subject to disciplinary sanctions if they "engage in frivolous behaviors" by submitting applications that have no merit. Representatives are permitted to put forth a "good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." The model rules of professional conduct permit advocates to make good faith arguments in support of their client's position, even if the advocate believes the client would ultimately not prevail. Threatening to impose a permanent bar on applicants who put forth claims that challenge existing law – which may under current law be foreclosed – deters representatives from putting forth nuanced arguments. These regulations place representatives in the untenable position of needing to fulfill their ethical obligations to make every argument on their client's behalf, including for the purpose of arguing to expand the law, and potentially subjecting their client to the permanent bar. CAIR Coalition will also have to explain, in detail, the frivolousness ban and explain the risks of making arguments to extend the law to our clients. This is a detailed and complex area of law, and forcing CAIR Coalition to make these explanations so early in our representation will take a significant amount of the limited time we have with our clients – time that that other parts of this Rule force us to use to focus on the preparation of evidence in order to avoid pretermission – and may foreclose our ability to make arguments for expansion of the law since, practically, we may not be able to get a client's signoff to make those arguments.

D. *De Facto* Bars to Asylum

30. The Rule also adds significant new *de facto* bars to asylum under the guise of discretionary factors, creating adverse factors that in all but the most extreme of cases would force the denial of asylum.

31. One would require immigration judges, with limited exceptions, to deny asylum to people who have already been found to have suffered persecution or have a well-founded fear of

persecution on the basis of a political opinion, race, religion, or membership in a particular social group if they transited through another country on the way to the United States without applying for asylum. CAIR Coalition regularly represents people who have come through Mexico, for example, and their experiences there with kidnapping, violence, and assault make clear that they could not be safe in Mexico. For example, CAIR Coalition represents three siblings who lived in Mexico with their mother while they were awaiting their hearing under the Migrant Protection Protocols. On their journey with their mother though Mexico, they stayed at a half-way house and were threatened with guns drawn by a criminal group who targeted the house because they had seen people that were from different nationalities staying there (persecution on account of nationality). Also when the children and mother began living in a migrant camp in Mexico while they awaited their hearing the eldest teenage daughter (15 at the time) and the youngest (9 at the time) were assaulted. In one of occasion the children saw a mother and a child being kidnapped by the Zetas within walking distance and ran away from the cartel group for fear they would be kidnapped too.

32. Another *de facto* bar would instruct Immigration Judges to consider as a significant adverse discretionary factor that an asylum applicant asylum entered outside a port of entry. In CAIR Coalition's experience some asylum seekers are unaware that designated ports of entry exist. In other cases, designated ports of entry are difficult to access, causing migrants to attempt unauthorized border crossings. Even when immigrants reach a designated port of entry, they still encounter problems accessing the U.S. through the port of entry. Most recently, Customs and Border Patrol ("CBP") officers only allow the asylum seeker to cross the international line if space is available in the port of entry ("metering"). In other instances, CBP officers have turned asylum seekers away by claiming "we're not doing asylum here" or telling migrants the port of entry is "full." A September 2018 report by the U.S. Office of Inspector General ("OIG") found that metering and the Administration's "Zero Tolerance Policy" "likely resulted in additional illegal border crossings." The report concluded that "OIG saw evidence that limiting the volume of asylum-seekers entering at ports of entry leads some aliens who would otherwise seek legal entry into the

United States to cross the border illegally." Indeed, last year CAIR Coalition represented a Cuban man who approached the border and received a number to wait in line to apply for admission to the United States. He waited in this line for several months, and by the time he was let in, the administration attempted to apply the Transit Ban to his case.

33. Even after an Immigration Judge has concluded that an applicant is eligible for asylum, another *de facto* bar imposed by the Rule would instruct Immigration Judges to consider as a significant adverse discretionary factor if the applicant used fraudulent documents. Yet many countries require documents to exit and asylum seekers may need fraudulent documents to escape persecution, torture, and violence. Given CAIR Coalition's proximity to three major international airports in the capital region, we often see people apply for asylum who boarded a flight using fraudulent documents. A couple of years ago, we represented an LGBTQ man from Tanzania as he applied for asylum. As part of his regular work, he had been issued a transit visa. When he returned to his country following a work trip, some members of his community learned of his sexual orientation and beat and threatened him. Fearing for his life, he booked a ticket to leave his country and altered his then expired transit visa, to present to customs in his country and also at another stop in northern African in order to flee the continent. Under this rule, however, he would be barred from asylum, even though this was the only means to board a flight and escape with his life.

34. Similarly, the Rule requires immigration judges, with limited exceptions, to deny applications if the asylum seeker took more than fourteen days to cross another country. Yet often these people are sick, tired, beaten, supporting frail or young family members, and on foot. They often have to dodge dangerous gangs and are sometimes kidnapped. All of these factors can delay progress across a country and it should not be held against the asylum seeker. In the example of the three siblings CAIR Coalition represents, described above, it took them two to three weeks to make the journey from Southern Mexico to the border, and as described, they experienced multiple horrors along the way.

35. Similarly, the Rule requires immigration judges, with limited exceptions, to deny

applications if the asylum seeker has not, at the time of application, timely filed their state, local, or federal tax returns. Finding information on tax returns is very difficult. When CAIR Coalition has gathered this information for clients in the past, it has taken significant time and we have had to have the clients sign authorization forms to access the tax information. Also, many clients who do not have work authorization have to, in order to feed themselves and their families, work for cash in the gray economy. They do not know if their employers withheld taxes or reported their earnings appropriately. This is a very complicated area of law and not one that CAIR Coalition is expert in. So each case will take more time to research this in advance of filing the I-589 which asks this specific question which has to be answered in order to avoid pretermission and in addition to the staff time, CAIR Coalition may need to expend resources to either train a staff member in tax law or retain a tax expert who can advise us on the complex tax issues our clients face. This is also particularly difficult since certain clients, under a different rule, will only have fifteen days to file their I-589, and gathering this information in that time period is well-nigh impossible.

III. Irreparable Harm to CAIR Coalition

A. Irreparable Harm Due to the Rule Front Loading Work

36. The Rule forces asylum seekers to make out a *prima facie* case in their I-589 and state every particular social group claim on pain of pretermission or a permanent bar due to a finding of frivolousness. A companion rule would require this to be done in 15 days for asylum applicants in asylum-and-withholding-only proceedings. Subjecting applicants to these processes would have the effect of front-loading highly fact-specific and complex legal issues during a time when immigrants commonly face both logistically and emotionally difficult circumstances that make it difficult for them to put their best case forward. Yet, it is critical for asylum seekers to do so. If they fail to put forward a sufficient case, the inevitable result will be the return of deserving asylum applicants to their home countries, where they will face persecution (including but not limited to murder) on account of their race, religion, nationality, membership in a particular social group, or political opinion in violation of the foundational principle of non-refoulement in the Refugee Convention. This is not conjecture. CAIR Coalition has had clients who, once deported,

have faced grisly, even deadly, consequences. Take the case of Mr. Ilunga, a Congolese asylum applicant CAIR Coalition placed with pro bono counsel. Even though Mr. Ilunga testified he had been kidnapped, imprisoned, raped, and tortured daily for over two months by the Congolese intelligence agency due to his political affiliation, ICE deported him back to the Congo before the Fourth Circuit Court of Appeals could issue its decision granting his petition for review. *See Ilunga v. Holder*, 777 F.3d 199 (4th Cir. 2015). During the pendency of his petition, Mr. Ilunga had been forced to go into hiding to stay alive. Despite succeeding on his case, CAIR Coalition and pro bono counsel were unable to regain contact with him to discuss his return and presume him dead.

37. Due to the changed standards and the dire consequences, this Rule will require CAIR Coalition to have to develop information significantly earlier. As noted, applicants seeking protection have often been forced to leave their home countries on short notice, unable to bring with them the evidence needed to meet an increased burden, such as records documenting past persecution or torture. For this reason, when CAIR Coalition staff represent a client in filling out their asylum application, one of the first things staff does is work with the asylum seeker's family and friends in the home country to obtain any evidence of past harm and persecution. Given how difficult and time-consuming this process can be, it is difficult to imagine how most individuals would be able to gather the kind of evidence necessary to meet an increased standard of proof at this initial inquiry stage even under more dire and expedient circumstances, especially if the fifteen-day rule is allowed to take effect.

38. For instance, CAIR Coalition staff aims to complete an initial intake in eight minutes. After intake, CAIR Coalition staff spend on average two to three minutes entering intake information in their database and verifying certain basic information such as when the individual's next court date is and what their current status is. At the trial representation stage, a typical case may take approximately 40 to 50 hours to complete. If the individual's criminal history is lengthy or serious in nature, or there are other potential bars that have to be considered, a case may exceed

100 hours of work, as CAIR Coalition staff must engage in significant analysis to determine arguments against bars to asylum or withholding of removal. This Rule will require CAIR Coalition to learn *all* the information necessary to make a *prima facie* case and fill out an I-589 during the first intake. This can take many hours, particularly as it takes significant time to build trust with a client, to get them to discuss the often violent and often sexual persecution they have suffered, and especially given the trauma and PTSD that so many clients suffer. Moreover, the new Form I-589 adds more than 30 new questions that address, among other things, the new *de facto* bars instituted by the Rule. Because the applicant must sign the form under penalty of perjury, we will have read each of those questions carefully to them, which will obviously take considerable time, especially if we are working through an interpreter or forced to speak to the client in a language that they are not fluent in, if their primary language is not one we can find an interpreter for.

39. Consequently, CAIR Coalition would need to expend more time and resources to assess clients during intakes and/or to prepare clients—both adults and children—for filling out their I-589, including to elicit and prepare more facts to determine potential particular social groups and all of the potential grounds for asylum, withholding of removal, or protection under the Convention Against Torture.

40. In 2019, CAIR Coalition provided 4,090 individual consultations with adults and children to ascertain their asylum options, spending 4,000 hours conducting jail visits. The additional time required to account for the sweeping impact of the new Rule would likely cut by more than half the number of adults CAIR Coalition could prepare during each jail visit. Although CAIR Coalition has paused in-person jail visits in light of the COVID-19 pandemic, CAIR Coalition staff are still conducting intakes by phone. However, phone intakes require more time than in-person intakes for several reasons: (a) facility staff do not always provide private phone call spaces for such calls; (b) phone use is in high demand inside housing units due to COVID-19; and (c) it takes significantly longer to gain someone's trust and get them to share personal information over the phone, especially when they are inconsistently afforded privacy for such calls. There is

no way for CAIR Coalition to compensate for this loss; it has finite resources and only has permission to make jail visits a few times a month, so, together with the limited phone access, time is at a premium. Having to get everything necessary to fill out a Form I-589 over the phone and in the brief times we are allowed to meet with people in jails will dramatically reduce the number of people CAIR Coalition can serve.

41. CAIR Coalition's staff will also have to spend added time and resources on each asylum seeker's case, including the time and resources required to analyze and brief eligibility issues given all of the new *de facto* bars (called "discretionary factors" in the Rule) and the requirement to state all particular social groups on the Form I-589 itself. We anticipate the amount of time that it will take to work up a case will effectively double. Because of the risk of pretermission if the initial submission is deemed inadequate, the case will have to be worked up for the filing of the initial I-589, this means at the very least staff will have about a month to prepare a filing (if we assume people will have a hearing within 15 days from their detention date, and will have 15 days to file after their hearing), if not less. And then because detained adult cases can be scheduled for merits hearings two weeks to a month and a half from their master calendar hearing, staff will continue to have to work in a crunch to represent a client. Depending on the complexity of a case, we staff cases assigning one attorney or one attorney and one legal assistant to a case, with an idea that they will complete the case in a 3-4-month cycle. In order to meet these expedited deadlines and the evidentiary burden that is being frontloaded because of this rule, we will have to increase our case to staff ratios thus reducing the amount of cases we can actually staff. Whereas in 2019, CAIR Coalition was able to represent 365 detained adults and children in court, bring 312 full merits hearings, including asylum proceedings, and bring 42 appeals to the Board of Immigration Appeals and the Fourth Circuit Court of Appeals, the Rule would significantly reduce the amount of cases in which CAIR Coalition could support and represent asylum-seekers going forward.

42. By dramatically increasing the number of individuals potentially subject to bars to

asylum eligibility through the *de facto* "discretionary" bars, and dramatically increasing the information required to file an I-589, the Rule would undoubtably increase the proportion of cases requiring resource-intensive assistance by CAIR Coalition staff. The Rule would thus put the organization in an impossible position: CAIR Coalition would either need to raise more funds simply to be able to continue serving the same number of clients, or reduce the number of clients it serves to fit within its current budget. Moreover, even if we are able to raise increased funds, irrespective of the current economic crisis due to COVID-19, the constraints imposed by this Rule would make work assisting asylum seekers unsustainable. We have experimented with assigning high caseloads to staff individually and in groups with expedited deadlines. The outcome has always been the same: staff burnout and quit. It usually takes 2 months to recruit, and onboard a new staff member, and under this Rule we anticipate that our staff turnover rate would increase. As part of our strategic plan we have focused on maintaining a low staff turnover statistic for attorneys, to above two years, and anticipate this turnover rate would be severely decreased given the unsustainable demands all these changes would cause to our methods of assisting asylum seekers. The complete reworking of the asylum process under this rule will put significant strain on our staff and our organization as we will likely have to expend more time onboarding new staff if our staff turnover increases.

43. Given the increased complexity resulting from the new Rule (including, *inter alia*, the need to fill out the I-589 with a *prima facie* case almost immediately, the need to articulate particular social groups immediately, the applicability of a number of new discretionary bars to asylum eligibility, etc.), CAIR Coalition also anticipates that it would not be able to staff client intake interviews with legal assistant or law student volunteers, as it has sometimes been able to do in the past. In addition, due to the potential pretermission bar and the potential for a frivolousness finding, CAIR Coalition estimates that we will be less able to refer cases to pro bono counsel. Pro bono counsel are generally not experts in immigration law, and with the potential of a permanent ban for an asylum seeker if they misjudge an application, we estimate that counsel may be less willing to take on these cases.

44. The inability to rely on legal assistant or law student volunteers for intake interviews will cause a ripple effect felt throughout the organization as will the more limited ability to refer items to pro bono counsel. For example, CAIR Coalition staff members and volunteer lawyers will be required to redirect their time and energy to intake and preliminary interviews and will thus be unable to assist as many clients in other aspects of the asylum process. Because CAIR Coalition's organizational model relies on volunteer lawyers to represent clients in trial-stage proceedings, a reduction in overall volunteer capacity will necessarily reduce CAIR Coalition's capacity to represent as many clients as possible.

B. Irreparable Harm Due to the Scope of the Massive Changes in the Rule

45. The Rule is a massive revision and paradigm shift in many areas of asylum law including nexus, particular social group, discretion, the I-589 form, pretermission, frivolousness, etc. As a result of this significant change, the Rule will likely require CAIR Coalition's staff members and lawyers to undergo substantial additional training, resulting in further reductions in CAIR Coalition's capacity to represent as many clients as possible.

46. Additionally, CAIR Coalition would be forced to divert significant staff resources to analyzing and interpreting the Rule, overhauling its client information database, developing new systems, and preparing new informational and advocacy materials.

47. For example, even updating CAIR Coalition's client database to include information relevant to the new Rule's requirements would take a single staff member between three to five days to complete, as this information would need to be retrieved for each active client. CAIR Coalition uses Salesforce to keep track of client and case information. Currently, CAIR Coalition staff are only required to input initial intake information. Because the Rule forces an I-589 to state a *prima facie* case on pain of pretermission and frivolousness and requires all particular social groups up front, within fifteen days for some applicants, CAIR Coalition staff expect to spend significantly more time entering an individual's complete history and all relevant information from a complete intake interview – similar to what is needed to draft a hearing declaration – in addition to having to spend more time pulling all of the information necessary to prepare a

complete asylum application.

48. Additionally, the base framework of the database and CAIR Coalition's intake process would need to be retooled to add questions and responses relevant to the new Rule requirements. It takes approximately five to ten hours to customize, test, and implement small changes to CAIR Coalition's database and an additional three to five hours to train staff on the changes. Given the massive number of changes this Rule makes and the number of new questions on the Form I-589, CAIR Coalition estimates that the changes required to fully customize and update its database to track the new information and train its staff will easily exceed 20 hours.

49. Although CAIR Coalition has contracted with a Salesforce systems consultant to assist with such changes, this assistance is subject to a monthly time cap due to cost restrictions. Given the substantial changes required by the Rule, the necessary changes to the Salesforce database could easily take the consultant far longer than their monthly cap permits, requiring CAIR Coalition to expend additional time and money simply to update their database. The opportunity cost of these updates cannot be ignored, especially as CAIR Coalition was already in the midst of several other technological updates, including updating programmatic technical updates identified in the middle of 2020, and transitioning CAIR Coalition staff onto Salesforce's Lightening Platform, many or all of which may need to be deferred in order to prioritize changes to account for the asylum eligibility bars implemented by the Rule, which are set to go into effect in less than a month's time.

50. In addition to providing direct representation to adults and children, CAIR Coalition also hosts workshops for underrepresented individuals and assists detained adults with their *pro se* asylum applications by gathering country conditions, helping them prepare testimony, and serving as a resource for specific questions. In 2019, CAIR Coalition hosted 182 such workshops and assisted 241 adults with their *pro se* applications. The added complexities posed by the new Rule will require the CAIR Coalition staff to revise *all* current training materials and to spend significantly more time assisting and advising each *pro se* applicant instead of hosting group workshops, thus reducing the total number of applicants it is able to serve.

51. CAIR Coalition has approximately 24 *pro se* informational packets that cover different aspects of asylum and the Convention Against Torture that it uses during its Know Your Rights trainings given to children and adults in detention. These packets cover the elements of asylum, the elements of the Convention Against Torture, the standards applied, etc. Given the fundamental change to asylum and immigration law effected by this Rule, CAIR Coalition will have to spend substantial resources rewriting and redoing *all* of these resources used for trainings. It currently takes anywhere between one day to one week to rewrite *pro se* materials and it takes even more time to make them child-friendly or to translate them. The need to rework all these documents at the same time or very rapidly following the effective date of the Rule would require the organization to assign numerous staff full-time to this task, in lieu of providing direct services to clients. This will reduce the number of clients that we can serve. Given the 30 day time window for this Rule to become effective and the need to have staff ready on day one to avoid potentially harming our clients with pretermission or frivolousness decisions, CAIR Coalition is already planning to start spending significant resources well before the effective date to prepare for this Rule.

C. Irreparable Harm to CAIR Coalition's Budget

52. As noted above, the large changes in the rule and the high stakes to ensuring that initial intakes are able to result in the filing of an I-589 form, CAIR Coalition will be less able to rely on volunteers, law students, and pro bono counsel. Reduced volunteer opportunities and capacity would also result in the diversion of resources from other CAIR Coalition initiatives, such as providing translation services, conducting country conditions research. While significant majorities of CAIR Coalition's funds come from federal and local state contracts and foundation grants, the organization still depends on large and small scale donors, whose contributions primarily go towards non-earmarked operational funds. Maintaining an engaged volunteer workforce not only helps CAIR Coalition with cases, but is also a significant factor in the organization's ability to attract small and large donors, as volunteers often also donate or connect the organization with donors. Fewer volunteer opportunities directly translates into reduced volunteer engagement and, often, a decrease in the organization's ability to recruit and maintain donors.

53. The Rule also will jeopardize CAIR Coalition's already tight budget. If the organization places fewer asylum cases with volunteers at law firms, it is likely to receive fewer of the much-needed firm donations upon which it depends for close to five percent of its annual budget. Much of CAIR Coalition's funding from law firm donations comes from CAIR Coalition giving them opportunities to provide direct assistance with and staffing of with asylum matters; to the extent many clients are no longer eligible for asylum, or pro bono firms are reluctant to take cases in light of potential pretermission or frivolousness findings, CAIR Coalition expects that such donations could decrease.

54. Moreover, some of CAIR Coalition's funding is tied to the number of adult clients that the organization serves each year. CAIR Coalition currently has four contracts with local government entities to represent immigrant residents who are in detention. As part of each of these funding contracts, CAIR Coalition agreed to represent a certain number of immigrants per year, a representation goal which was based on the average number of hours and representation capacity for one staff attorney. The increased hours that each asylum-seeker would require if the Rule were permitted to take effect would reduce the overall number of people served, placing this future funding in jeopardy. Indeed, because the Rule would reduce the number of clients CAIR Coalition could serve in court proceedings per staff member, it is unclear whether CAIR Coalition would be able to comply with existing funding conditions tied to the number of individuals it represents in such proceedings. CAIR Coalition also expects its foundation grants, some of which require representation in certain numbers of cases and in specific impact issues areas that may no longer be possible to litigate, to decrease.

55. Finally, the constant barrage of new rules and changes designed to slam shut the door of asylum coupled with baseless insinuations of fraudulent asylum applications has had a deleterious effect on CAIR Coalition's staff and our volunteers. Constantly being diverted from our mission in order to address change after change after change of regulations and rulings from this Administration, all of which seemed designed to slam shut the door of this country on those most in need of protection, bona fide refugees who – with a little assistance of counsel that CAIR

Coalition tries to provide to understand the complexities of law – could prove themselves deserving of asylum, has proved disheartening. In addition, CAIR Coalition's staff and our volunteers interact with our clients, see their trauma, understand the suffering and often torture they have endured. To hear those people – the people our laws, based on international obligations entered into in the wake of the Holocaust were meant to protect – belittled as rapists, or not the best people, or as people trying to cheat the system is galling to those of us and our staff who know these people and their horrible stories of suffering. CAIR Coalition screens our clients and identifies those who have legitimate cases. CAIR Coalition's staff pours our lives into this work, and yet the Rule brushes this away, falsely saying that the changes it wreaks on the fundament of asylum law are minor and will be easily handled. Facing this constant barrage has led the organization to expend time identifying and creating self-help documents to help staff navigate their insurance system so they can access counseling services. We have also had to expend more time providing additional mental health and resiliency training services, engaging a mental health experts to shepherd our staff through these difficult times. We have managed to obtain some of these services at a low bono rate, expending less than $10,000 so far for an 80+ staff workforce – although that is still an appreciable amount for our organization – but it is unclear if this amount will continue as is, and rather it will likely increase as we anticipate we will have to host these services and trainings more often to sustain our embattled staff. Some of the results of this barrage will not be mitigated, and as stated earlier, we anticipate higher staff turnover rates.

IV Conclusion

56. In sum, the Rule would irreparably harm CAIR Coalition, including by frustrating its fundamental organizational mission to serve as many detained noncitizen adults and children as possible. CAIR Coalition would be unable to represent the same number of clients that it has traditionally, both because fewer clients would be eligible for asylum relief and because the organization would have to spend more of its limited resources on each individual case. The Rule also would force CAIR Coalition to divert scarce resources away from other important programs to compensate for the additional time and staffing resources required to continue serving clients

under the Rule.

57. The relief requested in the Plaintiffs' Complaint would properly address the injuries to CAIR Coalition described above and in the public comment CAIR Coalition submitted in opposition to the Rule. If Plaintiffs prevail in this action, CAIR Coalition would be able to devote its staff time and resources to represent more clients and assist *pro se* individuals than it would be able to if the Rule were permitted to take effect.

58. CAIR Coalition is unaware of any way they can recover the increased costs that the Rule will impose on them as an organization, and would suffer immediate and irreparable injury under the Rule if the rule were permitted to take effect.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: December 21, 2020

Washington, D.C.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY et al.,

Defendants.

Case No. 20-cv-9253-JD

DECLARATION OF NAOMI A. IGRA IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Assigned to Hon. Judge James Donato

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I, Naomi A. Igra, declare as follows:

1. I am an attorney licensed to practice law in all the courts of the State of California. I am an associate at the law firm of Sidley Austin LLP, counsel of record for Plaintiffs Pangea Legal Services ("Pangea"), Dolores Street Community Services, Inc. ("DSCS"), Catholic Legal Immigration Network, Inc. ("CLINIC"), and Capital Area Immigrants' Rights Coalition ("CAIR Coalition") (collectively "Plaintiffs") in this case. This declaration is submitted in support of Plaintiffs' Motion for Temporary Restraining Order, and Order to Show Cause. The facts set forth in this declaration are within my personal knowledge. If called as a witness, I could and would competently testify as follows.

2. Attached hereto as **Exhibit 1** is a true and correct copy of "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," Department of Homeland Security, 85 Fed. Reg. 80,274, dated Dec. 11, 2020 ("Final Rule").

3. Attached hereto as **Exhibit 2** is a true and correct copy of "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," Department of Homeland Security, 85 Fed. Reg. 36,264, dated June 15, 2020 ("NPRM" or "Proposed Rule").

4. Attached hereto as **Exhibit 3** is a true and correct copy of memorandum titled "Guidance Regarding New Regulations Governing Procedures for Asylum and Withholding of Removal and Credible Fear and Reasonable Fear Reviews," Department of Justice, dated December 11, 2020 ("DOJ Policy Memo.").

5. Attached hereto as **Exhibit 4** is a true and correct copy of a letter from Catholic Legal Immigration Network, Inc., RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, dated July 15, 2020 ("CLINIC Comment").

6. Attached hereto as **Exhibit 5** is a true and correct copy of a letter from Pangea Legal Services, RE: RIN 1125-AA94 or EOIR Docket 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067, dated July 15, 2020 ("Pangea Comment").

7. Attached hereto as **Exhibit 6** is a true and correct copy of a letter from Dolores Street Community Services RE: Comments in Opposition to the DHS/USCIS AND DOJ/EOIR Joint

Notice of Proposed Rulemaking ("NPRM" or "Proposed Rule") entitled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020 ("Dolores Comment"), dated July 15, 2020.

8. Attached hereto as **Exhibit 7** is a true and correct copy of a letter from Capital Area Immigrant's Rights Coalition, RE: 85 FR 36264; EOIR Docket No. 18-0002, A.G. Order No. 4714-2020; RIN 1125-AA94, Comments in Response to Joint Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, dated July 15, 2020 ("CAIR Comment").

9. Attached hereto as **Exhibit 8** is a true and correct copy of a letter from the Association of Pro Bono Counsel, RE: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review - EOIR Docket No. 18-0002; RIN 1125-AA94, July 15, 2020 ("APBCO Comment").

10. Attached hereto as **Exhibit 9** is a true and correct copy of a letter from the Attorney Generals of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia, RE: Comments on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (Proposed June 15, 2020), RIN: 1125–AA94, dated July 15, 2020 ("Joint State AG Comment").

11. Attached hereto as **Exhibit 10** is a true and correct copy of a letter from the State of Colorado, RE: RIN l125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rule on Asylum, and Collection of Information, 0MB Control Number 1615-0067, dated July 14, 2020 ("Colorado Comment").

12. Attached hereto as **Exhibit 11** is a true and correct copy of a letter from the City of New York, RE: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, EOIR Docket No.18-0002; A.G Order No.4714-2020, dated July 15, 2020 ("NYC Comment").

13. Attached hereto as **Exhibit 12** is a true and correct copy of Department of Homeland Security, Application for Asylum and for Withholding of Removal, Form I-589, as revised 08/25/2020 ("I-589").

14. Attached hereto as **Exhibit 13** is a true and correct copy of a letter from Round Table of Former Immigration Judges RE: Comments in Opposition to Proposed Rulemaking: 85 FR 36264, RIN 1125-AA94; 1615-AC42 EOIR Docket No. 18-0002; A.G. Order No. 4714-2020, Dated July 13, 2020 ("RoundTable Comment").

15. Attached hereto as **Exhibit 14** is a true and correct copy of a purported order signed by Peter Gaynor and dated September 10, 2020, filed on September 15, 2020 by Defendants Chad Wolf, DHS, Kenneth Cuccinelli, and USCIS in the case Immigrant Legal Res. Ctr. v. Wolf, 20-CV-05883-JSW.

16. Attached hereto as **Exhibit 15** is a true and correct copy of a purported ratification of prior action signed by Defendant Chad Wolf and dated September 17, 2020, filed on September 18, 2020 by Defendants Chad Wolf, DHS, Kenneth Cuccinelli, and USCIS in the case Immigrant Legal Res. Ctr. v. Wolf, 20-CV-05883-JSW.

17. Attached hereto as **Exhibit 16** is a true and correct copy of a Notice of Correction filed on November 18, 2020 by Defendants Chad Wolf, DHS, Kenneth Cuccinelli, and USCIS in the case *Immigrant Legal Res. Ctr. v. Wolf*, Case No. 20-CV-05883-JSW.

18. Attached hereto as **Exhibit 17** is a true and correct copy of a purported order signed by Peter Gaynor and dated November 14, 2020.

19. Attached hereto as **Exhibit 18** is a true and correct copy of a purported ratification of prior action signed by Defendant Chad Wolf and dated November 16, 2020.

20. Attached hereto as **Exhibit 19** is a true and correct copy of a decision by the Government Accountability Office in the matter of *Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland* Security, dated August 14, 2020.

21. Attached hereto as **Exhibit 20** is a true and correct copy of a letter from the City and County of Denver, RE: RIN 1125-AA94 or EOIR Docket No.18-0002, Public Comment Opposing

Proposed Rules on Asylum and Collection of Information OMB Control Number 1615-0067, dated July 15, 2020 ("Denver Comment").

22. Attached hereto as **Exhibit 21** is a true and correct copy of a letter from the Immigration and Nationality Law Committee of the New York City Bar Association, RE: RIN 1125-AA94 or EOIR Docket No.18-0002, Public Comment Opposing Proposed Rules on Asylum and Collection of Information OMB Control Number 1615-0067, dated July 14, 2020 ("City Bar Comment").

23. Attached hereto as **Exhibit 22** is a true and correct copy of the GAO website listing active vacancies noticed by the Department of Homeland Security as of December 23, 2020.

24. Attached hereto as **Exhibit 23** is a true and correct copy of a letter from the United Nations High Commissioner for Refugees, RE: Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services), dated July 15, 2020 ("UNHCR Comment").

25. Attached hereto as **Exhibit 24** is a true and correct copy of a letter from Human Rights First, RE: EOIR Docket No. 18-0002, Human Rights First's Comment in Response to Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, dated July 15, 2020 ("HFR Comment").

26. Attached hereto as **Exhibit 25** is a true and correct copy of a comment from Asylum Seeker Advocacy Project to the Notice of Proposed Rulemaking and Request for Comment on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94 or EOIR Docket No. 18-0002, 85 FR 36264, dated July 15, 2020 ("ASAP Comment").

27. Attached hereto as **Exhibit 26** is a true and correct copy of a letter from The City Bar Justice Center, in conjunction with *pro bono* partner Willkie Farr & Gallagher LLP, RE: RIN 1125–AA94 or EOIR Docket No. 18–0002; Comment in Opposition to DOJ/DHS Joint Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, dated July 15, 2020 ("CBJC Comment").

28. Attached hereto as **Exhibit 27** is a true and correct copy of a letter from Ayuda, RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067, dated July 15, 2020 ("Ayuda Comment").

29. Attached hereto as **Exhibit 28** is a true and correct copy of the Form I-589 Public Comments and Response Matrix published by the Department of Justice and Department of Homeland Security with the Final Rule.

30. Attached hereto as **Exhibit 29** is a true and correct copy of a letter from The Tahirih Justice Center, RE: Comments in Response to the United States Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) and Department of Justice (DOJ) Office for Immigration Review (EOIR) (the Departments) Joint Notice of Executive Proposed Rulemaking (NPRM or the rule): Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020, dated July 15, 2020.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on this 23rd day of December, 2020, at Sacramento, California.

Respectfully submitted,

By: */s/ Naomi A. Igra*
Naomi A. Igra

EXHIBIT 1

DECLARATION OF NAOMI A. IGRA

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 235

RIN 1615–AC42

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1208, and 1235

[EOIR Docket No. 18–0102; A.G. Order No. 4922–2020]

RIN 1125–AA94

Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

AGENCY: Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On June 15, 2020, the Department of Homeland Security (''DHS'') and the Department of Justice (''DOJ'') (collectively ''the Departments'') published a notice of proposed rulemaking (''NPRM'' or ''proposed rule'') that would amend the regulations governing credible fear determinations. The proposed rule would make it so that individuals found to have a credible fear will have their claims for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (''INA'' or ''the Act'') (''statutory withholding of removal''), or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (''CAT''), adjudicated by an immigration judge within the Executive Office for Immigration Review (''EOIR'') in streamlined proceedings (rather than under section 240 of the Act), and to specify what standard of review applies in such streamlined proceedings. The Departments further proposed changes to the regulations regarding asylum, statutory withholding of removal, and withholding and deferral of removal under the Convention Against Torture (''CAT'') regulations. The Departments also proposed amendments related to the standards for adjudication of applications for asylum and statutory withholding. This final rule (''rule'' or ''final rule'') responds to comments received in response to the NPRM and generally adopts the NPRM with few substantive changes.

DATES: This rule is effective on January 11, 2021.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Executive Summary of the Final Rule

On June 15, 2020, the Departments published an NPRM that would amend the regulations governing credible fear determinations to establish streamlined proceedings under a clarified standard of review. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020). The proposed rule would also amend regulations regarding asylum, statutory withholding of removal, and withholding and deferral of removal under the regulations. *Id.*

The following discussion describes the provisions of the final rule, which is substantially the same as the NPRM, and summarizes the changes made in the final rule.

A. Authority and Legal Framework

The Departments are publishing this final rule pursuant to their respective authorities under the Immigration and Nationality Act (''INA'') as amended by the Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135.

The INA, as amended by the HSA, charges the Secretary ''with the administration and enforcement of this chapter [titled ''Immigration and Nationality''] and all other laws relating to the immigration and naturalization of aliens'' and granted the Secretary the power to take all actions ''necessary for carrying out'' the provisions of the immigration and nationality laws. INA 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3); *See* HSA, sec. 1102, 116 Stat. at 2273–74; Consolidated Appropriations Resolution of 2003, Public Law 108–7, sec. 105, 117 Stat. 11, 531.

The HSA charges the Attorney General with ''such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by [EOIR], or by the Attorney General with respect to [EOIR] . . . .'' INA 103(g)(1), 8 U.S.C. 1103(g)(1); *see* 6 U.S.C. 521; HSA, sec. 1102, 116 Stat. at 2274.

Furthermore, the Attorney General is authorized to ''establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.'' INA 103(g)(2), 8 U.S.C. 1103(g)(2); HSA, sec. 1102, 116 Stat. 2135, 2274.

B. Changes in the Final Rule

Through the NPRM, the Departments sought to satisfy a basic tenet of asylum law: To assert a ''government's right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm.'' 85 FR at 36265 (citations omitted). To achieve this dual aim, the Departments proposed numerous amendments to the DHS and DOJ regulations.[1] After carefully reviewing all of the comments received on the NPRM, the Departments are making the following changes to the final rule.

This final rule makes thirteen non-substantive changes to the regulatory provisions in the proposed rule, some of which were noted by commenters. First, the final rule corrects a typographical error—*i.e.* ''part'' rather than ''party''—in 8 CFR 208.30(e)(2)(ii), which was proposed to read, ''Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another *party* of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so'' (emphasis added). Second, the Departments added the word ''for'' to correct the form name ''Application for Asylum and for Withholding of Removal'' at 8 CFR 208.31(g)(2), 1208.30(g)(2)(iv)(B), and 1208.31(g)(2). Third, the Departments are replacing the word ''essential'' with the word ''material'' in 8 CFR 208.20(c)(1) and 1208.20(c)(1), consistent with the stated intent of the NPRM.

Fourth, the Departments are making stylistic revisions to 8 CFR 208.15(a)(1) and 1208.15(a)(1), including breaking them into three subparagraphs, to make them easier to follow and to reduce the risk of confusion. Fifth, the Departments

[1] In addition to the amendments outlined in more detail herein, the Departments also proposed additional minor amendments for clarity, such as replacing references to the former Immigration and Naturalization Service with references to DHS where appropriate (*see, e.g.,* 8 CFR 208.13(b)(3)(ii)) or replacing forms listed by form number with the form's name (*see, e.g.,* 8 CFR 1003.42(e)). The Departments also further reiterate the full explanation and justifications for the proposed changes set out in the preamble to the NPRM. 85 FR at 36265–88.

are editing the temporal language in 8 CFR 208.15(a)(3)(i) and (ii) and 1208.15(a)(3)(i) for clarity and consistency with similar language in 8 CFR 208.15(a)(2) and 1208.15(a)(2). The edited language clarifies the relevant temporal scope to read ''after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States'' in lieu of the language in the NPRM. Sixth, the Departments are striking the parenthetical phrase ''(''rogue official'')'' in 8 CFR 208.18(a)(1) and 1208.18(a)(1). Relatedly, they are replacing the remaining uses of the phrase ''rogue official'' in 8 CFR 208.16(b)(3)(iv), 208.18(a)(1), and 1208.18(a)(1) with its definition, ''public official who is not acting under color of law.'' [2] Seventh, the Departments are adding the clarifying phrase ''as defined in section 212(a)(9)(B)(ii) and (iii) of the Act'' to 8 CFR 208.13(d)(2)(i)(D) and 1208.13(d)(2)(i)(D) consistent with the intent of the NPRM. Eighth, the Departments are clarifying the language in 8 CFR 208.1(g) and 1208.1(g) to alleviate apparent confusion and improve consistency with the intent of the NPRM regarding the use of stereotypes as evidence for an asylum claim. A bald statement that a country or its denizens have a particular cultural trait that causes citizens, nationals, or residents of that country to engage in persecution is evidence lacking in probative value and has no place in an adjudication.

Ninth, the Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(a) and (b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT,[3] and not solely to asylum applications. That point is already clear in 8 CFR 208.6(d), (e) and 1208.6(d), (e), and the Departments see no reason not to conform the other paragraphs in that section for consistency. Tenth, and relatedly, the Departments are making edits to 8 CFR 208.6(a), (b), (d) and (e) and 8 CFR 1208.6(a) and (b), (d), and (e) to make clear that applications for refugee admission pursuant to INA 207(c)(1), 8 U.S.C. 1157(c)(1), and 8 CFR part 207 are subject to the same information disclosure provisions as similar applications for asylum, withholding of removal under the INA, and protection under the regulations implementing the CAT. The Departments already apply the disclosure provisions to such applications as a matter of policy and see no basis to treat such applications differently than those for protection filed by aliens already in or arriving in the United States. Eleventh, the Departments are amending 8 CFR 208.13(d)(2)(ii) to reflect that, operationally, DHS may refer or deny an asylum application, depending on the circumstances of the applicant. *See* 8 CFR 208.14. Twelfth, the Departments are correcting 8 CFR 1208.30(g)(1)(i), (ii) to reflect that asylum officers issue determinations, not orders. *See* 8 CFR 208.30(e).

Thirteenth, EOIR is making a conforming change to 8 CFR 1244.4(b) to align it with the both the appropriate statutory citation and the corresponding language in 8 CFR 244.4(b). Aliens described in INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), including those subject to the firm resettlement bar contained in INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), are ineligible for Temporary Protected Status. That statutory ineligibility ground is incorporated into regulations in both chapter I and chapter V of title 8; however, while the title I provision, 8 CFR 244.4(b), cites the correct statutory provision—INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi)—the title V provision, 8 CFR 1244.4(b), maintains an outdated reference to an incorrect statutory provision. *Compare* 8 CFR 244.4(b) (referencing INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A)), *with* 8 CFR 1244.4(b) (referencing former INA 243(h)(2), 8 U.S.C. 1253(h)(2)).

The Departments are also making four non-substantive changes in the final rule to correct regulatory provisions that were inadvertently changed or deleted in the proposed rule or that introduced an unnecessary redundancy. First, the final rule reinserts language relating to DHS's ability to reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge, which was inadvertently removed from 8 CFR 1208.30(g)(2)(iv)(A) in the NPRM. The final rule reinserts that language in 8 CFR 208.30(g)(2)(i); it pertains to a DHS procedure and, thus, appropriately belongs in chapter I, rather than chapter V, of title 8.

Second, the final rule strikes the regulatory text changes proposed to 8 CFR 103.5. Those changes were not discussed in the preamble to the NPRM and were inadvertently included in the NPRM's proposed regulatory text.

Third, the final rule reinserts the consideration—of-novel-or-unique-issues language in 8 CFR 208.30(e)(4) that was inadvertently proposed to be removed in the NPRM, with modifications to account for changes in terminology adopted via this final rule (specifically, ''[i]n determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a reasonable possibility of persecution or torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.'').

Fourth, this final rule removes the following sentence from the proposed 8 CFR 208.30(e)(4): ''An asylum officer's determination will not become final until reviewed by a supervisory asylum officer.'' Nearly identical text already exists in 8 CFR 208.30(e)(8) and would be repetitive to include in 8 CFR 208.30(e)(4).

In response to issues raised by commenters or to eliminate potential confusion caused by the drafting in the NPRM, the Departments are making five additional changes to the NPRM in the final rule. First, the Departments are amending the waiver provision in 8 CFR 208.1(c) and 1208.1(c) related to claims of ineffective assistance of counsel to provide an exception for egregious conduct on the part of counsel. As discussed, *infra,* the Departments believe that cognizable ineffective assistance of counsel claims in the context of failing to assert a particular social group should be extremely rare. If a particular social group is not asserted because the alien did not tell his or her counsel about it, then there has been no ineffective assistance on the part of counsel. If the alien did provide his or her counsel with a particular social group and counsel elected not to present it as a strategic choice, then there is no basis to reopen the proceedings. *See Matter of B–B-,* 22 I&N Dec. at 310 (''subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen''). Nevertheless, the Departments recognize there may be *sui generis* situations in which ''egregious circumstances'' may warrant reopening due to ineffective assistance of counsel in this context, provided that appropriate procedural requirements for such a claim are observed. Thus, the Departments are adding such an

[2] The NPRM did not use the term ''rogue official'' in 8 CFR 1208.16(b)(3)(iv); rather it referred to ''officials acting outside their official capacity.'' The discrepancy regarding this phrasing between 8 CFR 208.16(b)(3)(iv) 8 CFR 1208.16(b)(3)(iv) in the NPRM was inadvertent, and the Departments are correcting it accordingly in both regulations in the final rule.

[3] *See* UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

exception to the final rule, consistent with existing case law. *See id.* (''The respondents opted for a particular strategy and form of relief, and although they might wish to fault their former attorney and recant that decision, they are nonetheless bound by it, unless they can show egregious conduct on counsel's part.''); *see also Matter of Velasquez,* 19 I&N Dec. 377, 377 (BIA 1986) (concession of attorney is binding on an alien absent egregious circumstances).

Second, the Departments are amending the language in 8 CFR 208.1(e) and 1208.1(e) regarding when threats may constitute persecution to clarify that particularized threats of severe harm of an immediate and menacing nature made by an identified entity or person may constitute persecution, though the Departments expect that such cases will be rare. This revision, as discussed *infra,* is consistent with existing case law. *See Duran-Rodriguez* v. *Barr,* 918 F.3d 1025, 1028 (9th Cir. 2019) (''death threats alone can constitute persecution'' but ''they constitute 'persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm' '' (citation omitted)). As noted, threats ''combined with confrontation or other mistreatment'' are likely to be persecution; however, ''cases with threats *alone,* particularly anonymous or vague ones, rarely constitute persecution.'' *Id.* (citation omitted) (emphasis added); *see also Juan Antonio* v. *Barr,* 959 F.3d 778, 794 (6th Cir. 2020) (threats alone amount to persecution only when they are ''of the most immediate and menacing nature'' (citation omitted)).

Third, in recognition of commenters' concerns and the reality that aliens under the age of 18, especially very young children, may not have decisional independence regarding an illegal entry into the United States, the Departments are amending 8 CFR 208.13(d)(1)(i) and 1208.13(d)(1)(i) to reflect that an unlawful or attempted unlawful entry into the United States by an alien under the age of 18 will not be considered as a significant adverse discretionary factor in considering a subsequent asylum application filed by such an alien. The Departments do not believe that a similar exception is warranted in 8 CFR 208.13(d)(1)(ii) and (iii), and 1208.13(d)(1)(ii) and (iii), however. For (d)(1)(ii) to apply to an alien under the age of 18, that alien must have filed an asylum application in the United States, notwithstanding any language barriers or other impediments; thus, there is no reason to assume categorically that such an alien could not have filed an application for protection in another country. Consequently, the Departments find that no age exemption is warranted in 8 CFR 208.13(d)(1)(ii) and 1208.13(d)(1)(ii). Further, as discussed, *infra,* there is no reason that an alien of any age would need to use fraudulent documents to enter the United States in order to seek asylum. Accordingly, no age exemption is warranted in 8 CFR 208.13(d)(1)(iii) and 1208.13(d)(1)(iii). Even without age exemptions, the Departments note that these discretionary factors do not constitute bars to asylum and that adjudicators may appropriately consider an applicant's age in assessing whether a particular application warrants being granted as a matter of discretion.

Fourth, in response to commenters' concerns about the applicable effective date of the frivolousness provisions in 8 CFR 208.20 and 1208.20, the Departments have clarified the language in those provisions. The amendments to those provisions provided in this rule apply only to asylum applications filed on or after the effective date of the rule. The current definition of ''frivolousness'' will continue to apply to asylum applications filed between April 1, 1997, and the effective date of the rule.

Fifth, to avoid confusion and potential conflict between the proposed language of 8 CFR 208.20(b) and 1208.20(b) and 8 CFR 208.20(d) and 1208.20(d), the Departments are deleting language in the former regarding an alien's opportunity to account for issues with a claim. The intent of the NPRM, expressed unequivocally in the proposed addition of 8 CFR 208.20(d) and 1208.20(d), was clear that adjudicators would not be required to provide ''multiple opportunities for an alien to disavow or explain a knowingly frivolous application.'' 85 FR at 36276. The Departments inadvertently retained language from the current rule in the proposed additions of 8 CFR 208.20(b) and 1208.20(b), however, that was in tension with that intent. *Compare, e.g.,* 8 CFR 208.20(b) (proposed) (''Such finding [of frivolousness] will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.''), *with* 8 CFR 208.20(d) (proposed) (''If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolous finding.''). Accordingly, in the final rule, the Departments are deleting the sentence from 8 CFR 208.20(b) and 1208.20(b) regarding an alien's opportunity to address issues with his or her claim after receiving the statutory warning regarding the knowing filing of a frivolous asylum application to avoid any residual confusion on the point.

The following discussion describes the provisions of the final rule, which are substantially the same as the NPRM, and also incorporates the changes made in the final rule summarized above.

C. Provisions of the Final Rule

1. Expedited Removal and Screenings in the Credible Fear Process

1.1. Asylum-and-Withholding-Only Proceedings for Aliens With Credible Fear

DOJ is amending 8 CFR 1003.1, 8 CFR 1003.42(f), 8 CFR 1208.2, 8 CFR 1208.30, and 8 CFR 1235.6—and DHS is amending 8 CFR 208.2(c), 8 CFR 208.30(e)(5) and (f), and 8 CFR 235.6(a)(1)—so that aliens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture and accordingly receive a positive fear determination would appear before an immigration judge for ''asylum-and-withholding-only'' proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1). Such proceedings would be adjudicated in the same manner that currently applies to certain alien crewmembers, stowaways, and applicants for admission under the Visa Waiver Program, among other categories of aliens who are not entitled by statute to proceedings under section 240 of the Act, 8 U.S.C. 1229a. *See* 8 CFR 208.2(c)(1)(i)–(viii), 1208.2(c)(1)(i)–(viii).[4] Additionally, to ensure that these claims receive the most expeditious consideration possible, the Departments are amending 8 CFR 208.5 and 8 CFR 1208.5 to require DHS to make available appropriate applications and relevant warnings to aliens in its custody who have expressed a fear in the expedited removal process and received a positive determination. The Departments believe that this change would bring the proceedings in line with the statutory objective that the expedited removal process be streamlined and efficient.

[4] In addition, DOJ proposed a technical correction to 8 CFR 1003.1(b), which establishes the jurisdiction of the BIA, to correct the reference to 8 CFR 1208.2 in paragraph (b)(9) and ensure that the regulations accurately authorize BIA review in ''asylum-and-withholding-only'' proceedings.

1.2. Consideration of Precedent in Credible Fear Determinations

DOJ is adding language to 8 CFR 1003.42(f) to specify that an immigration judge will consider applicable legal precedent when reviewing a negative fear determination. This instruction would be in addition to those currently listed in 8 CFR 1003.42 to consider the credibility of the alien's statements and other facts of which the immigration judge is aware. These changes would codify in the regulations the current practice and provide a clear requirement to immigration judges that they must consider and apply all applicable law, including administrative precedent from the Board of Immigration Appeals (''BIA''), decisions of the Attorney General, decisions of the Federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits, and decisions of the Supreme Court.

1.3. Remove and Reserve DHS-Specific Procedures From DOJ Regulations

DOJ is removing and reserving the following provisions in chapter V of 8 CFR: 8 CFR 1235.1, 8 CFR 1235.2, 8 CFR 1235.3, and 8 CFR 1235.5. When the Department first incorporated part 235 into 1235, it stated that ''nearly all of the provisions * * * affect bond hearings before immigration judges.'' Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9823, 9826 (Feb. 28, 2003). Upon further review, the Department determined that these sections regard procedures that are specific to DHS's examinations of applicants for admission as set forth in 8 CFR 235.1, 8 CFR 235.2, 8 CFR 235.3, and 8 CFR 235.5, and do not need to be duplicated in the regulations for EOIR in Chapter V, except for the provisions in 8 CFR 1235.4, relating to the withdrawal of an application for admission, and 8 CFR 1235.6, relating to the referral of cases to an immigration judge.

In comparison to the NPRM, this final rule is making an additional technical amendment by updating the outdated reference to ''the Service'' in 8 CFR 1235.6(a)(1)(ii) to read ''DHS.''

1.4. Reasonable Possibility Standard for Statutory Withholding of Removal and Torture-Related Fear Determinations

The Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to clarify and raise the statutory withholding of removal screening standard and the torture-related screening standard under the CAT regulations for aliens in expedited removal proceedings and stowaways. Specifically, the Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof in credible fear screenings from a significant possibility that the alien can establish eligibility for statutory withholding of removal to a reasonable possibility that the alien would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 CFR 208.16, 208.30(e)(2), 1208.16. Similarly, for aliens expressing a fear of torture, the Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof from a significant possibility that the alien is eligible for withholding or deferral of removal under the CAT regulations to a reasonable possibility that the alien would be tortured in the country of removal. *See* 8 CFR 208.18(a), 208.30(e)(3), 1208.18(a); 85 FR at 36268. Consistent with INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the asylum eligibility screening standard (a significant possibility that the alien could establish eligibility for asylum) currently applied in credible fear screenings remains unchanged. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). By clarifying and applying the ''reasonable possibility'' standard to the statutory withholding of removal screening and the torture-related screening under the CAT regulations, the alien's screening burdens would become adequately analogous to the merits burdens, where the alien's burdens for statutory withholding of removal and protections under the CAT regulations are higher than the burden for asylum.

The Departments are also amending 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to refer to the screenings of aliens in expedited removal proceedings and of stowaways for statutory withholding of removal as ''reasonable possibility of persecution'' determinations and the screening for withholding and deferral of removal under the CAT regulations as ''reasonable possibility of torture'' determinations, in order to avoid confusion between the different standards of proof.

In conjunction with the edits to DHS's regulation in 8 CFR 208.30, DOJ is amending 8 CFR 1208.30. Currently, after an asylum officer determines that an alien lacks a credible fear of persecution or torture, the regulation provides that an immigration judge in EOIR reviews that determination under the credible fear (''significant possibility'') standard. 8 CFR 208.30(g), 1208.30(g). DHS's ''reasonable possibility'' screening standard for statutory withholding of removal and CAT protection claims is a mismatch with EOIR's current regulation, which does not provide for a reasonable possibility review process in the expedited removal context. Therefore, DOJ is modifying 8 CFR 1208.30(g) to clarify that credible fear of persecution determinations (*i.e.,* screening for asylum eligibility) would continue to be reviewed under a ''credible fear'' (significant possibility) standard, but screening determinations for eligibility for statutory withholding of removal and protection under the CAT regulations would be reviewed under a ''reasonable possibility'' standard.

Additionally, to clarify terminology in 8 CFR 208.30(d)(2), mention of the Form M–444, Information about Credible Fear Interview in Expedited Removal Cases, is replaced with mention of relevant information regarding the ''fear determination process.'' This change clarifies that DHS may relay information regarding screening for a reasonable possibility of persecution and a reasonable possibility of torture, in addition to a credible fear of persecution.

DHS is also revising the language in 8 CFR 208.30(e)(1) to interpret the ''significant possibility'' standard that Congress established in section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v).

In comparison to the NPRM, this final rule is correcting a typographical error—*i.e.* ''part'' rather than ''party''—in 8 CFR 208.30(e)(2)(ii). The sentence now reads: ''Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so[.]'' In addition, this final rule adds the word ''for'' to correct the form name ''Application for Asylum and for Withholding of Removal'' at 8 CFR 1208.30(g)(2)(iv)(B). This final rule also reinserts language allowing DHS to reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge, which was inadvertently removed from 8 CFR 1208.30(g)(2)(iv)(A) in the NPRM. The final rule reinserts that language in 8 CFR 208.30(g)(2)(i) because it pertains to a DHS procedure and, thus, appropriately belongs in chapter I, rather than chapter V, of title 8.

1.5. Amendments to the Credible Fear Screening Process

The Departments further amend 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to make several additional technical and substantive amendments regarding fear interviews, determinations, and reviews of determinations. The Departments amend 8 CFR 208.30(a) and 8 CFR 1208.30(a) to clearly state that the respective sections describe the exclusive procedures applicable to applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), and receive ''credible fear'' interviews, determinations, and reviews under section 235(b)(1)(B) of the Act, 8 U.S.C. 1225(b)(1)(B).

DHS is clarifying the existing ''credible fear'' screening process in 8 CFR 208.30(b), which states that if an alien subject to expedited removal indicates an intention to apply for asylum or expresses a fear of persecution or torture, or a fear of return, an inspecting officer shall not proceed further with removal until the alien has been referred for an interview with an asylum officer, as provided in section 235(b)(1)(A)(ii) of the Act, 8 U.S.C. 1225(b)(1)(A)(ii). The rule also states that the asylum officer would screen the alien for a credible fear of persecution and, as appropriate, a reasonable possibility of persecution and a reasonable possibility of torture, and conduct an evaluation and determination in accordance with 8 CFR 208.9(c), which is consistent with current policy and practice. These proposals aim to provide greater transparency and clarity with regard to fear screenings.

DHS is also including consideration of internal relocation in the context of 8 CFR 208.30(e)(1)–(3), which outline the procedures for determining whether aliens have a credible fear of persecution, a reasonable possibility of persecution, and a reasonable possibility of torture. Considering internal relocation in the ''credible fear'' screening context is consistent with existing policy and practice, and the regulations addressing internal relocation at 8 CFR 208.16(c)(3)(ii) and 8 CFR 1208.16(c)(3)(ii) (protection under the CAT regulations); 8 CFR 208.13(b)(1)(i)(B) and 8 CFR 1208.13(b)(1)(i)(B) (asylum); and 8 CFR 208.16(b)(1)(i)(B) and 8 CFR 1208.16(b)(1)(i)(B) (statutory withholding). The regulatory standard that governs consideration of internal relocation in the context of asylum and statutory withholding of removal adjudications is different from the standard that considers internal relocation in the context of protection under the CAT regulations. *See generally Maldonado* v. *Lynch,* 786 F.3d 1155, 1163 (9th Cir. 2015) (noting the marked difference between the asylum and CAT regulations concerning internal relocation).

In addition, the Departments are adding asylum and statutory withholding eligibility bar considerations in 8 CFR 208.30(e)(1)(iii) and (e)(2)(iii), and 8 CFR 1003.42(d). Currently, 8 CFR 208.30(e)(5)(i) provides that if an alien, other than a stowaway, is able to establish a credible fear of persecution or torture but also appears to be subject to one or more of the mandatory eligibility bars to asylum or statutory withholding of removal, then the alien will be placed in section 240 proceedings. The Departments are amending 8 CFR 208.30 to apply mandatory bars to applying for or being granted asylum at the credible fear screening stage for aliens in expedited removal proceedings and for stowaways, such that if a mandatory bar to applying for or being granted asylum applies, the alien would be unable to show a significant possibility of establishing eligibility for asylum. In 8 CFR 208.30(e)(5), DHS requires asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under section 208(a)(2)(B)–(D) of the Act, 8 U.S.C. 1158(a)(2)(B)–(D), or the bars to asylum eligibility under section 208(b)(2) of the Act, 8 U.S.C. 1158(b)(2), including any eligibility bars established by regulation under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C); and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the CAT regulations. If a mandatory bar to asylum applies, the alien will then be screened only for statutory withholding of removal or withholding or deferral of removal under the CAT regulations. If the alien is subject to a mandatory bar to asylum that is also a mandatory bar to statutory withholding of removal, then the alien will be screened only for deferral of removal under the CAT regulations. An alien who could establish a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal would receive a negative fear determination, unless the alien could establish a reasonable possibility of torture, in which case he or she would be referred to the immigration court for asylum-and-withholding-only proceedings. In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations.

Additionally, under 8 CFR 208.30(e)(5), DHS has used a ''reasonable fear'' standard (identical to the ''reasonable possibility'' standard enunciated in this rule) in procedures related to aliens barred from asylum under two interim final rules issued by the Departments,[5] as described in 8 CFR

[5] On July 16, 2019, the Departments issued an interim final rule providing that certain aliens described in 8 CFR 208.13(c)(4) or 1208.13(c)(4) who enter, attempt to enter, or arrive in the United States across the southern land border on or after such date, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, will be found ineligible for asylum (and, because they are subject to this bar, not be able to establish a credible fear of persecution) unless they qualify for certain exceptions. *See* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). On July 24, 2019, the U.S. District Court for the Northern District of California enjoined the Departments ''from taking any action continuing to implement the Rule'' and ordered the Departments ''to return to the pre-Rule practices for processing asylum applications.'' *E. Bay Sanctuary Covenant* v. *Barr,* 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). On August 16, 2019, the U.S. Court of Appeals for the Ninth Circuit issued a partial stay of the preliminary injunction so that the injunction remained in force only in the Ninth Circuit. *E. Bay Sanctuary Covenant* v. *Barr,* 934 F.3d 1026, 1028 (9th Cir. 2019). On September 9, 2019, the district court then reinstated the nationwide scope of the injunction. *E. Bay Sanctuary Covenant* v. *Barr,* 391 F. Supp. 3d 974 (N.D. Cal. 2019). Two days later, the Supreme Court stayed the district court's injunction. *Barr* v. *East Bay Sanctuary Covenant,* 140 S. Ct. 3 (2019). On July 6, 2020, the Ninth Circuit affirmed the district court's injunction. *E. Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832 (9th Cir. 2020). Additionally, on June 30, 2020, the interim final rule was vacated by the D.C. District Court in *Capital Area Immigrants' Rights (''CAIR'') Coalition, et al.* v. *Trump,* 19–cv–02117 (D.D.C. 2020) and *I.A., et al.* v. *Barr,* 19–cv–2530 (D.D.C. 2020).

On November 9, 2018, the Departments issued an interim final rule providing that certain aliens described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) who entered the United States in contravention of a covered Presidential proclamation or order are barred from eligibility for asylum. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018). On December 19, 2018, the U.S. District Court for the Northern District of California enjoined the Departments ''from taking any action continuing to implement the Rule'' and ordered the Departments ''to return to the pre-Rule practices for processing asylum applications.'' *E. Bay Sanctuary Covenant* v. *Trump,* 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018). On February 28, 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed the injunction. *E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242, 1284 (9th Cir. 2020). The Departments in this rule do not make any

208.13(c)(3)–(4). The Departments include technical edits in 8 CFR 208.30(e)(5), to change ''reasonable fear'' to ''reasonable possibility'' to align the terminology with the other proposed changes in this rule. Similarly, DOJ makes technical edits in 8 CFR 1208.30(g)(1) and 8 CFR 1003.42(d)—both of which refer to the ''reasonable fear'' standard in the current version of 8 CFR 208.30(e)(5)—to change the ''reasonable fear'' language to ''reasonable possibility.'' These edits are purely technical and would not amend, alter, or impact the standard of proof applicable to the fear screening process and determinations, or review of such determinations, associated with the aforementioned bars.

Additionally, in 8 CFR 208.2(c)(1), 8 CFR 1208.2(c)(1), 8 CFR 235.6(a)(2), and 8 CFR 1235.6(a)(2), the Departments include technical edits to replace the term ''credible fear of persecution or torture'' with ''a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture'' to mirror the terminology used in proposed 8 CFR 208.30 and 8 CFR 1208.30. Moreover, in 8 CFR 1208.30(g)(2)(iv)(C), DOJ makes a technical edit to clarify that stowaways barred from asylum and both statutory and CAT withholding of removal may still be eligible for deferral of removal under the CAT regulations.

The Departments further amend 8 CFR 208.30(g) and 8 CFR 1208.30(g)(2), which address procedures for negative fear determinations for aliens in the expedited removal process. In 8 CFR 208.30(g)(1), the Departments treat an alien's refusal to indicate whether he or she desires review by an immigration judge as declining to request such review. Also, in 8 CFR 208.31, the Departments treat a refusal as declining to request review within the context of reasonable fear determinations.

In comparison to the NPRM, this final rule adds the word ''for'' to correct the form name to ''Application for Asylum and for Withholding of Removal'' at 8 CFR 208.31(g)(2) and 1208.31(g)(2). This final rule also reinserts language concerning novel or unique issues in 8 CFR 208.30(e)(4) that was inadvertently proposed to be removed in the NPRM, with modifications to account for changes in terminology adopted via this final rule. The language now reads: ''In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a reasonable possibility of persecution or torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.'' Also, this final rule removes one sentence from the proposed 8 CFR 208.30(e)(4)—''An asylum officer's determination will not become final until reviewed by a supervisory asylum officer''—because similar text already exists in 8 CFR 208.30(e)(8) and it would be repetitive to include it in 8 CFR 208.30(e)(4).

2. Amendments Related to the Filing Requirements and Elements for Consideration of Form I–589, Application for Asylum and for Withholding of Removal

2.1. Frivolous Applications

The Departments amend both 8 CFR 208.20 and 1208.20 regarding determinations that an asylum application is frivolous. *See* INA 208(d)(6), 8 U.S.C. 1158(d)(6) (providing that an alien found to have ''knowingly made a frivolous application for asylum'' is ''permanently ineligible for any benefits'' under the Act). The Departments propose the new standards in order to ensure that manifestly unfounded or otherwise abusive claims are rooted out and to ensure that meritorious claims are adjudicated more efficiently so that deserving applicants receive benefits in a timely fashion.

The Departments clarify the meaning of ''knowingly'' by providing that ''knowingly'' requires either actual knowledge of the frivolousness or willful blindness toward it. 8 CFR 208.20(a)(2), 1208.20(a)(2). The Departments also amend the definition of ''frivolous.'' 8 CFR 208.20, 208.20(c)(1)–(4), 1208.20, 1208.20(c)(1)–(4). Under the new definition, if knowingly made, an asylum application would be properly considered frivolous if the adjudicator were to determine that it included a fabricated material element; that it was premised on false or fabricated evidence; that it was filed without regard to the merits of the claim; or that it was clearly foreclosed by applicable law. The definition aligns with the Departments' prior understandings of frivolous applications, including applications that are clearly unfounded, abusive, or involve fraud, and the Departments believe the definition would better effectuate the intent of section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), to discourage applications that make patently meritless or false claims.

In addition, the Departments allow asylum officers adjudicating affirmative asylum applications to make findings that aliens have knowingly filed frivolous asylum applications and to refer the cases on that basis to immigration judges (for aliens not in lawful status) or to deny the applications (for aliens in lawful status). 8 CFR 208.20(b), 1208.20(b). For an alien not in lawful status, a finding by an asylum officer that an asylum application is frivolous would not render an alien permanently ineligible for immigration benefits unless an immigration judge or the BIA subsequently makes a finding of frivolousness upon de novo review of the application. Asylum officers would apply the same definition used by immigration judges and the BIA under this rule. *Id.* This change would allow U.S. Citizenship and Immigration Services (''USCIS'') to more efficiently root out frivolous applications, deter frivolous filings, and reduce the number of frivolous applications in the asylum system. Additionally, an asylum officer who makes a finding of frivolousness would produce a record on that issue for an immigration judge to review. Further, the proposed change is consistent with congressional intent to ''reduce the likelihood that fraudulent or frivolous applications will enable deportable or excludable aliens to remain in the U.S. for substantial periods.'' S. Rep. No. 104–249, at 2 (1996).

The Departments clarify that, as long as the alien has been given the notice of the consequences of filing a frivolous application, as required by section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A), the adjudicator need not give the alien any additional or further opportunity to account for any issues prior to the entry of a frivolousness finding. 8 CFR 208.20(d), 1208.20(d). The Departments have determined that this provision is sufficient to comply with the Act's requirements, and that there is no legal or operational justification for providing additional opportunities to address aspects of a claim that may warrant a frivolousness finding. The Departments believe the current regulatory framework, which provides that an EOIR adjudicator may only make a frivolous finding if he or she ''is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim,'' has not successfully achieved the Departments' goal of preventing knowingly frivolous applications that delay the adjudication of other asylum applications that may merit relief.

As this rule would overrule *Matter of Y–L–,* 24 I&N Dec. 151 (BIA 2007), and revise the definition of ''frivolous,'' adjudicators would not be required to

amendments that would implement the rules at issue in the aforementioned cases.

provide opportunities for applicants to address discrepancies or implausible aspects of their claims if an applicant had been provided the warning required by INA 208(d)(4)(A) (8 U.S.C. 1158(d)(4)(A)).

In order to ameliorate the consequences of knowingly filing a frivolous application in appropriate cases, however, the Departments include a mechanism that would allow certain aliens in removal proceedings to withdraw, with prejudice, their applications by disclaiming the applications; accepting an order of voluntary departure for a period of no more than 30 days; withdrawing, also with prejudice, all other applications for relief or protection; and waiving any rights to file an appeal, motion to reopen, and motion to reconsider. 8 CFR 208.20(f), 1208.20(f). In such instances, the aliens would not be subject to a frivolousness finding and could avoid the penalties associated with such a finding. In addition, the regulation does not change current regulatory language that makes clear that a frivolousness finding does not bar an alien from seeking statutory withholding of removal or protection under the CAT regulations. Finally, the Departments clarify that an application may be found frivolous even if the application was untimely. 8 CFR 208.20(e), 1208.20(e).

In comparison to the NPRM, this final rule updates the frivolousness language in 8 CFR 208.20 and 8 CFR 1208.20 to further clarify that the new frivolousness standards only apply prospectively to applications filed on or after the effective date of this final rule. This final rule also replaces the word ''essential'' with the word ''material'' in 8 CFR 208.20(c)(1) and 1208.20(c)(1), consistent with the stated intent of the NPRM. Finally, to avoid confusion and potential conflict between the proposed language of 8 CFR 208.20(b) and 1208.20(b) and 8 CFR 208.20(d) and 1208.20(d), this final rule deletes the following sentence from proposed 8 CFR 208.20(b) and 1208.20(b): ''Such finding will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.''

2.2. Pretermission of Applications

DOJ adds a new paragraph (e) to 8 CFR 1208.13 to clarify that immigration judges may pretermit and deny an application for asylum, statutory withholding of removal, or protection under the CAT regulations if the alien has not established a prima facie claim for relief or protection under the applicable laws and regulations. *See Matter of E–F–H–L–,* 27 I&N Dec. 226 (A.G. 2018); *see also Matter of A–B–,* 27 I&N Dec. 316, 340 (A.G. 2018) (''Of course, if an alien's asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group * * *—an immigration judge or the Board need not examine the remaining elements of the asylum claim.''). Other immigration applications are subject to pretermission when legally insufficient, and the INA and current regulations do not require asylum to be treated any differently. Such a decision would be based on the Form I–589 application itself and any supporting evidence. Under this rule, an immigration judge may pretermit an asylum application in two circumstances: (1) Following an oral or written motion by DHS, and (2) sua sponte upon the immigration judge's own authority. Provided the alien has had an opportunity to respond, and the immigration judge considers any such response, a hearing would not be required for the immigration judge to make a decision to pretermit and deny the application. In the case of the immigration judge's exercise of his or her own authority, parties would have at least ten days' notice before the immigration judge would enter such an order. A similar timeframe would apply if DHS moves to pretermit, under current practice. *See* EOIR, *Immigration Court Practice Manual* at D–1 (Aug. 2, 2018), *https://www.justice.gov/eoir/page/file/1084851/download.*

2.3. Particular Social Group

The Departments adopt amendments to codify long-standing standards from case law regarding the cognizability of particular social groups and to provide clarity, allow for uniform application, and reduce the time necessary to evaluate claims involving particular social groups. These requirements would aid efficient litigation and avoid gamesmanship and piecemeal litigation.

Specifically, the Departments codify the requirements that (1) a particular social group must be (a) composed of members who share a common immutable characteristic, (b) defined with particularity, and (c) socially distinct in the society in question; (2) the group must exist independently of the alleged persecutory acts; and (3) the group must not be defined exclusively by the alleged harm. 8 CFR 208.1(c), 1208.1(c). Additionally, the Departments list nine, non-exhaustive circumstances that, if a particular social group consisted of or was defined by, would not generally result in a favorable adjudication. *Id.* Further, the Departments adopt several procedural requirements regarding the alien's responsibility to define the particular social group. *Id.*

In comparison to the NPRM, this final rule amends the waiver provision in 8 CFR 208.1(c) and 1208.1(c) related to claims of ineffective assistance of counsel based on a failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge to provide an exception for egregious conduct on the part of counsel. The Departments believe that cognizable ineffective assistance of counsel claims in the context of failing to assert a particular social group should be extremely rare. Nevertheless, the Departments recognize there may be unique situations in which ''egregious conduct'' on the part of counsel may warrant reopening in this context, provided that appropriate procedural requirements for such a claim are observed.

2.4. Political Opinion

The Departments adopt amendments to define ''political opinion'' and provide other guidance for adjudicators regarding applications for asylum or statutory withholding of removal premised on the applicant's political opinion. These amendments would provide additional clarity for adjudicators and better align the regulations with statutory requirements and general understanding that a political opinion is intended to advance or further a discrete cause related to political control of the state.

Specifically, the Departments define ''political opinion'' for the purposes of applications for asylum or for statutory withholding of removal as an opinion expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. 8 CFR 208.1(d), 1208.1(d). Additionally, the Departments adopt a list of potential definitional bases for a political opinion that would not, in general, support a favorable adjudication: A political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. *Id.* Finally, consistent with section 101(a)(42) of the Act, 8 U.S.C.

1101(a)(42), the Departments provide that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, would be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or be subject to persecution for such failure, refusal, or resistance would be deemed to have a well-founded fear of persecution on account of political opinion. *Id.*

2.5. Persecution Definition

Given the wide range of cases interpreting ''persecution'' for the purposes of the asylum laws, the Departments are adding a new paragraph to 8 CFR 208.1 and 1208.1 to define ''persecution'' and to better clarify what does and does not constitute persecution given the extreme and severe nature of harm required. The Departments believe that these changes would better align the relevant regulations with the high standard Congress intended for the term ''persecution.'' *See Fatin* v. *INS,* 12 F.3d 1233, 1240 n.10, 1243 (3d Cir. 1993).

Specifically, this rule provides that persecution requires ''an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control.'' 8 CFR 208.1(e), 1208.1(e). The Departments further clarify that persecution does not include, for example: (1) Every instance of harm that arises generally out of civil, criminal, or military strife in a country; (2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional; (3) intermittent harassment, including brief detentions; (4) threats with no actions taken to carry out the threats; (5) non-severe economic harm or property damage; or (6) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or likely would be applied to an applicant personally. *See id.*

In comparison to the NPRM, this final rule amends the language in 8 CFR 208.1(e) and 1208.1(e) regarding when threats alone may constitute persecution to clarify that particularized threats of severe harm of an immediate and menacing nature made by an identified entity may constitute persecution. The Departments expect that such cases will be rare. *See, e.g., Duran-Rodriguez* v. *Barr,* 918 F.3d at 1028 (explaining that ''death threats alone can constitute persecution'' but ''constitute persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm'' (quotation marks and citation omitted)).

2.6. Nexus

The Departments add paragraph (f) to both 8 CFR 208.1 and 1208.1 to provide clearer guidance on situations in which alleged acts of persecution would not be on account of one of the five protected grounds. This proposal would further the expeditious consideration of asylum and statutory withholding claims by bringing clarity and uniformity to this issue.

Specifically, the Departments are adopting the following eight non-exhaustive circumstances, each of which is rooted in case law, that would not generally support a favorable adjudication of an application for asylum or statutory withholding of removal due to the applicant's inability to demonstrate persecution on account of a protected ground: (1) Interpersonal animus or retribution; (2) interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue; (3) generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state; (4) resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations; (5) the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence; (6) criminal activity; (7) perceived, past or present, gang affiliation; and (8) gender. 8 CFR 208.1(f)(1)–(8), 1208.1(f)(1)–(8). At the same time, the regulation would not foreclose that, at least in rare cases, such circumstances could be the basis for finding nexus, given the fact-specific nature of this determination.

2.7. Stereotype Evidence

In order to make clear that pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim, the Departments bar consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes are offered in support of an alien's claim. 8 CFR 208.1(g), 1208.1(g).

In comparison to the NPRM, the final rule clarifies the language in 8 CFR 208.1(g) and 1208.1(g) to alleviate apparent confusion and improve consistency with the intent of the NPRM regarding the use of stereotypes as an evidentiary basis for an asylum claim. In the final rule, bald statements that a country or its denizens have a particular cultural trait that causes citizens, nationals, or residents of that country to engage in persecution is evidence lacking in probative value and has no place in an adjudication.

2.8. Internal Relocation

The Departments are adopting amendments to 8 CFR 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), and 1208.16(b)(3) regarding the reasonableness of internal relocation because the Departments determined that the current regulations inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate. The Departments adopt a more streamlined presentation in the regulations of the most relevant factors for adjudicators to consider in determining whether internal relocation is a reasonable option. This clarification would assist adjudicators in making more efficient adjudications and would bring the regulatory burdens of proof in line with baseline assessments of whether types of persecution generally occur nationwide.

Specifically, the Departments amend the general guidelines regarding determinations of the reasonableness of internal relocation to specify that adjudicators should consider the totality of the circumstances. 8 CFR 208.13(b)(3), 1208.13(b)(3). In addition, the Departments amend the list of considerations for adjudicators including, inter alia, an instruction that adjudicators consider ''the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.'' *Id.* The Departments also adopt a presumption that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a

preponderance of the evidence that it would not be. 8 CFR 208.13(b)(3)(iii), 1208.13(b)(3)(iii). This presumption would apply regardless of whether an applicant has established past persecution. For ease of administering these provisions, the Departments also provide examples of the types of individuals or entities who are private actors. 8 CFR 208.13(b)(3)(iv), 1208.13(b)(3)(iv).[6]

2.9. Discretionary Factors

Asylum is a discretionary form of relief, and the Departments provide general guidelines on factors for adjudicators to consider when determining whether or not an alien merits the relief of asylum as a matter of discretion. 8 CFR 208.13(d), 1208.13(d). Specifically, the Departments provide three factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion: (1) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country; (2) subject to certain exceptions, the failure of an alien to seek asylum or refugee protection in at least one country through which the alien transited before entering the United States; and (3) an alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country. 8 CFR 208.13(d)(1), 1208.13(d)(1). The adjudicator must consider all three factors, if relevant, during every asylum adjudication. If one or more of these factors were found to apply to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination, though the adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.

In addition, the Departments provide nine additional adverse factors that, if applicable, would ordinarily result in the denial of asylum as a matter of discretion. 8 CFR 208.13(d)(2)(i), 1208.13(d)(2)(i). Specifically, the Departments list the following factors for the adjudicator to consider: (1) Whether an alien has spent more than 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States, 8 CFR 208.13(d)(2)(i)(A), 1208.13(d)(2)(i)(A);[7] (2) whether the alien transited through more than one country prior to arrival in the United States, 8 CFR 208.13(d)(2)(i)(B), 1208.13(d)(2)(i)(B);[8] (3) whether the applicant would be subject to a mandatory asylum application denial under 8 CFR 208.13(c), 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty, 8 CFR 208.13(d)(2)(i)(C) 1208.13(d)(2)(i)(C); (4) whether the applicant has accrued more than one year of unlawful presence in the United States prior to filing an application for asylum, 8 CFR 208.13(d)(2)(i)(D), 1208.13(d)(2)(i)(D); (5) whether the applicant, at the time he or she filed the asylum application, had failed to timely file or to timely file an extension request of any required Federal, state, or local tax returns; failed to satisfy any outstanding Federal, state, or local tax obligations; or has income that would generate tax liability but that has not been reported to the Internal Revenue Service, 8 CFR 208.13(d)(2)(i)(E), 1208.13(d)(2)(i)(E); (6) whether the applicant has had two or more prior asylum applications denied for any reason, 8 CFR 208.13(d)(2)(i)(F), 1208.13(d)(2)(i)(F); (7) whether the applicant has previously withdrawn an asylum application with prejudice or been found to have abandoned an asylum application, 8 CFR 208.13(d)(2)(i)(G), 1208.13(d)(2)(i)(G); (8) whether the applicant previously failed to attend an interview with DHS regarding his or her application, 8 CFR 208.13(d)(2)(i)(H), 1208.13(d)(2)(i)(H);[9] and (9) whether the applicant was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen within one year of the change in country conditions, 8 CFR 208.13(d)(2)(i)(I), 1208.13(d)(2)(i)(I); *see also* INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii); 8 CFR 1003.2(c)(3)(ii), 1003.23(b)(4)(i).

This rule provides that if the adjudicator were to determine that any of these nine circumstances applied during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial or referral of asylum would result in an exceptional and extremely unusual hardship to the alien. 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii).

In comparison to the NPRM, this final rule adds the clarifying phrase ''as defined in section 212(a)(9)(B)(ii) and (iii) of the Act'' to 8 CFR 208.13(d)(2)(i)(D) and 1208.13(d)(2)(i)(D) consistent with the intent of the NPRM. In addition, this final rule amends 8 CFR 208.13(d)(1)(i) and 1208.13(d)(1)(i) to reflect that an unlawful or attempted unlawful entry into the United States by an alien under the age of 18 will not be considered as a significant adverse discretionary factor in considering a subsequent asylum application filed by such an alien. Further, the final rule amends 8 CFR 208.13(d)(2)(ii) to reflect that, operationally, DHS may refer or deny an asylum application, depending on the circumstances of the applicant. *See* 8 CFR 208.14.

2.10. Firm Resettlement

Due to the increased availability of resettlement opportunities and the interest of those genuinely in fear of persecution in attaining safety as soon as possible, the Departments revise the definition of firm resettlement that applies to asylum adjudications at 8 CFR 208.15 and 1208.15.[10] These

[6] Because the issue of internal relocation arises in the context of applications for both asylum and statutory withholding of removal, the Departments are amending the relevant regulations related to applications for statutory withholding of removal for the same reasons discussed herein they are amending the regulations related to asylum applications. *See* 8 CFR 208.16(b)(3) and 1208.16(b)(3).

[7] The Departments, however, provided exceptions for aliens who demonstrate that (1) they applied for and were denied protection in such country, (2) they are a trafficking victim as set out as 8 CFR 214.11, or (3) such country was at the time the alien transited not a party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 8 CFR 208.13(d)(2)(i)(A)(*1*)–(*3*), 1208.13(d)(2)(i)(A)(*1*)–(*3*).

[8] The Departments, however, provided the same exceptions described above. *See* 8 CFR 208.13(d)(2)(i)(B)(*1*)–(*3*), 1208.13(d)(2)(i)(B)(*1*)–(*3*).

[9] The Departments included exceptions if the alien shows by the preponderance of the evidence that either exceptional circumstances prevented the alien from attending the interview or that the interview notice was not mailed to the last address provided by the alien or the alien's representative and neither the alien nor the alien's representative received notice of the interview. 8 CFR 208.13(d)(2)(i)(H)(*1*)–(*2*), 1208.13(d)(2)(i)(H)(*1*)–(*2*).

[10] As the Departments noted in the proposed rule, 85 FR at 36286 n.41, 43 countries have signed the Refugee Convention since 1990. In particular, resettlement opportunities in Mexico, one of the most common transit countries for aliens coming to the United States, have increased significantly in recent years. For example, the UNHCR has documented a notable increase in asylum and refugee claims filed in Mexico—even during the ongoing COVID–19 pandemic—which strongly

changes recognize the increased availability of resettlement opportunities and that an alien fleeing persecution would ordinarily be expected to seek refuge at the first available opportunity where there is no fear of persecution or torture. Further, the changes would ensure that the asylum system is used by those in need of immediate protection rather than those who chose the United States as their destination for other reasons and then relied on the asylum system to reach that destination.

Specifically, the Departments identify three circumstances under which an alien would be considered firmly resettled: (1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and (i) received or was eligible for any permanent legal immigration status in that country, (ii) resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist), or (iii) resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country; (2) the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or (3) (i) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or (ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States. 8 CFR 208.15(a)(1)–(3), 1208.15(a)(1)–(3).

The Departments further provide that the issue of whether the firm resettlement bar applies arises ''when the evidence of record indicates that the firm resettlement bar may apply,'' and specifically allows both DHS and the immigration judge to first raise the issue based on the record evidence. 8 CFR 208.15(b), 1208.15(b). Finally, the Departments specify that the firm resettlement of an alien's parent(s) would be imputed to the alien if the resettlement was prior to the alien turning 18 and the alien resided with the parents at the time of the firm resettlement unless the alien could not have derived any legal immigration status or any nonpermanent legal immigration status that was potentially indefinitely renewable from the parent. *Id.*

In comparison to the NPRM, this final rule analyzes the components of 8 CFR 208.15(a)(1) and 1208.15(a)(1), breaks it into three subparagraphs, and changes the syntax, all for easier readability and to avoid confusion. The changes in the final rule are stylistic and do not reflect an intent to make a substantive change from the NPRM. This final rule also changes the temporal language in 8 CFR 208.15(a)(3)(i) and (ii) and 1208.15(a)(3)(i) and (ii) for clarity and consistency with similar language in 8 CFR 208.15(a)(2) and 1208.15(a)(2). The changes clarify the relevant temporal scope to read ''after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States'' in lieu of the language in the NPRM. Finally, as discussed above, the rule corrects a related outdated statutory cross-reference in 8 CFR 1244.4(b).

2.11. ''Public Officials''

The Departments are revising 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) to provide further guidance for determining what sorts of officials constitute ''public officials,'' including whether an official such as a police officer is a public official for the purposes of the CAT regulations if he or she acts in violation of official policy or his or her official status. Specifically, in comparison to the NPRM, this final rule strikes the parenthetical phrase ''(''rogue official'')'' in 8 CFR 208.18(a)(1) and 1208.18(a)(1). Relatedly, this final rule replaces the remaining uses of the phrase ''rogue official'' in 8 CFR 208.16(b)(3)(iv), 208.18(a)(1), and 1208.18(a)(1) with the definition, ''public official who is not acting under color of law.'' As recently noted by the Attorney General in *Matter of O–F–A–S–,* 28 I&N Dec. 35, 38 (A.G. 2020), ''continued use of the 'rogue official' language by the immigration courts going forward risks confusion, not only because it suggests a different standard from the 'under color of law' standard, but also because 'rogue official' has been interpreted to have multiple meanings.''

In addition, the Departments clarify (1) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (*i.e.,* under ''color of law'') and (2) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law does not constitute a ''pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,'' even if such actions cause pain and suffering that could rise to the severity of torture. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1). This amendment clarifies that the requirement that the individual be acting in an official capacity applies to

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suggests that Mexico is an appropriate option for seeking refuge for those genuinely fleeing persecution. *See, e.g.,* Shabia Mantoo, *Despite pandemic restrictions, people fleeing violence and persecution continue to seek asylum in Mexico,* U.N. High Commissioner for Refugees (Apr. 28, 2020), *https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html* (''While a number of countries throughout Latin America and the rest of the world have closed their borders and restricted movement to contain the spread of coronavirus, Mexico has continued to register new asylum claims from people fleeing brutal violence and persecution, helping them find safety.''). Asylum and refugee claims filed in Mexico increased 33 percent in the first three months of 2020 compared to the same period in 2019, averaging almost 6000 per month. *Id.* Asylum claims filed in Mexico rose by more than 103 percent in 2018 compared to the previous year. U.N. High Commissioner for Refugees, *Fact Sheet* (Apr. 2019), *https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf.* Overall, ''[a]sylum requests have doubled in Mexico each year since 2015.'' Congressional Research Serv., *Mexico's Immigration Control Efforts* (Feb. 19, 2020), *https://fas.org/sgp/crs/row/IF10215.pdf.* Moreover, some private organizations acknowledge that asylum claims in Mexico have recently ''skyrocket[ed],'' that ''Mexico has adopted a broader refugee definition than the U.S. and grants a higher percentage of asylum applications,'' and that ''Mexico may offer better options for certain refugees who cannot find international protection in the U.S.,'' including for those ''who are deciding where to seek asylum [*i.e.* between Mexico and the United States].'' Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ* (Nov. 2019), *https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf.* Moreover, the Mexican Constitution was amended in 2011 to include the specific right to asylum and further amended in 2016 to expand that right. *See* Mex. Const. Art. 11 (''Every person has the right to seek and receive asylum. Recognition of refugee status and the granting of political asylum will be carried out in accordance with international treaties. The law will regulate their origins and exceptions.''). In fact, the grounds for seeking and obtaining refugee status under Mexican law are broader than the grounds under U.S. law. As in the United States, individuals in Mexico may seek refugee status as a result of persecution in their home countries on the basis of race, religion, nationality, gender, membership in a social group, or political opinion. *Compare* 2011 Law for Refugees, Complementary Protection, and Political Asylum (''LRCPPA''), Art. 13(I), *with* INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i). However, individuals in Mexico may also seek refugee status based on ''generalized violence'' and ''massive violation of human rights.'' *See* 2011 LRCPPA, Art. 13(II). In short, resettlement opportunities are unquestionably greater now than when the regulatory definition of ''firm resettlement'' was first implemented, and those changes warrant revisions to that definition accordingly.

both a ''public official,'' such as a police officer, and an ''other person,'' such as an individual deputized to act on the government's behalf. *Id.*

The Departments also clarify the definition of ''acquiescence of a public official'' so that, as several courts of appeals and the BIA have recognized, ''awareness''—as used in the CAT ''acquiescence'' definition—requires a finding of either actual knowledge or willful blindness. 8 CFR 208.18(a)(7), 1208.18(a)(7). The Departments further clarify in this rule that, for purposes of the CAT regulations, ''willful blindness'' means that ''the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.'' *Id.*

Additionally, the Departments clarify that acquiescence is not established by prior awareness of the activity alone, but requires an omission of an act that the official had a duty to do and was able to do. 8 CFR 208.18(a)(7), 1208.18(a)(7).

2.12. Information Disclosure

The Departments are making changes to 8 CFR 208.6 and 8 CFR 1208.6 to clarify that information may be disclosed in certain circumstances that directly relate to the integrity of immigration proceedings, including situations in which there is suspected fraud or improper duplication of applications or claims. Specifically, the Departments provide that to the extent not already specifically permitted, and without the necessity of seeking the exercise of the Attorney General's or Secretary's discretion under sections 1208.6(a) and 208.6(a), respectively, the Government may disclose all relevant and applicable information in or pertaining to the application for asylum, statutory withholding of removal, and protection under the CAT regulations as part of a Federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien's immigration or custody status; during an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or Federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse. 8 CFR 208.6(d)(1)(i)–(iv), 1208.6(d)(1)(i)–(vi). Finally, the Departments provide that nothing in 8 CFR 208.6 or 1208.6 should be construed to prohibit the disclosure of information in or relating to an application for asylum, statutory withholding of removal, and protection under the CAT regulations among specified government employees or where a government employee or contractor has a ''good faith and reasonable'' belief that the disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime. 8 CFR 208.6(e), 1208.6(e).

The Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT, and not solely to asylum applications. That point is already clear in 8 CFR 208.6(d) and 1208.6(d), and the Departments see no reason not to conform the other paragraphs in that section for consistency.

2.13. Severability

Given the numerous and varied changes proposed in the NPRM, the Departments are adding severability provisions in 8 CFR parts 208, 235, 1003, 1208, 1212, and 1235. *See* 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). Because the Departments believe that the provisions of each part would function sensibly independent of other provisions, the Departments make clear that the provisions are severable so that, if necessary, the regulations can continue to function without a stricken provision.

3. Other

In comparison to the NPRM, this final rule strikes the regulatory text changes proposed at 103.5 because those changes were inadvertently included in the NPRM's proposed regulatory text.

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

The comment period for the NPRM closed on July 15, 2020, with more than 87,000 comments received. Organizations, including non-government organizations, legal advocacy groups, non-profit organizations, religious organizations, unions, congressional committees, and groups of members of Congress, submitted 311 comments, and individual commenters submitted the rest. Most individual comments opposed the NPRM.

Many if not most comments opposing the NPRM either misstate its contents, provide no evidence (other than isolated or distinguishable anecdotes) to support broad speculative effects, are contrary to facts or law, or lack an understanding of relevant immigration law and procedures. As the vast majority of comments in opposition fall within one of these categories, the Departments offer the following general responses to them, supplemented by more detailed, comment-specific responses in Section II.C of this preamble.

Many comments oppose the NPRM because they misstate, in hyperbolic terms, that it ends or destroys the asylum system or eliminates the availability of humanitarian protection in the United States. The NPRM does nothing of the kind. The availability of asylum is established by statute, INA 208, 8 U.S.C. 1158, and an NPRM cannot alter a statute.[11] Rather, the NPRM, consistent with the statutory authority of the Secretary and the Attorney General, adds much-needed guidance on the many critical, yet undefined, statutory terms related to asylum applications. Such guidance not only improves the efficiency of the system as a whole, but allows adjudicators to focus resources more effectively on potentially meritorious claims rather than on meritless ones. In short, the NPRM enhances rather than degrades the asylum system.

Many comments misstate that the NPRM creates a blanket rule denying asylum based on its addition of certain definitions—*e.g.,* particular social group, political opinion, nexus, and persecution. Although the rule provides definitions for these terms and examples of situations that generally will not meet those definitions, the rule also makes clear that the examples are generalizations, and it does not categorically rule out types of claims based on those definitions. In short, the rule does not contain the blanket prohibitions that some commenters ascribe to it.

Many comments assert that the NPRM targets certain nationalities, groups, or types of claims and is motivated by a nefarious or conspiratorial animus, particularly an alleged racial animus. The Departments categorically deny an improper motive in promulgating the NPRM. Rather, the animating principles of the NPRM were to provide clearer guidance to adjudicators regarding a number of thorny issues that have

[11] For similar reasons, the NPRM cannot—and does not—alter the general availability of withholding of removal under the Act or protection under the CAT.

created confusion and inconsistency; to improve the efficiency and integrity of the overall system; to correct procedures that were not working well, including the identification of meritless or fraudulent claims; and to reset the overall asylum adjudicatory framework in light of numerous—and often contradictory or confusing—decisions from the Board and circuit courts. The Departments' positions are rooted in law, as explained in the NPRM. In short, the Departments have not targeted any particular groups or nationalities in the NPRM or in the provisions of this final rule.[12] Rather, the Departments are appropriately using rulemaking to provide guidance in order to streamline determinations consistent with their statutory authorities. *See Heckler* v. *Campbell,* 461 U.S. 458, 467 (1983) (''The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. . . . A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.'') (citation omitted); *see also Lopez* v. *Davis,* 531 U.S. 230, 243–44 (2001) (''[E]ven if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. . . . The approach pressed by Lopez—case-by-case decision-making in thousands of cases each year—could invite favoritism, disunity, and inconsistency.'') (citations and internal quotations omitted).

Many, if not most, commenters asserted that the rule was ''arbitrary and capricious,'' though nearly all of those assertions were ultimately rooted in the fact that the rule did not adopt the commenters' policy preferences rather than specific legal deficiencies. The Departments have considered all comments and looked at alternatives. The Departments understand that many, if not most, commenters opposing the rule believe that most asylum applications are meritorious and, thus, would prefer that more applications for asylum be granted; that border restrictions should be loosened; and that the Departments, as a matter of forbearance or discretion, should decline to enforce the law when doing so would be beneficial to aliens. For all of the reasons discussed in the NPRM, and reiterated herein, the Departments decline to adopt those positions.

The Departments further understand that many if not most commenters have a policy preference for the status quo over the proposed rule changes. The Departments have been forthright in acknowledging the changes, but have also explained the reasoning behind those changes, including the lack of clarity in key statutory language and the resulting cacophony of case law that leads to confusion and inconsistency in adjudication. The Departments acknowledge changes in positions, where applicable have provided good reasons for the changes; they believe the changes better implement the law; and they have provided a ''reasoned analysis'' for the changes, which is contained in the NPRM and reiterated herein in response to the comments received. In short, the rule is not ''arbitrary and capricious'' under existing law. *See FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

Finally, many commenters assert that various provisions of the NPRM are inconsistent with either Board or circuit-court precedents. The Departments may engage in rulemaking that overrules prior Board precedent, and as noted in the NPRM, 85 FR at 36265 n.1, to the extent that some circuits have disagreed with the Departments' interpretations of ambiguous statutory terms in the past, the Departments' new rule would warrant reevaluation in appropriate cases under well-established principles of administrative law. *See Nat'l Cable & Telecomms. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 982 (2005) (hereinafter ''*Brand X*''); *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–844 (1984). Moreover, '' 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations.'' *Scialabba* v. *Cuellar de Osorio,* 573 U.S. 41, 56–57 (2014) (plurality op.) (quoting *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999)).

Consequently, for the reasons explained in the NPRM and herein, prior Board and circuit court decisions do not restrict the Departments to the extent asserted by most commenters. Further, as also discussed, *infra,* and recognized by commenters, much of the relevant circuit court case law points in different directions and offers multiple views on the issues in the NPRM. There is nothing inappropriate about the Departments seeking to improve the consistency, clarity, and efficiency of asylum adjudications, and to bring some reasonable order to the dissonant views on several important-but-contested statutory issues. *See, e.g., Fed. Express Corp.* v. *Holowecki,* 552 U.S. 389, 403 (2008) (''We find no reason in this case to depart from our usual rule: Where ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives.'').

Overall, and as discussed in more detail below, the Departments generally decline to adopt the recommendations of comments that misinterpret the NPRM, offer dire and speculative predictions that lack support, are contrary to facts or law, or otherwise lack an understanding of relevant law and procedures.

B. Comments Expressing Support for the Proposed Rule

Comment: At least two organizations and other individual commenters expressed general support for the rule. Some commenters noted the need for regulatory reform given the current delays in asylum adjudication and said the rule is a move in the right direction. Other commenters indicated a range of reasons for their support, including a desire to limit overall levels of immigration, a belief that many individuals who claim asylum are instead simply seeking better economic opportunities, or a belief that asylum seekers or immigration representatives abuse the asylum system.

Commenters stated that the rule will aid both adjudicators and applicants. For example, one individual and organization explained that:

> [T]hese proposals will give aliens applying for protection ample notice and motivation to file complete and adequately reasoned asylum applications in advance of the merits hearing, which will protect the rights of the alien, assist the IJ in completing the case in a timely manner, and aid the ICE attorney in representing the interests of the government.

Response: The Departments note and appreciate these commenters' support for the rule.

[12] Asylum claims are unevenly distributed among the world's countries. *See* EOIR, *Asylum Decision Rates by Nationality* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1107366/download.* Thus, to the extent that the NPRM affects certain groups of aliens more than others, those effects are a by-product of the inherent distribution of claims, rather than any alleged targeting by the Departments. *See also DHS* v. *Regents of Univ. of Cal.,* 140 S.Ct. 1891, 1915–16 (2020) (impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of racial animus, invidious discrimination, or an equal protection violation).

C. Comments Expressing Opposition to the Proposed Rule

1. General Opposition

1.1. General Immigration Policy Concerns

Comment: Many commenters expressed a general opposition to the rule, and noted that, although they may not be commenting on every aspect of the rule, a failure to comment on a specific provision does not mean that the commenter agrees with a provision. Commenters stated that the rule would ''destroy'' the U.S. asylum system and would result in the denial of virtually all asylum applications. Instead, commenters recommended that the current regulations remain in place. Moreover, commenters stated that the rule conflicts with America's values and deeply rooted policy of welcoming immigrants and refugees. Commenters asserted that the rule would damage the United States' standing in the world. Commenters explained that the United States should be promoting values of freedom and human rights, and that immigration benefits the United States both economically and culturally. Commenters asserted that the rule provides inadequate legal reasoning and is inappropriately motivated by the administration's animus against immigrants.

Response: The rule is not immoral, motivated by racial animus, or promulgated with discriminatory intent. Instead, the rule is intended to help the Departments better allocate limited resources in order to more expeditiously adjudicate meritorious asylum, statutory withholding of removal, and CAT protection claims. For example, placing aliens who receive a positive credible fear screening into asylum-and-withholding-only proceedings will lessen the strain on the immigration courts by limiting the focus of such proceedings and thereby streamlining the process. Similarly, applying certain asylum bars and raising the standards for statutory withholding of removal and CAT protection will help screen out non-meritorious claims during the credible fear screening, which will allow the Departments to devote their limited resources to adjudicating claims that are more likely to be meritorious. Likewise, allowing immigration judges to pretermit asylum applications that are not prima facie eligible for relief will allow judges to use limited hearing time to focus on cases with a higher chance of being meritorious. The rule's expanded definition of frivolousness will also help to deter specious claims that would otherwise require the use of limited judicial resources. The rule's additional guidance regarding certain definitions (such as particular social groups, political opinion, persecution, and acquiescence, among others), as well as enumerated negative discretionary factors, will provide clarity to adjudicators and the parties and make the adjudicatory process more efficient and consistent.

These changes do not ''destroy'' the U.S. asylum system, prevent aliens from applying for asylum, or prevent the granting of meritorious claims, contrary to commenters' claims. The asylum system remains enshrined in both statute and regulation. Rather, the changes are intended to harmonize the process between the relevant Departments, provide more clarity to adjudicators, and allow the immigration system to more efficiently focus its resources on adjudicating claims that are more likely to be meritorious. In doing so, the rule will help the Departments ensure that the asylum system is available to those who truly have ''nowhere else to turn.'' *Matter of B–R–,* 26 I&N Dec. 119, 122 (BIA 2013) (internal citations omitted).

1.2. Issuance of Joint Regulations

Comment: At least one commenter expressed a belief that it is inappropriate for DHS (characterized by the commenter as the immigration prosecutors) and DOJ (characterized by the commenter as the immigration adjudicators) to issue rules jointly because the agencies serve different roles and missions within the immigration system. The commenter stated that the issuance of joint regulations calls into question the agencies' independence from each other.

Response: The HSA divided, between DHS and DOJ, some immigration adjudicatory and enforcement functions that had previously been housed within DOJ. *See* INA 103, 8 U.S.C. 1103 (setting out the powers of the Secretary and Under Secretary of DHS and of the Attorney General); *see also* HSA, sec. 101, 116 Stat. at 2142 (''There is established a Department of Homeland Security, as an executive department of the United States . . . .''). However, the Departments disagree that issuing joint regulations violates the agencies' independence in the manner suggested by commenters. Instead, the DHS and DOJ regulations are inextricably intertwined, and the Departments' roles are often complementary. *See, e.g.,* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (providing for immigration judge review of asylum officers' determinations regarding certain aliens' credible fear claims); *see* also 8 CFR 208.30 and 1208.30 (setting out the credible fear procedures, which involve actions before both DHS/USCIS and DOJ/EOIR). Because officials in both DHS and DOJ make determinations involving the same provisions of the INA, including those related to asylum, it is appropriate for the Departments to coordinate on regulations like the proposed rule that affect both agencies' equities in order to ensure consistent application of the immigration laws.

1.3. Impact on Particular Populations

Comment: Commenters asserted that the proposed regulation is in conflict with American values and that it would deny due process to specific populations—including women, LGBTQ asylum seekers, and children. Commenters similarly expressed concerns that the proposed regulation would lead to the denial of virtually all applications from those populations, which, commenters asserted, would place them in harm's way.

Commenters asserted that the elimination of gender-based claims would be particularly detrimental to women and LGBTQ asylum-seekers. Commenters asserted that the proposed rule would ''all but ban'' domestic-violence-based and gang-based claims. Commenters noted that courts have found that such claims can be meritorious.

Response: The Departments disagree that the rule is contrary to American values. The United States continues to fulfill its international commitments in accordance with the Refugee Act of 1980,[13] evidenced by United Nations High Commissioner for Refugees (''UNHCR'') data on refugee resettlement confirming that the United States was the top country for refugee resettlement in 2019, as well as 2017 and 2018. *See* UNHCR, *Resettlement at a Glance (January–December 2019), https://www.unhcr.org/protection/resettlement/5e31448a4/resettlement-fact-sheet-2019.html.* Further, since the Refugee Act was passed, the United States has admitted more than three million refugees and granted asylum to more than 721,000 individuals. *See* UNHCR, *Refugee Admissions, https://www.state.gov/refugee-admissions/.* In Fiscal Year (''FY'') 2019 alone, the Departments approved nearly 39,000 asylum applications. EOIR, *Asylum Decision Rates,* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1248491/download* (listing 18,836 grants); USCIS, *Number of Service-wide Forms Fiscal*

[13] *See infra* Section II.C.6.8 for further discussion on this point.

Year To- Date, *https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY19Q4.pdf* (listing 19,945 grants). This rule does not affect the United States' long-standing commitment to assisting refugees and asylees from around the world.

The rule does not deny due process to any alien. As an initial matter, courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin* v. *Mukasey,* 538 F.3d 143, 156–57 (2d Cir. 2008); *Ticoalu* v. *Gonzales,* 472 F.3d 8, 11 (1st Cir. 2006) (citing *DaCosta* v. *Gonzales,* 449 F.3d 45, 49–50 (1st Cir. 2006)). Still, the statute and regulations provide for certain basic procedural protections—such as notice and an opportunity to be heard—and the rule does not alter those basic protections. *See LaChance* v. *Erickson,* 522 U.S. 262, 266 (1998) (''The core of due process is the right to notice and a meaningful opportunity to be heard.''); *see also Lapaix* v. *U.S. Att'y Gen.,* 605 F.3d 1138, 1143 (11th Cir. 2010) (''Due process requires that aliens be given notice and an opportunity to be heard in their removal proceedings.''). Aliens in removal proceedings will continue to be provided a notice of the charges of removability, INA 239(a)(1), 8 U.S.C. 1229(a)(1), have an opportunity to present the case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), and have an opportunity to appeal, 8 CFR 1003.38. Aliens in asylum-and-withholding-only proceedings will continue to be provided notice of referral for a hearing before an immigration judge, 8 CFR 1003.13 (defining ''charging document'' used by DHS to initiate non-removal, immigration proceedings before an immigration judge), to have an opportunity to be heard by an immigration judge, 8 CFR 1208.2(c), and have an opportunity to appeal, 8 CFR 1003.1(b)(9). Nothing in the proposed regulations alters those well-established procedural requirements.

The generalized concern that the rule will categorically deny asylum to classes of persons, such as women or LGBTQ asylum-seekers—and thus put those persons in harm's way—is unsupported, speculative, and overlooks the case-by-case nature of the asylum process. The rule provides more clarity to adjudicators regarding a number of difficult issues—*e.g.* persecution, particular social group, and nexus—in order to improve the consistency and quality of adjudications, but it establishes no categorical bars to domestic-violence-based or gang-based claims, and no categorical bars based on the class or status of the person claiming asylum; instead, asylum cases turn on the nature of the individual's claim. Moreover, in accordance with its non-refoulement obligations, the United States continues to offer statutory withholding of removal and CAT protection. Although this rule amends those forms of relief, the amended relief continues to align with the provisions of the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, and the CAT, such that eligible aliens will not be returned to places where they may be subjected to persecution or torture.

The portion of the rule that draws the objection above does not categorically ban or eliminate any types of claims, including those posited by the commenters. In relevant part, the rule codifies a long-standing test for determining the cognizability of particular social groups and sets forth a list of common fact patterns involving particular-social-group claims that generally will not meet those long-standing requirements. *See* 85 FR at 36278–79; *see also* 8 CFR 208.1(f)(1), 1208.1(f)(1). At the same time, the Departments recognized in the NPRM that ''in rare circumstances,'' items from the list of common fact patterns ''could be the basis for finding a particular social group, given the fact- and society-specific nature of this determination.'' 85 FR at 36279. Thus, the NPRM explicitly stated that the rule did not ''foreclose'' any claims; the inquiry remains case-by-case.

2. Expedited Removal and Screenings in the Credible Fear Process

2.1. Asylum-and-Withholding-Only Proceedings for Aliens With Credible Fear

Comment: One organization stated that the rule would deprive individuals who have established a credible fear from being placed into full removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. Another organization claimed that the rule, ''effectively destroys due process rights of asylum seekers'' as it would prevent these individuals from contesting removability where there are ''egregious due process violations,'' defects in the Notice to Appear, or competency concerns.

One organization stated that the rule is contrary to congressional intent because there is no statutory prohibition against placing arriving asylum seekers into complete section 240 proceedings, and at least one organization claimed that this intent is supported by the legislative history. One organization expressed its disagreement with the rule's citation to *Matter of M–S–,* 27 I&N Dec. 509 (A.G. 2019), 85 FR at 36267 n.9, contending that if Congress intended to ''strip asylum-seekers of their due process rights, it would have expressly said so.'' Another organization stated that the rule is ''[a]rbitrary and capricious,'' noting that the proposed policy is a ''dramatic change'' from decades of practice but claiming the Departments offer ''no discussion'' as to why it is necessary.

One organization emphasized that ''asylum-only proceedings,'' are limited in scope and both parties are prohibited from raising ''any other issues.'' The organization alleged that the NPRM did not include any data regarding the number of asylum seekers who are placed in section 240 proceedings after passing a credible fear interview, or the number of respondents in these proceedings who are granted some form of relief besides asylum or withholding of removal. Because of this, the organization claimed that the rule ''does not provide adequate justification'' for the proposed change.

Another organization claimed the rule ''pre-supposes'' that asylum seekers would not be eligible for other forms of immigration relief. The organization noted that many individuals who are apprehended at the border as asylum applicants may also be victims of human trafficking or serious crimes committed within the United States. The organization stated that Congress has recognized the unique assistance that victims of human trafficking and victims of crimes potentially eligible for U visas are able to provide to Federal law enforcement, claiming this is the reason the S visa, T visa, and U visa programs were created. The organization asserted that if the Departments ''cut off'' access to a complete section 240 proceeding, they will essentially ''tie the hands'' of law enforcement. Another organization expressed concern that the rule would prevent survivors of gender-based and LGBTQ-related violence in expedited removal proceedings from applying for protection under the Violence Against Women Act (''VAWA'') or the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (''TVPRA'').

One organization contended that there is little efficiency in abandoning removability determinations in removal proceedings, arguing that ''[i]n the overwhelming majority of cases, the pleadings required to establish removability take 30 seconds.'' The organization argued that Congress

would not have chosen to sacrifice competency and accuracy to save such a short amount of time. Another organization criticized the rule's statement that ''referring aliens who pass a credible fear for section 240 proceedings runs counter to [the] legislative aims'' of a quick expedited removal process, 85 FR at 36267, arguing that this justification is ''faulty at best and baseless at worst.'' One organization claimed that administrative efficiency is aided by the availability of a broad range of reliefs because respondents placed in full removal proceedings often qualify for a simpler form of relief, allowing courts to omit many of these complexities.

One organization noted that, in the expedited removal context, decisions are made by Customs and Border Protection (''CBP'') officers. The organization expressed concern about the risk of error in permitting an enforcement officer to act as both ''prosecutor and judge,'' particularly when the officer's decisions are not subject to appellate review. The organization also noted the rule's reference to the ''prosecutorial discretion'' of DHS in removal proceedings and argued that this discretion does not include the authority to create new types of proceedings. Instead, the organization contended that this discretion is confined to decisions surrounding the determination of whether to pursue charges. Another organization emphasized that, while DHS has the discretion to place an individual without documentation directly into section 240 proceedings instead of expedited removal, this discretion is ''initial,'' and does not continue once the individual has established fear (as the individual must then be referred for full consideration of his or her claims). The organization disagreed with the rule's assertion, 85 FR at 36266, that the current practice of placing applicants with credible fear into section 240 proceedings ''effectively negat[es]'' DHS's prosecutorial discretion.

The organization further disagreed with the Departments' claim that ''[b]y deciding that the [individual] was amenable to expedited removal, DHS already determined removability,'' 85 FR at 36266, contending this ''overreaches.'' The organization noted that, pursuant to section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), a DHS inspector does have initial discretion to place an applicant into expedited removal proceedings if it is determined that the person ''is inadmissible under section 1182(a)(6)(C) or 1182(a)(7);'' however, the organization emphasized that this is not the ultimate determination for applicants who establish credible fear, as DHS cannot continue to seek expedited removal at this point.

One organization stated that, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Public Law 104–208, Div. C, 110 Stat. 3009, 3009–546, it created two specific removal procedures: Expedited removal proceedings in section 235 of the Act, 8 U.S.C. 1225, and regular removal proceedings in section 240 of the Act, 8 U.S.C. 1229a. The organization asserted that section 240 proceedings are the ''exclusive'' admission and removal proceedings ''unless otherwise specified'' in the Act, 8 U.S.C. 1229a(a)(3). The organization also noted Congress's specification that certain classes of citizens should not be placed in full removal proceedings, noting the exclusion of persons convicted of particular crimes (INA 240(a)(3), 8 U.S.C. 1229a(a)(3)); INA 238(a)(1), 8 U.S.C. 1228(a)(1)) as well as the prohibition of visa waiver program participants from contesting inadmissibility or removal except on the basis of asylum (INA 217(b), 8 U.S.C. 1187(b)). The organization also noted that, within the expedited removal statute itself, Congress specifically excluded stowaways from section 240 proceedings (INA 235(a)(1), 8 U.S.C. 1225(a)(2)); in contrast, Congress considered asylum seekers to be applicants for admission under section 235(a)(1) of the Act, 8 U.S.C. 1225(a)(1), and did not similarly exclude them (*see* INA 235(b), 8 U.S.C. 1225(b)). The organization concluded that the plain text of the INA ''precludes the agencies' claim that they are free to make up new procedures to apply to arriving asylees'' *(citing Henson* v. *Santander Consumer USA, Inc.,* 137 S. Ct. 1718, 1723 (2017)). The organization claimed that IIRIRA's legislative history ''unanimously confirms'' this conclusion, citing the conference report by the Joint Committee from the House and the Senate in support of its assertion. *See* H.R. Rep. No. 104–828 at 209 (1996). The organization also emphasized that, after twenty-three years of placing applicants with credible fear into section 240 proceedings, ''Congress has never suggested that the agencies got that wrong.''

Another organization emphasized that Congress only authorized expedited removal for a specific category of noncitizens and that, at the time this determination was made, the class was confined to individuals arriving at ports of entry. The organization argued that Congress did not intend to deter individuals who have ''cleared the hurdle of establishing a credible fear of persecution.'' Another organization argued that the credible fear screening ''creates an exit'' from expedited removal proceedings, emphasizing that those who establish credible fear are effectively ''screened out'' of expedited removal proceedings (INA 235(b)(1)(B)(ii)–(iii), 8 U.S.C. 1225(b)(1)(B)(ii)–(iii)). One organization expressed particular concern that ''the president has announced an intention to expand expedited removal to the interior of the United States,'' noting that noncitizens who have been in the United States for up to two years are more likely to have other forms of relief to pursue.

Response: The Departments disagree with commenters that the INA requires aliens who are found to have a credible fear to be placed in full removal proceedings pursuant to section 240 of the Act, 8 U.S.C. 1229(a). The expedited removal statute states only that ''the alien shall be detained for further consideration of the application for asylum,'' but is silent on the type of proceeding. INA 235(b)(1)(B)(ii) 8 U.S.C. 1225(b)(1)(B)(ii). This silence is notable as Congress expressly required or prohibited the use of full removal proceedings elsewhere in the same expedited removal provisions. *Compare* INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A) (explicitly requiring certain aliens not eligible for expedited removal to be placed in section 240 removal proceedings), *with* INA 235(a)(2), 8 U.S.C. 1225(a)(2) (explicitly prohibiting stowaways from being placed in section 240 removal proceedings).[14] As explained in the NPRM, the former Immigration and Naturalization Service (''INS'') interpreted this ambiguous section to place aliens with positive credible fear determinations into section 240 removal proceedings. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312 (Mar. 6, 1997). However, it is the Departments' view that the better interpretation is to place aliens with positive credible fear determinations into limited asylum-and-withholding-only proceedings. This is consistent with the statutory language that the

[14] The Departments note that section 240(a)(3) of the Act (8 U.S.C. 1229a(a)(3)), which makes removal proceedings the ''exclusive'' procedure for inadmissibility and removability determinations, is inapplicable here because DHS has already determined inadmissibility as part of the expedited removal process. *See* INA 235(b)(1)(A)(i) (8 U.S.C. 1225(b)(1)(A)(i)).

alien is entitled to a further proceeding related to the alien's ''application for asylum,'' and not a full proceeding to also determine whether the alien should be admitted or is otherwise entitled to various immigration benefits. INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii).

This interpretation also best aligns with the overall purpose of the expedited removal statute to provide a streamlined and efficient removal process for certain aliens designated by Congress.[15] *See generally* INA 235, 8 U.S.C. 1225; *cf. DHS* v. *Thuraissigiam,* 140 S.Ct. 1959, 1966 (2020) (''As a practical matter . . . the great majority of asylum seekers who fall within the category subject to expedited removal do not receive expedited removal and are instead afforded the same procedural rights as other aliens.''). Further, contrary to commenters' claims, placing aliens into asylum-and-withholding-only proceedings is not inconsistent with the purposes of the credible fear statute. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). The credible fear process was designed to ensure that aliens subject to expedited removal are not summarily removed to a country where they may face persecution on account of a protected ground or torture. This rule maintains those protections by ensuring that an alien with a positive credible fear finding receives a full adjudication of their claim in asylum-and-withholding-only proceedings.

Regarding commenters' concerns about due process in asylum-and-withholding-only proceedings, the Departments note that the rule provides the same general procedural protections as section 240 removal proceedings. *See* 85 FR at 36267 (''These 'asylum-and-withholding-only' proceedings generally follow the same rules of procedure that apply in section 240 proceedings . . . .''); *accord* 8 CFR 1208.2(c)(3)(i) (''Except as provided in this section, proceedings falling under the jurisdiction of the immigration judge pursuant to paragraph (c)(1) or (c)(2) of this section [*i.e.,* asylum-and-withholding-only proceedings] shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 1240, subpart A [*i.e.,* removal proceedings].''). Moreover, just as in removal proceedings, aliens will be able to appeal their case to the BIA and Federal circuit courts, as necessary. Finally, DOJ has conducted asylum-and-withholding-only proceedings for multiple categories of aliens for years already, 8 CFR 1208.2(c)(1) and (2), with no alleged systemic concerns documented about the due process provided in those proceedings.

The Departments agree with the commenter who noted that removability determinations are typically brief for those aliens subject to expedited removal who subsequently establish a credible fear and are placed in removal proceedings. The Departments believe that comment further supports the placement of such aliens in asylum-and-withholding-only proceedings since ''in the overwhelming majority of cases,'' there is no need for a new removability determination that would otherwise be called for in removal proceedings.

The Departments disagree with commenters that section 240 removal proceedings are more efficient than asylum-and-withholding-only proceedings or that more data is required to align asylum-and-withholding-only proceedings with the statutory language of INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), especially when there was little analysis—and no data offered—to support placing aliens with positive credible fear determinations in removal proceedings in the first instance. *See* 85 FR at 36266 (stating that the 1997 decision to place such aliens in removal proceedings was made with limited analysis, other than to note that the statute was silent on the type of proceeding that could be used). Most aliens subject to the expedited removal process are, by definition, less likely to be eligible for certain other forms of relief due to their relatively brief presence in the United States. *See, e.g.,* INA 240A(b)(1), 8 U.S.C. 1229b(b)(1) (cancellation of removal for certain non-permanent residents requires ten years of continuous physical presence); INA 240B(b)(1)(A), 8 U.S.C. 1229c(b)(1)(A) (voluntary departure at the conclusion of proceedings requires an alien to have been physically present in the United States for at least one year prior to the service of a notice to appear). In particular, they are less likely to be eligible for the simplest form of relief, voluntary departure, because either they are arriving aliens, INA 240B(a)(4), 8 U.S.C. 1229c(a)(4), or they are seeking asylum, 8 CFR 1240.26(b)(1)(i)(B) (requiring the withdrawal of claims for relief in order to obtain pre-hearing voluntary departure), or they have not been physically present in the United States for at least one year prior to being placed in proceedings, INA 240B(b)(1)(A), 8 U.S.C. 1229c(b)(1)(A). Further, immigration judges often adjudicate multiple forms of relief in a single removal proceeding—in addition to asylum, withholding of removal, or CAT claims—and those additional issues generally only serve to increase the length of the proceedings. Although there may be rare scenarios in which aliens subject to expedited removal are eligible for a form of relief other than asylum, the Departments believe that interpreting the statute to place aliens with positive credible-fear determinations into more limited asylum-and-withholding-only proceedings properly balances the need to prevent aliens from being removed to countries where they may face persecution or torture with ensuring the efficiency of the overall adjudicatory process.

The Departments also disagree with comments that the placement of aliens who have passed a credible fear review in asylum-and-withholding-only proceedings will somehow ''tie the hands'' of law enforcement regarding an alien's eligibility for certain visas. The rule has no bearing on an alien's ability to provide assistance to law enforcement, and the adjudication of applications for S-, T-, and U-visas occurs outside of any immigration court proceedings.[16] *See generally* 8 CFR 214.2(t) (S-visa adjudication process), 214.11 (T-visa adjudication process), 214.14 (U-visa adjudication process).

Commenters also mischaracterize the Departments' policy reliance on DHS's prosecutorial discretion authority, claiming that the Departments are relying on this discretion as the legal authority for placing aliens with positive credible fear determinations into asylum-and-withholding-only proceedings. However, it is the expedited removal statute that provides the authority, *see* INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), not DHS's prosecutorial discretion. In the NPRM, the Departments noted that it made better policy sense to place aliens with positive credible fear determinations into asylum-and-withholding-only proceedings; placing aliens in section 240 proceedings after a credible fear determination ''effectively negates DHS's original discretionary decision.'' 85 FR at 36266.

The Departments acknowledge commenters' concerns about CBP processing aliens for expedited removal and the exercise of prosecutorial discretion, but those issues are beyond

[15] The Departments note that any comments regarding the potential expansion of expedited removal is outside the scope of this rule. *Cf.* Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019).

[16] The Departments note that S-visa recipients are already subject to withholding-only proceedings. INA 214(k)(3)(C), 8 U.S.C. 1184(k)(3)(C); 8 CFR 236.4(d), (e) and 1208.2(c)(2)(vi).

the scope of the rule. Moreover, the rule does not affect DHS's use of prosecutorial discretion, nor does it alter any other statutory authority of CBP.

2.2. Consideration of Precedent When Making Credible Fear Determinations in the ''Credible Fear'' Process

Comment: One organization stated that the rule would ''unnecessarily narrow'' the law that immigration judges must consider in the context of a credible fear review, restricting them to the circuit court law in their own jurisdiction. The organization alleged that this ''makes little sense'' because individuals seeking a credible fear review will often have their asylum claim adjudicated in a jurisdiction with different case law than the jurisdiction where their credible fear claim is reviewed. As an example, one organization suggested that an asylum seeker apprehended in Brownsville, Texas, in the Fifth Circuit, could subsequently have his or her asylum claim heard in an immigration court located within another circuit's jurisdiction. Because of this, the organization urged asylum officers and immigration judges to consider all case law when determining the possibility of succeeding on the claim, ''[r]egardless of the location of the credible fear determination.''

One organization claimed the rule could require asylum officers to order the expedited removal of an applicant who has shown an ability to establish asylum eligibility under section 208 of the Act, 8 U.S.C. 1158, in another circuit or district, which the organization alleged is contrary to section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v). The organization also claimed this portion of the rule is ''flatly contrary'' to the decision in *Grace* v. *Whitaker,* 344 F. Supp. 3d 96 (D.D.C. 2018) (hereinafter ''*Grace I*''), *overruled in part, Grace* v. *Barr,* 965 F.3d 883 (D.C. Cir. 2020), holding that the same provision in USCIS guidance was contrary to the INA. The organization quoted *Grace I,* 344 F. Supp. 3d 96 in which the court stated that ''[t]he government's reading would allow for an [individual's] deportation, following a negative credible fear determination, even if the [individual] would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading leads to the exact opposite result intended by Congress.'' *Id.* at 140. The organization also claimed the rule violates *Brand X* because it exceeds the Departments' ''limited ability to displace circuit precedent on a specific question of law to which an agency decision is entitled to deference'' (citing *Grace I,* 344 F. Supp. 3d at 136). Another organization alleged that the Departments offer no explanation for the policy change, claiming there is ''no discernable reason'' for it other than to ''limit the possibility of favorable case law in another jurisdiction.''

One organization noted that well-settled USCIS policy holds that, in the case of a conflict or question of law, ''generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard'' regardless of where the credible fear interview is held. The organization claimed that this policy is in line with congressional intent, quoting a statement from Representative Smith that ''[l]egal uncertainty must, in the credible fear context, adhere to the applicant's benefit.'' The organization alleged that the NPRM fails to note or explain this departure from practice.

Response: The Departments decline to respond to comments centering on an asylum officer's consideration of precedent as that issue was not addressed in this rule, and further disagree with commenters that immigration judges are currently required to consider legal precedent from all Federal circuit courts in credible fear proceedings. DOJ has not issued any regulations or guidance requiring immigration judges to use a ''most favorable'' choice of law standard in credible fear review proceedings. *See, e.g.,* 8 CFR 1003.42.

Moreover, the statute is silent as to this choice of law question. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). Due to this ambiguity, the Departments are interpreting the statute to require immigration judges to apply the law of the circuit in which the credible fear review proceeding is located. This better comports with long-standing precedent affirming the use of the ''law of the circuit'' standard in immigration proceedings. *See Jama* v. *ICE,* 543 U.S. 335, 351 n.10 (2005) (''With rare exceptions, the BIA follows the law of the circuit in which an individual case arises . . . .'' (citations omitted)); *Ballesteros* v. *Ashcroft,* 452 F.3d 1153, 1157 (10th Cir. 2006) (explaining that an immigration judge ''should analyze removability and relief issues using only the decisions of the circuit in which he or she sits . . . since it is to that circuit that any appeal from a final order of removal must be taken''). It will also provide clarity to immigration judges conducting credible fear reviews, particularly on issues in which there is conflicting circuit court precedent.

Further, contrary to commenters' assertions, in most cases the immigration judge conducting the credible fear review in person will be in the same circuit in which the full asylum application in asylum-and-withholding only proceedings would be adjudicated if the judge finds the alien has a credible fear.[17] Aliens in this posture are subject to detention by DHS. *Thuraissigiam,* 140 S.Ct. at 1966 (''Whether an applicant [subject to expedited removal] who raises an asylum claim receives full or only expedited review, the applicant is not entitled to immediate release.''). As a result, unless DHS moves the alien to a detention facility in a different circuit, the case would likely remain in the same jurisdiction. Requiring the immigration judge to review nationwide circuit case law would only create inefficiencies in a credible fear review process that Congress intended to be streamlined. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (requiring immigration judge review to be completed ''as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days'' after the asylum officer's determination).

Moreover, the Departments have reviewed the statutory mandate in the credible fear context and note that a rule requiring evaluation of a claim using law beyond that of a particular circuit could produce perverse outcomes contrary to the statute. For example, an alien could be found to have a ''significant possibility'' of establishing eligibility for asylum under section 208 of the Act even though binding law of the circuit in which the application would be adjudicated precludes the alien from any possibility of establishing eligibility for asylum. Such an absurd result would be both contrary to the statutory definition of a credible fear, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), and would further burden the system with claims that were known to be unmeritorious at the outset. The Departments decline to adopt a course of action that would lead to results inconsistent with the statute.

Moreover, adopting the uniform rule proposed by the Departments would ameliorate otherwise significant operational burdens—burdens that would be inconsistent with Congress's

[17] Even in situations in which an immigration judge conducts the review from a different location—*e.g.* by telephone or by video teleconferencing—in a different circuit, the rule provides a clear choice of law principle to apply.

goal of establishing an efficient expedited removal system. Without it, asylum officers and immigration judges around the country would potentially have to consider and apply a shifting patchwork of law from across the country, and this obligation would undermine the stated statutory aim of expedited removal: To remove aliens expeditiously.

The Departments' choice-of-law rule in this context is reasonable. The most natural choice-of-law principle is the rule that the law of the circuit where the interview is conducted governs. That is the principle embraced by DOJ in adjudicating the merits of asylum claims, *Matter of Anselmo,* 20 I&N Dec. 25, 31 (BIA 1989) (''We are not required to accept an adverse determination by one circuit . . . as binding throughout the United States.''), as well as by circuit courts. For example, where the law governing an agency's adjudication is unsettled, an agency generally is required to acquiesce only in the law of the circuit where its actions will be reviewed; while ''intracircuit acquiescence'' is generally required, ''intercircuit acquiescence'' is not. *See Johnson* v. *U.S. R.R. Ret. Bd.,* 969 F.2d 1082, 1093 (D.C. Cir. 1992). Because the circuits may disagree on the law, requiring acquiescence with every circuit would charge the Departments with an impossible task of following contradictory judicial precedents. *See Nat'l Envtl. Dev. Ass'n Clean Air Project* v. *EPA,* 891 F.3d 1041, 1051 (D.C. Cir. 2018); *see also Grant Med. Ctr.* v. *Hargan,* 875 F.3d 701, 709 (D.C. Cir. 2017).

Intercircuit nonacquiescence principles are especially important where there is ''venue uncertainty,'' meaning the agency cannot know at the time it issues its decision in which circuit that decision will be reviewed. In those situations, an agency has discretion in its choice of law, though it must be candid about its nonacquiescence. *See Grant Med. Ctr.,* 875 F.3d at 707. The rule's choice-of-law provision in this context is fully consistent with the Board's long-standing approach and the administrative-law principles embraced by circuit courts. At the time of the credible-fear screenings by an asylum officer, the only circuit with a definite connection to the proceedings is the circuit where the screening of the alien takes place. The location of the alien at the time of the credible fear determination will be the determinative factor as to which circuit's law applies. Applying that circuit's law is an objective, reasonable, administrable, and fair approach to credible-fear screening.

In *Grace* v. *Barr,* the D.C. Circuit affirmed an injunction of USCIS's implementation of a ''law of the circuit'' policy in credible fear proceedings. 965 F.3d 883 (D.C. Cir. 2020) (hereinafter ''*Grace II*''). However, in that case, the court affirmed an injunction based on USCIS's failure to explain the basis of its ''law of the circuit'' policy and expressly declined to decide whether the substance of such a policy—if explained more fully—would be contrary to law. *Id.* at 903. Here, as detailed above, the Departments have explained the necessity of codifying a law of the circuit policy in credible fear proceedings before immigration judges and, to that end, are interpreting an ambiguous statutory provision, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (defining ''credible fear of persecution'' by reference to eligibility for asylum), in which the Departments are entitled deference. *See Chevron, U.S.A., Inc.,* 467 U.S. at 844 (holding that, when interpreting an ambiguous statute, ''a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency'').

2.3. Remove and Reserve DHS-Specific Procedures From DOJ Regulations

Comment: In the context of discussing the DOJ's removal of DHS-specific provisions from 8 CFR part 1235, at least one commenter expressed concern that the rule would eliminate or make more difficult the parole authority at 8 CFR 235.3(c).

Response: Following the enactment of the HSA, EOIR's regulations were transferred to or duplicated in a newly created chapter V of 8 CFR, with related redesignations. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9830, 9834 (Feb. 28, 2003); *see also* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 10349 (Mar. 5, 2003). DOJ transferred parts of the Code of Federal Regulations that pertained exclusively to EOIR from chapter I to chapter V; duplicated parts of the Code of Federal Regulations that related to both the INS and EOIR, which were included in both chapters I and V; and made technical amendments to both chapters I and V. For example, DOJ duplicated all of part 235 in the newly created 8 CFR part 1235 because the Department determined that ''nearly all of the provisions of this part affect bond hearings before immigration judges.'' 68 FR at 9826. The Departments anticipated further future adjustments and refinements to the regulations in the future ''to further refine the adjudicatory process.'' 68 FR at 9825.

Upon further review, however, DOJ has determined that 8 CFR 1235.1, 1235.2, 1235.3, and 1235.5 are not needed in 8 CFR chapter V because they concern procedures specific to DHS's examination of applicants for admission and are outside the purview of DOJ's immigration adjudicators. *See* 85 FR at 36267. In order to prevent confusion and reduce the chance of future inconsistencies with 8 CFR 235.1, 235.2, 235.3, and 235.5, which are not amended, the rule removes and reserves 8 CFR 1235.1, 1235.2, 1235.3, and 1235.5. Finally, in response to the commenter's particular concern, the Departments note that DOJ does not make parole determinations, and DHS's parole authority in 8 CFR 235.3(c) is both unaffected by this rule and outside the scope of the rulemaking generally.

2.4. Reasonable Possibility as the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations for Aliens in Expedited Removal Proceedings and Stowaways

Comment: One organization noted that the rule would require that those applying for withholding of removal to prove a ''reasonable fear'' of persecution, which is a higher standard than that required for asylum. The organization suggested that the drafters of the rule were targeting individuals who are ineligible for asylum and are thus applying for withholding of removal only. The organization noted that a large number of refugees may meet this criteria due to the administration's ''unsuccessful attempts'' to impose additional asylum restrictions on individuals entering the United States outside a port of entry, as well as those arriving at the southern border after passing through third countries, if they did not apply for asylum and have their application(s) rejected in one of those countries.

One commenter alleged that the rule would ''greatly increase the burden'' of individuals eligible only for withholding of removal or protection under CAT to succeed in initial interviews and present their cases before an immigration judge. The commenter noted that the rule would require asylum seekers who would be subject to a bar on asylum, including those subject to the ''transit ban'' found at 8 CFR 208.13(c)(4)(ii), to meet the heightened standard in order to have their cases heard before an immigration judge. The commenter alleged that the rule would ''essentially eliminate'' the

''significant possibility'' standard set forth by Congress in the INA and replace it with a ''reasonable possibility'' standard which is much harder for asylum seekers to meet. One organization claimed that, as a result, ''[m]eritorious asylum seekers will be screened out of the asylum system—a reality Congress expressly prohibited.''

One organization claimed that Congress intended to set a low screening standard for the credible fear process in order to aid eligible asylum seekers and alleged that the NPRM fails to provide justification for raising this standard. The organization expressed concern that asylum officers lack the resources to ''jump'' from applying the ''significant possibility'' standard to the ''reasonable possibility'' standard during a brief interview and also emphasized that noncitizens are more likely to obtain counsel in immigration court than in the initial screening process. One commenter stated that the rule, ''[u]nrealistically and unconscionably'' heightens the standard individuals must meet upon arrival at the border and limits the protections for individuals who ''have or would be tortured.''

One organization emphasized that the ''reasonable possibility'' standard is essentially the same burden of proof used when adjudicating an asylum application in a full immigration hearing. The organization claimed, however, that individuals seeking a fear determination will almost always have less evidence and less time to present their case than individuals in court. As a result, the organization alleged that the standard of proof in fear determinations should be lower than that used in immigration court hearings. Another organization criticized the Departments' assertion that raising the screening bar is necessary to ''align'' the screening with the burden of proof in the merits proceeding for each type of relief. The organization disagreed, noting that asylum officers must already consider the merits burden of proof when screening for fear under existing law, as they must determine whether there is a ''significant possibility'' that an applicant ''could be eligible'' for each type of potential relief. The commenter asserted that this necessarily entailed a consideration of the burden of proof to establish eligibility for those forms of relief. As a result, the higher screening burden ''serves only to require more and stronger evidence before the merits stage, and at a moment when applicants are least likely to be able to amass it.''

One organization noted that many credible fear applicants are ''profoundly traumatized, exhausted, terrified,'' and unfamiliar with the legal process, and emphasized that these individuals will not have time to gather their thoughts or collect evidence to support ''highly fact-specific inquiries'' at an interview screening. Another organization stated that asylum-seekers are screened in ''exceedingly challenging circumstances,'' as well as in cursory interviews over the telephone. One organization specifically alleged that the Departments failed to consider how trauma affects the fear screening process, emphasizing research showing that trauma affects demeanor in ways that could ''easily affect credibility'' (nervousness, inability to make eye contact, etc.). At least one organization expressed particular concern for LGBTQ asylum seekers, and another organization emphasized that arriving applicants are unrepresented, unlikely to understand U.S. legal standards, and may be fearful or reluctant to discuss their persecution with authorities.

One organization claimed the Departments have offered no evidence that the current procedure of using one standard to screen for any claim for relief complicates or delays the expedited removal process, alleging that this argument is not supported by government data. The organization noted that the number of individuals removed through expedited removal has increased fairly steadily over the years, stating that 43 percent of removals during 2018 were through the expedited removal process and that this proportion has not changed over the past decade. The organization also asserted there is no evidence that ''requiring asylum officers to evaluate varying claims relating to the same group of facts with three different screens would be simpler,'' claiming this would actually make the determination more complicated.

The organization also disagreed with the Departments' suggestion that DOJ's language in a previous rule ''imposing the higher burden to a particular group in a previous rule supports their rationale'' (citing 85 FR at 36270). The organization emphasized that, in the previous rule, DOJ applied a higher screening standard strictly to individuals ''subject to streamlined administrative removal processes for aggravated felons under section 238(b) of the Act and for [people] subject to reinstatement of a previous removal order under section 241(a)(5) of the Act.'' Regulation Concerning the Convention Against Torture, 64 FR 8478, 8485 (Feb. 19, 1999). The organization claimed DOJ specifically distinguished that group as different from the ''broad class'' of arriving individuals subject to expedited removal, stating that the Departments offer no explanation for why this ''broad class'' can now be treated as a ''narrowly defined class whose members can raise only one claim.'' The organization also accused the Departments of failing to explain what authority they used to add to and raise the statutory burden of proof in Congress's ''carefully described credible fear procedures.'' INA 235(b), 8 U.S.C. 1225(b).

One organization noted that a U.S. district court vacated the ''third country asylum ban regulations'' on June 30, 2020, *see Capital Area Immigrants' Rights Coalition* v. *Trump,*— F.Supp.3d—, 2020 WL 3542481 (D.D.C. 2020) and also noted that the Ninth Circuit upheld a previous injunction against the rule on July 6, 2020, *see E. Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832 (9th Cir. 2020). The organization also referred to a separate rule that it claimed attempted to ban asylum for individuals entering the United States without inspection and noted that this rule was ''blocked'' by two separate district courts. *See E. Bay Sanctuary Covenant* v. *Trump,* 354 F.Supp.3d 1094 (N.D. Cal 2018); *O.A.* v. *Trump,* 404 F. Supp. 3d 109 (D.D.C. 2019). The organization noted that, based on these cases, it is unclear who would be eligible for withholding of removal or CAT only. The organization concluded by emphasizing that Congress created the credible fear standard as a safeguard due to ''the life or death nature of asylum,'' and described the proposed higher evidentiary standard as ''cruelly irresponsible.''

Response: In general, commenters appear to have confused multiple rulemakings, as well as the existing legal differences between and among asylum, statutory withholding of removal, and protection under the CAT regulations. The Departments decline to adopt the commenters' positions to the extent they are based on inaccurate or confused understandings of the proposed rule and of the legal distinctions between and among asylum, statutory withholding of removal, and protection under the CAT regulations.

Contrary to commenters' claims, the change of the credible fear standards for statutory withholding and protection under the CAT regulations are unrelated to the Departments' other asylum-related regulatory efforts, which are outside the scope of this rule, and the current change is not intended to ''target'' aliens that are not subject to those previous asylum regulations. *See, e.g.,* Asylum Eligibility and Procedural

Modifications, 84 FR 33829 (July 16, 2019); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018). Further, the change in standards has no bearing on how any alleged trauma is assessed during the screening process by either asylum officers or immigration judges. Adjudicators in both Departments have conducted these assessments for many years and are trained and well-versed in assessing the credibility of applicants, including accounting for any alleged trauma that may be relevant.

As discussed in the NPRM, Congress did not require the same eligibility standards for asylum, statutory withholding of removal, and protection under the CAT in the ''credible fear'' screening process. *See* 85 FR at 36268–71. In fact, the INA does not include any references to statutory withholding of removal or protection under the CAT regulations when explaining the ''credible fear'' screening process. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* The Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, 112 Stat. 2681–822.

Instead, the Departments have the authority to establish procedures and standards for statutory withholding of removal and protection under the CAT. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1) (''The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens * * *.''); INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); FARRA, Public Law 105–277, sec. 2242(b), 112 Stat. at 2681–822 (providing that ''the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3'' of CAT).

Using this authority, the Departments believe that, rather than being ''unrealistic[ ]'' or ''unconscionabl[e]'' as commenters claim, raising the standards of proof to a ''reasonable possibility'' during screening for statutory withholding of removal and protection under the CAT regulations better aligns the initial screening standards of proof with the higher standards used to determine whether aliens are in fact eligible for these forms of protection when applying before an immigration judge. Further, as explained in the NPRM, this higher standard will also serve to screen out more cases that are unlikely to be meritorious at a full hearing, which will allow the overburdened immigration system to focus on cases more likely to be granted. And, contrary to commenters' claims, the NPRM did not claim that the use of a single ''significant possibility'' standard complicates or delays the expedited removal process.

The Departments recognize that a higher screening standard may make it more difficult to receive a positive fear determination. However, the Departments disagree with commenters that raising the screening standard for statutory withholding of removal and CAT protection will require aliens to submit significantly stronger documentary evidence. At the credible fear interview stage, these claims rest largely on the applicant's testimony, which does not require any additional evidence-gathering on the applicant's part. *See, e.g.,* 8 CFR 208.30(d), 208.30(e)(2) (describing the interview and explicitly requiring the asylum officer to make a credible fear determination after ''taking into account the credibility of the statements made by the alien in support of the alien's claim'').

In addition, the Departments have long used the ''reasonable possibility'' standard for reasonable fear determinations made under 8 CFR 208.31 and 8 CFR 1208.31, which cover certain classes of aliens who are ineligible for asylum but who are eligible for statutory withholding of removal and protection under the CAT regulations. *See* 8 CFR 208.31(a), 208.31(c), 1208.31(a), 1208.31(c).[18] By changing the standard in credible fear interviews for statutory withholding and CAT protection, asylum officers will process such claims under the same standard, providing additional consistency. Moreover, asylum officers receive significant training and the Departments have no concerns that they will be able to properly apply the standards set forth in this rule. *See* 8 CFR 208.1(b) (ensuring training of asylum officers).

In short, it is both illogical and inefficient to screen for three potential forms of protection under the same standard when two of those forms have an ultimately higher burden of proof. The Departments' rule harmonizes the screening of the various applications consistent with their respective ultimate burdens and ensures that non-meritorious claims are more quickly weeded out, allowing the Departments to focus more of their resources on claims likely to have merit.

2.4.1. Specific Concerns With ''Significant Possibility'' Standard

Comment: One commenter claimed the rule would make it much harder for asylum seekers subject to expedited removal to have their asylum requests ''fully considered'' by an immigration judge. The commenter noted that Congress intentionally set a low standard—''significant possibility''—for the credible fear interview in order to prevent legitimate refugees from being deported; one organization noted that this standard was designed to ''filter out economic migrants from asylum seekers.'' Commenters argued that the rule's redefinition of the ''significant possibility'' standard as ''a substantial and realistic possibility of succeeding'' contradicts the language Congress set forth in section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v) and is thus ''ultra vires.''

One organization argued that the legislative history confirms Congress's intent to protect ''bona fide'' asylum seekers. The organization cited the Judiciary Committee report to the House version of the bill that stated that ''[u]nder this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution'' and that ''the asylum officer should attempt to elicit all facts relevant to the applicant's claim.'' The organization included a statement from Senator Orrin Hatch noting that ''[t]he conference report struck a compromise'' and the standard adopted was ''intended to be a low screening standard for admission into the usual full asylum process.''

Finally, one organization stated that there is no ''sliding scale for legal standards based on the volume of cases,'' emphasizing that national security is irrelevant to the appropriate legal standard for credible fear. The organization claimed that raising the standard in order to ''better secure the homeland'' contradicts the clear meaning of the statute and is ''ultra vires.''

Response: Again, commenters appear to have confused the existing legal differences between and among asylum, statutory withholding of removal, and CAT protection, and the Department declines to adopt the commenters' positions to the extent they are based on inaccuracies or misstatements of law.

The rule does not change the ''significant possibility'' standard in credible fear interviews for asylum claims, which is set by statute. *See* INA

[18] Commenters raised concerns about analogizing the use of the ''reasonable possibility'' screening standard in 8 CFR 208.31 and 1208.31, which applies only to certain categories of aliens. However, the Departments referenced those regulations here and in the NPRM merely to show that the ''reasonable possibility'' standard has long existed in other contexts. *See, e.g.,* 85 FR at 36270.

235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). As a result, asylum claims will continue to be processed under the ''significant possibility'' standard in credible fear interviews. Instead, the rule only changes the standard to a ''reasonable possibility'' for statutory withholding of removal and CAT protection claims. Congress did not address the standards for these claims in credible fear interviews and instead explicitly focused on asylum claims. *See generally* INA 235(b), 8 U.S.C. 1225(b)(1)(B) (describing asylum interviews). Therefore, the Departments are within their authority to change these standards, as the use of a ''reasonable possibility'' standard does not contradict the ''significant possibility'' language in the statute, which only applies to asylum claims. *See generally* INA 103(a)(1), 8 U.S.C. 1103(a)(1) (''The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . .''); INA 103(g)(2), 8 U.S.C. 1103(g)(2) (''The Attorney General shall establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.'').

Moreover, in response to commenters' concerns about the ''significant possibility'' asylum standard in credible fear proceedings, the Departments note that this change does not raise the standard; instead, it merely codifies existing policy and practice in order to provide greater clarity and transparency to adjudicators and affected parties. USCIS already uses the ''significant possibility'' definition in screening whether an asylum-seeker has established a credible fear of persecution. *See* Memorandum from John Lafferty, Chief, Asylum Div., U.S. Citizenship and Immigration Servs., Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations 2 (Feb. 28, 2014).

This definition is also consistent with Congress's intent to create ''a low screening standard for admission into the usual full asylum process,'' 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch), and with the statutory text. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). For example, the ''significant possibility'' standard does not require a showing that it is more likely than not that the applicant can meet their asylum burden in immigration court. Instead, the standard merely requires the applicant establish ''a substantial and realistic possibility of succeeding'' on their asylum claim, which in turn requires a showing of as little as a 10 percent chance of persecution on account of a protected ground. *See I.N.S.* v. *Cardoza-Fonseca,* 480 U.S. 421, 431–32 (1987). This additional language will help adjudicators and affected parties to ensure that the proper screening standard is used in the credible fear process.

2.5. Proposed Amendments to the Credible Fear Screening Process

Comment: One organization claimed that the rule would essentially combine the credible fear interview with the merits hearing and require an asylum officer to do both simultaneously. The organization contended that this would leave applicants who turn themselves in to CBP with no time to prepare and ''essentially no chance of success.'' The organization emphasized that individuals arriving at the border are often ''exhausted, stressed out, or ill,'' noting the high probability that an individual will be physically, emotionally, or mentally unfit for an interview that ''may determine whether he and his family lives or dies.'' The organization claimed this situation has been aggravated by the COVID–19 pandemic.

One organization stated that some individuals fleeing persecution and torture ''bypass CBP'' because they lack knowledge about asylum or believe they will be treated unfairly. The organization noted that some of these individuals prepare asylum applications on their own (either prior or subsequent to apprehension by ICE) and emphasized that these cases, which fall ''outside the established procedures,'' are far more difficult to regulate. The organization contended that, if the credible fear and merits interviews are combined, poor asylum or CAT protection seekers will be incentivized to evade CBP in order to try and obtain help preparing an application. The organization emphasized that if the Departments replace the existing procedure with one that is ''essentially impossible for many deserving people to use,'' their jobs will become more difficult and their efforts less efficient.

One organization expressed concern regarding the specific language in proposed 8 CFR 208.30(d)(1), claiming that it ''does not pass either simple humanity or due process.'' The organization conceded that the language of existing 8 CFR 208.30(d)(1) is identical, but claimed this ''does not excuse the proposed provision.'' Instead, the organization claimed the language should read as follows: ''[i]f the [asylum] officer conducting the interview determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer *shall* reschedule the interview.''

One organization also emphasized that the rule would require asylum officers to consider bars to asylum, including the internal relocation bar,[19] during initial fear screenings. The organization alleged that the rule seems to build off the ''Asylum and Internal Relocation Guidance'' issued by USCIS, which the organization claimed was posted last summer ''without going through an NPRM.'' Another organization claimed that this portion of the rule is ''contrary to law and existing practice,'' noting that section 235(b) of the Act, 8 U.S.C. 1225(b), requires asylum officers to determine whether there is a ''significant possibility'' that an applicant could establish eligibility for asylum in some future proceeding. One organization emphasized that most credible fear applicants are unrepresented and have difficulty understanding the complex internal relocation analysis, noting that asylum seekers would likely need to include detailed country conditions materials in support of their claims. In addition, the organization claimed that adding ''an additional research burden'' on asylum officers would be inefficient.

One organization noted that the rule would require asylum officers to determine whether an applicant is subject to one of the mandatory bars under section 208(a)(2)(B)–(D) of the Act, 8 U.S.C. 1158(a)(2)(B)–(D), and, if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under CAT. The organization emphasized that each of the mandatory bars involves intensive legal analysis and claimed that requiring asylum officers to conduct this analysis during a screening interview would result in ''the return of many asylum seekers to harm's way.''

Another organization claimed this portion of the rule is ''unworkable,'' noting that the mandatory bars are heavily litigated and often apply differently from circuit to circuit. The organization alleged that the new

[19] The Departments note that the possibility of internal relocation is not a mandatory bar to asylum. Rather, it is part of the underlying asylum eligibility determination and could rebut a presumption of a well-founded fear after a finding of past persecution, or be a reason to find that the applicant does not have a well-founded fear of persecution. As it is still a consideration during the credible fear screening, the Departments address the comment in the response below.

credible-fear analysis would require asylum officers to exceed their statutory authority and would violate due process by mandating fact-finding in a procedure that does not provide applicants with notice or the opportunity to respond with evidence. One organization claimed that ''countless asylum-seekers could be erroneously knocked out of the process based on hasty decisions, misunderstandings, and limited information,'' noting that the existing rule ''errs in favor of review.''

The organization also expressed concern that the rule would require asylum officers to treat an individual's silence as a reason to deny an immigration judge's review of a negative credible fear interview. The organization emphasized that many asylum seekers do not understand what is happening when they receive a negative credible fear determination from an asylum officer and do not know what it means to seek review by an immigration judge; as a result, many asylum seekers ''will simply not answer the question.'' The organization noted that many of these individuals are still ''tired and traumatized'' from their journey, and some have been separated from their families.

The organization noted that, historically, asylum officers have been required to request immigration judge review on behalf of individuals who remain silent; however, the organization alleged that the rule would ''reverse existing policy'' and require officers to indicate that unresponsive individuals do not want review. The organization noted that the NPRM does not include data on how many asylum seekers succeed in their credible fear claims before an immigration judge without specifically making a request to an asylum officer; nor does the rule contain data on how many immigration judge reviews are ''expeditiously'' resolved after the judge explains the asylum seeker's rights and the individual chooses not to pursue review. The organization claimed that its concerns are enhanced by the decision to allow CBP officers, rather than fully trained USCIS asylum officers, to conduct credible fear interviews. One organization emphasized that it is unreasonable to assume that asylum seekers who decline to expressly request further review are declining review by an independent agency. The organization stated that ''[a]bsent a clear waiver of the opportunity for review by an independent agency, it is reasonable to assume that asylum seekers arriving at our borders wish to pursue all available avenues of relief.''

One organization noted a statement from Senator Patrick Leahy, which introduced a newspaper article that expressed concern that an unenacted early version of IIRIRA ''gives virtually final authority to immigration officers at 300 ports of entry to this country.'' 142 Cong. Rec. S4461 (daily ed. May 1, 1996) (statement of Senator Patrick Leahy). The organization also alleged that ''[g]iving one agency unfettered power to decide whether an asylum seeker ever has a day in court goes against the intent of Congress.''

Response: In general, most of the commenters' concerns are speculative and fail to account for the fact-specific and case-by-case nature of the interviews and reviews in question. Moreover, their concerns tacitly question the competence, integrity, and professionalism of the adjudicators conducting interviews and reviews—professionals who are well-trained and experienced in applying the relevant law in the context of these screenings and reviews.

The suggestion that aliens genuinely seeking refuge regularly evade officials of the very government from whom they seek refuge is unsupported by evidence. Nothing in the rule restricts or prohibits any organization from providing assistance to any alien; instead, the rule's focus is on assisting adjudicators with clearer guidance and more efficient processes.

Additionally, many of the commenters failed to acknowledge the multiple layers of review inherent in the screening process, which reduces the likelihood of any errors related to consideration of the facts of the claim or application of relevant law. *See Thuraissigiam,* 140 S.Ct. at 1965–66 (''An alien subject to expedited removal thus has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear.''). To the extent that commenters mischaracterized the rule, provided comments that are speculative or unfounded, suggested that the Departments should not follow the law, or ignored relevant procedural protections that already address their concerns, the Departments decline to adopt such comments.

The Departments disagree that this rule combines the credible fear interview with a full hearing on an asylum application, or that the credible fear interview represents the ''final'' adjudication of an asylum application. This rule maintains the same ''significant possibility'' standard for asylum officers in conducting a credible fear interview with respect to screening the alien for eligibility for asylum, and any alien who is found to have a credible fear is referred to an immigration judge for asylum-and-withholding-only proceedings for consideration of the relief application. *See* 8 CFR 208.30(g). This rule does not change the fundamental structure of the credible fear process. Instead, during the credible fear interview, the rule additionally requires the asylum officer to consider internal relocation and relevant asylum bars as part of his or her determination, and separately to treat the alien's failure to request a review of a negative fear determination as declining the request.

Regarding commenters' concerns about unrepresented aliens having difficulty with the internal relocation analysis in the credible fear process, the Departments note that aliens are able to consult with a person of their choosing prior to their credible fear interview and have that person present during the interview. *See* 8 CFR 208.30(d)(4). Considering internal relocation in the credible fear screening context is consistent with existing policy and practice. *See* 85 FR 36272. Moreover, there is no reason to believe that an alien, in the course of providing testimony regarding the facts of his or her claim, cannot also provide testimony about his or her ability to internally relocate; in fact, in many cases, an alien's relocation is already part of the narrative provided in support of the alien's overall claim. In addition, the Departments disagree that requiring asylum officers to consider internal relocation is inefficient. To the contrary, as current practice requires such issues to be adjudicated in section 240 removal proceedings, screening out cases subject to internal relocation before requiring a lengthier proceeding before an immigration judge is inherently more efficient. It also has a further salutary effect of increasing the ability of adjudicators to address meritorious claims in a more timely manner. Lastly, contrary to commenters' assertions, this rule is unrelated to USCIS guidance on internal relocation, and any issues relating to such guidance are outside the scope of this rule.

Regarding commenters' concerns about requiring asylum officers to determine whether certain asylum bars apply during the credible fear interview, the Departments note that asylum officers are well trained in asylum law and are more than capable of determining whether long-standing statutory bars apply, especially in the credible fear screening context. INA

235(b)(1)(E), 8 U.S.C. 1235(b)(1)(E) (defining an asylum officer as one who ''has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under [INA 208, 8 U.S.C. 1158], and . . . is supervised by an officer who [has had similar training] and has had substantial experience adjudicating asylum applications.''); *see generally* 8 CFR 208.1(b) (covering training of asylum officers).

Moreover, the statute requires asylum officers to determine whether ''the alien could establish eligibility for asylum under section 1158 of this title,'' which would by extension include the application of the bars listed in section 1158 that are a part of this rule. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Further, asylum officers already assess whether certain bars may apply to applications in the credible fear context—they simply do not apply them under current regulations. *See* Government Accountability Office, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* at 10 (Feb. 2020), *https://www.gao.gov/assets/710/704732.pdf* (''In screening noncitizens for credible or reasonable fear . . . . [a] USCIS asylum officer is to determine if the individual has any bars to asylum or withholding of removal that will be pertinent if the individual is referred to immigration court for full removal proceedings.''); U.S. Citizenship and Immigr. Serv., *Lesson Plan on Credible Fear of Persecution and Torture Determinations* at 31 (2019), *https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf* (''Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not.''). Lastly, responding to commenters' concerns that such determinations would be ''final,'' this rule does not change the existing process allowing for an immigration judge to review any negative fear determination, which would include any bar-related negative fear determination. 8 CFR 208.30(g); *see also Thuraissigiam,* 140 S.Ct. at 1965–66 (''An alien subject to expedited removal . . . has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear.'').

Regarding commenters' concerns that aliens do not understand the credible fear process and, therefore, will refuse to indicate whether they want an immigration judge to review their negative fear finding, the Departments first note that if an alien requests asylum or expresses a fear of return, the alien is given an M–444 notice, Information about Credible Fear Interview, which explains the credible fear process and the right to an attorney at no cost to the U.S. Government. It would be unusual for an alien who has already undergone an interview, relayed a claim of fear, answered questions from an asylum officer about his or her claim, and continued to maintain that he or she has a genuine fear of being returned to his or her country of nationality to then—at the next step—be unaware of the nature of the process when asked whether he or she wishes to have someone else review the claim. The Departments further note that regulations require the asylum officer to ask aliens whether they wish to have an immigration judge review the negative credible fear decision. *See* 8 CFR 208.30(g) (requiring the asylum officer to ''provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I–869''). And the relevant form states, ''You may request that an Immigration Judge review this decision.'' *See* Form I–869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge.

These procedures provide explicit informational protections to individuals in the credible fear process, and treating refusals as affirmative requests only serves to create unnecessary and undue burdens on the immigration courts. Although the Departments do not maintain data on how many individuals refuse to request immigration judge review of a negative fear finding, the Departments believe it is reasonable to require an individual to answer affirmatively when being asked by an asylum officer if the individual wishes to have their negative fear finding reviewed.

In response to a commenter's concern about 8 CFR 208.30(d)(1), which allows an asylum officer to reschedule a credible fear interview under certain circumstances, the Departments note that this rule does not change any language in that subparagraph and, therefore, any comments regarding that subparagraph are outside the scope of this rule.

3. Form I–589, Application for Asylum and for Withholding of Removal, Filing Requirements

3.1. Frivolous Applications

3.1.1. Allowing Asylum Officers To Make Frivolousness Findings

Comment: Commenters expressed a range of concerns regarding the proposed changes to allow DHS asylum officers to make frivolousness findings and deny applications or refer applications to an immigration judge on that basis. 85 FR at 36274–75.

Commenters expressed concerns about asylum officers' training and qualifications to make frivolousness findings. For example, at least one commenter noted that these DHS officers are not required to earn law degrees. Another organization disagreed with the NPRM's assertion that asylum officers are qualified to make frivolousness determinations because of their current experience making credibility determinations, emphasizing that ''credibility and frivolous determinations differ significantly.'' At least one organization noted that the applicant has the burden of proof in a credibility determination while the government bears the burden of proof in a frivolousness determination.

At least one organization emphasized that this authority is currently only vested in immigration judges and the BIA, and commenters expressed concern that allowing asylum officers to make frivolousness findings improperly changes the role of asylum officers in the asylum system. For example, one organization claimed that allowing asylum officers to make frivolousness determinations ''improperly changes their role from considering humanitarian relief, to being an enforcement agent.'' Commenters noted a law professor's statement that ''allowing asylum officers to deny applications conflicts with a mandate that those asylum screenings not be adversarial.'' Suzanne Monyak, *Planned Asylum Overhaul Threatens Migrants' Due Process,* LAW 360 (June 12, 2020), *https://www.law360.com/access-to-justice/articles/1282494/planned-asylum-overhaul-threatens-migrants-due-process* (quoting Professor Lenni B. Benson).

Commenters suggested that the rule would not require USCIS to allow asylum applicants to address inconsistencies in their claims, alleging that individuals appearing in non-adversarial proceedings before a DHS officer would not be granted important procedural protections. One organization cited both the U.S. Court of

Appeals for the Second Circuit and the BIA to support its claim that a comprehensive opportunity to be heard makes sense in the frivolousness context, noting that immigration enforcement is not limited to initiating and conducting prompt proceedings that lead to removals at any cost. *Liu* v. *U.S. Dep't of Justice.,* 455 F.3d 106, 114 n.3 (2d Cir. 2006); *Matter of S–M–J–,* 21 I&N Dec. 722, 727, 743 (BIA 1997).

One organization stated that, although immigration judges would have de novo review of findings by asylum officers, an adverse finding is ''always part of the DHS toolbox'' in immigration court and is considered by immigration judges.

Response: As stated in the proposed rule, the Departments find that allowing asylum officers to make frivolousness findings in the manner set out in the proposed rule and adopted as final in this rule will provide many benefits to the asylum process, including ''strengthen[ing] USCIS's ability to root out frivolous applications more efficiently, deter[ing] frivolous filings, and ultimately reduc[][ing] the number of frivolous applications in the asylum system.'' 85 FR at 36275.

The Departments disagree with commenters' allegations that asylum officers are not qualified or trained to make frivolousness findings. Instead, all asylum officers receive significant specialized ''training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles'' and also receive ''information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, torture of persons in other countries, and other information relevant to asylum determinations.'' 8 CFR 208.1(b). Moreover, there is no doubt that asylum officers are qualified to make significant determinations regarding asylum claims, including the most important determination—an adjudication on the merits regarding whether or not an alien has demonstrated eligibility for asylum. *See, e.g.,* 8 CFR 208.14(c) (''If the asylum officer does not grant asylum to an applicant after an interview . . . the asylum officer shall deny, refer, or dismiss the application . . . .''). Given asylum officers' authority and qualifications to make determinations on the underlying merits of asylum applications, the Departments find that they are clearly qualified to make subsidiary determinations such as frivolousness findings.[20]

Commenters are incorrect that the Departments analogized credibility determinations to frivolousness findings. *See* 85 FR at 36275. Instead, the Departments discussed asylum officers' credibility findings as background regarding the mechanisms currently used by asylum officers to approach questions similar to those involving frivolousness. *Id.* Nevertheless, the Departments disagree with commenters' implication that asylum officers should not be permitted to make frivolousness findings because the government bears the burden of proof. Not only does the statute not assign a burden of proof to the Departments regarding frivolousness findings, INA 208(d)(6), 8 U.S.C. 1158(d)(6), but for those not in lawful status, asylum officers' frivolousness findings are subject to de novo review by an immigration judge, and must simply be sufficiently supported.

Commenters are further incorrect that allowing asylum officers to make frivolousness findings improperly converts the USCIS affirmative application process from non-adversarial to adversarial. The purpose of the non-adversarial interview is to ''elicit all relevant and useful information bearing on the applicant's *eligibility for asylum*.'' 8 CFR 208.9(b) (emphasis added). There is nothing inherently contradictory—or adversarial—in eliciting all relevant and useful information regarding an applicant's eligibility for asylum and then determining, based on that information, that the applicant is ineligible for asylum because the applicant knowingly filed a frivolous application. Moreover, a nonadversarial process does not mean that the asylum officer simply has to accept all claims made by an alien as true; if that were the case, an asylum officer could never refer an application based on an adverse credibility determination. Further, equating the nonadversarial asylum interview process with a prohibition on finding an application to be frivolous is in tension with statutory provisions allowing adjudicators of asylum applications to consider, inter alia, ''candor'' and ''falsehoods'' in assessing an applicant's credibility. INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii).

In short, the Departments find that allowing asylum officers to make frivolousness findings does not conflict with the requirement that asylum officers conduct asylum interviews ''in a nonadversarial manner.'' 8 CFR 208.9(b). Instead, asylum officers will consider questions of frivolousness in the same manner that they consider other questions of the applicant's eligibility for asylum, such as whether the applicant has suffered past persecution or whether the applicant fears harm on account of a protected ground. Just as interview questions about these eligibility factors are appropriate topics for asylum officers in the current interview process, questions and consideration of frivolousness are similarly appropriate.

Regarding commenters' concerns about procedural protections for aliens who appear before an asylum officer for an interview, the Departments emphasize that both the proposed rule and this final rule prohibit a frivolousness finding unless the alien has been provided the notice required by section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A) of the consequences under section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), of filing a frivolous asylum application. *See* 8 CFR 208.20(d), 1208.20(d). This requirement complies with the Act, which does not require any further warning or colloquy in advance of a frivolousness finding. Accordingly, while commenters are correct that the rule does not require USCIS to allow asylum applicants to address inconsistencies prior to a frivolousness finding or follow any other delineated procedures, the Departments reiterate that, as stated in the proposed rule, the procedural requirements provided by the rule for a frivolousness finding comply with the Act's requirements. 85 FR at 36276–77.

Further, the Departments emphasize that, for aliens who lack legal status and who are referred to an immigration judge because the asylum officer did not grant asylum to the alien, *see* 8 CFR 208.14(c)(1), USCIS asylum officers' frivolousness findings are not given effect and are subject to an immigration judge's de novo review. 8 CFR 208.20(b). Accordingly, for most, if not all, aliens who may be subject to a frivolousness finding by an asylum officer, this further review is effectively the procedural protection called for by commenters, as the alien will be on

[20] Although not strictly applicable to asylum officers who adjudicate asylum applications under section 208 of the Act, the Departments note that the definition of an asylum officer in other contexts as one who ''has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications'' under section 208 and is supervised by someone who has had ''substantial experience'' adjudication asylum applications further supports the determination that asylum officers are well-qualified to make frivolousness determinations. INA 235(b)(1)(E) (8 U.S.C. 1225(b)(1)(E)).

notice regarding the possible frivolousness finding and should be prepared to and expect to explain the issues surrounding it.

The Departments agree with commenters that DHS trial attorneys in immigration court may provide arguments regarding frivolousness in any appropriate case. However, as also stated in the proposed rule, the possibility of frivolousness findings in immigration court alone has been insufficient to deter frivolous filings consistent with the congressional intent behind section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6). 85 FR at 36275. Allowing asylum officers to also consider and make determinations regarding whether an affirmative asylum applicant's application is frivolous provides efficiencies not available from consideration of questions of frivolousness by an immigration judge alone, including providing immigration judges with a more robust and developed written record regarding frivolousness. *Id.*

Finally, to the extent that commenters suggested the proposed changes should not be implemented because they would make it easier to detect asylum fraud and would harm aliens who submit fraudulent asylum applications, the Departments do not find such suggestions compelling enough to warrant deleting such changes. *See Angov* v. *Lynch,* 788 F.3d 893, 901, 902 (9th Cir. 2015) (noting ''an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated''). Cases involving asylum fraud are ''distressingly common,'' *id.* at 902, and the Departments are committed to ensuring the integrity of immigration proceedings by using all available statutory tools to root out such fraud.

3.1.2. Changes to the Definition of ''Frivolous''

Comment: Commenters expressed a range of concerns with the rule's changes to the definition of ''frivolous'' and the expanded scope of applications that could qualify as such. One commenter claimed the rule would make it easier for immigration judges and asylum officers to ''throw out'' asylum requests as frivolous.

At least one commenter noted that, prior to the enactment of section 208(d)(6) of the Act 8 U.S.C. 1158(d)(6), a frivolous asylum application was defined in the employment context as ''manifestly unfounded or abusive'' and ''patently without substance.'' 85 FR at 36274. The commenter concluded that lowering this standard is ''ultra vires and an abuse of discretion.''

Commenters noted that, to be considered frivolous, an application must have been ''knowingly made,'' and the individual must have been given notice at the time of filing pursuant to section 208(d)(4)(A) of the Act 8 U.S.C. 1158(d)(4)(A). Commenters expressed concern that the NPRM seeks to redefine the term ''knowingly'' to include ''willful blindness'' toward frivolousness. At least one organization expressed concern that the NPRM relies on *Global-Tech Appliances, Inc.* v. *SEB S.A.,* 563 U.S. 754, 769 (2011) to support its definition for ''knowingly,'' emphasizing that this case ''involved sophisticated litigants represented by attorneys familiar with the intricacies of American patent law'' and contending that it would be inappropriate to hold asylum seekers to this standard. Commenters stated that the NPRM does not adequately explain how ''willful blindness'' differs from recklessness or negligence.

At least one organization expressed concern that the rule removes the requirements that (1) a fabrication be deliberate; and (2) the deliberate fabrication be related to a material element of the case. The organization claimed the rule suggests that asylum seekers who are unaware that an ''essential element'' is fabricated would be permanently barred from immigration benefits. The organization noted that the NPRM does not define ''essential'' but instead focuses on ''fabricated material evidence,'' emphasizing that, given the variance of standards, courts have held that ''fabrication of material evidence does not necessarily constitute fabrication of a material element,'' quoting *Khadka* v. *Holder,* 618 F.3d 996, 1004 (9th Cir. 2010).

Another organization stated that while ''[f]alse and fabricated evidence is inappropriate,'' poor language skills and faulty memory can ''produce honest mistakes that look like falsification,'' emphasizing that the rule's definition of ''frivolous'' provides the Departments with ''numerous opportunities to pressure applicants.''

Commenters expressed particular concerns with the rule's changes so that an application that lacks merit or is foreclosed by existing law could result in a frivolousness finding, particularly because case law involving asylum is constantly changing. For example, at least one organization contended that the rule contradicts existing regulations regarding a representative's duty to advocate for his or her client, emphasizing that representatives are allowed to put forth ''a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.'' *See* 8 CFR 1003.102(j)(1). Similarly, commenters alleged that the imposition of a permanent bar on applicants who raise claims challenging existing law ''deters representatives from putting forth nuanced arguments,'' contending that a representative's ethical duty to make every argument on a client's behalf could potentially subject the client to the permanent bar. In addition, commenters argued that the ability of attorneys to make good faith arguments has been ''crucial to modifying and expanding the law,'' emphasizing that good faith arguments by representatives allow asylum seekers to pursue ''a claim to the full extent of the law.'' One organization stated that, by imposing penalties on individuals who make good faith attempts to seek protection ''in light of contrary law based on different jurisdictions,'' the rule ''undoes years of jurisprudence in this field.''

Commenters also emphasized that the rule would expand when the penalties for a frivolous filing may attach and would require individuals who wish to challenge a denial of asylum in Federal court to risk a finding that would bar any future immigration relief. One commenter alleged that, should an immigration judge find an application to be frivolous under the rule, the applicant would be ineligible for all forms of immigration relief simply for ''making a weak asylum claim.'' One organization expressed concern that, as a result, asylum seekers would not seek relief for fear of losing their case and being accused of submitting a frivolous application. One organization claimed that the rule's frivolousness procedure is designed to ''instill fear in applicants to keep them from applying.'' Another organization emphasized that expediency is ''inappropriate'' in the context of a determination that would ''subject the applicant to one of the harshest penalties in immigration law.'' Commenters otherwise emphasized the seriousness for applicants of frivolousness findings.

At least one organization called the rule ''exceptionally unfair,'' emphasizing that many asylum seekers are unrepresented and do not speak English, making it difficult for them to understand the complexities of ''the ever-evolving law.'' The organization noted that many asylum seekers fall prey to unscrupulous attorneys or notarios who file asylum applications for improper purposes, arguing that it is

entirely unfair to penalize applicants in these types of situations.

Finally, at least one organization claimed that the rule would increase the workload of immigration judges, as they would be forced to determine whether the legal arguments presented sought to ''extend, modify, or reverse the law'' or were merely foreclosed by existing law. The organization argued that, because of the burdens already placed on immigration judges, this expectation is unrealistic and ''adds another layer to the litigation of referred asylum cases'' in immigration court.

Response: In general, commenters on this point either mischaracterized or misstated the proposed rule or relied solely on a hypothetical and speculative ''parade of horribles'' that ignores the actual text and basis of the rule. Contrary to commenters' concerns, the Departments do not believe that the proposed rule allows immigration judges or asylum officers to treat legitimate asylum requests as frivolous. Instead, the rule establishes four limited grounds for a frivolousness finding: Applications that (1) contain a fabricated essential element; (2) are premised on false or fabricated evidence unless the application would have been granted absent such evidence; (3) are filed without regard to the merits of the claim; or (4) are clearly foreclosed by applicable law. 8 CFR 208.20(c)(1)–(4), 1208.20(c)(1)–(4). In addition, the rule provides that an alien ''knowingly files a frivolous asylum application if . . . [t]he alien filed the application with either actual knowledge, or willful blindness, of the fact that the application'' was one of those four types. 8 CFR 208.20(a)(2), 1208.20(a)(2).

These changes are not ultra vires or an abuse of discretion. The Departments emphasize that the regulations interpret and apply the INA itself, the relevant provisions of which postdate the regulation defining frivolous as ''manifestly unfounded or abusive.'' In addition, the INA does not define the term ''frivolous,'' *see* INA 208(d)(6), 8 U.S.C. 1158(d)(6), and the Departments possess the authority to interpret such undefined terms. *See* INA 103(a)(3), (g)(2), 8 U.S.C. 1103(a)(3), (g)(2); *see also Chevron,* 467 U.S. at 866 (''When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.''). The Departments believe that the prior regulatory definition artificially limited the applicability of the frivolous asylum bar because it did not fully address the different types of frivolousness, such as abusive filings, filings for an improper purpose, or patently unfounded filings.

Regarding the inclusion of willful blindness in determining what applications will be considered knowingly frivolous, the Departments reiterate that the inclusion of a willful blindness standard as part of a ''knowing'' action is consistent with long-standing legal doctrine:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge. . . . It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts. . . .

Global-Tech Appliances, Inc., 563 U.S. at 766 (internal citations omitted);[21] *see also, e.g., United States* v. *Caraballo-Rodriguez,* 726 F.3d 418 (3d Cir. 2013) (noting that ''knowledge'' can be demonstrated by actual knowledge or willful blindness.); *United States* v. *Perez-Melendez,* 599 F.3d 31, 41 (1st Cir. 2010) (''Willful blindness serves as an alternate theory on which the government may prove knowledge.'').

The doctrine of willful blindness applies in many civil proceedings as well. *See Global-Tech Appliances,* 563 U.S. at 768 (''Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. 271(b).''). Given this background, if Congress did not wish to allow for willfully blind actions to satisfy the ''knowing'' requirement of section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), Congress could have expressly provided a definition of ''knowingly'' in the Act. *Cf. Perrin* v. *United States,* 444 U.S. 37, 42 (1979) (''A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'') (citations omitted). Due to Congress's silence, however, the Departments find that the inclusion of willful blindness, as it is generally interpreted, is a reasonable interpretation that better aligns the regulations with congressional intent to limit and deter frivolous applications.

Regarding the four grounds for finding an asylum application frivolous at 8 CFR 208.20(c) and 1208.20(c), the Departments emphasize that an application will not be found to be frivolous unless the alien knew, or was willfully blind to the fact, that the application met one of the four grounds. Accordingly, commenters are incorrect that an alien who does not know that an essential element is fabricated will be at risk of an immigration judge finding that his or her application is frivolous. Similarly, an alien who submits a claim that is clearly foreclosed by the applicable law but who, as noted by commenters, does not know that the claim is so clearly foreclosed, would not have his or her claim found frivolous on that basis.[22]

The Departments disagree that the rule will enable the Departments to ''pressure'' applicants who make mistakes of fact in the context of their application. Two of the bases related to fabricated elements or evidence, neither of which can be characterized appropriately as a mistake of fact. The other two bases go to the merits of the case or to applicable law, and neither of those turn on a mistake of fact.

One commenter expressed concern about the NPRM's proposed change, in the context of the definition of frivolous, from a fabricated ''material'' element to a fabricated ''essential'' element. The existing regulatory text provides that ''an asylum application is frivolous if any of its material elements is deliberately fabricated''; under the NPRM, an application that contained a fabricated ''essential element'' might have been found frivolous. The Departments acknowledge that the NPRM indicated that it was maintaining the prior definition of ''frivolous,'' which was premised on a fabricated ''material'' element, 85 FR at 36275, but then used the word ''essential'' in lieu of ''material'' in the proposed regulatory text itself. Although the Departments do not perceive a relevant difference between the two phrasings, they are reverting to the use of ''material'' in this context in the final rule to avoid any confusion.

[21] The Departments disagree with commenters' concerns that *Global-Tech* is an inappropriate case to cite given the complexity of the underlying dispute. Instead, this case provides a clear and concise summary of the willful blindness standard, which is separate and apart from the underlying facts or adjudication.

[22] As 85 percent of asylum applicants in immigration proceedings have representation, the likelihood of an alien alone knowingly making an argument that is foreclosed by law is relatively low as both a factual and legal matter. *See* EOIR, *Current Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download.*

Finally, commenters were particularly concerned about the frivolousness grounds covering claims that lack merit or are foreclosed by existing law. However, commenters' concerns are not based on the actual rule. As explained in the NPRM, an unsuccessful claim does not mean that the claim is frivolous. *See* 85 FR at 36273–77. For example, arguments to extend, modify, or reverse existing precedent are not a basis for a frivolousness finding under the ''clearly foreclosed by applicable law'' ground. 85 FR at 36276. Similarly, as discussed *supra,* both the relatively low numbers of pro se asylum applicants in immigration court proceedings and the requirement that a frivolous asylum application be ''knowingly'' filed will likely make frivolousness findings uncommon for pro se aliens under the ''clearly foreclosed by applicable law'' ground. Moreover, the proposed definition is fully consistent with the long-standing definition of ''frivolous'' behavior as applied in the context of practitioner discipline. *See* 8 CFR 1003.102(j)(1) (''A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay.''). In other words, the bases for finding an asylum application frivolous do not limit ethical attorneys' conduct in the manner described by commenters.

As some commenters noted, however, some aliens may hire unscrupulous representatives or notarios who file applications for improper purposes. While the Departments are sympathetic to aliens who are victims of these unethical practices, the Departments note that, as described below in Section II.C.3.2 of this preamble, aliens must sign each asylum application attesting to the application's accuracy and acknowledging the consequences of filing a frivolous application; moreover, ''[t]he applicant's signature establishes a presumption that the applicant is aware of the contents of the application.'' 8 CFR 208.3(c)(2), 1208.3(c)(2). An alien may later file a motion to reopen premised on ineffective assistance of counsel [23] or pursue other subsequent avenues of redress against unscrupulous individuals, but the Departments find that an alien should not automatically be immune from the consequences of an asylum application he or she held out as accurate.[24] To offer such immunity would create moral hazard. It would encourage aliens not to read or familiarize themselves with the contents of their applications, thereby subverting both the efficiency and accuracy of asylum adjudications. Moreover, the requirement that a frivolous asylum application be ''knowingly'' filed also ensures that only genuinely culpable—or co-conspirator—aliens will face the full consequences associated with these unethical practices. *Cf. United States* v. *Phillips,* 731 F.3d 649, 656 (7th Cir. 2013) (''It is careless to sign a document without reading it, but it is a knowing adoption of its contents only if the signer is playing the ostrich game ('willful blindness'), that is, not reading it *because* of what she knows or suspects is in it.'').

The Departments disagree that the changes, including consideration of legal arguments regarding whether an asylum application was premised on a claim that was foreclosed by existing law, will increase the workload of immigration judges. As an initial point, immigration judges are already accustomed to both making frivolousness determinations and to assessing whether claims are foreclosed by applicable law; indeed, immigration judges are already required to apply precedent in asylum cases, even when a frivolousness finding is not at issue. Thus, the intersection of those two streams of decision making does not represent any additional adjudicatory burden. Further, the rule does not mandate that immigration judges make a determination in all cases, and many cases will not factually or legally lend themselves to a need to wrestle with close calls and complex determinations of whether an application was ''clearly foreclosed by applicable law'' due to the rest of the context of the application or the case. Finally, commenters also failed to consider that the direct inclusion of applications that are clearly foreclosed by applicable law as a possible basis for frivolousness findings may cause secondary efficiencies by disincentivizing the filing of meritless asylum applications in the first instance—applications that already take up significant immigration court resources.

3.1.3. Other Concerns With Regulations Regarding Frivolous Applications

Comment: Commenters expressed concern with the rule's changes to the procedural requirements that must be satisfied before an immigration judge may make a frivolousness finding. For example, commenters noted that the rule would allow immigration judges to make frivolousness findings without providing an applicant with additional opportunities to account for perceived issues with his or her claim. Similarly, an organization alleged that immigration judges would not have to provide an opportunity for applicants to meaningfully address the frivolousness indicators found by an asylum officer. Commenters stated that the rule conflicts with *Matter of Y–L–,* 24 I&N Dec. at 155, emphasizing that the NPRM only requires that applicants be provided notice of the consequences of filing a frivolous application. At least one organization claimed the rule, by not requiring immigration judges to first provide an opportunity to explain, assumes that ''applicants know what a judge would consider 'meritless' or implausible.'' The organization contested the NPRM's assertion that an asylum applicant ''already . . . knows whether the application is . . . meritless and is aware of the potential ramifications,'' claiming instead that applicants often lack a sophisticated knowledge of immigration law. *See* 85 FR at 36276.

Response: As stated in the proposed rule, the only procedural requirement Congress included in the Act for a frivolousness finding is the notice requirement at section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A). 85 FR at 36276. In addition, the asylum application itself provides notice that an application may be found frivolous and that a frivolousness finding results in significant consequences. *Id.* The law is clear on this point. *See, e.g., Niang* v. *Holder,* 762 F.3d 251, 254–55 (2d Cir. 2014) (''Because the written warning provided on the asylum application alone is adequate to satisfy the notice requirement under 8 U.S.C. 1158(d)(4)(A) and because Niang signed and filed his asylum application containing that warning, he received adequate notice warning him against filing a frivolous application.''). Thus, every alien who signs and files an asylum application has received the

[23] *See Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988) (setting out requirements for motions to reopen due to ineffective assistance of counsel allegations).

[24] The Departments further note that purposefully filing meritless asylum applications, including for the purposes of causing DHS to initiate removal proceedings, violates the EOIR rules of professional conduct and constitutes behavior that may result in professional sanctions. *See In re Bracamonte,* No. D2016–0070 (July 1, 2020), *https://www.justice.gov/eoir/page/file/1292646/download* (entering into a settlement agreement with a practitioner who ''acknowledges that it was improper to file asylum applications without an indicated basis for asylum or an indication as to any asylum claim, to cancel or otherwise advise clients to fail to appear for asylum interviews, and to not demonstrate a clear intention to pursue an asylum claim, in order to cause DHS to issue a Notice to Appear to his clients'').

notice required by section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A).

Accordingly, commenters are correct that the rule's changes allow immigration judges to make frivolousness findings without the procedural requirements required by the current regulation and attendant case law. But the regulation and case law are not required by the Act, and have not been successful in preventing the filing of frivolous applications. To the extent commenters are correct that the rule conflicts with *Matter of Y–L–,* that decision is premised on the existing regulatory language that the Departments are revising. Thus, as the Departments noted in the proposed rule, this rule would overrule *Matter of Y–L–* and any other cases that rely on the same reasoning or now-revised regulatory language. 85 FR at 36277.

Comment: At least one organization expressed its belief that DHS could institute frivolousness procedures more directly related to DHS's adjudication of employment authorization requests (''EADs''). For example, the commenter noted that there is ''no explanation'' for why DHS cannot simply conduct a prima facie review of an I–589 filing prior to granting an EAD application or scheduling the I–589 interview. The organization claimed that, if the concern is the time and expense dedicated to ''clearly fraudulent'' applications, DHS could devise a policy to screen for indicators that the application itself lacks merit or supporting documentation. The organization contended that DHS does this with other benefit applications and is not prohibited from issuing Requests for Evidence or Notices of Intent to Deny to affirmative asylum applicants prior to an interview.

Response: Although the Departments appreciate this comment and DHS may evaluate it further as an additional avenue to protect the integrity of the asylum adjudication process, the Departments find that the changes set out in the proposed rule better align with congressional intent and are more efficient than a secondary process tied to the adjudication of EADS. Divorcing the question of frivolousness from the underlying adjudication of the application itself would potentially undermine Congress's clear direction that aliens face consequences for filing frivolous asylum applications. INA 208(d)(6), 8 U.S.C. 1158(d)(6). Moreover, asylum officers and immigration judges, the officials in the asylum system who are trained to review and adjudicate applications for asylum, are best positioned to make the sorts of determinations that the commenter suggests should instead be made by the DHS officials adjudicating EAD requests.

Comment: At least one organization alleged that the rule, ''perhaps recognizing its own harshness,'' claims to ''ameliorate the consequences'' by allowing applicants to withdraw their application(s) before the court with prejudice, accept a voluntary departure order, and leave the country within 30 days. The organization contended that, rather than ameliorating the consequences of a frivolous filing, these measures essentially replicate them in severity and permanence.

Response: Despite commenters' concerns, the Departments emphasize that this option to avoid the consequences of a frivolousness finding is a new addition to the regulations and provides applicants with a safe harbor not previously available. The Departments believe that the conditions are strict but reasonable and fair when compared with the alternative: The severe penalty for filing a frivolous application, as recognized by Congress at section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6). Further, the Departments disagree that the consequences of withdrawing an application are of the same severity as a frivolousness finding because an alien who withdraws an application will be able to leave the United States without a removal order and seek immigration benefits from abroad, while an alien who is found to have submitted a frivolous application is ''permanently ineligible for any benefits'' under the Act. INA 208(d)(6), 8 U.S.C. 1158(d)(6).

Comment: One organization emphasized that, although the NPRM claims that broadening the definition of frivolous would root out ''unfounded or otherwise abusive claims,'' the NPRM does not include any evidence of large numbers of pending frivolous applications.

Response: Congress laid out consequences for filing a frivolous asylum application at section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), demonstrating the importance of the issue. There is no precise data threshold for a regulation that implements a clear statutory priority. Moreover, Federal courts have recognized both the extent of asylum fraud and the fact that the Government does not catch all of it. *Angov,* 788 F.3d at 902 (''Cases involving fraudulent asylum claims are distressingly common. . . . And for every case where the fraud is discovered or admitted, there are doubtless scores of others where the petitioner gets away with it because our government didn't have the resources to expose the lie.''). Indeed, as the Departments noted in the NPRM, the prior definition did not adequately capture the full spectrum of claims that would ordinarily be deemed frivolous, 85 FR at 36274, making statistics based on the prior definition either misleading or of minimal probative value.

The Departments note the record numbers of asylum applications filed in recent years, including 213,798 in Fiscal Year 2019, up from the then-previous record of 82,765 in Fiscal Year 2016. EOIR, *Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download.* Given this significant increase in applications—which almost certainly means an increase in frivolous applications—and the corresponding increase in adjudications, the Departments believe it is important to ensure the regulations best reflect congressional intent and deter the submission of frivolous applications that delay the adjudication of meritorious cases.

Comment: Another organization expressed particular concern for children seeking asylum, noting that, although the TVPRA requires unaccompanied children's claims to be heard by asylum officers, the rule's expansion of a ''frivolous'' claim would result in the denial of meritorious claims for children who are unrepresented and ''unable to decipher complex immigration law.'' The organization contended that, because the rule would permit asylum officers who determine that a child's claim is ''frivolous'' to refer the case to immigration court without examining the merits of the claim, unaccompanied children ''would be forced into adversarial proceedings before an immigration judge in clear violation of the TVPRA and in a manner that would subject them to all of the harms attendant to adversarial hearings where there is no guarantee of representation.''

Similarly, at least one organization emphasized that the ''safety valve'' of allowing children to accept withdrawal conditions to avoid the consequences of a frivolousness finding is illusory, and may pressure children to waive valuable rights.

Response: Again, the Departments note that these concerns generally are not rooted in any substantive evidence and either mischaracterize or misstate the proposed rule. The Departments find the safeguards in place for allowing asylum officers to make a finding that an asylum application is frivolous are sufficient to protect unaccompanied alien children (''UAC'') in the application process. Even if an asylum officer finds an application is frivolous,

the application is referred to an immigration judge who provides review of the determination. The asylum officer's determination does not render the applicant permanently ineligible for immigration benefits unless the immigration judge or the BIA also make a finding of frivolousness. *Id.* Further, asylum officers and immigration judges continue to use child-appropriate procedures taking into account age, stage of language development, background, and level of sophistication.[25] Finally, to be found frivolous, an application must be knowingly filed as such, and the Departments anticipate that very young UACs will typically not have the requisite mental state to warrant a frivolousness finding.

Comment: At least one commenter appeared to express concern that the rule includes all applications submitted after April 1, 1997, as those which could potentially be deemed frivolous.

Response: To the extent the commenter is concerned about frivolous applications in general dating back to April 1, 1997, the Departments note that DOJ first implemented regulations regarding frivolous asylum applications on March 6, 1997, effective April 1, 1997. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10344 (Mar. 6, 1997). The April 1, 1997 effective date was enacted by Congress in 1996 through IIRIRA. *See* IIRIRA, Public Law 104–208, sec. 604(a), 110 Stat. 3009, 3009–693. Thus, all asylum applications filed on or after April 1, 1997, have been subject to a potential penalty for frivolousness for many years.

The NPRM made clear, however, that the new regulatory definition of frivolous applies only to applications filed[26] on or after the effective date of the final rule. To provide further clarification on this point, the Departments made several non-substantive edits to the regulatory text at 8 CFR 208.20 and 8 CFR 1208.20 in the final rule to clarify the temporal applicability of the existing definition of frivolousness and the prospective application of the definition contained in the rule. Thus, the commenters apparent retroactivity concerns about the definition of a frivolous application have been addressed. For further discussion of the rule's retroactive applicability, *see* Section II.C.7 of this preamble.

3.2. Pretermission of Legally Insufficient Applications

3.2.1. Pretermission and the INA

Comment: Commenters stated that allowing immigration judges to pretermit applications conflicts with multiple sections of the INA and is not a ''reasonable'' interpretation of the INA.

Commenters cited section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), alleging that the phrase ''may apply for asylum'' should be broadly construed. Commenters also noted that the statute requires the establishment of a procedure for considering asylum applications. INA 208(d)(1), 8 U.S.C. 1158(d)(1). Commenters claimed that allowing for the pretermission of asylum applications does not satisfy this required procedure and is an ''unreasonable interpretation'' of the statute.

Commenters stated that the rule violates section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), which states that ''[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.'' Commenters stated that the rule violates this requirement by ''requiring immigration judges to abandon their essential function of examining the noncitizen about their application for relief.''

Similarly, commenters stated that the rule violates section 240(b)(4)(B) of the Act, 8 U.S.C. 1229a(b)(4)(B), which states that ''the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.'' Commenters believe the rule violates this provision because it denies aliens the ability to present and examine evidence on their own behalf, including their own credible testimony.

Finally, commenters stated that the rule violates section 240(c)(4) of the Act, 8 U.S.C. 1229a(c)(4), which states that, inter alia, ''the immigration judge shall weigh the credible testimony along with other evidence of record'' when determining whether an alien has met his or her burden of proof on an application for relief. INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B).

Commenters also disagreed with the Departments that allowing pretermission of applications would not conflict with the legislative history of IIRIRA. *See* 85 FR at 36277 n.26 (noting statements in H.R. Rep. No. 104–469, part 1 (1996) regarding balancing the need for the alien to provide sufficient information on the application with the need for the alien's application to be timely). Commenters stated that the rule creates additional burdens for aliens with regard to submission and preparation of the Form I–589.

Response: Allowing pretermission of asylum applications in the manner set out in this rule does not violate the INA. As an initial point, the regulations have long allowed immigration judges to pretermit asylum applications when certain grounds for denial exist. *See* 8 CFR 1240.11(c)(3).[27] Additionally, courts have affirmed the pretermission of legally deficient asylum applications. *See, e.g., Zhu* v. *Gonzales,* 218 F. App'x 21, 23 (2d Cir. 2007) (''Here, the IJ alerted Zhu early in the proceedings that his asylum claim might be pretermitted if he failed to illustrate a nexus to a protected ground, and granted him a 30-day continuance in which to submit a brief addressing the nexus requirement. When Zhu had neither submitted a brief, nor requested an extension of the deadline, after nearly 60 days, the IJ acted within his discretion in pretermitting the asylum claim.''). As discussed further below, the pretermission of legally deficient asylum applications is consistent with existing law, and immigration judges already possess authority to take any action consistent with their authorities under the law that is appropriate and necessary for the disposition of cases, 8 CFR 1003.10(b), to generally take any appropriate action consistent with applicable law and regulations, *id.* 1240.1(a)(1)(iv), and to regulate the course of a hearing, *id.* 1240.1(c). Accordingly, the authority of an immigration judge to pretermit an asylum application is well-established even prior to the proposed rule.[28]

[25] For further discussion of the intersection of the rule and the TVPRA, see section II.C.6.10.

[26] This includes applications filed in connection with a motion to reopen on or after the effective date of the rule or applications filed on or after the effective date of the rule after proceedings have been reopened or recalendared.

[27] The text of 8 CFR 1240.11(c)(3) references, *inter alia,* the mandatory denial of an asylum application pursuant to 8 CFR 1208.14. In turn, 8 CFR 1208.14(a) references 8 CFR 1208.13(c), which lists the specific grounds for the mandatory denial of an asylum application, including those listed in INA 208(a)(2) and (b)(2) (8 U.S.C. 1158(a)(2) and (b)(2)). Some of those grounds may require a hearing to address disputed factual issues, but some involve purely legal questions—*e.g.* INA 208(b)(2)(A)(ii) and (B)(i) (8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i)) (an alien convicted of an aggravated felony is ineligible for asylum)—and, thus, may be pretermitted without a hearing.

[28] The National Association of Immigration Judges (''NAIJ''), the union which formerly represented non-supervisory immigration judges, opposed the rule on general grounds but did not take a position on this specific provision. A. Ashley Tabadorr, *Comment by the National Association of Immigration Judges,* (July 15, 2020), *https://www.naij-usa.org/images/uploads/newsroom/*

Further, regarding sections 208(a)(1) and 208(d)(1) of the Act, 8 U.S.C. 1158(a)(1) and (d)(1), nothing in the rule regarding the pretermission of applications affects the ability of aliens to apply for asylum, and this rule adds to the already robust procedures in place for the consideration and adjudication of applications for asylum. Instead, pretermission establishes an efficiency for the adjudication of applications for asylum that have been submitted for consideration and is utilized in a similar fashion as summary decision is used in other DOJ immigration-related proceedings, *see* 28 CFR 68.38, and as summary judgment is used in Federal court proceedings, *see* Fed. R. Civ. P. 56.

Similarly, pretermission of asylum applications in the manner set out in this rule does not violate any provision of section 240 of the Act, 8 U.S.C. 1229a. First, section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), authorizes immigration judges to ''interrogate, examine, and cross-examine the alien and any witnesses'' but does not establish a mandatory requirement for them to do so in every case on every application or issue. Further, it is settled law that immigration judges may pretermit applications for relief in other contexts. *See, e.g., Matter of J–G–P–,* 27 I&N Dec. 642, 643 (BIA 2019) (explaining that the immigration judge granted DHS's motion and pretermitted the respondent's application for cancellation of removal due to the respondent's disqualifying criminal conviction); *Matter of Moreno-Escobosa,* 25 I&N Dec. 114 (BIA 2009) (reviewing questions of eligibility for a waiver of inadmissibility under former section 212(c) of the Act (8 U.S.C. 1182(c) (1994)) following an immigration judge's pretermission of the respondent's application). Second, the rule allows the applicant a ''reasonable opportunity'' to present evidence on his or her own behalf before pretermission as an immigration judge would not pretermit an application without either the time expiring for the alien to respond to DHS's motion or the judge's notice. Similarly, the alien would be afforded the opportunity to present evidence, including written testimony, on their own behalf prior to an immigration judge's decision to pretermit an application, in accordance with section 240(b)(4)(B) and (c)(4) of the Act, 8 U.S.C. 1229a(b)(4)(B) and (c)(4).

Regarding the legislative history of IIRIRA, the Departments find that allowing pretermission in the manner set out in the proposed rule and this final rule does not conflict with the legislative history of IIRIRA. First, regarding the statement in the House report cited in the proposed rule, the Departments note that at that point, the House legislation would have imposed a 30-day filing deadline for asylum applications. *See* H.R. Rep. No. 104–469, pt. 1, at 259 (1996). Accordingly, the Departments find that congressional statements suggesting lower requirements for specificity in an asylum application were based on a concomitant suggestion that an application should be filed within 30 days and were correspondingly obviated by the longer one-year filing deadline ultimately enacted by IIRIRA. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Second, there is no discussion in the IIRIRA conference report that similarly encourages a condensed application for the sake of expediency. *See generally* H.R. Rep. No. 104–828 (1996) (conference report). Finally, the Departments reiterate that, as stated in the proposed rule, the alien would only be expected to provide ''enough information to determine the basis of the alien's claim for relief and if such a claim could be sufficient to demonstrate eligibility.'' 85 FR at 36277 n.26. Indeed, the Departments expect that aliens who complete the Form I–589, Application for Asylum and for Withholding of Removal, in accordance with the instructions and provide all information requested by the form would provide sufficient information for the prima facie determination, just as it does in the context of a motion to reopen. *See INS* v. *Abudu,* 485 U.S. 94, 104 (1988) (''There are at least three independent grounds on which the BIA may deny a motion to reopen. First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought.'') Further, an alien would be able to provide additional information as desired in response to the DHS motion or immigration judge notice regarding possible pretermission. In short, a requisite prima facie showing for an asylum application is not an onerous burden, and the Departments disagree with the commenter that allowing pretermission presents any additional mandatory burden on the alien beyond that which is already required by the asylum application itself.

3.2.2. Pretermission and the Regulations

Comment: Commenters stated that allowing pretermission of applications in the manner set out in the proposed rule violates the other regulatory provisions, including 8 CFR 1240.1(c), 8 CFR 1240.11(c)(3), and 8 CFR 1240.11(c)(3)(iii). Regarding 8 CFR 1240.1(c) (''The immigration judge shall receive and consider material and relevant evidence . . . .''), commenters noted that pretermission would foreclose consideration of an asylum seeker's testimony, which is often one of the most important pieces of evidence, as well as witness testimony. Regarding 8 CFR 1240.11(c)(3) (''Applications for asylum and withholding of removal so filed will be decided by the immigration judge . . . after an evidentiary hearing to resolve factual issues in dispute.''), commenters emphasized the regulation's requirement that an immigration judge's decision be made ''after an evidentiary hearing'' and noted that the factual and legal issues in an asylum claim are often interconnected. Regarding 8 CFR 1240.11(c)(3)(iii) (''During the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf''), commenters stated that pretermission would deprive the alien of the opportunity to meet his or her burden of proof through testimony, which may be sufficient for the alien to sustain the burden of proof without corroboration.

Commenters stated that allowing pretermission would make into surplusage the provisions of the regulations regarding the authority of the immigration judge to consider evidence (8 CFR 1240.11(c) and control the scope of the hearing (c)(3)(ii)).

Response: Allowing pretermission of asylum applications that fail to demonstrate a prima facie claim for relief or protection in the manner set out in the proposed rule and this final rule does not violate other provisions of the Departments' regulations. As stated in the proposed rule, ''[n]o existing regulation requires a hearing when an asylum application is legally deficient.'' 85 FR at 36277. Commenters' arguments to the contrary misconstrue the regulatory framework. The Departments agree that an alien's testimony may be important evidence for a case. *See, e.g., Matter of Mogharrabi,* 19 I&N Dec. 439, 445 (BIA 1987) (''The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and

2020.07.15.00.pdf (''NAIJ's comment to the proposed rulemaking takes no position on what the law should be or how it is to be interpreted.''). Nevertheless, individual immigration judges have, on occasion, pretermitted legally-deficient asylum applications even prior to the issuance of the proposed rule.

coherent account of the basis for his fear.'').[29] But in cases where it is clear from the fundamental bases of the alien's claim that the claim is legally deficient and the alien will not be able to meet his or her burden of proof, regardless of the additional detail or specificity that the alien's testimony may provide, such testimony is not material or relevant and is not needed for the judge to be able to make a determination that the application is legally insufficient.[30]

Further, the rule does not conflict with the specific regulatory sections cited by the commenters. To the contrary, as discussed, *supra,* the rule is fully consistent with an immigration judge's existing authority to take any action consistent with their authorities under the law that is appropriate and necessary for the disposition of cases, 8 CFR 1003.10(b), to generally take any appropriate action consistent with applicable law and regulations, *id.* 1240.1(a)(1)(iv), and to regulate the course of a hearing, *id.* 1240.1(c). Further, the rule does not affect the instruction at 8 CFR 1240.1(c) for immigration judges to consider material and relevant evidence. If a case presents a prima facie claim, the case will proceed through the adjudicatory process consistent with current practice, including the submission and consideration of whatever material and relevant evidence is included in the record. Similarly, in that adjudication, the alien would be examined and allowed to present evidence and witnesses, consistent with 8 CFR 1240.11(c)(3)(iii). Finally, those applications that present a prima facie claim will proceed to an evidentiary hearing to resolve those factual and legal issues presented by the alien's claim. *See* 8 CFR 1240.11(c)(3). Accordingly, pretermission works to supplement the existing regulations; it does not conflict with them, nor does it render them surplusage.

3.2.3. Pretermission and BIA Case Law

Comment: Commenters stated that allowing immigration judges to pretermit and deny asylum applications violates *Matter of Fefe,* 20 I&N Dec. 116 (BIA 1989), and *Matter of Ruiz,* 20 I&N Dec. 91 (BIA 1989). Commenters disagreed with the Departments' distinguishing *Matter of Fefe* in the proposed rule by noting that the underlying regulations interpreted by the BIA in *Matter of Fefe* are no longer in effect. *See* 85 FR at 36277. Instead, commenters stated that both the BIA and the Federal courts have noted that the current regulations at 8 CFR 1240.11 are substantially similar to the regulations at issue in *Matter of Fefe. See Matter of E–F–H–L–,* 26 I&N Dec. 319, 323 (BIA 2014) (noting that the current regulatory ''language does not differ in any material respect from that in the prior regulations''), *vacated by* 27 I&N Dec. 226, 226 (A.G. 2018); *Oshodi* v. *Holder,* 729 F.3d 883, 898 (9th Cir. 2013) (''We reaffirm our holding, and the BIA's own rule, that an applicant's oral testimony is 'an essential aspect of the asylum adjudication process' and the refusal to hear that testimony is a violation of due process.'') (citing *Matter of Fefe,* 20 I&N Dec. at 118).

Response: As stated in the proposed rule, the Departments find that intervening changes to the regulations since its publication and the Attorney General's vacatur of *Matter of E–F–H–L–* have superseded the BIA's holding in *Matter of Fefe.* 85 FR at 36277. The BIA's statement in *Matter of E–F–H–L–* that the current regulations ''do not differ in any material respect'' from those in effect in 1989 was simply not accurate, and the Departments find that the regulations today create a substantively different framework for adjudications than the regulations in 1989. Notably, the earlier regulations contained a general requirement that all applicants be examined in person by an immigration judge or asylum officer prior to the application's adjudication. 8 CFR 208.6 (1988). Today, however, the regulations provide direct examples of times when no hearing on an asylum application is required: If no factual issues are in dispute and once the immigration judge has determined that the application must be denied pursuant to the mandatory criteria in 8 CFR 1208.14 or 1208.16. *See* 8 CFR 1240.11(c)(3) (''An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.'').

The procedures at 8 CFR part 208 at issue in *Matter of Fefe* were first amended in 1990. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 FR 30674 (July 27, 1990) (final rule); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 FR 11300 (Apr. 6, 1988) (proposed rule). At that time, the Department clearly indicated that the purpose of the amendments[31] was to allow immigration judges and the BIA greater flexibility to ''limit the scope of evidentiary hearings . . . to matters that are dispositive of the application for relief.'' 53 FR at 11301. The Department of Justice explained that, ''[i]f it is apparent upon the record developed during a proceeding that the alien is clearly ineligible for asylum or withholding of deportation, the Immigration Judge will be permitted to forego a further evidentiary hearing on questions extraneous to the decision, thus avoiding unnecessary and time consuming factual hearings on nondispositive issues.'' *Id.*

Despite the BIA's statements opining on the similarity of 8 CFR 1240.11(c) and 8 CFR 236.3 and 242.17 (1988)—which, as stated elsewhere have been vacated by the Attorney General—the Departments find that there are clear procedural differences between a general requirement to conduct a hearing and regulations that establish clear exceptions to a hearing requirement. In short, the Board's decisions in *Matter of Fefe* and *Matter of E–F–H–L–,* in light of subsequent legal developments, simply do not stand for the propositions advanced by some commenters. *See Ramirez* v. *Sessions,* 902 F.3d 764, 771 n.1 (8th Cir. 2018) (''The current relevance of [*Matter of Fefe* and *Matter of E–F–H–L–*] is questionable. The regulations applied in *Matter of Fefe* were later rescinded and replaced. Further, *Matter of E–F–H–L–,* which reaffirmed *Matter of Fefe,* was vacated [by the Attorney General] after the petitioner withdrew his application.'').

[29] Nevertheless, despite commenters' statements, the Departments emphasize that while an alien's testimony *may* be sufficient to meet his or her burden of proof on its own, such testimony must be ''credible,'' ''persuasive,'' and refer to sufficient specific facts.'' INA 240(c)(4)(B) (8 U.S.C. 1229(c)(4)(B)). Otherwise, the immigration judge may determine that the alien should provide corroborative evidence unless the alien can demonstrate that he or she does not have and cannot reasonably obtain the evidence. *Id.; see also Matter of E–P–,* 21 I&N Dec. 860, 862 (BIA 1997) (a finding of credible testimony is not dispositive as to whether asylum should be granted).

[30] The Departments also note that an alien may proffer written testimony as part of his or her response to either the DHS motion or judge's notice regarding pretermission.

[31] The amended regulatory provisions at 8 CFR 236.3, which regarded exclusion proceedings, and 8 CFR 242.17, which regarded deportation proceedings, are the precursors to current regulatory sections 8 CFR 1240.33 and 8 CFR 1240.49. *Cf.* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 450 (Jan. 3, 1997) (discussing the relocation of ''old regulations which are still applicable to proceedings commenced prior to April 1, 1997 . . . to new parts of the regulations as separate subtopics''). Current 8 CFR 1240.11(c)(3) in turn follows this approach for the consideration of asylum applications during removal proceedings under section 240 of the Act (8 U.S.C. 1229a).

Further, even if the regulation conflicted with a prior interpretation by the BIA, the Attorney General, consistent with his authority to interpret the INA, may still issue the rule. INA 103(g), 8 U.S.C. 1103(g). The Departments are not bound by prior judicial interpretations of the Departments' own regulations, as such interpretations are not interpretations of the INA's statutory requirements.

Matter of Ruiz, is also distinguishable. There, the BIA held that an immigration judge could not require an alien who sought to reopen proceedings conducted in absentia to demonstrate a prima facie eligibility for asylum in conjunction with the motion to reopen. *Matter of Ruiz,* 20 I&N Dec. at 93. Instead, the BIA held that the alien must demonstrate a ''reasonable cause for his failure to appear.'' *Id.* But the change in the rule here—which allows immigration judges to pretermit and deny asylum applications that fail to demonstrate a prima facie claim for relief or protection—has no connection to what aliens must demonstrate in order to reopen a hearing conducted in absentia. The in absentia requirements are separately set out by the Act and regulations. *See* INA 240(b)(5)(C)(i)–(ii), 8 U.S.C. 1229a(b)(5)(C)(i)–(ii) (providing conditions for rescinding an in absentia removal order based on a motion to reopen); 8 CFR 1003.23(b)(4)(ii). There is no separate requirement to demonstrate further eligibility for any application for relief, consistent with *Matter of Ruiz.* Further, the equivalent statutory right to former section 236(a) of the Act, 8 U.S.C. 1226(a), which was at issue in *Matter of Ruiz,* is the alien's rights in a proceeding under section 240(b)(4) of the Act, 8 U.S.C. 1229(b)(4), which, as discussed above, are not violated by allowing an immigration judge to pretermit and deny applications that fail to demonstrate a prima facie claim for relief or protection.

3.2.4. Additional Concerns Regarding Pretermission

Comment: Multiple commenters expressed concern that the rule would allow immigration judges to dismiss asylum claims without a hearing, denying applicants the opportunity to appear in court and offer testimony. Commenters emphasized that the rule is ''extremely problematic'' from a due process perspective and violates aliens' Fifth Amendment due process rights. In support, commenters cited to case law discussing the right to testify and finding due process violations when that right is curtailed or limited. *See, e.g., Atemnkeng* v. *Barr,* 948 F.3d 231, 242 (4th Cir. 2020) (holding that there was a due process violation where the immigration judge deprived an asylum applicant of the opportunity to testify on remand). Commenters emphasized a quote from the chair of the American Immigration Lawyers Association's asylum committee stating that ''the pretermission authority was the most striking attack on due process in the proposal,'' and noting that some immigration judges already have denial rates of 90 percent or higher.

Response: The commenters appear to misconstrue both the nature of the rule and the difference between issues of fact and issues of law. None of the examples provided by commenters involved situations in which an immigration judge pretermitted an application as legally deficient; rather, they involve situations in which an immigration judge initially allowed testimony but then cut-off questioning—or, in one case, disallowed testimony altogether—following a remand. In other words, the posture of the examples cited by commenters is one in which an alien had already demonstrated a prima facie case, making those examples inapposite to the rule. Commenters did not provide any examples where a properly supported legal pretermission—by itself—was found to be a due process violation, nor did commenters explain how analogous summary-decision or summary-judgment provisions in other contexts—*e.g.* 28 CFR 68.38 or Fed. R. Civ. P. 56—remain legally valid even though they, too, curtail an individual's ability to testify or introduce evidence in proceedings. In short, the commenters' concerns appear unconnected to the actual text of the rule and the applicable law.

The Departments disagree that allowing immigration judges to pretermit and deny asylum applications that do not show a prima facie claim for relief would violate applicants' due process rights. The essence of due process is notice and an opportunity to be heard. *See LaChance,* 522 U.S. at 266. Nothing in the rule eliminates notice of charges of removability against an alien, INA 239(a)(1), 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), or on appeal, 8 CFR 1003.38.

In addition, the rule would not require or expect aliens to meet their ultimate burden of proof to avoid pretermission; instead, the alien must only (per one common definition of ''prima facie'') ''establish a fact or raise a presumption, unless disproved or rebutted.'' *Black's Law Dictionary* (11th ed. 2019); *cf. Tilija* v. *Att'y Gen.,* 930 F.3d 165, 171 (3d Cir. 2019) (''To establish a prima facie claim, the movant 'must produce objective evidence that, when considered together with the evidence of record, shows a reasonable likelihood that he is entitled to [asylum] relief.''' (citation omitted)). Further, the rule ensures the alien has an opportunity to respond to either the DHS motion or the judge's notice regarding pretermission and provide the court with additional argument or evidence, including proffered written testimony, in support of the alien's application.

Comment: Commenters emphasized that asylum seekers are vulnerable and often unrepresented and noted the low rates of representation for aliens in the Migrant Protection Protocols (''MPP'') in particular. Because many asylum seekers do not speak English, it is often difficult for them to navigate the complexities of the immigration system. Commenters specifically noted that it is hard for detained, unrepresented individuals to complete asylum applications because they are often required to use ''unofficial translators'' with whom they are not comfortable sharing personal information. Commenters stated that the immigration judge's consideration of an alien's response to the judge's notice or DHS motion regarding pretermission does not alleviate the commenters' concerns. Commenters argued that the same language barriers and other vulnerabilities would apply to both the response and the underlying Form I–589 application; thus, they contend, a response alone does not provide a ''meaningful opportunity'' to address misunderstandings or fully engage with the judge or DHS.

Response: As an initial point, the commenters' assertion of a low rate of representation is inaccurate. The Departments note that a large majority (85 percent at the end of FY2020) of those asylum seekers who are in proceedings before DOJ—and who, in turn, could have an immigration judge pretermit their asylum applications—are represented in proceedings. EOIR, *Adjudication Statistics: Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download.* Second, while the Departments agree with commenters that many asylum seekers' first or preferred language is a language other than English, the Departments find that it is reasonable to expect aliens to utilize translators or other resources in order to complete the Form I–589 application in accordance with the regulations and instructions, which

require that the form be completed in English. *See* 8 CFR 208.3(a), 1208.3(a) (noting that an applicant must file an I–589 ''in accordance with the instructions on the form''); Form I–589, Application for Asylum and for Withholding of Removal, Instructions, 5 (Sept. 10, 2019), *https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf* (''Your answers must be completed in English.''). Moreover, existing regulations already require that foreign-language submissions be translated into English, *see* 8 CFR 103.2(b)(3), 1003.33, so it is unclear how a non-English-speaking alien could submit evidence without a translator in any case.

The Departments thus disagree that aliens would be unable to answer the questions on the Form I–589 with enough specificity to make a prima facie claim for relief or protection. The Departments further note that aliens whose applications are deficient will be able to provide additional argument or evidence in response to either DHS's motion to pretermit or the judge's sua sponte notice. *See* 8 CFR 1208.13(e) (as amended). Despite commenters' concerns that this process is insufficient, this is the same process that is regularly used in immigration court, including other times when an alien's ability to seek a particular form of relief may be foreclosed by DHS filing a motion to pretermit. 85 FR at 36277.

Comment: Commenters stated that allowing immigration judges to pretermit applications would violate the duty of the immigration judge under the Act and the regulations to develop the record, particularly for cases where the alien appears pro se and for cases involving UACs. *See, e.g., Jacinto* v. *I.N.S.,* 208 F.3d 725, 734 (9th Cir. 2000) (''[U]nder the statute and regulations previously cited, and for the reasons we have stated here, immigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel . . . .'').

Response: Allowing immigration judges to pretermit and deny asylum applications that do not demonstrate a prima facie claim for relief or protection does not violate the immigration judge's responsibility to develop the record. Instead, the rule comports with this duty by requiring immigration judges to provide notice and an opportunity to respond before pretermitting any application. Such notice should provide the parties with information regarding the judge's concerns, and should elicit relevant information in response. Similarly, in the context of DHS motions to pretermit, the immigration judge would consider the alien's response to the motion and may solicit additional information, if needed, for review.

Comment: Commenters stated that pretermission conflicts with adjudication guidance in UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status,* which provides that, ''while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.'' UNHCR, *Handbook On Procedures and Criteria for Determining Refugee Status,* ¶ 196 (1979) (reissued Feb. 2019), *https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.* As a result, commenters stated that allowing immigration judges to pretermit and deny applications that do not demonstrate a prima facie claim does not meet the United States' international obligations and does not align with congressional intent to follow the Refugee Convention.

Response: Commenters' reliance on guidance from UNHCR is misguided. UNHCR's interpretations of (or recommendations regarding) the Refugee Convention and Protocol, including the UNHCR Handbook, are ''not binding on the Attorney General, the BIA, or United States courts.'' *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 427 (1999). ''Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28 (citation and internal quotations omitted). Further, to the extent such guidance ''may be a useful interpretative aid,'' *id.* at 427, it would apply only to statutory withholding of removal, which is the protection that implements Article 33 of the Convention. *Cf. R–S–C* v. *Sessions,* 869 F.3d 1176, 1188, n.11 (10th Cir. 2017) (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''). And although the rule would allow pretermission of Form I–589 applications submitted for withholding of removal or CAT protection, such pretermission does not necessarily constrict or limit the population of aliens that may qualify for such protection. Instead, it simply provides an efficiency for the adjudication of those claims that do not demonstrate a baseline prima facie eligibility for relief.

Comment: Commenters emphasized that the rule forces the entire eligibility decision to be based on the Form I–589 and supporting documents, noting that this could be problematic if the applicant does not initially possess all of the necessary documentation. Commenters also claimed that pretermitting an application while the individual is still working to gather paperwork would be ''grossly unfair'' and contended that, if the rule is adopted, it must provide a ''working period'' after submission during which an application cannot be pretermitted. Commenters also noted that unrepresented individuals may have their applications terminated prior to finding representation who could help them supplement an application that was originally lacking or insufficient.

Other commenters noted that there are many cases that initially appear to lack eligibility but later qualify for asylum after testimony is taken and additional facts are uncovered. Commenters referenced *Matter of Fefe,* 20 I&N Dec. 116, and *Matter of Mogharrabi,* 19 I&N Dec. 443, noting that there are often discrepancies between the written and oral statements in an asylum application that can only be resolved through direct examination.

Response: Commenters again appear to misstate the rule, to misunderstand the difference between issues of fact and issues of law, and to misunderstand the difference between a prima facie legal showing and a full consideration of the merits of a case. The rule requires simply a prima facie case for relief; it does not require that every factual assertion be supported by additional corroborative evidence. If the alien's application for relief states sufficient facts that could support his or her claim for relief or protection, the immigration judge would not pretermit the application solely because some additional documentation is still being gathered.[32] Accordingly, the

[32] Many commenters raised this issue specifically for particular social group asylum claims, noting the fact-intensive nature of the social distinction element—*i.e.,* that it be recognized by the society in question—required for such groups. *See S.E.R.L.,* 894 F.3d at 556 (''And that must naturally be so, once it is given that social distinction involves proof of societal views. What those views are and how they may differ from one society to another are questions of fact''). The Departments recognize that situations in which particular social group asylum claims may be pretermitted due to a failure to make a prima facie showing of the social distinction element are likely to be rare. Nevertheless, the

Departments disagree that a minimum ''working period'' before which an application may not be pretermitted is needed.

Regarding applications that at first appear insufficient but are later bolstered through additional information, the Departments again emphasize that the rule provides the alien with the opportunity to respond to either the DHS motion or the judge's notice regarding pretermission. The Departments expect that such a response would be used to provide additional information, which the immigration judge would consider prior to making any final determination regarding pretermission. Moreover, in both *Matter of Fefe* and *Matter of Mogharrabi,* there was no question about whether the alien had stated a prima facie claim. In the former, the immigration judge raised doubts over the alien's credibility—not over the legal basis of the claim—that were not resolved because the alien did not testify. In the latter, the Departments see no indication that the alien could not have stated a prima facie claim.

Finally, an immigration judge may only pretermit an application that is legally deficient. Thus, the gathering of additional facts that do not bear on the legal cognizability of the claim—for example, gathering the specific names of every speaker at a political rally—is not required by the rule to avoid pretermission.

Comment: Commenters also criticized the 10-day notice period, claiming it is ''unreasonably short,'' especially considering the COVID–19 pandemic.

Response: The 10-day period is consistent with current EOIR practice, where it has worked well. *See* EOIR, *Immigration Court Practice Manual* at D–1 (July 2, 2020), *https://www.justice.gov/eoir/page/file/1258536/download.* The Departments disagree that the current COVID–19 situation affects the reasonableness of the 10-day deadline as filings can be submitted by mail and, in some locations, online. *See* EOIR, *Welcome to the EOIR Courts & Appeals System (ECAS) Information Page, https://www.justice.gov/eoir/ECAS.* Further, if an immigration court location is unexpectedly closed on the day of the deadline, the deadline is extended until the immigration court reopens. *See* EOIR, *PM 20–07: Case Management and Docketing Practices,* 2 n.1 (Jan. 31, 2020), *https://www.justice.gov/eoir/page/file/1242501/download.* Moreover, many non-detained hearings continue to be postponed due to COVID–19 rendering deadlines largely malleable until hearings resume.

Comment: Commenters alleged that the rule would result in a higher rate of pretermission for unrepresented individuals because these applicants would be unfamiliar with the ''magic language'' needed to survive a motion to pretermit. As a result, commenters claimed that the rule violates the Fifth and Sixth Amendments, and concurrently violates section 240(b)(4)(A) and (B) of the Act, 8 U.S.C. 1229a(b)(4)(A) and (B).[33]

Response: Commenters are incorrect that the rule violates an alien's right to counsel under section 240(b)(4)(A) of the Act, 8 U.S.C. 1229a(b)(4)(A), and the Sixth Amendment. First, section 240(b)(4)(A) of the Act, 8 U.S.C. 1229a(b)(4)(A), provides that aliens ''shall have the privilege of being represented, at no expense to the government, by counsel of the alien's choosing who is authorized to practice in such proceedings.'' No provision of this rule would limit an alien's ability to obtain representation as provided by the INA. Second, the Sixth Amendment right to counsel does not apply in immigration proceedings, which are civil, not criminal, proceedings. *See, e.g., Tawadrus* v. *Ashcroft,* 364 F.3d 1099, 1103 (9th Cir. 2004).[34]

Commenters are similarly incorrect that the rule violates the equal protection component of the Fifth Amendment's Due Process Clause because unrepresented aliens will be more likely to have asylum applications pretermitted than similarly situated represented aliens. First, commenters' concerns that the rule will have a disparate impact are speculative. Second, similar procedures in other civil proceedings—such as the summary decision procedures of 28 CFR 68.38 or summary judgment under the Federal Rules of Civil Procedure—do not violate the Fifth Amendment. Third, even if the commenters were correct that the rule has a discriminatory impact, the Departments find it would not violate the Fifth Amendment's equal protection guarantee because the rule does not involve a suspect classification or burden any fundamental right. *See Heller* v. *Doe,* 509 U.S. 312, 319 (1993) (holding that ''a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity'').

Allowing the pretermission of applications would enhance judicial efficiency by no longer requiring a full hearing for applications that are legally deficient on their face. There continue to be record numbers of both pending cases before EOIR[35] and asylum applications[36] filed annually. Accordingly, the Departments seek to most efficiently allocate EOIR's limited adjudicatory capacity in order to decide cases in a timely manner, including granting relief to aliens with meritorious cases as soon as possible. Accordingly, there is at least a rational basis for allowing pretermission of asylum applications in this manner. *Cf. DeSousa* v. *Reno,* 190 F.3d 175, 184 (3d Cir. 1995) (''[D]isparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. . . . Under this minimal standard of review, a classification is accorded 'a strong presumption of validity' and the government has no obligation to produce evidence to sustain its rationality.'' (internal citations omitted)).

Comment: Commenters also alleged that the pretermission of asylum applications is incompatible with federally established pleading standards

immutability and particularity requirements are not necessarily factbound—though they may be in discrete cases—and the failure of an alien to make a prima facie showing that a proposed particular social group consists of a characteristic that is immutable (or fundamental) or is defined with particularity may warrant pretermission of the claim in appropriate cases.

[33] Commenters did not provide further explanation regarding how the rule allegedly violates section 240(b)(4)(B) of the Act (8 U.S.C. 1229a(b)(4)(B)), which provides that: The alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter. This rule does not affect any procedures that relate to aliens' rights under this provision of the INA, and, accordingly, the Departments need not respond further to this point.

[34] Although the Sixth Amendment's right to counsel does not apply in immigration proceedings, some courts have held that a constitutional right to counsel in immigration proceedings applies as part of the Fifth Amendment's due process clause. *See, e.g., Arrey* v. *Barr,* 916 F.3d 1149, 1157 (9th Cir. 2019) (''Both Congress and our court have recognized the right to retained counsel as being among the rights that due process guarantees to petitioners in immigration proceedings.''). Nevertheless, neither the proposed rule nor this final rule violates such a right to counsel as the rule does not amend any procedures related to an alien's right to obtain counsel of his or her choosing at no government expense.

[35] EOIR, *Adjudication Statistics: Pending Cases* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1242166/download* (1,122,697 pending cases as of the second quarter of FY2020)

[36] EOIR, *Adjudication Statistics: Total Asylum Applications* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1106366/download* (120,495 asylum applications filed as of the second quarter of FY2020).

and ''would be an abrupt change from decades of precedent and practice before the immigration court.'' Commenters provided a hypothetical chain of events to illustrate this alleged violation of pleading standards and cited to *Braden* v. *Wal-Mart Stores, Inc.,* 588 F.3d 585, 594 (8th Cir. 2009) (citing *Ashcroft* v. *Iqbal,* 556 U.S. 662, 678 (2009) and *Bell Atl. Corp.* v. *Twombly,* 550 U.S. 554, 556 (2007)).

Response: The Federal Rules of Civil Procedure do not apply in immigration court. *See* Fed. R. Civ. P. 81 (setting out the applicability of the rules); *see also* 8 CFR part 1003, subpart C (setting out the immigration court rules of procedure). Accordingly, commenters' reliance on cases that interpret Rule 8(a) of the Federal Rules of Civil Procedure are not applicable to immigration court. Moreover, the commenters' comparisons to a pleading standard are inaccurate as the decision to pretermit an application is akin to a summary judgment decision, not a pleading determination. *Cf.* F.R. Civ. P. 56 (''The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.''). In order to ensure the immigration judge has as much information as possible about the underlying claim, the rule ensures the applicant has the opportunity to respond to the possible pretermission of his or her application, either as a response to a DHS motion to pretermit or a response to the immigration judge's notice of possible pretermission.

Comment: Commenters contended that the rule, in combination with the Immigration Court Performance Metrics, incentivizes immigration judges to pretermit asylum applications in order to fulfill case completion requirements.

Response: The Departments strongly disagree with the commenters' underlying premise, namely that immigration judges are unethical or unprofessional and decide cases based on factors other than the law and the facts of the cases. Immigration judges exercise ''independent judgment and discretion'' in deciding cases, 8 CFR 1003.10, and are expected to ''observe high standards of ethical conduct, act in a manner that promotes public confidence in their impartiality, and avoid impropriety and the appearance of impropriety in all activities,'' EOIR, *Ethics and Professionalism Guide for Immigration Judges* at 1 (2011), *https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.* Further, it is well-established that ''[t]he administrative process is entitled to a presumption of regularity,'' *Int'l Long Term Care, Inc.* v. *Shalala,* 947 F. Supp. 15, 21 (D.D.C. 1996), and commenters provide no evidence for the bald assertion that immigration judges will ignore applicable law and the evidence in each case simply in order to pretermit the case. *See also United States* v. *Chemical Found.,* 272 U.S. 1, 14–15 (1926) (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.''). To the contrary, in FY 2019, the first full FY after immigration judge performance measures went into effect, not only did most non-supervisory immigration judges working the full year meet the case completion measure without any difficulty, *see* EOIR, *Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019, https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019,* but complaints of immigration judge misconduct actually declined slightly from the prior FY, *see* EOIR, *Adjudication Statistics: Immigration Judge Complaints, https://www.justice.gov/eoir/page/file/1104851/download,* even though the total number of immigration judges increased 12 percent, *see* EOIR, *Adjudication Statistics: Immigration Judge Hiring, https://www.justice.gov/eoir/page/file/1242156/download.*

Allowing pretermission of Form I–589 applications that do not establish a prima facie claim for relief or protection under the law provides immigration judges with a mechanism to improve court efficiency by clarifying that there need not be a full merits hearing on those cases that present no legal questions for review, allowing them to devote more time to cases in which facts are at issue. There is no basis for the assumption that the rule would inappropriately incentivize immigration judges to pretermit applications solely to fulfill case-completion goals. As noted, *supra,* some immigration judges already pretermit legally deficient applications, and the Departments are unaware of any link between that action and performance metrics; in fact, immigration judges have pretermitted legally deficient asylum applications since at least 2012, *Matter of E–F–H–L–,* 26 I&N Dec. 319 (BIA 2014), which was several years before performance measures were implemented.

Moreover, assuming, *arguendo,* there were such an incentive, it would be counter-balanced by the performance measure for an immigration judge's remand rate. In other words, an immigration judge who improperly pretermitted applications in violation of the law solely in order to complete more cases would have those cases remanded by the Board on appeal which, in turn, would cause the immigration judge's remand rate to exceed the level set by the performance measures. In short, there is no legal, factual, or logical reason to believe that codifying an immigration judge's authority to pretermit legally deficient applications and the existence of immigration judge performance evaluations will incentivize immigration judges to violate the law in their decision making.

Comment: Commenters emphasized that asylum applications are governed by the law at the time of adjudication rather than the time of filing and expressed concern that the pretermission of applications for lack of a prima facie showing of eligibility forces immigration judges and asylum officers to become ''soothsayers.''

Response: Allowing immigration judges to pretermit and deny applications that do not present a prima facie claim for relief or protection does not conflict with this point. If the judge determines that pretermission is appropriate, that decision would be based on the law and regulations in place at that point, and the decision to pretermit is the adjudication of the application.

Comment: Commenters questioned the effect the rule will have on the asylum clock, especially if a decision affecting eligibility is abrogated by a higher court after an application was filed and pretermitted; one commenter expressed concern that the rule does not specify ''when in the process DHS or the judge can move.'' One commenter emphasized that ''[a]ny final rule which is eventually published should consider how the asylum clock will operate, and should provide clear instructions which attorneys and their clients can rely on.''

Response: The Departments note that USCIS recently published a final rule, Asylum Application, Interview, and Employment Authorization for Applicants, that eliminates the asylum clock.[37] However that rule is currently the subject of ongoing litigation and portions of the rule are subject to a preliminary injunction, as applied to two plaintiff organizations.[38] Regardless, as stated in the proposed rule, an immigration judge who

[37] 85 FR 38532, 39547.

[38] *Casa de Maryland* v. *Wolf,* No. 8:20–cv–02118–PX, 2020 WL 5500165, (D. Md. Sept. 11, 2020) (order granting preliminary injunction).

determines that an asylum application that fails to demonstrate prima facie eligibility for relief or protection under applicable law may ''pretermit and deny'' such application. *See* 8 CFR 1208.13(e). Accordingly, a decision to pretermit and deny would have the same asylum clock effects as any other denial of an asylum application by the immigration judge.

Comment: Commenters alleged that the rule would greatly decrease efficiency in the asylum process, as the number of cases in which a hearing is denied would ''skyrocket'' and the majority of these respondents would appeal to the BIA. Commenters noted the BIA's current backlog and the increased delay in issuing briefing schedules and decisions.

Response: Allowing immigration judges to pretermit and deny asylum applications that do not demonstrate a prima facie claim for relief or protection will increase, not decrease, efficiencies for DOJ. Commenters' predictions of how many cases will be pretermitted under these changes are speculation, as the Departments do not have data on the underlying bases for denials currently, which would be required to accurately predict how many might be pretermitted in the future. Moreover, as fewer than 20 percent of asylum applications are granted even with a full hearing, *see* EOIR, *Asylum Decision Rates, https://www.justice.gov/eoir/page/file/1248491/download,* and many of the ones not granted are appealed already, there is likely to be little operational impact on the BIA.[39] In contrast, pretermitting legally deficient claims will improve efficiency for immigration courts by allowing immigration judges to screen out cases that do not demonstrate prima facie eligibility and, thus, allowing potentially meritorious applications to progress more expeditiously to individual hearings.

Comment: One commenter noted that there are particular signatures on the asylum application which can only be signed by the applicant at the final hearing and claimed that pretermission is ''non-sensical'' because the application will not yet be complete.

Response: The Departments disagree with commenters' concerns that asylum applications may not be pretermitted because a signature is required by the applicant at the final hearing. The Departments believe that the commenters are referring to the signature in Part G of the Form I–589, which is most often signed by the alien at the beginning of the merits hearing on the alien's asylum application and in which the alien swears that the application's contents are true and acknowledges the consequences of submitting a frivolous application. Accordingly, the signature in Part G of the Form I–589 is related to a possible frivolousness finding and the attendant consequences.

Moreover, for the purposes of determining whether to pretermit an application, whether or not the immigration judge has had the applicant sign in Part G, the applicant signs in Part D at the time the application is completed. The signature in Part D is the alien's certification under penalty of perjury that the application and any evidence submitted with it are ''true and correct,'' in addition to another notice of the consequences of filing a frivolous application and other activities. Given the alien's signature in Part D that the application is ''true and correct,'' the Departments believe that the application is sufficient for the purposes of possible pretermission even without a signature in Part G.

Comment: Commenters stated that allowing pretermission will inevitably violate the confidentiality obligations for asylum applicants, speculating that the immigration judge, alien, and DHS counsel will engage in inappropriate conversations regarding the specifics of an asylum application in front of other people during master calendar hearings.

Response: With few exceptions, most immigration hearings are open to the public. 8 CFR 1003.27. Regulations further note that ''[e]videntiary hearings on applications for asylum or withholding of removal will be open to the public unless the alien expressly requests that the hearing be closed.'' 8 CFR 1240.11(c)(3)(i). A master calendar hearing is not an evidentiary hearing. *See Immigration Court Practice Manual,* ch. 4.15(a), *https://www.justice.gov/eoir/page/file/1258536/download* (''Master calendar hearings are held for pleadings, scheduling, and other similar matters.''). Further, an evidentiary hearing is designed to ''resolve factual matters in dispute,'' 8 CFR 1204.11(c)(3), which would necessarily exclude such a hearing from the ambit of pretermission. Accordingly, there is no reason that the specifics of an asylum application would be discussed at a master calendar hearing, and even if they were, an immigration judge may close the courtroom as appropriate to protect the parties. 8 CFR 1003.27(b).

Comment: Commenters noted that the Departments are required to comply with Executive Orders 12866 and 13653, which together direct agencies to evaluate the costs and benefits of alternative methods and to select the approach that maximizes net benefits. Commenters contended that the rule is ''wholly unconcerned'' with calculating the costs and benefits of the pretermission of asylum applications or reducing costs to Federal government agencies.

In particular, commenters expressed concern about costs of the rule possibly eliminating what the commenters referred to as the current, more flexible ''redlining'' procedure in favor of pretermission. The commenters explained that ''redlining'' allows the alien to update and edit the asylum application after it is filed ''up until the point of decision.''

Commenters disagreed that the rule will create efficiencies, arguing instead that the rule will ''increase administrative burden, expense, and processing time by effectively creating two distinct opportunities for appeals to the BIA, including: (1) Appeal from the IJ's decision to pretermit; and (2) appeal on the merits after the IJ's decision to pretermit is overturned.''

Response: The Office of Information and Regulatory Affairs, in conducting its review of the proposed rule, concluded that the Departments complied with Executive Orders 12866 and 13653, as set out in section V.D of the proposed rule. 85 FR at 36289–90. The Departments' consideration included all provisions of the proposed rule, including the changes to 8 CFR 1208.13 regarding pretermission of applications.

Further, as stated above, the Departments emphasize that allowing pretermission of applications will increase efficiencies by allowing immigration judges to complete the adjudication of certain legally insufficient asylum applications earlier in the process, which in turn leaves additional in-court adjudication time available for those applications that may be meritorious. This change would not prevent aliens from amending or updating applications that are pending a decision by the immigration judge, including a decision on pretermission. In addition, the Departments dispute the commenters' assumption that immigration judge decisions to pretermit an application will be overturned. Immigration judges apply the immigration laws and would only pretermit applications that fail to demonstrate a prima facie case for eligibility for relief—in other words, that the application could be sufficient to establish eligibility for relief. Applications that are facially deficient

[39] The Departments note that DOJ has also recently taken steps to improve adjudicatory efficiency at the BIA. *See* EOIR, *Case Processing at the Board of Immigration Appeals* (Oct. 1, 2019), *https://www.justice.gov/eoir/page/file/1206316/download.*

in this manner would not comply with the applicable law and regulations, and, as such, the Departments would not expect such decisions to be overturned on appeal.

4. Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal [40]

4.1. Membership in a Particular Social Group

Comment: One organization noted generally that the rule denies asylum to individuals fleeing violence and persecution. Commenters noted that the inclusion of ''particular social group'' in the statute was designed to create flexibility in the refugee definition so as to capture individuals who do not fall within the other characteristics enumerated in section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), and to ensure that the United States provides protection in accordance with its treaty obligations. Commenters argued that the rule's narrowing of particular social group has been rejected by the Federal courts as contrary to congressional intent to align U.S. refugee law with the Convention relating to the Status of Refugees and its 1967 Protocol. *See Flynn* v. *Sec'y of Health, Ed. & Welfare,* 344 F. Supp. 94, 96 (E.D. Wis. 1972). Another organization stated that, by denying the most common grounds of particular social group membership, the rule ''abridges U.S. obligations under the Refugee Convention . . . which affords asylum seekers the opportunity to explain why they fit into a protected group.'' The organization also claimed that the rule breaches the United States' commitment to nonrefoulement, noting that the United States has committed itself to this principle as a party to the Refugee Protocol, the CAT, and customary international law. Commenters emphasized a quote from the UNHCR stating that ''[t]he term membership of a particular social group should be read in an evolutionary manner.''

Another organization noted that while the phrase ''particular social group'' in the Refugee Convention does not apply to every person facing persecution, the Convention requires only that a social group not be ''defined exclusively by the fact that it is targeted for persecution.'' According to the Convention, ''the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.'' As a result, the organization contended that the Convention allows particular social groups that do not exist independently of the persecution.

The organization claimed the NPRM takes the opposite approach, defining ''circular'' not only as particular social groups exclusively defined by persecution but also as those that do not exist independently of the persecution claim. The organization noted that, in doing so, the NPRM seeks to adopt the circularity analysis in *Matter of A–B–,* 27 I&N Dec. 316, which treats any group partially defined by the persecution of its members as circular. The organization alleged that this interpretation of circularity is a ''dramatic departure'' from longstanding precedent, noting that the courts of appeals have held that a particular social group is not circular unless it is defined ''entirely'' by persecution. The organization claimed that the Departments do not acknowledge or justify this ''departure,'' which makes the rule arbitrary. The organization also claimed that the Federal appellate cases cited in the rule have the same effect. In addition, the organization emphasized that the BIA has long accepted particular social groups with references to the persecution bringing asylum seekers to the United States.

One organization claimed the rule's requirement that the cognizable group must exist independently from the persecution abrogates the following specific particular social groups already recognized by circuit courts: Former gang members, *Arrazabal* v. *Lynch,* 822 F.3d 961 (7th Cir. 2016); former members of the Kenyan Mungiki, *Gatimi* v. *Holder,* 578 F.3d 611 (7th Cir. 2009); defected KGB agents, *Koudriachova* v. *Gonzales,* 490 F.3d 255 (2d Cir. 2007); young Albanian women targeted for prostitution, *Cece* v. *Holder,* 733 F.3d 662 (7th Cir. 2013) (en banc); former child guerilla soldiers in Uganda, *Lukwago* v. *Ashcroft,* 329 F.3d 157 (3d Cir. 2003); individuals targeted by Pakistani terrorist groups, *Rehman* v. *Att'y Gen. of U.S.,* 178 F. App'x 126 (3d Cir. 2006), and the Taliban, *Khattak* v. *Holder,* 704 F.3d 197 (1st Cir. 2013); and Ghanaians returning from the United States, *Turkson* v. *Holder,* 667 F.3d 523 (4th Cir. 2012).

Another organization claimed that, under international guidelines, the ''common characteristic'' and ''socially visible'' elements of a particular social group are meant to be ''disjunctive,'' requiring proof of either one or the other. The organization also alleged that the ''particularity'' requirement is unfounded, noting that, according to UNHCR, the size of the group is irrelevant in determining whether a particular social group exists.

Similarly, one organization noted that the rule would require a particular social group to be ''defined with particularity'' and ''recognized as socially distinct in the society at question,'' claiming that the NPRM fails to provide any reason for codifying these standards. The organization alleged that the particularity and social distinction requirements ''cut across'' each other, noting the BIA's interpretation that an asylum seeker ''identify a group that is broad enough that the society as a whole recognizes it, but not so broad that it fails particularity'' and claiming that this has caused the BIA to essentially end asylum grants based on particular social groups that have not been previously approved.

Multiple commenters called the rule ''unwise and discriminatory.'' Commenters alleged that the rule is designed to prevent individuals from Central America from receiving asylum and claimed that the rule evidences the Departments' intent to prevent ''whole classes of persons'' from claiming asylum based simply on ''the macro-level characteristics of their country of origin.'' One organization representing DHS employees criticized the Departments for creating a rule based on the belief that asylum seekers are engaging in ''gamesmanship'' within the United States legal system, a premise, the organization claimed, that is ''contrary to our experiences as adjudicators.'' The organization stated that several of the social groups ''slated for dismissal'' in the rule ''encompass a wide cross-section of potentially successful asylum claims.'' The organization also alleged that the rule creates a ''rebuttable presumption'' that asylum claims based on any of the ''broadly enumerated particular social groups'' are insufficient unless ''more'' is provided, but claimed the rule fails to define what is actually needed for a successful claim.

Another organization alleged that the NPRM's proposal would violate due process, claiming that the private interest at stake—preventing the violence or torture that would occur due to refoulement—is ''the most weighty interest conceivable.'' The organization contended that the government's countervailing interest is ''nonexistent'' due to the NPRM's silence, also alleging that ''working with pro se asylum seekers'' imposes a minimal burden on the government.

[40] As an initial matter, the Departments note that commenters' discussion on these points often referred solely to asylum claims. Where relevant, however, the Departments have also considered the comments in regards to statutory withholding of removal.

One organization claimed that the adjudication of asylum applications has become ''increasingly politicized'' over the past three years through the Attorney General's self-certification of cases. The commenter noted that the Attorney General has issued nine decisions in the past three years that restrict eligibility of relief for noncitizens (with four additional self-certified decisions pending), while only four precedential decisions were issued during the eight years of the previous administration. The organization stated that, rather than clarifying existing definitions, the rule ''virtually eliminates particular social group as a basis for asylum.''

One organization emphasized that if the Departments choose to codify the prerequisites to particular social groups as stated in the rule, they must ''consider all reasonable alternatives presented to'' them. Multiple organizations suggested the Departments adopt the *Matter of Acosta* standard for the analysis of particular social group claims, meaning that ''particular social group'' should be interpreted consistently with the other four protected characteristics laid out in the INA. 19 I&N Dec. 211, 233 (BIA 1985), *abrogated in part on other grounds by Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987). One organization emphasized that this definition is simple, straightforward, and could be understood by pro se asylum seekers.

Another organization alleged that the Departments failed to consider adopting the UNHCR definition of particular social group, which includes both immutability and the basic requirement that the group ''be perceived as a group by society.'' The organization contended that this standard, like the *Matter of Acosta* definition, is reasonable, emphasizing that it remains ''significantly closer to the other grounds for asylum in the INA'' than the Departments' proposal.

One organization expressed concern that the rule would codify the ''restrictive definition'' of particular social group announced in *Matter of M–E–V–G–,* 26 I&N Dec. 227, 237 (BIA 2014), noting that the rule shortens the definition set forth in *Matter of Acosta.* The organization also contended that the rule misconstrues the concept of particular social group by inserting unrelated legal issues into the definition, which the organization believes would lead to greater confusion for all parties involved. The organization emphasized that each particular social group claim should be evaluated on a ''case-by-case basis'' instead of being subjected to general rules that would result in ''blanket denials.'' Another organization stated that the Attorney General's own decision in *Matter of A–B–,* 27 I&N Dec. 316, is based on the necessity of a ''detailed, case-specific analysis of asylum claims'' and highlights the BIA's previous errors in ''assessing the cognizability of a social group without proper legal analysis.'' One organization asserted that the rule appears to codify the wrongly-decided *Matter of W–Y–C– & H–O–B–,* 27 I&N Dec. 189 (BIA 2018), and ''takes those restrictions even further.''

Another organization emphasized that the circuit courts have disagreed on ''at least a portion'' of the definition of particular social group. One organization noted that elements of the rule's proposed definition have met an ''uneven fate'' in the courts of appeals, with many courts finding at least one of the provisions inconsistent with the statutory text. Another organization contended that the circuit courts cannot be ''overruled'' by either this rule or ''the Attorney General's attempt to devise a new definition of 'particular social group' that intends to cut off certain claims'' that have been previously recognized by the circuit courts and the BIA. One organization noted that, while the NPRM states in its first footnote that agencies have the authority to re-interpret ambiguous statutory phrases, it fails to explain how the definitions at issue arise from an ambiguous term. Another organization claimed that until the Supreme Court resolves the disagreements surrounding the particular social group definition, the Departments have no authority to ''overrule'' the circuit courts' interpretation of this term.

Another organization alleged that the rule would ''carve out'' a laundry list of particular social groups toward which the administration has shown ''pervasive, unlawful hostility'' without any effort to ground these exceptions in the Departments' statutory authority, claiming this is a violation of the Administrative Procedure Act (''APA''). One organization contended that ''[t]he use of such brazen ipse dixit without more renders each entry on the list arbitrary,'' also claiming that this impedes the Departments' goal of consistency. The organization claimed the Departments failed to consider whether their ''laundry list'' of generally-barred particular social groups would result in the erroneous denial of meritorious claims.

Commenters claimed that one of the ''most unfair'' aspects of the rule is that it would require asylum seekers to state every element of a particular social group with exactness before the immigration judge. Commenters expressed particular concern with the portion of the rule stating that a failure to define a formulation of a particular social group before a judge constitutes a waiver of any such claim under the Act, including on appeal. One organization noted that this portion of the rule would disproportionately impact unrepresented asylum seekers, particularly those subjected to MPP, and would ''forever punish asylum seekers who were the victims of ineffective assistance of counsel.''

Another organization alleged that the combination of performance goals and interminable dockets will result in ''the demise of due process in Immigration Court for pro se litigants.'' The organization noted the importance of the ''motions practice'' in a legal system that is committed to due process, emphasizing the long-standing practice of allowing motions to reopen in the context of ineffective assistance of counsel. Another organization stated that, over the past five years, between 15 percent and 24 percent of all asylum seekers have been unrepresented by counsel, emphasizing that these individuals do not have training in United States asylum law, often speak little to no English, and are unfamiliar with the intricate rules surrounding particular social groups. One organization expressed specific concern for refugees. Another organization claimed that the rule provides no reasoning for its ''expansion of the punitive effect of waiver to encompass ineffective assistance claims,'' claiming this is against public policy and is also arbitrary and capricious; at least one other organization emphasized this point as well.

One organization expressed particular concern for members of the LGBTQ community, emphasizing that, due to the nature of the ''coming out and transitioning process,'' the formulation of a particular social group may change over time, also noting that a refugee may not know right away that he or she is HIV positive. The organization claimed that the rule, ''disregards the reality of LGBTQ lives'' and will cause LGBTQ asylum seekers to be sent back to danger merely because they were unable to ''come up with the right verbiage to describe the complicated process of coming out and transitioning.'' The organization claimed this issue is exacerbated by the fact that many of these individuals are unrepresented and do not speak English. Another organization noted that the INA requires exceptions to the one-year filing

deadline for ''changed and extraordinary circumstances,'' INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), emphasizing that this is particularly important for this category of asylum seekers.

One organization claimed the rule would make it especially difficult for African asylum seekers to qualify for asylum based on particular social group membership. The organization also expressed concern for women survivors of female genital cutting (''FGC''), alleging that these individuals would not know to include this fact as part of a gender-based particular social group claim. The organization claimed it would be ''a miscarriage of justice'' to preclude these women from presenting claims.

One organization alleged that the rule would make it ''almost impossible'' for children, particularly those from Central America or Mexico, to obtain asylum protection based on membership in a particular social group. The organization alleged that the rule's barring of a particular social group claim that was not initially raised in the asylum application (or in the ''record'' before an immigration judge) raises ''serious due process concerns'' for children, as many of the children arriving in the United States have suffered immense trauma and may not be able to discuss their experiences for quite some time. The organization expressed particular concern for unaccompanied children, noting they are often unable to discuss the harm they experienced in their home country until they have spent time with a trusted adult. The organization noted that, for many children, the asylum process is the first time they ever discuss their experiences, claiming the rule ''is unrealistic and an untenable burden for most children.''

Commenters also stated that an asylum seeker's life should not depend on his or her ''ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements.'' One organization stated that ''[a]pplying for asylum is not a word game; asylum seekers' lives are on the line with every application that an adjudicator decides.'' Multiple commenters claimed that asylum officers and immigration judges have a duty to help develop the record. One organization stated that the Departments should rely on the decisions of EOIR and Article III courts rather than on the expertise of asylum seekers. Finally, one organization expressed concern that this portion of the rule contains no exceptions for minors or individuals who are mentally ill or otherwise incompetent, stating that holding these respondents to this kind of legal standard violates their rights under the Rehabilitation Act. *See* 29 U.S.C. 794; *see also Franco-Gonzales* v. *Holder,* 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

Response: The Departments disagree with general comments that the rule would deny asylum to all individuals fleeing violence and persecution. The Departments note that asylum protection is not available to every applicant who is fleeing difficult or dangerous conditions in his or her home country. To qualify for asylum, an applicant must demonstrate, among other things, that the feared persecution would be inflicted ''on account of'' a protected ground, such as membership in a particular social group. *See* INA 101(a)(42), 8 U.S.C. 1101(a)(42) (defining ''refugee'' as a person who, inter alia, has suffered ''persecution or a well-founded fear of persecution on account of . . . membership in a particular social group''). Even accepting that the term ''particular social group'' was intended to create flexibility in the refugee definition, the contours of that flexible term are clearly ambiguous and within the purview of the Departments to decide. *See, e.g., Matter of A–B–,* 27 I&N Dec. at 326 (''As the Board and the Federal courts have repeatedly recognized, the phrase 'membership in a particular social group' is ambiguous.'' (collecting cases)). Accordingly, the Departments are establishing clear guidelines for adjudicators and parties regarding the parameters of particular-social-group claims. The Departments believe that such guidelines will promote a more uniform approach towards adjudicating such claims. This will not only aid adjudicators in applying a more uniform standard, but will also aid parties such that they may have a clearer understanding of how they may prevail on a particular social group claim as they develop their applications.

The Departments disagree that the proposed changes to particular-social-group claims violate the Act, case law, or the due process rights of immigrants. As noted in the NPRM, Congress has not defined the term ''membership in a particular social group.'' *See* 85 FR at 36278; *see also Grace II,* 965 F.3d at 888 (''The INA nowhere defines 'particular social group.' '').[41] Additionally, despite commenters' contentions that the Convention Relating to the Status of Refugees (''Refugee Convention''), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, or the related Refugee Protocol offers guidance on the matter, the term is not defined in either of those instruments. 85 FR at 36278; *see also Matter of A–B–,* 27 I&N Dec. at 326, n.5 (''The Protocol offers little insight into the definition of 'particular social group,' which was added to the Protocol 'as an afterthought.' '') (quoting *Matter of Acosta,* 19 I&N Dec. at 232)).

The Board has noted that the term ''particular social group'' is both ambiguous and difficult to define. *Matter of M–E–V–G–,* 26 I&N Dec. at 230 (''The phrase 'membership in a particular social group,' which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define.''). Moreover, the Board has also recognized that prior approaches to defining the term have led to confusion and inconsistency, warranting further evaluation. As the Board stated in *M–E–V–G–:*

> Now, close to three decades after *Acosta,* claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. . . . In *Matter of R–A–,* 22 I&N Dec. 906, 919 (BIA 1999; A.G. 2001), we cautioned that ''the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.''

Id. at 231 (footnote omitted). Consequently, the inherently case-by-case nature of assessing the cognizability of a particular social group, the lack of a clear definition of the term and its consideration through an open-ended and largely subjective

[41] One commenter questioned the accuracy of the Departments' citation to and characterization of *Grace II's* underlying case, *Grace I,* 344 F. Supp. 3d at 146, because, according to the commenter, the case stated that the Attorney General could ''not propose a general rule that a particular social group will not qualify for asylum'' and did ''not reach the question of whether the Attorney General could propose a general rule that a particular group does qualify for asylum.'' Irrespective of the commenter's characterization of the Departments' citation, the D.C. Circuit recently reversed the district court regarding its statements that the agency action contested in that litigation improperly established a categorical bar against recognizing a specified particular social group. *Grace II,* 965 F.3d at 906. Specifically, the court determined that the Departments' use of the term ''generally'' demonstrated that the Departments had not imposed a categorical rule against finding the particular social group at issue in that litigation. *Id.* Similarly, the Departments here have set forth a list of particular social groups that ''generally, without more'' will not be cognizable, but have specifically recognized that the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279.

lens by adjudicators, and the potential for confusion and inconsistent application—particularly with conflicting circuit court interpretations of similar groups—all make the definition of a particular social group ripe for rulemaking. *See Lopez* v. *Davis,* 531 U.S. 230, 244 (2001) (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking'' (quotation marks omitted)).

Furthermore, courts have also expressly held that the term is ambiguous. *See, e.g., Cordoba* v. *Holder,* 726 F.3d 1106, 1114 (9th Cir. 2013) (''We have recognized that the phrase 'particular social group' is ambiguous.''); *Fatin,* 12 F.3d at 1238 (''Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group.' Thus, the statutory language standing alone is not very instructive.'').[42]

As noted in the NPRM, ambiguities in the Act should ''be resolved, first and foremost, by the agency.'' 85 FR at 36265 (quoting *Matter of R–A–,* 24 I&N Dec. at 631 (quoting *Brand X,* 545 U.S. at 982 (internal quotation and citations omitted)). Further, the Supreme Court has clearly indicated that administrative agencies, rather than circuit courts, are the most appropriate entities to make determinations about asylum eligibility in the first instance. The Supreme Court, in *INS* v. *Ventura,* 537 U.S. 12 (2002), noted:

> Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. . . . In such circumstances a judicial judgment cannot be made to do service for an administrative judgment. . . . Nor can an appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency. . . . A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Id. at 16 (cleaned up)); *cf. Gonzales* v. *Thomas,* 547 U.S. 183, 185–87 (2006) (applying *Ventura* to require a remand from the circuit court to the agency to determine a question of the meaning of ''particular social group). ''Indeed, 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations.'' *Scialabba* v. *Cuellar de Osorio,* 573 U.S. 41, 56–57 (2014) (plurality op.) (quoting *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999)). Accordingly, the Departments are acting within their well-established authority to define the term ''particular social group.''

Furthermore, the Departments' regulations regarding the adjudication of claims pertaining to ''membership in a particular social group'' are reasonable interpretations of the term, as evidenced by a long history of agency and circuit court decisions to have interpreted the terms consistently with the Departments' guidelines. *See Matter of W–G–R–,* 26 I&N Dec. 208, 222–23 (BIA 2014) (pertaining to past or present criminal activity or associations)*; Cantarero* v. *Holder,* 734 F.3d 82, 86 (1st Cir. 2013) (same); *Gonzalez* v. *U.S. Att'y Gen.,* 820 F.3d 399, 405 (11th Cir. 2016) (same); *Matter of A–B–,* 27 I&N Dec. at 320 (pertaining to presence in a country with generalized violence or a high crime rate and private criminal acts of which governmental authorities were unaware or uninvolved)*; Matter of S–E–G–,* 24 I&N Dec. 579, 585–86 (BIA 2008) (pertaining to attempted recruitment of the applicant by criminal, terrorist, or persecutory groups); *Matter of E–A–G–,* 24 I&N Dec. 591, 594–95 (BIA 2008) (same); *Matter of A–M–E– & J–G–U–,* 24 I&N, Dec. 69, 75 (BIA 2007) (same); *Matter of Pierre,* 15 I&N Dec. 461, 462–63 (BIA 1975) (pertaining to interpersonal disputes of which governmental authorities were unaware or uninvolved); *Gonzalez-Posadas* v. *Att'y Gen. of U.S.,* 781 F.3d 677, 685 (3d Cir. 2015) (same); *Gonzales-Veliz* v. *Barr,* 938 F.3d 219, 230–31 (5th Cir. 2019) (pertaining to private criminal acts of which governmental authorities were unaware or uninvolved); *Delgado-Ortiz* v. *Holder,* 600 F.3d 1148, 1151–52 (9th Cir. 2010) (''We conclude that Petitioners' proposed social group, 'returning Mexicans from the United States,' . . . is too broad to qualify as a cognizable social group.''); *Sam* v. *Holder,* 752 F.3d 97, 100 (1st Cir. 2014) (Guatemalans returning after a lengthy residence in the United States is not a cognizable particular social group).

The Departments agree with commenters that circuit court interpretations of the phrase ''particular social group'' have been uneven, and the inconsistency with which that phrase has been evaluated strongly militates in favor of the agencies adopting a clearer, more uniform definition. Further, the Departments have considered all relevant circuit court law on the issue and note that significant conflicts exist among the various interpretations. *See, e.g., Paloka* v. *Holder,* 762 F.3d 191, 197 (2d Cir. 2014) (highlighting conflicting circuit court decisions regarding whether young Albanian women are a particular social group and collecting cases showing differing circuit court decisions regarding cognizability of other particular social groups). Nevertheless, the Departments believe that the rule reflects an appropriate and reasonable synthesis of legal principles consistent with the Departments' respective policy positions. Additionally, as noted in the NPRM, 85 FR at 36265 n.1, to the extent that some circuits have disagreed with the Departments' reasonable interpretation, the Departments' proposed rule would warrant re-evaluation in appropriate cases under well-established principles. *See Brand X,* 545 U.S. at 982; *cf. Ventura,* 537 U.S. at 16–17 (within broad limits, the INA entrusts agencies, not circuit courts, to make basic asylum eligibility determinations).

The Departments disagree with commenters' assertions that the rule would render it ''virtually impossible'' to prevail on asylums claim involving membership in a particular social group or undermine the concept of ''case-by-case'' adjudication of particular-social-group claims, as described in *Matter of A–B–,* 27 I&N Dec. 316. Assuming the formulation of the proposed particular social group would, if supported, meet the definition of such a group in the first instance—*i.e.,* assuming the proposed particular social group sets forth a prima facie case that the group is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct—the rule does not alter an adjudicator's responsibility to determine whether the facts and evidence of each individual case ultimately establish that the proposed particular social group is cognizable. Thus, whether a proposed group has—*see, e.g., Matter of Toboso-Alfonso,* 20

[42] One commenter also suggests that the Departments cited *Cordoba,* 726 F.3d 1106, with a ''glaring omission.'' The commenter suggests that *Cordoba* acknowledges that the term ''particular social group'' is ambiguous, but asserts that the Departments fail to recognize that the case goes on to ''clear up that ambiguity.'' The Departments need not delve further into this analysis, which is refutable for various reasons, other than to state that the case plainly supports the proposition that the term ''particular social group'' is ambiguous and that such ambiguities are left to the Departments to clarify pursuant to agency authority. *Chevron,* 467 U.S. at 845 (''Once [the court] determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the [agency's] view that it is appropriate in the context of this particular program is a reasonable one.'').

I&N Dec. 819, 822 (BIA 1990) (designated as precedent by Attorney General Order No. 1895–94 (June 12, 1994)) (homosexuals in Cuba may be a particular social group)—or has not—*see, e.g., Matter of Vigil,* 19 I&N Dec. 572, 575 (BIA 1988) (young, male, urban, unenlisted Salvadorans do not constitute a particular social group)—been recognized in other cases is not dispositive of whether the proposed particular social group in an individual case is cognizable. *See S.E.R.L.* v. *Att'y Gen.,* 894 F.3d 535, 556 (3d Cir. 2018) (''Consequently, it does not follow that because the BIA has accepted that one society recognizes a particular group as distinct that all societies must be seen as recognizing such a group.''). Adjudicators should not assume that a particular social group that has been found cognizable in one case is cognizable in every other case in which it is asserted or is cognizable in perpetuity, nor should they assume the opposite. *Id.* Rather, if the proposed particular social group would be legally cognizable if sufficiently supported by evidence, adjudicators should continue to adjudicate particular social group claims on a case-by-case basis.

Further, as the Departments have specified, while the listed groups would be ''generally insufficient to establish a particular social group'' because they do not meet the definition of such a group, the Departments do not entirely foreclose the possibility of establishing an asylum claim on those bases. Rather, the rule simply lists social groups that, ''without more,'' generally will not meet the particularity and social distinction requirements for particular social group. 85 FR at 36279.

Such general guidelines are an appropriate use of agency authority that comports with the Attorney General's decision in *Matter of A–B–. Cf.* 8 CFR 208.4(a)(4),(5), 1208.4(a)(4), (5) (providing general categories of circumstances that may qualify as changed circumstances or extraordinary circumstances for purposes of INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D)); 8 CFR 212.7(d), 1212.7(d) (''The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . . with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances[.]''); *Matter of Y–L–,* 23 I&N Dec. at 274–76 (establishing a general presumption that aggravated felony drug trafficking crimes are ''particularly serious crimes'' for purposes of INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B)). The Departments are providing clarity on this issue through rulemaking, rather than through other forms of sub-regulatory guidance or through the development of case law in individual adjudications, in order to promote much needed uniformity and clarity on the particular-social-group issue. *See also* Memorandum from Jefferson B. Sessions, III, Attorney General, re: *Prohibition on Improper Guidance Documents* 1 (Nov. 16, 2017), *https://www.justice.gov/opa/press-release/file/1012271/download* (in contrast with issuing informal ''guidance documents,'' ''notice-and-comment rulemaking . . . has the benefit of availing agencies of more complete information about a proposed rule's effects than the agency could ascertain on its own, and therefore results in better decision making''). The Department applies the same response to address commenters' concerns with respect to the ''broad wording'' of the groups that the rule describes as generally not cognizable for asylum claims.

The Departments also disagree with commenters that the rule is unwise or discriminatory, or that the purpose of this rule is to exclude certain groups of applicants or target individuals from Central America and Mexico. As stated above, the rule is not ''immoral,'' motivated by racial animus or promulgated with discriminatory intent. Rather, it is rooted in case law from the BIA, multiple circuits, and the Supreme Court, none of which have evinced a racial or discriminatory animus. Further, the rule is intended to help the Departments better allocate limited resources in order to more expeditiously adjudicate meritorious asylum, statutory withholding of removal, and CAT protection claims. Relatedly, with respect to commenters' concerns about this rule's potential effect on certain, discrete groups—*e.g.,* LGBTQ individuals, minors, and other specific nationalities—the Departments note that they have codified a long-standing test for determining cognizability of particular social groups and have set forth a list of common fact patterns involving particular-social-group claims that generally will not meet those well-established requirements. The Departments did not first determine which groups should or should not be cognizable and craft a rule around that determination, and the rule does not single out any discretely-labeled groups in the manner suggested by commenters. Moreover, as the rule makes clear, it applies ''in general'' and does not categorically rule out specific claims depending on the claim's evidentiary support. Further, because each asylum application is adjudicated based on its own facts and evidentiary support and because the rule does not categorically rule out specific claims, commenters' concerns about the effects of the rule on broad, undifferentiated categories without reference to specific claims are conclusory, conjectural, unfounded, and wholly and inherently speculative.

With respect to commenters' claims that the social groups that would be dismissed under the rule would historically encompass a large number of potentially successful asylum claims, the Departments reiterate that they are setting forth, by regulation, a reasonable interpretation of the statutory term ''particular social group'' that will ameliorate stressors upon the healthy functioning of our immigration system and encourage uniformity of adjudications. Even assuming, without deciding, that there are other, broader interpretations of the term ''particular social group'' that might encompass a larger number of asylum applicants, the relevant inquiry is not whether the Departments' interpretation is the preferred interpretation or even the best interpretation. Rather the relevant inquiry is whether the Departments' interpretation is reasonable. *See Chevron,* 467 U.S. at 845; *see also Holder* v. *Martinez Gutierrez,* 566 U.S. 583, 591 (2012) (observing that the agency's ''position prevails if it is a reasonable construction of the [INA], whether or not it is the only possible interpretation or even the one a court might think best''). The regulations indeed set forth a reasonable interpretation of the term ''particular social group,'' for the reasons described above. The Departments also note again that the rule will not categorically exclude the listed groups, rather it issues guidance that such groups will ''generally'' not meet the requirements of a cognizable particular social group ''without more.''

Relatedly, commenters' statements that the rule would result in denial of meritorious claims are circular. A claim is meritorious if it meets all of the statutory requirements for asylum, including, where appropriate, the ambiguous statutory requirement of demonstrating ''membership in a particular social group.'' The Departments note the commenters' position that the term should be defined more broadly than what the Departments proposed, and, to be sure, a broader definition would result in more groups being recognized as cognizable. However, for the reasons explained in the NPRM, 85 FR at

36277–79, and throughout this rulemaking, the Departments have set forth a reasonable definition of the term as part of their well-established authority to do so. To the extent that applicants are unable to meet the statutory requirements, including ''membership in a particular social group'' as that term is reasonably defined by the Departments, their claims are not meritorious.

The Departments believe that commenter assertions that parties will need to prove that they do not belong in or are distinct from a listed particular social group misconstrue the particular social group analysis. People may, and are likely to, belong to multiple groups, which might or might not include cognizable particular social groups. An applicant need not prove that he or she does not belong to a non-cognizable group, only that he or she belongs to a cognizable group and was persecuted on account of that membership. Membership in a non-cognizable group does not negate one's membership in a cognizable group. Thus, an asylum applicant who has membership in one of the listed groups, which will generally not be cognizable without more, does not preclude an applicant from prevailing on a separate cognizable claim.

The Departments disagree with commenter assertions that the rule impermissibly creates a negative presumption against cognizability of the listed groups. As an initial point, the listed groups, as discussed in the NPRM, 85 FR at 36279, are generally rooted in case law, and commenters neither allege that the circuit court case law underlying the listing of these groups establishes a ''negative presumption'' against groups that have not been recognized in that case law, nor urge the Departments to abandon their longstanding policy to treat circuit court case law as binding—including decisions regarding the cognizability of alleged particular social groups—in the circuit in which it arises. Thus, to the extent that commenters disagree with the Departments' codification of existing case law, that disagreement lies with the case law itself. Additionally, in the Departments' experience, many advocates treat the recognition of a particular social group—either by the Board or a circuit court—as establishing a positive presumption, if not a categorical rule, that the group is cognizable in every case, yet commenters expressed no concern with that type of presumption. *Cf. S.E.R.L.,* 894 F.3d at 556 (''S.E.R.L. relies heavily on [*Matter of A–R–C–G–*], in which the Board considered a group consisting of married female victims of domestic violence.''); *Amezcua-Preciado* v. *U.S. Att'y Gen.,* 943 F.3d 1337, 1344 (11th Cir. 2019) (discussing similar proposed particular social groups across multiple circuits that closely tracked the group recognized by the BIA in *Matter of A–R–C–G–*); *Del Carmen Amaya-De Sicaran* v. *Barr,*—F.3d—, 2020 WL 6373124 (4th Cir. 2020) (noting decisions from other circuits addressing similar proposed particular social groups that closely tracked the group recognized by the BIA in *Matter of A–R–C–G–*). As the Departments discussed, *supra,* the rule does not depart from longstanding principles regarding the case-by-case nature of asylum adjudications. Thus, adjudicators do not apply a positive presumption that a particular social group that has been found cognizable in one case is cognizable in every other case in which it is asserted or is cognizable in perpetuity, nor do they apply a categorical negative presumption that a group listed in the rule is always and in every case not cognizable. Nothing in the rule creates categorical presumptions, either positive or negative.

It is always the applicant's burden to demonstrate that he or she belongs to a cognizable particular social group and must set forth the facts and evidence to establish that claim, regardless of whether or not the proposed group is described in this rule. INA 208(b)(1)(B), 8 U.S.C. 1158(b)(1)(B). This rulemaking highlights common proposed groups that generally, without more, will not meet an applicant's burden to demonstrate membership in a ''particular social group,'' and the burden remains on the applicant, as it always has, to demonstrate that he or she is a member of a cognizable particular social group. *Id.* This rulemaking puts applicants on notice that such groups, generally, without more, will not be cognizable. To the extent that an applicant believes that his or her membership in one of the listed groups should nevertheless be recognized, he or she may present his or her claim stating why the proposed group is cognizable and, as appropriate, appeal it to the BIA and a Federal circuit court.

The commenters' statements about the Attorney General's authority to certify cases and issue precedential decisions relate to powers delegated to the Attorney General by Congress that have existed for decades and are far outside of the scope of this rulemaking. INA 103(a)(1), (g), 8 U.S.C. 1103(a)(1), (g); 8 CFR 1003.1(h). All decisions in the immigration system are made in accordance with the evidence and applicable law and policy. In particular, EOIR's mission remains the same—to adjudicate cases in a fair, expeditious, and uniform manner. *See* EOIR, About the Office, *https://www.justice.gov/eoir/about-office* (last updated Aug. 14, 2018); *see also* 8 CFR 1003.1(d)(1)(ii) (''Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board[.]''); 8 CFR 1003.1(e)(8)(ii) (''[T]he Director shall exercise delegated authority from the Attorney General identical to that of the Board[.]''); 8 CFR 1003.10(b) (''immigration judges shall exercise their independent judgment and discretion'').

The Departments decline to incorporate the commenter recommendation to codify either the *Matter of Acosta* standard for particular social group, which required only that a group be immutable, or the alleged UNHCR standard, which commenters stated requires immutability and that the group ''be perceived as a group by society'' in lieu of the *Matter of M–E–V–G–* standard, which requires immutability, particularity, and social distinction. To do so would be to shirk decades of development in particular social group claims in favor of a standard set forth shortly after enactment of the Refugee Act of 1980, when ''relatively few particular social group claims had been presented'' to immigration adjudicators, and which ''led to confusion and a lack of consistency'' in subsequent years as adjudicators struggled with ''numerous and varied'' proposed groups. *See Matter of M–E–V–G–,* 26 I&N Dec. at 231. Moreover, ''immutability, while important, has never been the last or only word on the definition of a social group,'' because ''[m]any social groups are labile in nature.'' *Ahmed* v. *Ashcroft,* 348 F.3d 611, 617 (7th Cir. 2003). Further, notwithstanding the commenter's statement that the *M–E–V–G–* standard is confusing, the Departments note that the nearly all of the circuits have applied the *M–E–V–G–* test and the Third and Ninth Circuits have expressly accorded *Chevron* deference to that framework. *See, e.g., S.E.R.L.,* 894 F.3d at 554 n.20 (collecting cases). As the commenter notes, the Seventh Circuit has neither rejected nor endorsed the framework.

Relatedly, the Departments will not incorporate commenter suggestions to expand the regulatory language with respect to the requirement of

immutability to include characteristics that are ''so fundamental to individual identity or conscience that it ought not be required to be changed[,]'' as stated in *Matter of Acosta.* 19 I&N Dec. at 233. Contrary to the commenter's assertion, the Departments clearly noted in the NPRM that this rulemaking codifies the ''longstanding requirements'' of immutability, particularity, and social distinction, recognizing that ''[i]mmutability entails a common characteristic: A trait that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.'' 85 FR at 36278 (internal quotations omitted) (citing *Matter of Acosta,* 19 I&N Dec. at 233). Accordingly, the Departments believe that this language adequately addresses the commenter concerns without further expanding the definition in the regulatory language.

The Departments disagree with commenters' concerns that the rule's requirement that the particular social group must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm is arbitrary. 85 FR at 36278. This codifies the Attorney General's analysis for determining whether a social group has been defined ''circularly,'' as laid out in *Matter of A–B–,* 27 I&N Dec. at 334 (''To be cognizable, a particular social group must 'exist independently' of the harm asserted in an application for asylum or statutory withholding of removal.''); *see generally Matter of M–E–V–G–,* 26 I&N Dec. at 243 (''The act of persecution by the government may be the catalyst that causes the society to distinguish [a collection of individuals] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.''). In response to commenters' assertions that the Convention allows for particular social groups that do not exist independently of the persecution, and that this rule reflects a ''departure'' from the current particular-social-group adjudication, the Departments reiterate that ''[t]he 'independent existence' formulation'' has existed for some time and ''has been accepted by many courts.'' 85 FR at 36278; *see, e.g., Perez-Rabanales* v. *Sessions,* 881 F.3d 61, 67 (1st Cir. 2018) (''A sufficiently distinct social group must exist independent of the persecution claimed to have been suffered by the alien and must have existed before the alleged persecution began.''); *Lukwago,* 329 F.3d at 172 (''We agree that under the statute a 'particular social group' must exist *COM007*independently of the persecution suffered by the applicant for asylum.''); *accord Amaya-De Sicaran,* 2020 WL 6373124 at *5 (''The proposition that a cognizable particular social group cannot be defined by the underlying persecution is hardly controversial. The anti-circularity principle—and the *Chevron* deference to which it is entitled—has won wide acceptance among the circuit courts . . . . Even prior to the Attorney General's decision, we have applied the anti-circularity principle . . . . And a broader examination of caselaw pre-*Matter of A–B–* confirms that this is no new proposition.'').

In recent litigation, asylum seekers did ''not challenge *A–B–*'s description of the circularity rule'' and, the court determined, *A–B–*'s test sets forth ''exactly the analysis required to determine whether a particular claim is or is not circular.'' *Grace II,* 965 F.3d at 905. For courts that have rejected this ''independent existence'' requirement, *see, e.g., Cece,* 733 F.3d at 671–72, both subsequent decisions recognizing the requirement, *see, e.g., Matter of A–B–,* 27 I&N Dec. 316, and *Matter of M–E–V–G–,* 26 I&N Dec. 227, and the Departments' proposed rule codifying it would warrant re-evaluation under well-established principles, *see Brand X,* 545 U.S. at 982; *see also Amaya-De Sicaran,* 2020 WL 6373124 at *5 (''The Attorney General's [anti-circularity formulation] in *Matter of A–B–* is not arbitrary and capricious.'').

The Departments disagree with commenters' concerns about due process violations with respect to the rule's requirement that, while in proceedings before an immigration judge, an applicant must ''first define the proposed particular social group as part of the asylum application or otherwise in the record'' or ''waive any claim based on a particular social group formulation that was not advanced.'' To the extent that this requirement allegedly ''goes further than'' *Matter of W–Y–C–& H–O–B–,* 27 I&N Dec. 189, as the commenter alleges, this requirement is merely a codification of the longstanding principle that arguments not made in front of an immigration judge are deemed waived for purposes of further review. *See, e.g., In re J–Y–C–,* 24 I&N Dec. 260, 261 n.1 (BIA 2007) (claim not raised below is not appropriate to consider on appeal).

Contrary to commenters' concerns, the rule does not violate notions of fairness or due process.[43] Nothing in the rule eliminates an alien's right to notice and an opportunity to be heard, which are the foundational principles of due process. *See Matthews* v. *Eldridge,* 424 U.S. 319, 348–49 (1976) (''The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'' (cleaned up)). Aliens remains subject to specified procedures regarding claims of a fear of return to an alien's country of nationality, including the ability to have a claim reviewed or heard by an immigration judge. Moreover, the fact that applicable law may limit the types of claims an alien may bring—*e.g.,* an asylum claim based on a fear of persecution unrelated to one of the five statutory grounds in INA 101(a)(42), 8 U.S.C. 1101(a)(42)—or the ability of an alien to bring an asylum or statutory withholding claim at all—*e.g.,* an alien convicted of an aggravated felony for which the alien was sentenced to an aggregate term of imprisonment of at least five years, INA 208(b)(2)(A)(ii), (B)(i) and 241(b)(3)(B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(i) and 1231(b)(3)(B)(ii)—does not mean that an alien has been deprived of due process. As explained in the NPRM and reiterated herein, this rule is rooted in well-established law and does not violate an alien's due process right regarding an application for relief or protection from removal.

Some commenters objected to the procedural requirement that an alien must initially define the proposed particular social group as either part of the record or with the application. The INA directs the Attorney General to establish procedures for the consideration of asylum applications, INA 208(d)(1), 8 U.S.C. 1158(d)(1), and regulations already require both an

[43] Asylum is a discretionary benefit demonstrated by the text of the statute that states the Departments ''*may* grant asylum,'' INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (emphasis added); *Dep't of Homeland Sec.* v. *Thuraissigiam,* 140 S. Ct. 1959, 1965 n.4 (2020) (''A grant of asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary.''), and provides authority to the Attorney General and Secretary of Homeland Security to limit and condition, by regulation, asylum eligibility under INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). Courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin,* 538 F.3d at 156–57; *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 49–50). In other words, ''there is no constitutional right to asylum per se.'' *Mudric* v. *Att'y Gen. of U.S.,* 469 F.3d 94, 98 (3d Cir. 2006). Thus, how the Departments choose to exercise their authority to limit or condition asylum eligibility and an adjudicator's consideration of an applicant's conduct in relation to asylum eligibility do not implicate due process claims.

application for an alien to seek asylum, 8 CFR 208.3(a) and 1208.3(a), and that the application be completed in full to be filed, *id.* 208.3(c)(3) and 1208.3(c)(3). To the extent that some commenters' concerns regarded the exactness with which an alien must define the particular social group, the Departments note that most asylum applicants, 87 percent, have representation, EOIR, *Current Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download,* and that aliens, if of limited English proficiency, are able to avail themselves of the resources provided to them by the government that detail pro bono or low cost alternatives.

One commenter worried that an alien would have to ''expertly craft arguments in the English language in a way that satisfies highly technical legal requirements.'' The Department disagrees that this is what the regulations require. As an initial point, nothing in the rule requires an alien to craft arguments when applying for asylum. Aliens, with or without representation, have filled out asylum applications for decades, including by stating particular social groups as a basis for the asylum claim. Commenters have not submitted any evidence or alleged any change in an alien's ability to complete the application over the preceding 40 years, and the Departments are unaware of any reasons or allegations that aliens are now less capable of filling out an application—including stating a particular social group, if appropriate—that has been used for years. An alien simply has to state in the application why the alien is afraid. As noted in the NPRM, the specific form of the delineation will not be considered over and above the substance of the alleged particular social group. Further, if there are deficiencies, the alien will be provided an opportunity to correct them. Nothing in the rule requires aliens to ''craft arguments'' meeting ''highly technical legal requirements,'' and commenters' suggestions to the contrary are simply not consistent with either the rule and the longstanding practice.

One commenter indicated that it was the asylum officer's or immigration judge's duty to assist in developing the record, citing section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1); *Jacinto,* 208 F.3d at 734 (an immigration judge has the duty to fully develop the record where a respondent appears pro se); and *Agyeman* v. *INS,* 296 F.3d 871, 877 (9th Cir. 2002) (an immigration judge must adequately explain the procedures to the respondent, including what he must prove to prevail at the hearing). Even accepting the immigration judge's duty as described by the cited case law, this is not in conflict with the rule, as the rule clearly explains by regulation what an applicant must do to demonstrate a cognizable particular social group, a concept which was previously articulated in disparate BIA decisions that have been interpreted differently by the various circuits. Additionally, even if, as stated in *Jacinto,* an immigration judge has a duty to fully develop the record, this does not obviate the applicant's burden of demonstrating at least prima facie eligibility for the relief which he or she is seeking prior to proceeding to a more intensive hearing.

Regarding commenters' concerns focused on the ability for aliens to seek redress after an improper particular social group was presented based on ineffective assistance of counsel, the Departments note that the rule is consistent with both practice and applicable law. If a particular social group is not presented because the alien did not tell his or her counsel about it, then there has been no ineffective assistance on the part of counsel. If the alien did provide his or her counsel with a particular social group and counsel elected not to present it as a strategic choice, then there is no basis to reopen the proceedings. *See In re B–B–,* 22 I&N Dec. 309, 310 (BIA 1998) (''subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen''); *cf. Matter of Velasquez,* 19 I&N Dec. 377, 382 (BIA 1986) (concession of attorney is binding on an alien absent egregious circumstances). Nevertheless, the Departments recognize there may be unique ''egregious circumstances'' in which reopening based on ineffective assistance of counsel may be warranted, provided that the appropriate procedural requirements for such a claim are observed. *See Matter of Lozada,* 19 I&N Dec. 637, 639 (BIA 1988). Thus, the Departments are revising the final rule to account for such a scenario, though they expect such claims to be rare.

The Departments disagree with the commenters' fairness concerns with respect to the rule's requirement that applicants define the proposed particular social group as part of the asylum claim. As an initial point, asylum applicants have provided definitions of alleged particular social groups in asylum applications for many years, and there is no evidence of any recent change that would preclude them from doing so. The commenters' concerns may be based on an inaccurate belief that the rule requires legal precision of a particular social group, but as discussed above, that is simply not the case. Adjudicators are experienced with addressing the substance rather than the form of a claim, and articulation deficiencies will have an opportunity for correction before an immigration judge renders a decision.

The Departments also acknowledge commenters' concerns about the ''ever changing landscape'' of particular-social-group law and the due process concerns associated with that. The ''ever-changing landscape'' is, in fact, a principal animating factor behind this rulemaking, as the Departments believe the rule will function as a ''hard reset'' on the divergent—and sometimes contradictory—case law regarding particular social groups over the past several years in lieu of clearer guidelines that are both reasonable and easier for adjudicators and applicants alike to follow. In particular, the current state of case law may make it confusing for applicants to appreciate what is or is not a cognizable group, and the rule directly addresses that concern by providing clear definitions that should allow for more effective consideration of meritorious claims. In short, providing clearer guidance should reduce due process concerns, rather than increase them.

Similarly, the Departments disagree that this rulemaking will be harmful to pro se respondents. Although there are comparatively few pro se asylum applicants as an initial matter, EOIR, *Current Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download,* the Departments believe that this regulation will provide clarity to all respondents, including those who are pro se. That clarity will also allow immigration judges to better consider pro se claims and ensure that the record is developed appropriately consistent with the law.

The Departments believe that this clarity will also assist immigration judges in their adjudications, contrary to commenters' assertions. The Departments also disagree with commenters' statements that reducing the amount of time that adjudicators must spend evaluating claims is an improper purpose for the rule. The Departments contest allegations that they may not take regulatory action to help improve efficiencies with immigration adjudications. Regardless, as noted in the NPRM, reducing the amount of time that adjudicators must spend evaluating claims and more uniform application of the law are two additional benefits to ''providing clarity to [the particular social group] issue.'' 85 FR at 36279.

The Departments note commenter concerns that the rule does not create a regulatory requirement for immigration judges to clarify the particular social group for the record and instead allows for immigration judges to pretermit without holding an evidentiary hearing. The Departments note that the asylum application itself, which the applicant must sign attesting to the application's accuracy, and in which the applicant has had the opportunity to list his or her particular social group, is already part of the record without any further need for the immigration judge to clarify. Because the burden is always on the asylum applicant to establish eligibility, INA 208(b)(1)(B), 8 U.S.C. 1158(b)(1)(B), and because the immigration judge must remain a neutral arbiter of the claim, EOIR, *Ethics and Professionalism Guide for Immigration Judges* 2 (Jan. 26, 2011), *https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf* (''An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.''), it would not be appropriate for the immigration judge to assist the alien in crafting his or her claim. Nevertheless, immigration judges are experienced and well-trained adjudicators who are adept at understanding the substance of a claim even if it is not perfectly articulated. Moreover, an alien will have 10 days to respond to any attempt to pretermit an application as legally insufficient, and there is no expectation that immigration judges will fail to follow the rule's requirements on that issue. In short, the Departments do not expect immigration judges to abdicate their duties to the law in considering an applicant's asylum claim.

The Departments disagree with commenters' concerns that the rule, in their estimation, violates the Rehabilitation Act of 1973, 29 U.S.C. 794, because it does not provide exceptions for minors, mentally ill persons, or individuals otherwise lacking competency.[44] The Departments note that no alien is excluded from applying for asylum—nor excluded from participating in processes to adjudicate such an application—on account of a disability. Further, all applicants for asylum are adjudicated under the same body of law, regardless of any particular individual characteristics, and nothing in the rule changes that. The Departments are unaware of any law requiring all asylum claims from minors, mentally ill persons, or incompetent aliens to be granted or establishing a categorical rule that each of those groups, regardless of any other characteristics, necessarily states a cognizable particular social group. The Departments are also unaware of any blanket exceptions to statutory eligibility for asylum for these identified groups. The rule does not change any established law regarding minors, *e.g.,* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C), or those who lack mental competency, *e.g., Matter of M–A–M–,* 25 I&N Dec. at 480, 481–83 (holding that immigration judges should ''consider indicia of incompetency throughout the course of proceedings'' and implement appropriate safeguards, where necessary). In short, the rule provides clarity for asylum claims relevant to all aliens and does not alter any existing accommodations generally made for the identified groups. Further, because each asylum application is adjudicated based on its own facts and evidentiary support and because the rule does not categorically rule out specific claims, commenters' concerns about the effects of the rule on broad, undifferentiated categories without reference to specific claims are conclusory, conjectural, unfounded, and wholly and inherently speculative.

4.1.1. Past or Present Criminal Activity or Association (Including Gang Membership)

Comment: One organization noted that at least one court has recognized asylum claims from former child soldiers forced to commit bad acts, citing *Lukwago,* 329 F.3d at 178–180. The organization also stated that the United States has enacted the Child Soldiers Accountability Act, Public Law 110–340, imposing criminal and immigration penalties for those who use child soldiers. *See* 18 U.S.C. 2442. The organization emphasized that children recruited into other types of criminal acts, like gang activity, ''are not materially different from the children who fight on the front lines of conflicts in other parts of the world.'' The organization concluded by encouraging the government to extend its opposition to the use of child soldiers to ''a willingness to protect children fleeing from all types of forced criminal activity.''

Another organization emphasized that past activity is an immutable characteristic that ''cannot be undone,'' noting that an individual's personal biographical history cannot be changed. The organization noted that if a gang maintains that a child forcibly recruited is a member for life, the child would be regarded as a traitor for trying to leave the gang at a later time and would have a reasonable basis to fear for his or her life.

One organization alleged that the rule would change the law ''without explanation or justification'' by overturning the decisions of multiple Federal courts of appeals. The organization specifically referenced *Urbina-Mejia* v. *Holder,* 597 F.3d 360 (6th Cir. 2010) and *Benitez Ramos* v. *Holder,* 589 F.3d 426 (7th Cir. 2009). The organization claimed this would be contrary to the stated goal of the ''laundry list,'' which is legal consistency. *See* 85 FR at 36278. The organization also contended that the rule would be contrary to the intent behind the asylum bars, which preclude asylum based on a range of criminal conduct but ''pointedly'' do not preclude relief on account of previous gang membership. INA 208(b)(2)(A)–(B), 8 U.S.C. 1158(b)(2)(A)–(B). The organization also claimed the rule is contrary to congressional intent, claiming it makes no attempt to explain ''why the statutory bars'' on particular former persecutors ''should be extended by administrative interpretation to former members of gangs.'' *Benitez Ramos,* 589 F.3d at 430.

Response: The Departments note that the case cited by the commenter, *Lukwago,* 329 F.3d 157, which the commenter alleges recognized the likelihood of a cognizable particular social group involving former child soldiers, was published in 2003, well before the now-codified test for cognizability had been developed in *Matter of S–E–G–,* 24 I&N Dec. at 585–86 and *Matter of E–A–G–,* 24 I&N Dec. at 594–95. *See Matter of M–E–V–G–,* 26 I&N Dec. at 236–37 & n.11. Accordingly, this decision does not lend support to the commenter's claim. The Departments further note, however, that the court in *Lukwago* acknowledged that ''given the ambiguity of the [term ''particular social group''], [the court's] role is limited to reviewing the BIA's interpretation, using *Chevron* deference to determine if it is a ''permissible construction of the statute.'' *Lukwago,* 329 F.3d at 171. Additionally, the Child Soldiers Accountability Act is unrelated to this rulemaking.

Although past activity is an immutable characteristic, immutability alone is not sufficient to establish a cognizable particular social group; particularity and social distinction are also required. *See Matter of S–E–G–,* 24 I&N Dec. at 585–86; *Matter of E–A–G–,*

[44] The Departments note that the Rehabilitation Act applies to individuals with disabilities, and the status of being a minor does not automatically qualify someone as an ''individual with a disability'' under the statutory definition of that term. 29 U.S.C. 705(2).

24 I&N Dec. at 594–95; *Matter of M–E–V–G–,* 26 I&N Dec. at 237.

The Departments disagree with commenters that the rule would undermine establishing legal consistency and uniformity in the immigration laws, as it should encourage such consistency across all circuits by providing much-needed guidance on an ambiguous term in the Act. In fact, the circuits are themselves split on the issue of whether former gang membership is cognizable as a particular social group. *Compare Martinez* v. *Holder,* 740 F.3d 902, 910–12 (4th Cir. 2014) (former member of a criminal street gang may be a particular social group) *and, Benitez-Ramos* v. *Holder,* 589 F.3d 426, 430–31 (7th Cir. 2009) (same), *with Gonzalez* v. *U.S. Att'y Gen.,* 820 F.3d 399, 405 (11th Cir. 2016) (agreeing with First Circuit that former gang members do not constitute a cognizable ''particular social group''); *Cantarero* v. *Holder,* 734 F.3d 82, 85–86 (1st Cir. 2013) (''The BIA reasonably concluded that, in light of the manifest humanitarian purpose of the INA, Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger. . . . Such recognition would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country. It would, moreover, offer an incentive for aliens to join gangs here as a path to legal status.''); *and Arteaga* v. *Mukasey,* 511 F.3d 940, 945–46 (9th Cir. 2007) (''We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft.''). *See also* Cong. Research Serv., *Asylum and Gang Violence: Legal Overview* 20 (Sept. 5, 2014) (''Granting asylum to aliens based on their membership in groups made up of former gang members is more complicated in that several Federal courts of appeals have evidenced at least some willingness to view former gang members as a particular social group, while others have suggested that granting asylum to those who belong to organizations that have perpetrated acts of violence or other crimes in their home countries is contrary to the humanitarian purposes of asylum.''). To the extent that commenters assert that circuit case law conflicts with the Departments' rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X,* 545 U.S. at 982.

4.1.2. Presence in a Country With Generalized Violence or a High Crime Rate

Comment: One commenter objected generally to the fact that the rule excludes asylum seekers coming from ''a country with generalized violence or a high crime rate,'' as the commenter believes this to be irrelevant. The commenter stated that the restriction appears designed to target individuals from specific countries and runs contrary to the purpose of asylum. The commenter stated that ''[i]t is natural'' for people to flee countries with violence that the governments are unable to control. One organization claimed the restriction will have a prejudicial impact on asylum seekers from Central America. Another organization specifically referenced the high crime rate in many African countries, claiming that violence is ''rampant'' due to ''national security forces'' and ''copycat violators.'' Another commenter stated generally that ''[t]he choice for them was to be killed and/or raped or to risk the hardships of seeking asylum in the U.S.,'' alleging that the frequency of these types of abuses does not make it reasonable to exclude them from eligibility for asylum claims. One organization claimed the restriction would unfairly impact LBGTQ+ individuals who are ''disproportionately victimized'' by violent crime and gender-based violence.

One organization noted that it would be ''difficult if not impossible'' to meet the three-prong test found in *Matter of M–E–V–G–,* 26 I&N Dec. at 237, using a claim in which the particular social group is based on ''presence in a county with generalized violence or a high crime rate.'' However, the organization expressed concern that this restrictive language (which it claims is not directly related to the particular social group definition at issue) would likely cause adjudicators to deny asylum applications solely because the applicant came from a country with a high crime rate, even if the applicant were to articulate a particular social group unrelated to the crime rate.

One organization claimed the rule is contrary to established case law recognizing that presence in a country with generalized violence or a high crime rate is ''irrelevant'' to evaluating an asylum seeker's claim. The organization noted that the Fourth Circuit has explained in at least three published opinions that criminal activities of a gang affecting the population as a whole are ''beside the point'' in evaluating an asylum seeker's particular claim. *See Alvarez-Lagos* v. *Barr,* 927 F.3d 236, 251 (4th Cir. 2019); *Zavaleta-Policiano* v. *Sessions,* 873 F.3d 241, 248 (4th Cir. 2017); *Crespin-Valladares* v. *Holder,* 632 F.3d 117, 127 (4th Cir. 2011).

Another organization alleged that the ''social distinction'' requirement makes it nearly impossible to develop a cognizable particular social group that does not reference the asylum seeker's country of origin. As a result, the organization claimed the rule would ''upend'' section 208 of the Act, 8 U.S.C. 1158, by preventing individuals fleeing ''the most violent countries in the world'' from receiving asylum or withholding of removal. The organization also contended that the ''generalized violence'' category is arbitrary to the extent it attempts to codify the statement in *Matter of A–B–* that particular claims are unlikely to satisfy the statutory grounds for demonstrating government inability or unwillingness to control the persecutors. *Matter of A–B–,* 27 I&N Dec. at 320. The organization claimed that attempting to codify that statement conflates two distinct elements of the asylum test, as the question of whether the government can control persecutors is distinct from whether a particular social group is cognizable. The organization also alleged that the Departments do not acknowledge or justify this conflation.

Response: The Departments acknowledge commenters' points that generalized violence may be a driving force behind many people fleeing their home countries. Although the suffering caused by such conditions is regrettable, the Departments note that asylum was never intended to protect individuals from generalized violence; instead, it was designed to protect those from violence perpetrated upon them on the basis of a protected ground, as well as other qualifying requirements. *See Harmon* v. *Holder,* 758 F.3d 728, 735 (6th Cir. 2014) (''General conditions of rampant violence alone are insufficient to establish eligibility.'').

Although circuit courts may not have been clear whether asylum claims based on fear of generalized violence or high crime rates are not cognizable on particular social group grounds or on nexus grounds (or on both grounds),[45] *see, e.g., Melgar de Torres* v. *Reno,* 191 F.3d 307, 314 (2d Cir. 1999) (''The increase in general crime that has been documented in the record does not

[45] Although the Departments have placed this category under the definition of ''particular social group,'' it may also be appropriately considered under the definition of ''nexus'' as well, as the lists under both definitions are nonexhaustive.

lend support to an asylum claim since a well-founded fear of persecution must be on account of an enumerated ground set forth in the Act, and general crime conditions are not a stated ground.''); *Umana-Ramos* v. *Holder,* 724 F3d 667, 670 (6th Cir. 2013) (''General conditions of rampant gang violence alone are insufficient to support a claim for asylum.''), they have been consistent that such fears are not a cognizable basis for asylum, even, contrary to one commenter, in the Fourth Circuit. *See, e.g., D.M.* v. *Holder,* 396 F. App'x 12, 14 (4th Cir. 2010) (''As found by the Board, the Petitioners have failed to show that they are at a greater risk of being victims of violent acts at the hands of criminal gangs than any other member of the general population in El Salvador. We have clearly held that a fear of general violence and unrest is inadequate to establish persecution on a protected ground.'').

The Departments believe that this rule—which establishes that particular-social-group claims grounded in an applicant's presence in a country with general violence or high crime rates, without more, will generally not be cognizable—is consistent with the Act, international law, and case law, particularly in connection to the definition of particular social group discussed, *supra,* which requires that the group exist independently of the alleged harm. Relatedly, commenters' allegations that the rule was crafted in response to the frequency of types of harm suffered are misguided. With respect to establishing a nexus to a protected ground, such as particular social group, it is not the frequency or severity of abuses that would render such claims insufficient, but rather the reasons for the abuse. Asylum is intended to protect individuals who have suffered abuses for a specific reason, on account of a protected ground. *Cf. Delgado-Ortiz,* 600 F.3d at 1151 (''Asylum is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground.'').

The Departments further note that an alien coming from a country with generalized violence or high crime rates is not precluded from asylum on that basis alone; the rule merely establishes that a particular-social-group claim premised upon general violence or high crime rates will not, without more, prevail. To succeed on a particular-social-group claim, an applicant must demonstrate that he or she has been or will be targeted on the basis of immutable, particular, and socially distinct characteristics, and the Departments believe that groups defined by general violence or high crime rates generally do not meet this threshold.

The Departments do not disagree with commenters who suggested that it would be natural for individuals to flee countries where their governments could not control violence. Indeed there are myriad reasons that would encourage or compel an individual to leave his or her home country. However, a government's inability or unwillingness to control violence is but one factor for asylum eligibility with respect to claims of persecution by non-state actors. Applicants must meet all eligibility factors and merit a positive exercise of discretion to warrant relief.

The Departments agree with commenters who stated that it would be difficult for applicants whose particular social group is predicated upon general violence or high crime rates in the country of origin to demonstrate that their proposed group meets all three requirements of immutability, particularity, and social distinction. However, the Departments do not believe that a regulatory standard stating so would lead adjudicators to deny applications where the applicant has articulated a particular social group unrelated to the crime rate. Rather, the Departments believe that this rulemaking offers clear guidance to adjudicators and parties that such proposed groups, without more, will not be cognizable. *See* 85 FR at 36278 (''The proposed rule would further build on the BIA's standards and provide clearer guidance to adjudicators regarding whether an alleged group exists and, if so, whether it is cognizable as a particular social group in order to ensure the consistent consideration of asylum and statutory withholding claims.''). Furthermore, immigration judges and asylum officers undergo training in which they learn to adjudicate asylum claims, including the cognizability of particular social groups. The Departments are confident that adjudicators are aptly prepared, through training and experience, to adjudicate asylum claims without confusing the particular-social-group analysis with other facets of asylum eligibility requiring a separate analysis.

With respect to commenter statements that this rule is contrary to established case law which, the commenter stated, established that a country's generalized violence and high crime rates were ''irrelevant'' to the applicant's claim, the commenter appears to have conflated relevance for sufficiency. The Fourth Circuit, in the cited cases, determined that generalized violence or high crime rate did not undermine claims where the court determined there was sufficient evidence to establish a nexus to a protected ground. However, these cases do not endorse a position that claims rooted in generally violent conditions or high crime rates, without more, would be sufficient to warrant a grant of asylum. *See Alvarez-Lagos,* 927 F.3d at 251; *Zavaleta-Policiano,* 873 F.3d at 248; *Crespin-Valladares,* 632 F.3d at 127.

4.1.3. Being the Subject of a Recruitment Effort by Criminal, Terrorist, or Persecutory Groups

Comment: One organization noted that the rule narrows the definition of credible fear by ''eliminating claims to protection from fear of gangs or terrorists.'' Another organization claimed there is no support in the cases cited by the NPRM for making gang recruitment-related particular social groups generally non-cognizable, emphasizing that the NPRM does not provide any evidence as to why the courts should not continue to consider recruitment-based particular social groups on a case-by-case basis.

One organization noted that the U.S. government recognizes that children are often targets for gang recruitment and gang violence in their home countries. The organization expressed concern regarding the rule's presumption that ''attempted recruitment'' or ''private criminal acts'' are not sufficient for asylum, contending this ignores the reality that many child asylum seekers flee their home countries ''precisely because the government is unable or unwilling to control non-state actors like terrorist or gang organizations who would recruit or harm children and families.''

One organization noted that UNHCR has emphasized the importance of recognizing claims based on resistance to and desertion from non-state armed groups, explaining that gangs may try to harm individuals who have resisted gang activity, are opposed to gang practices, or attempt to desert a gang.

Response: The Departments disagree with the commenter's assertion that the rule eliminates any claims to protection. As stated above, the rule will not eliminate any particular-social-group claims. Rather, it sets forth a list of social group claims that will generally not be, without more, cognizable. This does not foreclose the possibility that an applicant could pursue or prevail on a claim in which they were the subject of a recruitment effort by a criminal, terrorist, or persecutory group. As noted by the NPRM, ''such facts could be the basis for finding a particular social group, given the fact- and society-specific nature of this determination.''

85 FR at 36279; *see also Grace II,* 965 F.3d at 906 (''[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.''). However, as a general rule, such groups will not be cognizable, consistent with existing Attorney General and BIA precedent. *Matter of A–B–,* 27 I&N Dec. at 335 (''Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group''); *Matter of S–E–G–,* 24 I&N Dec. at 584 (''[Y]outh who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed. However, this does not necessarily mean that the shared past experience suffices to define a particular social group for asylum purposes.''); *Matter of E–A–G–,* 24 I&N Dec. at 594–95 (determining that ''persons resistant to gang membership'' is not cognizable); *see also Constanza* v. *Holder,* 647 F.3d 749, 754 (8th Cir. 2011); *see also Lizama* v. *Holder,* 629 F.3d 440, 447 (4th Cir. 2011); *Larios* v. *Holder,* 608 F.3d 105, 109 (1st Cir. 2010); *Lushaj* v. *Holder,* 380 F. App'x 41, 43 (2d Cir. 2010); *Barrios* v. *Holder,* 581 F.3d 849, 855 (9th Cir. 2009). The Departments do not dispute that children may be targets for gangs, gang recruitment, and gang violence in their countries of origin. However, whether such applicants for asylum have been harmed or fear harm from the gangs is only one part of the overall asylum inquiry. Even a further showing that the government is unwilling or unable to protect the applicant would not be enough to merit a grant of asylum without meeting the other eligibility requirements. As discussed above, an applicant must also demonstrate that the harm he or she suffered or fears is on account of protected ground, such as membership in a particular social group.

4.1.4. The Targeting of the Applicant for Criminal Activity for Financial Gain Based on Perceptions of Wealth or Affluence

Comment: Another organization claimed that history is full of examples of persecution of classes of people on the basis of perceived wealth or influence. The organization stated that, under the proposed rule, the members of the kulak class who were killed after the Russian Revolution or the many wealthy and middle class Cubans who fled the Cuban Revolution would not have been recognized as persecuted social groups.

Another organization contended that there is no legal basis or support in the NPRM for precluding courts from analyzing particular social groups involving wealth on a case-by-case basis. The organization referenced the BIA's decision in *Matter of A–M–E– & J–G–U–,* 24 I&N Dec. 69 (BIA 2007), *aff'd Ucelo-Gomez* v. *Mukasey,* 509 F.3d 70 (2d Cir. 2007) (cited at 85 FR at 36279), stating the fact that the BIA held thirteen years ago that ''affluent Guatemalans'' is not a cognizable particular social group ''does not even begin to support the NPRM's sweeping proposal to bar all PSGs that mention wealth.''

Response: As noted in the NPRM, a social group which is founded upon being targeted for criminal activity for financial gain or for perceptions of wealth or affluence are generally, without more, unable to meet the well-established requirements for cognizability. 85 FR at 36279; *see Matter of A–M–E– & J–G–U–,* 24 I&N Dec. at 75.

With respect to commenters who presented specific examples that they alleged illustrated persecution of classes of people on the basis of perceived wealth or influence, as well as comments suggesting that the Departments are doing away with individualized analysis, the Departments note again that there may exist examples of social groups based on wealth that are cognizable, and that the listed social groups have been identified as generally not cognizable, without more. However, ''the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279; *see Grace II,* 965 F.3d at 906 (''[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.'').

4.1.5. Interpersonal Disputes of Which Governmental Authorities Were Unaware or Uninvolved

Comment: One organization noted that the rule would limit particular social groups based on both ''interpersonal disputes of which governmental authorities were unaware or uninvolved'' and ''private criminal acts of which governmental authorities were unaware or uninvolved.'' The organization emphasized that it is unlikely that a particular social group framed in this way would be cognizable; however, because the fact pattern is included in the rule as a ''limiting concept,'' the organization expressed concern that adjudicators would likely deny asylum based on this language, even though the rule specifies that it applies ''in the context of analyzing a particular social group.''

Another organization expressed concern that governments could attempt to remove U.S. or international sanctions by demonstrating that ''private actors'' were carrying out persecution against political dissidents and religious minorities. The organization noted that these governments could use propaganda to ''inflame local residents against a particular group,'' using the decimation of the Tutsis population in Rwanda as an example. According to the organization, governments could claim this was not a human rights violation because ''government soldiers themselves took no part in the attack.'' Another organization emphasized that violence is sometimes outside the state's reach, noting that violent activity can occur where weak governments use allied armed groups to provide security.

Response: As discussed above with respect to particular social groups defined by general violence or high crime rates, the Departments agree with commenters that it would be difficult to demonstrate that particular social groups defined by interpersonal disputes of which governmental authorities were unaware or uninvolved, without more, are cognizable. However, immigration judges and asylum officers undergo rigorous training on how to adjudicate asylum claims, including the cognizability of particular social groups. The Departments are confident that adjudicators are aptly prepared to adjudicate asylum claims without confusing the particular social group analysis with other facets of asylum eligibility requiring a separate analysis. The Departments fail to see how setting forth a social group that the commenter believes is unlikely to be presented is grounds for the commenter's objection to the rule.

The Departments do not address comments raising concerns about international sanctions or holding international governments accountable for alleged human rights violations, as the Departments' implementing statutes and regulations are unrelated to such matters, which are more properly handled by the Department of State.

Comments raising concerns about non-governmental violence that occurs ''outside the state's reach'' or in cases where ''weak governments use allied armed groups to provide security'' do not alter the Departments' determination that particular social

groups predicated upon interpersonal disputes of which governmental authorities were unaware or uninvolved, without more, are generally not cognizable. The commenter's statement about non-governmental violence that occurs ''outside the state's reach'' is not sufficiently specific for the Departments to draw any conclusion about its relevancy to such social groups. Although the Departments must be explicit that they are not endorsing the cognizability of such groups, the commenter's proposed scenario regarding weak governments using allied armed groups clearly would not involve governmental unawareness and is unlikely to involve personal disputes.[46]

4.1.6. Private Criminal Acts of Which Governmental Authorities Were Unaware or Uninvolved

Comment: One organization noted generally that the rule would remove protections for individuals fleeing violence from non-state actors. Another organization claimed that the rule's exclusion of acts ''of which governmental authorities are unaware or uninvolved'' disproportionately affects the ability of children to seek asylum. The organization noted that the ability of many children to access state protection in their home country is dependent upon the adults in their lives, emphasizing that not all children have an adult to help them obtain protection. The organization also noted that some children who go directly to government officials for protection may be dismissed. One organization noted generally that it has ''long been determined'' that the government does not actually need to be aware of the threats and that there is no requirement to report the persecution to the government if doing so ''would be futile or place the applicant at greater risk of harm,'' citing *Bringas-Rodriguez* v. *Sessions,* 850 F.3d 1051, 1062–72 (9th Cir. 2017) (en banc) and *Lopez* v. *U.S. Att'y Gen.,* 504 F.3d 1341, 1345 (11th Cir. 2007). Another organization claimed that the rule disregards the ''well-documented fact'' that oppressive governments utilize irregular forces for the purpose of denying their actions. The organization emphasized that chronic violence arises when a government is unwilling or unable to protect the life and liberty of its citizens, claiming that this government inaction puts people at risk of death. The organization concluded by alleging that the rule would send these individuals back ''into mortal danger.''

Another organization claimed this portion of the rule would violate the APA in at least six different ways. First, the organization alleged that the rule is contrary to law, as the INA does not state or imply that interpersonal or ''private'' acts cannot give rise to asylum. Instead, the statute makes clear that such acts can do so if they ''rise to the level of persecution, are taken on account of a protected ground, and are inflicted by actors the government is unable or unwilling to control.'' Second, the organization claimed that it is ''manifestly unreasonable'' to use the particular social group analysis to ''place entire groups of persecutors outside the asylum laws,'' noting that the particular social group analysis is dependent on the nature of the group to which the survivor belongs rather than the identity of the persecutor. Third, the organization alleged that a general prohibition of asylum in all situations where the government is ''uninvolved'' in the persecution is ''arbitrary and contrary to law,'' claiming that the substitution of ''uninvolved'' for ''unable or unwilling'' would render large categories of previously meritorious claims ineligible. The organization also emphasized that the rule would require survivors of persecution by non-state actors to report persecution to authorities ''even where laws against gender-based violence are limited or non-existent.'' The organization noted that current asylum law allows applicants to submit evidence as to why reporting this type of violence was impossible or dangerous, claiming there is no legitimate justification for the prohibition of such evidence.

Fourth, the organization claimed that the NPRM's use of the word ''private'' implicitly raises the ''unable or unwilling'' standard on some claims. Fifth, the organization contended that the ''interpersonal'' category is ''even more sweeping'' and therefore contrary to the INA, claiming that the plain meaning of the ''interpersonal'' violence category would bar *all* asylum claims. Sixth, the organization claimed the ''interpersonal'' and ''private'' categories violate the INA to the extent that, in the Departments' view, they apply to domestic or other gender-based violence. The organization claimed this is ''at odds'' with the evidence, which clearly shows that this type of violence is ''not simply a private matter based on personal animosity.'' The organization also claimed that the application of the ''interpersonal'' and ''private'' categories to domestic and other gender-based violence would violate constitutional equal protection principles because the presumption created by these categories would have a disproportionate effect on women (as women are much more likely to experience violence by an intimate partner).

Similarly, another organization noted that this portion of the rule is especially damaging to gender and LGBTQ+ related claims because ''many are rooted in intimate partner or family violence that government actors choose to ignore as private or family matters.'' The organization emphasized the BIA's decision in *Matter of A–R–C–G–,* 26 I&N Dec. 338 (BIA 2014), holding that a Guatemalan woman should be granted asylum on the basis of abuse by her former spouse, noting that this precedent has allowed many female asylum seekers from Central America to win cases. One organization stated that ''the very indifference'' of governmental authorities to the plight of survivors of gender-based violence proves that persecution exists, emphasizing there is ''no good reason'' for denying the claims of survivors who can show their government's failure to protect them.

Another organization claimed the rule ''condemns women to endure various forms of domestic- and gender-based violence, stripping them of the humanitarian protection of the United States.'' The organization contended that this ''upends'' the longstanding recognition and protection of particular social groups, across circuits, on the following grounds: Femicide, *Perdomo* v. *Holder,* 611 F.3d 662, 662 (9th Cir. 2010); honor killings, *Sarhan* v. *Holder,* 658 F.3d 649, 649 (7th Cir. 2011); female genital mutilation, *Mohammed* v. *Gonzales,* 400 F.3d 785, 785 (9th Cir. 2005); arranged or inescapable marriages, *Acosta Cervantes* v. *Barr,* 795 F. App'x 995, 995 (9th Cir. 2020); and ''other forms of domestic violence,'' *Muñoz-Ventura* v. *Barr,* 799 F. App'x 977, 977 (9th Cir. 2020). One organization contended that, by dismissing violence against women or LGBTQ+ individuals as an ''interpersonal dispute,'' the rule fails to recognize that gender-based violence is a ''social means to subordinate rather than an individual problem'' and requires comprehensive responses.

Response: The Departments disagree that the rule is contrary to law. At the outset, the Departments acknowledge that the INA does not specify whether interpersonal or ''private'' acts can give rise to an asylum claim. While the actions of private actors are also discussed elsewhere in this

[46] Regarding the commenters' specific example, the Departments note that claims from Tutsis in Rwanda may also be framed in terms of race or nationality which are not defined in the rule and are separate from claims based on a particular social group.

rulemaking,[47] the Departments will now address concerns as they were raised specifically in the context of establishing a particular social group. As the commenters contend, acts can give rise to asylum claims only if they are taken on account of a protected ground, such as ''particular social group.'' And, as discussed above, the term ''particular social group'' is ambiguous. As the Departments have set forth a reasonable determination that the term would generally not include, without more, social groups predicated upon private criminal acts of which governmental authorities were unaware or uninvolved, such private acts would generally not be sufficient grounds for asylum. *See Matter of A–B–,* 27 I&N Dec. at 335 (''groups defined by their vulnerability to private criminal activity likely lack the particularity'' required for cognizability).

The commenter's allegations that the rule violates the APA are predicated on presumptions that the rule categorically excludes certain types of social group claims. As stated above, ''the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279; *see Grace II,* 965 F.3d at 906 (''[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.''). The Departments believe that the listed social groups generally fail to meet the requirements for cognizability, not because, as the commenter alleged, of the identity of the persecutor, but rather because such groups are generally defined by the group members' vulnerability to private criminal activity. *See Matter of A–B–,* 27 I&N Dec. at 335.

The Departments note that social groups predicated on domestic or other gender-based violence, insofar as the group is defined by private criminal acts of which governmental authorities were unaware or uninvolved, will generally not be cognizable, as they, like all social groups defined by such acts, likely lack the requisite particularity due to the ''broad swaths of society [that] may be susceptible to victimization'' or social distinction to be cognizable. *Matter of A–B–,* 27 I&N Dec. at 335–36. Similarly, the Departments disagree with commenter's assertions that the rule would implicitly raise the ''unwilling or unable'' standard, as the Departments believe that social groups defined by private criminal acts of which governmental authorities were unaware or uninvolved are not cognizable under the particular social group analysis of immutability, particularity, and social distinction, irrespective of the government's inability or unwillingness to help, which is an independent factor in considering asylum eligibility.

With respect to commenters' concerns about this rule's potential effect on LGBTQ and gender-based-violence related claims, the Departments note again that they have codified a long-standing test for determining cognizability of particular social groups and have set forth a list of common fact patterns involving particular-social-group claims that generally will not meet those well-established requirements. The Departments did not first determine a set of groups that should or should not be cognizable and craft a rule around that determination.

To the extent that commenters assert that circuit case law conflicts with the Departments' rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X,* 545 U.S. at 982.

4.1.7. Past or Present Terrorist Activity or Association

Comment: At least one commenter raised concerns with the ''past or present terrorist activity or association'' base for not favorably adjudicating a particular social group. The commenter asserted that the terms ''terrorist activity'' and ''terrorist association'' were overbroad and, as a result, would result in unnecessary denials of asylum claims. Moreover, the commenter stated that the Departments did not provide ''empirical research'' to support the provision's inclusion, but rather relied on the ''unproven'' statement that allowing particular social groups defined by terrorist activity or association would reward membership in organizations that cause harm to society and create a perverse incentive to engage in reprehensible or illicit behavior as a means of avoiding removal.

Response: The Departments disagree that the terms ''terrorist activity'' or ''terrorist association'' are overbroad. The Departments are using the ''terrorist activity'' language that Congress clearly defined in the INA. *See* INA 212(a)(3)(B)(iii), 8 U.S.C. 1182(a)(3)(B)(iii). To the extent the commenter alleges that the statutory definition itself is overbroad, such arguments are outside the scope of this rule. Moreover, the Departments do not believe the phrase ''terrorist association'' is overly broad. The Departments intend for this provision to apply to those who voluntarily associate, or have previously voluntarily associated, with a terrorist organization. The Departments believe the ordinary meaning of the term provides sufficient definition for adjudicators to apply. *See, e.g.,* ''Associate'' Definition, Merriam-Webster, *https://www.merriam-webster.com/dictionary/associate* (defined as ''join[ing] as a partner, friend, or companion'' with an example of ''They were closely associated with each other during the war'').

Although the Departments do not maintain data on the number of prior asylum grants based on a terrorism-related particular social group, the Departments believe it is reasonable that, as a general matter, persons applying for asylum in the United States cannot claim asylum based on their participation in, or association with, terrorism. For example, Congress included certain terrorism-related activities as a categorical bar from asylum eligibility. *See* INA 208(b)(2)(A)(v), 8 U.S.C. 1158(b)(2)(A)(v).[48] Similarly, although this is not a categorical bar to terrorism-based particular social groups, generally disfavoring such groups is consistent with this Congressional intent.

Finally, the Departments note that association with past or current terrorist activity is at least as ''anti-social'' as association with criminal gang activity, if not more so, and the latter has been rejected as a basis for a particular social group by multiple courts. *Cf. Arteaga,* 511 F.3d at 945–46 (''We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit

[47] The Departments note that longstanding law has precluded private acts of violence as a basis for asylum or similar protection for many years. *See, e.g., Matter of Pierre,* 15 I&N Dec. 461, 462–63 (BIA 1975) (strictly personal dispute between a husband and wife does not state a claim on account of race, religion, political opinion or membership in a particular social group). Further, circuit courts have also held that private acts of violence are not a cognizable basis for asylum, though their decisions are sometimes rooted in other bases. *See, e.g., Prado* v. *U.S. Att'y Gen.,* 315 F. App'x 184, 188 (11th Cir. 2008) (''Ordinary criminal activity and acts of private violence are generally not 'persecution' within the meaning of 8 U.S.C. 1101(a)(42)(A).''). The Departments' consideration of private violence under the definition of particular social group in no way precludes its consideration in connection with the other requirements necessary for asylum, including nexus and persecution.

[48] The Departments note that certain activities or associations that trigger terrorism-related inadmissibility grounds may potentially be the subject of discretionary group-based, situational, or individual exemptions. In such cases, they would not constitute bars to asylum eligibility.

theft.''); *Cantarero,* 734 F.3d at 85–86 (''The BIA reasonably concluded that, in light of the manifest humanitarian purpose of the INA, Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger. . . . Such recognition would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country. It would, moreover, offer an incentive for aliens to join gangs here as a path to legal status. . . . Accordingly, the BIA's interpretation merits our deference under *Chevron.*''); *Elien,* 364 F.3d at 397 (''Such recognition unquestionably would create a perverse incentive for [aliens] coming to or residing in the United States to commit crimes, thereby immunizing themselves from deportation. . . . Moreover, the BIA has never extended the term 'social group' to encompass persons who voluntarily engaged in illicit activities.''). Consequently, the Departments decline to follow a suggestion that terrorist association should generally be considered a cognizable particular social group.

4.1.8. Past or Present Persecutory Activity or Association

Comment: One organization claimed that the NPRM's proposed bar on ''past persecutory activity,'' 85 FR at 36279, is contrary to the APA in the same manner as the proposed bar on past criminal conduct. The organization alleged that listing a scenario involving past persecutory activity as generally non-cognizable would create even greater uncertainty, however, because ''past persecutory activity'' is not defined in the NPRM.

Response: Although the commenter's broad and unspecified allegations make a response difficult, the Departments do not believe this rulemaking is in violation of the APA for reasons given in both the NPRM and this final rule, and they reiterate that this rulemaking does not impose any categorical bar as suggested by the commenter. The Departments have provided descriptions and reasons for all the provisions and have established a reasonable basis for the rule. With respect to the commenter's concerns about what conduct falls under the term ''past persecutory activity,'' the Departments note that this rulemaking, including the NPRM, sets forth clear guidelines about what conduct constitutes persecutory activity, 85 FR at 36280–81, and thus, that this should serve as a guide for conduct involving past persecutory activity.

4.1.9. Status as an Alien Returning From the United States

Comment: One organization noted that the rule would generally not find a particular social group to be cognizable if based on ''status as an alien returning from the United States.'' The organization expressed concern about this, noting that there have been circumstances where ''Westernized Iraqi citizens have faced persecution and potential torture based on their perceived ties to the United States.'' The organization emphasized that each proposed particular social group should be evaluated on a case-by-case basis instead of being subjected to general rules that would result in ''blanket denials.''

Another organization claimed that ''status as an alien returning from the United States'' is on its face an ''immutable, socially distinct, and particular'' characteristic. The organization emphasized that past association as a former resident of the United States is similar to one's membership in a family or one's specific history because it is a particular characteristic that cannot be changed. The organization alleged that this portion of the rule could result in the denial of asylum to individuals persecuted due to their real or imputed association with the United States by ''a regime that is hostile to this country, or its culture and values.''

One organization disagreed with the claim that any group based on individuals returning from the United States will be ''too broad'' to qualify as a particular social group, 85 FR at 36279, claiming this is ''factually and legally erroneous.'' The organization alleged that, as a factual matter, the number of individuals returning to some countries from the United States is small. As a legal matter, the organization claimed that whether a group is potentially large would not, by itself, mandate the conclusion that the group is not particular.

Response: The Departments reiterate once again that this rule does not foreclose the possibility of pursuing and prevailing upon a particular social group claim defined by the applicant's status as an alien returning from the United States. ''[T]he regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279; *see Grace II,* 965 F.3d at 906 (''[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.''). If applicants believe that their proposed group as an alien returning from the United States meets one of the exceptions to the general rule based on, as commenter's proposed, the group meeting the particularity requirement, the applicants may propose such a group.

The Department disagrees with comments that individuals returning from the United States can, generally, demonstrate that their group is sufficiently particular or socially distinct. *See, e.g., Reyes* v. *Lynch,* 842 F.3d 1125, 1139 (9th Cir. 2016) (upholding BIA's determination that a proposed social group of deportees ''was too amorphous, overbroad and diffuse because it included men, women, and children of all ages, regardless of the length of time they were in the United States, the reasons for their removal, or the recency of their removal''); *Lizama,* 629 F.3d at 446 (rejecting proposed group of ''young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs'' as ''clearly fail[ing] to meet the required criteria'' (internal quotations omitted)). However, to the extent that commenters believe there may be exceptions to this general rule, ''the rule does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279; *see Grace II,* 965 F.3d at 905.

4.2. Political Opinion

Comment: Commenters argued that the proposed definition of political opinion is inconsistent with legislative intent and international law, which, commenters asserted, require the term to be construed broadly. Specifically, commenters asserted that Congress, in passing the Refugee Act of 1980, aimed to align the United States definition of ''refugee'' with the United States' obligations under the 1967 Protocol relating to the Status of Refugees. Commenters provided excerpts from the House Report for the Refugee Act of 1980 and UNHCR guidance stating the term should be construed broadly. Commenters also argued that Congress is the branch that holds the plenary power and that the proposed edits to 8 CFR 208.1(d) are an attempt ''to do an end run around the legislative intent'' of section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42).

Commenters expressed concern that the proposed definition of political opinion is inconsistent with Federal court and BIA precedent. Commenters

cited *Cardoza-Fonseca,* 480 U.S. 421, to argue that the proposed definition of ''political opinion'' is too narrow. One commenter also cited cases from the United States Courts of Appeals for the Second, Third, and Ninth Circuits, which the commenter argued evidence that the term political opinion should be construed broadly. Another commenter noted that Federal courts have recognized political opinions based on feminist beliefs, labor organizing, environmental beliefs, support of student organizations, and gangs. With respect to BIA precedent, one commenter asserted that the NPRM incorrectly interpreted *Matter of S–P–,* 21 I&N Dec. 486 (BIA 1996), and that the case actually instructs that the term political opinion should be construed broadly. The commenter similarly asserted that the BIA decisions in *Matter of D–V–,* 21 I&N Dec. 77 (BIA 1993), and *Matter of N–M–,* 21 I&N Dec. 526 (BIA 2011), support a broad reading of political opinion. One commenter cited the third edition of the Webster's New World College Dictionary (1997) to argue that the definition of the word ''political'' is unambiguously understood to include more than just opposition to a particular regime. Accordingly, the commenter argued, the proposed definition of political opinion contradicts the plain meaning of the INA.

Commenters expressed concern that political opinions not directly related to regime change would be considered invalid under the proposed definition. As an example, one commenter asserted that Wang Quanzhang (who the commenter stated is a human rights defender in China) and Ivan Safronov (a Russian journalist who, the commenter stated, was charged with treason for contributing to a prominent business newspaper) would not have valid political opinions under the proposed definition. Commenters asserted that individuals could hold valid political opinions unrelated to regime change such as LGBTQ rights advocacy, voter registration advocacy, and opinions on the publication of data about COVID–19 in countries that seek to hide the pandemic's impact. One commenter noted that in some nations the geopolitical landscape renders a distinction between opposition to a specific regime indistinguishable from political opinions about cultural issues.

Commenters similarly expressed concern that gang-based claims would be rejected under the proposed definition. Commenters asserted that gangs can have substantial political power and that some nations are unable to control gang violence and influence. One commenter stated that the United States Department of State recognized this reality in its 2019 Country Reports on Human Rights Practices. Other commenters cited provisions of the UNHCR Guidelines on International Protection noting that gang-based and gender-based claims can be valid.

Commenters also expressed concern with the ''absent expressive behavior'' language in proposed 8 CFR 208.1(d) and 8 CFR 1208.1(d), asserting that section 208(b) of the Act, 8 U.S.C. 1158(b), does not require protected grounds to be expressed in a particular way and that ''political opinion,'' not ''political activity'' is the protected ground. Commenters asserted that the proposed definition contradicts UNHCR Guidance on expressing opinions. Commenters argued that ''absent expressive behavior'' is ''antithetical to the concept of an imputed political opinion against a non-state organization'' and that it is inconsistent with Federal case law that has recognized imputed political opinions against gangs that fall outside of the proposed definition of expressive behavior.

One commenter expressed concern that the proposed definition of political opinion ''frustrates the reliance interests'' of ''thousands'' of individuals whose asylum claims are based on political opinions under the current understanding of the concept. The commenter expressed concern that individuals with pending applications would ''have a much lower likelihood of obtaining relief under the proposed rule.''

Response: In regards to commenters' concerns that the final rule contravenes various Federal circuit court decisions, the Departments note that the disparity in interpretations of the term political opinion is a partial motive for the amendment. As discussed in the NPRM, this rule will provide clarity in an area of conflicting case law that has made uniform application challenging for adjudicators.

One commenter suggested that the Departments were ''seek[ing] to erase all precedent that is favorable to asylum seekers.'' The Departments deny this purported motive. As mentioned in the NPRM, the purpose behind the amendments surrounding political opinion is to provide clarity to adjudicators, avoid further strain on the INA's definition of ''refugee,'' and to acknowledge that the statutory requirements and general understanding of political opinion is intended to advance or further a discrete cause related to political control of a state.

A commenter expressed concern that the Departments failed to recognize that many asylum seekers flee their homelands because their governments are unable or unwilling to control non-state actors, including international criminal organizations. The Departments do not disagree that this may be the motivation for some aliens to flee their homelands. However, that fact alone does not create a basis for protection under the immigration laws. Asylum and statutory withholding of removal are narrowly tailored—allowing for the discretionary grant of protection from removal in the case of asylum and granting protection from removal in the case of withholding—to aliens who demonstrate that they meet specific eligibility criteria. The asylum laws were not created to address any misfortune that may befall an alien. Rather, asylum generally is available to individuals who are able to establish, among other things, that the harm they experienced or fear was (or there is a well-founded basis to believe would be) inflicted on account of a protected ground. The rule will improve the system by creating a clearer definition of political opinion, which, in turn, will assist in the expeditious processing of meritorious claims.

Several commenters listed various opinions which, commenters' opined, would no longer fit within the political opinion category. The Departments acknowledge that the rule codifies a specific definition for articulating political opinion claims, though it also incorporates existing case law principles.[49] As explained in the NPRM, the Departments seek to provide clear standards for adjudicators to determine political opinion claims. For example, if political opinion were expanded to include opposition to international criminal organizations, it would ''interfere with the other branches' primacy in foreign relations,'' and ''strain the language of'' INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). *See Saladarriaga* v. *Gonzales,* 402 F.3d 461, 467 (4th Cir. 2005) (holding that an individual's cooperation with the DEA, even if it stemmed from disapproval of a drug cartel, did not constitute a political opinion). Although the Departments agree that international

[49] As discussed herein, the rule itself applies prospectively to applications filed on or after its effective date; accordingly, it will have no effect on pending applications, contrary to commenters' concerns. However, the rule also codifies many principles that are already applicable through binding case law. Thus, although the rule itself may not apply to pending applications, applicable case law that is reflected in the rule may nevertheless still apply to pending applications.

criminal organizations threaten both their fellow countrymen and the international community, the appropriate redress for such concerns is not to broadly grant asylum on the basis of political opinion.

A commenter stated, without more, that the rule does not meet the materiality standard as outlined in the UNHCR guidance. The Departments decline to respond to commenters' general assertions that the rule violates U.S. international treaty obligations.

The Departments do not share a commenter's concern that the NPRM defines ''political opinion'' narrowly to the extent that it runs afoul of congressional intent to define ''refugee'' broadly. The NPRM notes that since the enactment of the statute, the definition of ''refugee'' has been strained in various contexts. *See Saladarriaga,* 402 F.3d at 467. Thus, one aspect of the motive behind the NPRM is to reduce the strain on the statute and return the statute to its original meaning.

Additionally, the commenter claimed that the expansive definition was meant to mirror the 1967 Protocol relating to the Status of Refugees, the 1951 Convention relating to the Status of Refugees, and UNHCR guidelines, which the commenter claims are now violated by the new definition. The Departments reject this conclusion. While UNHCR guidelines are informative, they are not prescriptive and thus not binding. *See Aguirre-Aguirre,* 526 U.S. at 427 (''The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts.''); *Cardoza-Fonseca,* 480 U.S. at 439, n.22 (''Indeed, the Handbook itself disclaims such force[.]'').

In regards to the meaning of ''political,'' the Departments note that, according to the Merriam-Webster Dictionary, ''political'' does have numerous definitions. *See* ''Political'' Definition, Merriam-Webster, *https://www.merriam-webster.com/dictionary/political.* However, all but one of those definitions relates specifically, and often solely, to governments. Moreover, the first definition refers only to the government. Similarly, the Departments reject commenters' assertions that ''expressive behavior'' is solely ''political action'' and therefore distinct from political opinion. First, the Departments note that the definition of political opinion has been highly debated. *See, e.g.,* Catherine Dauvergne, *Toward a New Framework for Understanding Political Opinion,* 37 Mich. J. Int'l L. 243, 246–47 (2016) (''The tension between [differing interpretations of political opinion] raises the overarching question of whether political opinion should be defined at all. It is evident that existing definitions have not provided sufficient guidance, and that there is no definition in the adjacent area of human rights law that can be logically imported . . . . [A] broadly agreed-upon definition of political opinion would advance the jurisprudence by providing a consistent standard.''). The NPRM aims to clarify this definition for adjudicators. The Departments' use of ''expressive behavior'' is directly related to the NPRM's definition of political opinion as ''intended to advance or further a discrete cause related to political control of a state.'' 85 FR at 36280. Moreover, the Departments are unaware of any claim rooted in political opinion that did not contain some type of expressive behavior, and it is not clear how an opinion never uttered or conveyed could be recognized as a political opinion.

Another commenter expressed concern that a particular state's geopolitical landscape that would leave political opinions indistinguishable from cultural issues. First, BIA case law clearly holds that political opinion involves a cause against a state or political entity rather than against a culture. *Matter of S–P–,* 21 I&N Dec. at 494. However, the Departments also acknowledge that there may be rare circumstances that will amount to exceptions to the general guiding principles laid out in the NPRM. For this reason, the rule uses ''in general'' to guide adjudicators in their determinations.

4.3. Persecution

Comment: Commenters expressed a wide range of concerns with the rule's definitional standard for ''persecution.'' *See* 85 FR at 36280–81; 8 CFR 208.1(e), 1208.1(e). Overall, commenters asserted that the Departments' justification was generally flawed and inappropriately relied on case law to support its position.

Commenters asserted that the proposed definition of persecution is inconsistent with the statutory meaning of the word. For example, commenters argued that the new definition impermissibly alters the definition of refugee so that it does not conform with the United Nations Convention and Protocol Relating to the Status of Refugees. Commenters said this violates the ''fixed-meaning canon'' of construction, which ''holds that words must be given the meaning they had when the text was adopted.'' Commenters considered the meaning of ''refugee,'' which incorporates persecution, in the Refugee Act and argued that legislators intended for persecution to have a broad meaning in order to align the INA with U.S. international obligations.

Commenters expressed concern that the proposed definition of persecution would exclude claims based on threats with no accompanying effort to carry out the threat or non-exigent threats. Commenters cited and discussed numerous Federal cases, including, *Cardoza-Fonseca,* 480 U.S. 421, and argued that Federal case precedent suggests that threats alone can be the basis of asylum claims. One commenter provided the example of death threats and noted that the United States Court of Appeals for the Sixth Circuit reasoned that an applicant need not wait for an actual attempt on his or her life before having a valid claim for asylum. *Juan Antonio,* 959 F.3d at 794. Another commenter similarly argued that a teenage girl who rebuffed inappropriate advances from a corrupt official would not be able to prevail on a persecution claim unless the official assaulted her. Commenters asserted that through the focus on severe and exigent threats, the proposed definition and the accompanying non-exhaustive list of factors would unlawfully lead to denials of asylum claims where applicants suffer significant harms that fall short of an immediate threat to life or property. At least one commenter asserted that this requirement of action would inappropriately eliminate claims based on a well-founded fear of future persecution.

Commenters expressed concern that the proposed definition of persecution wrongfully fails to account for the possibility of cumulative harms rising to the level of persecution and argued that Federal case law instructs that adjudicators must consider cumulative harm. *See, e.g., Herrera-Reyes* v. *Att'y Gen. of U.S.,* 952 F.3d 101, 109 (3d Cir. 2020); *Tairou* v. *Whitaker,* 909 F.3d 702, 707 (4th Cir. 2018); *Matter of O–Z– & I–Z–,* 22 I&N Dec. 23 (BIA 1998). Commenters expressed concern that the rule would prevent applicants who have suffered multiple distinct harms from prevailing on an asylum claim if each instance is deemed to be not severe or to be minor. To illustrate these concerns, one commenter discussed persecution suffered by the Rohingya and another detailed the case of one of his clients whose application, the commenter argued, would be granted under the current regulations and case law but denied under the persecution definition established by the rule.

One commenter argued that because factors suggesting a lack of persecution

are overrepresented, adjudicators would not be engaging in case-by-case analysis and that the scales are inappropriately tipped towards finding a lack of persecution.

Commenters expressed concern that the proposed definition inappropriately fails to consider how children and adults experience harm differently. Specifically, commenters argued that children may experience harm because of affiliation with family members and caregivers and that harm suffered by children may rise to the level of persecution even though the same harm would not rise to such a level for adults. Other commenters noted that it is not reasonable to expect children to seek protection from official sources.

Commenters expressed concern that the proposed rule would require asylum seekers to demonstrate that persecutory laws would likely be enforced against them. As an example, commenters noted that asylum seekers coming from countries where same sex relationships carry the death penalty would not be able to secure asylum unless they could also establish that the law would likely be applied to them. In many cases, one commenter argued, such a penalty is not enforced frequently because sexual minorities are not likely to break the law given the risk of death. The commenter noted that the United States Court of Appeals for the Ninth Circuit has suggested that applicants with these types of claims should prevail. *See Karouni* v. *Gonzales,* 399 F.3d 1163, 1173 (9th Cir. 2005). Commenters also noted that even if laws such as the above are not enforced, they are still persecutory in nature because of the fear and vulnerability that they create in those that could be subjected to the laws.

Response: As stated in the proposed rule, the Departments added new paragraphs in 8 CFR 208.1 and 1208.1 ''to define persecution and better clarify what does and does not constitute persecution.'' 85 FR at 36280. These changes clarify that persecution is an extreme concept that requires severe harm and specify different examples of conduct that, consistent with case law, do not rise to the level of persecution. *See* 85 FR at 36280–81. They are not unduly restrictive, and it is well-established that not every harm that befalls an alien, even if it is unfair, offensive, unjust, or even unlawful, constitutes persecution. *See Gjetani* v. *Barr,* 968 F.3d 393, 397 (5th Cir. 2020) (''Persecution is often described in the negative: It is *not* harassment, intimidation, threats, or even assault. Persecution is a specific term that does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.'' (quotation omitted)); *see also Ahmed* v. *Ashcroft,* 341 F.3d 214, 217 (3d Cir. 2003) (discrimination against stateless Palestinians in Saudi Arabia did not amount to persecution).

Commenters are correct that the definition of ''refugee'' in the Act, first codified by the Refugee Act, incorporates ''persecution'' and that Congress enacted the Refugee Act in order to conform the Act with the United States' obligations under the 1967 Protocol relating to the Status of Refugees. *See Matter of Acosta,* 19 I&N Dec. at 219. However, commenters are incorrect that Congress intended for the Refugee Act to import any specific international or extrinsic definition of ''persecution.'' Instead, as explained by the BIA, Congress used the term persecution prior to the Refugee Act, and, accordingly, it is presumed that Congress intended for that pre-Refugee Act construction to continue to apply. *Id.* at 222.[50] That prior construction of the term included the notions that ''harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome . . . and either by the government of a country or by persons or an organization that the government was unable or unwilling to control.'' *Id.* The standards for persecution contained in the proposed rule and this final rule align with this understanding of ''persecution,'' and the rule is not incompatible with the Act or the United States' international treaty obligations.

Some of the standards implemented by this rule involve matters that the Federal courts have adjudicated inconsistently. For example, the rule establishes that repeated threats would not constitute persecution absent ''actual effort to carry out the threats.'' 8 CFR 208.1(e), 1208.1(e). Courts have held that threats, even with accompanying action, do not necessarily rise to the level of persecution. *See, e.g., Gjetani,* 968 F.3d at 398 (collecting cases and explaining that ''[E]ven those subject to brutal physical attack are not necessarily victims of 'persecution.' Courts have condemned all manner of egregious and even violent behavior while concluding they do not amount to persecution.''); *see also Quijano-Rodriguez* v. *Gonzales,* 139 F. App'x 910, 910–11 (9th Cir. 2005) (collecting cases).

The Departments note that Federal courts have also held that threats without attempts to carry out the threat may at times constitute persecution. *See, e.g., Duran-Rodriguez* v. *Barr,* 918 F.3d 1025, 1028 (9th Cir. 2019) (explaining that ''death threats alone can constitute persecution'' but ''they constitute 'persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm' '' (citation omitted)). Threats ''combined with confrontation or other mistreatment'' are likely to be persecution; however, ''cases with threats *alone,* particularly anonymous or vague ones, rarely constitute persecution.'' *Id.* (internal citation omitted) (emphasis added); *see also Lim* v. *INS,* 224 F.3d 929, 936 (9th Cir. 2000) (''In certain extreme cases, we have held that repeated and especially menacing death threats can constitute a primary part of a past persecution claim, particularly where those threats are combined with confrontation or other mistreatment. . . . Threats standing alone, however, constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual 'suffering or harm.''). Even the case cited by commenters, *Juan Antonio,* 959 F.3d at 794, noted that threats alone amount to persecution only when they are ''of a most immediate and menacing nature''; moreover, the respondent in that case experienced beatings and rape in addition to threats, rendering that case inapposite to the rule, *id.* at 793.

The Departments believe that the rule reflects appropriate and reasonable lines drawn from the relevant case law regarding persecution, particularly due to the difficulty associated with assessing the credibility of an alleged threat, especially in situations in which the threat was made anonymously and without witnesses or the existence of other corroborating evidence. *See Lim,* 224 F.3d at 936 (''Furthermore, claims of threats are hard to disprove. A finding of past persecution raises a regulatory presumption of future persecution and flips the burden of proof . . . to show that conditions have changed to such a degree that the inference is invalid . . . . Flipping the burden of proof every time an asylum applicant claimed that he had been threatened would unduly handcuff the [government].''). To the extent that the standards implemented by this rule conflict with case law interpreting what sorts of conduct rise to the level of persecution, the Departments invoke

[50] Moreover, as also noted by the BIA, the Protocol itself leaves the determination of who should be considered a refugee, which inherently includes a determination of who is at risk of persecution, to each state party itself. *Matter of Acosta,* 19 I&N Dec. at 220.

their authority to interpret the ambiguities of what constitutes persecution—an undefined term in the Act—outside the bounds of such prior judicial constructions. *See Brand X,* 545 U.S. at 982; *see also Grace II,* 965 F.3d at 889 (noting that the term ''persecution'' is ''undefined in the INA''); *cf. Fernandez* v. *Keisler,* 502 F.3d 337, 347–48 (4th Cir. 2007) (applying *Brand X* to affirm the BIA's rejection of the Fourth Circuit's prior interpretation of section 101(a)(22) of the Act, 8 U.S.C. 1101(a)(22), where the court's prior interpretation did not rest on a determination that the statute was ''unambiguous''). Moreover, in response to the commenters' concerns, the final rule more clearly specifies the types of threats included within the definition such that menacing and immediate ones may still come within the definition consistent with the case law noted above.

To the extent that aspects of persecution adjudications are not covered by the rule, the Departments expect adjudicators to conduct all determinations consistent with the law, regulations, and precedent. Accordingly, the rule does not conflict with case law explaining that harms must be considered cumulatively and in the aggregate, *see, e.g., Matter of Z–Z–O–,* 26 I&N Dec. 586, 589 (BIA 2015) (holding that applicant's experiences did not amount to persecution ''when considered either individually or cumulatively''); *Matter of O–Z– & I–Z–,* 22 I&N Dec. at 25–26 (considering incidents of harm ''[i]n the aggregate''), because it does not in any way direct adjudicators to blindly only consider harm suffered individually. In other words, adjudicators will still consider harms suffered by applicants in the aggregate.

Similarly, the rule does not end case-by-case adjudications of whether conduct constitutes persecution. The Departments disagree with commenters that the Departments' choice to frame persecution in the context of conduct that does not rise to the level of persecution while leaving open further adjudication of what conduct constitutes persecution in any way ''tips the scales.'' ''Persecution is often described in the negative . . . .'' *Gjetani,* 968 F.3d at 397.

As noted by commenters, Federal courts have held that an applicant's age is relevant for determining whether the applicant suffered persecution. *See, e.g., Liu* v. *Ashcroft,* 380 F.3d 307, 314 (7th Cir. 2004) (''[A]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution.''). Commenters are incorrect, however, that the rule's persecution standard conflicts with this instruction. Instead, the rule provides a general standard for persecution that is built around the severity of the harm. 8 CFR 208.1(e), 1208.1(e). This focus on severity does not foreclose arguments or an adjudicator's finding that harms suffered by an applicant are severe in their particular context given the applicant's age or particular circumstances, even if such harms may not generally be considered severe for the average applicant.

Regarding commenters' concerns with the rule's instruction that ''[t]he existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally,'' the Departments note this standard is consistent with well-established law that ''an asylum applicant can establish a well-founded fear of persecution by proving either a pattern or practice of persecution of a social group, of which the applicant has proven she is a member, or by proving the applicant will be singled out personally.'' *Ayele* v. *Holder,* 564 F.3d 862, 870 (7th Cir. 2009). Laws that are unenforced or enforced infrequently cannot demonstrate a pattern or practice of persecution, 8 CFR 208.13(b)(2)(iii), 1208.13(b)(2)(iii), and without credible evidence that such laws would be applied to the applicant, the alien cannot demonstrate that he or she would be singled out individually for persecution, *id.* The rule does not alter these well-established precepts. Further, this requirement that the mere existence of a law, without more, is insufficient to rise to the level of persecution is in keeping with prior interpretations of persecution. For example, the BIA has explained that evidence of the enactment of a new law is not evidence of changed country conditions for the purposes of a motion to reopen ''without convincing evidence that the prior version of the law was different, or was differently enforced, in some relevant and material way.'' *Matter of S–Y–G–,* 24 I&N Dec. 247, 257 (BIA 2007).

This definition does not foreclose an applicant from citing to the existence of such laws as a part of his or her evidence to demonstrate past persecution or risk of future persecution. Nor does this requirement require an applicant to live in secret in order to avoid future harm. Further, the Departments expect that in many cases there may be credible evidence of the enforcement of such laws. For example, in the Ninth Circuit case cited by commenters, the government conceded at oral argument that the Lebanese government arrested individuals for homosexual acts and enforced the law at issue. *Karouni,* 399 F.3d at 1172.

Finally, the rule's persecution standard does not in any way foreclose claims based solely on a well-founded fear of future persecution. Instead, the adjudicator will consider whether the future harm feared by the applicant would constitute persecution under the rule's standards. In other words, the adjudicator would consider whether the feared harm would be carried out by an individual with the intent to target the applicant's belief or characteristic, would be severe, and would be inflicted by the government or by persons or organizations that the government is unable or unwilling to control.[51]

4.4. Nexus

Comment: Numerous commenters expressed general disagreement regarding the rule's nexus provisions, including referring to the list as an ''anti-asylum wish list.'' Commenters claimed that it directed adjudicators to deny most claims.

Some commenters alleged that the Departments were attempting to accelerate asylum hearings at the expense of due process; the commenters construed the rule as creating a checklist that bypasses careful consideration that due process requires. Others opined that the rule prioritized efficiency and expediency over fairness, due process, and ''basic humanity.'' Commenters stated the rule allowed ''blanket denials.''

Another commenter opined that the rule was arbitrary because the Departments failed to consider the real-world implications of the proposal. Commenters expressed concern that, after the enactment of the rule, many asylum seekers would not have favorable adjudication of their claims,

[51] Specifically regarding commenters' concerns that the rule's standard that threats without accompanying action do not constitute persecution would undermine claims based on fear of future persecution, the Departments believe that the commenters are conflating past harms and determinations of past persecution with fear of future harm and determinations of a well-founded fear of future persecution. Indeed, it is difficult to understand how anyone could predict whether future threats will occur and difficult to conceive of a claim in which an alien alleges a fear of future threats but not a fear of future physical, mental, or economic harm. The real issue is the likelihood of future harm based on past threats, and the rule does not alter an alien's ability to argue that past threats are evidence of either past persecution or a likelihood of future persecution.

including those based on violence from non-state actors. Others claimed the rule's nexus components were ''completely incapable of supporting a meritorious asylum claim.''

Commenters expressed concern that the rule precludes a mixed-motive analysis, reasoning that if an actor had any one, potential motive listed in the rule, it would be fatal to the claim, and that it violates the ''one central reason'' standard. INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i).

Some of the commenters' disagreement surrounded *Matter of A–B–,* 27 I&N Dec. 316. One commenter opined that the rule is contrary to *Matter of A–B–*'s requirement of case-by-case rigorous analysis, and another commenter worried that the NPRM codified *Matter of A–B–,* despite, as the commenter characterized, its unfavorable treatment in various Federal courts.

Other commenters argued that the nexus provisions conflated ''categories of people'' with requirements of the perpetrator's mental state.

Another commenter expressed concern that the rule included ''substantive changes to the law disguised in procedural attire.''

Response: As an initial point, to the extent commenters' points misstate the rule, address issues not raised by the rule, are rooted in erroneous reasoning, are contrary to facts or law, or reflect unsubstantiated and exaggerated melodramatic views of the rule, the Departments decline to adopt those points. The Departments do not wish to enact some ''anti-asylum wish list'' in this rule. In codifying the circumstances that are generally insufficient to support a nexus finding, the Departments are simply specifying common circumstances, consistent with case law, in order to provide clarity and efficiency for adjudicators. The Departments proposed these amendments in order to assist aliens with meritorious claims, as well as the entire immigration system. As with all regulations or policy changes, the Departments considered the effect this rule will have; accordingly, the Departments reject commenters' allegations that such implications were not considered.

The rule's inclusion of these general guidelines for nexus determinations will not result in due process violations from adjudicators failing to engage in an individualized analysis. The rule provides a nonexhaustive list of eight circumstances that generally will not warrant favorable adjudication, but the rule does not prohibit a favorable adjudication depending on the specific facts and circumstances of the applicant's particular claim. *See* 8 CFR 208.1(f), 1208.1(f) (''For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, the Secretary, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances''); *see also Grace II,* 965 F.3d at 906 (holding that the inclusion of qualifying terms like ''in general'' and ''generally'' demonstrated that the government had not enacted a rule that all gang-based asylum claims would fail to demonstrate eligibility for asylum). In other words, the rule implicitly allows for those rare circumstances in which the specified circumstances could in fact be the basis for finding nexus given the fact-intensive nature of nexus determinations. *See* 85 FR at 36279. The amended regulations do not remove that fact-intensive nature from the nexus inquiry; rather, the amended regulations provide clarity in order to reduce the amount of time that adjudicators must spend evaluating claims. While the Departments did consider expediency and fairness, the Departments disagree that expediency is prioritized over and above due process.

The Departments disagree with commenters' concerns that the nexus provisions eliminate the mixed motive analysis or violate the ''one central reason'' standard. As discussed above in Section II.C.4.3 of this preamble, to the extent that aspects of persecution adjudications are not covered by the rule, the Departments expect adjudicators to conduct all determinations consistent with the law, regulations, and precedent. Here, the rule provides guidance on harms that would not be considered on account of one of the five protected grounds; the rule did not state, nor was it meant to be construed, that it precluded mixed motive analysis if the situation involved one of the five protected grounds in addition to one of the listed circumstances that would generally not be harm on account of a protected ground. Further, the preamble to the NPRM acknowledges mixed motive claims by quoting the REAL ID Act of 2005, which defined the nexus element as requiring that one of the five protected grounds to be ''at least one central reason for persecuting the applicant.'' 85 FR at 36281.

As to the concerns surrounding *Matter of A–B–,* the Departments reiterate the above discussion that adjudicators should continue to engage in individualized, fact-based adjudications as the rule provides only a list of circumstances that do not constitute harm on account of a protected ground in most, but not all, cases. Accordingly, the rule is consistent with the Attorney General's admonishment, in *Matter of A–B–,* of the BIA for failing to engage in an individualized analysis and instead accepting the Government's concessions as true. 27 I&N Dec. at 339. Regarding commenters' further concerns that the rule should not codify *Matter of A–B–* given its varied treatment by the Federal courts, the Departments note that the United States Court of Appeals for the District of Columbia Circuit recently affirmed that *Matter of A–B–* holds that decision makers must make individual determinations on a case-by-case basis. *Grace II,* 965 F.3d at 905. The Departments also note that every circuit court addressing *Matter of A–B–* on its merits so far, as opposed to the unusual procedural challenge at issue in *Grace II,* has found it to be a valid exercise of the Attorney General's authority. *See, e.g., Gonzales-Veliz* v. *Barr,* 938 F.3d at 234 (''In sum, because *A–B–* did not change any policy relating to asylum and withholding of removal claims, we reject Gonzales-Veliz argument that *A–B–* constituted an arbitrary and capricious change in policy.''); *Diaz-Reynoso* v. *Barr,* 968 F.3d 1070, 1080 (9th Cir. 2020) (''Accordingly, we decline to hold that the Attorney General's decision in *Matter of A–B–* was arbitrary or capricious.'').

The Departments disagree with the commenters' allegation that the Departments conflated nexus with other asylum requirements by not solely focusing on the perpetrator's state of mind. The NPRM provides a list of situations that would not ordinarily be on account of a protected ground. 85 FR at 36281. The listed situations are attenuated from protected grounds to the extent that they do not meet the necessary nexus requirement. While some of the listed situations, particularly those related to the rationale for the harm, are closely related to other elements of asylum, including particular social group, a nexus analysis has often required an examination of the persecutor's views. *See Sharma* v. *Holder,* 729 F.3d 407, 412–13 (5th Cir. 2013); *Caal-Tiul* v. *Holder,* 582 F.3d 92, 95 (1st Cir. 2009). Thus, the inclusion of the situations related to rationale for the harm are consistent with case law.

Finally, the Departments reiterate that the NPRM does not re-write asylum law as some commenters suggested. As noted in the NPRM and herein, the provisions of the rule related to the substance of asylum claims flows from

well-established statutory authority and relevant case law; thus, it does not ''re-write'' substantive asylum law. The NPRM falls squarely within the Departments' authority, which is discussed more fully in Section 6.5 of this preamble.

4.4.1. Interpersonal Animus or Retribution

Comment: Commenters expressed particular concerns regarding the specification that claims based on ''interpersonal animus or retribution'' generally will not be favorably adjudicated. 8 CFR 208.1(f)(1), 1208.1(f)(1). One commenter opined that it was arbitrary and irrational for the Departments to rely on *Zoarab* v. *Mukasey,* 524 F.3d 777, 781 (6th Cir. 2008), in support of this change because that case's facts were ''unusual.''

Commenters expressed confusion as to whether interpersonal modified both animus and retribution. If it did not modify retribution, commenters expressed concern that retribution, which they defined as punishment, encompasses all asylum claims.

Other commenters remarked that all harm between people is interpersonal.

Commenters also expressed concern that the inclusion of this situation would result in the erasure of mixed motive analysis as some ''may engage in persecution for pretextual reasons to hide their bias.''

Response: The inclusion of claims based on ''interpersonal animus and retribution'' as examples of claims that will generally not result in a favorable adjudication because the harm is not on account of a protected ground is consistent with longstanding precedent. The Departments cited to just one case, *Zoarab,* 524 F.3d at 781, to illustrate this point in the NPRM, but there are numerous other examples. *See, e.g., Martinez-Galarza* v. *Holder,* 782 F.3d 990, 993 (8th Cir. 2015) (finding that harm ''motivated by purely personal retribution'' is not a valid basis for an asylum claim); *Madrigal* v. *Holder,* 716 F.3d 499, 506 (9th Cir. 2013) (explaining that ''mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim''); *Amilcar-Orellana* v. *Mukasey,* 551 F.3d 86, 91 (1st Cir. 2008) (holding that ''[f]ear of retribution over personal matters is not a basis for asylum under the Immigration and Nationality Act''); *Jun Ying Wang* v. *Gonzales,* 445 F.3d 993, 998 (7th Cir. 2006) (acknowledging that the Seventh Circuit has ''repeatedly held that a personal dispute cannot give rise to a claim for asylum''); *Molina-Morales* v. *INS,* 237 F.3d 1048, 1052 (9th Cir. 2001) (quoting *Grava* v. *INS,* 205 F.3d 1177, 1181 n.3 (9th Cir. 2000), and reiterating that ''[p]urely personal retribution is, of course, not'' a protected ground, specifically, imputed political opinion); *Blanco de Belbruno* v. *Ashcroft,* 362 F.3d 272, 284 (4th Cir. 2004) (finding that ''[f]ears of 'retribution over purely personal matters . . .' do[es] not constitute [a] cognizable bas[is] for granting asylum'') (quoting *Huaman–Cornelio* v. *BIA,* 979 F.2d 995, 1000 (4th Cir. 1992)). The Departments disagree that *Zoarab* is not an accurate example of this basic proposition despite commenters' characterizations of the case's particular facts. Furthermore, after the NPRM was promulgated, the Attorney General made the point more explicitly that interpersonal animus or retribution will generally not support a nexus finding required under the INA. *See Matter of A–C–A–A–,* 28 I&N Dec. 84, 92 (A.G. 2020) (''An alien's membership in a particular social group cannot be incidental, tangential, or subordinate to the persecutor's motivation for why the persecutor sought to inflict harm. . . . Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus.'' (cleaned up)). ''The reasoning for this is straightforward: When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse.'' *Id.* (internal quotation marks omitted).

To the extent commenters argue that any harm between two people is ''interpersonal,'' commenters misinterpret both the cases supporting this provision and the rule itself. Instead, the point here is that a personal dispute between two people—for example a property dispute that causes some sort of altercation or a personal altercation because of one person's involvement with a criminal investigation and prosecution—is not generally a valid basis for an asylum claim because it is not harm on account of a protected ground. Further, as set out in the rule, the qualifier ''interpersonal'' applies to both animus and retribution. Accordingly, commenters are incorrect that this provision states that any claim based on ''retribution'' would generally be insufficient and that all or most claims would fail as a result.

Finally, the Departments reiterate the discussion above in Section II.C.4.4 of this preamble that the inclusion of these examples does not foreclose a mixed motive analysis. Accordingly, to the extent an applicant's fear is based on harm partially motivated by an interpersonal dispute and partially motivated by another potentially protected ground, the adjudicator will consider those particular facts and circumstances to determine the applicant's eligibility for asylum or statutory withholding of removal.

4.4.2. Interpersonal Animus in Which the Alleged Persecutor Has Not Targeted, or Manifested an Animus Against, Other Members of an Alleged Particular Social Group in Addition to the Member Who Has Raised the Claim at Issue

Comment: Commenters also raised concerns regarding this change in the NPRM described in this heading. One commenter argued that it was a ''clear attempt to bar women from obtaining asylum based on domestic violence,'' a claim that the commenter noted was an ''uncontroversial basis for asylum in many of our courtrooms until the Attorney General issued *Matter of A–B–.*'' One commenter asserted that this amendment gives the persecutor a ''free pass'' to persecute someone because that person will be unable to establish that another person suffered under this persecutor. Further, the commenter argued that asking an alien to investigate, while attempting to flee for safety, whether the persecutor had persecuted others was impossible, absurd, and arbitrary. Another commenter claimed that it violated the INA to require an alien to demonstrate that the persecutor ''manifested animus against others.'' One commenter claimed that the amendment was irrational because it held aliens seeking asylum through membership in a particular social group to a different and higher evidentiary standard than aliens seeking asylum through the other four protected grounds. The commenter asserted that this reading was supported by the BIA's use of ejusdem generis in *Matter of Acosta,* 19 I&N Dec. 211, and the Attorney General's favorable citation of the rule in *Matter of L–E–A–,* 27 I&N Dec. 581. Another commenter insisted that ''interpersonal'' was a meaningless modifier.

Response: The Departments, based on prior case law, decided that demonstration of animus against other members of the particular social group is generally necessary to establish nexus. 85 FR at 36281; *see also Matter of A–C–A–A–,* 28 I&N Dec. 84, 92 (A.G. 2020) (''Furthermore, if the persecutor has neither targeted nor manifested any animus toward any member of the particular social group other than the applicant, then the applicant may not satisfy the nexus requirement.''). The focus of the nexus requirement is membership in the group, INA

101(a)(42), 8 U.S.C. 1101(a)(42), and by definition, a ''group'' encompasses more than one individual. Thus, an alleged persecutor who has no interest in harming other individuals ostensibly in that group is generally not seeking to persecute one individual on account of his or her membership in that alleged particular social group. Without such animus against other group members, the motivation would appear to be personal, rather than on account of membership in the group, and a personal dispute, as discussed above, is generally insufficient on its own to qualify the applicant for the relief of asylum. *See Madrigal,* 716 F.3d at 506.

Asylum law is not meant to provide redress for every victim of crime no matter how sympathetic those victims may be. Accordingly, in order to demonstrate that an alien was persecuted ''on account of'' a particular social group based on interpersonal animus, the alien will ordinarily need to demonstrate that the persecutor has targeted or manifested an animus against someone else in that particular social group. Because an alien will necessarily articulate a particular social group that is socially distinct in order for the group to be cognizable in the first instance, it is reasonable to expect the alien to be able to articulate whether the alleged persecutor has sought to harm other members of that group. The rule does not require aliens to investigate or ask their alleged persecutors anything; rather, the aliens should already have evidence about the persecutor's motives in order to advance a valid asylum claim in the first instance, especially in cases where the alleged persecutor is the government.

Despite the inclusion of this ground as a statement of one type of claim that is generally incapable of supporting an application for relief, the Departments reject commenters' interpretation of this provision as a bar. Rather, as the Departments have detailed above, the rule itself allows for circumstances where a listed situation, based on the specific facts, will support a nexus finding. For example, as noted by commenters, an applicant who is a persecutor's initial victim may argue that despite the persecutor's lack of action against other group members, the applicant's dispute with the persecutor is in fact on account of the protected ground and not on account of a non-protected personal concern.[52]

Accordingly, commenters' suggestion that each persecutor will have a ''free pass'' is also incorrect.[53]

Additionally, the Departments disagree that this provision evidences discriminatory intent against a particular class of asylum applicants. The rule is designed to provide expedited adjudication of meritorious claims as well as increased clarity and uniformity—a problem that commenters highlighted by noting that ''many,'' but not all, courts held a particular standard regarding applications premised on domestic violence.

The Departments do not believe that this requirement violates the INA, and without a more specific comment, they are unable to respond.

This provision is not irrational and does not hold aliens relying on membership in a particular social group to a higher evidentiary standard. Although particular social group is a more amorphous category than race, religion, nationality, or political opinion—and, thus, more in need of definitional clarity—each protected ground requires demonstration of the same base elements: Persecution or a well-founded fear of persecution on account of a protected ground.

Further, ''interpersonal'' is not a meaningless modifier. The Departments use the term ''interpersonal'' to differentiate instances of animus and dispute between two private parties from instances of animus and dispute between a private individual and a government official.

4.4.3. Generalized Disapproval of, Disagreement With, or Opposition to Criminal, Terrorist, Gang, Guerilla, or Other Non-State Organizations Absent Expressive Behavior in Furtherance of a Discrete Cause Against Such Organizations Related To Control of a State or Expressive Behavior That is Antithetical to the State or a Legal Unit of the State

Comment: Commenters expressed concerns regarding the required analysis, the underlying intent, and the necessary elements of the inclusion of ''generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state'' in the list of circumstances that will generally not support a nexus finding. Specifically, some commenters argued that this provision undermines a rigorous fact-based analysis as it ''categorically state[s] that certain opinions can never be political.'' The commenters urged that this type of labeling is incorrect and improper. Additionally, commenters asserted that the provision ''evidences a clear discriminatory intention to utterly annihilate the entire genres of asylum cases where opposition to gangs constitutes a political opinion.'' Another commenter claimed that the rule was ''clearly designed'' to eliminate asylum for those fleeing the ''Northern Triangle'' (El Salvador, Guatemala, and Honduras) of Central America. One commenter asserted that because the international criminal organizations function as quasi-governments, there is often no reason for an alien to engage in expressive behavior that is antithetical to the state because ''the state has no real authority.''

Response: First, commenters are incorrect that this provision prohibits certain opinions from being considered ''political.'' Instead, as discussed above, adjudicators should continue to engage in fact-based analysis of the particular facts and circumstances of an individual applicant's claim, and the rule expressly allows for rare circumstances in which the facts of a listed situation could be the basis for finding nexus. This provision does not remove that fact-intensive nature from the nexus inquiry.

Additionally, the Departments disagree that this provision evidences a discriminatory intent. Again, the rule is designed to allow a more expeditious adjudication of meritorious asylum claims so that applicants do not have to wait a lengthy amount of time before receiving relief. The Departments' inclusion in this section of the rule of a certain category of claims that is frequently raised but is generally insufficient to establish nexus is not the product of a desire to harm or inhibit a particular people, nationality, or group.

As to a commenter's suggestion that aliens may be unlikely to engage in expressive behavior that is antithetical to the state because the state has no real authority due to international criminal organizations functioning as quasi-governments, the Departments interpret this comment to refer to organizations such as drug cartels whom the commenter believes function as de facto governments in some countries. Although the Departments question the factual accuracy of the commenter's point and otherwise believe the comment is either hypothetical or

[52] The Departments also note that the commenters' example of an ''initial victim'' necessarily presumes both that there are other victims and that the alien knows or will know of them. Consequently, that example would fall outside of the rule's purview in any event.

[53] Further, persecutors are not brought to justice under U.S. asylum law nor should it be viewed that way. The Departments are not giving persecutors ''one free pass'' because they are often not dealing with the persecutors themselves.

speculative, especially due to the fact-intensive, case-by-case nature of asylum application adjudications, they nevertheless note that the rule does not preclude claims based on opposition to non-state organizations related to efforts by the state to control such organizations. 8 CFR 208.1(d), 1208.1(d). And if an applicant establishes that the organization is the de facto government or otherwise functions in concert with the government, then the rule does not preclude a claim based on the applicant's opposition to that organization or the government. In other words, whether the country has ''real authority'' or not, nothing in the rule precludes a claim based on opposition to non-state organizations in the circumstances outlined in the rule, though the Departments note that, in general, aliens who do not engage in expressive behavior regarding such organizations or the government are unlikely to establish a nexus based on political opinion for purposes of an asylum application.

4.4.4. Resistance to Recruitment or Coercion by Guerilla, Criminal, Gang, Terrorist, or Other Non-State Organizations

Comment: Commenters asserted that the inclusion of ''resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations'' as a particular circumstance that generally does not support a nexus finding does not take in to account the significant power yielded by transnational criminal organizations, which often function as de facto governments.

Response: The Departments appreciate commenters' concerns about the expansive power of transnational criminal organizations. The Departments agree with commenters that such organizations may pose significant dangers. If an alien asserts that the government is unable or unwilling to control the transnational criminal organization, the alien may present evidence to establish that. As the Departments have previously mentioned, the NPRM explicitly acknowledges the fact-intensive nature of the nexus inquiry and further acknowledges that rare circumstances defined by the listed situations may warrant a favorable nexus determination.

4.4.5. The Targeting of the Applicant for Criminal Activity for Financial Gain Based on Wealth or Affluence or Perceptions of Wealth or Affluence

Comment: Regarding ''the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence,'' one commenter expressed concern about the Departments' citation to *Aldana-Ramos* v. *Holder,* 757 F.3d 9, 18 (1st Cir. 2014), as support. The commenter stated that the case's primary holding was ''even if a persecutor seeks to harm an asylum seeker for financial gain, the BIA must engage in a mixed motive analysis to determine whether the protected characteristic was also a central reason for the persecution.'' The commenter alleged that the Departments were relying on *Aldana-Ramos* to ''implement a blanket rule against asylum seekers who may be targeted, in part, based on wealth or perceived wealth, with no regulatory requirement that adjudicators engage in mixed motive analysis, as is required under the Real ID Act as codified in the INA.''

Response: As discussed above, the nexus provisions do not eliminate the mixed-motive analysis. The NPRM explicitly detailed that it was providing guidance on what generally would not be considered one of the five protected grounds; the NPRM did not state, nor was it meant to be construed, that it precluded mixed-motive analysis if the situation involved one of the five protected grounds in addition to a situation on the list that was not adjudicated to be a protected ground. Thus, the NPRM is consistent with mixed-motive analysis precedent, and an applicant may provide argument, like the respondent in *Aldana-Ramos,* that his or her alleged persecutor is motivated by a protected ground in addition to the non-protected ground stated in the exception.

4.4.6. Criminal Activity

Comment: Commenters expressed concern about the rule's inclusion of ''criminal activity'' as the basis of claims that will generally not support a favorable adjudication due to the breadth of the provision and the underlying precedent. Numerous commenters opined that ''virtually all harm'' that satisfies the persecution requirement could be characterized as ''criminal activity'' because ''in virtually every country, beatings, rape, and threatened murder'' are criminalized. Another commenter realized that this broad definition may not be what the Departments intended, but without providing boundaries on the term, the Departments invited ''mass denials of claims by those who have bona fide asylum claims.'' A commenter expressed concern that the category would include aliens who were forced or coerced into committing crimes. Additionally, a commenter expressed reservations about the Departments' reliance on *Zetino* v. *Holder,* 622 F.3d 1007, 1016 (9th Cir. 2010), explaining that the ''alien was detained and unrepresented before the immigration court and the BIA'' and ''it was not until he had filed a pro se petition for review that he obtained counsel, and most of his appeal centered on procedural defects in the proceedings below.''

Response: The inclusion of ''criminal activity'' is not overly expansive. Rather, as demonstrated by the explanatory case citation provided by the Departments, this provision is meant to capture cases that are premised on generalized criminal activity. *See Zetino,* 622 F.3d at 1016 (discussing the ''desire to be free from harassment by criminals motivated by theft or random violence by gang members'').

The Departments find that these generalized claims are distinct from the commenters' concerns that persecutory acts in general may be ''criminal.'' To the extent commenters are nevertheless concerned that this provision would prohibit a broader swath of claims, the Departments again reiterate that these categories of cases are not categorical bans. Instead, the rule explicitly noted that there may be exceptions, and an applicant may present argument to the adjudicator as to why their individual case meets the nexus requirement. For example, aliens who were forced and coerced into crime may be an exception based upon the specific facts of the situation.

Further, the citation to *Zetino* remains an accurate example of the Departments' proposition despite commenters' concerns, which involved procedural issues unrelated to the relevant points in the case.

4.4.7. Perceived, Past or Present, Gang Affiliation

Comment: Regarding the inclusion of ''perceived, past or present, gang affiliation'' as the basis of claims that will generally not support a favorable adjudication, commenters objected to a perceived double standard and the implications for aliens, especially children. Several commenters argued that this provision was arbitrary and capricious because it would make individuals who were incorrectly imputed to be gang members ineligible for asylum while allowing incorrect

imputation of other characteristics, for example, homosexuality, to be grounds for asylum. Another commenter noted that this change would twice victimize aliens because imputed gang membership occurs at no fault of their own. One commenter also expressed concern that children who are forced into prostitution or drug smuggling would lose their right to asylum.

Response: The Departments acknowledge commenters' concerns and have sympathy for aliens who incorrectly have gang membership imputed onto them by no fault of their own. These concerns, however, do not result in a viable asylum claim. ''[T]he asylum statute does not provide redress for every misfortune.'' *Matter of A–B–,* 27 I&N Dec. at 318.

Regarding commenters' concerns that the rule provides an inconsistent approach to immutability, commenters compare dissimilar claims. While gang affiliation and homosexuality are traits that may both be imputed, accurately or not, to an applicant, the underlying ground of the latter may be a protected ground while the former is not. Thus, the Departments' approach toward immutability is consistently based on the protected nature of the underlying ground.

Commenters are incorrect that this provision would cause children, such as those forced into prostitution or drug smuggling by criminal gangs, to lose their eligibility for asylum.[54] Indeed, as noted in the preamble, claims premised on these sorts of gang affiliations had already been found in case law to not support a finding of asylum eligibility prior to the proposed rule's publication. *See, e.g., Reyes,* 842 F.3d at 1137–38 (holding that ''former members of the Mara 18 gang in El Salvador who have renounced their membership'' was not a cognizable particular social group); *Matter of A–B–,* 27 I&N Dec. at 320 (''Generally, claims by aliens pertaining to . . . gang violence perpetrated by non-governmental actors will not qualify for asylum.''). Because these gang-based claims are not related to a protected ground, it reasonably follows that they would further not succeed on nexus because the harms would not be on account of a protected ground. Nevertheless, the Departments again reiterate that, as discussed above, the rule explicitly provides for rare exceptions; children who were forced into prostitution or drug smuggling may present argument that their case sufficiently meets the nexus requirements based upon the specific facts in their application.

4.4.8. Gender

Comment: Some commenters expressed strong objections to the NPRM's inclusion of gender in the list of circumstances that would not ordinarily result in a favorable adjudication, including allegations that the provision is arbitrary and capricious as well as ''cruel and contrary to the purposes underlying Congress' desire to provide protection to refugees.'' Some commenters also argued that the amendments took a new and capricious position and would result in substantial and irreparable harm to aliens. One commenter opined that this provision was really about a desire to reduce the amount of aliens who could seek asylum.

Commenters asserted that gender has been one of the bedrock bases for asylum claims and that, as a result, the rule overturns decades of contrary legal precedent. In support, commenters cited to multiple cases ''in which immigration judges, the BIA, and the courts of appeals have held that gender-based persecution provides a valid ground for asylum.'' [55] One commenter claimed that the proposed rule ''runs counter to every case to have considered it.'' According to commenters, this includes the precedent cited in support of the rule, *Niang* v. *Gonzales,* 422 F.3d 1187 (10th Cir. 2005), which they assert in fact holds that gender can provide an adequate basis for establishing membership in a particular social group. *Id.* at 1199–1200. Some commenters asserted that the Departments should have included a larger quotation in the NPRM preamble, including:

> the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ''on account of'' their membership. 8 U.S.C. 1101(a)(42)(A). It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution. The issue then becomes whether the protesting women constitute a social group.

Niang, 422 F.3d at 1199. One commenter expressed a belief that the Departments' choice of language to cite in *Niang* was designed to deceive the public and to reduce the notice and comment burden.

Commenters asserted that the inclusion of gender conflicts with the international obligations and international norms of the United States. For example, a commenter noted that the UNHCR, which oversees the Refugee Convention, has confirmed that people fleeing persecution based on gender, gender-identity, and sexual orientation do qualify for asylum under the Convention's definition of a refugee. In regards to numerosity, the commenter pointed to UNHCR guidance which explained, ''[t]he size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size.'' Commenters stated that because the inclusion of gender would exclude meritorious claims for relief, the rule against gender-based asylum claims would violate the government's duty of non-refoulement as codified in statutory withholding of removal at section 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A). Commenters stated that the rule against gender-based asylum would aid and abet violations of the law of nations in contravention of the Alien Tort Claims Act (''ATCA'') because there is a specific and universal obligation to prevent domestic violence and other violence against women in international law.

One commenter argued that it is improper to disfavor gender-based claims in the nexus section. In support of that position, the commenter asserted that to support a general bar on gender-based claims within the nexus analysis, the agencies would need to show that gender is not generally a central reason for persecution throughout the world, and further, the proposed regulation changes do nothing to establish any empirical claims about causation.

Commenters also expressed concern that the amendment would prevent adjudicators from evaluating claims on a case-by-case basis.

[54] The Departments note that aliens who are victims of criminal activities, including human trafficking, may be eligible for other immigration benefits beyond asylum based on that victimization. INA 101(a)(15)(T),(U), 8 U.S.C. 1101(a)(15)(T),(U).

[55] For example, one commenter cited to the following cases: *De Pena-Paniagua* v. *Barr,* 957 F.3d 88, 93–94 (1st Cir. 2020); *Cece,* 733 F.3d 671–72; *Sarhan* v. *Holder,* 658 F.3d 649, 654–57 (7th Cir. 2011); *Perdomo,* 611 F.3d at 662; *Agbor* v. *Gonzales,* 487 F.3d 499, 503 (7th Cir. 2007); *Hassan* v. *Gonzales,* 484 F.3d 513, 517–18 (8th Cir. 2007); *Barry* v. *Gonzales,* 445 F.3d 741, 745 (4th Cir. 2006); *Gao* v. *Gonzales,* 440 F.3d 62, 70 (2d Cir. 2004), *vac'd on other grounds sub nom. Keisler* v. *Gao,* 552 U.S. 801 (2007); *Niang,* 422 F.3d at 1999–1200; *Mohammed* v. *Gonzales,* 400 F.3d 785, 795–98 (9th Cir. 2005); *Balogun* v. *Ashcroft,* 374 F.3d 492, 499 (7th Cir. 2004); *Abay* v. *Ashcroft,* 368 F.3d 634, 639–42 (6th Cir. 2004); *Yadegar-Sargis* v. *INS,* 297 F.3d 596, 603–04 (7th Cir. 2002); *Fatin,* 12 F.3d at 1241; *In re Kasinga,* 21 I&N Dec. 357, 375 (BIA 1996); *cf., e.g., Kadri* v. *Mukasey,* 543 F.3d 16, 21 (1st Cir. 2008) (''Sexual orientation can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group.''); *Karouni* v. *Gonzales,* 399 F.3d at 1171–72 (reaching the same conclusion).

Another commenter noted that levels of gender-based violence have risen during the coronavirus pandemic and stated that, as a result, it is not appropriate for the Departments to take action to restrict asylum claims based on gender.

A commenter requested that the Departments not eliminate one of the few protections for gender-based violence.

Another commenter noted the Department of State's work to reduce and eliminate gender-based violence, including emphasizing in the refugee protection context that the ''empowerment and protection of women and girls has been a central part of U.S. foreign policy and national security'' and that ''gender-based violence[ ] is a critical issue'' that is ''intricately linked to'' the Department's strategic goals.

Finally, a commenter made numerous unsupported claims, including that the inclusion of gender violates the constitutional guarantee of equal protection; that the inclusion of gender in the laundry list is contrary to the evidence; and that the NPRM's failure to include a rationale for listing gender as failing the nexus requirement is, without more, sufficient to render that inclusion arbitrary.

Response: Regarding commenters' concerns that gender and ''private criminal acts'' would no longer be recognized as a viable claim, the Departments again note that the rule, after listing the eight situations that will generally not result in favorable adjudication, also notes that in rare circumstances, given the fact-specific nature of such determinations, such facts could be the basis for finding nexus. Although the nexus requirement for an asylum claim requires scrutiny when an asserted particular social group encompasses ''millions'' of individuals, *Matter of A–C–A–A–,* 28 I&N Dec. 92, the rule does not categorically bar all gender-based asylum claims contrary to the assertions of commenters. In other words, the rule does not completely prohibit applications with a nexus related to issues of gender from being granted, and the inclusion of gender in the list of circumstances that generally does not constitute harm on account of a protected ground does not conflict with the requirement that adjudicators consider each application on a case-by-case basis. Further, a purpose for the amendments was to allow for increased clarity and more uniform adjudication than the prior scheme which was shaped through case law. Thus, the Departments do not believe that the inclusion of gender in the listed situations generally resulting in unfavorable adjudication is cruel, novel, capricious, or contrary to congressional intent.

The Departments acknowledge commenters' discussion of a wide range of case law involving issues surrounding gender and applications for asylum or for statutory withholding of removal. To the extent that the Departments' inclusion of ''gender'' as an example of a nexus basis that generally will not support a favorable adjudication conflicts with the provided case law, the Departments reiterate the discussion in Section II.C.4.3 of this preamble regarding *Brand X.* The Departments invoke their authority to interpret the ambiguities in the Act, including what constitutes harm on account of a protected ground, outside the bounds of any prior judicial constructions. *See Brand X,* 545 U.S. at 982 (explaining that agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations because there is a presumption that Congress left statutory ambiguity for the agencies to resolve).

Regarding commenters' specific objections to the Departments' use of *Niang,* the Departments agree that the section following the quote in the NPRM stated that the issue surrounding gender is the nexus determination. This does not undermine, but enhances, the inclusion of gender in the listed circumstances that, without more, will not generally result in favorable adjudication based on nexus. *Niang* goes on to place more limits on a specific gender-based particular social group: ''It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution. The issue then becomes whether the protesting women constitute a social group.'' *Niang,* 422 F.3d at 1200. This tracks with the rule: Harm on account of gender alone will generally result in unfavorable adjudication.

Another commenter pointed to the UNHCR's approach toward gender and numerosity. While the Departments appreciate the comment, they note that they are not bound by the UNHCR, and commenters' reliance on guidance from UNHCR is misplaced. UNHCR's interpretations of or recommendations regarding the Refugee Convention and Protocol, such as set forth in the UNHCR Handbook, are ''not binding on the Attorney General, the BIA, or United States courts.'' *INS* v. *Aguirre-Aguirre,* 526 U.S. at 427. ''Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28. Further, to the extent such guidance ''may be a useful interpretative aid,'' *id.* at 427, it would apply only to statutory withholding of removal, which is the protection that implements Article 33 of the Convention, *cf. R–S–C–* v. *Sessions,* 869 F.3d 1176, 1188, n.11 (10th Cir. 2017) (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''). In the withholding of removal context, the Departments disagree with commenters that the rule will violate the United States' non-refoulement obligations because such claims are not, without more, meritorious.

In addition, the Departments note that commenters asserted that violating a so-called ''specific and universal obligation to prevent domestic violence and other violence against women'' was a viable claim under the ATCA. The Departments further note, however, that the ''aiding and abetting'' violations of the law of nations is not currently recognized as within the scope of the ATCA. *Doe* v. *Nestle, S.A.,* 929 F.3d 623 (9th Cir. 2019), *cert. granted sub nom. Nestle USA, Inc.* v. *Doe I,* No. 19–416, 2020 WL 3578678 (July 2, 2020), and *cert. granted sub nom. Cargill, Inc.* v. *Doe I,* No. 19–453, 2020 WL 3578679 (July 2, 2020). Moreover, the commenters failed to demonstrate that such a claim would ''rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,'' such as violation of safe conducts, infringement of the rights of ambassadors, or piracy, that the Court has recognized. *Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 724–25 (2004).

Much of the commenters' concern regarding the inclusion of gender arises from a misunderstanding of the complexity of particular social groups and the role of mixed-motive analysis. The Departments explain that the inclusion of gender indicates that, generally, a claim based on gender, without additional evidence, will not be favorably adjudicated in regards to the nexus claim. However, it does not read, nor should it be interpreted to mean, that the inclusion of gender in the claim is fatal. Rather, a claim based on gender alone will generally be insufficient. As to the role of mixed motive analysis, the text of the NPRM acknowledges mixed motive claims by quoting the REAL ID

Act of 2005 that defined the nexus element as requiring that one of the five protected grounds be ''at least one central reason for persecuting the applicant.'' 85 FR at 36281. Further, the NPRM explicitly detailed that it was providing guidance on what would not be considered one of the five protected grounds; the NPRM did not state, nor was it meant to be construed, that it precluded mixed motive analysis if the situation involved one of the five protected grounds in addition to a situation on the list that was not adjudicated to be a protected ground.[56]

The Departments disagree with commenters that the rule must show that gender is not the cause of harm around the world in order to include gender in the list of circumstances that generally does not constitute harm on account of a protected ground. Indeed, these comments miss the purpose of this discussion in the rule. The Departments do not make any statement about the question or prevalence of gender-based harm in other countries, but instead the point is that such harm is not on account of a protected ground and accordingly generally fails to support a valid claim to asylum or to statutory withholding of removal. As noted elsewhere, asylum is not designed to provide relief from all manners of harm that may befall a person. *See, e.g., Gjetani,* 968 F.3d at 397–98.

The Departments further disagree with commenters' statements that the inclusion of gender violates the constitutional guarantee of equal protection. The rule does not provide any benefits or discriminate on the basis of one gender over another.

Other commenters noted the severe problem of gender-based violence, especially in the global coronavirus pandemic, and the extensive work the Department of State is undertaking to reduce and eliminate gender-based violence. The Departments agree with commenters regarding the severity of the problem and the good work being done across the Federal government to address the problem. As previously mentioned, however, the narrow asylum statutes are not drafted to provide redress for every problem. The Departments must act within the legal framework set out by Congress.

4.5. Evidence Based on Stereotypes

Comment: Commenters expressed numerous reservations and disagreements with the Departments' regulation regarding the admissibility of evidence based on or promoting stereotypes to support the basis of an applicant's fear of harm. 8 CFR 208.1(g), 1208.1(g).

Some commenters alleged that the NPRM created a vague new evidentiary bar. Other commenters opined that the provision excludes necessary and critical evidence; some alleged that the NPRM was ''part of [the Departments'] efforts to make it harder for asylum seekers to present their cases,'' including claims based on particular social groups. Commenters also worried that the changes would unfairly advantage the government and violate due process. Other commenters expressed concern that the amendments would place a larger burden on adjudicators as they would be presented with difficult and time-consuming factual and legal issues. Regarding well-founded fear, a commenter alleged that the distinction between widespread, systemic laws or policies—evidence used to support a well-founded fear of persecution—and cultural stereotypes is so narrow that it will result in a ''quagmire of confusion'' and ''countless hours and resources of litigation.''

Other commenters claimed that cultural stereotypes were necessary for well-founded fear of persecution claims and were utilized in country condition reports. For example, a commenter argued that the Department of State's country reports contain cultural stereotypes. As evidence of this claim, the commenter included three quotes from the Human Rights Report for Guatemala: ''[a] culture of indifference to detainee rights put the welfare of detainees at risk''; ''[t]raditional and cultural practices, in addition to discrimination and institutional bias, however, limited the political participation of women and members of indigenous groups''; and ''[i]ndigenous communities were underrepresented in national politics and remained largely outside the political, economic, social, and cultural mainstream.'' Further, the commenter asserted that this was evidence that ''it would be impossible to discuss conditions in any country without discussing its culture and without engaging in at least some stereotyping.'' The commenter extrapolated this onto several other elements of an asylum claim, including a subjectively genuine and objectively reasonable fear of harm and a socially distinct, particular social group.

A commenter opined that this provision was evidence that the Departments ''fail[ed] to engage in reasoned decision making''; the commenter continued by claiming that the NPRM ''raises doubts about whether the agency appreciates the scope of its discretion or exercised that discretion in

[56] The Departments note that gender was not included among other broad categories, such as race or nationality, as a basis for refugee status in either the 1951 Refugee Convention or the 1980 Refugee Act. Further, no precedential decision has unequivocally recognized gender, standing alone, as a basis for asylum. *See, e.g., Fisher* v. *INS,* 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (''Persecution on account of sex is not included as a category allowing relief under section 101(a)(42)(A) of the Act.''). The Departments further note that gender has frequently been analyzed by circuit courts in the context of the definition of a particular social group, rather than under the rubric of nexus, though the courts themselves are in disagreement over the issue. *See Matter of A–C–A–A–,* 28 I&N at 91 (''Although I do not decide the matter in this case, I note that there has been disagreement among the courts of appeals about whether gender-based groups may constitute a particular social group within the meaning of the INA.''). At least three circuits have concluded that gender is too broad or sweeping to constitute a particular social group itself. *See Gomez* v. *INS,* 947 F.2d 660, 664 (2d Cir. 1991) (''Like the traits which distinguish the other four enumerated categories-race, religion, nationality and political opinion-the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.''), *Safaie* v. *INS,* 25 F.3d 636, 640 (8th Cir. 1994) (''We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.''); *Da Silva* v. *U.S. Att'y Gen.,* 459 F. App'x 838, 841 (11th Cir. 2012) (''The BIA determined that 'women' was too broad to constitute a particular social group. We agree that such a group is too numerous and broadly defined to be considered a 'social group' under the INA.''). Another circuit has quoted the language in *Gomez* approvingly. *Lukwago* v. *Ashcroft,* 329 F.3d 157, 172 (3d Cir. 2003). Still another has rejected ''generalized sweeping classifications for asylum,'' while noting that the Board ''has never held that an entire gender can constitute a social group under the INA.'' *Rreshpja* v. *Gonzales,* 420 F.3d 551, 555 (6th Cir. 2005). One circuit has intimated that gender alone could suffice to constitute a particular social group, though it remanded the case to the Board to address that issue in the first instance. *Perdomo,* 611 F.3d at 667; *but see Rreshpja,* 420 F.3d at 555 (''We do not necessarily agree with the Ninth Circuit's determination that virtually all of the women in Somalia are entitled to asylum in the United States.''). Further, although gender is generally regarded as an immutable characteristic, *see e.g., Kauzonaite* v. *Holder,* 351 F. App'x 529, 531 (2d Cir. 2009) (''However, although gender is an immutable characteristic. . . gender alone is insufficient to identify a particular social group.''), modern notions of gender fluidity may raise questions about that assumption in individual cases. *Cf, e.g., Bostock* v. *Clayton,* 140 S.Ct. 1731, 1779 & n.45 (2020) (''while the Court does not define what it means by a transgender person, the term may apply to individuals who are 'gender fluid,' that is, individuals whose gender identity is mixed or changes over time.'' (Alito, J. dissenting)). Further, because every alien has a gender of some classification, gender may not carry sufficient particularity to warrant classification as a particular social group. *Cf. Matter of L–E–A-,* 27 I&N Dec. at 593 (''Further, as almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group. There is no evidence that Congress intended the term 'particular social group' to cast so wide a net.''). In short, although the rule considers gender under the category of nexus, it may also be appropriately considered under the definition of ''particular social group'' as well, as the lists under both definitions are nonexhaustive.

a reasonable manner.'' *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1905 (2020) (quoting *Michigan* v. *EPA,* 576 U.S. 743, 750 (2015) (internal quotation marks omitted)).[57] Finally, commenters asserted that the provision's purported application only to aliens and not to DHS represented an unfair asymmetry because there was no prohibition of DHS filing evidence promoting stereotypes in opposition to asylum applications.

Response: The Departments reject the characterization of the rule regarding admissibility of evidence based on stereotypes as a new evidentiary bar. Numerous courts, and the BIA, have made clear that the Federal rules of evidence do not apply in immigration proceedings, but the evidence must be probative and its admission may not be fundamentally unfair. *See, e.g., Rosendo-Ramirez* v. *INS,* 32 F.3d 1085, 1088 (7th Cir. 1994); *Baliza* v. *INS,* 709 F.2d 1231, 1233 (9th Cir. 1983); *Tashnizi* v. *INS,* 585 F.2d 781, 782–83 (5th Cir. 1978); *Trias-Hernandez* v. *INS,* 528 F.2d 366, 369 (9th Cir. 1975); *Marlowe* v. *INS,* 457 F.2d 1314, 1315 (9th Cir. 1972); *Matter of Toro,* 17 I&N Dec. 340, 343 (BIA 1980); *Matter of Lam,* 14 I&N Dec. 168, 170 (BIA 1972). As the rule makes clear, ''conclusory assertions of countrywide negative cultural stereotypes'' are not probative of any of the eligibility grounds for asylum. *Matter of A–B–,* 27 I&N Dec. at 336 n.9.

For example, in *Matter of A–B–,* the Attorney General determined that the evidence submitted in *Matter of A–R–C–G–,* 26 I&N Dec. 388 (BIA 2014), ''an unsourced partial quotation from a news article eight years earlier,'' was not appropriate evidence to support the ''broad charge'' that Guatemala had a '' 'culture of machismo and family violence.' '' *Matter of A–B–,* 27 I&N Dec. at 336 n.9 (quoting *Matter of A–R–C–G–,* 26 I&N Dec. at 394). Similarly, the rule establishes that such unsupported stereotypes are not admissible as probative evidence. 85 FR at 36282 (''pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim''); *see also Matter of A–C–A–A–,* 28 I&N Dec. at 91 n.4 (''Furthermore, the Board should remember on remand that 'conclusory assertions of countrywide negative cultural stereotypes . . . neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.' '' (quoting *Matter of A–B–,* 27 I&N Dec. at 336 n.9)).

Reliance on stereotypes about a country, race, religion, nationality, or gender is inconsistent with the individualized consideration asylum claims require. Further, by definition, stereotypes are not subject to verification and have little intrinsic probative value; to the contrary, they frequently undermine credibility considerations that are important to an asylum claim. *Cf. Thomas* v. *Eastman Kodak Co.,* 183 F.3d 38, 61 (1st Cir. 1999) (''The concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments.''). Instead, they reflect ''a frame of mind resulting from irrational or uncritical analysis.'' *Nguyen* v. *INS,* 533 U.S. 53, 68 (2001). Thus, even ''benevolent'' stereotypes are generally disfavored in law. *Cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Johnson Controls,* 499 U.S. 187, 199–200 (1991) (stating, in rejecting employer policy related to female fertility due to potential exposure to fetal hazards, that the ''beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination''). In short, stereotypes about another individual or country have little place in American law as evidence supporting any type of claim. *See United States* v. *Bahena-Cardenas,* 411 F.3d 1067, 1078 (9th Cir. 2005) (''Refusing to allow expert testimony that would encourage or require jurors to rely on cultural stereotypes is not an abuse of discretion.'').

To be sure, asylum claims are generally rooted in hearsay, frequently cannot be confronted or rebutted, and are typically uncorroborated except by other hearsay evidence. *See, e.g., Angov,* 788 F.3d at 901 (' 'The specific facts supporting a petitioner's asylum claim—when, where, why and by whom he was allegedly persecuted—are peculiarly within the petitioner's grasp. By definition, they will have happened at some time in the past—often many years ago—in a foreign country. In order for the [DHS] to present evidence ''refuting or in any way contradicting'' petitioner's testimony, it would have to conduct a costly and often fruitless investigation abroad, trying to prove a negative—that the incidents petitioner alleges did not happen.' '' (quoting *Abovian* v. *INS,* 257 F.3d 971, 976 (9th Cir. 2001) (Kozinski, J., dissenting from denial of pet'n for reh'g en banc))); *Mitondo* v. *Mukasey,* 523 F.3d 784, 788 (7th Cir. 2008) (''Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that a particular incident occurred, there may be doubt about whether a given alien was among the victims. Then the alien's oral narration must stand or fall on its own terms. Yet many aliens, who want to remain in the United States for economic or social reasons unrelated to persecution, try to deceive immigration officials.''). Thus, adjudicators are certainly seasoned in assessing evidence that is not subject to verification and has minimal probative value in the context of asylum claims.

Nevertheless, the Departments believe that the harms associated with the use of evidence rooted in stereotypes far outweigh what little, if any, probative value such evidence may have in an asylum claim. Accordingly, the rule does not represent a wholly new evidentiary bar per se, but rather a codification of the point that such stereotypes will not meet the existing admissibility standards because they are inherently not probative. Contrary to commenters' suggestions, such evidence should not be necessary to an asylum application. Even if such stereotypes were admitted into evidence, they would be given little to no weight for the reasons stated above. Further, to the extent that an applicant's claim is supported only by the applicant's personal stereotypes about a country or the alleged persecutor, that claim is likely unmeritorious in the first instance.

Further, the Departments disagree with commenter assertions that the term ''cultural stereotypes'' is vague. As alluded to above, the concept of stereotyping is well-established in American jurisprudence, and legal questions regarding stereotypes, especially stereotypes about foreign countries, arise in a variety of settings. *See, e.g., United States* v. *Ramirez,* 383 F.Supp.2d 1179, 1180 (D. Neb. 2005) (collecting cases excluding testimony based on cultural stereotypes of different foreign countries); *United States* v. *Velasquez,* No. CR 08–0730 WHA, 2011 WL 5573243, at *3 (N.D. Cal. 2011) (not permitting a ''cultural defense'' expert witness to testify ''as his opinions are based on cultural stereotypes and generalizations that have no probative value in this case'' and permitting a ''mental condition expert'' to testify on the condition that he ''refrain from offering testimony based on stereotypes and/or generalizations of Guatemalan, Mayan, Mam or any other culture''); *see also*

[57] The Departments respond to allegations of failure to engage in reasoned decision making below in section II.C.6.2.

Bahena-Cardenas, 411 F.3d at 1078 (''Refusing to allow expert testimony that would encourage or require jurors to rely on cultural stereotypes is not an abuse of discretion.''). Moreover, existing Department policies forbid the use of generalized stereotypes in law enforcement activities. *See* U.S. Dep't of Justice, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity 4 (2014) (''Reliance upon generalized stereotypes involving the listed characteristics is absolutely forbidden.''), *https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf.* Thus, the Departments do not believe that adjudicators will have difficulty understanding the rule's reference to ''cultural stereotypes.''

The Departments also disagree with commenter assertions that it will be difficult to distinguish between widespread, systemic laws or policies—a form of accepted evidence to establish a well-founded fear—and cultural stereotypes. The Departments are seeking to bar admissibility of non-probative evidence of the kind described in *Matter of A–B–,* broad cultural stereotypes that have no place in an impartial adjudication. Evidence of systemic laws or policies is more probative and concrete than unsupported assertions of reductive cultural stereotypes. For example, bald statements that a country, as a whole, has a particular cultural trait that causes certain members of that country to engage in persecution is evidence that has no place in an adjudication. In contrast, evidence that a country's leader has instituted a program to carry out systematic persecution against certain groups would be highly probative evidence. General assertions of cultural stereotypes are inherently conclusory, reductive, and unhelpful to the adjudicator or trier of fact—in addition to being harmful in and of themselves—and should not be admissible.

In support of the claim that cultural stereotypes are necessary for many asylum claims, one commenter presented three excerpts from a Department of State Human Rights Report on Guatemala. The Departments appreciate the commenter's examples, but they do not reflect assertions of pernicious cultural stereotypes described in this rulemaking.

The first alleged stereotype was that ''[a] culture of indifference to detainee rights put the welfare of detainees at risk.'' However, the report goes on to state: ''On August 22, Ronald Estuardo Fuentes Cabrera was held in confinement while awaiting trial for personal injury charges after a car accident. Fuentes died from internal thoracic injury hours before his scheduled trial and without having received a medical exam, while his wife and the passenger of the other vehicle were taken for medical care.'' U.S. Dep't of State, 2019 Country Reports on Human Rights Practices: Guatemala 6 (2019), *https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/*guatemala. Further, the report nowhere alleges that Guatemalans are indifferent to detainee rights because of some cultural trait peculiar to Guatemalans. Thus, not only do these statements not promote any particular cultural stereotype about Guatemalans based on race, religion, nationality, gender or similar characteristic, but they are supported by some facts. In short, this statement reflects verifiable facts, not a stereotype.

The second alleged stereotype was that ''[t]raditional and cultural practices, in addition to discrimination and institutional bias, . . . limited the political participation of women and members of indigenous groups.'' Once again, the report went on to detail the low numbers of women and indigenous people in the government to support its conclusion. *Id.* at 12–13. Elsewhere in the report, the State Department included specific information about sexual harassment: ''No single law, including laws against sexual violence, deals directly with sexual harassment, although several laws refer to it. Human rights organizations reported sexual harassment was widespread.'' *Id.* at 17. Similarly, the report contained specific information about discrimination: ''Although the law establishes the principle of gender equality and criminalizes discrimination, women, and particularly indigenous women, faced discrimination and were less likely to hold management positions.'' *Id.* The Departments do not see how this broad statement suggests a stereotype about an alleged persecutor for purposes of supporting an asylum claim such that it would fall within the ambit of the rule. Moreover, it is, again, based on evidence rather than a stereotype.

The final alleged stereotype contained in the report was that ''[i]ndigenous communities were underrepresented in national politics and remained largely outside the political, economic, social, and cultural mainstream.'' This quote was also followed by supporting statements, including details regarding indigenous leaders who were killed. *Id.* at 20–21. Again, the Departments do not see how this broad statement suggests a stereotype such that it would fall under the rule. Further, it does not suggest that indigenous individuals possess some inherent trait—as opposed to larger structural factors in the country—that causes them to be underrepresented in national politics. Thus, it is also based on evidence rather than a stereotype.

Other commenters expressed concern that this portion of the rule would place a larger burden on adjudicators. The Departments appreciate both the comment and the underlying concern. But, as noted above, adjudicators at both Departments are experienced in assessing evidence of little-to-no probative value, and immigration judges at DOJ are already experienced at ruling on evidentiary objections as a matter of course in immigration proceedings. Thus, the Departments do not believe that this portion of the rule will increase any burden beyond what adjudicators already face. The definition of ''cultural stereotypes'' is straightforward; the Departments have confidence that adjudicators will be able to apply such a definition in a timely and fair manner. Nevertheless, in response to some of the apparent confusion by some commenters, the Departments have modified the language in the final rule to make it clearer. The change does not reflect a substantive modification from what was intended in the NPRM.

The Departments reject the commenters' assertions that this rule was passed with bad intent. One aim of this rule is to allow a more expeditious adjudication of meritorious asylum claims so that applicants do not have to wait a lengthy amount of time before receiving relief. The Departments agree with the commenter who stated that many asylum applications require at least some discussion of the culture of the country to which the applicant fears return. However, the Departments disagree with the commenter's assertions that some level of stereotyping would be helpful to the applicant's claim. Stereotypes are inherently unsupported generalizations. Such conclusory statements are not probative and can indeed be harmful, as discussed above.

Further, the Departments disagree with the commenter who asserted that the rule would disadvantage the applicant and violate due process. As discussed above, an applicant's inability to submit nonprobative evidence neither disadvantages the applicant nor violates due process.

Finally, in response to commenters' concerns about the perceived asymmetry of the rule, the Departments note that DHS is already bound by policy to treat stakeholders, including

aliens, in a non-discriminatory manner. DHS therefore may not rely on stereotype evidence to oppose an asylum application. *See* U.S. Immigration and Customs Enforcement, Office of Diversity and Civil Rights, *https://www.ice.gov/leadership/*dcr (''It is U.S. Immigration and Customs Enforcement's (ICE) policy to ensure that employees, applicants for employment and all stake holders are treated in a non-discriminatory manner in compliance with established laws, regulations and Executive Orders.''); *cf. Doe* v. *Att'y Gen.,* 956 F.3d 135, 155 n.10 (3d Cir. 2020) (''The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about 'what he or she does in bed' is never appropriate.'' (quoting USCIS, *RAIO Directorate—Officer Training: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* 34 (Dec. 28, 2011))). Further, although Federal case law is clear that stereotypes have no place as a basis to deny asylum applications, *e.g., Doe,* 956 F.3d at 155 n.10 (collecting cases), there is no similar Federal case law regarding the use of stereotypes as a basis for granting asylum applications, and the issue of the reliance on stereotypes to support an asylum application has arisen only recently, *Matter of A–B–,* 27 I&N Dec. at 336 n. 9. Consequently, as both immigration judges and DHS are already bound by policy, if not also law, not to rely on stereotypes as a basis to oppose or deny an asylum application, the rule does not create any asymmetry regarding evidence of stereotypes. To the contrary, it corrects an existing asymmetry to ensure that asylum applications are not granted based on inappropriate evidence of stereotypes.

4.6. Internal Relocation

Comment: Commenters generally expressed concern that the NPRM would create a standard for the analyzing the reasonableness of internal relocation that almost no applicant for asylum, withholding of removal, or protection under the CAT regulations would be able to meet.[58]

Commenters expressed several concerns with the proposed list of factors pertaining to the internal relocation analysis in proposed 8 CFR 208.13(b)(3) and 1208.13(b)(3). First, commenters expressed concern that the list places too much weight on the identity and reach of the persecutor, and that it lacks factors pertaining to the asylum seeker and factors unrelated to the asylum application (such as country conditions).

Second, commenters asserted that the proposed list inappropriately implies that asylum seekers coming from large countries or who are subjected to persecution from a single source can reasonably relocate internally. Some commenters argued that persecution does not end at the limits of political jurisdictions and that persecutors could have contacts throughout a country or region. One commenter noted that UNHCR guidance does not require an asylum seeker to prove that his or her entire home country is unsafe before seeking asylum. Similarly, one commenter expressed concern with the proposed definition of the term ''safety,'' arguing that there has been no judicial disagreement or confusion pertaining to the current regulation and that the proposed definition would limit adjudicators' ability to perform case-by-case analyses.

Third, commenters argued that the proposed rule inappropriately focuses on an asylum seeker's ability to travel to the United States. Commenters noted a lack of jurisprudence discussing ability to travel and alleged that since asylum seekers had to first travel to the United States to make a claim, the factor would lead to the denial of most applications.

Fourth, commenters similarly expressed concern that the proposed rule would eliminate the reasonableness analysis, thus forcing adjudicators to ignore the overall context of an asylum applicant's plight. One commenter argued that many cases have been sent to the BIA from Federal courts so that adjudicators could apply the current reasonableness test to internal relocation determinations.

Finally, commenters took issue with the NPRM's assertion that 8 CFR 208.13(b) and 1208.13(b) include ''unhelpful'' language that undermines the need for the entire section. Commenters noted that Federal courts and the BIA have almost unanimously endorsed the current language and have not raised such concerns.

Commenters also expressed concern with the proposed regulation's change to the burden of proof for asylum seekers who establish they were subjected to past persecution by a non-governmental entity. Commenters argued that, contrary to the NPRM's assertion, the current regulations are preferable. Specifically, increasing the burden would be inappropriate, commenters argued, because asylum seekers would have already established past persecution and that the government is unable or unwilling to protect them.

One commenter noted that the proposed change to the burden of proof is unnecessary because DHS could offer information evidencing that internal relocation is reasonable, and then the applicant could respond to such information.

One commenter argued that the proposed change to the burden of proof in the case of non-state actors unfairly targets asylum seekers from Central American countries and Mexico because the types of individuals and groups that would be considered non-state actors under the proposed rule are commonly cited persecutors in asylum cases pertaining to these countries.

Response: To respond to commenters' concerns that ''almost no applicant . . . would be able to meet'' the revised standard for reasonableness of internal relocation, the Departments reject that concern as speculative. The Departments also reject a commenter's allegation that the factors in this section were ''justifications to deny applications of *bona fide* asylum seekers.'' These factors are relevant and material to an alien's asylum eligibility, as discussed in further detail below.

The Departments emphasize that the rule requires adjudicators to consider ''the totality of the relevant circumstances'' (as stated in 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal)) when determining the reasonableness of internal relocation. The Departments note that the proposed list identifies the ''most relevant'' circumstances for consideration and provides a streamlined presentation of those factors. *See* 85 FR at 36282. The list of factors in paragraph (b)(3) is not exhaustive, however, so the regulatory amendments do not foreclose consideration of factors mentioned by commenters, such as factors related to the particular asylum seeker or factors unrelated to the asylum application. This approach is not a one-size-fits-all analysis, as one commenter alleged. Rather, the totality of the relevant circumstances test allows adjudicators to consider each case individually.

Relatedly, the Departments disagree that the list of factors afford inordinate weight to the identity and reach of the persecutor or that adjudicators must make determinations in a vacuum. As a baseline matter, asylum is a form of

[58] The Departments note that consideration of internal relocation in the context of an application for withholding of removal under the CAT regulations is different than the consideration of internal relocation in the context of an application for asylum and statutory withholding of removal. *Compare, e.g.,* 8 CFR 1208.13(b)(3), 1208.16(b)(3) (assessing the reasonableness of internal relocation), *with* 1208.16(c)(3)(ii) (assessing internal relocation without reference to reasonableness).

discretionary relief for which an applicant must demonstrate to the Secretary or Attorney General that he or she, inter alia, is a refugee as defined in section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), and warrants a favorable exercise of discretion. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *Cardoza-Fonseca,* 480 U.S. at 428 n.5; 8 CFR 208.14(a), (b), 1208.14(a), (b). To determine whether the applicant is a refugee under section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), the Departments assess the applicant's ''fear of persecution,'' which includes whether the applicant could relocate to avoid future persecution and whether it would be reasonable to do so. *See Melkonian* v. *Ashcroft,* 320 F.3d 1061, 1069 (9th Cir. 2003) (requiring a finding that an alien could relocate to avoid persecution and that it ''must be reasonable to expect them to do so'' (citing *Cardenas* v. *INS,* 294 F.3d 1062, 1066 (9th Cir. 2002)); *see also Singh* v. *Ilchert,* 63 F.3d 1501, 1511 (9th Cir. 1995) (permitting the Attorney General to assess an alien's ability to relocate to a safer part of the country). The Act does not require consideration of internal relocation. *See generally* INA 208, 8 U.S.C. 1158. Rather, this analysis was implemented by regulation to address whether ''an [asylum] applicant may be able to avoid persecution in a particular country by relocating to another area of that country.'' Asylum Procedures, 65 FR 76121 (Dec. 6, 2000). This rule would refine those regulations, which agencies may do so long as they give a reasoned explanation for the change. *See, e.g., Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' (citing *Brand X,* 545 U.S. at 981–82)).

As the Departments explained in the NPRM, the changes are necessary for numerous reasons. First, the Departments believe the ''current regulations regarding internal relocation inadequately assess the relevant considerations.'' 85 FR at 36282. Second, the Departments changed the regulatory burdens of proof because the Departments determined that the burdens should generally align with those ''baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions.'' *Id.* Third, the Departments made amendments to facilitate ''ease of administering these provisions.'' *Id.* The Departments believe that the rulemaking will better serve the needs of adjudicators who will benefit from the addition of factors that more adequately assess relevant considerations for internal relocation and the elimination of less relevant factors. Despite commenters' disagreements with the new list of factors, the Departments believe that the regulations must clearly and accurately guide adjudicators in assessing the reasonableness of internal relocation. The Departments anticipate that the new regulations will facilitate more accurate and timely determinations, given that adjudicators will spend most of their time considering the most relevant factors and less time considering less relevant factors or trying to determine whether certain factors are relevant. This is especially significant considering the unprecedented pending caseload and the need for efficient adjudication. *See* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/*download. Given these revisions to the regulations, adjudicators are not left to make determinations ''in a vacuum,'' as commenters suggested.

Accordingly, the Departments determined that the following factors were most relevant to an adjudicator's analysis: ''the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.'' 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). The Departments do not imply that this list compels the conclusion that asylum seekers who come from large countries or who were subjected to persecution from a single source can reasonably relocate internally, as commenters alleged. Instead, the Departments find those factors ''most relevant'' for adjudicators to consider in determining whether internal relocation is reasonable—not that those factors absolutely indicate that internal relocation is reasonable. 85 FR at 36282. Furthermore, as noted above, the listed relevant factors are not exhaustive and adjudicators may consider other factors that may be relevant to a particular case.

As commenters pointed out, the Departments recognize that persecutors may not be confined to political jurisdictions, which is already reflected in the factor assessing the ''size, reach, or numerosity of the alleged persecutor.'' 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). Moreover, the Departments disagree with a commenter's allegation that the rule redefines safety—neither the proposed rule nor this final rule redefines ''safety.''

The Departments disagree that the factor assessing the alien's ability to travel to the United States is inappropriate. First, this factor is considered under the totality of the circumstances; thus, this factor's presence will not automatically result in one determination or another. The Departments added this factor so that adjudicators would fully consider whether an alien had already traveled a great distance to relocate to the United States, and whether the alien's ability to do so reflected a similar ability to relocate within the country from which the alien is seeking protection. Second, in contrast to commenters, the Departments believe that a lack of jurisprudence on this factor counsels in favor of including it in the regulation. Nor do the Departments find the lack of directly relevant jurisprudence surprising. Because the current regulations do not highlight an alien's ability to travel to the United States as one of the most relevant factors, courts would have had little reason to consider this factor unless a party raised it. *See, e.g., Garcia-Cruz* v. *Sessions,* 858 F.3d 1, 8–9 (1st Cir. 2017) (remanding the case to the BIA to consider the reasonableness factors specifically provided in the regulations); *Khattak,* 704 F.3d at 203–04 (same). Nevertheless, case law has considered travel-related factors such as an alien's return trips or previous relocations. *See, e.g., Ullah* v. *Barr,* No. 18–28912020 WL 6265858, at *1–2 (2d Cir. Oct. 26, 2020) (holding that country's lack of restriction on internal movement or relocation and alien's ability to work and move around the country without incident supported the BIA's finding that the alien could safely relocate to avoid future persecution); *Gambashidze* v. *Ashcroft,* 381 F.3d 187, 193 (3d Cir. 2004) (considering, in part, that the alien and his family relocated to a city that ''is not a great distance'' from the city where they faced persecution before the alien relocated again to the United States); *Belayneh* v. *I.N.S.,* 213 F.3d 488, 491 (9th Cir. 2000) (holding that the alien had not established a reasonable fear of future persecution in part because she had ''traveled to the United States and returned to Ethiopia three times without incident''). These cases provide examples in which courts

recognized that the ability and willingness to travel and the distance traveled are all relevant to the reasonableness inquiry because they may indicate the extent to which an alien is physically or financially able to travel. In that same vein, the Departments have determined that an alien's ability to travel to the United States is clearly relevant and appropriate to the reasonableness inquiry.

The rule does not eliminate the reasonableness analysis, as commenters alleged. First, the heading of each regulatory section is ''Reasonableness of internal relocation.'' 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). The heading indicates the content of the section. What follows is a list of factors and the requisite burdens of proof to aid an adjudicator's assessment of the reasonableness of internal relocation. For example, the regulations state, in the case of a governmental persecutor, ''it shall be presumed that internal relocation would not be reasonable, unless the Department of Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, *it would be reasonable for the applicant to relocate*'' and, in the case of a non-governmental persecutor, ''there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that *it would be unreasonable to relocate.*'' 8 CFR 208.13(b)(3)(ii), (b)(3)(iii), 1208.13(b)(3)(ii), (b)(3)(iii) (emphases added). The reasonableness inquiry continues to be an active prong of the internal relocation assessment. In addition, under the new regulations, adjudicators must not disregard other factors, as commenters alleged; rather, the regulations instruct adjudicators to consider ''the totality of the relevant circumstances.'' 8 CFR 208.13(b)(3), 1208.13(b)(3). Application of the previous regulations by courts and the BIA are irrelevant and unpersuasive as evidence that the rules cannot be changed. As previously explained, it is properly within the Departments' authority to revise their regulations. *See, e.g., Encino Motorcars, LCC,* 136 S. Ct. at 2125.

The Departments maintain that the language in the previous regulations was unhelpful. 85 FR at 36282. Equivocal phrases in the prior regulation—that factors ''may, or may not, be relevant''—are almost paradigmatically unhelpful. The Departments believe the revised regulations, including review under the totality of the circumstances and the nonexhaustive list of factors provided, will continue to allow adjudicators to assess internal relocation on a case-by-case basis.

Although commenters alleged that Federal courts and the BIA have ''nearly unanimously endorsed'' the previous regulations, the cases referenced in support of their allegations merely apply the previous regulations. Judicial application of regulations cannot be construed as ''endorsing'' the regulations except to the extent that a court finds the regulations to be a reasonable interpretation of the statute. *See Chevron,* 467 U.S. at 844 (''[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'').

Finally, the Departments disagree that changing the burden of proof is inappropriate. As explained in the NPRM, the Departments believe the realigned burden of proof follows the ''baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions.'' 85 FR at 36282. Contrary to the commenters' assertion, when an adjudicator is determining reasonableness of internal relocation, an applicant may not have already established past persecution or that the government was unable or unwilling to protect the alien. For example, an applicant may be claiming a fear of future persecution pursuant to 8 CFR 208.13(b)(2), 1208.13(b)(2). Although showing past persecution raised a rebuttable presumption that internal relocation would be unreasonable under the prior regulation, the Departments have concluded, upon fresh review, that applying a blanket presumption independent of the identity of the persecutor is inconsistent with assessments of how widespread persecution is likely to be based on the identity of the alleged persecutor. Whereas government or government-sponsored actors would generally be expected to have nationwide influence, a private individual or organization would not ordinarily have such reach. Placing the burden on the government to show that the alien's fear of future persecution is *not* well-founded where he was previously persecuted by a non-governmental actor therefore inverts the usual burden of proof—which lies with the applicant—without good reason. *See* 85 FR at 36282 (explaining this rationale).

In the final rule, DHS still bears the burden to demonstrate that the applicant could relocate to avoid future persecution and that it would be reasonable for the applicant to do so in the case of a governmental persecutor (8 CFR 208.13(b)(3)(ii), 1208.13(b)(3)(ii) (asylum); 208.16(b)(3)(ii), 1208.16(b)(3)(ii) (statutory withholding of removal)), and the alien bears the burden to demonstrate that it would be reasonable to relocate in the case of a non-governmental persecutor (8 CFR 208.13(b)(3)(iii), 1208.13(b)(3)(iii)). These burdens reflect the Departments' belief that aliens who claim past persecution by non-state actors should bear the burden to rebut the presumption that internal relocation is reasonable.

The different burdens of proof do not unfairly target or discriminate against asylum seekers from Central American countries and Mexico, as commenters alleged. The new burden of proof applies to all asylum seekers, regardless of the country of origin. The Departments note that, contrary to the commenters' allegations, the examples of private-actor persecutors provided by the regulations exist in many countries, not just Central American countries and Mexico. *See, e.g., Mashiri* v. *Ashcroft,* 383 F.3d 1112, 1115–16 (9th Cir. 2004) (detailing facts in which a German citizen of Afghan descent was persecuted by non-state actors in Germany, some of whom were part of a Neo-Nazi mob); *Doe* v. *Att'y Gen. of the U.S.,* 956 F.3d 135, 139–40 (3d Cir. 2020) (detailing facts in which a Ghanaian citizen was persecuted by family members and neighbors in Ghana).

4.7. Factors for Consideration in Discretionary Determinations

Comment: Commenters generally expressed concern that the Departments did not provide a sufficient justification for the proposed changes and did not consider the practical consequence of the proposed rule. Commenters similarly expressed general concerns that the proposed changes are in conflict with section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), are contrary to case precedent, are immoral, and would negatively impact children seeking asylum. The true purpose of the rule, some commenters asserted, is to lead to the denial of virtually all asylum applications.

Commenters expressed concern that the Departments seek to depart from the BIA's approach in *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987). One commenter stated that it was inappropriate to use language from the

case to justify the proposed new factors while also superseding the case's central holding. Commenters stated that *Matter of Pula* instructs that danger of persecution should outweigh all but the most egregious factors. Commenters similarly stated that *Matter of Pula* requires adjudicators to consider the totality of the circumstances and to not give any particular factor such significant weight that it would outweigh all the others.

Citing *East Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832 (9th Cir. 2020), one commenter expressed concern that the proposed rule conflicts with recent Federal court precedent that the creation of ''eligibility bars'' to asylum is constrained by statute. The commenter asserted that as some of the discretionary factors would require denial of applications as a matter of discretion, they are, in actuality, unlawful eligibility bars.

Commenters stated that the proposed negative factors that adjudicators would be required to consider are not related to the merits of an asylum claim and are unavoidable in many cases. As a result, commenters argued, adjudicators would be required to deny most asylum cases as a matter of discretion. One commenter asserted that the Departments did not consider alternative policy options, and one commenter stated that the rule should be amended to require adjudicators to consider positive factors in their discretionary determinations. Commenters argued that inappropriately cabining discretion in this way is in conflict with making asylum determinations on a case-by-case basis.

Commenters expressed concern that the only way for applicants to overcome the presence of nine of the proposed adverse factors would be to show ''extraordinary circumstances'' or ''exceptional and extremely unusual hardship.'' One commenter stated that a demonstration of past persecution or a well-founded fear of future persecution is ''per se'' exceptional and extremely unusual hardship. Therefore, the commenter argued that by meeting the legal standard for asylum, applicants necessarily would meet the proposed new standard of exceptional and extremely unusual hardship. The commenter similarly stated that past persecution is ''exceptional hardship.'' Another commenter stated that application of the ''exceptional and extremely unusual hardship'' standard in exercising discretion for asylum applications contravenes the INA because Congress did not expressly provide for that heightened standard. Instead, the commenter noted that in section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A), Congress stated that the Attorney General ''may'' grant asylum. The commenter asserted that if Congress intended the use of a heightened standard, it would have expressly done so, as it did in section 240A(b)(1)(D) of the Act, 8 U.S.C. 1229b(b)(1)(D), for non-LPR cancellation of removal. The commenter cited the Supreme Court's decision in *Cardoza-Fonseca* for support. *See* 480 U.S. at 432 (''[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.''). Accordingly, consistent with *Matter of Marin,* 16 I&N Dec. 581, 584–85 (BIA 1978), the commenter asserted that the totality of the circumstances approach should be applied in the exercise of discretion for asylum applications.

Commenters disagreed with the Departments' position that creating a list of proposed factors would save adjudicators time. Specifically, commenters noted that since a finding of ''extraordinary circumstances'' or an exceptional and extremely unusual hardship would require a separate hearing, the proposed factors would not save time.

Response: The Departments disagree that they failed to provide sufficient justification for this proposed change in the NPRM, evidenced by the three-page discussion of this section alone. *See* 85 FR at 36282–85. Nevertheless, the Departments provide further explanation in this final rule.

Asylum is a discretionary benefit. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (providing that the Departments ''*may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section'' (emphasis added)); *see also Cardoza-Fonseca,* 480 U.S. at 443 (''[A]n alien who satisfies the applicable standard under § 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it.'' (emphases in original)). Accordingly, ''with respect to any form of relief that is granted in the exercise of discretion,'' an alien must satisfy the eligibility requirements for asylum and establish that the application ''merits a favorable exercise of discretion.'' INA 240(c)(4)(A),8 U.S.C. 1229a(c)(4)(A); *see also Matter of A–B–,* 27 I&N Dec. at 345 n.12 (explaining that the ''favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA'' and providing relevant discretionary factors to consider in the exercise of such discretion), *abrogated on other grounds, Grace II,* 965 F.3d at 897–900.

In its broadest sense, legal discretion is defined as the ''exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.'' *Discretion,* Black's Law Dictionary (11th ed. 2019); *see also Discretion,* Merriam-Webster (last updated July 6, 2020), *https://www.merriam-webster.com/dictionary/discretion* (defining ''discretion'' as the ''power of free decision or latitude of choice within certain legal bounds''). While the statute and case law are clear that a grant of asylum is subject to discretion, *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *INS* v. *Stevic,* 467 U.S. 407, 423 n.18 (1984), the statute and regulations are silent as to guidance that may direct such exercise of discretion.

The BIA has explained that the exercise of discretion requires consideration of the relevant factors in the totality of the circumstances, based on the facts offered by the alien to support the application in each case. *See Matter of Pula,* 19 I&N Dec. at 473 (noting that ''a number of factors . . . should be balanced in exercising discretion''). Further, the BIA has provided factors that may be relevant to the inquiry, including humanitarian considerations, such as the alien's age or health; any countries through which the alien passed en route to the United States and those countries' available refugee procedures; personal ties to the United States; and the alien's use of fraudulent documents. *See id.* at 473–74 (''Each of the factors . . . will not, of course, be found in every case. . . . In the absence of any adverse factors, however, asylum should be granted in the exercise of discretion.'').

In building upon the BIA's guidance and evaluating all policy options, the Departments have determined that it is appropriate to codify discretionary factors for adjudicators to consider. 85 FR at 36283. The statute and regulations currently contain discretionary factors for consideration in regard to other forms of relief. *See, e.g.,* 8 CFR 212.7(d), 1212.7(d) (authorizing the Attorney General to consent to an application for visa, admission to the United States, or adjustment of status, for certain criminal

aliens when declining to favorably exercise discretion ''would result in exceptional and extremely unusual hardship''); *see also Matter of Y–L–,* 23 I&N Dec. 270, 276–77 (A.G. 2002) (providing various factors that may indicate extraordinary and compelling circumstances that the Attorney General may consider to determine whether certain aggravated felonies are ''particularly serious crimes'' under section 241(b)(3)(B) of the INA for purposes of withholding of removal); *Matter of Jean,* 23 I&N Dec. 373, 383–84 (A.G. 2002) (explaining that discretionary relief requires a balancing of the equities, including, if any, extraordinary circumstances, the gravity of an alien's underlying criminal offense, or unusual hardships). The Departments have similar authority to promulgate discretionary factors for asylum relief. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *see* 85 FR at 36283.

Contrary to commenters' concerns that the proposed rule effectively creates bars (or ''eligibility bars'') to asylum and inappropriately cabins adjudicators' discretion, the Departments reiterate that this rulemaking identifies various factors for consideration in making a discretionary determination on an asylum application. These factors are not bars; accordingly, concerns that the rule would result in the denial of all asylum claims are misguided. Rather, in regard to the three significantly adverse factors, the proposed rule clearly stated that ''the adjudicator *should also consider any other relevant facts and circumstances* to determine whether the applicant merits asylum as a matter of discretion.'' *Id.* (emphasis added). And in regard to the nine adverse factors, the proposed rule stated that ''the *adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances* . . . or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum would result in exceptional and extremely unusual hardship to the alien.'' *Id.* (emphasis added). Thus, a finding that any of the factors applies does not foreclose consideration of other relevant facts and circumstances, which a true asylum ''bar'' would require.

Commenters asserted that this rule is inconsistent with the BIA's approach in *Matter of Pula* and subsequent related case law in which past persecution or a strong likelihood of future persecution ''should generally outweigh all but the most egregious of adverse factors.'' 19 I&N Dec. at 474. The Departments clearly stated in the NPRM that the rule ''supersede[d]'' the BIA's approach in *Matter of Pula,* 85 FR at 36285, which is squarely within their authority. ''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' *Encino Motorcars, LLC,* 136 S. Ct. at 2125 (citing *Brand X,* 545 U.S. at 981–82). The Court has further explained what a ''reasoned explanation'' should entail: Awareness in its decision making process that it is changing positions; demonstration that the new policy is permissible under the implementing statute, and not just the APA; statement and belief that the new policy is better; and provision of ''good reasons'' for the new policy. *See Organized Village of Kake* v. *U.S. Dep't of Agric.,* 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (summarizing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009)). In the NPRM, the Departments provided such information: awareness of changed position, 85 FR at 36285; demonstration that the policy is permissible under the INA and APA, *see generally* 85 FR at 36282–85; statement that the new policy is better, 85 FR at 36283; and good reasons for the new policy, 85 FR at 36283, 36285. Accordingly, the Departments properly and permissibly changed their policy from *Matter of Pula.*

Significantly, the rule does not preclude consideration of positive factors. Further, the NPRM instructed adjudicators to ''consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.'' 85 FR at 36283. Accordingly, the rule allows for consideration of positive equities as part of an adjudicator's discretionary analysis. The Departments have determined that the factors provided in the NPRM are appropriate and relevant to such analysis.

Moreover, the rule does not ''categorically limit'' adjudicators' discretion or make certain outcomes ''practically mandatory''; rather, the rule guides the exercise of discretion by providing various factors for consideration. The NPRM clearly stated, and the Departments reiterate, that the proposed factors were ''nonexhaustive.'' 85 FR at 36283. Further, the NPRM stated that ''any other relevant facts and circumstances'' should be considered and provided exceptions to one of the significantly adverse factors. *See id.* Accordingly, although the Departments proposed significantly adverse and adverse factors, an adjudicator must continue to consider positive factors in the discretionary analysis.

The Departments disagree with commenters that past or future persecution should be considered ''per se'' exceptional and extremely unusual hardship. Rather, the Departments have determined that the approach described in the NPRM—providing criteria for an adjudicator's consideration in the exercise of discretion, in addition to consideration of whether extraordinary circumstances or exceptional and extremely unusual hardship exists—is appropriate. Moreover, the Departments disagree that consideration of extraordinary circumstances or exceptional and extremely unusual hardship conflicts with the Act. Congress authorized the Attorney General to make discretionary asylum determinations, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), and that authority permits him to deny asylum even if an applicant can establish past or future persecution.

The Departments ''believe that the inclusion of the proposed factors in the rule will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.'' 85 FR at 36283, 36285. In this way, the list of factors to consider, including consideration of extraordinary circumstances or exceptional and extremely unusual hardship, would take place in one streamlined adjudication. Accordingly, the Departments disagree with commenters that the list of factors would not save time, is ''unworkable'' or ''cumbersome,'' or limits adjudicatory discretion.

The Departments also disagree that this section of the rule is immoral or would negatively impact children seeking asylum. Adjudicators consider these factors, as relevant, to all asylum cases. As it may relate specifically to children, if extraordinary circumstances exist or exceptional and extremely unusual hardships would arise if the application was denied, the adjudicator should consider such circumstances. *See* Section II.C.1.3 of this preamble for further discussion on this point.

4.7.1. Unlawful Entry or Unlawful Attempted Entry Into the United States

Comment: Commenters expressed general concern that the proposed regulation would improperly lead adjudicators to deny ''virtually all'' applications for asylum seekers who enter the United States between ports of entry. One commenter stated that the ''immediate flight'' exception is too narrow.

Commenters averred that the proposed regulation is contrary to section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), which instructs that individuals are eligible to apply for

asylum regardless of where they enter the United States.

Commenters expressed concern that the proposed regulation is inconsistent with case law. Commenters argued that contrary to the NPRM's argument, *Matter of Pula,* 19 I&N Dec. Dec. 467 (BIA 1987), does not support the Departments' position that an unlawful entry should be a significant adverse factor. Instead, one commenter asserted that in *Matter of Pula* the BIA reversed *Matter of Salim,* 18 I&N Dec. 311 (BIA 1982), to the extent that *Matter of Salim* suggested that ''the most unusual showing of countervailing equities'' was needed to overcome a ''circumvention of orderly procedures.'' Citing, for example, *Zuh* v. *Mukasey,* 547 F.3d 504, 511 n.4 (4th Cir. 2008), commenters similarly argued that Federal courts of appeals have given the manner of an asylum seeker's entry into the United States very little weight (and sometimes no weight) in discretionary determinations and have noted that place of entry reveals little about the merits of the case. And, citing *Huang* v. *INS,* 436 F.3d 89, 100 (2d Cir. 2006), one commenter noted that the Second Circuit Court of Appeals reasoned that if an illegal manner of entry were afforded significant weight, then virtually no asylum applicant would prevail.

Commenters expressed concern that codification of unlawful entry as a significantly adverse factor in discretionary determinations contradicts recent Federal court decisions from the Ninth Circuit Court of Appeals and the District Court for the District of Columbia that struck down November 2018 regulations by the Departments. Commenters argued that the NPRM is similar to a 2018 Interim Final Rule (IFR) that, when coupled with a presidential proclamation issued the same day, made any individual who arrived between designated ports of entry ineligible for asylum. Commenters noted that the Ninth Circuit Court of Appeals found that the 2018 IFR was arbitrary and capricious and that it infringed upon treaty commitments (*E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242 (9th Cir. 2020)). Commenters noted that the District Court for the District of Columbia held that the bar was inconsistent with the INA and congressional intent (*O.A.* v. *Trump,* 404 F. Supp. 3d 109, 147 (D.D.C. 2019)). Commenters expressed concern that the present rulemaking is intended to circumvent the courts' decisions on the 2018 IFR.

Commenters disagreed with the NPRM's reasoning that the proposed rule is necessary to address the strained resources used to adjudicate the growing number of asylum cases. One commenter asserted that ''expediency'' is not an appropriate consideration in determining the relief available to asylum seekers. The commenter also noted that in *Gulla* v. *Gonzales,* 498 F.3d 911, 919 n.2 (9th Cir. 2007), the Ninth Circuit Court of Appeals held that ''hypothetical numbers'' of potential asylum seekers is not a basis to deny relief to an applicant who has demonstrated a valid claim. The commenter similarly argued that limiting asylum to those who traveled from contiguous countries and those who flew directly to the United States is in conflict with case precedent and obligations under the 1967 Refugee Protocol.

Commenters expressed concern with the impact of the proposed rule in light of the CBP's practice of ''metering.'' Commenters asserted that, under the practice, applicants are required to wait for months in ''dangerous conditions'' in Mexico before they are able to apply for asylum. Commenters stated that some applicants are motivated to enter the United States between ports of entry in order to avoid the dangerous conditions.

One commenter expressed concern that codifying unlawful entry as a significant adverse discretionary factor would particularly burden children. The commenter argued that children often arrive with adults (such as parents, smugglers, or traffickers) who choose the manner and place of entry. The commenter argued further that children who travel to the United States on their own may not comprehend the importance of arriving at a port of entry.

Response: The Departments disagree that this factor will result in the denial of ''virtually all'' asylum applications. This factor is but one factor that an adjudicator must consider in light of all other relevant factors and circumstances. 85 FR at 36283. Likewise, the Departments disagree that the exception for aliens who enter or attempt entry ''made in immediate flight,'' 8 CFR 208.13(d)(1)(i), 1208.13(d)(1)(i), is too narrow. The Departments believe this exception properly balances the need for orderly processing of aliens with urgent humanitarian considerations.

As described throughout this rule, asylum is a discretionary benefit. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). The Departments have a legitimate interest in maintaining order and security on U.S. borders through the administration of lawful admissions procedures and, as stated in the proposed rule, the Departments remain concerned by the immense strain on resources needed to process aliens who illegally enter the United States. 85 FR at 36283 (citing Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018)). Aliens who unlawfully enter the United States circumvent the requirement that all applicants for admission be inspected, *see* INA 235(a)(3), 8 U.S.C. 1225(a)(3); break U.S. law, *see* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A); INA 275(a)(1), 8 U.S.C. 1325(a)(1); and contribute to the ever-increasing strain on the government's limited resources. Given such limited resources, and subject to a full discretionary analysis of all relevant factors as described in the NPRM, the Departments have determined that failure to lawfully apply for admission, in other words, unlawful entry or attempted unlawful entry, should generally be considered a significant adverse factor in an asylum adjudication.

The Departments disagree with commenters' allegations that DHS procedures at the border have ''virtually shut down the processing of asylum applications'' and prevented asylum seekers from lawfully presenting themselves at the border. At various times since 2016, CBP has engaged in metering to regulate the flow of aliens present at land ports of entry on the southern border in order to ''address safety and health hazards that resulted from overcrowding at ports of entry.'' *See* DHS, OIG 18–84, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5–6 & n.11 (Sept. 27, 2018), *https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.* Individuals who are subject to metering are not prevented from presenting at the port of entry.[59]

Claims that refugees who are unable to get a visa will have to overcome the significant negative discretionary factor are unfounded. The rule does not require any alien to obtain a visa in order to apply for asylum. Under the law, ''[a]ny 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 and including an alien who is brought to the United States after having been interdicted in international or United States waters) irrespective of such alien's status, may apply for asylum,''

[59] The permissibility of this practice is the subject of ongoing litigation, and the Departments decline to further comment on the legality or propriety of the practice in this rulemaking. *See Al Otro Lado, Inc.* v. *McAleenan,* No. 17–cv–02366–BAS–KSC, 2020 WL 4015669 (S.D. Cal. July 16, 2020).

INA 208(a)(1), 8 U.S.C. 1158(a)(1), and nothing in the rule changes that statutory framework. Moreover, nothing in the rule changes the longstanding principle that the Secretary and the Attorney General may deny asylum as a matter of discretion, even to aliens who otherwise meet the statutory definition of a refugee. *See INS* v. *Cardoza-Fonseca,* 480 U.S. at 428 n.5, 444–45 (''It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General.'*. . . [Congress] chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.'' (emphasis in original) (citation omitted)). Rather, consistent with the relevant authority, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), the Secretary and Attorney General are simply providing additional clarity and guidance to adjudicators to aid their consideration of asylum claims as a matter of discretion.

The Departments disagree with commenters' assertion that *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987), is ''fundamentally incompatible'' with this rule. As a threshold matter, the Departments reiterate that the rule incorporates as a discretionary factor consideration of whether an alien unlawfully entered or attempted to unlawfully enter the United States. 85 FR at 36283. *Matter of Pula* similarly allows for consideration of this factor as part of the discretionary analysis:

> Yet while we find that an alien's manner of entry or attempted entry is a proper and relevant discretionary factor to consider in adjudicating asylum applications, we agree with the applicant that *Matter of Salim, supra,* places too much emphasis on the circumvention of orderly refugee procedures. *This circumvention can be a serious adverse factor,* but it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. *This factor is only one of a number of factors which should be balanced in exercising discretion,* and the weight accorded to this factor may vary depending on the facts of a particular case.

19 I&N Dec. at 473 (emphases added).

The rule is consistent with *Matter of Pula* inasmuch as that factor must not be considered in a way that practically denies relief in all cases. The rule clearly states that the factor is one of many discretionary factors for an adjudicator to consider, consistent with *Matter of Pula's* holding that the totality of the circumstances should be examined. 85 FR at 36283 (''If one or more of these factors applies to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination, though the adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.''); 8 CFR 208.13(d), (d)(2)(ii), 1208.13(d), (d)(2)(ii). Like *Matter of Pula,* the rule would not treat this factor as an absolute bar. *See* 8 CFR 1208.13(d) (''Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.'').

Similarly, the Departments disagree with commenters' assertions that this rule contravenes section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1). As explained, this rule does not bar individuals from applying for asylum. The rule merely articulates that unlawful entry or attempted unlawful entry are significant adverse factors when considering whether to grant asylum as a matter of discretion.

Commenters cited various Federal circuit court treatment that allegedly forecloses consideration of this factor as significantly adverse. Cases cited by the commenters, however, prohibit the use of this factor as a bar to asylum,[60] and the Departments reiterate that the articulated discretionary factors do not equate to asylum bars. Commenters also selectively quoted from cases for support, thus mischaracterizing several cases as foreclosing provisions of the NPRM.[61] Insofar as commenters cited to *Matter of Pula's* approach that considers persecution or strong likelihood of future persecution as factors that ''generally outweigh all but the most egregious adverse factors,'' 19 I&N Dec. at 474, the Departments reiterate that the rule supersedes *Matter of Pula* in that regard. *See* 85 FR at 36285. Given that non-discretionary statutory withholding of removal and CAT protection are available, the Departments believe the rule's revised approach that considers the enumerated discretionary factors under the totality of the circumstances is appropriate in all cases, including those in which the applicant has otherwise demonstrated asylum eligibility. *See id.*

Commenters also contend that this rule contradicts Federal precedents striking down the Departments' previous rule, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018).[62] Unlike the rule struck down in those cases, however, consideration of unlawful entry or attempted unlawful entry as a significantly adverse factor in a discretionary analysis is not an asylum bar. This factor is one of many factors that an adjudicator must consider in the totality of the circumstances. *See* 8 CFR 208.13(d), 1208.13(d) (''Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.'').

Further, commenters alleged that the Departments ''appear to seek a way around the courts' decisions'' by ''injecting'' the previous rule barring asylum into the NPRM as a discretionary analysis and that the NPRM failed to ''address how the purpose of INA 208(a) is effectuated by inclusion of unlawful entry as a significant adverse discretionary factor.'' The Departments reject the contention that the rule is merely ''injecting'' one rule into another. The rule struck down in *East Bay Sanctuary Covenant* and *O.A.* established a bar to asylum eligibility, and the courts in those cases held that the rule exceeded the Attorney General's authority under INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), to establish additional limitations on asylum eligibility. But both courts have acknowledged that the Attorney General has broader authority to deny asylum as a matter of discretion to otherwise eligible applicants under INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). *See E. Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832, 849 (9th Cir. 2020) (explaining in the context of a different eligibility bar that ''the Attorney General's discretion to deny asylum under

[60] Commenters cited *Gulla,* 498 F.3d at 917, which states that ''it would be anomalous for an asylum seeker's means of entry to *render him ineligible* for a favorable exercise of discretion,'' *id.* (emphasis added), and *Huang,* 436 F.3d at 100, which contemplates whether ''illegal manner of flight and entry *were enough independently to support a denial of asylum,*'' *id.* (emphasis added). The Departments understand those cases to state that manner of entry cannot, on its own, bar an applicant from asylum relief. Further, the Departments note that in regards to manner of entry, *Gulla* found that the petitioner did not unlawfully enter or attempt to enter the United States, 498 F.3d at 919; thus, that case is not particularly relevant for purposes of the factor at issue in 8 CFR 208.13(d)(1)(i), 1208.13(d)(1)(i).

[61] For example, commenters stated that Federal circuit courts have given ''manner of entry'' ''little to no weight'' in discretionary determinations. Commenters quoted from *Zuh* v. *Mukasey,* 547 F.3d 504 (4th Cir. 2008). In context, however, the court first referenced *Matter of Pula*'s totality of the circumstances analysis and then stated that the ''use of fraudulent documents *to escape imminent capture or further persecution*'' should be afforded ''little to no weight.'' *Id.* at 511 n.4 (emphasis added). *Zuh* does not stand for the proposition that this factor should never be afforded greater weight.

[62] Commenters cited *E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242 (9th Cir. 2020), and *O.A.* v. *Trump,* 404 F. Supp. 3d 109, 147 (D.D.C. 2019).

§ 1158(b)(1)(A)'' is broader than ''his discretion to prescribe criteria for eligibility for asylum'' under § 1158(b)(2)(C)); *O.A.,* 404 F. Supp. 3d at 151 (''[T]here is a vast difference between considering how the alien entered the United States as one, among many, factors in the exercise of a discretionary authority, and a categorical rule that disqualifies any alien who enters across the southern border outside a designated port of entry.''). Consistent with those decisions, this rule simply clarifies that unlawful entry or attempted unlawful entry is a significant adverse factor in a discretionary analysis. Further, the Departments point to their explanation at 85 FR at 36283:

> the Secretary and Attorney General have not provided general guidance in agency regulations for factors to be considered when determining whether an alien merits asylum as a matter of discretion. Nevertheless, the Departments have issued regulations on discretionary considerations for other forms of relief, *e.g.,* 8 CFR 212.7(d), 1212.7(d) (discretionary decisions to consent to visa applications, admission to the United States, or adjustment of status, for certain criminal aliens), and the Departments believe it is similarly appropriate to establish criteria for considering discretionary asylum claims.

The Departments acknowledge that while that explanation does not specifically reference section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A), the explanation clearly states that the purpose of this section of the rule is to establish criteria to guide the exercise of discretion required in considering asylum claims. As explained in the NPRM and this final rule, asylum is a discretionary form of relief under section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A). Accordingly, this rule enables efficient and proper exercise of the discretion required by section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A).

Although the Departments agree with commenters that expediency is not the only relevant ''consideration when making a determination that would dictate the relief available to an asylum seeker,'' it is also true that ''the public has an interest in relieving burdens on the asylum system and the efficient conduct of foreign affairs.'' *See E. Bay Sanctuary Covenant,* 964 F.3d at 855. By disfavoring (though, not barring) asylum applicants who unlawfully enter the United States and by deterring meritless asylum claims, the Departments seek to ensure that those who need relief most urgently are better able to obtain it. As stated in the proposed rule, the Departments ''believe that the inclusion of the proposed factors in the rule will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.'' 85 FR at 36283. Adjudicators exercise independent judgment in each case before them, 8 CFR 1003.10(b), and this rule facilitates efficient adjudication of asylum applications, consistent with such exercise of independent judgment. Contrary to the suggestions of commenters, the rule does not codify expediency as the sole—or even one—factor to consider in determining asylum relief.

Commenters unpersuasively contend that the rule directly conflicts with Federal circuit case law. The commenters confuse the requirements for a grant of asylum by misconstruing a finding of eligibility as sufficient to grant asylum. Asylum eligibility is separate from the necessary discretionary analysis, as reflected in the statute: ''with respect to any form of relief that is granted in the exercise of discretion,'' an alien must establish satisfaction of the eligibility requirements for asylum and that the alien ''merits a favorable exercise of discretion.'' INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A); *see also Cardoza-Fonseca,* 480 U.S. at 428 n.5 (explaining that ''a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General*''' (quoting INA 208(a)) (emphases in original)); *Matter of A–B–,* 27 I&N Dec. at 345 n.12, (stating that the ''favorable exercise of discretion is a discrete requirement'' in granting asylum and should not be disregarded ''solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA''), *abrogated on other grounds, Grace II,* 965 F.3d at 897–900. The rule does not predicate asylum eligibility on unlawful entry or attempted unlawful entry. Instead, the rule makes such factor a consideration in the discretionary analysis.

In response to commenters' other quoted excerpts from case law, the Departments considered that responding to unlawful entry or attempted unlawful entry require expenditure of valuable government resources. 85 FR at 36283. Not all aliens who unlawfully enter or attempt to unlawfully enter intend to apply for asylum, and apprehension and processing of these aliens continues to strain resources. Accordingly, the Departments codify this factor as part of the discretionary analysis, to be considered in the totality of the circumstances, to determine whether an applicant warrants a favorable exercise of discretion.

The Departments disagree with commenters' assertions that the rule, in practice, will deny relief to ''virtually all asylum cases'' or that the rule will limit asylum relief to applicants from contiguous nations or applicants who arrive by air. The Departments reiterate the independent judgment exercised by adjudicators in applying immigration law, and this rulemaking does not dictate particular outcomes. Adjudicators examine the unique factors in each case before them, in accordance with applicable law and regulations. Accordingly, the Departments find these assertions to be purely speculative.

The Departments also disagree that the rule particularly burdens children. As discussed elsewhere in this final rule, adjudicators may consider whether extraordinary circumstances exist or whether exceptional and extremely unusual hardships would arise if the application was denied. In the case of a child's unlawful entry or attempted unlawful entry, an adjudicator could consider an alien's juvenile status and other related factors stemming from the alien's age, as relevant to and presented in the case. *See* Section II.C.1.3 of this preamble for further discussion on this point. Nevertheless, the Departments recognize that aliens under the age of 18 often have no say in determining their manner of entry into the United States. Accordingly, the Departments have modified the language in the final rule to reflect that the unlawful entry of an alien under age 18 would not necessarily be a significant adverse discretionary factor.[63]

4.7.2. Failure of an Alien To Apply for Protection From Persecution or Torture in at Least One Country Outside the Alien's Country of Citizenship, Nationality, or Last Lawful Habitual Residence Through Which the Alien Transited Before Entering the United States

Comment: Commenters expressed general opposition to the proposed rule's requirement that adjudicators consider failure to apply for asylum in third countries through which applicants traveled to reach the United States to be a significant adverse factor. Commenters argued that placing great negative weight on the applicant's route to the United States is inconsistent with discretionary determinations, which,

[63] Such entry would remain a significant adverse discretionary factor for any adults traveling with the minor, however.

commenters argued, should be based on a consideration of all the equities.

Commenters asserted that, contrary to the NPRM's reasoning, failure to apply for asylum protection in a third country is often not evidence of misuse of the asylum system. Commenters asserted that there are numerous reasons that applicants would not apply for asylum in such countries, including lack of knowledge on how to apply and language barriers. Additionally, commenters cited violence and a fear of persecution as a reason that applicants may not apply for asylum in third countries. One commenter noted that the U.S. government has issued travel advisories urging Americans to reconsider travel plans to El Salvador, Honduras, Guatemala, and eleven Mexican states because of violence. Furthermore, the commenter noted that the U.S. government urges travelers to ''exercise caution'' when travelling to sixteen other Mexican states, and that the United States has issued its highest travel warning—''Do Not Travel''—for the remaining five Mexican states. The commenter asserted that these warnings indicate that the conditions in some Mexican states are as dangerous as those in Syria and Iraq, which also have the highest travel warning. Given these various warnings, the commenter asserted, it is not reasonable to expect individuals to apply for asylum in Mexico.

Commenters asserted that the NPRM's reasoning failed to adequately consider the realities of the asylum systems in Mexico, Guatemala, Honduras, and El Salvador. In the case of Mexico, the commenter argued that the asylum system there is restrictive, underfunded, and underdeveloped. Commenters similarly asserted that the asylum systems in Guatemala, Honduras, and El Salvador are rudimentary.

Commenters argued that the requirement to apply for asylum in a third country en route to the United States inappropriately advantaged asylum seekers coming from contiguous countries, as well as those who have the means to fly non-stop to the United States. With respect to asylum seekers who reached the United States by air travel, commenters asserted that the NPRM lacked a rationale as to why asylum seekers who had even a brief layover in another country would be required to apply for asylum in that country. Commenters noted that such a requirement is particularly harmful for those coming from countries where direct flights to the United States are not possible. Commenters asserted that this difference in treatment violated the Fifth Amendment of the United States Constitution. Commenters asserted that the exceptions outlined in the proposed regulation are identical to language in the Departments' July 16, 2019, IFR. In considering the legality of the IFR, commenters stated that the Ninth Circuit Court of Appeals found the rule to be arbitrary and capricious and inconsistent with the INA.

One commenter asserted that the proposed provision conflicts with two statutory provisions concerning when asylum seekers must apply for asylum in another country: Sections 208(a)(2)(A) and 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(vi). Specifically, the commenter asserted that the proposed provision is not consistent with these statutory sections because it would exclude large classes of individuals from asylum, it does not require adjudicators to consider the safety of the third countries, and it does not require adjudicators to consider the fairness of third country asylum procedures.

Response: This factor was promulgated as a way to ensure that aliens in need of protection apply at the first available opportunity. As stated in the proposed rule, the Departments believe that there is a higher likelihood that aliens who fail to apply for protection in a country through which they transit en route to the United States are misusing the asylum system. 85 FR at 36283; *see also* Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33831 (July 16, 2019). Because the Departments recognize that this may not always be the case, the rule provides exceptions for situations in which an alien was denied protection in the country at issue, the alien was a victim of a severe form of trafficking in persons, or the relevant country was not a party to certain humanitarian conventions, as provided in 8 CFR 208.13(d)(1)(ii), 1208.13(d)(1)(ii). In addition, the adjudicator may consider whether exceptional circumstances exist or whether denial of asylum would result in exceptional and extremely unusual hardship to the alien. 85 FR at 36285.

Further, because this factor is race-neutral on its face and applies equally to all aliens, it does not violate the Fifth Amendment's due process guarantee. *See Washington* v. *Davis,* 426 U.S. 229, 242 (1976) (''[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. . . . Standing alone, [disproportionate impact] does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.'' (citation omitted)). This factor was not motivated by discriminatory intent. The rule and this factor in particular apply equally to all asylum applicants. To the extent that any one group is disproportionately affected by the rule, such outcome was not based on discriminatory intent, but rather on the demographics of the affected population and the Departments' aim to ensure that asylum protection in the United States is available and timely granted to applicants who genuinely need it most. *See generally* 85 FR at 36283; *see also Regents of Univ. of Cal.,* 140 S. Ct. at 1915–16 (rejecting the claim that revoking an immigration policy that primarily benefitted Latinos supported an inference of invidious discrimination against Latinos, because any disparate impact could be explained by the demographic fact that ''Latinos make up a large share of the unauthorized alien population''). The Departments have determined that aliens who do not apply for protection in a country through which they transit are less likely to merit relief as a matter of discretion; thus, the Departments proposed such factor to be considered while also providing the opportunity for aliens to present evidence to the contrary. *See id.*

Moreover, this factor is not arbitrary. The rule requires adjudicators to consider, as part of their discretionary analysis, whether an alien transited through a country en route to the United States but did not apply for asylum there. If an alien did not apply for protection, regardless of whether transit was effectuated by foot, flight layover, or sea, the alien forwent the immediate opportunity to apply for protection in the transited country for the future opportunity to apply for protection in the United States. The Departments believe this choice is relevant to an adjudicator's discretionary analysis because it may indicate the urgency or legitimacy of an applicant's claim. Thus, adjudicators should consider, as relevant, whether an alien failed to apply for protection in a country through which the alien transited en route to the United States, in the totality of the circumstances, to determine whether the alien merits relief as a matter of discretion. Moreover, nothing in the rule categorically prohibits an adjudicator from concluding that, under the circumstances, an applicant's brief layover in transit is less probative of the urgency of the applicant's claim than a

longer stay. Nor does anything in the rule categorically prohibit an adjudicator from concluding that, under the circumstances, an applicant's layover in transit in a country known for human rights abuses is less probative of the urgency of the applicant's claim than a layover in a country with a well-recognized system for providing humanitarian protection. In any event, promulgating this factor in the rule ensures that adjudicators at least account for it in the exercise of discretion, even though its probative value may vary from case to case.

The Departments also disagree with commenters who claim the Departments ''merely refer[ ] back to its earlier rulemaking on the third country transit bar.'' The NPRM's citation to Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33831 (July 16, 2019), was meant to clearly reiterate, while avoiding redundancy, the Departments' continued belief that, generally, aliens who do not apply for protection in a country through which they transit en route to the United States are more likely to have a non-meritorious asylum claim. As evidenced by the clause in the NPRM that states, ''as previously explained,'' the Departments explained this factor earlier in the proposed rule. 85 FR at 36282–83. The Departments provided extensive explanation of the BIA's decision in *Matter of Pula* in which the BIA held that ''whether the alien passed through any other countries or arrived in the United States directly from his country'' was a factor to consider in determining whether a favorable exercise of discretion is warranted. 19 I&N Dec. at 473–74. The Departments chose to codify that factor in the regulations. The Departments disagree with commenters who alleged that this factor ''ignores'' the fact that countries through which an alien may transit may be as dangerous as the country of origin and is based on an incorrect premise that there is a ''real opportunity'' to seek asylum in all countries party to the Convention. By becoming party to those treaties, the third countries through which an alien may have travelled are obligated, based on the treaties they have joined, to provide protection from removal to individuals who are likely to face persecution on account of a protected ground or torture. Accordingly, the Departments understand this factor to be consistent with the provisions of section 208 of the Act, 8 U.S.C. 1158.

For similar reasons, the Departments find commenters' assertion that there are numerous reasons that applicants would not apply for asylum in such countries, including lack of knowledge on how to apply and language barriers, as well as violence and a fear of persecution, as unpersuasive. As an initial point, aliens who apply for asylum in the United States do so despite the possibility of language barriers and lack of knowledge of application procedures, and commenters did not explain—and the Departments cannot ascertain—why these barriers would affect only other countries, but not the United States.

Additionally, the alleged failure to apply in other countries due to violence or a fear of persecution is based principally on anecdotes and speculation and is neither borne out by evidence nor distinguished from similar conditions in the United States. For example, the UNHCR has documented a notable increase in asylum and refugee claims filed in Mexico—even during the ongoing COVID–19 pandemic—which strongly suggests that Mexico is an appropriate option for seeking refuge for those genuinely fleeing persecution. *See, e.g.,* Summary of Statement by UNHCR Spokesperson Shabia Mantoo, *Despite Pandemic Restrictions, People Fleeing Violence and Persecution Continue to Seek Asylum in Mexico,* UNHCR (Apr. 28, 2020), *https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html* (''While a number of countries throughout Latin America and the rest of the world have closed their borders and restricted movement to contain the spread of coronavirus, Mexico has continued to register new asylum claims from people fleeing brutal violence and persecution, helping them find safety.''). Asylum and refugee claims filed in Mexico increased 33 percent in the first three months of 2020 compared to the same period in 2019, with nearly 17,800 claims in 2020. *Id.* Asylum claims filed in Mexico rose by more than 103 percent in 2018 compared to the previous year. UNHCR, Mexico Fact Sheet (Apr. 2019), *https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf.* Overall, ''[a]sylum requests have doubled in Mexico each year since 2015.'' Clare Ribando Seelke, Cong. Rsch. Serv., IF10215, *Mexico's Immigration Control Efforts* 2 (2020), *https://fas.org/sgp/crs/row/IF10215.pdf.*

Moreover, some private organizations acknowledge that asylum claims in Mexico have recently ''skyrocket[ed],'' that ''Mexico has adopted a broader refugee definition than the U.S. and grants a higher percentage of asylum applications,'' and that ''Mexico may offer better options for certain refugees who cannot find international protection in the U.S.,'' including for those ''who are deciding where to seek asylum [*i.e.,* between Mexico and the United States].'' Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ* 1, 7 (Nov. 2019), *https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf.* If aliens coming to the United States through Mexico feared living in Mexico, it would be irrational for them to seek refuge there in large numbers; yet, that is precisely what the available data suggests.

Additionally, commenters do not indicate why violence in part of one country is different from violence existing in a part of the United States. Just as violence may occur in parts of the United States but individuals fleeing persecution consider the country ''safe'' and want to live here, localized episodes of violence in other countries do not mean the country, as a whole, is unsafe for individuals fleeing persecution. In other words, the presence of local or regional violence, particularly criminal violence, exists in *all* countries, even those generally considered ''safe,'' but such presence of local or regional violence does not render those countries too dangerous that individuals fleeing persecution could not take refuge anywhere in the country. *Cf. Cece,* 733 F.3d at 679 (Easterbrook, dissenting) (''Crime may be rampant in Albania, but it is common in the United States too. People are forced into prostitution in Chicago. . . . Must Canada grant asylum to young women who fear prostitution in the United States, or who dread the risk of violence in or near public-housing projects?''). For instance, per the United Nations Office on Drugs and Crime Chart on Victim of Intentional Homicide, the murder rate in Mexico of 29.1/100,000 in 2018, *see* United Nations Office on Drugs and Crime, *Mexico, Victims of Intentional Homicide, 1990–2018, https://dataunodc.un.org/content/data/homicide/homicide-rate,* was lower than that in American cities such as St. Louis, Baltimore, Detroit, New Orleans and Baton Rouge. *See, e.g.,* Missouri, FBI: UCR (2018); Maryland, FBI: UCR (2018); Michigan, FBI: UCR (2018); Louisiana, FBI: UCR (2018), *https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/offenses-known-to-law-enforcement* (Table 8). The murder rate in Baltimore, America's deadliest big city, is twice that of Mexico. Sean Kennedy, '*The Wire' is*

Finished, but Baltimore Still Bleeds, Wall St. J. (Feb. 7, 2020), *https://www.wsj.com/articles/the-wire-is-finished-but-baltimore-still-bleeds-11581119104.* In short, although the Departments acknowledge commenters' concerns, they are supported by little evidence, do not explain why their concerns do not also apply to the United States, and are ultimately outweighed by the overall need to ensure appropriate and consistent consideration of probative discretionary factors that the rule provides.

Furthermore, this factor does not conflict with sections 208(a)(2)(A) and 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(vi), as one commenter alleged. Those provisions pose bars to asylum eligibility, but this factor merely guides adjudicators' discretion to grant or deny asylum to otherwise eligible applicants. Generally, the safe third country provision, INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A), bars an alien from applying for asylum if the Attorney General determines that the alien could be removed to a country in which the alien's life or freedom would not be threatened and where the alien has access to a process for determining asylum claims or equivalent protection. The firm resettlement provision, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(a)(vi), bars asylum eligibility for an alien who firmly resettled in another country before arriving in the United States.

In contrast to those two provisions, this factor—regarding whether an alien failed to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States—is considered by an adjudicator in making a discretionary determination on the alien's asylum application. Whether an application warrants a favorable exercise of discretion is distinct from whether an alien is barred altogether from applying for asylum, as is the case with the safe third country provision, or from establishing eligibility for asylum, as is the case with the firm resettlement provision. To the extent that the commenter's concerns about the safety of a third country and availability of asylum procedures in that third country specifically refer to the safe third country provision in section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), those are irrelevant to this distinct factor considered in discretionary determinations. To the extent that the commenter suggests specifically incorporating those considerations—the safety of a third country and availability of asylum procedures in that third country—into this factor, the Departments reiterate that an adjudicator may consider, as relevant, extraordinary circumstances and exceptional or extremely unusual hardship that may result if asylum is denied. *See* 85 FR at 36285.

Regardless, the Attorney General's discretion to deny asylum to otherwise eligible applicants is not limited by the safe third country or firm resettlement bars. *East Bay Sanctuary* and *O.A.* both presented the question whether the eligibility bar there conflicted with the statute's other eligibility bars, because the Attorney General's authority to ''by regulation establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum'' must be ''consistent with this section.'' INA 208(b)(2)(C), 8 U.S.C. 1108(b)(2)(C). Here, by contrast, the Attorney General would be acting under his authority under INA 208(b)(1)(*A*), which includes no similar ''consistent with'' requirement. Simply, the Secretary of Homeland Security or the Attorney General ''may'' deny asylum in their discretion. *Id.; see E. Bay Sanctuary Covenant,* 964 F.3d at 849 (''Unlike the broad discretion to deny asylum to aliens who are eligible for asylum, the discretion to prescribe criteria for eligibility is constrained by § 1158(b)(2)(C), which allows the Attorney General to 'establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum' only so long as those limitations and conditions are 'consistent with' § 1158.'').

4.7.3. Use of Fraudulent Documents To Enter the United States

Comment: Commenters expressed several general concerns regarding the regulatory provisions on fraudulent documents. First, commenters argued that the provisions would result in the denial of most asylum applications. Second, commenters argued that it is sometimes impossible for asylum seekers to obtain valid documents and that in some instances pursuing such documents could put them in greater danger. Third, commenters asserted that it is particularly difficult for women to obtain valid travel documents in some countries because they need to first obtain the approval of a male relative. Fourth, commenters asserted that the NPRM lacked a valid rationale as to why those travelling through multiple countries would be punished under the proposed rule and those who came directly to the United States from a contiguous country or a direct flight would be excused. Finally, one commenter argued that the proposed provisions are ultra vires because ''the law at INA 208 and 209 provide for specific waivers of the use of [fraudulent documents].''

Commenters argued that the NPRM's assertion that the use of fraudulent documents makes enforcement of immigration laws difficult and requires significant resources is not supported by evidence and is false. One commenter noted that under section 208(d)(5)(A)(i) of the Act (8 U.S.C. 1158(d)(5)(A)(i)) an individual cannot be granted asylum until he or she has completed a background check and his or her identity ''has been checked against all appropriate records or databases.'' The commenter noted that the statute's requirements are applicable to every person seeking asylum regardless of whether fraudulent documents were used. Thus, the commenter argued, making the use of fraudulent documents a significant adverse factor would not reduce the amount of resources needed to adjudicate asylum cases.

One commenter argued that the proposed fraudulent document provisions are contrary to congressional intent. Specifically, the commenter noted that on May 1, 1996, the Senate debated an immigration bill that would have summarily deported, among others, asylum seekers who used false documents to enter the United States. The commenter noted that Senator Patrick Leahy introduced an amendment to the bill that would remove the use of ''summary exclusion procedures for asylum applicants.'' The commenter quoted some of Senator Leahy's remarks in support of the amendment, in which he noted that people fleeing persecution will probably get fraudulent passports. The commenter noted there was bipartisan support of the amendment.

Commenters asserted that Federal courts have recognized that false documents may be needed to flee persecution. Citing *Gulla* v. *Gonzales,* 498 F.3d 911 (9th Cir. 2007), one commenter noted that Mr. Gulla, an Iraqi asylum seeker, used forged passports to flee government persecution on account of his religion and that the court concluded that reasoned use of false documentation in that case supported Mr. Gulla's asylum claim rather than detracted from it.

One commenter argued that the NPRM's rationale for the fraudulent document provisions distorted the BIA's reasoning in *Matter of Pula.* Specifically, the commenter argued that even though the BIA delineated a difference between the use of fraudulent

documents to escape persecution and falsifying a United States passport to assume the identity of a United States citizen, the BIA noted that an adjudicator would still be required to consider the totality of the circumstances in both cases. Accordingly, the commenter argued that the case does not provide justification for making the use of a fraudulent document a significantly adverse factor.

Response: As an initial point, commenters failed to explain why an alien genuinely seeking asylum would need to use false documents to enter the United States in the first instance, as distinguished from using false documents only to leave the alien's country of nationality. An alien need not necessarily have entered the United States to apply for asylum; rather, an alien ''arriv[ing] in the United States'' may apply for asylum. INA 208(a)(1), 8 U.S.C. 1158(a)(1). Thus, an alien may seek asylum at a port of entry without using or attempting to use any documents whatsoever. Moreover, large numbers of aliens enter the United States without presenting any documents at all, including those who subsequently seek asylum after turning themselves in or are otherwise apprehended by DHS. *See* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A) (rendering inadmissible an alien who enters the United States without being admitted or paroled); *see also* Perla Trevizo, *How Do You 'Secure' the Border When Most Migrants Are Just Turning Themselves In?, Tuscon.com* (Dec. 15, 2018), *https://tucson.com/news/state-and-regional/how-do-you-secure-the-border-when-most-migrants-are-just-turning-themselves-in/article_deed8d48-fa50-11e8-837c-0b4b3be5a42a.html* (noting that ''large groups'' of aliens simply ''cross illegally to turn themselves in,'' with no mention of any entry documents, false or otherwise). The use of fraudulent documents undermines the integrity of the immigration system and is unnecessary for an alien to apply for asylum. In other words, because neither fraudulent documents nor even entry into the United States are requirements to make an asylum application, the use of such documents to enter or attempt to enter the United States strongly suggests that the motive of an alien using such documents is to enter the United States for reasons other than a genuine fear of persecution or a need for protection. Consequently, the Departments find it reasonable to consider that factor as a significantly adverse discretionary one for purposes of adjudicating an asylum application, and the commenters did not persuasively explain why that should not be the case.

Even if entry documents were a prerequisite to the ability to apply for asylum, the Departments nevertheless would find that this factor would deter the use of false documents, which create burdensome administrative costs in filtering valid from invalid documentation and dissipate human resources that could be used to ensure that meritorious claims are addressed efficiently. Those benefits, in the Departments' view, would also ultimately outweigh any costs associated with the denial of asylum applications due to the use of such documents.

Further, the Departments disagree that this factor would result in denial of most applications. Regardless of what documents aliens may use to depart their countries of nationality, there is no evidence that most asylum applicants use false documents to enter the United States; rather, most aliens seeking asylum either appear at a port of entry and request asylum without seeking to enter with any particular documents or enter the United States without inspection, *i.e.,* without presenting any documents at all.

Commenters' concerns are also speculative, and the Departments reiterate that this factor is one of many factors considered under the adjudicator's discretionary analysis—not a bar to asylum.

85 FR at 36283 (''[T]he adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.''). Further, an alien may introduce relevant evidence of extraordinary circumstances, including challenges described by the commenters, for the adjudicator to consider. *See* 85 FR at 36283. The Departments also emphasize that an alien's use of fraudulent documents to enter the United States is a ground that renders the alien inadmissible. INA 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C). This clear, negative consequence underscores congressional disapproval of the use of fraudulent documents to enter the United States.

In the NPRM, the Departments explained why this factor considers use of fraudulent documents for aliens traveling through more than one country but not aliens arriving from a contiguous country. 85 FR at 36283 n.35. For aliens arriving from a contiguous country, an alien may simply be carrying the documents he or she used to depart that country, particularly in situations in which the exit control for the contiguous country is located in close physical proximity to the port of entry into the United States or the embarkation point for a trip by air or sea to the United States; thus the Departments will not consider this a significant adverse factor for such aliens. As further explained in the NPRM, the rule aligns with *Lin* v. *Gonzales,* 445 F.3d 127, 133 (2d Cir. 2006), and *Matter of Pula,* 19 I&N Dec. at 474, cases that draw a distinction between presentation of a fraudulent document to an immigration court and the use of a fraudulent document to escape immediate danger. 85 FR at 36283 n.35. To the extent other BIA cases reject such a distinction, the rule supersedes conflicting case law. Accordingly, aliens are not ''punished,'' as commenters alleged, if they travel through more than one country. Rather, the line drawn in *Lin* and *Pula* supports differential treatment. If an alien arrives directly (such as by air), there is an innocuous explanation for his carrying of fraudulent documents: He still has them because he used them to escape immediate danger. But if an alien travels through more than one such country, that justification for carrying fraudulent documents—escaping persecution—becomes far more attenuated. As explained elsewhere in the NPRM and this final rule, the Departments believe that if aliens who travel through more than one country, subject to some exceptions, are escaping persecution, they have an opportunity to seek protection in any of the countries through which they transit en route to the United States. If aliens arriving from a contiguous country are escaping persecution, the first place to seek protection would be the United States, and so the Departments will not consider such aliens' use of fraudulent documents in pursuit of protection as a significant adverse factor.

Contrary to commenters' assertions, section 208 of the Act, 8 U.S.C. 1158, does not provide a waiver for the use of fraudulent documents to enter the United States, and section 209 of the Act, 8 U.S.C. 1159, only waives a ground of inadmissibility related to the use of fraudulent documents, INA 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(C)(i), in conjunction with an application for adjustment of status for an alien who has already been granted asylum. Consequently, neither provision applies to the rule, which addresses solely discretionary determinations in connection with an asylum application. Moreover, the potential availability of a waiver of a ground of inadmissibility, which is itself discretionary, for an alien

who has already been granted asylum and is seeking lawful permanent resident status does not suggest that the basis for the ground of inadmissibility is not also a relevant discretionary consideration in the first instance.

Because this factor would discourage use of fraudulent documents and streamline the discretionary analysis regarding the use of fraudulent documents, the Departments believe the factor would reduce the overall time expended to address the issue of fraudulent documents on a systemwide basis because fewer aliens would use fraudulent documents and adjudicators would consider their use more consistently. Although the use of fraudulent documents to enter the United States is difficult to track in general and the Departments do not track the number of asylum applicants who present such documents, the Departments nevertheless expect less time to be expended overall. To the extent that this provision deters the use of fraudulent documents, the provision will conserve enforcement resources that may otherwise be spent ferreting out fraud and will support the overall integrity of the immigration systems and ensure that benefits are not inappropriately granted. The Departments find those benefits outweigh the various concerns raised by commenters.

The Departments follow applicable law and regulations. If the proposed amendments cited by commenters were not included in the version of the bill that became law, then the Departments do not follow or consider legislative history regarding such amendments. *See Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.,* 469 U.S. 189, 194 (1985) (''Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'').

The Departments again note the NPRM, which explains how the rule interacts with case law regarding this factor. 85 FR at 36283 n.35. Further, this rule supersedes previous regulations that case law may have interpreted in reaching decisions prior to promulgation of the rule at hand. To the extent that other circuits have disagreed with the Departments' reasonable interpretation, the Departments' proposed rule would warrant re-evaluation in appropriate cases under well-established principles. *See Brand X,* 545 U.S. at 982.

The rule requires adjudicators to consider this factor, like all the factors outlined in the NPRM, in light of all relevant factors. *See* 85 FR at 36283, 36285. In this regard, the rule aligns with the approach in *Matter of Pula,* contrary to the commenters' assertions. The Departments note, however, that the rule also supersedes *Matter of Pula* in some regards, as explicitly provided in the NPRM. 85 FR at 36285.

4.7.4. Spent More Than 14 Days in Any One Country

Comment: Commenters expressed general concerns with the proposed regulation's introduction of a bar that would make any person who spent more than 14 days in any country en route to the United States ineligible for asylum. Specifically, commenters asserted the new bar is cruel and arbitrary and capricious, and that it is designed to make most aliens who enter from the southern border ineligible for asylum.

Commenters asserted that the NPRM's reasoning as to the necessity for a 14-day bar is inadequate and that the policy would be contrary to the concept of firm resettlement. One commenter argued that the NPRM failed to explain how a 14-day stay in a country equates to an offer of firm resettlement, and another asserted that the length of stay in a country is irrelevant to the merits of an LGBTQ asylum seeker's claim. Additionally, one commenter stated that being given an application to seek protection in another country does not equate to an offer of firm resettlement. The same commenter argued the NPRM's use of a single Federal case to support the proposed provision—*Yang* v. *INS,* 79 F.3d 932 (9th Cir. 1996)—is not persuasive. The commenter stated that in *Yang,* refugees from Laos who spent 14 years in France with refugee status were denied asylum in the United States. The commenter asserted that using this case to support the position that denying asylum applications for anyone who spent 14 days in another country with no kind of lawful status is ''irrational.''

Commenters argued that the proposed 14-day bar would punish those who seek to comply with U.S. policies. Specifically, commenters noted that under the CBP ''metering'' policy, asylum seekers sometimes are required to wait more than 14 days (one commenter stated that the wait could span months) in order to make their asylum claims. Commenters also asserted that asylum seekers subject to MPP are often required to spend more than 14 days (up to weeks or months) in Mexico. Commenters expressed concern that asylum seekers subject to metering and MPP would be barred from asylum under the proposed rule. One commenter similarly argued that the United States has used COVID–19 as a ''pretext'' to close the Mexican border to all asylum seekers. The commenter implied that these policies could likewise cause an individual to be in a third country for longer than 14 days.

Commenters asserted that many asylum seekers travel to the United States by foot, bus, or train, which, commenters assert, often takes longer than 14 days. Commenters asserted that the length of an asylum seeker's journey is often extended due to the need to avoid detection from government officials and non-government actors trying to return the asylum seeker back to the country from which the individual is fleeing. Additionally, commenters noted that there could be other reasons that an asylum seeker's journey could be extended beyond 14 days, including robbery, kidnap, or rape. One commenter asserted that those who travel through southern Mexico face additional hurdles, asserting that the Mexican government refuses to issue travel documents and that the government threatens to fine transportation companies that sell tickets to those without travel documents.

One commenter expressed concern that the proposed regulation did not include an exception for children and other discrete populations, who, the commenter stated, might not have control over the amount of time spent in third countries en route to the United States.

Response: This factor is not a bar to asylum, as commenters alleged. This factor is considered, along with all the other factors outlined in the rule, as part of an adjudicator's discretionary analysis. Further, the NPRM clearly recognized that ''individual circumstances of an alien's presence in a third country or transit to the United States may not necessarily warrant adverse discretionary consideration in all instances,'' and subsequently provided various exceptions. 85 FR at 36284.

Consideration of this factor is not cruel or arbitrary and capricious. This factor is considered adverse only when an alien spends more than 14 days in a country that permits applications for asylum, refugee status, or similar protections. The Departments believe that an alien should apply for protection at the first available opportunity, but the Departments would not hold an alien responsible for failure to apply for protection that does not, in fact, exist. Asylum is a form of relief intended for aliens who legitimately need urgent protection. If any alien stays in one country for more than 14 days and that

country permits applications for various forms of protection but the alien fails to apply for such protections, then the Departments consider that failure to be indicative of a lack of urgency on the alien's part. This factor thus screens for urgency, an important consideration in light of the growing number of asylum applications the Departments receive: The Departments have seen record numbers of asylum applications, along with record numbers of asylum denials, in the past decade. For comparison, in FY 2008, 42,836 asylum applications were filed while, in FY 2019, 213,798 asylum applications were filed. *See* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download.* These record numbers have slowed the adjudication process for all asylum seekers, including those who urgently need protection. Thus, the Departments expect that considering this factor will assist the efficient adjudication of asylum claims.

The NPRM does not equate either a 14-day stay in one country or the offer to seek protection, on their own, as firm resettlement, contrary to commenters' assertions. For amendments to the firm resettlement bar, commenters should refer to Section II.C.7 of the preamble to the NPRM, 85 FR at 36285–86, and Section II.C.4.8 of the preamble to this final rule, revised at 8 CFR 208.15, 1208.15.

Contrary to commenters' allegations, the proposed treatment of an alien who spends more than 14 days in a country en route to the United States as a significant adverse factor does not conflict with firm resettlement. First, an alien found to have firmly resettled is barred from asylum relief. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The provision at hand, however, is not a mandatory bar but a discretionary factor to be considered by the adjudicator, subject to exceptions in cases where the alien's application for protection in the third country was denied, the alien is a victim of a severe form of human trafficking defined in 8 CFR 214.11, or the alien was present in or transited through only countries that were not parties to the Refugee Convention, Refugee Protocol, or CAT at the relevant time. 8 CFR 208.13(d)(2)(i)(A)(*1*)–(*3*), (d)(2)(i)(B)(*1*)–(*3*); *see also* 85 FR at 36824. Second, as proposed by the NPRM, the firm resettlement bar would apply ''when the evidence of record indicates'' that it would apply. 85 FR at 36286. Then, the alien bears the burden of proof to demonstrate that the bar does not apply, consistent with 8 CFR 1240.8(d). *See id.* Accordingly, the discretionary factor of whether an alien spent more than 14 days in any one country that provides applications for refugee, asylee, or other protections prior to entering or arriving in the United States is different from but related to the firm resettlement bar: If an alien successfully demonstrates that the firm resettlement bar does not apply, then an adjudicator would consider that factor as part of a discretionary analysis regarding the asylum application.

The Departments disagree that the reference to *Yang,* 79 F.3d at 935–39, is irrational. That case clearly demonstrates why the Departments are promulgating this factor for consideration. As stated in the NPRM, that case ''uph[eld] a discretionary firm resettlement bar, and reject[ed] the premise that such evaluation is arbitrary and capricious or that it prevents adjudicators from exercising discretion.'' 85 FR at 36284 (citing *Yang,* 79 F.3d at 935–39). Such reasoning is relevant to all cases in which this factor is considered, whether the alien spent 14 days or 14 years in another country. Further, contrary to the commenters' assertion, even if the alien spent 14 days or more in another country, this factor is not a bar to asylum; rather, it is considered in light of all other relevant factors and various exceptions. *See id.*

For aliens subject to MPP, those aliens who have entered the United States and were processed under MPP are no longer en route to the United States and have already applied for admission to the United States, whereas, this factor considers whether an alien stayed for more than 14 days in one country ''[i]mmediately prior to his arrival in the United States or en route to the United States.'' 8 CFR 208.13(d)(2)(i)(A), 1208.13(d)(2)(i)(A). If an alien claims that he was subject to metering and waited more than 14 days in Mexico, he or she may introduce such evidence as an extraordinary circumstance. Moreover, such aliens may apply for protection in Mexico; if that application is denied, then the factor would not apply. In addition, the Departments reject any contention that COVID–19 has been used as a pretext to close the southern border. The government has taken steps at the Canadian and Mexican border to curb the introduction and spread of the virus, which continues to affect the United States and the entire world. *See* DHS, *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus* (updated Oct. 22, 2020), *https://www.dhs.gov/news/2020/06/16/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus;* Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 FR 16559 (Mar. 24, 2020); Security Bars and Processing, 85 FR 41201 (July 9, 2020) (proposed rule).

For discrete populations, if circumstances exist that extend an alien's stay in one country to surpass 14 days, an adjudicator will consider such circumstances to determine whether they constitute extraordinary circumstances. Further, an adjudicator will evaluate whether such alien falls into one of the three exceptions to this factor.

4.7.5. Transits Through More Than One Country Between His Country of Citizenship, Nationality, or Last Habitual Residence and the United States

Comment: Commenters asserted that the proposed provision pertaining to transit through more than one country en route to the United States is arbitrary and capricious and contrary to congressional intent. They stated that the rule would inappropriately advantage asylum seekers coming from Mexico and Canada. Commenters similarly asserted that the proposed rule would advantage those coming from countries where direct flights to the United States are available and those who could afford to purchase tickets on such flights. They asserted that there was no rationale as to why asylum seekers travelling by air with one or more layovers in another country should be treated differently from those who took a direct flight. And they further expressed concern that the proposed factor would be particularly onerous on women and LGBTQ asylum seekers.

Commenters averred that the proposed factor of transit through more than one country conflicts with Federal court precedent. Specifically, commenters noted that a Federal district court invalidated a prior regulation concerning a third country transit ban. Commenters expressed concern that the Departments are trying to implement the ban a second time by making it a factor in discretionary determinations and asserted that the proposed provision would likewise be struck down by the courts.

Commenters expressed concern with two of the NPRM's proposed exceptions to the proposed third country transit factor. First, one commenter contended that exempting travel through countries that are not party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to

the Status of Refugees, or the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment is overly narrow. Specifically, the commenter argued that since 146 countries are party to the 1951 convention and 147 countries are party to the Protocol, the exception would be inapplicable to many asylum seekers' journeys. Second, commenters expressed concern that the proposed exception of applying for asylum in countries visited en route to the United States is not reasonable. Commenters asserted that the asylum systems of many nations through which asylum seekers commonly travel (such as Guatemala, Honduras, and El Salvador) are not well developed and that the countries are sometimes just as dangerous as the ones from which they are fleeing.

Response: The Departments disagree that this factor is arbitrary and capricious or contrary to congressional intent. Although not a bar, this discretionary factor is consistent with case law regarding firm resettlement and safe third countries. *See* 85 FR at 36284. Further, taken together with the exceptions, the factor is consistent with section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A).

Similar to the aforementioned factors that consider whether an alien stayed in one country for more than 14 days and whether an alien failed to seek protection in a country through which the alien transited en route to the United States, this factor aims to ensure that asylum is available for those who have an urgent need for protection. The Departments generally believe that aliens with legitimate asylum claims would not forego the opportunity to seek protection in countries through which they traveled if they had an urgent need. However, the Departments acknowledge that circumstances may exist in which an alien did, in fact, travel through more than one country and has an urgent need for asylum; accordingly, the Departments outlined three exceptions to this factor, *see* 85 FR at 36284; 8 CFR 208.13(d)(2)(i)(A)(*1*)–(*3*), (B)(*1*)–(*3*), 1208.13(d)(2)(i)(A)(*1*)–(*3*), (B)(*1*)–(*3*), in addition to the general consideration of extraordinary circumstances or exceptional and extremely unusual hardship that may result if the application is denied. *See* 85 FR at 36283–84. For these reasons, the Departments did not promulgate this factor in an arbitrary and capricious manner.

Relatedly, this factor does not improperly advantage asylum seekers from Canada, Mexico, or countries with direct flights to the United States. As background, asylum and refugee provisions were incorporated into U.S. law based on the United States' international obligations, in part, from the 1951 Convention relating to the Status of Refugees and 1967 Protocol. Signatories to those agreements comprise an ''international regime of refugee protection.'' UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: II. Background,* ¶ 3, EC/SCP/54 (July 7, 1989), *https://www.unhcr.org/en-us/excom/scip/3ae68cbe4/implementation-1951-convention-1967-protocol-relating-status-refugees.html.* To that end, the Departments believe this system operates to ensure aliens may apply for protection as soon as possible, not to ensure that aliens receive protection specifically from the United States. Congress has authorized the Departments to bar an alien from applying for asylum in the United States if the alien may be removed to a third country that affords a full and fair process for determining asylum claims or equivalent temporary protections, pursuant to a bilateral or multilateral agreement. INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). The United States shares the burden of processing asylum claims with other countries pursuant to various agreements. *See, e.g.,* Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Dec. 5, 2002, *https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html; DHS, Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador, https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf.* Thus, asylum seekers from countries in closer proximity to the United States or with direct flights to the United States are not ''advantaged,'' and asylum seekers from countries that are farther away from the United States or without direct flights to the United States are not ''punished.'' If anything, aliens from countries farther away may have more opportunities to seek protection than those whose closest—or potentially only—option is the United States. In an ''international regime of refugee protection,'' it makes sense that aliens closer to the United States may obtain asylum more easily in the United States, just as aliens closer to other countries may obtain asylum more easily in those countries. Including this factor will encourage aliens to seek asylum in countries that are closest to them and encourage all treaty signatories to do their fair share in providing safe harbor for refugees.

For discussion of this rule's effect on women and LGBTQ asylum seekers, *see* Section II.C.1.3 of this preamble. The Departments note here, however, that the rule applies to all asylum seekers regardless of gender or sexual orientation.

Moreover, this factor is not an eligibility bar for asylum; it is merely one factor to be considered as relevant, along with various other factors outlined in the rule. The previous rulemaking cited by commenters, Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019), barred asylum relief to aliens who failed to apply for protection in a third country through which they traveled en route to the United States. While that rule encompasses similar considerations, it is fundamentally different because the 2019 rule constituted a mandatory bar to asylum. This rule considers this factor as part of an adjudicator's discretionary analysis. Adverse judicial treatment of the 2019 rule does not directly apply to this rulemaking, which the Departments propose to issue under a different statutory authority. *See E. Bay Sanctuary Covenant,* 964 F.3d at 849 (distinguishing ''the broad discretion to deny asylum to aliens who are eligible for asylum'' from the narrower ''discretion to prescribe criteria for eligibility'').

The Departments disagree with commenters that the exception for aliens who were present in or transited through countries that were, at the relevant time, not parties to the Refugee Convention, Refugee Protocol, or CAT is too narrow. That exception is fashioned to ensure that aliens have an opportunity to apply for protection—whether that be in the United States or in a country through which they transit. If a country does not offer such protection, then an alien would not be held to that standard and could avail themselves of the third exception. Regarding comments that the exceptions to this factor are insufficient due to danger in and underdevelopment of most countries through which aliens travel en route to the United States, the Departments note that, by becoming party to those treaties, the third countries through which an alien may have transited are obligated by treaty to provide protection from removal to individuals who are likely to face

persecution on account of a protected ground or torture. *See also* Section III.C.4.7.2 of this preamble, *supra* (discussing the availability of protection in countries outside the United States through which an alien may transit). Accordingly, the Departments believe the rule is consistent with section 208 of the Act (8 U.S.C. 1158). The Departments note that regardless of whether an alien claims any of the exceptions, an alien may still assert that denial of their asylum application would result in extraordinary circumstances or produce exceptional and extremely unusual hardship.

4.7.6. Subject to § 1208.13(c) But for the Reversal, Vacatur, Expungement, or Modification of a Conviction or Sentence

Comment: Commenters expressed general concerns with the provision of the proposed regulation relating to reversed or vacated criminal convictions, asserting that it would lead to many asylum applications being inappropriately denied.

One commenter asserted that the proposed regulation would inappropriately create a categorical approach to considering vacated convictions in discretionary determinations. The commenter asserted that adjudicators should consider vacated convictions on a case-by-case basis and argued that a vacated conviction could provide positive equities that should be considered.

Commenters asserted that the proposed regulation is inconsistent with due process. Specifically, one commenter asserted that the proposed regulation would bar from asylum relief individuals who had criminal sentences that were vacated, reversed, expunged, or modified unless there was an express finding that the person is not guilty. The commenter asserted that there could be instances where a prosecutor decides to decline to pursue a case further after learning of an underlying error in the criminal proceedings without first making a determination as to the defendant's innocence or guilt. The commenter asserted that the proposed regulation could cause some individuals in this position with otherwise meritorious claims to be barred from asylum. The commenter cited *Nelson* v. *Colorado,* 137 S. Ct. 1249, 1255–56 (2017), and argued that such an outcome would violate due process principles.

One commenter expressed concern that the proposed regulation is inconsistent with the INA and the BIA decision, *Matter of Devison,* 22 I&N Dec. 1362 (BIA 2000). The commenter asserted that the Act and precedent establish that juvenile charges and convictions are not criminal convictions and thus should not be considered under the proposed regulation. Similarly, the commenter cited research suggesting that a child's comprehension of the consequences for engaging in criminal activity varies based on age. Accordingly, the commenter asserted, individuals should not be subjected to excessive punishments for actions that they took when they were young.

Response: As an initial point, the Departments note that this provision is fully consistent with long-standing case law allowing adjudicators to appropriately consider as an adverse discretionary factor ''criminal conduct which has not culminated in a final conviction for purposes of the Act.'' *Matter of Thomas,* 21 I&N Dec. 20, 23–24 (BIA 1995) (collecting cases); *cf. Villanueva-Franco* v. *INS,* 802 F.2d 327, 329–30 (9th Cir. 1986) (finding that the Board could consider alien's extensive criminal record, which included an expunged felony conviction for assaulting a police officer, in weighing whether voluntary departure was merited as a matter of discretion); *Parcham* v. *INS,* 769 F.2d 1001, 1005 (4th Cir. 1985) (''Evidence of an alien's conduct, without a conviction, may be considered in denying the discretionary relief of voluntary departure.''); *Matter of Seda,* 17 I&N Dec. 550, 554 (BIA 1980) (noting that ''a plea of guilty [that] results in something less than a conviction'' is ''a significant adverse factor to be considered in whether a favorable exercise of discretion is warranted'' for voluntary departure), *overruled on other grounds by Matter of Ozkok,* 19 I&N Dec. 546, 552 (BIA 1988). Commenters did not persuasively explain why the Departments should abandon this long-standing principle in considering all conduct in making a discretionary determination, especially conduct that initially led to a criminal conviction.

Additionally, commenters' concerns that this factor will result in improper denials of asylum applications are speculative. This factor is not a bar to asylum. *Compare* Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640, 69654–56 (Dec. 19, 2019) (proposing additional bars to asylum eligibility based on criminal convictions and clarifying when an order vacating or modifying a conviction or sentence will preclude the application of the proposed bars). Considered relative to all the other factors proposed in NPRM, outcomes will vary on a case-by-case basis, given consideration of extraordinary circumstances or exceptional and unusual hardship resulting from a denial of asylum. 85 FR at 36283.

The Departments disagree that this factor creates a ''categorical approach,'' as commenters alleged. A categorical approach often applies when determining whether a particular conviction qualifies as an offense that would render the alien ineligible for discretionary relief. 8 CFR 208.13(c), 1208.13(c); *see Kawashima* v. *Holder,* 565 U.S. 478, 483 (2012). This factor merely counsels adjudicators that *if* a conviction qualifies, it should be considered an adverse factor notwithstanding any subsequent vacatur or reversal of that sentence (unless the alien was found not guilty). But this rule takes no position on what approach should apply—categorical or circumstance-specific—in determining whether a conviction would so qualify. Moreover, this factor does not affect existing case law allowing the consideration of criminal activity as a discretionary factor, even when that activity has not resulted in a conviction. The rule, as proposed and in this final iteration, however, considers this factor as relevant to each case, along with consideration of extraordinary circumstances or exceptional and extremely unusual hardship that may befall an alien if asylum is denied. In this way, the rule is consistent with the commenter's suggestion that criminal activity must be considered on a case-by-case basis.

The rule does not violate due process. Consistent with long-standing case law, the rule requires adjudicators to consider, as part of the discretionary analysis, convictions that remain valid for immigration purposes. *See* 85 FR at 36284. Due process requires that an alien receive a full and fair hearing that provides a meaningful opportunity to be heard. *See Kerciku* v. *INS,* 314 F.3d 913, 917 (7th Cir. 2003). This rule does not violate due process because it does not deprive aliens of their right to a hearing before an immigration judge, 8 CFR 1240.10, or their right to appeal to the BIA, 8 CFR 1003.1(b).

Moreover, because asylum is a discretionary form of relief, aliens have no constitutionally protected interest in a grant of asylum. *See Nativi-Gomez* v. *Ashcroft,* 344 F.3d 805, 807–09 (8th Cir. 2003) (explaining that an alien has no expectation that discretionary relief will be granted and, consequently, no protected liberty interest in such relief (citing *Ashki* v. *INS,* 233 F.3d 913, 921 (6th Cir. 2000)). Accordingly, this rule presents distinct issues from *Nelson,* 137 S. Ct. at 1255–56, cited by a commenter. *Nelson* holds only that a state may not continue to deprive a

person of his property—there, thousands of dollars in costs, fees, and restitution—after his conviction has been reversed or vacated. The case applied the balancing test in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), which balances the private interest affected, the risk of erroneous deprivation of such interest through procedures used, and the governmental interest at stake. Because, unlike the monetary exactions at issue in *Nelson,* the rule affects no constitutionally protected liberty or property interest, that case and the *Mathews* balancing test do not apply.

The Departments will continue to apply *Matter of Devison,* 22 I&N Dec. 1362 (BIA 2000), as relevant; however, the commenter misunderstands the holding in that case. In that case, as referenced by a commenter, the BIA held that an adjudication as a ''youthful offender'' constituted a determination of juvenile delinquency rather than a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. 1101(a)(48)(A). *Matter of Devison,* 22 I&N Dec. at 1366. ''In its reasoning, the Board drew a critical distinction between a finding of delinquency, which involves 'status' rather than guilt or innocence, and deferred adjudication or expungement. Deferred adjudications constitute convictions under the INA while findings of delinquency do not.'' *Uritsky* v. *Gonzales,* 399 F.3d 728, 730 (6th Cir. 2005) (describing the BIA's holding in *Matter of Devison*) (internal citation omitted). Accordingly, juvenile adjudications of delinquency will continue to be evaluated in accordance with applicable statutes and regulations. But, because *Matter of Devison* does not hold that juvenile convictions cannot qualify as criminal convictions under the Act, the Departments decline to apply it as suggested by the commenter. The rule does not change or reinterpret the definition or disturb case law regarding criminal convictions; in fact, the rule codifies long-standing case law through promulgation of this factor. *See* 85 FR at 36284. To the extent commenters expressed disagreement with the definition of ''conviction'' under the Act, that issue is outside the scope of this rulemaking.

Finally, to the extent commenters queried whether particular types of cases with specific facts would necessarily be denied, the Departments find such queries speculative or hypothetical. Moreover, the Departments do not generally provide advisory opinions on asylum applications, especially in a rulemaking. Rather, the Departments expect that their adjudicators will address each case based on its own particular facts and the applicable law.

4.7.7. More Than One Year of Unlawful Presence in the United States Prior To Filing an Application for Asylum

Comment: Commenters generally expressed concern that consideration of unlawful presence in discretionary determinations would lead to the denial of most asylum applications. One commenter expressed concern that the proposed provision fails to account for practical realities such as official ports of entry being ''effectively closed'' to asylum seekers for years and that it could take more than a year to recover from the trauma that led an individual to flee his or her country.

Commenters asserted that inclusion of the proposed unlawful presence factor in discretionary determination is ultra vires. Specifically, commenters noted that section 208(a)(2)(d) of the Act (8 U.S.C. 1158(a)(2)(d)) provides two instances in which an asylum application can be filed outside of the one-year deadline: (1) Changed circumstances that affect eligibility for asylum, and (2) extraordinary circumstances relating to the delay of filing the application within one year. Commenters asserted that the proposed regulation would frustrate this statutory framework because a person who filed more than one year after his or her last entry into the United States but meets one of the above-identified exceptions could still see their application denied under the proposed rule as a matter of discretion. Commenters also noted that there could be instances where the exceptions would not be applicable until after the one-year deadline has expired. Commenters stated that deadline exceptions are especially important for LGBTQ asylum seekers. Commenters stated that the process to understanding one's identity as an LGBTQ individual can take more than one year and requires safety, security, and a support system that is often not available during flight from their home countries. Similarly, commenters asserted that it could take over a year to detect an HIV infection because of the need for ''culturally competent and clinically appropriate'' medical care that is often not available to asylum seekers outside of the United States.

Commenters argued that the proposed regulation conflicts with congressional intent. One commenter detailed the legislative history surrounding the one-year filing deadline. Specifically, the commenter noted that the Senate version of the bill in which the deadline was debated raised the deadline from 30 days to one year and that an amendment to the House version changed the wording of one of the exceptions from ''changed country conditions'' to ''personal circumstances'' in order to broaden the exception for applications that would be accepted after the statutory deadline. The commenter also highlighted a floor speech that the commenter argued evidenced congressional intent to create broad exceptions to the one-year deadline in order to reduce the chance of arbitrary denials.

One commenter argued that the proposed regulation conflicts with agency policy. Specifically, the commenter argued that in *Matter of Y–C–,* 23 I&N Dec. 286, 287 (BIA 2002), the BIA stated that a failure to file within the one-year deadline does not result in an absolute bar to filing an asylum application. The commenter also asserted that the proposed regulation is in conflict with 8 CFR 208.4(a)(4)–(5) and 8 CFR 1208(a)(4)–(5), which, the commenter asserted, provide broad definitions for the changed and extraordinary circumstances exceptions. The commenter similarly asserted that the proposed regulation is in conflict with 8 CFR 208.4(a)(2)(B) and 8 CFR 1208.4(a)(2)(B), which require applicants to establish the exceptions ''to the satisfaction'' of the adjudicator. The commenter noted that USCIS guidance states the standard is one of ''reasonableness,'' which, the commenter asserted, is lower than that of ''clear and convincing evidence.'' The commenter asserted that USCIS's articulation of the standard evidences agency acknowledgement of congressional intent to have the exceptions be broadly available.

One commenter asserted that the proposed regulation is inconsistent with the United States' obligations under the 1967 Protocol. Specifically, the commenter asserted that the UNHCR Executive Committee opposed the one-year filing deadline when it was under consideration because it was concerned with the impact it would have on the ability of the United States to offer protection to those fleeing persecution. The commenter similarly asserted that President Clinton opposed the one-year filing deadline out of a concern for it being inconsistent with international treaty obligations.

Response: This factor, like the other factors, is not a bar to asylum. The Departments proposed this factor as one of many that an adjudicator must consider when determining whether an asylum application warrants a favorable exercise of discretion. 85 FR at 36283. Commenters' concerns that consideration of this factor would result

in the denial of most asylum applications are speculative, untethered to the inherent case-by-case nature of asylum adjudications, and based on the erroneous underlying premise that this factor functions as an eligibility bar.

Moreover, this factor would, of its own force, result in the denial of only a small number, if any, of asylum claims. For aliens who entered the United States unlawfully and who accrue at least one year of unlawful presence, the statutory one-year bar in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), would likely apply independently, regardless of this provision. And aliens who arrive in the United States lawfully and maintain lawful status do not accrue unlawful presence and, thus, would not be subject to this provision. INA 212(a)(9)(B)(ii), 8 U.S.C. 1182(a)(9)(B)(ii). Even if such aliens fell out of status, their previous status may demonstrate extraordinary circumstances, 8 CFR 208.4(a)(5)(iv), 1208.4(a)(5)(iv), which would excuse the statutory one-year filing deadline for a ''reasonable period,'' and that ''reasonable period'' is likely to be less than the one year of unlawful presence required to trigger this provision. *See* Asylum Procedures, 65 FR 76121, 76123–24 (Dec. 6, 2000) (''Generally, the Department expects an asylum-seeker to apply as soon as possible after expiration of his or her valid status, and failure to do so will result in rejection of the asylum application. Clearly, waiting six months or longer after expiration or termination of status would not be considered reasonable.''). Commenters' concerns also do not account for the exceptions to the accrual of unlawful presence, INA 212(a)(9)(B)(iii), 8 U.S.C. 1182(a)(9)(B)(iii), or for situations in which the Attorney General or Secretary may grant an asylum application notwithstanding this factor. In short, commenters' concerns that this provision will result in the denial of most asylum application is wholly unfounded.

This factor is consistent with the Act. The rule preserves consideration of the two statutory provisions, cited by commenters, in which aliens may file an asylum application outside of the one-year deadline—changed circumstances and extraordinary circumstances. *See* 85 FR at 36285. Further, the rule provides consideration of whether exceptional and extremely unusual hardship may befall an alien if asylum was denied. For the discrete populations referenced by the commenters who file outside of the one-year deadline, adjudicators may consider those circumstances in accordance with the rule.[64] Accordingly, the rule does not frustrate the statutory framework.

The Departments disagree that the rule conflicts with congressional intent and agency policy. First, the Departments note that legislative history is secondary to the text of the statute itself. *See Park 'N Fly, Inc.,* 469 U.S. at 194 (''Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.''). The Supreme Court has explained the difficulty in examining legislative history because, oftentimes, both support and opposition may be found, thereby ''creat[ing] more confusion than clarity.'' *Lamie* v. *U.S. Trustee,* 540 U.S. 526, 539 (2004); *see also Milner* v. *Dep't of Navy,* 562 U.S. 562, 572 (2011) (''We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.''). The Departments read the plain language of the statute conferring discretionary authority to the Attorney General to adjudicate asylum applications in promulgating this section of the rule, which guides the exercise of such discretion through consideration of various factors. Accordingly, in regard to this particular regulatory provision, the Departments rely on the text of the statute rather than the legislative history.

Second, the rule does not conflict with agency policy. This factor, as previously explained, does not function as an absolute bar to asylum; therefore, it does not conflict with case law holding that extraordinary circumstances may excuse untimely filing. Moreover, this factor does not conflict with current regulations, as alleged by a commenter. The rule does not change the definitions for changed circumstances or extraordinary circumstances in 8 CFR 208.4(a)(4)–(5), 1208.4(a)(4)–(5), and the rule repeatedly stated that the adjudicator will consider this factor, along with all of the factors, as part of the discretionary analysis. Thus, it does not offend 8 CFR 208.4(a)(2)(B), 1208.4(a)(2)(B).

In regard to one commenter's concern that the rule's ''clear and convincing evidence'' standard would displace USCIS's current ''reasonableness standard'' for excusing a late-filed application, the commenter conflates the burden for showing extraordinary circumstances excusing the general one-year filing deadline with the burden for showing exceptional and extremely unusual hardship warranting an exercise of discretion by the Secretary or Attorney General. *Compare* 8 CFR 208.4(a)(5), 1208.4(a)(5) (''The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals . . . that the delay was reasonable under the circumstances''), *with* 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii) (Secretary or Attorney General may favorably exercise discretion where one or more adverse discretionary factors are present in ''cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien''). The two standards do not conflict because they apply in different contexts and serve different purposes.[65] The ''to the satisfaction of the asylum officer'' standard reflects the statutory requirement that an alien must demonstrate extraordinary circumstances ''to the satisfaction of the Attorney General'' to excuse a late-filed asylum application. INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). It reflects a showing to be made by the alien in order to receive initial consideration of the asylum application, irrespective of its merits. The ''clear and convincing evidence'' standard reflects the showing necessary to warrant the Secretary's or Attorney General's favorable exercise of discretion when any significantly adverse factor—whether an unpaid tax obligation, or the denial of two previous applications—is present. This standard is consistent with prior standards set for the application of that discretion to immigration benefits. *See* 8 CFR 212.7(d), 1212.7(d). It represents a concluding consideration to determine whether a grant of asylum is ultimately appropriate and goes directly to the merits of the asylum application. The two standards therefore do not conflict.

The rule does not circumvent the United States' obligations under the 1967 Protocol. In accordance with its non-refoulement obligations under the 1967 Protocol, the United States continues to offer statutory withholding of removal and protection under the

[64] *See supra* Section II.C.1.3 for further discussion on vulnerable populations.

[65] For example, an alien may establish ineffective assistance of counsel as an extraordinary circumstance to excuse a failure to meet the one-year asylum application filing deadline. 8 CFR 208.4(a)(5)(iii), 1208.4(a)(5)(iii). That showing, however, simply allows the application to be filed and says little about whether the application should ultimately be granted as a matter of discretion, particularly if there are unrelated adverse factors to be considered, such as unpaid tax obligations. 8 CFR 208.13(d)(2)(i)(E)(2), 1208.13(d)(2)(i)(E)(2).

CAT regulations.[66] The Departments also find commenters' assertions unpersuasive that the UNHCR Executive Committee and former-President Clinton opposed the one-year deadline. As an initial matter, concerns regarding solely the one-year deadline are outside the scope of this regulation because the rule does not amend the deadline, nor could it. And, in any event, the Departments are not aware that any court has endorsed the UNHCR Executive Committee's and President Clinton's theory that the existing one-year time bar on asylum applications violates international law.

4.7.8. Tax Violations

Comment: Commenters asserted that tax violations are not related to the merits of an asylum application and that the proposed regulation would punish asylum seekers for not understanding tax law. Commenters asserted that another result of EAD regulations is that many asylum seekers work in the informal economy and are paid ''off the books'' to support themselves while their applications are pending. Commenters argued that it is not reasonable to expect asylum seekers (some of whom, one commenter noted, do not speak English) to navigate the complexities of tax law to determine if they are required to file taxes. Another commenter asserted that even if an asylum seeker determined that he or she was not required to file, it would be difficult prove in court due to employment in the informal economy. The commenter also noted that in seeking to comply with the proposed rule, asylum seekers may turn to, and be defrauded by, notarios.

One commenter asserted that, contrary to the NPRM's reasoning, consideration of this factor would require more adjudicative time. Specifically, the commenter asserted that longer asylum interviews and hearings would be required to determine whether an asylum seeker was required to file taxes.

Commenters further asserted that immigration judges are not qualified to make determinations as to whether an individual is required to file taxes and that by granting them such power the proposed rule would infringe upon the province of the Department of the Treasury. Commenters asserted that the proposed rule would open the DOJ to numerous and costly lawsuits under the APA where plaintiffs would allege that an immigration judge's misapplication of the tax code led to denials of asylum applications. Moreover, commenters argued that such lawsuits would ''effectively bankrupt'' the United States.

Commenters asserted that the proposed provisions relating to tax violations would violate the U.S. Constitution in two ways. First, commenters argued that the proposed provisions conflict with the Eighth Amendment's proscription against cruel and unusual punishment. Specifically, commenters asserted that if an applicant presents a meritorious claim, it would be cruel and unusual punishment to consider the ''minor civil error'' of not filing taxes on time a ''strict liability offense'' that completely bars the applicant from asylum protection. Second, commenters argued that the proposed regulation would violate the Equal Protection Clause because the proposed rule would create harsher penalties for asylum seekers who do not file than for citizens and LPRs. Specifically, commenters asserted that by barring individuals from eligibility for asylum protection, the proposed rule would create harsher penalties for asylum seekers for tax non-compliance than for citizens and LPRs who would not face such severe consequences.

Commenters also asserted that many asylum seekers would not be able to comply with the proposed tax provisions due to USCIS's rules pertaining to Employment Authorization Documents (''EAD''). Commenters asserted that under the EAD rules, it is not possible for asylum seekers to receive a social security number (''SSN'') prior to obtaining an EAD. One commenter asserted that the IRS website is unclear on whether asylum seekers without EADs would be eligible to receive Individual Taxpayer Identification Numbers (''ITIN''). The commenter asserted that even if an asylum seeker is eligible for an SSN or an ITIN, it could still be difficult for the applicant to obtain the identity documents needed to apply for an SSN or an ITIN from his or her home country.

Response: In general, the comments on this provision suggest either that aliens seeking asylum should be excused from filing Federal, state, or local income tax returns or that the Departments should ignore clear violations of law when aliens fail to do so. Neither suggestion is well-taken by the Departments, as either countenancing or ignoring violations of the law is inconsistent with each's mission. Moreover, the comments fail to acknowledge clear case law that income tax violations are a significant adverse discretionary factor in the immigration adjudication context. *See, e.g., Matter of A–H–,* 23 I&N Dec. 774, 782–83 (A.G. 2005) (noting that tax violations ''weigh against asylum'' because they exhibit ''disrespect for the rule of law''); *cf. In re Jean Gilmert Leal,* 2014 WL 4966499, *2 (BIA Sept. 9, 2014) (noting in the context of an application for adjustment of status that it is ''well settled'' that ''failure [to file tax returns] is a negative discretionary factor because it reflects poorly on the applicant's respect for the rule of law and his sense of obligation to his community'').

The Departments also note that consideration of tax returns filed by aliens are already enshrined in multiple places in immigration law. *See, e.g.,* 8 CFR 210.3(c)(3) (alien applicant for legalization program may establish proof of employment through, inter alia, Federal or state income tax returns); *id.* 214.2(a)(4) (alien dependents of certain visa holders who obtain employment authorization ''are responsible for payment of all Federal, state and local income, employment and related taxes and Social Security contributions on any remuneration received''); *id.* 214.2(5)(ii)(E) (restricting employment eligibility for certain visa dependents when the proposed employment is contrary to the interest of the United States, defined as, inter alia, employment of visa holders or dependents ''who cannot establish that they have paid taxes and social security on income from current or previous United States employment''); *id.* 214.2(g)(4), (5)(ii)(E) (same, but for a different visa category); *id.* 244.9(a)(2)(i), 1244.9(a)(2)(i) (income tax returns may serve as proof of residence for purposes of an application for Temporary Protected Status (''TPS'')); *id.* 1244.20(f)(1) (adjudicator may require proof of filing an income tax return before granting a fee waiver for a TPS application); *id.* 1245.13(e)(3)(iii)(E) (alien applicant for adjustment of status may establish proof of physical presence in the United States through, inter alia, income tax records). To the extent that commenters raised concerns about an alien's ability to navigate existing tax systems in the United States—a question that is beyond

[66] *See R–S–C–* v. *Sessions,* 869 F.3d 1176, 1188 n.11 (10th Cir. 2017) (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun* v. *Att'y Gen. U.S.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017) (similar); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016) (similar); *Maldonado,* 786 F.3d at 1162 (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of parties, was implemented in the United States by the FARRA and its implementing regulations). For further discussion on international law principles as they relate to this rulemaking, see section II.C.6.8 *infra.*

the scope of this rule—they neither acknowledged the many existing provisions linking aliens, benefits, and income tax returns nor persuasively explained why adherence to tax laws is an inappropriate discretionary factor to consider in the context of the rule.

The Departments disagree with commenters regarding the relation of tax violations to the statutory discretionary analysis. As the proposed rule explained, the Departments see no concern with treating an asylum applicant's failure to file tax forms, when required by law, as a negative factor in an asylum adjudication when all other individuals required to file tax returns in the United States are subject to negative consequences for failure to file required tax forms. *See* 85 FR at 36284. The Departments believe that adherence to U.S. tax law is applicable to a favorable exercise of discretion, and this factor evaluates such adherence as part of an adjudicator's discretionary analysis.

The Departments find commenters' concerns associated with working in the ''informal economy'' to be unpersuasive. Aside from the fact that working without authorization is unlawful, the Departments emphasize the potential dangers of working without authorization, including exploitation, and, thus, strongly discourage aliens from doing so. Although not the purpose of this regulation, if the rule deters aliens from working without authorization, then the Departments find that to be a positive unintended consequence. Further, to the extent that commenters assert this rule will have negative consequences on aliens who are violating the law—either by working without authorization or by failing to file tax returns—the Departments find continuing illegal activity to be an insufficiently persuasive basis to alter the rule.

To the extent that commenters are opposed to the EAD regulations or expressed concern in regard to notario fraud, such concerns are outside the scope of this rulemaking. Moreover, aliens who require an EAD but do not possess one should not be engaged in employment, and aliens who have not engaged in employment will—unless they have another source of taxable income—generally not be required to file income tax returns that are the subject of the rule. Further, the Departments recognize that notario fraud exists, but it exists independently of the rule and has existed for many years. To the extent that notario fraud exists in tax preparation services, again, that fraud exists outside of this rule and flows from long-standing state and Federal tax obligations, not any provision proposed in the rule. To the extent that commenters oppose this portion of the rule because they believe it will lead aliens to engage in unlawful behavior (*i.e.,* working without an EAD), the Departments note that nothing in the rule requires any individual to engage in unlawful behavior. Similarly, to the extent that commenters oppose the rule because they believe it will cause aliens to fulfill an existing legal obligation (*i.e.,* filing income tax returns) by utilizing individuals who themselves may engage in unlawful behavior (*i.e.,* notarios), the Departments also note that nothing in the rule requires aliens to hire individuals who engage in illegal behavior. Further, even if aliens turn to notarios to prepare and file tax returns, they would do so not in response to the rule, but in response to the myriad laws documented above that already incentivize or require aliens to file income tax returns. Moreover, under *Matter of A–H–,* 23 I&N at 782–83, immigration judges may already consider tax violations as a significantly adverse factor, and commenters point to no evidence of their predicted dire consequences from that decision. The Departments therefore believe any such speculative harm is outweighed by the policy benefits of codifying this factor by rule and providing clear guidance to adjudicators about how to weigh this factor when exercising discretion to grant or deny asylum. In short, commenters' concerns minimize personal responsibility and agency, are outside the scope of the rulemaking, and are outweighed by the policy benefits of the rule.

Commenters' concerns about tax law are similarly outside the scope of this rulemaking. Everyone, U.S. citizens and non-citizens alike, are required to comply with the tax laws. *See* 85 FR at 36284 (citing 26 U.S.C. 6012, 7701(b); 26 CFR 1.6012–1(a)(1)(ii), (b)). This rule does not change tax law, which, as relevant to this rulemaking, requires certain aliens to file tax forms without regard to their primary language or the complexity of the tax code. Nevertheless, the IRS has assistance available in multiple languages, *see* Internal Revenue Serv., *Help Available at IRS.gov in Different Languages and Formats* (last updated Apr. 3, 2020), *https://www.irs.gov/newsroom/help-available-at-irsgov-in-different-languages-and-formats,* and there are numerous legitimate agencies, clinics, and nonprofits that can also be solicited for assistance with tax law compliance, *see, e.g.,* Internal Revenue Serv., *Free Tax Return Preparation for Qualifying Taxpayers* (last updated Nov. 9, 2020), *https://www.irs.gov/individuals/free-tax-return-preparation-for-qualifying-taxpayers* (discussing the IRS's Volunteer Income Tax Assistance (''VITA'') program); *see also* Internal Revenue Serv., *IRS Publication 3676–B, https://www.irs.gov/pub/irs-pdf/p3676bsp.pdf* (explaining the types of tax returns prepared under the VITA program). This rule requires consideration of an asylum applicant's compliance with tax laws as part of the adjudicator's discretionary analysis and merely provides direction to adjudicators regarding how to assess, as a discretionary factor, an alien's failure to adhere to the law. It does not substantively change tax law in any way.

The Departments disagree with commenters' concerns that evaluating this factor will require more adjudicative time. As discussed above, consideration of a failure to file income tax returns is already an adverse factor for purposes of asylum adjudications. *See Matter of A–H–,* 23 I&N at 783. Thus, its further codification in applicable regulations will not appreciably require additional adjudicatory time. Further, even if it did, the benefit of clarity and guidance provided by this rule to the discretionary analysis outweighs any minimal, additional adjudicatory time.

The Departments are confident that asylum officers and immigration judges possess the competence and professionalism necessary to timely interpret and apply the relevant regulations and statutes when considering this factor. *See* 8 CFR 1003.10(b) (''immigration judges shall exercise their independent judgment and discretion''). Immigration judges have undergone extensive training; further, immigration judges already interpret and apply complex criminal law as it affects an alien's immigration status. In light of this, the Departments disagree with commenters who claim that immigration judges are not qualified to make determinations based on this factor. Relatedly, the Department declines to address commenters' speculative assertions that misapplication of the tax code by immigration judges will open up the Departments to litigation, which will, in turn, bankrupt the Departments. As discussed, *supra,* the Departments have already been considering the failure to file income tax returns as a discretionary factor for many years, and such considerations have not led to the dire consequences predicted by commenters.

Likewise, the Departments disagree that this factor improperly infringes on the purview of the Treasury Department. This factor evaluates the tax status of aliens only as it applies to their immigration status, which is clearly within the jurisdiction of the Departments. 8 CFR 208.2, 208.9(a), 1208.2, 1003.10(b). This factor does not determine tax-related responsibilities or consequences for such aliens.

Commenters misapply the Eighth Amendment's protection against cruel and unusual punishment. The Eighth Amendment applies in the context of criminal punishments, protecting against disproportional punishments as they relate to the offense. *See Roper* v. *Simmons,* 543 U.S. 551, 560 (2005) (''[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense.'' (cleaned up)).

Denial of an asylum application, however, is not a criminal punishment. As an initial matter, immigration proceedings are civil in nature. *See INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1038–39 (1984) (''A deportation proceeding is a purely civil action[.]''). Courts have held the Eighth Amendment inapplicable to deportation because, as a civil proceeding, it is not a criminal punishment. *See Sunday* v. *Att'y Gen. U.S.,* 832 F.3d 211, 219 n.8 (3d Cir. 2016) (collecting cases); *Elia* v. *Gonzales,* 431 F.3d 268, 276 (6th Cir. 2005); *Bassett* v. *U.S. Immigration and Naturalization Serv.,* 581 F.2d 1385, 1387–88 (10th Cir. 1978); *cf. Lopez-Mendoza,* 468 U.S. at 1038–39. The underlying principle of these cases is that the power to exclude aliens through deportation constitutes an ''exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country,'' rather than an exercise of penal power. *Trop* v. *Dulles,* 356 U.S. 86, 98, 101 (1958) (holding that Congress cannot strip citizenship as a punishment under the Eighth Amendment, but distinguishing denaturalization of a citizen from deportation of an alien); *see also Fong Yue Ting* v. *United States,* 149 U.S. 698, 705 (1893) (noting that the power to exclude aliens is an inherent function of sovereignty).

Accordingly, denial of asylum, regardless of the reasoning underlying such denial, cannot be construed as a criminal punishment subject to the Eighth Amendment because it is adjudicated in a civil proceeding as a form of discretionary relief. Further, this factor is not a ''strict liability offense,'' as asserted by the commenters, because it is only a factor to consider as part of the discretionary component of asylum eligibility under the Act. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *see* 85 FR at 36283.

Commenters also misapply the Equal Protection Clause. This rule applies to all aliens and does not impose any classifications that would trigger heightened scrutiny under the clause. Thus, this factor does not offend principles of equal protection under the Constitution.

Finally, to the extent that commenters are concerned certain aliens may have difficulties meetings their tax obligations due to DHS's EAD rules, the Departments again note that these discretionary factors are not bars to eligibility. The Departments note, however, that asylum seekers who lack an EAD should generally not have a tax liability as they are prohibited from engaging in employment. Any other comments regarding specific IRS requirements for the issuance of SSNs or ITINs are outside the scope of this rule.

4.7.9. Two or More Prior Asylum Applications Denied for Any Reason

Comment: One commenter noted that there are many reasons that an asylum applicant may have had two or more prior asylum applications denied, including ineffective assistance of counsel, mental disability that prevented the applicant from properly articulating the claim, and pursuing the claim pro se. The commenter asserted that it would be inappropriate in such circumstances to deny future bona fide asylum applications.

One commenter asserted that it was inappropriate to include the proposed provision concerning denial of two or more asylum applications as a factor in discretionary determinations. Instead, the commenter argued, the presence of such a factor should be considered on a case-by-case basis and together with all of the circumstances.

Response: This factor, like the other factors, is considered under the totality of the circumstances. Further, it is not a bar to asylum; it is one of various factors that adjudicators should consider in determining whether an application merits a favorable exercise of discretion.

The Departments reiterate that consideration of this factor, as well as the other factors, does not affect the adjudicator's ability to consider whether extraordinary circumstances exist or whether denial of asylum would result in exceptional and extremely unusual hardship to the alien. 85 FR at 36285; 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii). Accordingly, an adjudicator may consider the circumstances referenced by the commenter—ineffective assistance of counsel, mental disability, lack of counsel—and determine whether they constitute extraordinary circumstances. Further, the Departments reiterate that such aliens may still apply for other forms of relief, such as non-discretionary withholding of removal and protection under the CAT.

4.7.10. Withdrawn a Prior Asylum Application With Prejudice or Been Found To Have Abandoned a Prior Asylum Application

Comment: One commenter asserted that the proposed provisions concerning withdrawn and abandoned asylum applications are in conflict with a true discretionary determination. Specifically, the commenter asserted that discretionary determinations require consideration of the factor in light of the totality of circumstances, as opposed to the proposed ''strict liability'' standard.

Commenters asserted that, contrary to the NPRM's reasoning, there could be many valid reasons that an applicant would choose to withdraw or abandon an asylum application. One commenter noted that pursuing a family-based visa or Special Immigrant Juvenile (''SIJ'') status are two such examples. Another commenter noted that asylum seekers could be forced to abandon applications for reasons beyond their control, including a failure by the government to inform the asylum seeker of a court date, governmental notice that did not correctly state the time and place of a hearing, or a proceeding occurring in a language a respondent did not understand. Another commenter asserted that MPP has caused some asylum seekers at the southern border to abandon their applications. Specifically, the commenter asserted that some asylum seekers who had been returned to Mexico under MPP were subsequently kidnapped, which caused them to miss their hearings. The commenter asserted that immigration judges have been instructed to enter an order of removal in such instances, even when the judge has serious concerns that the asylum seeker did not appear as a result of kidnapping or violence.

One commenter acknowledged the existence of notarios and other bad actors who seek to abuse the asylum system by filing asylum applications without their clients' knowledge or consent and by engaging in ''ten year visa'' schemes. Rather than addressing abuse, the commenter argued that the proposed regulation would punish asylum seekers who have been victims

of such fraud because it could result in future applications being rejected on discretionary grounds.

One commenter asserted that asylum offices have ''piloted projects'' encouraging representatives to waive the asylum interview and have the matter referred directly to an immigration court. The commenter asserted that applicants may have relied on such action by asylum offices to assume the government did not have an objection to filing an asylum application for the purpose of being placed in removal proceedings. The commenter asserted that ICE should initiate removal proceedings in such situations if the individual has ''compelling reasons'' to pursue cancellation of removal.

Response: The Departments reiterate that this factor, along with all the other factors, is considered as part of the discretionary analysis. The rule does not propose a ''strict liability standard,'' as alleged by commenters, and this factor's presence does not bar asylum. The NPRM stated clearly that ''[i]f the adjudicator determines that any of these nine circumstances apply during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the alien.'' *See* 85 FR at 36283–84. Accordingly, while the presence of this factor constitutes an adverse factor, adjudicators will consider extraordinary circumstances or exceptional and extremely unusual hardship—of which commenters referenced numerous examples—that may have led an applicant to withdraw or abandon a prior application.

This rule does not ''punish'' asylum seekers for the conduct of their attorneys. Although the actions of an attorney may bind an alien absent egregious circumstances, *Matter of Velasquez,* 19 I&N at 377, nothing in the rule prohibits an alien from either alleging such circumstances to avoid the withdrawal or raising a claim of ineffective assistance of counsel.[67] If an alien has concerns about the conduct of his or her representative, the alien should file an ineffective assistance of counsel claim or immigration fraud claim. *See, e.g., Sow* v. *U.S. Att'y Gen.,* 949 F.3d 1312, 1318–19 (11th Cir. 2020) (ineffective assistance of counsel); *see also Viridiana* v. *Holder,* 646 F.3d 1230, 1238–39 (9th Cir. 2011) (distinguishing between an ineffective assistance of counsel claim and immigration consultant fraud and explaining that fraud by an immigration consultant may constitute an extraordinary circumstance). Overall, however, concerns about the impact of unscrupulous attorneys are largely speculative and remain capable of appropriate redress. Thus, the Departments decline to preemptively attempt to resolve speculative or hypothetical concerns.

Further, should unusual circumstances warrant, applicants may present evidence so that adjudicators may consider whether it constitutes an extraordinary circumstance or exceptional and extremely unusual hardship, as previously described. *Viridiana,* 646 F.3d at 1238–39. Accordingly, the Departments disagree that consideration of this factor punishes asylum seekers who are victims of fraud.

Finally, regarding commenters' notation that asylum seekers may have relied on previous USCIS pilot programs to assume the government did not have an objection to filing an asylum application for the purpose of being placed in removal proceedings, the Departments disagree that it would ever have been appropriate or authorized to file an asylum application without an actual fear of persecution or torture and an intent to seek such relief or protection. Indeed, the I–589 form itself requires the alien's attestation as to the truth of the information provided and an acknowledgement of the consequences of filing a frivolous application.

4.7.11. Failed To Attend an Interview Regarding His or Her Asylum Application

Comment: Commenters asserted that the proposed provision concerning failure to attend an interview regarding his or her asylum application is unfair, and that presence of the proposed factor should be one factor considered in context with the totality of the circumstances.

Commenters asserted that the proposed ''extraordinary circumstances'' exception is unfair because it would not recognize valid explanations that, as one commenter noted, do meet the current ''good cause'' standard. For example, one commenter asserted that valid exceptions that may not rise to the level of extraordinary circumstances include lack of child care on the day of the interview, issues with public transportation, medical issues, or an interpreter cancelling at the last minute. One commenter asserted that the NPRM does not clarify what explanations would rise to the level of extraordinary circumstances.

One commenter asserted that the proposed regulation would increase the court backlog and that USCIS factors in the possibility that applicants may not appear for interviews to ensure that no interview slot is wasted. Specifically, the commenter asserted that under current USCIS policy, USCIS will typically wait 46 days before turning over a case to an immigration court, so as to give the applicant time to establish good cause and reschedule a missed interview. By not giving USCIS such flexibility, the commenter argued, more cases would be referred to the immigration courts, thereby increasing the backlog.

One commenter expressed concern with the proposed exception regarding the mailing of notices. The commenter argued that it is unfair to require applicants to prove that the government sent the notice to the correct address. The commenter also asserted that it is important for USCIS to send the notice to both the applicant and the applicant's representative. By just sending the notice to a representative, the commenter argued, a representative who had a falling out with his or her client (as a result of, the commenter highlighted, ineffective assistance of counsel or dispute over payment) may not inform the applicant of an upcoming interview, which could cause the applicant to miss the interview. The commenter noted that in the current COVID–19 environment, a representative may not be able to go to the office to receive mail in a timely fashion, which means that some applicants may not learn of the interview until it is too late. Conversely, the commenter argued, sending the notice only to applicants could lead to missed interviews because applicants who do not understand English may disregard the notice due to a misunderstanding of its importance.

Response: This factor is not an absolute bar to asylum; instead, this factor is considered as part of the

[67] An alien may also file a claim with DOJ's Fraud and Abuse Prevention Program (Program), which investigates complaints of fraud, scams, and unauthorized practitioners and addresses these issues within EOIR. *See* EOIR, *Fraud and Abuse Prevention Program* (last updated Mar. 4, 2020), *https://www.justice.gov/eoir/*fraud-and-abuse-prevention-program. The Program also supports investigations into fraud and unauthorized practice, prosecutions, and disciplinary proceedings initiated by local, state, and Federal law enforcement and disciplinary authorities. *Id.* From the efforts of this Program, and others, the Departments seek to ensure that aliens in proceedings before them are not victims to unscrupulous behavior by their representatives.

adjudicator's discretionary analysis. The proposed rule clearly stated that presence of this factor constitutes an adverse factor, 85 FR at 36283, not an asylum bar. Further, the alien may argue that (1) exceptional circumstances prevented the alien from attending the interview or (2) the interview notice was not mailed to the last address provided by the alien or the alien's representative and that neither received notice of the interview. *See* 8 CFR 208.13(d)(2)(i)(H)(1)–(2), 1208.13(d)(2)(i)(H)(1)–(2) (proposed). Such exceptions are evidence that this factor does not constitute a bar to asylum.

The exceptions provided in proposed 8 CFR 208.13(d)(2)(i)(H)(1), 1208.13(d)(2)(i)(H)(1) broadly allow for ''exceptional circumstances.'' If the rule identified exact circumstances sufficient to negate this factor—departing the United States or withdrawing the application for another reason, as suggested by the commenter—it would unnecessarily limit aliens to a narrow set of permissible reasons for why an alien might have missed an interview. The Departments recognize that a number of reasons may cause an alien's absence at an interview, including unanticipated circumstances by the Departments, and the broad language allows for such possibility. Contrary to the commenter's allegations, the Departments included language specifically referencing failure to receive the notice. *See* 8 CFR 208.13(d)(2)(i)(H)(2), 1208.13(d)(2)(i)(H)(2) (proposed).

This factor is not arbitrary or unfair. The current administrative process required after an alien misses an interview demonstrates the necessity of this factor's inclusion in a discretionary analysis. While asylum officers may currently follow a process for missed interviews, as commenters described, missed interviews increase overall inefficiencies because a case does not timely progress as the Departments intend. Commenters' reasoning that the rule increases inefficiencies at the hearing stage in place of rescheduling the interview in the first instance is nonsensical. If a missed interview is rescheduled, the case is prolonged at the outset, thereby increasing overall time to adjudicate the application. Moreover, the application may still be adjudicated in a hearing at a later date, adding even more time overall for adjudication. If a missed interview triggers scheduling of a hearing, as outlined in this rule, the case efficiently proceeds to the hearing stage where an adjudicator will balance all factors, including the missed interview, in a discretionary analysis. At bottom, the rule encourages aliens to attend their interviews after filing an asylum application, which increases the likelihood of being granted asylum and, thus, reduces the likelihood of cases being referred to an immigration judge. Accordingly, the Departments disagree that this factor is arbitrary or unfair or would increase the backlog. Rather, the current system allows aliens to prolong adjudication of their applications at the expense of slowing the entire system, such that other aliens fail to receive timely adjudication of their applications. The Departments believe this current system is unfair and seek to resolve these inefficiencies through this rulemaking.

As commenters aptly pointed out, these cases may involve significant issues that must be determined and further explored in an interview. The interview is a vital step in adjudication of an asylum application. *See* DHS, *Establishing Good Cause or Exceptional Circumstances* (last updated Aug. 25, 2020), *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/*establishing-good-cause-or-exceptional-circumstances (''You must attend your scheduled asylum interview or the asylum office will treat your case as a missed interview (failure to appear).''). Other regulatory provisions already attest to the importance of this interview through imposition of blunt consequences. *See, e.g.,* 8 CFR 208.7(a)(iv)(D), 1208.7(a)(4) (providing that an alien will be denied an EAD upon failure to appear for an interview, absent extraordinary circumstances); *see also* 8 CFR 208.10(b)(1), 1208.10 (providing that failure to attend an interview may result in ''dismissal of the application''). In addition, aliens who are inadmissible or deportable and fail to attend their interview risk being deemed to have waived their right to an interview, the dismissal of their application, and being placed in removal proceedings where they may ultimately be ordered removed by an immigration judge. 8 CFR 208.14(c)(1). The NPRM's consideration of this factor further reflects the urgency and importance of attending such interviews but for the most exceptional reasons. For that reason, and not, as commenters alleged, to punish asylum seekers, the Departments include it as a factor for consideration.

Commenters' concerns about problems that may arise between an alien and his or her representative are speculative. Regardless of the rulemaking, such concerns are not without redress: an alien could file an ineffective assistance of counsel claim, *see, e.g., Sow,* 949 F.3d at 1318–19, or an alien could claim that immigration consultant fraud (or the like) is an extraordinary circumstances, *see Viridiana,* 646 F.3d at 1238–39.

Commenters' concerns about aliens providing a correct address to the Departments are also beyond the scope of this rulemaking. Aliens are already required to notify DHS of changes of address, INA 265, 8 U.S.C. 1305, and may face criminal, INA 266(b), 8 U.S.C. 1306(b), or civil, INA 237(a)(3)(A), 8 U.S.C. 1227(a)(3)(A), repercussions for not doing so. The rule does not alter the long-standing requirement that aliens notify the Government of their current address.

This exception employs a lower standard of preponderance of the evidence. Meeting such burden varies depending on the case; therefore, the Departments decline to expand on the exact method of proof or documents necessary to meet that burden.

4.7.12. Subject to a Final Order of Removal, Deportation, or Exclusion and Did Not File a Motion To Reopen To Seek Asylum Based on Changed Country Conditions Within One Year of the Changes in Country Conditions

Comment: Commenters expressed concern that the proposed discretionary factor pertaining to failure to file a motion to reopen after a final order had been entered and within one year since changed country conditions emerged would lead to the denial of most asylum applications. As with other proposed discretionary factors, commenters asserted that the proposed rule was not creating a true discretionary determination as a result of the weight given to the presence of this proposed factor. One commenter asserted that by giving this and other proposed factors significant negative weight, the Departments would be inappropriately deviating from *Matter of Pula,* which, the commenter argued, is well-established precedent. Commenters asserted that the proposed discretionary factor should be considered on a case-by-case basis and in context with all the circumstances.

One commenter asserted that the proposed factor is ultra vires and conflicts with congressional intent because it ''directly contradicts'' section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. 1229a(c)(7)(C)(ii), which states circumstances for which there are no time limits for filing a motion to reopen. The commenter argued that the one case cited by the NPRM in support of the proposed provision, *Wang* v. *BIA,* 508 F.3d 710, 715–16 (2d Cir. 2007), concerned a different provision of the INA. Specifically, the commenter

asserted that the asylum seeker in *Wang* was subject to a 90-day limit on filing a motion to reopen and was arguing for equitable tolling in light of ineffective assistance of counsel. The commenter thus argued it is ''irrational'' for the government to use the case to justify the regulation.

Another commenter expressed opposition to the rule because it presumes that the exact date of a country condition change can be precisely determined, which in turn presumes that country conditions ''turn on a dime.'' Because, the commenter alleged, the NPRM did not provide guidance on determining when a change exactly occurs, the commenter predicted ''protracted disputes'' over when a change occurs, which would be ''antithetical to judicial economy.'' One commenter expressed disagreement with the NPRM's reasoning that the proposed provision would increase ''efficiency in processing.'' Specifically, the commenter asserted that the NPRM failed to explain why adjudicating a motion to reopen filed 13 months after the presence of changed country conditions would be less efficient than adjudicating a similar motion filed 11 months after the change.

Response: This factor, like all other factors discussed herein, is part of the adjudicator's discretionary analysis. 85 FR at 36285. This factor's presence does not bar asylum; an alien who files a motion to reopen based on changed country conditions more than one year following such changed conditions may still show that extraordinary circumstances exist or that denial of asylum would result in an exceptional and extremely unusual hardship to the alien. 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii) (proposed). Accordingly, applications are indeed considered on a case-by-case basis, and concerns that this factor would result in denial of most asylum applications is speculative.

Further, commenters did not engage the Departments' animating thrust behind this provision—to discourage dilatory claims, encourage the timely adjudication of new claims, and improve overall efficiency. Those benefits far outweigh any alleged concerns raised by commenters, especially since the presence of ''changed country conditions'' is a clear statutory basis for filing a motion to reopen. INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii). Both the Departments and aliens have a clear interest in raising and adjudicating claims for asylum in a timely fashion. To that end, there is nothing unreasonable or inappropriate about considering a lengthy delay in raising a claim as an adverse discretionary factor because such delays undermine the efficiency of the overall system and may, as a secondary effect, delay consideration of other meritorious claims.

Consideration of this factor does not impermissibly deviate from *Matter of Pula.* As explicitly stated in the NPRM, the rule's approach supersedes *Matter of Pula.* 85 FR at 36285. Because ''[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change,'' *Encino Motorcars, LLC,* 136 S. Ct. at 2125, the Departments permissibly superseded *Matter of Pula's* approach. See Section II.C.4.7 of this preamble for further discussion regarding the permissibility of superseding that case.

This factor also aligns with the statute. As commenters correctly stated, section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. 1229a(c)(7)(C)(ii), provides ''there is no time limit'' to file a motion to reopen to apply for relief under section 208 of the Act, 8 U.S.C. 1158, or section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), based on changed country conditions. The rule does not institute a time limit in contravention of the statute.

Nor was the Departments' reference to *Wang,* 508 F.3d at 715–16, irrational. That case demonstrated the importance of aliens exercising due diligence in their cases. The citation was not meant to illustrate an identical fact pattern justifying the entire regulation, as one commenter alleged.

Although the Departments acknowledge it may be difficult to ascertain the precise date on which country conditions changed, the Departments also do not believe that ascertaining one specific day is necessarily required in most cases or that an inability to ascertain the precise date undermines the rule's efficacy. Even if country circumstances do not ''change on a dime'' and adjudicators can project only a range of dates, many cases would fall clearly inside or outside the one-year window. For example, if evidence showed that country conditions changed over a three-month period and the applicant filed two years outside the period, an adjudicator would be able to find this adverse factor notwithstanding difficulty in ascertaining a single day on which country conditions changed. In the Departments' view, the one-year window provides ample time for aliens to file a claim. And, in any event, the Departments doubt that it will be so difficult to ascertain a precise date in many cases. When a discrete event—*e.g.,* a ceasefire in a civil war—changes a country's conditions, determining a precise date will be straightforward. Accordingly, the rule would not produce ''protracted disputes'' about the date country conditions changed.

Moreover, commenters did not plausibly or persuasively explain why an alien with a genuine well-founded fear of persecution would delay in filing an asylum application for a significant length of time, and it strains credulity that such an alien would wait more than a year to seek asylum, absent some extraordinary circumstance. The rule requires that the alien exercise due diligence with regard to the case. 85 FR at 36285. If, for some reason, the alien is unable to meet that one-year deadline for reasons related to commenters' concerns that pinpointing the exact date a country condition changed will be problematic, an alien may present such an event as an extraordinary circumstance in accordance with the rule. *See id.*

The Departments have a significant interest in expedient, efficient adjudication of asylum cases. *See Talamantes-Penalver* v. *INS,* 51 F.3d 133, 137 (8th Cir. 1995) (''Enforcement of this nation's immigration laws is enhanced by the speedy adjudication of cases and the prompt deportation of offenders.''). Establishing this factor strongly encourages and underscores the importance of expedient resolution of asylum cases; however, the Departments note that expediency and efficiency do not trump extraordinary circumstances that may exist or exceptional or extremely unusual hardship that may result if asylum is denied.

The Departments have determined that the appropriate timeframe within which an alien should be able to file a motion to reopen based on changed country conditions is one year from a changed country condition. Currently, the regulation at 8 CFR 1208.4(a)(4)(ii) provides that an alien should file an asylum application

> within a reasonable period, given those ''changed circumstances.'' If the applicant can establish that he or she did not did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a ''reasonable period.''

Case law broadly applies this ''reasonable period'' standard. *See Pradhan* v. *Holder,* 352 F. App'x. 205, 207 (9th Cir. 2009) (explaining that, based on the record, the immigration judge properly denied an asylum application filed 11 months after the applicant learned of changed country conditions and his family kept him apprised of the political climate in the country); *cf. Ljucovic* v. *Barr,* 796 F.

App'x. 898, 899 (6th Cir. 2020) (dismissing for lack of jurisdiction a petition challenging the BIA's denial of a motion to reopen asylum proceedings four years following awareness of a changed condition because the petitioner did not exercise due diligence and file within a reasonable period of time). This factor would be no more difficult to apply than 8 CFR 1208.4's ''reasonable period'' standard, and, for purposes of the discretionary analysis, this rule determines that a reasonable period of time is one year within the date of the changed country condition. Further, just as 8 CFR 1208.4 allows adjudicators to consider ''delayed awareness'' in evaluating ''what constitutes a reasonable period'' when determining whether an alien may apply for asylum, this factor similarly allows adjudicators to consider whether extraordinary circumstances or exceptional or extremely unusual hardship would arise when determining whether to exercise discretion to grant or deny asylum.

Because Congress determined it reasonable for aliens to file an initial application within one year of arrival, INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), the Departments similarly find it reasonable to use a one-year timeline, rather than 11 months or 13 months as suggested by commenters, in evaluating this factor as part of a larger discretionary analysis, subject to the exceptions previously described. The Departments recognize that any specific deadline is inherently both over- and under-inclusive to some extent, but the benefits of a clear deadline that is both familiar to applicants and adjudicators and straightforward to administer outweigh any purported benefits attributable to an unfamiliar and uncommon deadline—*e.g.,* 13 months—or one that is more difficult to apply—*e.g.,* a ''reasonable period''—particularly in the context of a discretionary analysis.

4.8. Firm Resettlement

Comment: Commenters asserted that the proposed firm resettlement provisions conflict with international law. Commenters stated that Congress considered the language in section 208(b)(A)(vi) of the Act, 8 U.S.C. 1158(b)(A)(vi), to be equivalent to Article 1E of the Refugee Convention, which only considered refugees to be resettled when they permanently took up residence in a third country or were afforded rights comparable to third country nationals. One commenter stated that the permanent residency requirement is further evidenced in the 1950 amendments of the Displaced Persons Act. *See* An Act to Amend the Displaced Persons Act of 1948, Public Law 81–555, 64 Stat. 219 (1950). The commenter asserted that the amendments were designed to ensure that those who temporarily resided in parts of Europe following their flight from Nazi persecution would remain eligible for protection in the United States. Under the proposed rules, the commenter argued, these same individuals would be inappropriately barred from asylum.

Commenters expressed concern that, under proposed 8 CFR 208.15(a)(1), individuals unaware of third country resettlement laws in countries through which they fleetingly passed could be punished and that those attempting to firmly resettle in a third country could face a number of challenges incompatible with the congressional intent of the concept of firm resettlement. Commenters argued, for example, that those attempting to firmly resettle could face restrictions on freedom of movement, unfair immigration procedures, government corruption, violence, and the practical inability to obtain legally guaranteed documents permitting asylees the right to live and work in the country while an application is pending. Commenters similarly asserted that, contrary to the NPRM's reasoning, the number of resettlement opportunities has not grown in recent years, and that considering whether a third country is a signatory to the Refugee Convention is not sufficient to determine whether firm resettlement is possible. A firm resettlement inquiry, commenters argued, requires a case-by-case consideration of the facts and circumstances.

Commenters asserted that proposed 8 CFR 208.15(a)(1) would replace a clear standard that is well-established in Federal case law and international law with an ambiguous standard that would require adjudicators to speculate in regard to what applicants could have done in third countries through which they transited. Accordingly, commenters argued, the proposed provision would result in lengthy litigation. One commenter asserted that the proposed provision is not legally defensible, as evidenced by the recent transit bar litigation invalidating a similar provision.

Commenters also stated opposition to proposed 8 CFR 208.15(a)(2). Commenters expressed concern that the proposed one-year bar would apply even if there is no possibility of ever obtaining a permanent or indefinitely renewable status in the country. Commenters also asserted that the proposed provision would inappropriately exclude most asylum seekers who were returned to Mexico under MPP because MPP often requires aliens to wait in Mexico for more than a year. Another commenter stated that UNHCR estimates that approximately 16 million refugees have spent five years in countries where they could not be considered firmly resettled and that they would be inappropriately barred from asylum under the proposed provision. Commenters expressed concerns that the proposed provision does not include exceptions for individuals who are victims of trafficking, lack the financial means to leave a third country, or fear persecution in the third country.

Commenters asserted that examples in the United States demonstrate the problems with proposed 8 CFR 208.15(a)(2). Commenters asserted that recipients of Deferred Action for Childhood Arrivals—who commenters noted are granted permission to stay in the United States in two-year increments—would be considered firmly resettled under the proposed rule even though their status could be rescinded at any time. Second, commenters similarly asserted that many undocumented individuals in the United States have lived here for decades, but that they cannot be considered firmly resettled because they are denied the opportunity to fully and meaningfully participate in public life and they live and work under the fear of removal.

Commenters opposed proposed 8 CFR 208.15(a)(3). One commenter stated that the proposed provision is unclear as to when presence in a country of citizenship occurred. The commenter asked, ''[d]oes it mean that the applicant must have been present there *sometime* before coming to the United States, anytime in their whole lives?'' The commenter asserted that it is unfair and unreasonable to consider someone firmly resettled in a country of citizenship without also considering factors such as whether such individual has the right to reside in the country and could be reasonably expected to do so. Commenters asserted that proposed 8 CFR 208.15(b) conflicts with *Matter of A–G–G–,* 25 I&N Dec. 486 (BIA 2011), which commenters asserted requires DHS to present evidence that a mandatory bar applies. Commenters stated that, under the proposed provision, if DHS or an immigration judge raises the issue that the firm resettlement bar might apply, then the burden of proof shifts to the respondent. This burden shifting, commenters argued, would increase the number of

unjust asylum application denials because pro se asylum seekers—especially non-English speakers and detainees—lack access to the knowledge or resources necessary to satisfy their burden of proof. Moreover, one commenter stated that if the proposed provision grants authority to DHS counsel to determine that firm resettlement applies, even if an immigration judge disagrees, then the subsection would inappropriately usurp immigration judges' authority.

One commenter asserted that the proposed rule would inappropriately permit the firm resettlement circumstances of a parent to be imputed to children and that a child's case must be considered separately from his or her parents' cases. Commenters similarly asserted that it is unreasonable to expect children to comport their movements and behavior in accordance with the proposed regulation.

Commenters noted that refugees—in addition to asylum applicants—are subject to a statutory bar based on firm resettlement. *See* INA 207(c)(1), 8 U.S.C. 1157(c)(1). At least one commenter suggested that refugee admission applicants and asylum applicants should be subject to the same standards. Commenters noted that, because Congress enacted laws to protect refugees and intended the firm resettlement bar to exclude refugees from protection only in narrow circumstances, the proposed standard for firm resettlement was an ''affront to Congressional intent.''

Response: Despite a lengthy history of international law, regulatory enactments, and circuit court interpretations, *see Matter of A–G–G–,* 25 I&N Dec. at 489–501 (explaining firm resettlement history), Congress ultimately codified the firm resettlement bar to asylum in IIRIRA without including any specific firm resettlement requirements, just as it had previously codified a firm resettlement bar to refugee admission without any specific requirements, INA 207(c)(1), 8 U.S.C. 1157(c)(1). Rather, the statutory language only states that asylum shall not be granted to an alien who ''was firmly resettled in another country prior to arriving in the United States.'' INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). Accordingly, the Departments are using their regulatory authority to interpret this ambiguous statutory language.[68] *See Matter of R–A–,* 24 I&N Dec. at 631 (explaining that agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations because there is a presumption that Congress left statutory ambiguity for the agencies to resolve). A clearer interpretation will help adjudicators in making firm resettlement determinations. Circuit courts have previously provided diverging interpretations of the firm resettlement requirements. *See Matter of A–G–G–,* 25 I&N Dec. at 495–500 (explaining differing circuit court approaches under the prior firm resettlement regulations).

In addition, as discussed further herein, efforts by the Board to provide clarity have not been fully successful, as its four-step framework reflects an unwieldy amalgamation of two competing approaches offered by Federal courts: The ''direct offer approach'' and the ''totality of the circumstances approach.'' *Id.* at 496–98, 501. Further, as described more fully below, its framework is not directed by any applicable statute or regulation,[69] contains internal tension, is in tension with other regulations regarding the parties' burdens, introduces ambiguous concepts such as indirect evidence of an offer of firm resettlement of ''a sufficient level of clarity and force,'' *id.* at 502, and relies principally on the concepts of an ''offer'' [70] and of ''acceptance'' of firm resettlement, even though the INA does not require an offer or acceptance for the provisions of INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(ii), to apply. *See Matter of A–G–G–,* 25 I&N Dec. at 501–03 (discussing the various aspects of its four-step framework). Ultimately, the best reading of the Board's cases is that the availability of some type of permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status—regardless of whether the alien applies for such status or has such status offered—is sufficient to raise the possibility of the firm resettlement bar, and that reading is incorporated into the rule.[71] *See id.* at 503 (''The regulations only require that an offer of firm resettlement was available, not that the alien accepted the offer.''). Based on these considerations and others, as described more fully below, the Departments have concluded that the current framework—with its case-by-case development and four-step framework that is divorced from any statute or regulation—invites confusion and inconsistent results because of immigration judges' potentially subjective judgments about how the framework should apply to the particular evidence in any given case. The Departments accordingly believe that the rule-based approach contained in this final regulation is more appropriate. *See Lopez* v. *Davis,* 531 U.S. 230, 244 (2001) (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking'' (quotation marks omitted)).

In interpreting the statutory language, the Departments considered the history

[68] The Departments acknowledge that the concept of firm resettlement is a statutory bar to both refugee admission, INA 207(c)(1), 8 U.S.C. 1157(c)(1), and the granting of asylum, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The two separate bars were enacted 16 years apart.

[69] Although the Board in *Matter of A–G–G–,* 25 I&N Dec. at 501, asserted that its framework follows the language of 8 CFR 1208.15, nothing in the text of that regulation actually outlines a particular framework to follow when considering issues of firm resettlement, and the regulation certainly does not delineate the four steps put forth by the Board. Further, the Board's reading of 8 CFR 1240.8(d) to suggest that DHS bears the initial burden at step one of its framework of establishing evidence that the firm resettlement bar applies, *Matter of A–G–G–,* 25 I&N Dec. at 502, is likewise atextual, and is further called into significant doubt by a recent decision of the Attorney General, *see Matter of Negusie,* 28 I&N Dec. 120, 154–55 (A.G. 2020) (''Consistent with the clear statutory mandate that an alien has the burden of proving eligibility for immigration relief or protection, the regulations make plain that if evidence in the record indicates that [a] bar may apply, then the applicant bears the additional burden of proving by a preponderance of the evidence that it does not. Although the evidence in the record must raise the possibility that the bar 'may apply,' *id.* § 1240.8(d), neither the statutory nor the regulatory scheme requires an extensive or particularized showing of the bar's potential applicability, and evidence suggesting the bar's applicability may come from either party. While the immigration judge must determine whether the evidence indicates that the . . . bar may apply—and, thus, whether the alien bears the burden of proving its inapplicability—that determination is an evidentiary one that does not stem from any burden on DHS. This conclusion is underscored by other statutory and regulatory provisions that specify when DHS is required to assume an evidentiary burden. Placing an initial burden on DHS to establish the applicability of the . . . bar would be contrary to the relevant statutory and regulatory scheme, and would unnecessarily tax its limited resources.'' (footnote, citations, and internal quotations omitted)).

[70] The Board's efforts to refine the concept of an ''offer'' have not improved the clarity of the application of the firm resettlement bar, as adjudicators may understandably be confused about how to consider whether an alien accepted an offer that was ''available,'' but not necessarily made. *Matter of A–G–G–,* 25 I&N Dec. at 502–03. Similarly, the Board adopted a ''totality of the evidence'' standard, *id.* at 503, but did not explain if that standard was intended to encompass the Federal courts' ''totality of the circumstances'' approach or to constitute something different.

[71] As discussed herein, the Departments recognize that other parts of *Matter of A–G–G–* are superseded by this rule because, inter alia, they are unwieldy to apply, in tension with other regulations or with other parts of the decision itself, do not represent the best implementation of the statute, do not appreciate the actual availability of firm resettlement in many countries, and are outweighed by the benefits of the rule as a policy matter. Thus, the Departments have provided ''reasoned explanation[s]'' for their departures from *Matter of A–G–G–* to the extent that there are actual departures. *See Encino Motorcars, LLC,* 136 S. Ct. at 2125 (citing *Brand X,* 545 U.S. at 981–82).

of the firm resettlement concept and determined that prior interpretations do not fully address the need for clarity and specific delineation of the meaning of firm resettlement. Moreover, prior adjudicatory interpretations do not effectively appreciate the availability of firm resettlement in many countries. Thus, the Departments believe that a broader interpretation of firm resettlement is necessary to ensure that the United States' overburdened asylum system is available to those with a genuine need for protection, and not those who want to live in the United States for other reasons and simply use the asylum process as a way to achieve those goals. *See* 85 FR at 36285–86. The Departments' interpretation also comports with the overall purpose of the asylum statute, which is ''not to provide [applicants] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn.'' *Matter of B–R–,* 26 I&N Dec. at 122 (quotation marks omitted).

The Departments' definition creates three grounds for a finding of firm resettlement.[72] The first ground captures aliens who have resided, or could have resided, permanently or indefinitely in a country but who have chosen not to pursue such opportunities. The Departments have determined that the firm resettlement bar should apply regardless of whether the alien received a direct offer of resettlement from the third country. The Departments believe that aliens should reasonably be required to pursue settlement opportunities when fleeing persecution and entering a new country, rather than forum shopping for their destination. *See Matter of A–G–G–,* 25 I&N Dec. at 503 (explaining the purpose of the firm resettlement bar ''is to limit refugee protection to those with nowhere else to turn''). This requirement is also supported by the fact that, as discussed in the NPRM, 43 additional countries have signed the Refugee Convention since 1990, evincing an increasing ability of an alien to find safe haven outside his or her home country. *See* 85 FR at 36285–86 & n.41. Contrary to commenters' claims, this first ground does not apply to aliens if the third country grants only temporary or unstable statuses. For the first ground of the firm resettlement bar to apply, the alien must be able to reside permanently or indefinitely in the third country, and temporary or unstable statuses would not meet that definition. Similarly, in order for this first ground to apply to aliens who ''could have'' resided in a permanent or indefinite status, the immigration judge must make a finding that the alien was eligible for, and otherwise would be granted, permanent or indefinite status under the laws of the third country. Moreover, the Departments disagree with commenters that the rule should retain the exception for aliens who reside in a third country but have the conditions of their stay ''substantially and consciously restricted.'' *See* 8 CFR 1208.15(b) (current). The Departments note that the language of the current regulation is more apt to cause confusion because it is not clear why—or perhaps even how—a country would offer citizenship or permanent legal residence to someone yet ''substantially and consciously'' restrict that person's residence. Further, the Departments believe that interpreting the firm resettlement bar to apply to any type of permanent or indefinite status advances the goal of limiting asylum forum shopping by persons who have the ability to live in a third country.

The second ground captures aliens who are living for an extended period of more than one year in a third country without suffering persecution. By living safely in a third country for more than a year without suffering persecution, the alien has evinced the ability to live long term in that country and is thereby ''firmly'' resettled as interpreted by the Departments. The dictionary definition of ''firm'' is ''securely or solidly fixed in place,'' not ''uncertain,'' and ''not subject to change or revision.'' *Firm,* Merriam Webster, *https://www.merriam-webster.com/dictionary/firm.* The Departments believe that this ground reasonably meets this definition, as an alien who is living in a third country for more than a year can be considered to be ''fixed in place'' and not thought to be present in the third country only temporarily.

Consistent with the purpose of the asylum statute, the Departments believe that asylum should not be made available to persons who ''have long since abandoned'' traveling to the United States in their flight from persecution. *See Rosenberg* v. *Yee Chien Woo,* 402 U.S. 49, 57 n.6 (1971). Rather, travel to the United States should be ''reasonably proximate'' to the flight from persecution and not be interrupted by ''intervening residence in a third country.'' *Id.*[73] In including this ground, the Departments do not believe that legal presence should be a requirement of firm resettlement, as persons can live indefinitely without status in a country. For example, according to a 2017 study, the median duration of residence for the United States' undocumented population is approximately 15 years. *See* Pew Research Center, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time* (June 12, 2019), *https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/.* It is reasonable to conclude that such persons should be considered ''firmly resettled'' in the United States and do not intend to live in the United States only temporarily, and by the same reasoning, aliens who have resided for long periods in other countries—even without legal presence or status—can similarly be considered ''firmly resettled.'' Further, spending more than a year in a third country shows that the alien can support himself or herself or has the ability to receive necessary support. Separately, the Departments note that, contrary to commenters' concerns, the second ground would not apply to physical residence in Mexico after an alien was returned to Mexico under the MPP, because such aliens would already be considered to have arrived in the United States. Thus, time spent in Mexico solely as a direct result of returns to Mexico after being placed in MPP will not be considered for purposes of that specific element of the firm resettlement bar.[74]

The Departments also recognize that this second ground does not follow the language of the Refugee Convention or the Refugee Protocol, which require the alien to be recognized by the third country as possessing the same rights and obligations as citizens of that country. *See* 1951 Convention Relating to the Status of Refugees, Art. 1(E). In codifying the statutory firm resettlement bar as part of IIRIRA, however, Congress

[72] In comparison to the NPRM, this final rule expands the language in 8 CFR 208.15(a)(1) and 1208.15(a)(1) by breaking the first ground into three subparagraphs and changing the syntax to improve readability and clarity and to avoid confusion. The changes in the final rule are stylistic and do not reflect an intent to make a substantive change from the NPRM regarding 8 CFR 208.15(a)(1) and 1208.15(a)(1).

[73] By requiring that an alien live in any ''one'' third country for more than a year before triggering this ground, the Departments also recognize that it would not necessarily exclude aliens who make their flight in stages, *Yee Chien Woo,* 402 U.S. at 57 n.6, as aliens who remain in multiple countries over multiple years before coming to the United States are unlikely to have their travel to the United States viewed as ''reasonably proximate'' to their flight.

[74] An alien who physically resided voluntarily, and without continuing to suffer persecution, in Mexico for one year or more after departing the alien's country of nationality or last habitual residence and prior to arrival in or entry into the United States would potentially be subject to the bar, regardless of whether the alien was placed in MPP upon arrival in the United States.

did not include such a requirement, and, as a result, the Departments have chosen to interpret this ambiguous statutory language as not requiring the third country to provide the alien with rights comparable to that of citizens. *See Matter of R–A–,* 24 I&N Dec. at 631 (explaining presumption that Congress left statutory ambiguity for the agencies to resolve (citing *Brand X,* 545 U.S. at 982)).

The third ground captures aliens who maintain, or maintained and then later renounced, citizenship in a third country and were present in that country after fleeing their home country. By possessing citizenship in a third country and being physically present in that country, the alien has established that he or she has the ability to live with full citizenship rights in a third country, negating his or her need to apply for asylum in the United States. In response to a commenter's concerns about the timing of the alien's presence in the third country, the Departments clarify that the physical presence in the third country must occur after the alien leaves the home country where the alleged persecution occurred or where the well-founded fear of persecution would occur and before arriving in the United States.

Regarding commenters' concerns about the burden of proof, the Departments note that the existing burden framework outlined by the BIA is, at the least, not required by statute and appears to be in significant tension with existing regulations.[75] The burden associated with the firm resettlement bar as applied in removal proceedings is clarified in the existing language of 8 CFR 1240.8(d), which provides that the respondent has the burden of establishing eligibility for any requested benefit or privilege. That regulation then states that, if ''the evidence indicates that one or more of the grounds for mandatory denial'' of relief may apply, the alien has the burden of proving that such grounds do not apply. 8 CFR 1240.8(d). The existing regulation is thus clear that, if the evidence indicates that the firm resettlement bar may apply, then an applicant has the burden of proving that it does not. Although the evidence in the record must itself support the applicability of a bar, the regulations do not specify who must introduce that evidence, and relevant evidence may come from either party. Moreover, 8 CFR 1240.8(d) does not specify who may raise an issue of eligibility, only that the issue may be raised when the evidence indicates that a ground should apply. Because it is illogical to expect an alien applying for asylum to raise the issue that he or she is barred from receiving asylum, the rule appropriately acknowledges the reality that either DHS or the immigration judge may raise the issue based on the evidence, regardless of who submitted the evidence.

Similarly, although the immigration judge must determine whether the evidence indicates that the firm resettlement bar may apply—and, thus, whether the alien bears the burden of proving that it does not apply—that determination is simply an evidentiary one and does not place any burden on DHS. As noted, evidence that ''indicates that one or more of the grounds for mandatory denial of the application for relief may apply [*e.g.,* the firm resettlement bar],'' 8 CFR 1240.8(d), may be in the record based upon submissions made by either party; the regulation requires only that evidence be in the record, not that it be submitted by DHS. Put more simply, the regulations do not place an independent burden on DHS to establish a prima facie case. This conclusion is underscored by other regulations that, in contrast, specify when DHS is required to assume an evidentiary burden. *See, e.g.,* 8 CFR 208.13(b)(1)(ii) (''Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, [DHS] shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.''). Placing a prima facie burden on DHS would be contrary to the relevant regulatory scheme and would unnecessarily tax the agency's limited resources without any statutory or regulatory justification, especially when ''[t]he specific facts supporting a petitioner's asylum claim . . . are peculiarly within the petitioner's grasp.'' *Angov,* 788 F.3d at 901. To the extent that commenters asserted that circuit case law conflicts with the Departments' rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X,* 545 U.S. at 982. Further, as noted in the NPRM, 85 FR at 36286, the rule overrules prior BIA decisions that are inconsistent, in accordance with well-established principles. *See Encino Motorcars, LLC,* 136 S. Ct. at 2125 (''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' (citing *Brand X,* 545 U.S. at 981–82)).

In response to one commenter's concerns, the burden of proof provision does not allow DHS to make the final determination on whether the firm resettlement bar applies in EOIR proceedings; that authority continues to reside with DOJ for aliens whose asylum applications are referred for review by an immigration judge. *See* 8 CFR 208.14(c)(1), 1003.10(b), 1240.1(a)(1)(ii).

In response to concerns about imputing parents' firm resettlement to their minor children, the Departments note that the BIA has imputed parental attributes to children under other INA provisions on multiple occasions. *See, e.g., Holder,* 566 U.S. at 595–96 (2012) (describing various provisions of the Act in which parental attributes are imputed to children). Moreover, as noted in the NPRM, 85 FR at 36286, although the Departments have not previously established a settled policy regarding the imputation of the firm resettlement of parents to a child, the imputation in this rule is consistent with both case law and recognition of the practical reality that a child generally cannot form a legal intent to remain in one place. *See, e.g., Matter of Ng,* 12 I&N Dec. 411, 412 (Reg'l Comm'r 1967) (firm resettlement of father is imputed to a child who resided with his resettled family); *see also Vang* v. *INS,* 146 F.3d 1114, 1116–17 (9th Cir. 1998) (''We follow the same principle in determining whether a minor has firmly resettled in another country, *i.e.,* we look to whether the minor's parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute the parents' status to the minor.'').

Here, it is reasonable to assume that minor children who are traveling with their parents would remain with their parents in any third country and, therefore, should also be subject to the firm resettlement bar. Moreover, the rule provides an exception when the alien

[75] The Board's framework also contains internal tension that has resulted in confusion on this point. In *Matter of A–G–G–,* the Board indicated that DHS bears the burden of making a prima facie showing that an offer for firm resettlement exists and will typically do so through the submission of documentary evidence. *Matter of A–G–G–,* 25 I&N Dec. at 501 (''DHS should first secure and produce direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely.''). It then went on to say, however, that prima facie evidence may already be part of the record as evidence, including testimony, which is typically offered by a respondent, not DHS. *Id.* at 502 n.17. Consequently, immigration judges may become confused about how to apply the firm resettlement bar in cases in which the evidence of record submitted by a respondent, including the respondent's testimony, indicates that the bar may apply but in which DHS has not affirmatively produced its own evidence of firm resettlement. This rule resolves that tension, reaffirms that immigration judges should follow the requirements of 8 CFR 1240.8 as appropriate, and reiterates that evidence in the record may raise the applicability of 8 CFR 1240.8 regardless of who submitted the evidence.

child can establish that he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable temporary legal immigration status (such as asylee, refugee, or similar status) from his or her parent.[76] *See* 85 FR at 36294; 8 CFR 208.15(b), 1208.15(b).

The Departments acknowledge comments noting that the NPRM altered the definition of ''firm resettlement'' applicable to asylum applicants, but did not alter the definition applicable to refugee admission applicants, which is a distinction the Departments noted in the NPRM. 85 FR at 36285 n.40. The Departments did not propose to change 8 CFR 207.1(b) in the NPRM, *see id.,* and they do not believe such a change is warranted in this final rule, notwithstanding commenters' concerns regarding the two definitions.

Although the statutory provisions applying the firm resettlement bar in the refugee and asylum contexts are virtually identical, ''[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.'' *Envtl. Def.* v. *Duke Energy Corp.,* 549 U.S. 561, 574 (2007). The United States Refugee Admissions Program (''USRAP'') and the asylum system serve distinct missions and populations and, thus, warrant different approaches. The asylum statute is not designed ''to provide [applicants] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn.'' *Matter of B–R–,* 26 I&N Dec. at 122 (quotation marks omitted). In contrast, the USRAP has long focused on resolving protracted refugee situations and providing relief to refugees who have not been able to find a durable solution to their need for protection in the country of first flight. Moreover, due to the lengthy referral, vetting, and application process in the refugee resettlement program, *see generally* USCIS, *Refugee Processing and Security Screening* (June 3, 2020), *https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees/refugee-processing-and-security-screening,* time spent in a third country or otherwise awaiting overseas resettlement may not necessarily indicate that an alien was firmly resettled in the country hosting such populations.

Further, as a program explicitly addressing persons in foreign countries—rather than a form of relief available to aliens who arrive at or are inside the United States—the USRAP implicates issues of foreign relations and diplomacy in ways different than the asylum program. Additionally, although the current regulatory definitions of ''firm resettlement'' are similar, *compare* 8 CFR 207.1(b), *with* 8 CFR 208.15 *and* 1208.15, they are not identical. Rather, the definition applicable to refugee admission applicants requires that the alien entered the country of putative resettlement ''as a consequence of his or her flight from persecution,'' 8 CFR 207.1(b), whereas the definition applicable to asylum applicants indicates that entry into a country that was a necessary consequence of flight from persecution is one element of a potential exception to the general definition of ''firm resettlement.'' In other words, existing regulations already recognize distinctions in the definitions applicable to the two programs.

In short, although the Departments acknowledge commenters' concerns about the two different definitions, they do not believe changes to 8 CFR 207.1(b) are warranted at the present time. Nevertheless, the Departments do expect to study the issue closely and, if appropriate, may propose changes at a future date.

Finally, the Departments are noting two additional changes that the final rule makes regarding the issue of firm resettlement. First, consistent with the Departments' understanding that time spent in Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of that specific element of the firm resettlement bar, that point is being clarified explicitly in this final rule. Second, EOIR is making a conforming change to 8 CFR 1244.4(b) to align it with the both the appropriate statutory citation and the corresponding language in 8 CFR 244.4(b). Aliens described in INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), including those subject to the firm resettlement bar contained in INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), are ineligible for TPS. That statutory ineligibility ground is incorporated into regulations in both chapter I and chapter V of title 8; however, while the title I provision, 8 CFR 244.4(b), cites the correct statutory provision, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), the title V provision, 8 CFR 1244.4(b), maintains an outdated reference to an incorrect statutory provision. The final rule corrects that outdated reference.

4.9. ''Rogue Officials''/''Color of Law''

Comment: As an initial matter, commenters asserted that the terms ''color of law'' and ''official acting in his or her official capacity'' are not ambiguous and therefore are not open to agency interpretation. Commenters asserted that the rule seeks to codify the BIA's decision in *Matter of O–F–A–S–,* 27 I&N Dec. 709 (BIA 2019), *vacated by* 28 I&N Dec. 35, but that the standard set out in *Matter of O–F–A–S–* is an impossible burden. Specifically, commenters averred that ''if an official claims to be acting in an official capacity, is wearing an official uniform, or otherwise makes it known to the applicant that [he or she is] a government official, a CAT applicant would have no reason to know whether the official is acting lawfully or as a 'rogue' official.'' Commenters argued that to meet his or her burden, an applicant would have to obtain detailed information from a government official who has tortured or threatened him or her in order to establish that the actor was not acting in a rogue capacity.

Commenters also argued that the phrase ''under color of law'' calls for a more nuanced determination than the analysis required by the proposed regulation or the BIA's decision in *Matter of O–F–A–S–* would indicate. Quoting *Screws* v. *United States,* 325 U.S. 91, 111 (1945), commenters stated that ''[i]t is clear that under 'color' of law means under 'pretense' of law . . . . If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words 'under color of any law' were hardly apt words to express the idea.'' Following this analysis, commenters asserted that any proposed rule must emphasize that acting ''under color of law'' does not require the government official to be on duty, following orders, or to be acting on a matter of official government business.

Commenters similarly claimed that the proposed definition of ''rogue official'' is contrary to Federal and state jurisprudence because the proposed rule dismisses and invalidates the entire concept of ''color of law'' as being synonymous with ''acting in his or her official capacity.'' Commenters asserted that the Supreme Court views the terms as interchangeable because the

[76] The Department's experience in administering the firm resettlement bar indicates that cases in which a parent's firm resettlement would not be imputed to a minor child would be rare. Even in those rare cases, however, the Departments' use of child-appropriate procedures, as discussed elsewhere in the rule, which take into account age, stage of language development, background, and level of sophistication, would assist the child in ensuring that the child's claim is appropriately considered. *See, e.g.,* USCIS, *Interviewing Procedures for Minor Applicants* (Aug. 6, 2020), *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves.*

''traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' '' *West* v. *Atkins,* 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic,* 313 U.S. 299, 326 (1941)).

Commenters explained that, in alignment with the Supreme Court's interpretation, some circuits have defined ''color of law'' to mean the ''misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'' *See Iruegas-Valdez* v. *Yates,* 846 F.3d 806, 812–13 (5th Cir. 2017) (finding that the public official in question need not be high-level or follow ''an officially sanctioned state action''); *Garcia* v. *Holder,* 756 F.3d 885, 891–92 (5th Cir. 2014); *Ramirez-Peyro* v. *Holder,* 574 F.3d 893, 900–01 (8th Cir. 2009). Citing the Eighth Circuit, commenters asserted that this means that ''the focus is whether the official uses their position of authority to further their actions, even if for 'personal' motives.'' *Ramirez-Peyro,* 574 F.3d at 900–01. Commenters further asserted that the color-of-law analysis should be one of ''nexus''—*i.e.,* ''does the conduct relate to the offender's official duties?''

Commenters further quoted *Ramirez-Peyro,* 574 F.3d at 901, stating that ''it is not contrary to the purposes of the [Convention] and the under-color-of-law standard to hold Mexico responsible for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation's will and despite the fact that the actions may take place in circumstances where the officials should be acting on behalf of the state in another, legitimate, way.'' Quoting *Khouzam* v. *Ashcroft,* 361 F.3d 161, 171 (2d Cir. 2004), commenters asserted that, ''when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.'' Commenters also cited a recent decision from the Ninth Circuit Court of Appeals, in which the court held that even a rogue official is still a public official for purposes of the CAT. *See Xochihua-Jaimes* v. *Barr,* 962 F.3d 1175, 1184 (9th Cir. 2020) (''We rejected BIA's 'rogue official' exception as inconsistent with *Madrigal* [, 716 F.3d at 506.]'').

Ultimately, commenters argued that the CAT requires protection for those that have suffered any act of torture at the hands of state officials, even ''rogue officials,'' as such evidence demonstrates that the foreign state cannot or will not protect the applicant from torture. Moreover, the commenter asserted that it does not matter that some countries cannot control large numbers of rogue officials. *See, e.g., Mendoza-Sanchez* v. *Lynch,* 808 F.3d 1182, 1185 (7th Cir. 2015) (''It's simply not enough to bar removal if the [Mexican] government may be trying, but without much success, to prevent police from torturing citizens at the behest of drug gangs.''). Commenters averred that the correct inquiry in CAT claims is whether a government official committed torture, not whether the applicant can demonstrate that the official was not acting in a ''rogue capacity.''

Commenters stated that the proposed changes to the ''rogue official'' standard also conflict with the standard established by the Attorney General in *Matter of O–F–A–S–,* 28 I&N Dec. 35 (A.G. 2020), which was issued subsequent to the proposed rule's publication. For example, at least one commenter stated that the Attorney General ''rejected'' the use of the term ''rogue official,'' while the proposed rule would codify the use of the same term. Commenters further stated that the Attorney General's decision in *Matter of O–F–A–S–* created difficulty in providing comment on the proposed rule because it changed the state of the law that the rule would affect.[77]

Commenters argued that exempting public officials from the concept of acquiescence in instances in which the public official ''recklessly disregarded the truth, or negligently failed to inquire'' seems indistinguishable from ''willful blindness,'' a term recognized by the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits in the CAT analysis context. *See, e.g., Khouzam,* 361 F.3d at 170–71; *Myrie* v. *Att'y Gen. of U.S.,* 855 F.3d 509, 517 (3rd Cir. 2017), *Romero-Donado* v. *Sessions,* 720 Fed. App'x 693, 698 (4th Cir. 2018); *Iruegas-Valdez* v. *Yates,* 846 F.3d 806, 812 (5th Cir. 2017); *Torres* v. *Sessions,* 728 Fed. App'x 584, 588 (6th Cir. 2018); *Lozano-Zuniga* v. *Lynch,* 832 F.3d 822, 831 (7th Cir. 2016); *Fuentes-Erazo* v. *Sessions,* 848 F.3d 847, 852 (8th Cir. 2017); *Zheng* v. *Ashcroft,* 332 F.3d 1186, 1194–95 (9th Cir. 2003); *Medina-Velasquez* v. *Sessions,* 680 Fed. App'x 744, 750 (10th Cir. 2017). Commenters asserted that the rule should instead codify this ''near-universal standard.'' Further, commenters recommended codifying court decisions that have found government acquiescence even where parts of government have taken preventive measures. *See, e.g., Rodriguez-Molinero* v. *Lynch,* 808 F.3d 1134, 1139 (7th Cir. 2015) (noting it is not required to find the entire Mexican government complicit); *De La Rosa* v. *Holder,* 598 F.3d 103, 110 (2d Cir. 2010).

In addition, some commenters argued that the standard to demonstrate acquiescence is unreasonable because applicants would be required to demonstrate the legal duties of a government official who failed to act and also demonstrate whether the official was charged with preventing those actions but failed to act. Commenters asserted this would be an impossible standard to meet. Commenters also contended that the proposed rule's reliance on the Model Penal Code is irrelevant to what might occur in a foreign country.

Commenters argued that the proposed rule's amendments to 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) will prevent many individuals from meeting the burden to establish eligibility for protection under the regulations issued pursuant to the legislation implementing the CAT. Commenters were concerned that an individual would be unable to determine that an officer is a rogue officer when ''every discernable fact (including but not limited to uniforms, weapons, badges, police cars, etc.) indicates the officer is legitimate.'' Therefore, commenters asserted, requiring this kind of detailed information would be unreasonable or impossible. Commenters similarly asserted that the requirement that an applicant demonstrate that the government official who has inflicted torture did so under color of law and is not a rogue official ignores the actual circumstances under which people flee.

Commenters also expressed concern that individuals who were tortured would have no recourse because they would be unable to report the rogue official to other potentially rogue officials. For example, commenters stated that, in many countries (such as the Democratic Republic of the Congo), members of the police or military are intentionally organized into paramilitary groups so that the government can deny responsibility for human rights violations. Commenters asserted that, in such circumstances, individuals who are subjected to harm or in danger of such harm would face an insurmountable burden of proof.

[77] To the extent commenters' concerns with the ability to comment may relate to the period of time provided for comment, the Departments responses are set forth below in Section II.C.6.3 of this preamble.

Commenters asserted that it is extremely rare for a government to openly acknowledge that it condones torture. Rather, when evidence of torture occurs, the government will claim the perpetrator was a ''bad apple'' who acted on his or her own. Commenters asserted that this rule would accept the ''bad apple'' excuse on its face, preventing torture victims from receiving protection. Similarly, commenters asserted that most governments would not publicly admit that they torture their citizens and that, without such admissions, it would be difficult for victims of torture to prove that the injury was caused by a government official acting in an official capacity as opposed to on the official's private initiative. Commenters also asserted that the proposed changes appear specifically to restrict typical claims from Central America, where individuals are ''tortured at the hands of non-state actors such as gangs and cartels and where government actors are frequently complicit in these actions.'' Finally, one commenter asserted that, if an agency is going to demand such a high burden to establish torture, the agency should be the one to take on the burden of demonstrating the difference because the agency has more capacity to obtain the required information than the individual requesting the relief.

Response: The Departments disagree with commenters' assertions that the term ''acting in an official capacity'' is unambiguous and thus not subject to agency interpretation, as multiple decisions from the BIA, the Attorney General, and circuit courts attest. As demonstrated most recently by the Attorney General's decision in *Matter of O–F–A–S–,* 28 I&N Dec. at 36–37, the term ''acting in an official capacity'' is a term that has been subject to different interpretations since it was implemented in the regulations. *See* Regulations Concerning the Convention Against Torture, 64 FR 8490 (Feb. 19, 1999). As explained by the Attorney General subsequent to the NPRM, whether an individual acted in an official capacity has been the subject of multiple inaccurate or imprecise formulations. *Matter of O–F–A–S–,* 28 I&N Dec. at 36–37. On the one hand, then-Attorney General Ashcroft first articulated that the official capacity requirement means torture ''inflicted under color of law.'' *Id.* at 36. Subsequently, every Federal court of appeals to consider the questions has read the standard in the same manner. *Id.* at 37 (citing *Garcia,* 756 F.3d at 891; *United States* v. *Belfast,* 611 F.3d 783, 808–09 (11th Cir. 2010); *Ramirez-Peyro,* 574 F.3d at 900). However, at the same time, some Federal courts have viewed immigration judges as applying an amorphous, different concept of ''rogue official,'' which has not been accepted by circuit courts. *Id.* (citing Federal court of appeals decisions reviewing immigration court decisions applying an alleged ''rogue official'' analysis).

As the NPRM made clear, there is not a ''rogue official'' exception *per se* for CAT protection. 85 FR at 36286. Rather, ''rogue official'' is simply a shorthand label for an official who is not acting under color of law, and the actions of such an official are not a basis for CAT protection because the individual is not acting in an official capacity. The Attorney General confirmed this view that a ''rogue official'' is one who is not acting under color of law. *Matter of O–F–A–S–,* 28 I&N Dec. at 38 (''To the extent the Board used 'rogue official' as shorthand for someone not acting in an official capacity, it accurately stated the law. By definition, the actions of such officials would not form the basis for a cognizable claim under the CAT.''). Thus, there is no longer any confusion regarding the definition of a ''rogue official,'' and, consistent with the rule, such an official is one who is not acting under color of law.

Nevertheless, as the Attorney General also noted, ''continued use of the 'rogue official' language by the immigration courts going forward risks confusion . . . because 'rogue official' has been interpreted to have multiple meanings.'' *Id.* Accordingly, the Departments are removing that term from the final rule to avoid any further confusion. Its removal, however, does not result in any substantive change to the rule. Regardless of whether an official who is not acting in an official capacity is described as a ''rogue official,'' the actions of such an official are not performed under color of law and, thus, do not form the basis of a cognizable claim under the CAT.

Regarding commenters' concerns about the Attorney General's decision in *Matter of O–F–A–S–,* the Attorney General determined that it was necessary to provide a clarification of the ambiguous term ''acting in an official capacity'' without waiting for the Departments' NPRM to be finalized. That he issued his decision does not prevent the Departments from codifying that definition subsequently.

Moreover, the Departments disagree that the Attorney General's decision in *Matter of O–F–A–S–,* 28 I&N Dec. at 35, conflicts with the language of this rule. In *Matter of O–F–A–S–,* the Attorney General explained that ''acting in an official capacity'' means actions performed ''under color of law.'' *Id.* This rule amends the current regulatory language to clarify that the conduct supporting a CAT claim must be carried out under color of law, which is fully consistent with the Attorney General's decision. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1) (expressly using the phrase ''under color of law'').[78] Therefore, the regulatory text articulates that the test for determining whether an individual acted in an official capacity is whether the official acted under color of law. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1).

This amendment aligns the regulatory language with congressional intent and circuit case law finding that ''in an official capacity'' means ''under color of law.'' The Senate, in recommending that the United States ratify the CAT, explicitly stated that ''the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted 'under color of law.' '' S. Exec. Rep. No. 101–30, at 14 (1990). Further, as stated by the Attorney General in *Matter of O–F–A–S–,* every Federal court of appeals to consider the question has held that action ''in an official capacity'' means action ''under color of law.'' 28 I&N Dec. at 37 (citing *Garcia,* 756 F.3d at 891; *Belfast,* 611 F.3d at 808–09; *Ramirez-Peyro,* 574 F.3d at 900); *see also Ali* v. *Reno,* 237 F.3d 591, 597 (6th Cir. 2001) (adopting the ''under color of law'' standard in an opinion preceding *Matter of Y–L–,* 24 I&N Dec. 151).

The Senate's understanding of ''acquiescence'' for purposes of the CAT was that a finding of acquiescence requires a showing that the public official was aware of the act and that the public official had a legal duty to intervene to prevent the act but failed to do so. *See* S. Exec. Rep. No. 101–30, at 14 (''In addition, in our view, a public

[78] In clarifying this definition of a public official as one acting under color of law, the rule also makes clear that, for purposes of the CAT regulations, pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless the act is done while the official is ''acting in his or her official capacity. 85 FR at 36287; 8 CFR 208.18(a)(1) and 1208.18(a)(1). The Departments recognize that this change departs from the language considered in *Barajas-Romero* v. *Lynch,* 846 F.3d 351, 362–63 (9th Cir. 2017), which allowed for the consideration of a CAT claim even when the alleged torture was carried out by a public official not acting in an official capacity. Nevertheless, the Departments have provided reasoned explanations for this regulatory change and, thus, can implement that change in accordance with well-established principles. *See Encino Motorcars, LLC,* 136 S. Ct. at 2125 (''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'').

official may be deemed to 'acquiesce' in a private act of torture only if the act is performed with his knowledge and the public official has a legal duty to intervene to prevent such activity.''). As noted in the NPRM, however, the term ''awareness'' has led to some confusion. *See* 85 FR at 36287 (citing *Scarlett* v. *Barr,* 957 F.3d 316 (2d Cir. 2020)). Commenters asserted that the Departments, rather than creating a new definition for awareness, should instead codify the ''willful blindness'' standard as articulated by the circuit courts of appeals. But the final rule does just that: As noted in the NPRM, the Departments proposed to clarify that, in accordance with decisions from several courts of appeals and the BIA, '' 'awareness'—as used in the CAT 'acquiescence' definition—requires a finding of either actual knowledge or willful blindness.'' 85 FR at 36287; *see also* 8 CFR 208.18(a)(1), 1208.18(a)(1). The Departments, however, seeking to avoid further ambiguity, further define the term ''willful blindness'' to mean that the public official or other person acting in an official capacity was ''aware of a high probability of activity constituting torture and deliberately avoided learning the truth.'' 85 FR at 36287. The Departments further clarify that it is not enough that such a public official acting in an official capacity or other person acting in an official capacity was ''mistaken, recklessly disregarded the truth, or negligently failed to inquire.'' *Id.*

As explained in the NPRM, the Departments' definition of ''acquiescence'' aligns with congressional intent to require both an actus reus and a mens rea. *Id.* The Senate, during ratification of the CAT, included in its list of understandings the two elements required for a finding of acquiescence: Actus reus and mens rea. *See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Treaty Doc. 100–20: Hearing Before the S. Comm. on Foreign Relations,* S. Hrg. No. 101–718, 101st Cong., 2d Sess. 14 (1990) (''[T]o be culpable under the [CAT] . . . the public official must have had prior awareness of [the activity constituting torture] and must have breached his legal responsibility to intervene to prevent the activity.'' (statement of Mark Richard, Deputy Assist Att'y Gen., Criminal Division, Department of Justice)); U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. 36198 (1990). The definition further aligns with subsequent understandings that reduced the requirement from knowledge to mere awareness. *See Zheng,* 332 F.3d at 1193 (''The [Senate Committee on Foreign Relations] stated that the purpose of requiring awareness, and not knowledge, 'is to make it clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence.' '').

Regarding commenters' assertions that the proposed rule would create a burden that would be impossible for an applicant to meet, the Departments note that, currently, applicants must still demonstrate a legal duty and that this requirement does not change with this final rule. Even when applying the ''willful blindness'' standard articulated by various circuit courts of appeals, the applicant must demonstrate a legal duty and that the government official breached that legal duty. *See, e.g., Khouzam,* 361 F.3d at 171 (''From all of this we discern a clear expression of Congressional purpose. In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.'').

Regarding commenters' concerns about the burden applicants would have in establishing that an official was not a rogue official, the Departments reiterate that this rule codifies the analysis that, for an individual to be acting in an official capacity, he or she must be acting under color of law. As stated above, this standard aligns with the standard required by the Attorney General in *Matter of O–F–A–S–,* as well as the various circuit courts of appeals to have considered the issue. Therefore, the burden continues to require that an applicant demonstrate that an individual acted under color of law to demonstrate eligibility. The final rule does not raise or change the burden on the applicant, but merely provides clarity on the analysis. Moreover, the NPRM lists the main issues to consider in determining whether an official was acting under the color of law: Whether government connections provided the officer access to the victim, or to his whereabouts or other identifying information; whether the officer was on duty and in uniform at the time of his conduct; and whether the officer threatened to retaliate through official channels if the victim reported his conduct to authorities. 85 FR at 36287. The Departments believe these issues would be known by the alien, who could at least provide evidence in the form of his or her personal testimony if other witnesses or documents were unavailable. *See* 8 CFR 1208.16(c)(2) (''The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof [for a claim for protection under the CAT] without corroboration.'').

5. Information Disclosure

Comment: Commenters raised concerns that the rule's confidentiality provisions violate asylum seekers' right to privacy in their asylum proceedings, are ''expansive and highly concerning,'' and would put asylum seekers at ''grave risk of harm.'' Commenters were particularly concerned about cases involving gender-based violence. Commenters explained that broad disclosure language would deter asylum seekers from pursuing relief or revealing details of their alleged persecution for fear that their persecutor would learn about their asylum claim and subject them or their families to further harm. This fear, according to commenters, would be compounded by the fact that persecutors could potentially learn such information online without needing to be physically present in the United States. For example, commenters were concerned that disclosures in Federal litigation could be accessed by anyone because the litigation is public record.

One commenter noted that the exception for state or Federal mandatory reporting requirements at 8 CFR 208.6(d)(1)(iii) and 1208.6(d)(1)(iii) is ''completely open ended and provides no safeguards against publication'' to the public. Another commenter raised concerns about the exception allowing for an asylum application to be filed in an unrelated case as evidence of fraud. The commenter explained that, in practice, this would mean that information from one applicant's case would be accessible to another applicant, potentially putting the asylum applicant in danger.

Response: The Departments are fully cognizant of the need to protect asylum seekers, as well as their relatives and associates in their home countries, by preventing the disclosure of information contained in or pertaining to their applications. There are specific situations, however, in which the disclosure of relevant information is necessary to protect the integrity of the system, to ensure that those engaged in fraud do not obtain benefits to which they are not entitled, and to ensure that unlawful behavior is not inadvertently and needlessly protected. The existing confidentiality provisions do not provide for an absolute bar on disclosure, but even their exceptions may encourage fraud or criminal behavior. *See Angov,* 788 F.3d at 901

(''This points to an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated.''). Ultimately, there is no utility in protecting a false or fraudulent asylum claim, in restricting access to evidence of child abuse, or in restricting access to evidence that may prevent a crime, and the rule properly calibrates those concerns as outweighing the blunt shield of confidentiality for an assortment of unlawful behaviors that exists under the current regulations.

Here, the Departments have determined that additional, limited disclosure exceptions are necessary to protect the integrity of proceedings, to ensure that other types of criminal activity are not shielded by the confidentiality provisions, and to ensure that the government can properly defend itself in relevant proceedings. By their text, these additional disclosure exceptions are limited to specific circumstances in which the disclosure of such information is necessary and the need for the disclosure outweighs countervailing concerns. This rule includes clarifying exceptions explicitly allowing release of information as it relates to any immigration proceeding under the INA or legal action relating to the alien's immigration or custody status. This will ensure that the government can provide a full and accurate record in litigating such proceedings.

The rule also includes provisions for protecting the integrity of proceedings and public safety. These include provisions aimed at detecting fraud by allowing the Departments to submit similar asylum applications in unrelated proceedings; pursuing state or Federal criminal investigations, proceedings, or prosecutions; and protecting against child abuse. For example, the fraud exception will allow the Departments to consider potentially fraudulent similar applications or evidence in an immigration proceeding in order to root out non-meritorious claims, which will in turn allow the Departments to focus limited resources on adjudicating cases with a higher chance of being meritorious. *See, e.g., Angov,* 788 at 901–02 (''[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. . . . [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. . . . Consequently, immigration fraud is rampant.'').

Regarding commenters' concerns with the exception to allow disclosure as required by any state or Federal mandatory reporting requirements, the Departments note that the exception simply makes clear that government officials must abide by such laws. This provision is designed to prevent any inconsistencies and ensure that government officials comply with any mandatory reporting requirements. Accordingly, despite commenters' concerns with the breadth of this provision, the Departments disagree that any limiting language would be appropriate.

The Departments have considered commenters' concerns that an applicant's application will be submitted in another proceeding and thereby be made available to the other applicant, though they note that existing exceptions already cover ''[t]he adjudication of asylum applications'' and ''[a]ny United States Government investigation concerning any . . . civil matter,'' which, arguably, already encompass the use of applications across proceedings. 8 CFR 208.6(c)(1)(i), (v), 1208.6(c)(1)(i), (v). The Departments are maintaining the exceptions in the NPRM to ensure clarity on this point and to ensure that existing regulations are not inappropriately used to shield unlawful behavior. Because cases involving asylum fraud are ''distressingly common,'' *Angov,* 788 at 902, the need to root out fraudulent asylum claims greatly outweighs the concerns raised by commenters. Moreover, legitimate asylum seekers generally should be unaffected by this exception. Finally, the Departments reiterate that only ''relevant and applicable'' information is subject to disclosure under that exception; thus, rather than an open-ended exception, this exception ensures that only a limited amount of information is subject to disclosure under that exception.

Finally, as noted above, the Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT, and not solely to asylum applications. That point is already clear in 8 CFR 208.6(d) and 1208.6(d), and the Departments see no reason not to conform the other paragraphs in those sections for consistency. Relatedly, the Departments are also making edits to 8 CFR 208.6(a), (b), (d), and (e) and 8 CFR 1208.6(b), (d), and (e) to make clear that applications for refugee admission pursuant to INA 207(c)(1), 8 U.S.C. 1157(c)(1), and 8 CFR part 207 are subject to the same information disclosure provisions as similar applications for asylum, withholding of removal under the INA, and protection under the regulations implementing the CAT. The Departments already apply the disclosure provisions to such applications as a matter of policy and see no basis to treat such applications differently than those for protection filed by aliens already in or arriving in the United States.

6. Violates Domestic or International Law

6.1. Violates Immigration and Nationality Act

Comment: Commenters expressed a general belief that the rule violates the INA, such as by rendering it ''impossible'' or ''near impossible'' to obtain refugee status.

Multiple commenters stated that it appears the proposed rule is an ''unreasonable interpretation'' of sections 208 and 240 of the INA, 8 U.S.C. 1158 and 1229a, because two members of Congress have issued a statement in opposition to the rule.

Response: This rule implements numerous changes to the Departments' regulations regarding asylum and related procedures, including amendments to the expedited removal and credible fear screening process, changes to the standards for frivolous asylum application findings, a provision to allow immigration judges to pretermit applications in certain situations, codification of standards for consideration during the review of applications for asylum and for statutory withholding of removal, and amendments to the provisions regarding information disclosure. Each of these changes, as discussed with more specificity elsewhere in Section II.C of this preamble, is designed to better align the Departments' regulations with the Act and congressional intent. As also discussed, *supra,* the rule does not end asylum or refugee procedures, nor does it make it impossible for aliens to obtain such statuses. To the contrary, by providing clearer guidance to adjudicators and allowing them to more effectively consider all applications, the rule should allow adjudicators to more efficiently reach meritorious claims.

The Departments disagree that the statements of certain members of Congress about their personal opinion regarding the rule are sufficient to demonstrate that the rule is an ''unreasonable interpretation'' of the Act. Indeed, the statements of certain

members of Congress in 2020 is not clear evidence of the legislative intent behind the 1996 enactment of IIRIRA, which established the key statutory provisions related to this rule.

6.2. Violates Administrative Procedure Act

Comment: Commenters raised concerns that the rule does not comply with the APA. Commenters alleged that the rule is arbitrary and capricious under the APA because it does not offer ''reasoned analysis'' for the proposed changes. Commenters explained that ''reasoned analysis'' requires the Departments to display awareness that they are changing positions on a policy, to provide a legitimate rationale for departing from prior policy, and to identify the reasons for the change and why the change is a better solution to the issue.

In alleging this failure, commenters argued that the Departments did not analyze or rely on data or other evidence in formulating these changes. Moreover, commenters also claimed that the Departments did not consider possible alternatives to the changes and failed to consider important aspects of the various changes, including the impacts on the applicants and their communities. Commenters claimed that this rule is nothing more than a pretext for enshrining anti-asylum seeker sentiments, as evidenced by the thin or complete lack of justification for the various changes.

In addition, commenters claimed that this rule overlaps with other recent rules promulgated by the Departments, including rules involving asylum and adjusting fee amounts. Commenters claimed that it is arbitrary and capricious for the Departments to ''carve up [their] regulatory activity to evade comprehensive evaluation and comment.'' For example, one commenting organization stated that the rule treats domestic violence differently from another recent rule, in that the other rule bars relief for persons who have committed gender-based violence, while this rule bars relief from persons who have survived gender-based violence.

One commenting organization stated that the Departments are implementing this rule to enhance their litigating positions before EOIR and the Federal courts, which the commenter alleged is arbitrary and capricious where ''there is no legitimate basis for the regulation other than to enhance the litigating position'' of the Departments, particularly when the Departments are parties to the litigation.

Response: The Departments disagree that the promulgation of this rule is arbitrary and capricious under the APA. The APA requires agencies to engage in ''reasoned decisionmaking,'' *Michigan,* 576 U.S. at 750, and directs that agency actions be set aside if they are arbitrary or capricious, 5 U.S.C. 706(2)(A). This, however, is a ''narrow standard of review'' and ''a court is not to substitute its judgment for that of the agency,'' *Fox Television,* 556 U.S. at 513 (quotation marks omitted), but is instead to assess only whether the decision was ''based on a consideration of the relevant factors and whether there has been a clear error of judgment,'' *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). Arbitrary and capricious review is ''highly deferential, presuming the agency action to be valid.'' *Sacora* v. *Thomas,* 628 F.3d 1059, 1068 (9th Cir. 2010). It is ''reasonable for the [agency] to rely on its experience'' to arrive at its conclusions, even if those conclusions are not supported with ''empirical research.'' *Id.* at 1069. Moreover, the agency need only articulate ''satisfactory explanation'' for its decision, including ''a rational connection between the facts found 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); *see also Dep't of Commerce* v. *New York,* 139 S. Ct. 2551, 2569 (2019) (''We may not substitute our judgment for that of the Secretary, but instead must confine ourselves to ensuring that he remained within the bounds of reasoned decisionmaking.'' (citation and quotation marks omitted)).

Under this deferential standard, and contrary to commenters' claims, the Departments have provided reasoned explanations for the changes in this rule sufficient to rebut any APA-related concerns. The NPRM describes each provision in detail and provides an explanation for each change. *See* 85 FR at 36265–88. The Departments explained that these various changes will, among other things, maintain a streamlined and efficient adjudication process for asylum, withholding of removal, and CAT protection; provide clarity in the adjudication of such claims; and protect the integrity of such proceedings. *Id.* As noted in Section II.A of this preamble, the animating principles of the NPRM were to provide clearer guidance to adjudicators regarding a number of thorny issues that have caused confusion and inconsistency and even bedeviled circuit courts; to improve the efficiency and integrity of the overall system in light of the overwhelming number of cases pending; to correct procedures that were not working well, including procedures for the identification of meritless or fraudulent claims; and to provide a consistent approach for the overall asylum adjudicatory framework in light of numerous—and often contradictory or confusing—decisions from the Board and circuit courts regarding multiple important terms that are not defined in the statute.

For example, the Departments explained that the changes to use asylum-and-withholding-only proceedings for positive credible fear findings, to increase the credible fear standard for withholding of removal and CAT protection claims, to apply certain bars and the internal relocation analysis in credible fear interviews, to pretermit legally insufficient asylum applications, and to expand the grounds for a frivolous asylum finding are all intended to create a more streamlined and efficient process for adjudicating asylum, withholding of removal, and CAT protection applications. *See* 85 FR at 36266–67 (explaining that asylum-and-withholding-only proceedings will ensure a ''streamlined, efficient, and truly 'expedited' '' removal process); *id.* at 36277 (explaining that the pretermission of legally insufficient asylum applications will eliminate the need for a hearing); *id.* at 36273–76 (explaining that frivolous applications are a ''costly detriment, resulting in wasted resources and increased processing times,'' and that the new grounds for a finding of frivolousness will ''ensure that meritorious claims are adjudicated more efficiently'' and will prevent ''needless expense and delay''); *id.* at 36268–71 (explaining that raising the credible fear standard for withholding and CAT applications will allow the Departments to more ''efficiently and promptly'' distinguish between aliens whose claims are more or less likely to ultimately be meritorious); *id.* at 36272 (explaining that applying certain eligibility bars in credible fear interviews will help to eliminate unnecessary removal delays in section 240 proceedings and eliminate the ''waste of adjudicatory resources currently expended in vain'').

Similarly, the Departments also explained in the NPRM that many of the changes are intended to provide clarity to adjudicators and the parties, including the addition of definitions and standards for terms such as ''particular social group,'' ''political opinion,'' ''persecution,'' ''nexus,'' and ''internal relocation;'' the delineation of discretionary factors in adjudicating asylum applications; the addition of guidance on the meaning of

''acquiescence'' and the circumstances in which officials are not acting under color of law in the CAT protection context; and the clarification of the use of precedent in credible fear review proceedings. *See* 85 FR at 36278 (explaining that the rule's definition of ''particular social group'' will provide ''clearer guidance'' to adjudicators regarding whether an alleged group exists and, if so, whether the group is cognizable); *id.* at 36278–79 (explaining that the rule's definition of ''political opinion'' will provide ''additional clarity for adjudicators''); *id.* at 36280 (explaining that the rule's definition of ''persecution'' will ''better clarify what does and does not constitute persecution''); *id.* at 36281 (explaining that the rule's definition of ''nexus'' will provide ''clearer guidance'' for adjudicators to ''uniformly apply''); *id.* at 36282 (explaining that the rule's definition of ''internal relocation'' will help create a more ''streamlined presentation'' to overcome the current lack of ''practical guidance''); *id.* at 36283 (explaining that, for asylum discretionary determinations, the Departments have not previously provided general guidance in agency regulations for factors to be considered when determining whether an alien merits asylum as a matter of discretion); *id.* at 36286–87 (explaining that guidance for CAT acquiescence and for the circumstances in which an official is not acting under color of law standards is meant to provide clarity because current regulations ''do not provide further guidance''); *id.* at 36267 (explaining that the inclusion of language regarding the consideration of precedent in credible fear review proceedings is intended to provide a ''clear requirement'').

The Departments also explained that many of the changes are intended to protect the integrity of proceedings. *See* 85 FR at 36288 (explaining the expansion of information disclosure is necessary to protect against ''suspected fraud or improper duplication of applications or claims''); *id.* at 36283 (explaining that the inclusion of a discretionary factor for use of fraudulent documents is necessary due to concerns that the use of fraudulent documents makes the proper enforcement of the immigration laws ''difficult'' and ''requires an immense amount of resources''); *id.* (explaining that the inclusion of a discretionary factor for failure to seek asylum or protection in a transit country ''may reflect an increased likelihood that the alien is misusing the asylum system''); *id.* at 36284 (explaining that making applications that were previously abandoned or withdrawn with prejudice a negative discretionary factor would ''minimize abuse of the system'').

The Departments also disagree with commenters that the rule does not provide support for the specific grounds that would be insufficient to qualify as a particular social group or to establish a nexus.[79] The Departments provided numerous citations to BIA and Federal court precedent that the Departments relied on in deciding to add these specific grounds. *See* 85 FR at 36279 (list of cases supporting the grounds that generally will not qualify as a particular social group); *id.* at 36281 (list of cases supporting the grounds that generally will not establish nexus).

In addition to the explicit purposes detailed in the NPRM, the Departments also considered, contrary to commenters' claims, the effects that such changes may have on applicants. The Departments noted that the proposed changes ''are likely to result in fewer asylum grants annually.'' 85 FR at 36289. Moreover, the Departments recognized that any direct impacts would fall on these applicants. *Id.* at 36290. The Departments acknowledge that these impacts are viewed as ''harsh'' or ''severe'' by commenters, but the Departments also note, as discussed, *supra,* that many of the commenters' overall assertions about the effects of this rule are unfounded or speculative.[80] In addition, the Departments made the decision to include the various changes in this rule because, after weighing the costs and benefits, the Departments determined that the need to provide additional clarity to adjudicators; to enhance adjudicatory efficiencies; and to ensure the integrity of proceedings outweighed the potential costs to applicants, especially since the changes, particularly those rooted in existing law, would naturally fall more on applicants with non-meritorious claims. In fact, the enhanced adjudicatory efficiencies would be expected to allow adjudicators to focus more expediently on meritorious claims, which would be a benefit offsetting any costs to those applicants filing non-meritorious applications. Overall, as shown in the NPRM and the final rule, the Departments engaged in ''reasoned decision making'' sufficient to mitigate any APA concerns.

The Departments also disagree with commenters' claim that the Departments purposefully separated their asylum-related policy goals into separate regulations in order to prevent the public from being able to meaningfully review and provide comment. The Departments reject any assertions that they are proposing multiple rules for any sort of nefarious purpose. Each of the Departments' rules stand on its own, includes an explanation of its basis and purpose, and allows for public comment, as required by the APA. *See Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2386 (2020) (explaining that the APA provides the ''maximum procedural requirements'' that an agency must follow in order to promulgate a rule). To the extent commenters noted some overlap or joint impacts, however, the Departments regularly consider the existing legal framework when a specific rule is proposed or implemented. For example, with respect to the potential impacts of DHS fee changes, DHS conducts a biennial review of USCIS fees and publishes a Fee Rule that impacts all populations before USCIS. *See, e.g.,* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 62280, 62282 (Nov. 14, 2019) (explaining that, in accordance with 31 U.S.C. 901–03, USCIS conducts ''biennial reviews of the non-statutory fees deposited into the [Immigration Examinations Fee Account]''). It is natural that there would be some impact on aliens who intend to seek asylum, but any such change to those fees must be considered with respect to USCIS's overall fee structure. Thus, any such changes were properly outside the scope of this rule. Moreover, nothing in any rule proposed by the Departments, including the NPRM underlying this final rule, precludes the public from meaningfully reviewing and commenting on that rule.

Finally, commenters are incorrect that the rule is related to enhancing the government's litigating positions. As explained in the NPRM and this response section, the Departments detailed a number of reasons for promulgating this rule, including to increase efficiency, to provide clarity to adjudicators, and to protect the integrity of proceedings. To the extent the rule

[79] For further discussion regarding the changes related to particular social groups, see Section II.C.4.1 of this preamble, and for further discussion regarding the changes related to nexus, see Section II.C.4.4.

[80] The Departments also note that aliens with otherwise meritorious claims who are denied asylum under genuinely new principles in the rule—*e.g.,* the new definition of ''firm resettlement''—may remain eligible for other forms of protection from removal, such as statutory withholding of removal or protection under the CAT. Thus, contrary to the assertions of many commenters, the rule would not result in the ''harsh'' or ''severe'' consequence of an alien being removed to a country where his or her life would be in danger.

corresponds with interpretations of the Act and case law that the Departments have set forth in other contexts, the Departments disagree that such correspondence violates the APA. Instead, it shows the Departments' consistent interpretation and the Departments' intent to better align the regulations with the Act through this rulemaking.

6.3. 30-Day Comment Period

Comment: Commenters raised concerns with the 30-day comment period, arguing that the Departments should extend the comment period to at least 60 days or should reissue the rule with a new 60-day comment period. Due to the complex nature of the rule and its length, commenters requested additional time to comment, asserting that such time is needed to meet APA requirements that agencies provide the public with a ''meaningful opportunity'' to comment. Commenters also claimed that the 30-day comment period was particularly problematic due to the COVID–19 pandemic, which caused disruption and limited staff capacity for some commenters. Moreover, commenters stated that there should be no urgency to publish the rule due to the southern border being ''blocked'' due to COVID–19. Finally, commenters referenced the companion data collection under the Paperwork Reduction Act, which allowed for a 60-day comment period.

Response: The Departments believe the 30-day comment period was sufficient to allow for meaningful public input, as evidenced by the almost 89,000 public comments received, including numerous detailed comments from interested organizations. The APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c), and although Executive Orders 12866, 58 FR 51735 (Sept. 30, 1993), and 13563, 76 FR 3821 (Jan. 18, 2011), recommend a comment period of at least 60 days, a 60-day period is not required. Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that, although a 30-day period is often the ''shortest'' period that will satisfy the APA, such a period is generally ''sufficient for interested persons to meaningfully review a proposed rule and provide informed comment,'' even when ''substantial rule changes'' are proposed. *Nat'l Lifeline Ass'n* v. *Fed. Commc'ns Comm'n,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Further, litigation has mainly focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp.* v. *FCC,* 78 F.3d 620, 629–30 (D.C. Cir. 1996) (15-day comment period); *Northwest Airlines, Inc.* v. *Goldschmidt,* 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period). In addition, the Departments are not aware of any case law holding that a 30-day comment period was insufficient, and the significant number of detailed public comments is evidence that the 30-day period was sufficient for the public to meaningfully review and provide informed comment. *See, e.g., Little Sisters of the Poor,* 140 S. Ct. at 2385 (''The object [of notice and comment], in short, is one of fair notice.'' (citation and quotation marks omitted)).

One commenter noted that the comment period in the rule regarding the edits to the Form I–589, Application for Asylum and for Withholding of Removal, was 60 days, while the comment period for the substantive portions of the rule was only 30 days. In most cases, by statute, the Paperwork Reduction Act requires a 60-day comment period for proposed information collections, such as the Form I–589. 44 U.S.C. 3506(c)(2)(A). Although the statute allows an exception for proposed collections of information contained in a proposed rule that will be reviewed by the Director of the Office of Management and Budget under 44 U.S.C. 3507, *see* 44 U.S.C. 3506(c)(2)(B), the Departments sought a 60-day comment period to provide the public with additional time to comment on the form changes. In contrast, as explained above, there is no similar statutory requirement for the proposed rule itself.

6.4. Agency Is Acting Beyond Authority

Comment: At least one organization emphasized the Departments' reliance on *Brand X,* 545 U.S. at 982, as a justification for the portions of the rule overruling circuit court decisions relating to asylum. *See* 85 FR at 36265, n.1. One organization claimed the Departments ''ignore[d]'' the Supreme Court's decision in *Kisor* v. *Wilkie,* 139 S. Ct. 2400 (2019), which ''follows the recent trend towards limiting deference to an agency's interpretation of its own rules.'' According to the organization, *Brand X* can be interpreted to mean that, where statutory or regulatory terms are generally ambiguous and the agency has not ruled on a particular issue, circuit court law addressing the issue in question governs only until ''the agency has issued a dispositive interpretation concerning the meaning of a genuinely ambiguous statute or regulation.'' The organization also noted that *Chevron* deference requires a Federal court to accept an agency's ''reasonable construction of an ambiguous statute,'' emphasizing that the distinction between ''genuinely ambiguous language'' and ''plain language'' is crucial. *See Chevron,* 467 U.S. at 843–44, n.11.

The organization then alleged that the Departments' reliance on *Brand X* ''to entirely eviscerate Federal court caselaw'' is misplaced and contrary to controlling law. According to the organization, the Departments failed to demonstrate that each instance of the statutory language they seek to overrule is ''genuinely ambiguous,'' and the organization cited *Kisor,* 139 S. Ct. 2400, to support its claim that deference to ''agency regulations should not be afforded automatically.'' The organization claimed that *Kisor* limits the ability to afford deference unless (1) a regulation is genuinely ambiguous; (2) the agency's interpretation is reasonable regarding text, structure, and history; (3) the interpretation is the agency's official position; (4) the regulation implicates the agency's expertise; and (5) the regulation reflects the agency's ''fair and considered judgment.'' The organization contended that the Departments failed to meet these criteria, alleging that the proposed rule attempts to ''re-write asylum law rather than interpret the statute.''

Multiple commenters claimed that the rule is in opposition to the asylum criteria established by Congress and expressed concern that the rule was drafted without congressional input.

Response: The Departments did not ignore *Kisor,* 139 S. Ct. 2400. *Kisor* examined the scope of *Auer* deference, which affords deference to an agency's ''reasonable readings of genuinely ambiguous regulations.'' *Id.* at 2408 (citing *Auer* v. *Robbins,* 519 U.S. 452 (1997)). Here, ambiguous regulations are not at issue; instead, the Departments amended the regulations based on their reading of ambiguities in the statute, in accordance with Congress's presumed intent for the Departments to resolve these ambiguities. *See* 85 FR at 36265 n.1 (citing *Brand X,* 545 U.S. at 982).

The Departments disagree that the rulemaking ''eviscerates'' case law. As explained in the NPRM, ''administrative agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations, because there is 'a presumption that Congress, when it left ambiguity in a statute meant for

implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.' '' *Matter of R–A–,* 24 I&N Dec. at 631 (quoting *Brand X,* 545 U.S. at 982) (quotation marks and citations omitted); *see also* 85 FR at 36265 n.1; *Ventura,* 537 U.S. at 16 (''Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. In such circumstances a judicial judgment cannot be made to do service for an administrative judgment. Nor can an appellate court intrude upon the domain which Congress has exclusively entrusted to an administrative agency. A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'' (alteration, citations, and quotation marks omitted)). Moreover, '' 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations.'' *Cuellar de Osorio,* 573 U.S. at 56–57 (quoting *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999)).

Further, the Departments disagree that the rulemaking rewrites asylum law or that it conflicts with the asylum criteria established by Congress. Congress statutorily authorized the Attorney General to, consistent with the statute, make discretionary asylum determinations, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), establish additional limitations and conditions on asylum eligibility, INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), and establish other conditions and limitations on consideration of asylum applications, INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). The changes made by this rulemaking are consistent with those congressional directives. Regarding commenters' concerns that the rule was drafted without congressional input, the Departments once again point to Congress's statutory delegation of authority to the Attorney General. *See* INA 103(g)(1), (2), 8 U.S.C. 1103(g)(1), (2) (granting the Attorney General the ''authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens,'' and directing the Attorney General to ''establish such regulations . . . and perform such other acts as the Attorney General determines to be necessary for carrying out this section''). Congress, in other words, has already delegated to the Attorney General the power to promulgate rules such as this one, and no further congressional input is required.

6.5. Violates Separation of Powers

One organization emphasized that the Departments only have authority to ''faithfully interpret'' a statute, not to rewrite it. The organization contended that ''[r]ulemaking is not an opportunity for an agency to engage in an unauthorized writing exercise that duplicates the legislative role assigned to Congress.'' Another commenter claimed there is an ''urgent need'' for checks and balances on the ''power'' of immigration authorities in the asylum process, alleging that the U.S. government is allowing ICE and CBP to put lives in danger due to ''lack of oversight.'' One commenter contended that revising asylum law ''is not an executive branch function.''

Response: The Departments are not rewriting statutes. As explained throughout this final rule in various sections, the Departments are statutorily authorized to promulgate this rule under section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A) (authority to make discretionary asylum determinations), section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C) (authority to establish additional limitations and conditions on asylum eligibility), and section 208(d)(5)(B) of the Act, 8 U.S.C. 1158(d)(5)(B) (authority to establish other conditions and limitations on consideration of asylum applications). In section 103(a)(1) and (3) of the INA, 8 U.S.C. 1103(a)(1), (3), Congress has conferred upon the Secretary broad authority to administer and enforce the immigration laws and to ''establish such regulations . . . as he deems necessary for carrying out his authority'' under the immigration laws. Under section 103(g)(1), (2) of the Act, 8 U.S.C. 1103(g)(1), (2), Congress provided the Attorney General with the ''authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens,'' and directed the Attorney General to ''establish such regulations . . . and perform such other acts as the Attorney General determines to be necessary for carrying out this section.'' Thus, the Departments derive authority to promulgate this rule from the statute and issued this rule consistent with the statute, not in contravention of it. Moreover, the Departments have promulgated this rule in accordance with the APA's rulemaking process. *See* 5 U.S.C. 553; *see also* Sections II.C.6.2, 6.3 of this preamble.

The Departments also note that, although an agency ''must give effect to the unambiguously expressed intent of Congress,'' if Congress ''has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'' *Chevron,* 467 U.S. at 843–44; *see also Aguirre-Aguirre,* 526 U.S. at 424–25 (''It is clear that principles of *Chevron* deference are applicable to [the INA]. The INA provides that '[t]he Attorney General shall be charged with the administration and enforcement' of the statute and that the 'determination and ruling by the Attorney General with respect to all questions of law shall be controlling.' . . . In addition, we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.' '' (citations omitted)). Congress has clearly spoken in the Act, *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B); and INA 103(g)(1), (2), 8 U.S.C. 1103(g)(1), (2), and the Departments properly engaged in this rulemaking, consistent with 5 U.S.C. 553, to effectuate that statutory scheme. To the extent that comments disagree with provisions of the INA, such comments are properly directed to Congress, not the Departments.

6.6. Congress Should Act

Comment: Some commenters stated that Congress, not the Departments, must make the sorts of changes to the asylum procedures set out in the proposed rule. Commenters cited a variety of reasons why these changes are most appropriately the providence of Congress, including commenters' belief that the rule would effectively end or eliminate asylum availability and limit how many asylum seekers would receive relief annually, the breadth of the changes in the proposed rule, and alleged inconsistencies between the Act and the rule. Commenters expressed a belief that changes as significant as those proposed should be undertaken only by Congress. Other commenters suggested that Congress should separately enact other legislation to protect asylum seekers.

Response: As stated above, the Departments issued the proposed rule, and in turn are issuing this final rule, pursuant to the authorities provided by

Congress through the HSA and the Act. INA. *See, e.g.,* INA 103(a)(1) and (3), (g)(2), 208, 8 U.S.C. 1101(a)(1) and (3), (g)(2), 1158.[81] Despite commenters' statements, the provisions of the rule are consistent with these authorities and the Act, as discussed above. *See, e.g.,* Sections II.C.2, II.C.3, II.C.4, and II.C.6.1 of this preamble.

Should Congress enact legislation that amends the provisions of the Act that are interpreted and affected by this rule, the Departments will engage in future rulemaking as needed. Commenters' discussion of specific possible legislative proposals or initiatives, however, is outside of the scope of this rule.

6.7. Violates Constitutional Rights

Comment: One organization contended that the application of the ''interpersonal'' and ''private'' categories to domestic and gender-based violence would violate the Equal Protection Clause. The organization claimed the presumption created by these categories would have a disproportionate effect on women, who are much more likely than men to experience violence by an intimate partner.

Another organization alleged that the rule would essentially prevent women, children, LGBTQ individuals, people of color, survivors of violence, and torture escapees from obtaining asylum protection, claiming this violates the ''spirit and letter'' of both the Fifth Amendment and the Refugee Act of 1980. According to the organization, the rule is designed to ''eliminate due process'' and create ''impossible new legal standards'' to prevent refugees from obtaining asylum. One organization emphasized generally that asylum seekers should not be treated like criminals but should instead be shown dignity and respect; the organization noted that these individuals should also be given judicial due process.

Response: The rule makes no classifications prohibited by the Equal Protection Clause; thus, the commenter's allegation that the rule will disproportionately affect various groups—women, children, LGBTQ individuals, people of color, and survivors of violence and torture—is unfounded. The Departments do not track the factual bases for each asylum application, and each application is adjudicated on a case-by-case basis in accordance with the evidence and applicable law. Moreover, the changes alleged by commenters to have a disparate impact on discrete groups are ones rooted in existing law as noted in the NPRM, and commenters provided no evidence that existing law has caused an unconstitutional disparate impact. For allegations of disparate impact based on gender, a ''significantly discriminatory pattern'' must first be demonstrated. *Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977). The Departments are unaware of such a pattern, and commenters did not provide persuasive evidence of one, relying principally on anecdotes and isolated statistics, news articles, and reports.[82] Moreover, to the extent that the NPRM may affect certain groups of aliens more than others, those effects are a by-product of the intrinsic demographic distribution of claims, and a plausible equal protection claim will not lie in such circumstances. *See Regents of Univ. of Cal.,* 140 S. Ct. at 1915–16 (impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of animus, invidious discrimination, or an equal protection violation).

For allegations of disparate impact based on race, case law has ''not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact. . . . [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.'' *Washington,* 426 U.S. at 239, 242. No discriminatory motive or purpose underlies this rulemaking; it does not address race in any way;[83] and commenters have not explained—logically, legally, or otherwise—how the rule would even affect asylum claims based on persecution because of race.

In regard to allegations that the rule would discriminate against LGBTQ individuals, children, and survivors of violence or torture, the Departments reiterate that the rule applies equally to all asylum seekers. Further, as noted elsewhere, to the extent that the NPRM may affect certain groups of aliens more than others based on the innate characteristics of those who file asylum applications, those effects are a by-product of the intrinsic demographic distribution of claims, and a plausible equal protection claim will not lie in such circumstances. *See Regents of Univ. of Cal.,* 140 S. Ct. at 1915–16 (impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of animus, invidious discrimination, or an equal protection violation).

Relatedly, this rule does not eliminate statutory withholding of removal or protection under the CAT regulations, through which the United States continues to fulfill its commitments under the 1967 Refugee Protocol, consistent with the Refugee Act of 1980 and subsequent amendments to the INA, and the CAT, consistent with FARRA. *See R–S–C,* 869 F.3d at 1188, n.11 (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun* v. *Att'y Gen. U.S.,* 856 F.3d 249, 257 n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016); *Maldonado,* 786 F.3d at 1162 (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of parties, was implemented in the United States by the FARRA and its implementing regulations).

The rule does not eliminate due process. As explained previously in this rule, due process in an immigration proceeding requires notice and an opportunity to be heard. *See LaChance,* 522 U.S. at 266 (''The core of due process is the right to notice and a meaningful opportunity to be heard.''). The rule does not eliminate the notice of charges of removability against an alien, INA 239(a)(1), 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), or on appeal, 8 CFR 1003.38. Moreover, asylum is a discretionary benefit. *See* INA 208 (b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (stating that the Departments ''may'' grant asylum''); *see also Thuraissigiam,* 140 S. Ct. at 1965 n.4 (''A grant of

[81] In addition, Congress has authorized the Department to ''provide by regulation for any other conditions or limitations on the consideration of an application for asylum'' consistent with the other provisions of the Act. INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B).

[82] The Departments also note that accepting the commenters' assertion that the likelihood of women being subject to intimate-partner violence being greater than that of men necessarily demonstrates an equal protection violation would, in turn, mean that other immigration regulations regarding victims of domestic violence, *e.g.,* 8 CFR 204.2(c), are also unconstitutional because of their putative disparate impact.

[83] The NPRM did not mention race at all, except when quoting the five statutory bases for asylum—race, religion, nationality, political opinion, and membership in a particular social group.

asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary.''). The Attorney General and the Secretary are statutorily authorized to limit and condition asylum eligibility under section 208(b)(2)(C), (d)(5)(B) of the Act, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), by regulation and consistent with the Act, and courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin,* 538 F.3d at 156–57; *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 50). The Departments properly exercised that authority in this rulemaking, and that exercise does not implicate due process claims. Finally, the rule does not treat aliens ''like criminals,'' as commenters alleged. Aliens retain all due process rights to which they are entitled under law, and the rule does not change that situation.

6.8. Violates International Law

Comment: Commenters asserted that the proposed rule violates the Convention on the Rights of the Child (''CRC'') because the United States, as a signatory, is obligated to ''refrain from acts that would defeat the object and purpose of the Convention.'' Commenters averred that the CRC protects the rights of children to seek asylum; therefore, commenters argued, the United States must protect the right of children to seek asylum. Commenters also asserted that the proposed rule violates the Refugee Convention and the CRC by requiring adjudicators to presume that many child-specific forms of persecution do not warrant a grant of asylum. Commenters alleged that this will result in children being returned to danger in violation of the language and spirit of the Refugee Convention and the CRC.

One commenter cited Article 14 of the Universal Declaration of Human Rights (''UDHR''), G.A. Res. 217A (III), U.N. Doc. A/810 (1948), which states that ''[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'' That commenter asserted that the proposed revisions unnecessarily hinder access to asylum in contradiction of that right. Commenters also asserted that, under Article 34 of the Refugee Convention, the United States has an obligation to extend grants of asylum ''as far as possible'' to eligible refugees. These commenters asserted that this requires adjudicators to, at the very least, exercise a general presumption in favor of individuals who meet the definition of refugee. To do otherwise would not meet the United States' obligation to facilitate ''as far as possible'' the assimilation and naturalization of individuals who qualify as refugees.

Commenters criticized the Departments' statements that the continued viability of statutory withholding of removal, as referenced in the preamble to the NPRM, meets the United States' non-refoulement obligations. Commenters asserted that this is a misreading of the scope of both domestic and international obligations. As an initial matter, commenters averred that the Refugee Act of 1980, as implemented, was designed to give full force to the United States' obligations under the Refugee Convention, to the extent applicable by incorporation in the 1967 Protocol. Commenters argued that these obligations are not limited to one article of the Refugee Convention and are not limited to not returning an individual to a country where he or she would face persecution or other severe harm. Rather, commenters asserted, the obligations also require the United States to ensure that refugees are treated fairly and with dignity, and are guaranteed freedom of movement and rights to employment, education, and other basic needs. Commenters also cited the Refugee Convention's provision to provide a pathway to permanent status for refugees, which the commenters asserted is reflected in the asylum scheme implemented by the Refugee Act, not the statutory withholding of removal provisions. Commenters argued that narrowing the opportunity to receive asylum through the implementation of numerous regulatory obstacles makes asylum—and therefore permanent status—unattainable, which is inconsistent with the United States' obligations under U.S. and international law. Commenters also generally asserted that allowing immigration judges to pretermit applications for asylum violates the principle of non-refoulement.

Commenters generally asserted that the culmination of the proposed rule's procedural and substantive changes subvert the purpose of the Refugee Act, which was to implement the United States' commitments made through ratification of the 1967 Protocol. Further, one organizational commenter argued that the proposed rule ''re-orients the U.S. asylum process away from a principled, humanitarian approach focused on identifying individuals with international protection needs towards one that establishes a set of obstacles which must be overcome by individuals seeking international protection.'' Commenters also criticized the Departments' statements that the continued viability of statutory withholding of removal ensures continued compliance with international obligations. Specifically, commenters noted that many of the provisions of the proposed rule also affect eligibility for protection under statutory withholding of removal. Commenters argued that the proposed changes that affect statutory withholding of removal would not adequately meet the United States' obligations under the non-refoulement provisions of Article 33.

Response: This rule is consistent with the United States' obligations as a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Refugee Convention.[84] This rule is also consistent with U.S. obligations under Article 3 of the CAT, as implemented in the immigration regulations pursuant to the implementing legislation.

Regarding the CRC, as an initial point, although the United States has signed the instrument, the United States has not ratified it; thus, it cannot establish any binding obligations. *See Martinez-Lopez* v. *Gonzales,* 454 F.3d 500, 502 (5th Cir. 2006) (''The United States has not ratified the CRC, and, accordingly, the treaty cannot give rise to an individually enforceable right.''). Moreover, contrary to commenters' assertions, nothing in the rule is inconsistent with the CRC. Under the CRC, states are obligated to ''take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.'' Convention on the Rights of the Child, art. 22, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1448. Because this rule is consistent with the Refugee Act and the United States' obligations under the Refugee

[84] The Departments also note that neither of these treaties is self-executing, and that, therefore, neither is directly enforceable in the U.S. legal context except to the extent that they have been implemented by domestic legislation. *Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) (''The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.''); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (''CAT was not self-executing''); *see also Stevic,* 467 U.S. at 428 n.22 (''Article 34 merely called on nations to facilitate the admission of refugees to the extent possible; the language of Article 34 was precatory and not self-executing.'').

Convention and Article 3 of the CAT, it is consistent with the CRC.

Similarly, the Departments disagree with commenters' assertions that the rule violates the CRC by creating a presumption against ''child-specific forms of persecution.'' As an initial point, nothing in the rule singles out children or ''child-specific'' claims; rather, the rule applies to all types of claims regardless of the demographic characteristics of the applicant. Moreover, although certain types of children are afforded more protections by statute than similarly-situated non-child asylum applicants, *see e.g.,* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C), this rule does not affect those protections. Further, generally applicable legal requirements, including credibility standards and burdens of proof, are not relaxed or obviated for juvenile respondents. *See* EOIR, *Operating Policies and Procedures Memorandum 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* 7 (Dec. 20, 2017), *https://www.justice.gov/eoir/file/oppm17-03/download.*

The UDHR is a non-binding human rights instrument, not an international agreement; thus it does not impose legal obligations on the United States. *Alvarez-Machain,* 542 U.S. at 728, 734–35 (citing John P. Humphrey, *The U.N. Charter and the Universal Declaration of Human Rights,* in The International Protection of Human Rights 39, 50 (Evan Luard ed., 1967) (quoting Eleanor Roosevelt as stating that the UDHR is '' 'a statement of principles . . . setting up a common standard of achievement for all peoples and all nations' and 'not a treaty or international agreement . . . impos[ing] legal obligations.' '')). Moreover, although article 14(1) of the UDHR proclaims the right of ''everyone'' to ''seek and to enjoy'' asylum, it does not purport to state specific standards for establishing asylum eligibility, and it certainly cannot be read to impose an obligation on the United States to grant asylum to ''everyone,'' *see id.,* or to prevent the Attorney General and Secretary from exercising the discretion granted by the INA, consistent with U.S. obligations under international law, *see* UNHCR, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* 3 (Jan. 26, 2007), *https://www.unhcr.org/4d9486929.pdf* (''The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.'').

Similarly, the Departments disagree with commenters' unsupported assertions that the United States' obligation to ''as far as possible facilitate the assimilation and naturalization of refugees'' requires a general presumption in favor of granting asylum to all individuals who apply. Rather, as the Supreme Court has noted, Article 34 ''is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.'' *Cardoza-Fonseca,* 480 U.S. at 441.

Moreover, the United States implemented the non-refoulement provision of Article 33(1) of the Refugee Convention through the withholding of removal provision at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), and the non-refoulement provision of Article 3 of the CAT through the CAT regulations, rather than through the asylum provisions at section 208 of the Act, 8 U.S.C. 1158. *See Cardoza-Fonseca,* 480 U.S. at 429, 440–41 & n.25; *Matter of O–F–A–S–,* 27 I&N Dec. at 712; FARRA; 8 CFR 208.16(b), (c), 208.17 through 208.18; 1208.16(b), (c); 1208.17 through 1208.18. This rule's limitations on asylum, including the ability of immigration judges to pretermit applications, do not violate the United States' non-refoulement obligations.

At the same time, the changes to statutory withholding of removal and CAT protection do not misalign the rule with the non-refoulement provisions of the 1951 Refugee Convention, the 1967 Protocol, and the CAT. As explained above, the Departments have properly asserted additional standards and clarification for immigration judges to follow when evaluating claims for statutory withholding of removal and protection under the CAT.

6.9. Executive Order 12866 and Costs and Benefits of the Rule; Regulatory Flexibility Act

Comment: At least one commenter alleged that the rule creates ''serious inconsistencies'' with sections 208(a) and 240(b) of the Act, 8 U.S.C. 1158(a), 1229a(b), and the Constitution; as a result, commenters stated, the rule constitutes a ''significant regulatory action'' under Executive Order 12866 and the Departments must comply with the order's analysis requirements, specifically sections 6(a)(3)(B) and (C).

Multiple organizations claimed that the costs and benefits section of the rule fails to address the cost to the ''reputation'' of the United States, as well as the cost of losing the ''talent, diversity, and innovation'' brought by asylees.

Another organization emphasized that it is difficult to evaluate whether the Departments' ''multiple overlapping proposals to amend the same asylum provisions'' comply with Executive Order 12866's mandate that ''[e]ach agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.'' Citing *CSX Transportation, Inc.* v. *Surface Transportation Board,* 754 F.3d 1056, 1065–66 (D.C. Cir. 2014), the organization claimed it would be ''arbitrary and capricious'' for the Departments to account for costs and benefits in favor of this proposal that are identical to the costs and benefits ''already priced into the other revisions of the same provision.'' [85] The organization contended that there is no indication in the rule that the Departments have attempted to identify such overlap.

Commenters disagreed with the Department's assertion, pursuant to the Regulatory Flexibility Act (''RFA'') requirements, that the rule would ''not have a significant economic impact on a substantial number of small entities'' and that the rule only regulates individuals and not small entities. 85 FR at 36288–89. For example, commenters argued that the combined effect of the rule's provisions would, inter alia, affect how practitioners accept cases, manage dockets, or assess fees. Commenters asserted that these effects would, in turn, impact the overall ability of practitioners to provide services and affect aliens' access to representation. In addition, commenters stated that these changes demonstrate the rule would in fact regulate small entities, namely the law firms or other organizations who appear before the Departments.

Response: The Departments agree with commenters that the rule is a ''significant regulatory action.'' As stated in the proposed rule at section V.D, the rule was considered a ''significant regulatory action.'' 85 FR at 36289. As a result, the rule was submitted to the Office of Management and Budget for review, and the Departments included the required analysis of the rule's costs and benefits. *Id.* at 36289–90.

Regarding commenters' concerns that the analysis failed to consider intangible costs like alleged costs to the United States' reputation or the lost ''talent, diversity, and innovation'' from asylees,

[85] The Departments note that reliance on *CSX Transportation* is misplaced because that case involved the agency's consideration of costs to determine a maximum relief penalty amount and was not related to the consideration of costs in the context of an agency's required cost-benefit analysis.

the Departments note that such alleged costs are, in fact, the nonquantifiable opinions of the commenters. The Departments are not required to analyze opinions. Even if commenters' opinions about intangible concepts without clear definitions could be translated into measurable or qualitatively discrete considerations the Departments are unaware of any standard or metric to evaluate the cost of concepts such a country's reputation or ''innovation.'' Moreover, the fact-specific nature of asylum applications and the lack of granular data on the facts of every asylum application prevent the Departments from quantifying particular costs. Further, although Executive Order 12866 observes that nonquantifiable costs are important to consider, the order requires their consideration only to the extent that they can be usefully estimated, and the Departments properly assessed the rules using appropriate qualitative considerations. *See* 85 FR at 36289–90.

As stated above in Section II.C.6.9 of this preamble, each of the Departments' regulations stands on its own. This regulation is not ''inconsistent, incompatible, or duplicative'' with other proposed or final rules published by the Departments, and the Departments disagree with the implication that all rules that would affect one underlying area of the Act, such as asylum eligibility, must be issued in one single rulemaking to comply with Executive Order 12866. *Cf. Ctr. for Biological Diversity* v. *EPA,* 722 F.3d 401, 410 (D.C. Cir. 2013) (agencies have discretion to address an issue through different rulemakings over time).

As noted in the NPRM, the Departments believe that the rule will provide a significant net benefit by allowing for the expeditious and efficient resolution of asylum cases by reducing the number of meritless claims before the immigration courts, thereby providing the Departments with ''the ability to more promptly grant relief or protection to qualifying aliens.'' 85 FR at 36290. These benefits will ensure that the Departments' case volumes do not increase to an insurmountable degree, which in turn will leave additional resources available for a greater number of asylum seekers. Contrary to commenters' claims, the rule will not prevent aliens from submitting asylum applications or receiving relief or protection in appropriate cases. Moreover, the rule is not imposing any new costs on asylum seekers. Additionally, any costs imposed on attorneys or representatives for asylum seekers will be minimal and limited to the time it will take to become familiar with the rule. Immigration practitioners are already subject to professional responsibility rules regarding workload management, 8 CFR 1003.102(q)(1), and are already accustomed to changes in asylum law based on the issuance of new precedential decisions from the BIA or the courts of appeals.

Also, although becoming familiar with such a decision or with this rule may require a certain, albeit small, amount of time, any time spent on this process will likely be offset by the future benefits of the rule. Indeed, one purpose of the rule is to encourage clearer and more efficient adjudications, *see e.g.,* 85 FR at 36290, thus reducing the need for practitioners to become familiar with the inefficient, case-by-case approach that is currently employed for adjudicating issues such as firm resettlement. In addition, the Departments note that the prospective application of the rule will further diminish the effect of the rule on practitioners, as no practitioners will be required to reevaluate any cases or arguments that they are currently pursuing.

The Departments also reject the assertion that the rule would have a significant impact on small entities. The rule applies to asylum applicants, who are individuals, not entities. *See* 5 U.S.C. 601(6). The rule does not limit in any way the ability of practitioners to accept cases, manage dockets, or assess fees. Indeed, nothing in the rule in any fashion regulates the legal representatives of such individuals or the organizations by which those representatives are employed, and the Departments are unaware of cases in which the RFA's requirements have been applied to legal representatives of entities subject to its provisions, in addition to or in lieu of the entities themselves. *See* 5 U.S.C. 603(b)(3) (requiring that an RFA analysis include a description of and, if feasible, an estimate of the number of ''small entities'' to which the rule ''will apply''). To the contrary, case law indicates that indirect effects on entities not regulated by a proposed rule are not subject to an RFA analysis. *See, e.g., Mid-Tex Elec. Co-op, Inc.* v. *FERC,* 773 F.2d 327, 342–43 (D.C. Cir. 1985) (''[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda, and we think that Congress is unlikely to have embarked on such a course without airing the matter.''); *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (''Contrary to what [petitioner] supposes, application of the RFA does turn on whether particular entities are the 'targets' of a given rule. The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply.'. . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.'' (citing *Mid-Tex,* 773 F.2d 327 at 343)); *see also White Eagle Co-op Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009) (''The rule that emerges from this line of cases is that small entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.'').

Further, DOJ reached a similar conclusion in 1997 involving a broader rulemaking regarding asylum adjudications. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 453 (Jan. 3, 1997) (certifying that the rule would not have a significant impact on a substantial number of small entities because it ''affects only Federal government operations'' by revising the procedures for the ''examination, detention, and removal of aliens''). That conclusion was reiterated in the interim rule, 62 FR 10312, 10328 (Mar. 6, 1997), which was adopted with no noted challenge or dispute. This final rule is similar, in that it, too, affects only the operations of the Federal government by amending a subset of the procedures the government uses to process certain aliens. The Departments thus believe that the experience of implementing the prior rule supports their conclusion that there is no evidence that the current rule will have a significant impact on small entities as contemplated by the RFA or an applicable executive order.

6.10. Trafficking Victims Protection Reauthorization Act

Comment: Commenters argued that the proposed rule violates the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (''TVPRA''), Public Law 110–457, 122 Stat. 5044, by failing to consider its impact on applications for relief submitted by UAC. Specifically, commenters cited the TVPRA's instruction that ''[a]pplications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.'' 8 U.S.C. 1232(d)(8). Commenters averred that the rule fails to consider how UAC are subjected to and affected by persecution and other harm as well as the particular vulnerabilities of UAC.

Moreover, commenters argued that the proposed rule violates both the text and the spirit of the TVPRA by creating additional hurdles that increase the risk that UAC will be unable to meaningfully participate in the adjudication of their claims for relief. Specifically, commenters averred that it was unlikely that Congress would have provided protections to UAC from the bars to asylum related to the one-year filing deadline and the safe third country, only to then allow immigration judges to pretermit applications for asylum without a hearing.

One organizational commenter criticized the proposed rule's lack of ''meaningful discussion'' regarding how the new procedures would interact with USCIS's initial jurisdiction over applications for asylum from UAC. Commenters also stated that the proposed rule may result in confusion if an immigration judge exercises jurisdiction over a UAC's application that is pending before USCIS. If this were to occur, commenters alleged, the UAC may be required to submit two applications for asylum and also be required to demonstrate an exception to the one-year filing deadline that would not have been applicable to the application before USCIS.

Commenters also asserted that the new discretionary factor regarding accrual of one year or more of unlawful presence would act as a bar to asylum in direct contradiction of Congress's recognition of the need to exempt UACs from the one-year filing deadline. Although commenters acknowledged that this is a discretionary factor and not an outright bar, commenters asserted that even including this as a discretionary factor is contrary to Congress's intent.

Commenters stated that, based on the proposed regulatory language and accompanying preamble language, it is unclear whether asylum officers would be permitted to render a determination that an asylum application is frivolous for UAC who file defensive applications before USCIS in the first instance. By permitting the asylum officer to focus on matters that may be frivolous if the asylum officer identifies indicators of frivolousness, commenters asserted, the interview would become adversarial, in contradiction of Congress's purpose of granting UAC the non-adversarial, child-appropriate setting of an asylum interview for initial review of the asylum application.

Response: As recognized in the proposed rule, UAC[86] are not subjected to expedited removal. *See* 8 U.S.C. 1232(a)(5)(D)(i). Regarding the remainder of the rule, the rule does not violate the TVPRA. The TVPRA enacted multiple procedures and protections specific to UAC that do not apply to other similarly-situated asylum applicants. Although UAC are not subject to either the safe third country exception or the requirement to file an application within one year following the alien's arrival in the United States, INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E), Congress did not exempt UAC from all bars to asylum eligibility. As a result, UAC, like all asylum seekers, (1) may not apply for asylum if they previously applied for asylum and their application was denied, INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C), and (2) are ineligible for asylum if they are subject to any of the mandatory bars at section 208(b)(2)(A)(i)–(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(i)–(vi), or if they are subject to any additional bars implemented pursuant to the Attorney General's and Secretary's authority to establish additional limitations on asylum eligibility by regulation, *see* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). That Congress did not exempt UAC from all bars indicates congressional intent to hold UAC to the same standards to establish eligibility for asylum as other similarly situated applicants unless specifically exempted.

Contrary to commenters' suggestion, this rule does not alter asylum officers' jurisdiction over asylum applications from UAC. *See* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). If UAC are placed in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a, and raise asylum claims, immigration judges will continue to refer the claims to asylum officers pursuant to the TVPRA, consistent with the asylum statute and procedures in place prior to the promulgation of this rule. *See* INA 208(b)(3)(C), 8 U.S.C 1158(b)(3)(C). Those asylum officers will determine whether the UAC are eligible for asylum on the basis of this rule. This rule does not affect any other procedure or protection implemented by the TVPRA.

The Departments disagree that the rule undermines the spirit of the TVPRA by adding accrual of unlawful presence for one year or more as a negative discretionary factor. Although the NPRM may have been unclear on the point, its citation to INA 212(a)(9)(B) and (C), 8 U.S.C. 1182(a)(9)(B) and (C), 85 FR at 36284, indicated that its intent was for the phrase ''unlawful presence'' to have the same meaning as in INA 212(a)(9)(B)(ii) and (iii), 8 U.S.C. 1182(a)(9)(B)(ii) and (iii). Under INA 212(a)(9)(B)(iii)(I), 8 U.S.C. 1182(a)(9)(B)(iii)(I), aliens under the age of 18, such as UAC, do not accrue unlawful presence. Thus, commenters' concerns are unfounded, and the Departments are clarifying that point in the final rule.

Further, the Departments have concluded that the safeguards in place for allowing asylum officers to make a finding that an asylum application is frivolous are sufficient to protect UAC in the application process.[87] Even if an asylum officer finds an application is frivolous, the application is referred to an immigration judge, who provides review of the determination. The asylum officer's determination does not render the applicant permanently ineligible for immigration benefits unless the immigration judge or the BIA also makes a finding of frivolousness. 8 CFR 208.20(b), 1208.20(b). Further, asylum officers continue to conduct child appropriate interviews by taking into account age, stage of language development, background, and level of sophistication. *See* USCIS, Interviewing Procedures for Minor Applicants (Aug. 6, 2020), *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves.*

Finally, the Departments note that, for UAC who are not eligible for asylum

[86] UAC are children who (1) have no lawful immigration status in the United States, (2) are under the age of 18, and (3) do not have a parent or legal guardian in the United States or, if in the United States, available to provide care and physical custody. 6 U.S.C. 279(g)(2).

[87] As a practical matter, the Departments note that the statutory mens rea requirement that a frivolous asylum application be ''knowingly'' filed will likely preclude a frivolousness finding against very young UAC.

under this rule but who may still be eligible for withholding of removal under section 241 of the Act, 8 U.S.C. 1231, or protection under the CAT regulations, DOJ is cognizant of the ''special circumstances'' often presented by juvenile respondents in immigration proceedings. DOJ's immigration judges may make certain modifications to ordinary courtroom proceedings to account for juvenile respondents that would not be made for adult respondents. *See* EOIR, Operating Policies and Procedures Memorandum 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children 4–6 (Dec. 20, 2017), *https://www.justice.gov/eoir/file/oppm17-03/download; see also id. at 7 (directing immigration judges to take* ''*special care*'' *in cases involving UAC by, for example, expediting the consideration of requests for voluntary departure).*

In short, the Departments have fully considered whether the rule will have any particular impacts on UAC that are not already accounted for in existing law or are not addressed in the rule itself. The Departments have also fully considered commenters' concerns. Thus, for the reasons given above, the Departments believe that the rule does not have an unlawful impact on minors in general or on UAC in particular.

7. Retroactive Applicability

Comment: One organization stated generally that nearly all of the NPRM's provisions are illegally retroactive in effect. Multiple commenters noted that, although the NPRM seeks to make its frivolous definition prospective only in application, *see* 85 FR at 36304, it is silent as to whether its other provisions would apply retroactively. As a result, one organization claimed, the inference is that the Departments intend each of the NPRM's remaining provisions to apply to applications that are pending at the time the rule becomes effective. The organization alleged that this would violate the presumption against retroactivity, noting that a regulation cannot be applied retroactively unless Congress has provided a clear statement that the agencies may promulgate regulations with that effect. *See INS* v. *St. Cyr,* 533 U.S. 289, 316–17 (2001). The organization also claimed there is no statute authorizing the Departments to promulgate regulatory changes to asylum that have retroactive effect, contending the provisions of the NPRM would either impair rights concerning, or place new disabilities on, asylum applications already filed. The organization alleged that the proposed changes in the NPRM would harm asylum seekers.

At least one organization claimed that the NPRM's substantive standards would have an impermissible retroactive effect on pending applications. One organization alleged that each standard, including the list of bars to the favorable exercise of discretion, would overrule BIA precedent, attempt to overrule Federal appellate court precedent, shift burdens of proof, or otherwise change settled law. Another organization noted that there are currently more than 300,000 asylum cases pending before the asylum office and almost 1.2 million cases pending before the U.S. immigration courts, many of which include asylum applications. The organization argued that, if the rule is finalized, the Departments ''must clarify'' that its provisions will not be applied retroactively.

One commenter claimed that if the rule is enacted with the retroactive provisions intact, it will immediately be enjoined.

At least one commenter expressed concern that, if the NPRM is applied retroactively, there will be ''mass denials which violate due process,'' and the Departments will be ''tied up in Federal court for the next decade.'' At least one commenter contended that Congress will cease to fund the Departments because it will recognize that the money will be used to fund the attorney fees of litigants pursuant to the Equal Access to Justice Act ''after countless litigants prevail in their suits against [the Departments].''

At least one commenter claimed that, because the Supreme Court is currently attempting to ''reign in the administrative state'' and Congress is ''fed up'' with agency waste, the Departments are ''signing their own death warrants'' by seeking to enact the proposed rule. At least one commenter suggested the Departments' goal is to ''[s]hut down legal immigration by convincing Congress to defund the only agencies capable of adjudicating immigration petitions,'' suggesting this is ''treasonous'' and claiming that those who want to end legal immigration are in the extreme minority. At least one commenter emphasized that legal immigration is beneficial to the national economy but suggested this does not matter if those who care ''are not in a position to stop the train before it drives off a cliff.''

At least one organization claimed that the hundreds of thousands of pending asylum applications implicate a reliance interest in ''the state of the law as it stands.'' At least one organization alleged that this reliance interest is ''further prejudiced'' by the 30-day comment period allowed by the Departments, contending that ''in one swoop, previously eligible applicants may find themselves ineligible without any warning.''

Another organization expressed particular concern for LGBTQ applicants, claiming that applying the rule's standards to over 800,000 pending applications violates Fifth Amendment due process rights that apply ''equally to all people in the United States.'' One organization emphasized that the rule would apply to individuals, many of whom have U.S.-born children, who have already applied for asylum and are waiting on a hearing or interview.

Response: Although the Departments believe that substantial portions of the rule are most appropriately classified as a clarification of existing law rather than an alteration of prior substantive law, *see Levy* v. *Sterling Holding Co., LLC,* 544 F.3d 493, 506 (3d Cir. 2008) (''Thus, where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does *not* have an impermissible retroactive effect, regardless of whether Congress has delegated retroactive rulemaking power to the agency.'' (emphasis in original)), they nevertheless recognize that the potential retroactivity of the rule was not clear in the NPRM. Accordingly, to the extent that the rule changes any existing law, the Departments are electing to make the rule prospective to apply to all asylum applications—including applications for statutory withholding of removal and protection under the CAT regulations—filed on or after its effective date and, for purposes of the changes to the credible fear and related screening procedures, and reasonable fear review procedures, to all aliens apprehended or otherwise encountered by DHS on or after the effective date.[88] Nevertheless, to the extent that the rule merely codifies existing law or authority, nothing in the rule precludes adjudicators from

[88] In addition to serving as a bar to refugee admission and the granting of asylum, the concept of firm resettlement also operates as a bar to the adjustment of status of an asylee. INA 209(b)(4), 8 U.S.C. 1159(b)(4); 8 CFR 209.2(a)(1)(iv) and 1209.2(a)(1)(iv). Consistent with the prospective nature of the rule, the Departments will apply the new regulatory definitions of ''firm resettlement'' in 8 CFR 208.15 and 1208.15 for purposes of INA 209(b)(4), 8 U.S.C. 1159(b)(4), only to aliens who apply for asylum, are granted asylum, and then subsequently apply for adjustment of status, where all of these events occur on or after the effective date of this rule.

applying that existing authority to pending cases independently of the prospective application of the rule.[89]

The Departments decline to respond to commenters' assertions about potential implications that the rule's application to pending cases may have, such as ''mass denials'' of asylum applications and impact on future appropriations, as such comments are both unmoored from a reasonable basis in fact and wholly speculative due to the case-by-case and fact-intensive nature of many asylum-application adjudications. Further, as noted, the Departments are applying the rule prospectively, so the underlying factual premise of the commenters' concern is erroneous.

8. Miscellaneous/Other Points

8.1. Likelihood of Litigation

Comment: Commenters opposed the rule because it would ''create a flurry of litigation'' causing ''fundamental aspects of immigration law [to] remain uncertain for many years.''

Response: The Departments recognize that litigation, including the potential for an initial nationwide injunction, has become almost inevitable regarding any immigration policy or regulation that does not provide a perceived benefit to aliens, and they are aware that litigation will likely follow this rule, just as it has others of similar scope. *Cf. DHS* v. *New York,* 140 S. Ct. 599, 599 (2020) (Gorsuch, J. concurring in the grant of a stay) (''On October 10, 2018, the Department of Homeland Security began a rulemaking process to define the term 'public charge,' as it is used in the Nation's immigration laws. Approximately 10 months and 266,000 comments later, the agency issued a final rule. Litigation swiftly followed, with a number of States, organizations, and individual plaintiffs variously alleging that the new definition violates the Constitution, the Administrative Procedure Act, and the immigration laws themselves. These plaintiffs have urged courts to enjoin the rule's enforcement not only as it applies to them, or even to some definable group having something to do with their claimed injury, but as it applies to *anyone.*''). The Departments are also aware of the pernicious effects of nationwide injunctions. *See, e.g., Trump* v. *Hawaii,* 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J. concurring) (''Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called 'universal' or 'nationwide' injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the Federal court system—preventing legal questions from percolating through the Federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.'' (footnote omitted)). The Departments do not believe, however, that the inevitability of litigation over contested issues is a sufficient basis to stop them from exercising statutory and regulatory prerogatives in furtherance of the law and the policies of the Executive Branch. Accordingly, the Departments decline the invitation to withdraw the rule due to the threat of litigation.

8.2. DHS Officials

Comment: Commenters also argued that the proposed rule is procedurally invalid due to concerns with the authority of multiple DHS officials. Commenters stated that the rule is invalid because of the service of Ken Cuccinelli at USCIS. For example, commenters cited *L.M.–M.* v. *Cuccinelli,* 442 F. Supp. 3d 1 (D.D.C. 2020), in support of the argument that ''Mr. Cuccinelli's unlawful appointment invalidates any regulations that might be put into effect, implemented, or adopted during his tenure at USCIS.'' Commenters further noted that Mr. Cuccinelli began serving as the head of USCIS over one year ago, on June 10, 2019, despite the 210-day limitation for temporary appointments to senate-confirmed positions implemented by the Federal Vacancies Reform Act of 1998 (''FVRA''), Public Law 105–277, sec. 151, 112 Stat. 2681, 2681–612 through 2618–13 (codified at 5 U.S.C. 3346).

Similarly, commenters stated that Acting Secretary Chad Wolf and Chad Mizelle, the Senior Official Performing the Duties of the General Counsel, both are serving in violation of the FVRA and, accordingly, both lack signature authority that has force or effect. *See* 5 U.S.C. 3348(d)(1).

Response: Neither the NPRM nor this final rule was signed by Mr. Cuccinelli. Thus, the status of Mr. Cuccinelli's service within the Department is immaterial to the lawfulness of this rule. The NPRM and this final rule were signed by Chad Mizelle, the Senior Official Performing the Duties of the General Counsel for DHS, and not by Ken Cuccinelli. As indicated in the proposed rule at Section V.H, Chad Wolf, the Acting Secretary of Homeland Security, reviewed and approved the proposed rule and delegated the signature authority to Mr. Mizelle.

Secretary Wolf is validly acting as Secretary of Homeland Security. On April 9, 2019, then-Secretary Nielsen, who was Senate confirmed, used the authority provided by 6 U.S.C. 113(g)(2) to establish the order of succession for the Secretary of Homeland Security. This change to the order of succession applied to any vacancy. This exercise of the authority to establish an order of succession for DHS pursuant to 6 U.S.C. 113(g)(2) superseded the FVRA and the order of succession found in Executive Order 13753, 81 FR 90667 (Dec. 9, 2016). As a result of this change, and pursuant to 6 U.S.C. 113(g)(2), Kevin K. McAleenan, who was Senate-confirmed as the Commissioner of CBP, was the next successor and served as Acting Secretary without time limitation. Acting Secretary McAleenan subsequently amended the Secretary's order of succession pursuant to 6 U.S.C. 113(g)(2), placing the Under Secretary for Strategy, Policy, and Plans position third in the order of succession, below the positions of the Deputy Secretary and Under Secretary for Management. Because the Deputy Secretary and Under Secretary for Management positions were vacant when Mr. McAleenan resigned, Mr. Wolf, as the Senate-confirmed Under Secretary for Strategy, Policy, and Plans, was the next successor and began serving as the Acting Secretary.

Further, because he has been serving as the Acting Secretary pursuant to an order of succession established under 6 U.S.C. 113(g)(2), the FVRA's prohibition on a nominee's acting service while his or her nomination is pending does not apply, and Mr. Wolf remains the Acting

[89] For example, the rule states that the Secretary or Attorney General, subject to an exception, will not favorably exercise discretion in adjudicating an asylum application for an alien who has failed to satisfy certain tax obligations. 8 CFR 208.13(d)(2)(i)(E) and 1208.13(d)(2)(i)(E). That provision applies only to asylum applications filed on or after the effective date of the rule. However, the rule does not preclude the consideration of unfulfilled tax obligations as a discretionary consideration in adjudicating a pending asylum application based on established case law that may be applied to pending applications. *See, e.g., Matter of A–H–,* 23 I&N Dec. at 782–83 (''Moreover, certain additional factors weigh against asylum for respondent: Specifically, respondent testified that he received money from overseas for his political work, yet he never filed income tax returns in the United States and his children nevertheless received financial assistance from the Commonwealth of Virginia. Respondent's apparent tax violations and his abuse of a system designed to provide relief to the needy exhibit both a disrespect for the rule of law and a willingness to gain advantage at the expense of those who are more deserving.'' (footnote omitted)). In short, existing law will continue to apply to asylum applications filed prior to the effective date of this rule, regardless of whether that law is altered or incorporated into the rule.

Secretary notwithstanding President Trump's September 10 transmission to the Senate of Mr. Wolf's nomination to serve as DHS Secretary. *Compare* 6 U.S.C. 113(a)(1)(A) (cross-referencing the FVRA without the ''notwithstanding'' caveat), *with id.* 113(g)(1)–(2) (noting the FVRA provisions and specifying, in contrast, that section 113(g) provides for acting secretary service ''notwithstanding'' those provisions); *see also* 5 U.S.C. 3345(b)(1)(B) (restricting acting officer service under section 3345(a), in particular, by an official whose nomination has been submitted to the Senate for permanent service in that position).

That said, there have been recent challenges to whether Mr. Wolf's service is invalid, resting on the erroneous contentions that the orders of succession issued by former Secretary Nielsen and former Acting Secretary McAleenan were invalid. The Departments believe those challenges are not based on an accurate view of the law. But even if those contentions are legally correct—meaning that neither former Secretary Nielsen nor former Acting Secretary McAleenan issued a valid order of succession under 6 U.S.C. 113(g)(2)—then the FVRA would have applied, and Executive Order 13753 would have governed the order of succession for the Secretary of Homeland Security from the date of Nielsen's resignation.

The FVRA provides an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. In that alternate scenario, under the authority of the FVRA, Mr. Wolf would have been ineligible to serve as the Acting Secretary of DHS after his nomination was submitted to the Senate, *see* 5 U.S.C. 3345(b)(1)(B), and Peter Gaynor, the Administrator of the Federal Emergency Management Agency (''FEMA''), would have—by operation of Executive Order 13753—become eligible to exercise the functions and duties of the Secretary temporarily in an acting capacity. This is because Executive Order 13753 pre-established the President's succession order for DHS when the FVRA applies. Mr. Gaynor would have been the most senior official eligible to exercise the functions and duties of the Secretary under that succession order, and thus would have become the official eligible to act as Secretary once Mr. Wolf's nomination was submitted to the Senate. *See* 5 U.S.C. 3346(a)(2). Then, in this alternate scenario in which, as assumed above, there was no valid succession order under 6 U.S.C. 113(g)(2), the submission of Mr. Wolf's nomination to the Senate would have restarted the FVRA's time limits. *See* 5 U.S.C. 3346(a)(2).

Out of an abundance of caution, and to minimize any disruption to DHS and to the Administration's goal of maintaining homeland security, on November 14, 2020, with Mr. Wolf's nomination still pending in the Senate, Mr. Gaynor exercised the authority of Acting Secretary that he would have had (in the absence of any governing succession order under 6 U.S.C. 113(g)(2)) to designate a new order of succession under 6 U.S.C. 113(g)(2) (the ''Gaynor Order'').[90] In particular, Mr. Gaynor issued an order of succession with the same ordering of positions listed in former Acting Secretary McAleenan's November 2019 order. The Gaynor Order thus placed the Under Secretary for Strategy, Policy, and Plans above the FEMA Administrator in the order of succession. Once the Gaynor Order was executed, it superseded any authority Mr. Gaynor may have had under the FVRA and confirmed Mr. Wolf's authority to continue to serve as the Acting Secretary. Hence, regardless of whether Mr. Wolf already possessed authority pursuant to the November 8, 2019, order of succession effectuated by former Acting Secretary McAleenan (as the Departments have previously concluded), the Gaynor Order provides an alternative basis for concluding that Mr. Wolf currently serves as the Acting Secretary.[91]

On November 16, 2020, Acting Secretary Wolf ratified any and all actions involving delegable duties that he took between November 13, 2019, through November 16 2020, including the NPRM that is the subject of this rulemaking.

Under section 103(a)(1) of the Act, 8 U.S.C. 1103(a)(1), the Secretary is charged with the administration and enforcement of the INA and all other immigration laws (except for the powers, functions, and duties of the President, the Attorney General, and certain consular, diplomatic, and Department of State officials). The Secretary is also authorized to delegate his or her authority to any officer or employee of the agency and to designate other officers of the Department to serve as Acting Secretary. *See* INA 103, 8 U.S.C. 1103, and 6 U.S.C. 113(g)(2). The HSA further provides that every officer of the Department ''shall perform the functions specified by law for the official's office or prescribed by the Secretary.'' 6 U.S.C. 113(f). Thus, the designation of the signature authority from Acting Secretary Wolf to Mr. Mizelle is validly within the Acting Secretary's authority.

8.3. Article I Immigration Courts

Comment: At least one commenter, the former union representing immigration judges, expressed a belief that the immigration courts and the BIA should be moved from within DOJ in the Executive Branch into an independent article I court system.[92] The commenter indicated that such a move would address ''political influence'' and ensure ''neutral decision making.''

Response: Immigration judges are required to adjudicate cases in an ''impartial manner,'' 8 CFR 1003.10(b); they exercise ''independent judgment and discretion,'' *id.;* and they ''should not be swayed by partisan interests or public clamor,'' EOIR, *Ethics and Professionalism Guide for Immigration*

[90] Mr. Gaynor signed an order that established an identical order of succession on September 10, 2020, the day Mr. Wolf's nomination was submitted, but it appears he signed that order before the nomination was received by the Senate. To resolve any concern that his September 10 order was ineffective, Mr. Gaynor signed a new order on November 14, 2020. Prior to Mr. Gaynor's new order, the U.S. District Court for the District of New York issued an opinion concluding that Mr. Gaynor did not have authority to act as Secretary, relying in part on the fact that DHS did not notify Congress of Administrator Gaynor's service, as required under 5 U.S.C. 3349(a). *See Batalla Vidal* v. *Wolf,* No. 16CV4756NGGVMS, 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020). The Departments disagree that the FVRA's notice requirement affects the validity of an acting officer's service; nowhere does section 3349 indicate that agency reporting obligations are tied to an acting officer's ability to serve.

[91] On October 9, 2020, the U.S. District Court for the District of Columbia issued an opinion indicating that it is likely that section 113(g)(2) orders can be issued by only Senate-confirmed secretaries of DHS and, thus, that Mr. Gaynor likely had no authority to issue a section 113(g)(2) succession order. *See Nw. Immigrant Rights Project* v. *United States Citizenship & Immigration Servs.,* No. CV 19–3283 (RDM), 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020). This decision is incorrect because the authority in section 113(g)(2) allows ''the Secretary'' to designate an order of succession, *see* 6 U.S.C. 113(g)(2), and an ''acting officer is vested with the same authority that could be exercised by the officer for whom he acts.'' *In re Grand Jury Investigation,* 916 F.3d 1047, 1055 (D.C. Cir. 2019). The Acting Secretary of DHS is accordingly empowered to exercise the authority of ''the Secretary'' of DHS to ''designate [an] order of succession.'' 6 U.S.C. 113(g)(2). In addition, this is the only district court opinion to have reached such a conclusion about the authority of the Acting Secretary, and the Departments are contesting that determination.

[92] On November 2, 2020, the Federal Labor Relations Authority ruled that immigration judges are management officials for purposes of 5 U.S.C. 7103(a)(11), and, thus, excluded from a bargaining unit pursuant to 5 U.S.C. 7112(b)(1). *U.S. Dept. of Justice, Exec. Office for Immigration Review and National Association of Immigration Judges, Int'l Fed. of Prof. and Tech. Engineers Judicial Council 2,* 71 FLRA No. 207 (2020). That decision effectively decertified the union that previously represented a bargaining unit of non-supervisory immigration judges.

Judges, sec. VIII (Jan. 26, 2011), *https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.* To the extent that a union which represented immigration judges suggests that the members of its former bargaining unit do not engage in ''neutral decision making'' or are currently swayed by partisan influence in derogation of their ethical obligations, the Departments respectfully disagree, and note that the issue is one to be resolved between the former union and the members of its former bargaining unit, rather than through a rulemaking. The Departments are also unaware of any complaints filed by the former union regarding any specific immigration judges who have failed to engage in neutral decision making. In short, the commenter's premise is unfounded in either fact or law.

Otherwise, the recommendation is both beyond the scope of this rulemaking and the Departments' authority. Congress has the sole authority to create an article I court. *E.g.* 26 U.S.C. 7441 (''There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.''). Despite this authority, Congress has provided for a system of administrative hearings for immigration cases, *see, e.g.,* INA 240, 8 U.S.C. 1229a (laying out administrative procedures for removal proceedings), which the Departments believe should be maintained. *Cf. Strengthening and Reforming America's Immigration Court System: Hearing before the Subcomm. on Border Sec. & Immigration of the S. Comm. on the Judiciary,* 115th Cong. (2018) (written response to Questions for the Record of James McHenry, Director, EOIR) (''The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further.'').

9. Severability

Comment: Some commenters disagreed with the Departments' inclusion of severability provisions in the rule. *See* 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). For example, at least one commenter stated that the severability provisions conflict with the premise that all the provisions in the rule are related. Another commenter disagreed with the severability provisions, stating that the rule should instead be struck in its entirety.

Response: The changes made by the rule function sensibly independent of the other provisions. As a result, the Departments included severability language for each affected part of title 8 CFR. 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). In other words, the Departments included these severability provisions to clearly illustrate the Departments' belief that the severance of any affected sections ''will not impair the function of the statute as a whole'' and that the Departments would have enacted the remaining regulatory provisions even without any others. *See K Mart Corp.* v. *Cartier, Inc.,* 486 U.S. 281, 294 (1988) (discussing whether an agency's regulatory provision is severable). The Departments disagree that this severability analysis is impacted by the interrelatedness of either the provisions of this rule or the affected parts more generally. Indeed, it is reasonable for agencies, when practical, to make multiple related changes in a single rulemaking in order to best inform the public and facilitate notice and comment.

III. Regulatory Requirements

A. Administrative Procedure Act

This final rule is being published with a 30-day effective date as required by the Administrative Procedure Act. 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Departments have reviewed this regulation in accordance with the Regulatory Flexibility Act, *see* 5 U.S.C. 601 *et seq.,* and, as explained more fully above, have determined that this rule will not have a significant economic impact on a substantial number of small entities, *see* 5 U.S.C. 605(b). This regulation affects only individual aliens and the Federal government. Individuals do not constitute small entities under the Regulatory Flexibility Act. *See* 5 U.S.C. 601(6).

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this final rule is not a major rule as defined by section 804 of the Congressional Review Act. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. *See* 5 U.S.C. 804(2).

E. Executive Orders 12866, 13563, and 13771

This final rule is considered by the Departments to be a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 because it raises novel legal or policy issues. Accordingly, the regulation has been submitted to the Office of Management and Budget (''OMB'') for review.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits; reducing costs; harmonizing rules; and promoting flexibility.

The final rule would change or provide additional clarity for adjudicators across many issues commonly raised by asylum applications and would potentially streamline the overall adjudicatory process for asylum applications. Although the regulation will improve the clarity of asylum law and help streamline the credible fear review process, the regulation does not change the nature of the role of an immigration judge or an asylum officer during proceedings for consideration of credible fear claims or asylum applications. Notably, immigration judges will retain their existing authority to review de novo the determinations made by asylum officers in a credible fear proceeding, and will continue to control immigration court proceedings. In credible fear proceedings, asylum officers will continue to evaluate the merits of claims for asylum, withholding of removal, and CAT protection for possible referral to an immigration judge. Although this rule expands the bases on which an asylum officer may determine that a claim does not merit referral (and, as a consequence, make a negative fear determination), the alien will still be able to seek review of that negative fear

determination before the immigration judge.

Immigration judges and asylum officers are already trained to consider all relevant legal issues in assessing a credible fear claim or asylum application, and the final rule does not implement any changes that would make adjudications more challenging than those that are already conducted. For example, immigration judges already consider issues of persecution, nexus, particular social group, frivolousness, firm resettlement, and discretion in assessing the merit of an asylum application, and the provision of clearer standards for considering those issues in this rule does not add any operational burden or increase the level of operational analysis required for adjudication. Accordingly, the Departments do not expect the changes to increase the adjudication time for immigration court proceedings involving asylum applications or for reviews of negative fear determinations.

Depending on the manner in which DHS exercises its prosecutorial discretion for aliens potentially subject to expedited removal, the facts and circumstances of each individual alien's situation, DHS's interpretation or the relevant regulations, and application of those regulations by individual adjudicators, the changes may decrease the number of cases of aliens subject to expedited removal that result in a full hearing on an application for asylum. In all cases, however, an alien will retain the opportunity to request immigration judge review of DHS's initial fear determination.

The Departments are implementing changes that may affect any alien subject to expedited removal who makes a fear claim and any alien who applies for asylum, statutory withholding of removal, or protection under the CAT regulations. The Departments note that these changes are likely to result in fewer asylum grants annually due to clarifications regarding the significance of discretionary considerations and changes to the definition of ''firm resettlement.'' However, because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application, neither DOJ nor DHS can quantify precisely the expected decrease. As of September 30, 2020, EOIR had 589,276 cases pending with an asylum application. EOIR, *Workload and Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download*. In FY 2019, at the immigration court level, EOIR granted 18,816 asylum applications and denied 45,285 asylum applications. *See* 85 FR at 36289. An additional 27,112 asylum applications were abandoned, withdrawn, or otherwise not adjudicated. *Id.* As of January 1, 2020, USCIS had 338,931 applications for asylum and for withholding of removal pending. *Id.* at 36289 & n.44. In FY 2019, USCIS received 96,861 asylum applications, and approved 19,945 such applications. *Id.* at 36289 & n.45.

The Departments expect that the aliens most likely to be impacted by this rule's provisions are those who are already unlikely to receive a grant of asylum under existing law. Assuming DHS places those aliens into expedited removal proceedings, the Departments have concluded that it will be more likely that they would receive a more prompt adjudication of their claims for asylum or withholding of removal than they would under the existing regulations. Depending on the individual circumstances of each case, this rule would mean that such aliens would likely not remain in the United States—for years, potentially—pending resolution of their claims.

An alien who is ineligible for asylum may still be eligible to apply for the protection of withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding of removal under regulations issued pursuant to the legislation implementing U.S. obligations under Article 3 of the CAT. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 208.17 through 208.18, 1208.16, and 1208.17 through 1208.18. For those aliens barred from asylum under this rule who would otherwise be positively adjudicated for asylum, it is possible they would qualify for withholding (provided a bar to withholding did not apply separate and apart from this rule). To the extent there are any direct impacts of this rule, they would almost exclusively fall on that population. Further, the full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DHS nor DOJ collects such data at such a level of granularity.

Overall, the Departments assess that operational efficiencies will likely result from these changes, which could, inter alia, reduce the number of meritless claims before the immigration courts, provide the Departments with the ability to more promptly grant relief or protection to qualifying aliens, and ensure that those who do not qualify for relief or protection are removed more efficiently than they are under current rules.

F. Executive Order 12988: Criminal Justice Reform

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C 3501–3512, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The changes made in this final rule required DHS to revise USCIS Form I–589, Application for Asylum and for Withholding of Removal, OMB Control Number 1615–0067. DOJ and DHS invited public comments on the impact to the proposed collection of information for 60 days. *See* 85 FR at 36290.

DOJ and DHS received multiple comments on the information collection impacts of the proposed rule. Commenters expressed concern that the proposed revisions significantly increase the time and cost burdens for aliens seeking protection from persecution and torture, as well as adding to the burden of immigration lawyers, asylum officers, advocacy organizations, and immigration judges. DHS and DOJ have summarized all of the comments related to information collection and have provided responses in a document titled ''Form I–589 Public Comments and Response Matrix,'' which is posted in the rulemaking docket EOIR–2020–0003 at *https://www.regulations.gov/*. As a result of the public comments, DHS has increased the burden estimate for the Form I–589 and has updated the supporting statement submitted to OMB accordingly. The supporting statement can be found at *https://www.reginfo.gov/*. The updated abstract is as follows:

USCIS Form I–589

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Asylum and for Withholding of Removal.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–589; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Form I–589 is necessary to determine whether an alien applying for asylum or withholding of removal in the United States is classified as a refugee and is eligible to remain in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–589 is approximately 114,000, and the estimated hourly burden per response is 18.5 [93] hours. The estimated number of respondents providing biometrics is 110,000, and the estimated hourly burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual burden associated with this collection of information in hours is 2,237,700.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $70,406,400.[94]

H. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1244

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 208 and 235 are amended as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; 8 CFR part 2.

■ 2. Amend § 208.1 by adding paragraphs (c) through (g) to read as follows:

§ 208.1 General.

* * * * *

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group constituted egregious conduct.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a State or a unit thereof. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related

[93] This estimate is higher than the estimate provided in the NPRM because USCIS reevaluated its projections and determined that the hourly burden per response was likely to be higher than USCIS had initially estimated, which also increased the total estimated public burden (in hours).

[94] This estimate is higher than the estimate provided in the NPRM because USCIS reevaluated its projections in response to public comments suggesting that the monetary cost was likely to be higher than USCIS had initially estimated.

to efforts by the State to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the State or a legal sub-unit of the State. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of screening or adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats, except that particularized threats of severe harm of an immediate and menacing nature made by an identified entity may constitute persecution; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application or withholding of removal under section 241(b)(3) of the Act, the Secretary, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

(1) Interpersonal animus or retribution;

(2) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a State or expressive behavior that is antithetical to the State or a legal unit of the State;

(4) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(5) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(6) Criminal activity;

(7) Perceived, past or present, gang affiliation; or,

(8) Gender.

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence offered in support of such an application which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, shall not be admissible in adjudicating that application, provided that nothing in this paragraph shall be construed as prohibiting the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

■ 3. Amend § 208.2 by adding paragraph (c)(1)(ix) to read as follows:

§ 208.2 Jurisdiction.

* * * * *

(c) * * *

(1) * * *

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with §§ 208.30, 1003.42, or 1208.30.

* * * * *

■ 4. Amend § 208.5 by revising the first sentence of paragraph (a) to read as follows:

§ 208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear or reasonable fear determination under 8 CFR 208.30 or 208.31, and except in the case of an alien who is in custody pending a credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31. * * *

* * * * *

■ 5. Amend § 208.6 by revising paragraphs (a) and (b) and adding paragraphs (d) and (e) to read as follows:

§ 208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Secretary.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, or has received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

* * * * *

(d)(1) Any information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or

protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws,

(ii) As part of any State or Federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any State or Federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

(v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and

(vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status including petitions for review filed in accordance with 8 U.S.C. 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees and officers of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the Department of Labor, or a U.S. national security agency having a need to examine the information for an official purpose; or

(2) Where a United States Government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

■ 6. Amend § 208.13 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) and (d) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i) and (ii) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an alien merits a grant of asylum in the exercise of discretion:

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(C) Such country or all such countries were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Secretary, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) Such country was, at the time of the transit, not a party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and received a final judgment denying the alien protection in that country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) All such countries were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(C) Would otherwise be subject to § 208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence, unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;

(E) At the time the asylum application is filed with DHS has:

(*1*) Failed to timely file (or timely file a request for an extension of time to file) any required Federal, State, or local income tax returns;

(*2*) Failed to satisfy any outstanding Federal, State, or local tax obligations; or

(*3*) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(*1*) Exceptional circumstances prevented the alien from attending the interview; or

(*2*) The interview notice was not mailed to the last address provided by the alien or his or her representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of those changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Secretary, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial or referral (which may result in the denial by an immigration judge) of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i). Depending on the gravity of the circumstances underlying the application of paragraph (d)(2)(i), a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

■ 7. Revise § 208.15 to read as follows:

§ 208.15 Definition of ''firm resettlement.''

(a) An alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim:

(1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and—

(i) Received or was eligible for any permanent legal immigration status in that country;

(ii) Resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or

(iii) Resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution or torture, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, provided that time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of this paragraph; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

(ii) The alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless the alien establishes that he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) from the alien's parent.

■ 8. Amend § 208.16 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) to read as follows:

§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b)(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under the totality of the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the

persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including but not limited to persecutors who are gang members, public officials who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

■ 9. Amend § 208.18 by revising paragraphs (a)(1) and (7) to read as follows:

§ 208.18 Implementation of the Convention Against Torture.

(a) * * *

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law shall not constitute pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

* * * * *

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

* * * * *

■ 10. Revise § 208.20 to read as follows:

§ 208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, and before January 11, 2021, an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An application is frivolous if:

(1) Any of the material elements in the asylum application is deliberately fabricated, and the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

(2) Paragraphs (b) through (f) of this section shall only apply to applications filed on or after January 11, 2021.

(b) For applications filed on or after January 11, 2021, an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. For any application referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph 1208.20(c).

(c) For applications filed on or after January 11, 2021, an asylum application is frivolous if it:

(1) Contains a fabricated material element;

(2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

(3) Is filed without regard to the merits of the claim; or

(4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolousness finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may also be found frivolous unless:

(1) The alien wholly disclaims the application and withdraws it with prejudice;

(2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien knowingly filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

■ 11. Add § 208.25 to read as follows:

§ 208.25 Severability.

The provisions of part 208 are separate and severable from one another. In the event that any provision in part 208 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

■ 12. Amend § 208.30 by:

■ a. Revising the section heading; and

■ b. Revising paragraphs (a), (b), (c), (d) introductory text, (d)(1) and (2), (d)(5) and (6), (e) introductory text, (e)(1) through (5), (e)(6) introductory text, (e)(6)(ii), (e)(6)(iii) introductory text,

(e)(6)(iv), the first sentence of paragraph (e)(7) introductory text, and paragraphs (e)(7)(ii), (f), and (g).

The revisions read as follows:

§ 208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) of the Act, DHS has exclusive jurisdiction to make the determinations described in this subpart B. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Process and Authority.* If an alien subject to section 235(a)(2) or 235(b)(1) of the Act indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with this section. An asylum officer shall then screen the alien for a credible fear of persecution, and as necessary, a reasonable possibility of persecution and reasonable possibility of torture. An asylum officer, as defined in section 235(b)(1)(E) of the Act, has the authorities described in 8 CFR 208.9(c) and must conduct an evaluation and make a determination consistent with this section.

(c) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

(1) Arrived in the United States concurrently with the principal alien; and

(2) Desires to be included in the principal alien's determination. However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

(d) *Interview.* The asylum officer will conduct the interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. The asylum officer shall conduct the interview as follows:

(1) If the officer conducting the interview determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview.

(2) At the time of the interview, the asylum officer shall verify that the alien has received in writing the relevant information regarding the fear determination process. The officer shall also determine that the alien has an understanding of the fear determination process.

* * * * *

(5) If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language the alien speaks and understands, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter must be at least 18 years of age and may not be the alien's attorney or representative of record, a witness testifying on the alien's behalf, a representative or employee of the alien's country of nationality, or, if the alien is stateless, the alien's country of last habitual residence.

(6) The asylum officer shall create a summary of the material facts as stated by the alien. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct any errors therein.

(e) Procedures for determining credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture.

(1) An alien establishes a credible fear of persecution if there is a significant possibility the alien can establish eligibility for asylum under section 208 of the Act. ''Significant possibility'' means a substantial and realistic possibility of succeeding. When making such a determination, the asylum officer shall take into account:

(i) The credibility of the statements made by the alien in support of the alien's claim;

(ii) Such other facts as are known to the officer, including whether the alien could avoid any future harm by relocating to another part of his or her country, if under all the circumstances it would be reasonable to expect the alien to do so; and

(iii) The applicability of any bars to being able to apply for asylum or to eligibility for asylum set forth at section 208(a)(2)(B)–(C) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act.

(2) An alien establishes a reasonable possibility of persecution if there is a reasonable possibility that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal. When making such determination, the officer will take into account:

(i) The credibility of the statements made by the alien in support of the alien's claim;

(ii) Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so; and

(iii) The applicability of any bars at section 241(b)(3)(B) of the Act.

(3) An alien establishes a reasonable possibility of torture if there is a reasonable possibility that the alien would be tortured in the country of removal, consistent with the criteria in 8 CFR 208.16(c), 8 CFR 208.17, and 8 CFR 208.18. The alien must demonstrate a reasonable possibility that he or she will suffer severe pain or suffering in the country of removal, and that the feared harm would comport with the other requirements of 8 CFR 208.18(a)(1) through (8). When making such a determination, the asylum officer shall take into account:

(i) The credibility of the statements made by alien in support of the alien's claim, and

(ii) Such other facts as are known to the officer, including whether the alien could relocate to a part of the country of removal where he or she is not likely to be tortured.

(4) In all cases, the asylum officer will create a written record of his or her determination, including a summary of the material facts as stated by the alien, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a reasonable possibility of persecution or torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

(5)(i)(A) Except as provided in paragraph (e)(5)(ii) or (iii) or paragraph (e)(6) or (7) of this section, if an alien would be able to establish a credible fear of persecution but for the fact that the alien is subject to one or more of the mandatory bars to applying for asylum or being eligible for asylum contained in section 208(a)(2)(B)–(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, then the asylum officer will enter a negative credible fear of persecution determination with respect to the alien's eligibility for asylum.

(B) If an alien described in paragraph (e)(5)(i)(A) of this section is able to establish either a reasonable possibility of persecution (including by establishing that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, then the asylum officer will enter a positive reasonable possibility of persecution or torture determination, as applicable. The Department of Homeland Security shall place the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture.

(C) If an alien described in paragraph (e)(5)(i)(A) of this section fails to establish either a reasonable possibility of persecution (including by failing to establish that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).

(ii) If the alien is found to be an alien described in 8 CFR 208.13(c)(3), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture, if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).

(iii) If the alien is found to be an alien described in 8 CFR 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding of deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (''Agreement''). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph (e)(6). The asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

* * * * *

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture under paragraph (d) of this section.

(iii) An alien qualifies for an exception to the Agreement if the alien is not being removed from Canada in transit through the United States and:

* * * * *

(iv) As used in paragraphs (e)(6)(iii)(B), (C), and (D) of this section only, ''legal guardian'' means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien's behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

(7) When an immigration officer has made an initial determination that an alien, other than an alien described in

paragraph (e)(6) of this section and regardless of whether the alien is arriving at a port of entry, appears to be subject to the terms of an agreement authorized by section 208(a)(2)(A) of the Act, and seeks the alien's removal consistent with that provision, prior to any determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether the alien is ineligible to apply for asylum in the United States and is subject to removal to a country (''receiving country'') that is a signatory to the applicable agreement authorized by section 208(a)(2)(A) of the Act, other than the U.S.-Canada Agreement effectuated in 2004. * * *

* * * * *

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the applicable agreement, or would more likely than not be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or tortured, in the receiving country, the asylum officer shall make a written notation to that effect, and may then proceed to determine whether any other agreement is applicable to the alien under the procedures set forth in this paragraph (e)(7). If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of each of the applicable agreements, or would more likely than not be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or tortured, in each of the prospective receiving countries, the asylum officer shall make a written notation to that effect, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, under paragraph (d) of this section.

* * * * *

(f) *Procedures for a positive fear determination.* If, pursuant to paragraph (e) of this section, an alien stowaway or an alien subject to expedited removal establishes either a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture:

(1) DHS shall issue a Notice of Referral to Immigration Judge for asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1).

(2) Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and 8 CFR 212.5 of this chapter.

(g) *Procedures for a negative fear determination.* (1) If, pursuant to paragraphs (e) and (f) of this section, an alien stowaway or an alien subject to expedited removal does not establish a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, DHS shall provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative determination, in accordance with section 235(b)(1)(B)(iii)(III) of the Act and this § 208.30. The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(i) If the alien requests such review, DHS shall arrange for detention of the alien and serve him or her with a Notice of Referral to Immigration Judge, for review of the negative fear determination in accordance with paragraph (g)(2) of this section.

(ii) If the alien is not a stowaway and does not request a review by an immigration judge, DHS shall order the alien removed with a Notice and Order of Expedited Removal, after review by a supervisory officer.

(iii) If the alien is a stowaway and the alien does not request a review by an immigration judge, DHS shall complete removal proceedings in accordance with section 235(a)(2) of the Act. (2) Review by immigration judge of a negative fear determination.

(i) Immigration judges shall review negative fear determinations as provided in 8 CFR 1208.30(g). DHS, however, may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge.

(ii) DHS shall provide the record of any negative fear determinations being reviewed, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based, to the immigration judge with the negative fear determination.

■ 13. Amend § 208.31 by revising paragraphs (f) and (g) to read as follows:

§ 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be

withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 14. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1365b, 1379, 1731–32; Title VII of Public Law 110–229; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458); Public Law 112–54.

■ 15. Amend § 235.6 by revising paragraphs (a)(1)(ii) and (a)(2)(i) and (iii) and adding paragraph (c) to read as follows:

§ 235.6 Referral to immigration judge.

(a) * * *

(1) * * *

(ii) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident or refugee, or granted asylum, or, upon review pursuant to § 235.3(b)(5)(iv) of chapter I, an immigration judge determines that the alien was once so admitted or granted asylum, provided that such status has not been terminated by final administrative action, and the DHS initiates removal proceedings against the alien under section 240 of the Act.

* * * * *

(2) * * *

(i) If an asylum officer determines that the alien does not have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, and the alien requests a review of that determination by an immigration judge; or

* * * * *

(iii) If an immigration officer refers an applicant in accordance with the provisions of 8 CFR 208.30 or 8 CFR 208.31.

* * * * *

(c) The provisions of part 235 are separate and severable from one another. In the event that any provision in part 235 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 1003, 1208, 1212, 1235, and 1244 are amended as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 16. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Public Law 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Public Law 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Public Law 106–554, 114 Stat. 2763A–326 to–328.

■ 17. Amend § 1003.1 by revising paragraph (b)(9) to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(b) * * *

(9) Decisions of Immigration Judges in asylum proceedings pursuant to § 1208.2(b) and (c) of this chapter.

* * * * *

■ 18. Amend § 1003.42 by revising the section heading and paragraphs (a), (b), (d) through (g), (h)(1), and the last sentence in paragraph (h)(3) and adding paragraph (i) to read as follows:

§ 1003.42 Review of credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations.

(a) *Referral.* Jurisdiction for an immigration judge to review a negative fear determination by an asylum officer pursuant to section 235(b)(1)(B) of the Act shall commence with the filing by DHS of the Notice of Referral to Immigration Judge. DHS shall also file with the notice of referral a copy of the written record of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.

(b) *Record of proceeding.* The Immigration Court shall create a Record of Proceeding for a review of a negative fear determination. This record shall not be merged with any later proceeding involving the same alien.

* * * * *

(d) *Standard of review.* (1) The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to applying for asylum or being eligible for asylum under section 208(a)(2)(B)–(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, and such other facts as are known to the immigration judge, that the alien could establish his or her ability to apply for or be granted asylum under section 208 of the Act. The immigration judge shall make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act, and such other facts as are known to the immigration judge, that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal, consistent with the criteria in 8 CFR 1208.16(b). The immigration judge shall also make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, that the alien would be tortured in the country of removal, consistent with the criteria in 8 CFR 1208.16(c), 8 CFR 1208.17, and 8 CFR 1208.18.

(2) If the alien is determined to be an alien described in 8 CFR208.13(c)(3) or 8 CFR 1208.13(c)(3) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the Immigration Judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) prior to any further review of the asylum officer's negative fear determination.

(3) If the alien is determined to be an alien described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(iii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) prior to any further review of the asylum officer's negative fear determination.

(e) *Timing.* The immigration judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the supervisory asylum officer has approved the asylum officer's

negative credible fear determination issued on the Record of Negative Credible Fear Finding and Request for Review.

(f) *Decision.* (1) The decision of the immigration judge shall be rendered in accordance with the provisions of 8 CFR 1208.30(g)(2). In reviewing the negative fear determination by DHS, the immigration judge shall apply relevant precedent issued by the Board of Immigration Appeals, the Attorney General, the Federal circuit court of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court.

(2) No appeal shall lie from a review of a negative fear determination made by an Immigration Judge, but the Attorney General, in the Attorney General's sole and unreviewable discretion, may direct that the Immigration Judge refer a case for the Attorney General's review following the Immigration Judge's review of a negative fear determination.

(3) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in 8 CFR 1003.1(f). Such decision by the Attorney General may be designated as precedent as provided in 8 CFR 1003.1(g).

(g) *Custody.* An immigration judge shall have no authority to review an alien's custody status in the course of a review of a negative fear determination made by DHS.

(h) * * *

(1) *Arriving alien.* An immigration judge has no jurisdiction to review a determination by an asylum officer that an arriving alien is not eligible to apply for asylum pursuant to the 2002 U.S.-Canada Agreement formed under section 208(a)(2)(A) of the Act and should be returned to Canada to pursue his or her claims for asylum or other protection under the laws of Canada. *See* 8 CFR 208.30(e)(6). However, in any case where an asylum officer has found that an arriving alien qualifies for an exception to that Agreement, an immigration judge does have jurisdiction to review a negative fear finding made thereafter by the asylum officer as provided in this section.

* * * * *

(3) * * * However, if the asylum officer has determined that the alien may not or should not be removed to a third country under section 208(a)(2)(A) of the Act and subsequently makes a negative fear determination, an immigration judge has jurisdiction to review the negative fear finding as provided in this section.

* * * * *

(i) *Severability.* The provisions of part 1003 are separate and severable from one another. In the event that any provision in part 1003 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 19. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229.

■ 20. Amend § 1208.1 by adding paragraphs (c) through (g) to read as follows:

§ 1208.1 General.

* * * * *

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harm and must also have existed independently of the alleged persecutory acts or harm that forms the basis of the claim. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or, status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group was both not a strategic choice and constituted egregious conduct.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a State or a unit thereof. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the State to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the State or a legal sub-unit of the State. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for

such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats, except that particularized threats of a severe harm of immediate and menacing nature made by an identified entity may constitute persecution; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of government laws or policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, the Attorney General, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

(1) Interpersonal animus or retribution;

(2) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a State or expressive behavior that is antithetical to the State or a legal unit of the State;

(4) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(5) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(6) Criminal activity;

(7) Perceived, past or present, gang affiliation; or,

(8) Gender.

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence offered in support of such an application which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, shall not be admissible in adjudicating that application, provided that nothing in this paragraph shall be construed as prohibiting the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

■ 21. Amend § 1208.2 by adding paragraph (c)(1)(ix) to read as follows:

§ 1208.2 Jurisdiction.

* * * * *

(c) * * *

(1) * * *

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with § 208.30, § 1003.42, or § 1208.30.

* * * * *

■ 22. Amend § 1208.5 by revising the first sentence of paragraph (a) to read as follows:

§ 1208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31, and except in the case of an alien who is in custody pending a credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31. * * *

* * * * *

■ 23. Amend § 1208.6 by revising paragraphs (a) and (b) and adding paragraphs (d) and (e) to read as follows:

§ 1208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, or has received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

* * * * *

(d)(1) Any information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3) the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws;

(ii) As part of any State or Federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any State or Federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

(v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and

(vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status, including petitions for review filed in accordance with 8 U.S.C. 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the Department of Labor, or a U.S. national security agency having a need to examine the information for an official purpose; or

(2) Where a United States government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

■ 24. Section 1208.13 is amended by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv), (d), and (e) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i) and (ii) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department of Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an alien merits a grant of asylum in the exercise of discretion:

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(C) Such country or countries were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Attorney General, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) Such country was, at the time of the transit, not a party to the 1951 Convention relating to the Status of Refugees the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) All such countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment;

(C) Would otherwise be subject to § 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;

(E) At the time the asylum application is filed with the immigration court or is referred from DHS has:

(*1*) Failed to timely file (or timely file a request for an extension of time to file) any required Federal, State, or local income tax returns;

(*2*) Failed to satisfy any outstanding Federal, State, or local tax obligations; or

(*3*) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his or her asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(*1*) Exceptional circumstances prevented the alien from attending the interview; or

(*2*) The interview notice was not mailed to the last address provided by the alien or the alien's representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of the changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Attorney General, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i). Depending on the gravity of the circumstances underlying the application of paragraph (d)(2)(i), a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

(e) *Prima facie eligibility.* (1) Notwithstanding any other provision of this part, upon oral or written motion by the Department of Homeland Security, an immigration judge shall, if warranted by the record, pretermit and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law. An immigration judge need not conduct a hearing prior to pretermitting and denying an application under this paragraph (e)(1) but must consider any response to the motion before making a decision.

(2) Notwithstanding any other provision of this part, upon his or her own authority, an immigration judge shall, if warranted by the record, pretermit and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law, provided that the immigration judge shall give the parties at least 10 days' notice prior to entering such an order. An immigration judge need not conduct a hearing prior to pretermitting and denying an application under this paragraph (e)(2) but must consider any filings by the parties within the 10-day period before making a decision.

§ 1208.14 [Amended]

■ 25. Amend § 1208.14 by

■ a. Removing the words ''§ 1235.3(b) of this chapter'' in paragraphs (c)(4)(ii) introductory text and (c)(4)(ii)(A) and adding in their place the words ''§ 235.3(b) of chapter I''; and

■ b. Removing the citations ''§ 1208.30'' and ''§ 1208.30(b)'' in paragraph (c)(4)(ii)(A) and adding in their place the words ''§ 208.30 of chapter I''.

■ 26. Revise § 1208.15 to read as follows:

§ 1208.15 Definition of ''firm resettlement.''

(a) An alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim:

(1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and—

(i) Received or was eligible for any permanent legal immigration status in that country;

(ii) Resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or

(iii) Resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, provided that time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of this paragraph; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, or

(ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but

excluding status such as of a tourist) from the alien's parent.

■ 27. Amend § 1208.16 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) to read as follows:

§ 1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including persecutors who are gang members, public official who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

■ 28. Amend § 1208.18 by revising paragraphs (a)(1) and (7) to read as follows:

§ 1208.18 Implementation of the Convention Against Torture.

(a) * * *

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law shall not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

* * * * *

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

* * * * *

■ 29. Revise § 1208.20 to read as follows:

§ 1208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, and before January 11, 2021, an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An application is frivolous if:

(1) Any of the material elements in the asylum application is deliberately fabricated, and the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

(2) Paragraphs (b) through (f) shall only apply to applications filed on or after January 11, 2021.

(b) For applications filed on or after January 11, 2021, an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. For applications referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph (c) of this section.

(c) For applications filed on or after January 11, 2021, an asylum application is frivolous if it:

(1) Contains a fabricated material element;

(2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

(3) Is filed without regard to the merits of the claim; or

(4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolousness finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may be found frivolous unless:

(1) The alien wholly disclaims the application and withdraws it with prejudice;

(2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien filed a knowingly frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

■ 30. Add § 1208.25 to read as follows:

§ 1208.25 Severability.

The provisions of part 1208 are separate and severable from one another. In the event that any provision in part 1208 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

■ 31. Amend § 1208.30 by revising the section heading and paragraphs (a), (b) introductory text, (b)(2), (e), and (g) to read as follows:

§ 1208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) and 8 CFR 208.30, DHS has exclusive jurisdiction to make fear determinations, and the immigration judges have exclusive jurisdiction to review such determinations. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section and 8 CFR 208.30 are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act and 8 CFR 208.30. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

* * * * *

(2) *Desires to be included in the principal alien's determination.* However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

* * * * *

(e) *Determination.* For the standards and procedures for asylum officers in conducting credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture interviews and in making positive and negative fear determinations, see 8 CFR 208.30. The immigration judges will review such determinations as provided in paragraph (g) of this section and 8 CFR 1003.42.

* * * * *

(g) *Procedures for negative fear determinations*—(1) *Review by immigration judge of a mandatory bar finding.* (i) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) and is determined to lack a credible fear of persecution or a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3). If the immigration judge finds that the alien is not described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3), then the immigration judge shall vacate the determination of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3), the immigration judge will then review the asylum officer's negative determinations regarding credible fear and regarding reasonable possibility made under 8 CFR 208.30(e)(5)(iv) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear (''significant possibility'') standard described in paragraph (g)(2).

(ii) If the alien is determined to be an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(v), the immigration judge shall first review de novo the determination that the alien is described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4). If the immigration judge finds that the alien is not described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4), then the immigration judge shall vacate the determination of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4), the immigration judge will then review the asylum officer's negative decision regarding reasonable possibility made under 8 CFR 208.30(e)(5)(v) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g)(2).

(2) *Review by immigration judge of a negative fear finding.* (i) The asylum officer's negative decision regarding a credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture shall be subject to review by an immigration judge upon the applicant's request, in accordance with section 235(b)(1)(B)(iii)(III) of the Act. If the alien refuses to make an indication, DHS will consider such a response as a decision to decline review.

(ii) The record of the negative fear determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative fear determination.

(iii) A fear hearing will be closed to the public unless the alien states for the record or submits a written statement that the alien is waiving that requirement; in that event the hearing shall be open to the public, subject to

the immigration judge's discretion as provided in 8 CFR 1003.27.

(iv) Upon review of the asylum officer's negative fear determinations:

(A) If the immigration judge concurs with the determination of the asylum officer that the alien has not established a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the case shall be returned to DHS for removal of the alien. The immigration judge's decision is final and may not be appealed.

(B) If the immigration judge finds that the alien, other than an alien stowaway, establishes a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the immigration judge shall vacate the Notice and Order of Expedited Removal, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1), during which time the alien may file an application for asylum and for withholding of removal in accordance with 8 CFR 1208.4(b)(3)(i). Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(C) If the immigration judge finds that an alien stowaway establishes a credible fear of persecution, reasonable possibility of torture, or reasonable possibility of torture, the alien shall be allowed to file an application for asylum and for withholding of removal before the immigration judge in accordance with 8 CFR 1208.4(b)(3)(iii). The immigration judge shall decide the application as provided in that section. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph. Such decision on that application may be appealed by either the stowaway or DHS to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, and deferral of removal has not otherwise been granted pursuant to 8 CFR 1208.17(a), the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum, withholding of removal, or, as pertinent, deferral of removal becomes final, DHS shall terminate removal proceedings under section 235(a)(2) of the Act.

■ 32. Amend § 1208.31 by revising paragraphs (f) and (g) to read as follows:

§ 1208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by Immigration Judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to the Immigration Judge. The record of determination, including copies of the Notice of Referral to the Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to the Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

PART 1212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 33. The authority citation for part 1212 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458); Title VII of Public Law 110–229.

■ 34. Add § 1212.13 to read as follows:

§ 1212.13 Severability.

The provisions of part 1212 are separate and severable from one another. In the event that any provision in part 1212 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

§ 1212.14 [Amended]

■ 35. Amend § 1212.14 in paragraph (a)(1)(vii) by removing the words ''§ 1235.3 of this chapter'' and adding in their place the words ''§ 235.3 of chapter I''.

PART 1235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 36. The authority citation for part 1235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32; Title VII of Public Law 110–229; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458).

§§ 1235.1, 1235.2, 1235.3, and 1235.5 [Removed and Reserved]

■ 37. Remove and reserve §§ 1235.1, 1235.2, 1235.3, and 1235.5.

■ 38. Amend § 1235.6 by:

■ a. Removing paragraphs (a)(1)(ii) and (iii);

■ b. Redesignating paragraph (a)(1)(iv) as paragraph (a)(1)(ii) and revising it;

■ c. Revising paragraphs (a)(2)(ii) and (iii); and

■ d. Adding paragraph (c).

The revisions and addition read as follows:

§ 1235.6 Referral to immigration judge.

(a) * * *

(1) * * *

(ii) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident or refugee, or granted asylum, or, upon review pursuant to § 235.3(b)(5)(iv) of chapter I, an immigration judge determines that the alien was once so admitted or granted asylum, provided that such status has not been terminated by final administrative action, and DHS initiates removal proceedings against the alien under section 240 of the Act.

* * * * *

(2) * * *

(i) If an asylum officer determines that an alien does not have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, and the alien requests a review of that determination by an immigration judge; or

* * * * *

(iii) If an immigration officer refers an applicant in accordance with the provisions of § 208.30 or § 208.31.

* * * * *

(c) The provisions of part 1235 are separate and severable from one another. In the event that any provision in part 1235 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

PART 1244—TEMPORARY PROTECTED STATUS FOR NATIONALS OF DESIGNATED STATES

■ 39. The authority citation for part 1244 continues to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1254a note, 8 CFR part 2.

■ 40. Amend § 1244.4 by revising paragraph (b) to read as follows:

§ 1244.4 Ineligible aliens.

* * * * *

(b) Is an alien described in section 208(b)(2)(A) of the Act.

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

Dated: December 2, 2020.

William P. Barr,

Attorney General.

[FR Doc. 2020–26875 Filed 12–10–20; 8:45 am]

BILLING CODE 4410–30–P; 9111–97–P

EXHIBIT 2

DECLARATION OF NAOMI A. IGRA

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 235

RIN 1615–AC42

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1208, and 1235

[EOIR Docket No. 18–0002; A.G. Order No. 4714–2020]

RIN 1125–AA94

Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

AGENCY: Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Department of Justice and the Department of Homeland Security (collectively, ''the Departments'') propose to amend the regulations governing credible fear determinations so that individuals found to have such a fear will have their claims for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (''INA'' or ''the Act'') (''statutory withholding of removal''), or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT''), adjudicated by an immigration judge within the Executive Office for Immigration Review (''EOIR'') in streamlined proceedings (rather than in proceedings under section 240 of the Act), and to specify what standard of review applies in such streamlined proceedings. The Departments further propose changes to the regulations regarding asylum, statutory withholding of removal, and withholding and deferral of removal under the CAT regulations. The Departments also propose amendments related to the standards for adjudication of applications for asylum and statutory withholding.

DATES: Written or electronic comments on the notice of proposed rulemaking must be submitted on or before July 15, 2020. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day. Comments specific to the proposed collection of information will be accepted until August 14, 2020. All such submissions received must include the OMB Control Number 1615–0067 in the body of the submission. *Note:* Comments received on the information collection that are intended as comments on the proposed rulemaking rather than those specific to the collection of information will be rejected.

ADDRESSES: If you wish to provide comments regarding this rulemaking, you must submit comments, identified by the agency name and reference RIN 1125–AA94 or EOIR Docket No. 18–0002, by one of the two methods below.

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the website instructions for submitting comments.
- *Mail:* Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of electronic submission, please direct the mail/shipment to: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041. To ensure proper handling, please reference the agency name and RIN 1125–AA94 or EOIR Docket No. 18–0002 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

Collection of information. You must submit comments on the collection of information discussed in this notice of proposed rulemaking to both the rulemaking docket and the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). All such submissions received must include the OMB Control Number 1615–0067 in the body of the submission. OIRA submissions can be sent using any of the following methods.

- *Email (preferred): DHSDeskOfficer@omb.eop.gov* (include the docket number and ''Attention: Desk Officer for U.S. Citizenship and Immigration Services, DHS'' in the subject line of the email).
- *Fax:* 202–395–6566.
- *Mail:* Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503; Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call).

Maureen Dunn, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, 20 Massachusetts Ave. NW, Washington, DC 20529; telephone (202) 272–8377.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule via one of the methods and by the deadline stated above. All comments must be submitted in English, or accompanied by an English translation. The Departments also invite comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Departments in developing these procedures will reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection at *http://www.regulations.gov*. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFIABLE INFORMATION'' in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http://www.regulations.gov*.

Personally identifying information located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set

forth above will not be placed in the public docket file. The Departments may withhold from public viewing information provided in comments that they determine may affect the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov*. To inspect the agency's public docket file in person, you must make an appointment with the agency. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for agency contact information.

II. Discussion [1]

Since World War II, the United States has sought a comprehensive solution to the issues surrounding the admission of refugees into the country and the protection of refugees from return to persecution. As an expression of a nation's foreign policy, the laws and policies surrounding asylum are 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. *See, e.g., Kleindienst* v. *Mandel,* 408 U.S. 753, 765 (1972) (''In accord with ancient principles of the international law of nation-states, * * * the power to exclude aliens is inherent in sovereignty, [and] necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers * * * .'' (internal citations and quotation marks omitted)).

In the Refugee Act of 1980 (''Refugee Act''), Public Law 96–212, 94 Stat. 102, Congress furthered implementation of the United Nations Protocol Relating to the Status of Refugees (''Refugee Protocol''), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268, providing for a permanent procedure for the admission and protection of refugees, generally defined in domestic law as:

> any person who is outside of any country of such person's nationality * * * and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Refugee Act, sec. 201(a), 94 Stat. at 102 (codified at section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42)). Those five grounds are the sole grounds for asylum and refugee status.

A. Expedited Removal and Screenings in the Credible Fear Process

1. Asylum-and-Withholding-Only Proceedings [2] for Aliens With Credible Fear

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, div. C, 110 Stat. 3009, 3009–546 (''IIRIRA''), Congress established the expedited removal process, thus establishing two primary types of proceedings for determining the removability of an alien from the United States: (1) Expedited removal proceedings under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), and (2) removal proceedings under section 240 of the INA, 8 U.S.C. 1229a (''section 240 proceedings'').

First, section 235 of the INA, 8 U.S.C. 1225, contains the procedures for expedited removal. Under expedited removal, aliens arriving in the United States—and, in the discretion of the Secretary of Homeland Security (''Secretary''),[3] certain other designated classes of aliens [4]—who are found to be inadmissible under either section 212(a)(6)(C) of the INA, 8 U.S.C. 1182(a)(6)(C), regarding material misrepresentations, or section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), regarding documentation requirements for admission, may be ''removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section [208 of the INA, 8 U.S.C. 1158,] or a fear of persecution.'' INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i).[5] Among other things, expedited removal is an administrative process that allows for the fair and efficient removal of aliens who have made no claims regarding asylum or a fear of return or, if they have, have not established a fear of persecution or torture, without requiring lengthy and resource-intensive removal proceedings in immigration court.

Pursuant to statute and regulations, DHS implements a screening process,

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[1] As a prefatory matter, the Departments note that portions of this rule, in accordance with well-established administrative law principles, would supersede certain interpretations of the immigration laws by federal courts of appeals: The Supreme Court has ''also made clear that administrative agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations, because there is 'a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.' '' *Matter of R–A–,* 24 I&N Dec. 629, 631 (A.G. 2008) (quoting *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 982 (2005) (internal quotation and citations omitted)). ''A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.'' *Brand X,* 545 U.S. at 982. *Matter of A–B–,* 27 I&N Dec. 316, 327 (A.G. 2018).

[2] These proceedings have also been referred to as ''asylum-only'' proceedings in other contexts. *See, e.g., Matter of D–M–C–P–,* 26 I&N Dec. 644, 645 (BIA 2015) (''The applicant expressed a fear of returning to Argentina, and on June 23, 2011, his case was referred to the Immigration Court for asylum-only proceedings * * * .''). This NPRM uses the phrase ''asylum-and-withholding-only proceedings'' to ensure that the forms of relief and protection available are more accurately described.

[3] The Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135, as amended, charged the Secretary ''with the administration and enforcement of this chapter [titled, 'Immigration and Nationality'] and all other laws relating to the immigration and naturalization of aliens'' and granted the Secretary the power to take all actions ''necessary for carrying out'' the provisions of the immigration and nationality laws. *See* HSA, sec. 1102, 116 Stat. at 2273–74; Consolidated Appropriations Resolution of 2003, Public Law 108–7, div. L, sec. 105, 117 Stat. 11, 531 (codified at INA 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3)). The HSA states that the Attorney General ''shall have such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by [EOIR], or by the Attorney General with respect to [EOIR] * * * .'' HSA, sec. 1102, 116 Stat. at 2274 (codified at INA 103(g)(1), 8 U.S.C. 1103(g)(1)); *see* 6 U.S.C. 521. Furthermore, the Attorney General is authorized to ''establish such regulations, prescribe such forms of bonds, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.'' HSA, sec. 1102, 116 Stat. at 2274 (codified at INA 103(g)(2), 8 U.S.C. 1103(g)(2)).

[4] DHS has designated the following additional categories of aliens, if inadmissible under sections 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), as subject to expedited removal: (1) Aliens who are apprehended in the United States within 100 air miles of the border, who have not been admitted or paroled, and who cannot affirmatively show that they have been continuously physically present in the United States for the 14-day period prior to apprehension, *see* Designating Aliens For Expedited Removal, 69 FR 48877 (Aug. 11, 2004); and (2) aliens who arrived in the United States between ports of entry by sea, who have not been admitted or paroled, and who cannot affirmatively show that they have been continuously physically present in the United States for the two-year period prior to the determination of inadmissibility, *see* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 FR 68924 (Nov. 13, 2002). On July 23, 2019, DHS announced it would expand the application of expedited removal to aliens (not included in the additional categories established in 2002 and 2004) who are inadmissible under sections 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), who are apprehended anywhere in the United States, who have not been admitted or paroled, and who cannot affirmatively show that they have been continuously physically present for the two-year period prior to the determination of inadmissibility. *See* Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019). The U.S. District Court for the District of Columbia issued an injunction against the July 2019 designation. *Make the Road New York* v. *McAleenan,* 405 F. Supp. 3d 1 (D.D.C. 2019).

[5] Unaccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are exempt from expedited removal. *See* 8 U.S.C. 1232(a)(5)(D)(i).

known as ''credible fear'' screening, to identify potentially valid claims for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to the legislation implementing CAT, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 113,[6] to prevent aliens placed in expedited removal from being removed to a country in which they would face persecution or torture.[7] Currently, any alien who expresses a fear of persecution or torture, a fear of return, or an intention to apply for asylum during the course of the expedited removal process is referred to a DHS asylum officer for an interview to determine if the alien has a credible fear of persecution or torture in the country of return. INA 235(b)(1)(A)(ii), (B), 8 U.S.C. 1225(b)(1)(A)(ii), (B); *see also* 8 CFR 235.3(b)(4), 1235.3(b)(4)(i). If the asylum officer determines that the alien does not have a credible fear of persecution or torture (or, in certain instances, a reasonable possibility of persecution or torture), the alien may request that an immigration judge review that determination. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 208.30(g), 1208.30(g).

Under the current regulatory framework, if the asylum officer determines that an alien subject to expedited removal proceedings has a credible fear of persecution or torture (or, in certain instances, a reasonable possibility of persecution or torture), DHS places the alien before an immigration court for adjudication of the alien's claims by initiating section 240 proceedings. *See* 8 CFR 208.30(f), 235.6(a)(1)(ii), 1235.6(a)(1)(i). Section 240 proceedings are often more detailed and provide additional procedural protections, including greater administrative and judicial review, than expedited removal proceedings under section 235 of the Act. *Compare* INA 235(b)(1), 8 U.S.C. 1225(b)(1), *with* INA 240, 8 U.S.C. 1229a. Similarly, if an immigration judge, upon review of the asylum officer's negative determination, finds that the alien possesses a credible fear of persecution or torture (or, in certain instances, a reasonable possibility of persecution or torture), the immigration judge will vacate the expedited removal order, and DHS will initiate section 240 proceedings for the alien. 8 CFR 1208.30(g)(2)(iv)(B).

The INA, however, instructs only that an alien who is found to have a credible fear ''shall be detained for further consideration of the application for asylum,'' and neither mandates that an alien who demonstrates a credible fear be placed in removal proceedings in general nor in section 240 proceedings specifically. INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii).

The relevant regulations regarding the credible fear process, and the interplay between expedited removal and section 240 proceedings, were first implemented in 1997. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312 (Mar. 6, 1997).[8] At the time, the former Immigration and Naturalization Service (''INS'') explained that it was choosing to initiate section 240 proceedings in this context because the remaining provisions of section 235(b) of the Act, beyond those governing credible fear review, were specific to aliens who do not have a credible fear and because the statute was silent as to procedures for those who demonstrated such a fear. *Id.* at 10320. The INS's analysis at the time was very limited.

For several reasons, the Departments believe that section 235(b)(1), 8 U.S.C. 1225(b)(1), when compared with section 235(b)(2), 8 U.S.C. 1225(b)(2), may also be read as permitting a procedure for ''further consideration of [an] application for asylum'' that is separate from section 240 proceedings. First, while section 235(b)(1), 8 U.S.C. 1225(b)(1), mandates that an alien with a positive credible fear determination receive ''further consideration of [his or her] application for asylum,'' section 235(b)(2), 8 U.S.C. 1225(b)(2), mandates that other classes of aliens receive ''a proceeding under section 1229a of this title''—*i.e.,* section 240 of the INA, 8 U.S.C. 1229a. *Compare* INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), *with* INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A). The difference in language suggests that section 235(b)(1), 8 U.S.C. 1225(b)(1), does not require use of section 240 proceedings, in contrast to section 235(b)(2), 8 U.S.C. 1225(b)(2), which does so require. *See Henson* v. *Santander Consumer USA, Inc.,* 137 S. Ct. 1718, 1723 (2017) (''differences in language [generally] convey differences in meaning''). That negative inference is reinforced by the fact that aliens in expedited removal are expressly excluded from the class of aliens entitled to section 240 proceedings under section 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A). *See* INA 235(b)(2)(B)(ii), 8 U.S.C. 1225(b)(2)(B)(ii).

Second, an alien with a positive credible fear determination is entitled only to a further proceeding related to his or her ''application for asylum.'' INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). An asylum application's purpose is to determine whether the alien is entitled to relief or protection from removal, not whether the alien should be admitted or is otherwise entitled to immigration benefits. *See Matter of V–X–,* 26 I&N Dec. 147, 150 (BIA 2013) (holding that, ''although [an alien's] grant of asylum confer[s] a lawful status upon him, it [does] not entail an 'admission'''). By contrast, in section 240 proceedings, aliens generally may raise their admissibility and their entitlement to various forms of relief or protection. *Compare* INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), *with* INA 240(c)(2)–(4), 8 U.S.C. 1229a(c)(2)–(4).

Moreover, the Departments believe, for the reasons described in this rule, that it is better policy to place aliens with a positive credible fear determination in asylum-and-withholding-only proceedings rather than section 240 proceedings.

DHS has prosecutorial discretion at the outset to place an alien amenable to expedited removal instead in section 240 proceedings. *See Matter of J–A–B– & I–J–V–A–,* 27 I&N Dec. 168, 170 (BIA 2017) (''The DHS's decision to commence removal proceedings involves the exercise of prosecutorial discretion, and neither the Immigration Judges nor the Board may review a decision by the DHS to forgo expedited removal proceedings or initiate removal proceedings in a particular case.''); *Matter of E–R–M– & L–R–M–,* 25 I&N Dec. 520, 523 (BIA 2011). If DHS has exercised its discretion by initially commencing expedited removal proceedings against an alien, placing that alien in section 240 proceedings following the establishment of a credible fear effectively negates DHS's original discretionary decision. By deciding that the alien was amenable to expedited removal, DHS already determined removability, leaving only a determination as to whether the

[6] Because CAT is a non-self-executing treaty, *see, e.g., Hui Zheng* v. *Holder,* 562 F.3d 647, 655–56 (4th Cir. 2009), adjudicators do not apply CAT itself, but rather the regulations issued pursuant to the implementing legislation, principally 8 CFR 1208.16(c)–1208.18. *See* Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, sec. 2242(b), 112 Stat. 2681, 2681–822 (codified at 8 U.S.C. 1231 note).

[7] Screening for fear of torture in the designated country of removal is conducted not under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), but instead under the CAT regulations.

[8] The 1997 rule amended, inter alia, part 208 of title 8 of the CFR. Following the creation of DHS in 2003 after the passage of the HSA, EOIR's regulations were moved from Chapter I of Title 8 to Chapter V. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824 (Feb. 28, 2003). Part 208 was subsequently duplicated for EOIR at part 1208. *Id.*

individual is eligible for relief or entitled to protection from removal in the form of asylum, statutory withholding of removal, or protection under the CAT regulations. Further, it is evident that Congress intended the expedited removal process to be streamlined, efficient, and truly ''expedited'' based on the statutory limits it placed on administrative review of expedited removal orders, INA 235(b)(1)(C), 8 U.S.C. 1225(b)(1)(C); the temporal limits it placed on review of negative credible fear determinations by immigration judges, INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); and the limitations placed on judicial review of determinations made during the expedited removal process, INA 242(e), 8 U.S.C. 1252(e). The current policy of referring aliens who have established a credible fear for section 240 proceedings runs counter to those legislative aims.[9]

Accordingly, DOJ proposes to amend 8 CFR 1003.1, 8 CFR 1003.42(f), 8 CFR 1208.2, 8 CFR 1208.30, and 8 CFR 1235.6—and DHS proposes to amend 8 CFR 208.2(c), 8 CFR 208.30(e)(5) and (f), and 8 CFR 235.6(a)(1)—so that aliens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture and accordingly receive a positive fear determination will appear before an immigration judge for ''asylum-and-withholding-only'' proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1).[10] Such proceedings will be adjudicated in the same manner that currently applies to certain alien crewmembers, stowaways, and applicants for admission under the Visa Waiver Program, among other categories of aliens who are not entitled by statute to section 240 proceedings. *See* 8 CFR 208.2(c)(1)(i)–(viii), 1208.2(c)(1)(i)–(viii). Additionally, to ensure that these claims receive the most expeditious consideration reasonably possible, the Departments propose to amend 8 CFR 208.5 and 8 CFR 1208.5 to require DHS to make available appropriate applications and relevant warnings to aliens in its custody who have expressed a fear in the expedited removal process and received a positive determination.

These ''asylum-and-withholding-only'' proceedings generally follow the same rules of procedure that apply in section 240 proceedings, but the immigration judge's consideration is limited solely to a determination on the alien's eligibility for asylum, statutory withholding of removal, and withholding or deferral of removal under the CAT regulations (and, if the alien is eligible for asylum, whether he or she should receive it as a matter of discretion). 8 CFR 208.2(c)(3)(i), 1208.2(c)(3)(i). If the immigration judge does not grant the alien asylum, statutory withholding of removal, or protection under the CAT regulations, the alien will be removed, although the alien may submit an appeal of a denied application for asylum, statutory withholding of removal, or protection under the CAT regulations to the Board of Immigration Appeals (''BIA'').[11]

2. Consideration of Precedent When Making Credible Fear Determinations in the ''Credible Fear'' Process

DOJ proposes to add language to 8 CFR 1003.42(f) to specify that an immigration judge will consider applicable legal precedent when reviewing a negative fear determination. This instruction is in addition to those currently in 8 CFR 1003.42 to consider the credibility of the alien's statements and other facts of which the immigration judge is aware. These changes codify in the regulations the current practice and provide a clear requirement to immigration judges that they must consider and apply all applicable law, including administrative precedent from the BIA, decisions of the Attorney General, decisions of the federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits, and decisions of the Supreme Court.

3. Remove and Reserve DHS-Specific Procedures From DOJ Regulations

The Department of Justice proposes to remove and reserve 8 CFR 1235.1, 8 CFR 1235.2, 8 CFR 1235.3, and 8 CFR 1235.5. When the Department first incorporated part 235 into 1235, it stated that ''nearly all of the provisions * * * affect bond hearings before immigration judges.'' Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9826 (Feb. 28, 2003). Upon further review, the Department has determined that these sections regard procedures that are specific to DHS's examinations of applicants for admission as set forth in 8 CFR 235.1, 8 CFR 235.2, 8 CFR 235.3, and 8 CFR 235.5, and do not need to be duplicated

[9] In *Matter of X–K–,* 23 I&N Dec. 731 (BIA 2005)—which the Attorney General recently overruled in *Matter of M–S–,* 27 I&N Dec. 509 (A.G. 2019)—the Board of Immigration Appeals noted in dicta that although the INA ''does not require that such aliens * * *, there is legislative history suggesting that this comports with the intent of Congress.'' 23 I&N Dec. at 734 (citing H.R. Rep. No. 104–828, at 209 (1996) (Conf. Rep.) (''If the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under normal non-expedited removal proceedings.''). Although the notation in the House Conference Report may be read as supporting an interpretation of section 235(b) that allows for the current policy, the statute certainly does not compel the current policy. Indeed, we presume that Congress speaks most directly through its adopted statutory language, and, as explained above, that language actually clearly permits the use of asylum-and-withholding-only proceedings, rather than section 240 proceedings.

[10] Under existing regulations, in proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1), aliens may pursue not only claims for asylum, but also claims for ''withholding or deferral of removal''—which encompasses both statutory withholding of removal, and withholding and deferral of removal under the CAT regulations. 8 CFR 208.2(c)(3)(i), 1208.2(c)(3)(i). This rule makes no change to that aspect of the existing regulations.

[11] DOJ proposes a technical correction to 8 CFR 1003.1(b), which establishes the jurisdiction of the BIA, to correct the reference to 8 CFR 1208.2 in paragraph (b)(9) and ensure that the regulations accurately authorize BIA review in ''asylum-and-withholding-only'' proceedings. EOIR and the INS amended 8 CFR part 208 in 1997 following the enactment of IIRIRA. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444 (Jan. 3, 1997). Two of the many changes made at the time were (1) amending 8 CFR 208.2(b) to set out immigration judges' jurisdiction over asylum applications filed by aliens not entitled to proceedings under section 240 of the INA, 8 U.S.C. 1229a, and aliens who have been served, among other charging documents, a Notice to Appear; and (2) amending 8 CFR 3.1(b)(9) to specifically state that the BIA has jurisdiction over asylum applications described at 8 CFR 208.2(b). Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 455, 462. In 2000, EOIR and the INS redesignated then-existing 8 CFR 208.2(b) into separate paragraphs 8 CFR 208.2(b) (regarding immigration judges' jurisdiction over aliens served, among other charging documents, a Notice to Appear) and 8 CFR 208.2(c) (regarding immigration judges' jurisdiction over asylum applications filed by aliens not entitled to removal proceedings under section 240 of the INA). Asylum Procedures, 65 FR 76121, 76122 (Dec. 6, 2000). EOIR and the INS, however, failed to make a corresponding update to 8 CFR 3.1(b)(9) to account for the change to the cross-referenced paragraph 8 CFR 208.2(b). There is no indication that the Departments intended to remove appeals from ''asylum-and-withholding-only'' proceedings from the BIA's jurisdiction. In 2003, following the creation of DHS, EOIR's regulations were transferred from chapter I to chapter V of 8 CFR and redesignated. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9830, 9834 (Feb. 28, 2003). Since EOIR and the INS amended 8 CFR 208.2(b) in 2000, the BIA has continued to exercise jurisdiction over appeals from asylum-and-withholding-only proceedings. *See, e.g., Kanacevic* v. *I.N.S.,* 448 F.3d 129, 133 (2d Cir. 2006) (noting that the BIA summarily affirmed an immigration judge's decision in a proceeding under 8 CFR 208.2(c)(iii)); *Matter of D–M–C–P–,* 26 I&N Dec. at 647 (holding that neither an immigration judge nor the BIA has jurisdiction to consider whether asylum-and-withholding-only proceedings were improvidently instituted). Accordingly, the Departments are now correcting the reference at 8 CFR 1003.1(b)(9) to prevent ambiguity regarding the BIA's jurisdiction over appeals from immigration judges' decisions in proceedings under 8 CFR 1208.2(c), including decisions in ''asylum-and-withholding-only'' proceedings involving aliens found to have a credible fear of persecution or reasonable possibility of persecution or torture under the proposed rule.

in the regulations for EOIR in Chapter V, except for the provisions in 8 CFR 1235.4 relating to the withdrawal of an application for admission and 8 CFR 1235.6 relating to the referral of cases to an immigration judge.

4. Reasonable Possibility as the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations for Aliens in Expedited Removal Proceedings and Stowaways

This rule also proposes clarifying and raising the statutory withholding of removal screening standard and the torture-related screening standard under the CAT regulations for stowaways and aliens in expedited removal.[12] Currently, fear screenings for aliens in expedited removal proceedings and stowaways generally involve considering whether there is a significant possibility that the alien can establish, in a hearing on the merits, eligibility for asylum, statutory withholding of removal, or withholding or deferral of removal under the CAT regulations. *See* 8 CFR 208.30(e)(2)–(3). Screening for protection under statutory withholding of removal generally involves considering whether there is a significant possibility that the alien could establish in a hearing that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion, if removed to the proposed country of removal. *See* 8 CFR 208.16(b), 208.30(e)(2), 1208.16(b). Currently, screening for protection under the CAT regulations generally involves considering whether the alien can establish that there is a significant possibility that he or she could establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. *See* 8 CFR 208.16(c), 208.30(e)(3), 1208.16(c). The ''significant possibility'' standard has been interpreted by DHS as requiring that the alien ''demonstrate a substantial and realistic possibility of succeeding'' in immigration court. *See* Memorandum from John Lafferty, Chief, Asylum Div., U.S. Citizenship and Immigration Servs., *Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations* 2 (Feb. 28, 2014); *see also Holmes* v. *Amerex Rent-A-Car,* 180 F.3d 294, 297 (D.C. Cir. 1999) (stating in a non-immigration context that establishing a significant possibility involves demonstrating ''a substantial and realistic possibility of succeeding'' (quoting *Holmes* v. *Amerex Rent-a-Car,* 710 A.2d 846, 852 (D.C. 1998))). The Departments propose amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof in ''credible fear'' screenings for aliens in expedited removal proceedings and for stowaways from a significant possibility that the alien can establish eligibility for statutory withholding of removal to a reasonable possibility that the alien would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 CFR 208.16, 208.30(e)(2), 1208.16. Similarly, for aliens expressing a fear of torture, the Departments propose amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof from a significant possibility that the alien is eligible for withholding or deferral of removal under the CAT regulations to a reasonable possibility that the alien would be tortured in the country of removal. *See* 8 CFR 208.18(a), 208.30(e)(3), 1208.18(a).

Congress has not required that consideration of eligibility for asylum, statutory withholding of removal, and protection under the CAT regulations in the ''credible fear'' screening process be considered in the same manner. In fact, the ''credible fear'' screening process as set forth in the INA makes no mention whatsoever of statutory withholding of removal or protection under the CAT regulations. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* FARRA, 112 Stat. at 2681–822; INA 103(a)(1), 8 U.S.C. 1103(a)(1) (''The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens * * * .''); INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (''The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section * * * .''); INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); Regulations Concerning the Convention Against Torture, 64 FR 8478, 8478 (Feb. 19, 1999), as corrected by Regulations Concerning the Convention Against Torture, 64 FR 13881 (Mar. 23, 1999) (''Under Article 3 [of CAT], the United States had agreed not to 'expel, return ('refouler') or extradite' a person to another state where he or she would be tortured * * * . The United States currently implements Article 33 of the Refugee Convention through the withholding of removal provision in section 241(b)(3) * * * of the [INA] * * * .''). FARRA provides that ''the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3'' of CAT, ''subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of [CAT].'' FARRA, sec. 2242(b), 112 Stat. at 2681–822.

Recently, DHS began to apply the ''reasonable possibility'' standard of proof to determinations regarding potential eligibility for statutory withholding of removal and protection under the CAT regulations in ''credible fear'' screenings for aliens in expedited removal proceedings where an alien is found barred from asylum pursuant to 8 CFR 208.13(c)(3)–(4). On November 9, 2018, the Departments issued an Interim Final Rule (''IFR'') to provide that certain aliens described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) who entered the United States in contravention of a covered Presidential proclamation or order are barred from eligibility for asylum (hereinafter referred to as the ''Presidential Proclamation Asylum Bar IFR''). Under that rule, claims for statutory withholding and protection under the CAT regulations are analyzed under this ''reasonable possibility'' standard. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018).[13] In addition, on

[12] A stowaway is defined in section 101(a)(49) of the INA, 8 U.S.C. 1101(a)(49), as ''any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft.'' Further, ''[a] passenger who boards with a valid ticket is not to be considered a stowaway.'' *Id.* The rules that apply to stowaways relating to referrals for credible fear determinations and review by an immigration judge are found in section 235(a)(2) of the INA, 8 U.S.C. 1225(a)(2), which provides that:

> An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

[13] On December 19, 2018, the U.S. District Court for the Northern District of California enjoined the Departments ''from taking any action continuing to implement the Rule'' and ordered the Departments ''to return to the pre-Rule practices for processing asylum applications.'' *E. Bay Sanctuary Covenant* v. *Trump,* 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018). On February 28, 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed the

July 16, 2019, the Departments issued an IFR providing that certain aliens described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) who enter, attempt to enter, or arrive in the United States across the southern land border on or after such date, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, will be found ineligible for asylum unless they qualify for certain exceptions (hereinafter referred to as the ''Third Country Transit Asylum Bar IFR''). *See* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). That IFR provides that if an alien is found ineligible for asylum pursuant to the bar, asylum officers will similarly apply the ''reasonable possibility'' standard to any statutory withholding of removal or CAT regulation claims in the ''credible fear'' screening context. *See id.* at 33837.[14]

This proposed rule would expand the Departments' application of the ''reasonable possibility'' standard of proof. Specifically, the standard of proof in the ''credible fear'' screening process for statutory withholding of removal and protection under the CAT regulations would be raised from a significant possibility that the alien can establish eligibility for such relief or protection to a reasonable possibility that the alien would be persecuted or tortured. *See* 8 CFR 208.16, 208.30(e)(2), 1208.16; *see also* 8 CFR 208.30(e)(3) (currently employing a ''significant possibility'' standard), 8 CFR 208.18(a) and 1208.18(a) (defining torture). For aliens expressing a fear of persecution, the standard of proof in the screening remains unchanged regarding asylum eligibility, *i.e.,* a significant possibility that the alien could establish eligibility for asylum. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v).

Under this rule, during ''credible fear'' screening interviews,[15] asylum officers would consider whether aliens could establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture. Assessing a ''credible fear of persecution'' for purposes of asylum claims would continue to involve considering whether there is a significant possibility that the alien could establish eligibility for asylum under section 208 of the INA, 8 U.S.C. 1158, as is currently provided in the regulations. *See* 8 CFR 208.30(e)(2). However, under the proposed regulations, assessing a ''reasonable possibility of persecution'' would involve considering whether there is a reasonable possibility that the alien would be persecuted such that the alien should be referred to a hearing in immigration court to adjudicate eligibility for statutory withholding of removal. *See* 8 CFR 208.16(b), 1208.16(b).

Meanwhile, under this proposed rule, assessing a reasonable possibility of torture would involve considering whether there is a reasonable possibility that the alien would be tortured such that the alien should be referred for a hearing in immigration court to adjudicate potential eligibility for protection under the CAT regulations. *See* 8 CFR 208.16(c), 1208.16(c). Consistent with existing regulations, if the alien is referred to immigration court after receiving a positive fear determination, the immigration judge applies a ''more likely than not'' standard to the claims for statutory withholding of removal and protection under the CAT regulations. *See* 8 CFR 1208.16–1208.17.

To be eligible for asylum under section 208 of the INA, 8 U.S.C. 1158, an alien must ultimately prove a ''reasonable possibility'' of persecution upon return to his or her country. *See, e.g., Y.C.* v. *Holder,* 741 F.3d 324, 332 (2d Cir. 2013); *see also* 8 CFR 208.13(b)(2)(i)(B), 1208.13(b)(2)(i)(B). On the other hand, to be eligible for either statutory withholding of removal or protection under the CAT regulations, an alien must ultimately prove a ''clear probability'' of the relevant type of harm—*i.e.,* that the harm is more likely than not to occur—upon return to his or her country. *See Y.C.,* 741 F.3d at 333; 8 CFR 208.16(b)(2) and (c)(2), 1208.16(b)(2) and (c)(2); *see also E. Bay Sanctuary,* 950 F.3d at 1277 (''A 'clear probability' of persecution or torture means that it is 'more likely than not' that applicants will be persecuted upon their removal.''). Because an alien's merits burden with respect to claims for CAT protection and statutory withholding of removal is higher than that for a claim to asylum, it is reasonable for an alien's associated screening burden to be correspondingly higher than for an asylum claim. However, under the current regulations, an asylum officer conducting an interview under 8 CFR 208.30 determines whether there is a ''significant possibility'' that the alien would be eligible for statutory withholding of removal or protection under the CAT regulations. 8 CFR 208.30(e)(2)–(3). In other words, the asylum officer applies the same screening standard for fear of persecution under asylum and statutory withholding of removal and fear of torture under the CAT regulations, despite the fact that ultimate success on the merits requires differing standards of proof.

The decision to adopt such a regulatory scheme was made on the assumption that it would not ''disrupt[] the streamlined process established by Congress to circumvent meritless claims.'' Regulations Concerning the Convention Against Torture, 64 FR at 8485.

But while the INA and the CAT regulations authorize the Attorney General and Secretary to provide for consideration of statutory withholding of removal claims and claims for CAT protection together with asylum claims or other matters that may be considered in removal proceedings, the INA does not mandate that approach, *see, e.g.,* 8 U.S.C. 1103(a)(1) and 1225(b)(1); *cf. Foti* v. *INS,* 375 U.S. 217, 229–30 & n.16 (1963) (emphasizing that administrative regulations and procedure may broaden or narrow the subject matter within a court's scope of review, including review of orders denying voluntary departure or withholding or removal), or that they be considered in the same manner. This rule would end the current approach and require asylum

injunction. *E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242, 1284 (9th Cir. 2020). The Departments in this rule do not propose to make any amendments that would implement the rule at issue in *East Bay Sanctuary.*

[14] On July 24, 2019, the U.S. District Court for the Northern District of California enjoined the Departments ''from taking any action continuing to implement the Rule'' and ordered the Departments ''to return to the pre-Rule practices for processing asylum applications.'' *E. Bay Sanctuary Covenant* v. *Barr,* 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). On August 16, 2019, the U.S. Court of Appeals for the Ninth Circuit issued a partial stay of the preliminary injunction so that the injunction remained in force only in the Ninth Circuit. *E. Bay Sanctuary Covenant* v. *Barr,* 934 F.3d 1026, 1028 (9th Cir. 2019). On September 9, 2019, the district court then reinstated the nationwide scope of the injunction. 391 F.Supp.3d 974. Two days later, the Supreme Court stayed the district court's injunction. *Barr* v. *East Bay Sanctuary Covenant,* 140 S. Ct. 3 (2019). The Departments do not propose to make any amendments in this rule that would modify the substance of the rule at issue in that litigation.

[15] The Departments recognize that, as a linguistic matter, it may seem strange to refer to a proceeding in which a reasonable possibility standard is applied as a ''credible fear'' screening. But the Departments have elected to retain the ''credible fear'' nomenclature because the relevant statutory provision is titled ''removal without further review if no credible fear of persecution,'' INA 235(b)(1)(B)(iii), 8 U.S.C. 1225(b)(1)(B)(iii), and for continuity and for ease of distinguishing proceedings conducted under 8 CFR 208.30 from those conducted under 8 CFR 208.31. Moreover, this change is consistent with the Departments' IFR in 2018 that employed a reasonable possibility standard in the context of a credible fear screening for aliens subject to certain Presidential proclamations. *See* Presidential Proclamation Asylum Bar IFR, 83 FR at 55943.

officers conducting interviews under 8 CFR 208.30 to assess whether the interviewed aliens can establish a credible fear of persecution in asylum claims, a reasonable possibility of persecution in statutory withholding of removal claims, and a reasonable possibility of torture in claims under the CAT regulations.

The Departments' proposal to raise the standards of proof for assessing potential eligibility for statutory withholding of removal and withholding or deferral of removal under the CAT regulations in the ''credible fear'' screening context falls within the scope of the authority that Congress has granted to the Secretary and the Attorney General to carry out immigration and nationality laws. *See* HSA; FARRA; INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A) (allowing the Attorney General to ''decide[ ]'' whether an ''alien's life or freedom would be threatened'' before directing removal of the alien); Regulations Concerning the Convention Against Torture, 64 FR at 8478, as corrected by Regulations Concerning the Convention Against Torture, 64 FR 13881 (Mar. 23, 1999). Moreover, raising the standards of proof to a ''reasonable possibility'' during screening for statutory withholding of removal and withholding and deferral of removal under the CAT regulations better aligns the initial screening standards of proof with the higher standards used to determine whether aliens are in fact eligible for these forms of protection before immigration judges. Unlike in the context of asylum determinations, in which the ''well-founded fear'' standard is used, both in the statutory withholding and CAT withholding or deferral of removal contexts, immigration judges apply the higher ''more likely than not'' standard. *See* 8 CFR 1208.16–1208.17.

The ''reasonable possibility'' standard has long been used for fear determinations made under 8 CFR 208.31 and 8 CFR 1208.31, which cover certain classes of aliens who are ineligible for asylum but who are eligible for statutory withholding of removal and protection under the CAT regulations. *See* 8 CFR 208.31(a) and (c), 1208.31(a) and (c); *see also* INA 238(b)(5), 8 U.S.C. 1228(b)(5); INA 241(a)(5), 8 U.S.C. 1231(a)(5). ''This * * * screening process is modeled on the credible-fear screening process, but requires the alien to meet a higher screening standard.'' Regulations Concerning the Convention Against Torture, 64 FR at 8485; *see also Garcia* v. *Johnson,* No. 14–CV–01775, 2014 WL 6657591, at *2 (N.D. Cal. Nov. 21, 2014) (describing the aim of the regulations as providing ''fair and efficient procedures'' in reasonable fear screening that would comport with U.S. international obligations).

Significantly, when establishing the ''reasonable fear'' screening process, DOJ explained that the two affected categories of aliens should be screened based on the higher reasonable fear standard because, ''[u]nlike the broad class of arriving aliens who are subject to expedited removal, these two classes of aliens are ineligible for asylum,'' and may be entitled only to statutory withholding of removal or protection under the CAT regulations. Regulations Concerning the Convention Against Torture, 64 FR at 8485. ''Because the standard for establishing the likelihood of harm related to these forms of protection (a clear probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.'' *Id.*

The standard's long use evidences that it is consistent with the United States' non-refoulement obligations and would not prevent aliens entitled to protection under the CAT regulations from receiving it. Drawing on the established framework for considering whether to grant statutory withholding of removal or CAT protection in the reasonable fear context, this rule would establish a bifurcated screening process in which aliens subject to expedited removal will be screened for asylum under the ''significant possibility'' standard, and screened for statutory withholding of removal or CAT protection under the ''reasonable possibility'' standard.

The Departments also propose to amend 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to refer to the screenings of aliens in expedited removal proceedings and of stowaways for statutory withholding of removal as ''reasonable possibility of persecution'' determinations and the screening for withholding and deferral of removal under the CAT regulations as ''reasonable possibility of torture'' determinations, in order to avoid confusion between the different standards of proof. By proposing these amendments, the Departments seek to maintain operational efficiency by differentiating between screenings for forms of relief, including asylum under 8 CFR 208.30, and screenings for only statutory withholding of removal and withholding and deferral of removal under the CAT regulations under 8 CFR 208.31, because, as noted above, the two screenings apply to different populations of aliens. Currently, DHS asylum officers conduct screenings under a ''credible fear'' standard for, inter alia, stowaways and aliens in expedited removal proceedings who express a fear of persecution or torture, a fear of return, or an intention to apply for asylum. *See* 8 CFR 208.30(a), 1208.30(a). DHS asylum officers conduct screenings under a ''reasonable fear'' standard for aliens who express a fear of persecution or torture and who have been issued an administrative removal order under section 238 of the INA, 8 U.S.C. 1228, due to an aggravated felony conviction or who are subject to a reinstated removal order under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5). *See* 8 CFR 208.31(a), 1208.31(a). Accordingly, the Departments seek to make technical edits by using the term ''reasonable possibility'' as the legal standard and using ''reasonable fear'' only to refer to proceedings under 8 CFR 208.31 and 8 CFR 1208.31. Use of the term ''reasonable possibility'' rather than the term ''reasonable fear'' when discussing statutory withholding of removal and CAT protection screening determinations under 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 will prevent confusion over which type of analysis is at issue.

In conjunction with the edits proposed to DHS's regulation in 8 CFR 208.30, DOJ proposes edits to 8 CFR 1208.30 related to the legal standard of review. Currently, after an asylum officer determines that an alien lacks a credible fear of persecution or torture, the regulation provides that an immigration judge in EOIR then reviews that determination under the credible fear standard. 8 CFR 208.30(g), 1208.30(g). DHS's proposed ''reasonable possibility'' screening standard for statutory withholding of removal and CAT protection claims is a mismatch for EOIR's current regulation, which does not provide for a reasonable possibility review process in the expedited removal context. Therefore, DOJ proposes to modify 8 CFR 1208.30(g) to clarify that credible fear of persecution determinations will continue to be reviewed under a ''credible fear'' standard, but screening determinations for eligibility for statutory withholding of removal and protection under the CAT regulations will be reviewed under a ''reasonable possibility'' standard.

Additionally, to clarify terminology in 8 CFR 208.30(d)(2), mention of the Form M–444, Information about Credible Fear Interview in Expedited Removal Cases, would be replaced with mention of relevant information regarding the ''credible fear'' screening process. This

change would clarify that DHS may relay information regarding screening for a reasonable possibility of persecution and a reasonable possibility of torture, in addition to a credible fear of persecution.

Under the proposed rule, the burden is on the alien to show that there is a reasonable possibility that he or she would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion if removed to the country of removal. Similarly, the burden is on the alien to show there is a reasonable possibility that he or she would be tortured in the country of removal. As a result, the alien must demonstrate a reasonable possibility that he or she will suffer severe pain or suffering, whether physical or mental, in the country of removal and a reasonable possibility that the feared harm would fall within the definition of torture set forth in 8 CFR 208.18(a)(1)–(8) and 8 CFR 1208.18(a)(1)–(8).

A ''reasonable possibility'' standard is equivalent to the ''well-founded fear'' standard in section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), which is used to determine ultimate eligibility for asylum. *See I.N.S.* v. *Stevic,* 467 U.S. 407, 424–25 (1984); 8 CFR 208.13(b)(2)(i)(B), 1208.13(b)(2)(i)(B). The ''well-founded fear'' standard is lower than the ''more likely than not'' standard ultimately required to establish the likelihood of future harm for statutory withholding of removal and protection under the CAT regulations. Indeed: ''[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.'' *INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 431 (1987).

While lower than the ''clear probability'' standard governing the merits determination for statutory withholding of removal and withholding and deferral of removal under the CAT regulations, the ''reasonable possibility'' standard is a well-established standard of proof that is an appropriate screening standard to identify those who have meaningful claims to such protection. *See Matter of Mogharrabi,* 19 I&N Dec. 439, 440–46 (BIA 1987) (distinguishing the ''reasonable possibility'' and ''more likely than not'' standards). Determining a reasonable possibility of persecution does not rest on the statistical possibility of persecution, but rather on whether the applicant's fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution. *See id.* at 445.

For a number of reasons, the Departments do not believe that this change would implicate reliance interests. First, the ultimate eligibility standards remain the same. Second, it is exceedingly unlikely that aliens seek statutory withholding of removal or protection under the CAT regulations based on the applicable standard of proof. Third, the proposed change would provide numerous benefits. Raising the standards of proof to a ''reasonable possibility'' for the screening of aliens seeking statutory withholding of removal and CAT protection would allow the Departments to better screen out non-meritorious claims and focus limited resources on claims much more likely to be determined to be meritorious by an immigration judge. Adopting a higher standard for statutory withholding and CAT screenings would not hinder the streamlined process envisioned for expedited removal. Asylum officers already receive extensive training and guidance on applying the ''reasonable possibility'' standard in other contexts because they are determining whether a reasonable possibility of persecution or torture exists in reasonable fear determinations pursuant to 8 CFR 208.31. In some cases, asylum officers would need to spend additional time eliciting more detailed testimony from aliens to account for the higher standard of proof; however, the overall impact on the time asylum officers spend making screening determinations would be minimal. The procedural aspects of making screening determinations regarding fear of persecution and of torture would remain largely the same. Moreover, using a higher standard of proof in the screening context for those seeking statutory withholding of removal or protection under the CAT regulations in the immigration courts allows the Departments to more efficiently and promptly distinguish between aliens whose claims are more likely or less likely to ultimately be meritorious.

DHS also proposes in 8 CFR 208.30(e)(1) to interpret the ''significant possibility'' standard that Congress established in section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v). DHS's proposal would serve to promote greater clarity and transparency in credible fear of persecution determinations.

As stated in proposed in 8 CFR 208.30(e)(1), ''significant possibility'' means a substantial and realistic possibility of succeeding. As discussed above, this proposed definition of ''significant possibility'' is consistent with both case law and existing policy and practice, and allows relevant parties, including aliens, consultants, and legal representatives, to better understand the standard of proof that applies to credible fear of persecution claims. This definition is also consistent with congressional intent. The 104th Congress chose a screening standard ''intended to be a low screening standard for admission into the usual full asylum process.'' 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch). Originally, the Senate bill had proposed a ''determination of whether the asylum claim was 'manifestly unfounded,' while the House bill applied a 'significant possibility' standard coupled with an inquiry into whether there was a substantial likelihood that the alien's statements were true.'' *Id.* In IIRIRA, Congress then ''struck a compromise by rejecting the higher standard of credibility included in the House bill.'' *Id.* The House's ''significant possibility'' standard is lower than the ''more probable than not'' language in the original House version. 142 Cong. Rec. H11081 (daily ed. Sept. 25, 1996) (statement of House Judiciary Committee Chairman Henry Hyde). The proposed regulation is thus consistent with congressional intent because it defines ''significant possibility'' in a way that ensures that the standard does not reach the level of more likely than not. Overall, DHS's effort will contribute to ensuring consistency in making credible fear of persecution determinations.

5. Proposed Amendments to the Credible Fear Screening Process

The Departments further propose to amend 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to make several additional technical and substantive amendments regarding fear interviews, determinations, and reviews of determinations. The Departments propose to amend 8 CFR 208.30(a) and 8 CFR 1208.30(a) to clearly state that the respective sections describe the exclusive procedures applicable to applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), and receive ''credible fear'' interviews, determinations, and reviews under section 235(b)(1)(B) of the Act, 8 U.S.C. 1225(b)(1)(B).

DHS proposes to clarify the existing ''credible fear'' screening process in proposed 8 CFR 208.30(b), which states that if an alien subject to expedited removal indicates an intention to apply for asylum or expresses a fear of

persecution or torture, or a fear of return, an inspecting officer shall not proceed further with removal until the alien has been referred for an interview with an asylum officer, as provided in section 235(b)(1)(A)(ii) of the Act, 8 U.S.C. 1225(b)(1)(A)(ii). The proposed rule also states that the asylum officer would screen the alien for a credible fear of persecution and, as appropriate, a reasonable possibility of persecution or a reasonable possibility of torture, and conduct an evaluation and determination in accordance with 8 CFR 208.9(c), which is consistent with current policy and practice. These proposals aim to provide greater transparency and clarity with regard to fear screenings.

DHS also proposes to include consideration of internal relocation in the context of proposed 8 CFR 208.30(e)(1)–(3), which outline the procedures for determining whether aliens have a credible fear of persecution, a reasonable possibility of persecution, and a reasonable possibility of torture. Considering internal relocation in the ''credible fear'' screening context is consistent with existing policy and practice, and the regulations addressing internal relocation at 8 CFR 208.16(c)(3)(ii) and 8 CFR 1208.16(c)(3)(ii) (protection under the CAT regulations); 8 CFR 208.13(b)(1)(i)(B) and 8 CFR 1208.13(b)(1)(i)(B) (asylum); and 8 CFR 208.16(b)(1)(i)(B) and 8 CFR 1208.16(b)(1)(i)(B) (statutory withholding). The regulatory standard that governs consideration of internal relocation in the context of asylum and statutory withholding of removal adjudications is different from the standard that considers internal relocation in the context of protection under the CAT regulations. *See generally Maldonado* v. *Lynch,* 786 F.3d 1155, 1163 (9th Cir. 2015) (noting the marked difference between the asylum and CAT regulations concerning internal relocation).

In addition, the Departments propose to add asylum and statutory withholding eligibility bar considerations in proposed 8 CFR 208.30(e)(1)(iii) and (e)(2)(iii), and 8 CFR 1003.42(d). Currently, 8 CFR 208.30(e)(5)(i) provides that if an alien, other than a stowaway, is able to establish a credible fear of persecution or torture but also appears to be subject to one or more of the mandatory eligibility bars to asylum or statutory withholding of removal, then the alien will be placed in section 240 proceedings. In proposed 8 CFR 208.30(e)(5), DHS would require asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under section 208(a)(2)(B)–(D) of the Act, 8 U.S.C. 1158(a)(2)(B)–(D), or the bars to asylum eligibility under section 208(b)(2) of the Act, 8 U.S.C. 1158(b)(2), including any eligibility bars established by regulation under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C);[16] and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the CAT regulations.[17] An alien who could establish a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal would receive a negative fear determination, unless the alien could establish a reasonable possibility of torture, in which case he or she would be referred to the immigration court for asylum-and-withholding-only proceedings. In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations.

Under the current regulations at 8 CFR 208.30(e)(5), aliens who establish a credible fear of persecution or torture but appear to be subject to one or more of the mandatory bars are referred for section 240 proceedings. From an administrative standpoint, it is pointless and inefficient to adjudicate claims for relief in section 240 proceedings when it is determined that an alien is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage. Accordingly, applying those mandatory bars to aliens at the ''credible fear'' screening stage would eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate the waste of adjudicatory resources currently expended in vain.

If an asylum officer determines, at the ''credible fear'' screening stage, that an alien is subject to one or more mandatory bars, the alien would, under this rule, be permitted to request review of that determination by an immigration judge. *See* 8 CFR 208.30(g) (current), 8 CFR 208.30(g) (proposed); *see also* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (''The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination * * * that the alien does not have a credible fear of persecution.'').

The bars to asylum eligibility are not identical to the bars to statutory withholding eligibility. *Compare* 8 U.S.C. 1158(b)(2)(A)(i)–(vi) (bars to asylum eligibility), *with* 8 U.S.C. 1231(b)(3)(B)(i)–(iv) (bars to withholding of removal eligibility). Under the proposed regulations, an alien who is barred from asylum eligibility could be found to have a reasonable possibility of persecution in instances in which the alien is barred from asylum, but not likewise barred from statutory withholding. For instance, if an alien is subject to the firm resettlement bar, the alien is barred from asylum eligibility, but not barred from statutory withholding eligibility. In such a case, if the alien demonstrated a reasonable possibility of persecution, the alien would be referred to the immigration judge for asylum-and-withholding-only proceedings. The proposed rule would ensure that if an alien has established a significant possibility of eligibility for asylum or a reasonable possibility of persecution and is not barred from statutory withholding eligibility, the alien can appear before an immigration judge for consideration of the asylum, statutory withholding, and CAT claims. Moreover, this process would retain a mechanism for immigration judge review of the determination that the alien is not eligible for asylum, as required in section 235(b)(1)(B)(iii) of the Act, 8 U.S.C. 1225(b)(1)(B)(iii). Thus, the proposed rule would reasonably balance the various interests at stake. It would promote efficiency by avoiding duplicative administrative efforts while ensuring that those who are subject to a mandatory bar receive an opportunity to have the asylum officer's finding reviewed by an immigration judge.

[16] The following classes of aliens are ineligible for asylum: Aliens who (1) participated in certain types of persecution; (2) have been convicted of a particularly serious crime; (3) have committed (or are reasonably believed to have committed) a serious nonpolitical crime outside the United States; (4) are a danger to the security of the United States; (5) are removable on terrorism-related grounds; or (6) were firmly resettled in another country prior to arrival in the United States. INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi). The Secretary and the Attorney General may also by regulation establish additional ineligibilities. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). Together, the bars in these two subparagraphs are commonly referred to as the mandatory bars to a grant of asylum.

[17] The following classes of aliens are ineligible for statutory withholding of removal: Aliens who (1) participated in certain types of persecution; (2) have been convicted of a particularly serious crime; (3) have committed (or are reasonably believed to have committed) a serious nonpolitical crime outside the United States; or (4) are a danger to the security of the United States. INA 241(b)(3)(B)(i)–(iv), 8 U.S.C. 1231(b)(3)(B)(i)–(iv).

Additionally, under 8 CFR 208.30(e)(5), DHS currently uses (or potentially would use, pending the resolution of litigation), a ''reasonable fear'' standard (identical to the ''reasonable possibility'' standard enunciated in this rule) in procedures related to aliens barred from asylum under the two previously mentioned IFRs, as described in 8 CFR 208.13(c)(3)–(4). The Departments seek to make technical edits in proposed 8 CFR 208.30(e)(5), to change ''reasonable fear'' to ''reasonable possibility'' to align the terminology with the proposed changes in this rule. Similarly, DOJ proposes to make technical edits in 8 CFR 1208.30(g)(1) and 8 CFR 1003.42(d)—both of which refer to the ''reasonable fear'' standard in the current version of 8 CFR 208.30(e)(5)—to change the ''reasonable fear'' language to ''reasonable possibility.'' These edits are purely technical and would not amend, alter, or impact the standard of proof applicable to the fear screening process and determinations, or review of such determinations, associated with the aforementioned bars.

Additionally, in proposed 8 CFR 208.2(c)(1), 8 CFR 1208.2(c)(1), 8 CFR 235.6(a)(2), and 8 CFR 1235.6(a)(2), the Departments are making technical edits to replace the term ''credible fear of persecution or torture'' with ''a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture'' to mirror the terminology used in proposed 8 CFR 208.30 and 8 CFR 1208.30. Moreover, in proposed 8 CFR 1208.30(g)(2)(iv)(C), DOJ is making a technical edit to clarify that stowaways barred from asylum and both statutory and CAT withholding of removal may still be eligible for deferral of removal under the CAT regulations.

The Departments further propose to amend 8 CFR 208.30(g) and 8 CFR 1208.30(g)(2), which address procedures for negative fear determinations for aliens in the expedited removal process. Currently, 8 CFR 208.30(g) provides that when an alien receives notice of a negative determination, the asylum officer inquires whether the alien wishes to have an immigration judge review the decision. If that alien refuses to indicate whether he or she desires such review, DHS treats this as a request for review by an immigration judge. *See also* 8 CFR 1208.30(g)(2). In proposed 8 CFR 208.30(g)(1), the Departments seek to treat an alien's refusal to indicate whether he or she desires review by an immigration judge as declining to request such review. Also, in proposed 8 CFR 208.31, the Departments will treat a refusal as declining to request review within the context of reasonable fear determinations. This proposal aligns with the Departments' interest in the expeditious resolution of fear claims, with a focus on those claims that are most likely to be meritorious. Given that the alien has been informed of his or her right to seek further review and given an opportunity to exercise that right, referring an alien to an immigration judge based on a refusal to indicate his or her desire places unnecessary and undue burdens on the immigration courts.

The Departments welcome comments on all aspects of these proposals, including the use of asylum-and-withholding-only proceedings, the definition of ''significant possibility,'' and the raising of the standard for statutory withholding of removal and torture-related determinations to ''reasonable possibility.''

B. Form I–589, Application for Asylum and for Withholding of Removal, Filing Requirements

1. Frivolous Applications

Frivolous asylum applications are a costly detriment, resulting in wasted resources and increased processing times for an already overloaded immigration system. *See Angov* v. *Lynch,* 788 F.3d 893, 901–02 (9th Cir. 2015) (''[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. * * * [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. * * * Consequently, immigration fraud is rampant.''). Under section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), ''[i]f the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received [the notice of privilege of counsel and the consequences of knowingly filing a frivolous application], the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.'' By current regulation, such frivolousness determinations may only be made by an immigration judge or the BIA. 8 CFR 208.20, 1208.20.

For the penalty in section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), to apply, there must be a finding that an alien ''knowingly made a frivolous application for asylum'' after receiving the notice required by section 208(d)(4)(A), 8 U.S.C 1158(d)(4)(A). In other words, the alien's asylum application must be frivolous, the application must have been knowingly made—*i.e.,* knowing of its frivolous nature—and the alien must have received the notice required by section 208(d)(4)(A), 8 U.S.C. 1158(d)(4)(A), at the time of filing.[18] No penalty under this section will be imposed unless all three requirements are met. The term ''knowingly'' is not defined in either the statute or the current regulations. Consequently, the Departments propose to clarify that ''knowingly'' requires either actual knowledge of the frivolousness or willful blindness toward it. Willful blindness means the alien was aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise. This standard is higher than mere recklessness or negligence and is consistent with well-established legal principles. *See, e.g., Global-Tech Appliances, Inc.* v. *SEB S.A.,* 563 U.S. 754, 769–70 (2011). The term ''frivolous'' is not defined in the INA.[19] Prior to the enactment of section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), a frivolous asylum application was defined for purposes of granting employment authorization as

[18] The asylum application, Form I–589, contains a written notice of the consequences of making a frivolous asylum application pursuant to section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A), and that notice is sufficient to satisfy the third requirement of section 208(d)(6), 8 U.S.C. 1158(d)(6). *See, e.g., Niang* v. *Holder,* 762 F.3d 251, 254–55 (2d Cir. 2014) (''Because the written warning provided on the asylum application alone is adequate to satisfy the notice requirement under 8 U.S.C. 1158(d)(4)(A) and because Niang signed and filed his asylum application containing that warning, he received adequate notice warning him against filing a frivolous application.''). Thus, every alien who signs and files an asylum application has received the notice required by section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A).

[19] Depending on context, frivolous may mean, inter alia, ''[l]acking in high purpose; trifling, trivial, and silly'' or ''[l]acking a legal basis or legal merit; manifestly insufficient as a matter of law.'' *Black's Law Dictionary* (11th ed. 2019). Frivolous filings abuse the judicial process. *See Des Vignes* v. *Dep't of Transp., FAA,* 791 F.2d 142, 146 (Fed. Cir. 1986) (holding that frivolous filings abuse the judicial process by wasting the time and limited resources of adjudicators, unnecessarily expend taxpayer resources, and deny the availability of adjudicatory resources to deserving litigants). The Departments accordingly believe that ''frivolous'' is a term that is broad enough to encompass not only applications that are fraudulent, but also those that are plainly without legal merits. Both kinds of applications seriously undermine the adjudicatory process, yet although none of these conceptions of frivolousness is precluded by INA 208(d)(6), 8 U.S.C. 1158(d)(6), not all of them are captured by the current regulatory definition of frivolousness. There is no indication that Congress intended a narrow construction of 8 U.S.C. 1158(d)(6), and a narrow view of a frivolous asylum application is at odds with its intent to discourage improper applications. As discussed, *infra,* the proposed rule broadens the regulatory definition of a frivolous asylum application, provided the application was knowingly filed and the applicant received the appropriate notice, to more fully and accurately capture a broader spectrum of behavior that abuses the judicial process.

one that was ''manifestly unfounded or abusive.'' 8 CFR 208.7 (1995). Additional guidance interpreted ''frivolous'' in this context to mean ''patently without substance.'' *See Grijalva* v. *Illchert,* 815 F. Supp. 328, 331 (N.D. Cal. 1993) (summarizing prior regulatory and policy definitions of frivolousness before the current definition was promulgated in 1997). Subsequent to the enactment of section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), DOJ proposed defining a frivolous asylum application for purposes of that provision as one that ''is fabricated or is brought for an improper purpose'' before settling on the current definition of an application in which ''any of its material elements is deliberately fabricated.'' *Compare* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 468 (Jan. 3, 1997) (proposed rule), *with* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10344 (Mar. 6, 1997) (final rule). Although the final rule did not explain why DOJ altered its proposed definition of ''frivolous,'' the proposed rulemaking noted that the purpose of a definition of ''frivolous'' was ''to discourage applicants from making patently false claims.'' Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 447. In light of this regulatory definition, subsequent case law has noted that ''the term 'fraudulent' may be more appropriate than the term 'frivolous' when applied to a questionable asylum application.'' *Matter of Y–L–,* 24 I&N Dec. 151, 155 n.1 (BIA 2007) (citing *Barreto-Claro* v. *U.S. Att'y Gen.,* 275 F.3d 1334, 1339 n.11 (11th Cir. 2001), which observed that ''Fraudulent'' would be a more appropriate modifier than ''Frivolous'' in the statutory heading of section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6)). In short, the concept of a frivolous asylum application as understood by the Departments has encompassed a number of different, related concerns over the years—*i.e.,* applications that are unfounded, abusive, improperly brought, fabricated, or fraudulent—but not all of those are necessarily represented in the current regulatory definition premised solely on fabricated material elements.

The statutory text does not provide a definition of ''frivolous,'' expressly restrict how it may be defined, or compel a narrow definition limited solely to the deliberate fabrication of material elements, though the penalty in section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), only applies if a frivolous application is knowingly made—*i.e.,* with knowledge or willful blindness of its frivolousness—after an alien has received notice of the consequences of filing a frivolous application. The current regulatory definition of ''frivolous'' related to asylum applications, which limits the concept of frivolousness to deliberate fabrication of material elements, was promulgated in 1997 with the intent ''to discourage applicants from making patently false claims,'' but it did not address other types of frivolousness, such as abusive filings, filings for an improper purpose, or patently unfounded filings, or explain why these considerations of frivolousness were either no longer necessary or undesirable. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 468 (proposing to define a frivolous application as one that ''is fabricated or is brought for an improper purpose''); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 10344 (ultimately defining an asylum application as frivolous if ''any of its material elements is deliberately fabricated,'' but not explaining the basis for the change).

Consequently, the current, narrowly-drawn definition does not appear sufficient to capture the full spectrum of claims that would ordinarily be deemed ''frivolous,'' nor has it been fully successful in its stated intent of discouraging knowingly and patently false claims. This result can be seen in several cases where applications that one may ordinarily understand as ''frivolous'' are nonetheless not captured by the current narrow regulatory definition. *See, e.g., Scheerer* v. *U.S. Att'y Gen.,* 445 F.3d 1311, 1317–18 & n.10 (11th Cir. 2006) (reversing a frivolousness finding regarding a claim based on alleged fear of persecution due to the applicant's belief that the Holocaust did not occur); *L–T–M–* v. *Whitaker,* 760 F. App'x 498, 501 (9th Cir. 2019) (fabricated material evidence, including fraudulent documentation, does not make an asylum application frivolous because the regulatory definition of frivolousness requires the fabrication of an element and evidence is not an element).

L–T–M–, in particular, demonstrates the limitations of the current definition in discouraging false claims. Not only does it run contrary to numerous other federal court decisions upholding frivolousness findings based on fabricated evidence—*see, e.g., Selami* v. *Gonzales,* 423 F.3d 621, 626–27 (6th Cir. 2005) (affirming a frivolousness finding based on the submission of a fraudulent newspaper article); *Ursini* v. *Gonzales,* 205 F. App'x 496, 497–98 (9th Cir. 2006) (affirming a frivolousness finding based on the submission of false documents); *Diallo* v. *Mukasey,* 263 F. App'x 146, 150 (2d Cir. 2008) (affirming a frivolousness finding based on the submission of a fraudulent vaccination card); *Shllaku* v. *Gonzales,* 139 F. App'x 700, 702–03 (6th Cir. 2005) (affirming a frivolousness finding based on the submission of counterfeit documents)—but its potential to lead to absurd results by allowing claims supported by knowingly fabricated material evidence to escape the penalty called for in INA 208(d)(6), 8 U.S.C. 1158(d)(6), undermines the intent of that provision to discourage false claims. The proposed rule would revise the current definition of ''frivolous'' to broaden it and bring it more in line with prior understandings of frivolous applications, including applications that are clearly unfounded, abusive, or involve fraud, and better effectuate the intent of section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), to discourage applications that make patently meritless or false claims.

Accordingly, the Departments propose to amend the definition of ''frivolous'' to ensure that manifestly unfounded or otherwise abusive claims are rooted out and to ensure that meritorious claims are adjudicated more efficiently so that deserving applicants receive benefits in a timely fashion. The revised regulation also reflects Congress's concern with applications that are knowingly frivolous at the time of filing, regardless of whether an alien subsequently retracts or withdraws the application. *See* INA 208(d)(4) and (6), 8 U.S.C. 1158(d)(4) and (6); *Matter of X–M–C–,* 25 I&N Dec. 322, 325–27 (BIA 2010) (withdrawal of asylum application does not preclude finding that the application is knowingly frivolous); *see also Kulakchyan* v. *Holder,* 730 F.3d 993, 996 (9th Cir. 2013) (approving of *Matter of X–M–C–*); *Mei Juan Zheng* v. *Holder,* 672 F.3d 178, 184 (2d Cir. 2012) (same).

Existing regulations provide that immigration judges and the BIA may make findings that an alien has knowingly filed a frivolous asylum application. *See* 8 CFR 208.20, 8 CFR 1208.20. The Departments propose to amend these regulations to allow asylum officers adjudicating affirmative

asylum applications to make findings that aliens have knowingly filed frivolous asylum applications and to refer the cases on that basis to immigration judges (for aliens not in lawful status) or to deny the applications (for aliens in lawful status). For an alien not in lawful status, a finding by an asylum officer that an asylum application is frivolous would not render an alien permanently ineligible for immigration benefits unless an immigration judge or the BIA subsequently makes a finding of frivolousness upon de novo review of the application as stated in the current and proposed 8 CFR 208.20 and 8 CFR 1208.20. Asylum officers would apply the same definition used by immigration judges and the BIA as proposed by this rule. *Id.* As this proposed rule would overrule *Matter of Y–L–,* and revise the definition of ''frivolous,'' USCIS would not be required to provide opportunities for applicants to address discrepancies or implausible aspects of their claims in all cases when the asylum officer determines that sufficient opportunity was afforded to the alien. As with any other affirmative asylum case referred to the immigration judge by an asylum officer, the immigration judge would review the asylum application de novo.

By allowing asylum officers to find asylum applications to be frivolous, the Departments seek to enhance the officers' ability to identify and efficiently root out frivolous applications, and to deter the filing of such applications in the first place. The current practice for handling frivolous asylum applications at the affirmative asylum application stage generally involves asylum officers making negative credibility determinations. Asylum officers may refer asylum applications to the immigration courts based on negative credibility findings, but not solely based on frivolousness.

Making a credibility determination, positive or negative, involves conducting an asylum interview. If the asylum officer identifies credibility concerns, such as inconsistencies or lack of detail, the asylum officer confronts the applicant with these concerns during the interview and gives the applicant an opportunity to explain. If the asylum officer decides to make a negative credibility determination, the officer prepares a written assessment that explains the credibility concerns, such as inconsistencies, lack of detail, or both, and discusses the reasonableness of the applicant's explanations and the relevancy of the credibility concerns to the claim. *See* INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii); *Matter of B–Y–,* 25 I&N Dec. 236, 242 (BIA 2010) (''In making an adverse credibility determination, the opportunity for explanation requires that an Immigration Judge not rely on inconsistencies that take a respondent by surprise. *See Ming Shi Xue* v. *BIA,* 439 F.3d 111 (2d Cir. 2006) * * *. If an inconsistency is obvious or glaring or has been brought to the attention of the respondent during the course of the hearing, however, there is no requirement that a separate opportunity for explanation be provided prior to making the adverse credibility determination. *See Ye* v. *Dep't of Homeland Sec.,* 446 F.3d 289 (2d Cir. 2006).'').

The proposed amendments to the regulations would give asylum officers a valuable and more targeted mechanism for handling frivolous asylum applications. As noted above, when referring cases to the immigration courts based on negative credibility determinations, asylum officers may flag issues related to frivolousness for immigration judges to consider, but they cannot refer frivolous cases or deny applications solely on that basis. Allowing asylum officers to refer or deny frivolous cases solely on that basis would strengthen USCIS's ability to root out frivolous applications more efficiently, deter frivolous filings, and ultimately reduce the number of frivolous applications in the asylum system. These amendments would help the Departments better allocate limited resources and time and more expeditiously adjudicate meritorious asylum claims.

Moreover, under this proposed rule, if an asylum officer identifies indicators of frivolousness in an asylum application, the asylum officer would focus more during the interview on matters that may be frivolous. And an immigration judge who receives an asylum application with a frivolousness finding by an asylum officer would have a more robust and developed written record focused on frivolous material elements to help inform his or her ultimate decision. Thus, an asylum officer's finding that an application is frivolous would help improve the efficiency and integrity of the overall adjudicatory process.

Asylum officers are well prepared to put the proposed regulatory changes into operation. They receive extensive training on spotting indicators of frivolousness, fraud, and credibility concerns, including on reviewing and assessing written materials that may raise such concerns. In addition, asylum officers receive training on how to appropriately identify, raise, and address credibility and frivolousness concerns during interviews with asylum applicants. Thus, asylum officers are well equipped to adjudicate frivolousness in the affirmative asylum context.

Furthermore, the Departments' proposed regulatory changes are consistent with congressional intent. When the 104th Congress amended the procedures used to consider asylum applications through IIRIRA, it sought ''to reduce the likelihood that fraudulent or frivolous applications will enable deportable or excludable aliens to remain in the U.S. for substantial periods.'' S. Rept. No. 104–249, at 2 (1996). Allowing asylum officers, in addition to immigration judges and the BIA, to find filings frivolous would help deter aliens from filing frivolous asylum applications and reduce the likelihood that aliens with frivolous applications will be released into the United States for substantial periods of time, usually with work authorization.

The Departments also propose changes to 8 CFR 208.20 and 8 CFR 1208.20 to expand and clarify what circumstances would require an immigration judge or the BIA (and now asylum officers) to find an asylum application to be knowingly frivolous.[20] The proposed rule maintains the current definition of ''frivolous'' such that if knowingly made, an asylum application would be properly considered frivolous if the adjudicator determines that it includes a fabricated material element. The proposed rule also would provide, consistent with case law, that if knowingly made, an asylum application premised on false or fabricated evidence, unless it would be granted without the fabricated evidence, may also be found frivolous.[21] *See, e.g., Selami,* 423 F.3d at 626–27; *Ursini,* 205

[20] For purposes of 8 CFR 208.20 and 8 CFR 1208.20, an alien knowingly files a frivolous asylum application if the alien filed the application knowing that it was frivolous intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness, or the alien filed the application deliberately ignoring the fact that the application was frivolous. It is the alien's duty to read the asylum application before signing it. If an alien acts through an agent, the alien will be deemed responsible for actions of the agent if the agent acts with apparent authority. If the alien has signed the asylum application, he or she shall be presumed to have knowledge of its contents regardless of his or her failure to read and understand its contents. 8 CFR 208.3(c)(2), 1208.3(c)(2).

[21] The submission of fabricated evidence may still be sufficient to deny the application, *Matter of O–D–,* 21 I&N Dec. 1079, 1083 (BIA 1998), but it will not warrant a frivolousness finding if the application without the evidence is also approvable.

F. App'x at 497–98; *Diallo,* 263 F. App'x at 150; *Shllaku,* 139 F. App'x at 702–03.

Consistent with the concept of frivolousness as encompassing claims that are patently without substance or merit, an application, if knowingly made, would also be considered frivolous if applicable law clearly prohibits the grant of asylum. Of course, simply because an argument or claim is unsuccessful does not mean that it can be considered frivolous. *Matter of Cheung,* 16 I&N Dec. 244, 245 (BIA 1977). Neither could reasonable arguments to extend, modify, or reverse the law as it stands. *Cf.* Fed. R. Civ. P. 11(b)(2) (''By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances * * * the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law''). Finally, if knowingly made, an application filed without regard to the merits of the claim would be considered frivolous. *See Cooter & Gell* v. *Hartmax, Corp.,* 496 U.S. 384, 398 (1990) (''The filing of complaints, papers, or other motions without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction. * * * Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay.''). Such a sanction is fully consistent with the abusive nature of such applications, which are often filed for an ulterior purpose, such as being placed in removal proceedings, without regard to the merits of the application itself. *Cf. Matter of Jaso and Ayala,* 27 I&N Dec. 557, 558 (BIA 2019) (affirming the dismissal of immigration proceedings where a respondent filed an asylum application solely for the purpose of being placed in immigration proceedings to seek some other form of relief, recognizing that ''it is an abuse of the asylum process to file a meritless asylum application with the USCIS for the sole purpose of seeking cancellation of removal in the Immigration Court'');[22] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 447 (proposing to define an application as ''frivolous'' if, inter alia, it is ''brought for an improper purpose'' in order to discourage applicants from making false asylum claims).[23]

Further, section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A), requires that aliens receive notice of the consequences of knowingly filing a frivolous application. Under the proposed regulation, an immigration judge would not need to provide an additional opportunity to an alien to account for issues of frivolousness with the claim before determining that the application is frivolous, as long as the required notice was provided. The statute is clear on its face that the only procedural requirement for finding a frivolous asylum application to be knowingly made is the provision of notice under section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A). *See* INA 208(d)(6), 8 U.S.C. 1158(d)(6) (''If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter * * *.''); *see also Ndibu* v. *Lynch,* 823 F.3d 229, 235 (4th Cir. 2016) (describing the statute as ''clear and unambiguous''). Furthermore, an alien is on notice at the time of filing the application that it may be deemed frivolous. *Niang,* 762 F.3d at 254–55 (''Because the written warning provided on the asylum application alone is adequate to satisfy the notice requirement under 8 U.S.C. 1158(d)(4)(A) and because Niang signed and filed his asylum application containing that warning, he received adequate notice warning him against filing a frivolous application.''). Thus, an alien is already aware of the potential ramifications of filing a frivolous application. Moreover, an alien—who presumably knows whether his or her application is fraudulent or meritless—will naturally have an opportunity to account for any issues during the alien's removal proceeding if the alien so chooses. Consequently, there is no legal or operational reason to require a second warning and a third or fourth opportunity to address problematic aspects of the claim that may warrant a sanction for frivolousness.

The Departments note that the BIA has previously explained that ''it would be a good practice for an Immigration Judge who believes that an applicant may have submitted a frivolous asylum application to bring this concern to the attention of the applicant prior to the conclusion of proceedings.'' *Matter of Y–L–,* 24 I&N Dec. at 159–60. In *Matter of Y–L–,* however, the BIA interpreted the regulatory provision at 8 CFR 1208.20, which provides that an EOIR adjudicator may only make this finding if he ''is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.'' *Id.* at 159. There is no indication that the BIA's decision was meant to elaborate on any statutory procedural requirements. *Cf. Matter of B–Y–,* 25 I&N Dec. at 242 (''When the required frivolousness warnings have been given to the respondent prior to the start of a merits hearing, the Immigration Judge is not required to afford additional warnings or seek further explanation in regard to inconsistencies that have become obvious to the respondent during the course of the hearing.''). The proposed regulation does not contain the 8 CFR 208.20 or 8 CFR 1208.20 provision because the Departments believe the current regulatory framework has not successfully achieved the Departments' goal of preventing knowingly frivolous applications that delay the adjudication of other asylum applications that may merit relief. Moreover, an alien who files an asylum application already both knows whether the application is fraudulent or meritless and is aware of the potential ramifications of knowingly filing a frivolous application. The alien is therefore already on notice and has an opportunity to account for any issues with the claim without the immigration judge having to bring the issues to the alien's attention. Thus, there is no reason to require multiple opportunities for an alien to disavow or explain a knowingly frivolous application, and the current requirement, in essence, creates a moral hazard that encourages aliens to pursue false asylum applications because no penalty can attach until the alien is caught and

[22] Although the Board's decision affirmed an immigration judge's authority to dismiss such a case upon motion by DHS, such abusive filings for an improper purpose also warrant sanctioning as frivolous if the proceedings go forward.

[23] A leading immigration advocacy group has also noted the risk of a frivolousness finding in situations in which an alien makes a false claim to asylum solely to obtain a Notice to Appear and be placed in removal proceedings in order to seek another form of relief. *See* American Immigration Lawyers Association, *Ethical Considerations Related to Affirmatively Filing an Application for Asylum for the Purpose of Applying for Cancellation of Removal and Adjustment of Status for a Nonpermanent Resident* at 4 (2016), *https://www.aila.org/practice/ethics/ethics-resources/2016-2019/submitting-an-affirmative-asylum-app-ethical-qs* (describing as a ''classic instance'' of asylum frivolousness a situation in which an alien willfully creates false facts for an asylum application in order to be placed in removal proceedings to apply for another type of relief).

given an opportunity to retract the claim. *See Angov,* 788 F.3d at 901–02 (''[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. * * * [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. * * * Consequently, immigration fraud is rampant.''). Accordingly, the proposed rule would overrule *Matter of Y–L–* to the extent that the two may conflict.[24]

Finally, in order to ameliorate the consequences of knowingly filing a frivolous application in appropriate cases, the Departments propose a mechanism that would allow certain aliens to withdraw, with prejudice, their applications by disclaiming the applications; accepting an order of voluntary departure for a period of no more than 30 days; withdrawing, also with prejudice, all other applications for relief or protection; and waiving any rights to file an appeal, motion to reopen, and motion to reconsider. In such instances the aliens would not be subject to a frivolousness finding and could avoid the penalties associated with such a finding.[25] Finally, the proposed regulation does not change current regulatory language that makes clear that a frivolousness finding does not bar an alien from seeking statutory withholding of removal or protection under the CAT regulations.

2. Pretermission of Legally Insufficient Applications

Additionally, DOJ proposes to add a new paragraph (e) to 8 CFR 1208.13 to clarify that immigration judges may pretermit and deny an application for asylum, statutory withholding of removal, or protection under the CAT regulations if the alien has not established a prima facie claim for relief or protection under the applicable laws and regulations. *See Matter of E–F–H–L–,* 27 I&N Dec. 226, 226 (A.G. 2018); *see also Matter of A–B–,* 27 I&N Dec. 316, 340 (A.G. 2018) (''Of course, if an alien's asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group * * *—an immigration judge or the Board need not examine the remaining elements of the asylum claim.''). Such a decision would be based on the Form I–589 application itself and any supporting evidence.

The BIA previously addressed the issue of adjudicating applications for asylum without testimony in *Matter of Fefe.* 20 I&N Dec. 116 (BIA 1989). In *Matter of Fefe,* the BIA stated ''[a]t a minimum, we find that the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct.'' *Id.* at 118. But the regulations at issue in *Matter of Fefe* are no longer in effect. The only other prior BIA decision to address the matter was subsequently vacated by the Attorney General, and no longer has any precedential effect. *See Matter of E–F–H–L–,* 26 I&N Dec. 319, 322 (BIA 2014), *vacated on other grounds by* 27 I&N Dec. 226 (A.G. 2018).

Current regulations require a hearing on an asylum application only ''to resolve *factual* issues in dispute.'' 8 CFR 1240.11(c)(3) (emphasis added). No existing regulation requires a hearing when an asylum application is legally deficient. To the contrary, current regulations expressly note that no further hearing is necessary once an immigration judge determines that an asylum application is subject to certain grounds for mandatory denial. *Id.*

Moreover, other immigration applications are subject to pretermission without a hearing when they are not legally sufficient, and there is no reason to treat asylum applications differently. *See Zhu* v. *Gonzales,* 218 F. App'x 21, 23 (2d Cir. 2007) (finding that pretermission of an asylum application due to a lack of a legal nexus to a protected ground was not a due process violation when the alien was given an opportunity to address the issue). Further, pretermission due to a failure to establish prima facie legal eligibility for asylum is akin to a decision by an immigration judge or the BIA denying a motion to reopen to apply for asylum on the same basis, and both immigration judges and the BIA have routinely made such determinations for many years. *See INS* v. *Abudu,* 485 U.S. 94, 104 (1988) (holding that the BIA may deny a motion to reopen to file an asylum application if the alien has not made a prima facie case for that relief).

In short, neither the INA nor current regulations require holding a full merits hearing on purely legal issues, such as prima facie legal eligibility for relief.[26] Further, allowing the pretermission of legally deficient asylum applications is consistent with current practice, applicable law, and due process. As explained below, an immigration judge would only be able to pretermit an asylum application after first allowing the alien an opportunity to respond. The alien would be able to address any inconsistencies or legal weaknesses in the asylum application in the response to the judge's notice of possible pretermission.

Under the proposed regulation, an immigration judge may pretermit an asylum application in two circumstances: (1) Following an oral or written motion by DHS, and (2) sua sponte upon the immigration judge's own authority. Provided the alien has had an opportunity to respond, and the immigration judge considers any such response, a hearing would not be required for the immigration judge to make a decision to pretermit and deny the application. In the case of the immigration judge's exercise of his or her own authority, parties would have at least ten days' notice before the immigration judge would enter such an order. A similar timeframe would apply if DHS moves to pretermit, under current practice. *See* EOIR, Immigration Court Practice Manual at D–1 (Aug. 2, 2018), *https://www.justice.gov/eoir/page/file/1084851/download* (last visited May 20, 2020).

C. Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal

1. Membership in a Particular Social Group

To establish eligibility for asylum under the INA, as amended by the Refugee Act of 1980, or statutory withholding of removal, the applicant must demonstrate, among other things, that she or he was persecuted, or has a well-founded fear of future persecution, on account of a protected ground: ''race, religion, nationality, membership in a particular social group, or political opinion.'' *See* INA 101(a)(42), 8 U.S.C. 1101(a)(42); *see also* INA 208(b)(1)(A) and 241(b)(3)(A), 8 U.S.C. 1158(b)(1)(A) and 1231(b)(3)(A). Congress, however, has not defined the phrase

[24] The proposed rule would also overrule any other cases that rely on the same reasoning as *Matter of Y–L–,* to the extent that there is a conflict between the proposed rule and case law regarding frivolousness findings. *See, e.g., Matter of B–Y–,* 25 I&N Dec. at 241 (requiring explicit deliberateness/materiality findings).

[25] This safety-valve provision would modify *Matter of X–M–C–* by providing a limited exception to the general rule that an asylum application may still be deemed frivolous even if it is withdrawn.

[26] The Departments are not aware of anything in IIRIRA or related legislative history that would conflict with an immigration judge's ability to pretermit an asylum application that does not demonstrate prima facie eligibility for relief. For example, the Departments do not believe that requiring a sufficient level of detail to determine whether or not an alien has a prima facie case for asylum, statutory withholding of removal, or protection under the CAT regulations would necessarily require a voluminous application. *See* H.R. Rep. No. 104–469, part 1, at 175–76 (1996). The point instead is enough information to determine the basis of the alien's claim for relief and if such a claim could be sufficient to demonstrate eligibility.

''membership in a particular social group.'' Nor is the term defined in the United Nations Convention Relating to the Status of Refugees (''Refugee Convention''), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, or the related Refugee Protocol. Further, the term lacks the benefit of clear legislative intent. *See Fatin* v. *INS,* 12 F.3d 1233, 1239 (3d Cir. 1993) (Alito, J.) (''Thus, neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase 'particular social group.' ''); *cf. Matter of Acosta,* 19 I&N Dec. 211, 232 (BIA 1985) (''Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol''), *overruled on other grounds by Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987).

When Congress passed the Refugee Act of 1980, further implementing U.S. obligations under the Refugee Protocol, it included ''membership in a particular social group'' in its definition of ''refugee'' at section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42). Just a few years later, the BIA established that a particular social group is ''a group of persons all of whom share a common, immutable characteristic,'' and that the characteristic ''either is beyond the power of an individual to change or that it is so fundamental to his identity or conscience that it ought not be required to be changed.'' *Matter of Acosta,* 19 I&N Dec. at 233–34.

Although the Board did not significantly refine the formulation further until years later, *see, e.g., Matter of C–A–,* 23 I&N Dec. 951, 956, 959–60 (BIA 2006), it routinely issued decisions delineating which groups did and did not qualify as particular social groups in the context of the relevant societies for purposes of asylum protection, *see, e.g., Matter of H–,* 21 I&N Dec. 337, 342–43 (BIA 1996) (membership in a Somali subclan may constitute membership in a particular social group); *Matter of Toboso-Alfonso,* 20 I&N Dec. 819, 822–23 (BIA 1990) (designated for publication by the Attorney General in 1994) (homosexuals in Cuba may constitute a particular social group).[27]

Starting in the late 2000s, the BIA began to build on the *Acosta* definition in a series of cases, and subsequently settled on a three-part test for a particular social group, holding that the group must be ''(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.'' *Matter of M–E–V–G–,* 26 I&N Dec. at 237; *see also Matter of W–G–R–,* 26 I&N Dec. at 212–18.

Immutability entails a common characteristic: A trait ''that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.'' *Matter of Acosta* 19 I&N Dec. at 233. Particularity requires that the group ''must be defined by characteristics that provide a clear benchmark for determining who falls within the group'' and that ''the terms used to describe the group have commonly accepted definitions in the society of which the group is a part.'' *Matter of M–E–V–G–,* 26 I&N Dec. at 239. Further, the group must not be ''amorphous, overbroad, diffuse, or subjective.'' *Id.* To be considered ''socially distinct,'' the group must be a meaningfully discrete group as the relevant society perceives it. The term is not dependent on literal or ''ocular'' visibility. *Id.* at 238, 240–41.

The definition of ''particular social group'' has been the subject of considerable litigation and is a product of evolving case law, making it difficult for EOIR's immigration judges and Board members, as well as DHS asylum officers, to uniformly apply the framework. *See Matter of A–B–,* 27 I&N Dec. at 331 (''Although the Board has articulated a consistent understanding of the term 'particular social group,' not all of its opinions have properly applied that framework.''); *see also, e.g., Cordoba* v. *Holder,* 726 F.3d 1106, 1114 (9th Cir. 2013) (''We have recognized that the phrase 'particular social group' is ambiguous.'' (citing *Henriquez-Rivas* v. *Holder,* 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc))); *Fatin,* 12 F.3d at 1238 (''Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended.''); *see also Velasquez* v. *Sessions,* 866 F.3d 188, 198 (4th Cir. 2017) (Wilkinson, J. concurring) (noting that the legal ''analysis of 'particular social group' in the asylum statute is at risk of lacking rigor,'' that Congress did not intend '''membership in a particular social group' to be some omnibus catch-all,'' and that ''judicial interpretations of th[e] statute may outstrip anything Congress intended''). Accordingly, this regulation would provide clear parameters for evaluating cognizable ''particular social groups.''

The proposed rule would codify the longstanding requirements, as discussed above, that a particular social group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct in the society in question. In addition, the particular social group must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm.[28] *See Matter of A–B–,* 27 I&N Dec. at 334 (''To be cognizable, a particular social group must 'exist independently' of the harm asserted in an application for asylum or statutory withholding of removal.''); *see generally Matter of M–E–V–G–,* 26 I&N Dec. at 243 (''The act of persecution by the government may be the catalyst that causes the society to distinguish [a collection of individuals] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.'').

The proposed rule would further build on the BIA's standards and provide clearer guidance to adjudicators regarding whether an alleged group exists and, if so, whether it is cognizable as a particular social group in order to ensure the consistent consideration of asylum and statutory withholding claims. For example, the proposed rule

[27] Federal courts have raised questions about whether the Board or the Attorney General can recognize or reject particular social groups in this manner, *Pirir-Boc* v. *Holder,* 750 F.3d 1077, 1084 (9th Cir. 2014), and a recent federal district court decision has more clearly called into question the validity of this approach of announcing general rules of particular social group definitions. *Grace* v. *Whitaker,* 344 F. Supp. 3d 96, 126 (D.D.C. 2018) (finding that general rules of particular social group definitions, at least as applied to credible fear claims, run ''contrary to the individualized analysis required by the INA''), *appeal docketed,* No. 19–5013 (D.C. Cir. filed Jan. 30, 2019).

[28] The Departments recognize the existence of confusion over this standard because the independent existence of a particular social group is not precisely the same concept as noting the group cannot be defined *exclusively* by the alleged harm. Thus, the proposed rule clarifies that a valid particular social group must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm. Otherwise, ''[i]f a group is defined by the persecution of its members, the definition of the group moots the need to establish actual persecution'' *Matter of A–B–,* 27 I&N Dec. at 335. The ''independent existence'' formulation has been accepted by many courts. *See, e.g., Perez-Rabanales* v. *Sessions,* 881 F.3d 61, 67 (1st Cir. 2018) (''A sufficiently distinct social group must exist independent of the persecution claimed to have been suffered by the alien and must have existed before the alleged persecution began.''); *Lukwago* v. *Ashcroft,* 329 F.3d 157, 172 (3d Cir. 2003) (''We agree that under the statute a 'particular social group' must exist independently of the persecution suffered by the applicant for asylum.''). For courts that have rejected this ''independent existence'' requirement, *see, e.g., Cece* v. *Holder,* 733 F.3d 662, 671–72 (7th Cir. 2013) (en banc), both subsequent decisions recognizing the requirement, *see, e.g., Matter of A–B–* and *Matter of M–E–V–G–, supra,* and the Departments' proposed rule codifying it would warrant re-evaluation under well-established principles. *See Brand X,* 545 U.S. at 982.

would outline several nonexhaustive bases that would generally be insufficient to establish a particular social group. Without more, the Secretary of Homeland Security and the Attorney General, in general, would not favorably adjudicate claims of aliens who claim membership in a purported particular social group consisting of or defined, in substance, by the following circumstances:

(1) Past or present criminal activity or associations, *Matter of W–G–R–,* 26 I&N Dec. at 222–23; *Cantarero* v. *Holder,* 734 F.3d 82, 86 (1st Cir. 2013); *Gonzalez* v. *U.S. Att'y Gen.,* 820 F.3d 399, 405 (11th Cir. 2016);

(2) past or present terrorist activity or association;[29]

(3) past or present persecutory activity or association;

(4) presence in a country with generalized violence or a high crime rate, *Matter of A–B–,* 27 I&N Dec. at 320;

(5) the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups, *Matter of S–E–G–,* 24 I&N Dec. 579, 585–86 (BIA 2008); *Matter of E–A–G–,* 24 I&N Dec. 591, 594–95 (BIA 2008);

(6) the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence, *Matter of A–M–E– & J–G–U–,* 24 I&N Dec. 69, 75 (BIA 2007);

(7) interpersonal disputes of which governmental authorities were unaware or uninvolved, *Matter of Pierre,* 15 I&N Dec. 461, 462–63 (BIA 1975); *see also Gonzalez-Posadas* v. *Att'y Gen. of U.S.,* 781 F.3d 677, 685 (3d Cir. 2015);

(8) private criminal acts of which governmental authorities were unaware or uninvolved, *Matter of A–B–,* 27 I&N Dec. at 343–44; *see also Gonzales-Veliz* v. *Barr,* 938 F.3d 219, 230–31 (5th Cir. 2019);

(9) status as an alien returning from the United States, *Delgado-Ortiz* v. *Holder,* 600 F.3d 1148, 1151–52 (9th Cir. 2010) (''We conclude that Petitioners' proposed social group, 'returning Mexicans from the United States,' * * * * is too broad to qualify as a cognizable social group.''); *Sam* v. *Holder,* 752 F.3d 97, 100 (1st Cir. 2014) (Guatemalans returning after a lengthy residence in the United States is not a cognizable particular social group).

This list is nonexhaustive, and the substance of the alleged particular social group, rather than the specific form of its delineation, will be considered by adjudicators in determining whether the group falls within one of the categories on the list. Without additional evidence, these circumstances are generally insufficient to demonstrate a particular social group that is cognizable because it is immutable, socially distinct, and particular, that is cognizable because the group does not exist independently of the harm asserted, or that is cognizable because the group is defined exclusively by the alleged harm. At the same time, the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society-specific nature of this determination. In addition to resulting in more uniform application, providing clarity to this issue will reduce the amount of time the adjudicators must spend evaluating such claims.

The proposed regulation also specifies procedural requirements specific to asylum and statutory withholding claims premised on a particular social group. While in proceedings before an immigration judge, the alien must first define the proposed particular social group as part of the asylum application or otherwise in the record. If the alien fails to do so while before an immigration judge, the alien will waive any claim based on a particular social group formulation that was not advanced. *See Matter of W–Y–C– & H–O–B–,* 27 I&N Dec. 189, 190–91 (BIA 2018). Further, to encourage the efficient litigation of all claims in front of the immigration court at the same time—and to avoid gamesmanship and piecemeal analyses of claims in separate proceedings when all claims could have been brought at once—the alien will also waive the ability to file any motion to reopen or reconsider an asylum application related to the alien's membership in a particular social group that could have been brought at the prior hearing, including based on allegations related to the strategic choices made by an alien's counsel in defining the alleged particular social group. This limitation is consistent with current requirements for motions to reopen that preclude the raising of claims that could have been brought in a prior proceeding. *See* 8 CFR 1003.23(b)(3) (''A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing.''). These regulations will enable the immigration judge to adjudicate the alien's particular claim for relief or protection timely and efficiently, including deciding whether or not pretermission of the alien's application may be appropriate.

2. Political Opinion

The definition of ''political opinion'' has also been the subject of considerable litigation and is a product of evolving case law, making it difficult for EOIR's immigration judges and Board members, as well as DHS asylum officers, to uniformly apply the framework. *Compare, e.g., Hernandez-Chacon* v. *Barr,* 948 F.3d 94, 102–03 (2d Cir. 2020) (refusal to submit to the violent advances of gang members may be akin to a political opinion taking a stance against a culture of male-domination), *with Saldarriaga* v. *Gonzales,* 402 F.3d 461, 467 (4th Cir. 2005) (disapproval of a drug cartel is not a political opinion—''Indeed, to credit such disapproval as grounds for asylum would enlarge the category of political opinions to include almost any quarrel with the activities of almost any organization. Not only would the proliferation of asylum grants under this expansive reading interfere with the other branches' primacy in foreign relations, it would also strain the language of § 1101(a)(42)(A). The statute requires persecution to be on a discrete basis and to fall within one of the enumerated categories.'' (citations omitted)).

BIA case law makes clear that a political opinion involves a cause against a state or a political entity, rather than against a culture. *Matter of S–P–,* 21 I&N Dec. 486, 494 (BIA 1996) (''Here we must examine the record for direct or circumstantial evidence from which it is reasonable to believe that those who harmed the applicant were in part motivated by an assumption that his political views were antithetical to those of the *government.*'' (emphasis added)). For purposes of interpreting the Refugee Convention and subsequent Protocol, the United Nations High Commissioner for Refugees (''UNHCR'') also analyzes ''political opinion'' in terms of holding an opinion different from the Government or not tolerated by the relevant governmental authorities. *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection,* ch. II(B)(3)(f), ¶¶ 80–82 (Feb. 2019) (discussing political opinion refugee claims in terms of opinions not

[29] Just as past criminal associations cannot establish a particular social group, neither past association with terrorists or past association with persecutors warrants recognition as a particular social group. To do so would reward membership in organizations that cause harm to society and create a perverse incentive to engage in reprehensible or illicit behavior as a means of avoiding removal. *Cf. Cantarero,* 734 F.3d at 86.

tolerated by governmental the authorities or ruling powers).

Nevertheless, to avoid further strain on the INA's definition of refugee, INA 1101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), *see Saldarriaga,* 402 F.3d at 467, to provide additional clarity for adjudicators, and in recognition of both statutory requirements and the general understanding that a political opinion is intended to advance or further a discrete cause related to political control of a state, *id.* at 466–67, the Departments propose to define political opinion as one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. Moreover, in recognition of that definition, the Secretary or Attorney General, in general, will not favorably adjudicate claims of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior [30] in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. Finally, consistent with INA 101(a)(42), 8 U.S.C. 1101(a)(42), a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

3. Persecution

For purposes of eligibility for asylum and withholding of removal, persecution is defined as ''a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.'' *Matter of Acosta,* 19 I&N Dec. at 222; *see also Fatin,* 12 F.3d at 1240 (''Thus, we interpret *Acosta* as recognizing that the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.''). It encompasses two aspects: ''harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome * * * [and] harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.'' *Matter of Acosta,* 19 I&N Dec. at 222. Put differently, persecution requires an intent to target a belief, characteristic or group, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government is unable or unwilling to control. *Matter of A–B–,* 27 I&N Dec. at 337. For purposes of evaluating the severity of the level of harm, persecution connotes an extreme level of harm and does not encompass all possible forms of mistreatment. *See Shi* v. *U.S. Att'y Gen.,* 707 F.3d 1231, 1235 (11th Cir. 2013) (explaining that persecution is ''an extreme concept that does not include every sort of treatment [that] our society regards as offensive'' (quotation marks and citations omitted)); *Gormley* v. *Ashcroft,* 364 F.3d 1172, 1176 (9th Cir. 2004) (same).

It is thus well-established that not all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional constitutes persecution under the INA.[31] Further, intermittent harassment, including brief detentions, repeated threats with no effort to carry out the threats, or non-severe economic harm or property damage, do not typically constitute persecution. *See, e.g., de Zea* v. *Holder,* 761 F.3d 75, 80 (1st Cir. 2014) (persecution requires more than ''unpleasantness, harassment, and even basic suffering''); *Ruano* v. *Ashcroft,* 301 F.3d 1155, 1160 (9th Cir. 2002) (noting that ''unfulfilled threats alone generally do not constitute past persecution''); *Djonda* v. *U.S. Att'y Gen.,* 514 F.3d 1168, 1174 (11th Cir. 2008) (threats and a minor beating do not constitute past persecution); *Kazemzadeh* v. *U.S. Att'y Gen.,* 577 F.3d 1341, 1353 (11th Cir. 2009) (''Minor physical abuse and brief detentions do not amount to persecution.''); *Matter of T–Z–,* 24 I&N Dec. 163, 170 (BIA 2007) (explaining that economic harm must be ''severe'' to qualify as persecution).

Absent credible evidence that Government laws or policies have been or would be applied to an applicant personally, infrequent application of those laws and policies cannot constitute a well-founded fear of persecution. In other words, the mere existence of potentially persecutory laws or policies is not enough to establish a well-founded fear of persecution. Rather, there must be evidence these laws or policies were widespread and systemic, or evidence that persecutory laws or policies were, or would be, applied to an applicant personally. *Cf. Wakkary* v. *Holder,* 558 F.3d 1049, 1061 (9th Cir. 2009) (an applicant is not required to establish that his or her government would personally persecute the alien upon return if he or she can establish a pattern or practice of persecution against a protected group to which they belong. However, the governmental conduct must be ''systematic'' and ''sufficiently widespread'' and not merely infrequent).

Given the wide range of cases interpreting ''persecution'' for the purposes of the asylum laws, the Departments propose adding a new paragraph to 8 CFR 208.1 and 1208.1 to define persecution and to better clarify what does and does not constitute persecution. It would provide that persecution is an extreme concept of a severe level of harm. Under the proposed amendment, persecution would not include, for example: (1) Every instance of harm that arises generally out of civil, criminal, or military strife in a country, *see, e.g., Matter of Sanchez and Escobar,* 19 I&N Dec. 276, 284–85 (BIA 1985); (2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional, *see Fatin,* 12 F.3d at 1240; *Matter of V–T–S–,* 21 I&N Dec. 792, 798 (BIA 1997); (3)

[30] Expressive behavior includes public behavior commonly associated with political activism, such as attending rallies, organizing collective actions such as strikes or demonstrations, speaking at public meetings, printing or distributing political materials, putting up political signs, or similar activities in which an individual's political views are a salient feature of the behavior and communicated to others at the time the behavior occurs. Expressive behavior is not generally thought to encompass acts of personal civic responsibility such as voting, reporting a crime, or assisting law enforcement in an investigation, and those activities, by themselves, would not support a claim based on an alleged fear of harm due to a political opinion.

[31] ''Persecution * * * does not include discrimination.'' *Fisher* v. *INS,* 79 F.3d 955, 961 (9th Cir. 1996) (*en banc*) (internal quotation marks and authority omitted); *see also Ahmed* v. *Ashcroft,* 341 F.3d 214, 217 (3d Cir. 2003) (discrimination against stateless Palestinians in Saudi Arabia did not amount to persecution). Nor does harassment constitute persecution. *See, e.g., Halim* v. *Holder,* 590 F.3d 971, 976 (9th Cir. 2009) (alleged incidents constituted harassment, not persecution); *Ambati* v. *Reno,* 233 F.3d 1054, 1060 (7th Cir. 2000) (distinguishing persecution from harassment or annoyance); *Matter of V–F–D–,* 23 I&N Dec. 859, 863863 (BIA 2006) (determining harassment and discrimination based on religion did not constitute persecution).

intermittent harassment, including brief detentions; (4) repeated threats with no actions taken to carry out the threats; [32] (5) non-severe economic harm or property damage; or (6) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally. The Departments believe that these changes better align the relevant regulations with the high standard Congress intended for the term ''persecution.'' *See Fatin,* 12 F.3d at 1240 n.10.

4. Nexus

To establish eligibility for asylum under the INA, as amended by the Refugee Act of 1980 and the REAL ID Act of 2005, Public Law 109–13, sec. 101 (found at INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i)), the applicant must demonstrate, among other things, that at least one central reason for his or her persecution or well-founded fear of persecution was on account of a protected ground: Race, religion, nationality, membership in a particular social group, or political opinion. *See* INA 101(a)(42), 8 U.S.C. 1101(a)(42); INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). The requirement that the fear be on account of one of the five grounds is commonly called the ''nexus requirement.''

The REAL ID Act of 2005 refined the nexus requirement by requiring that one of the five protected grounds ''was or will be at least one central reason for persecuting the applicant.'' ''Reasons incidental, tangential, or subordinate to the persecutor's motivation will not suffice.'' *Matter of A–B–,* 27 I&N Dec. at 338. As with the definitions of particular social group and persecution, the contours of the nexus requirement have further been shaped through case law rather than rulemaking, making it difficult for EOIR's immigration judges and Board members, as well as DHS asylum officers, to uniformly apply it.

Accordingly, the proposed rule would provide clearer guidance on situations in which alleged acts of persecution would not be on account of one of the five protected grounds. This proposal would further the expeditious consideration of asylum and statutory withholding claims. For example, the proposed rule would outline the following eight nonexhaustive situations, each of which is rooted in case law, in which the Secretary of Homeland Security and the Attorney General, in general, will not favorably adjudicate asylum or statutory withholding of removal claims based on persecution:

(1) Personal animus or retribution, *Zoarab* v. *Mukasey,* 524 F.3d 777, 781 (6th Cir. 2008) (''Asylum is not available to an alien who fears retribution solely over personal matters.'');

(2) interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue, *Matter of A–B–,* 27 I&N Dec. at 339 (''the record does not reflect that [the applicant's] husband bore any particular animosity toward women who were intimate with abusive partners, women who had previously suffered abuse, or women who happened to have been born in, or were actually living in, Guatemala' '' and ''[w]hen the alleged persecutor is not even aware of the group's existence, it becomes harder to understand how the persecutor may have been motivated by the victim's 'membership' in the group to inflict the harm on the victim.' '' (quoting *Matter of R–A–,* 22 I&N Dec. 906, 919–21 (BIA 1999) (en banc)));

(3) generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state, *Saldarriaga,* 402 F.3d at 468 (''For the inscrutability of the political opinion he claims implies that any persecution he faces is due to the fact of his cooperation with the government, rather than the content of any opinion motivating that cooperation * * *. But when, as here, the applicant has not taken sides in such manner—much less under duress—and the conflict, though ubiquitous, is not aimed at controlling the organs of state, an applicant cannot merely describe his involvement with one side or the other to establish a political opinion * * *.'');

(4) resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations, *INS* v. *Elias-Zacarias,* 502 U.S. 478, 482 (1992) (''[T]he mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that [the respondent] fears persecution *on account of* political opinion, as § 101(a)(42) requires.'' (emphasis in original));

(5) the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence, *Aldana-Ramos* v. *Holder,* 757 F.3d 9, 18 (1st Cir. 2014) (''criminal targeting based on wealth does not qualify as persecution 'on account of' membership in a particular group''); or

(6) criminal activity, *Zetino* v. *Holder,* 622 F.3d 1007, 1016 (9th Cir. 2010) (''An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground * * *.'');

(7) perceived, past or present, gang affiliation, *Matter of E–A–G–,* 24 I. & N. Dec. 591, 596 (BIA 2008) (''[In *Arteaga* v. *Mukasey,* 511 F.3d 940, 945–46 (9th Cir. 2007)] the Ninth Circuit held that membership in a gang would not constitute membership in a particular social group. We agree.'' Furthermore, ''because we agree that membership in a criminal gang cannot constitute a particular social group, the respondent cannot establish particular social group status based on the incorrect perception by others that he is such a gang member.''); or

(8) gender, *Niang* v. *Gonzales,* 422 F.3d 1187, 1199–1200 (10th Cir. 2005) (''There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there * * *.'')

Without additional evidence, these circumstances will generally be insufficient to demonstrate persecution

[32] The Departments note that courts have been inconsistent in their treatment of threats as persecution. *See Lim* v. *INS,* 224 F.3d at 929, 936–37 (9th Cir. 2000) (explaining that threats are generally not past ''persecution,'' but are ''within that category of conduct indicative of a danger of future persecution.''); *Li* v. *Attorney Gen. of U.S.,* 400 F.3d 157, 164–65 (3d Cir. 2005) (same). *See also Guan Shan Liao* v. *United States Dep't of Justice,* 293 F.3d 61, 70 (2d Cir. 2002); *Boykov* v. *INS,* 109 F.3d 413, 416–17 (7th Cir. 1997); *Ang* v. *Gonzales,* 430 F.3d 50, 56 (1st Cir. 2005) (''[H]ollow threats, * * * without more, certainly do not compel a finding of past persecution.''); *but see Li* v. *Gonzales,* 405 F.3d 171, 177 (4th Cir. 2005) (''Persecution involves the infliction or threat of death, torture, or injury to one's person or freedom on account of one of the enumerated grounds in the refugee definition.''); *Tairou* v. *Whitaker,* 909 F.3d 702, 707–08 (4th Cir. 2018) (''Contrary to the BIA's reasoning, the threat of death alone constitutes persecution, and [an applicant] [is] not required to [show] * * * physical or mental harm to establish past persecution.''); *id.* (holding Board erred in reasoning that several death threats did not constitute past persecution where applicant ''suffered no major physical injuries and * * * did not claim to have suffered any long-term mental harm or problems''); *Hernandez-Avalos* v. *Lynch,* 784 F.3d 944, 949 (4th Cir. 2015) (''[W]e have expressly held that the threat of death qualifies as persecution.'' (internal quotation marks and citation omitted)). The Departments' proposed rule would warrant re-evaluation in appropriate cases under well-established principles. *See Brand X,* 545 U.S. at 982.

on account of a protected ground. At the same time, the regulation does not foreclose that, at least in rare circumstances, such facts could be the basis for finding nexus, given the fact-specific nature of this determination. In addition to resulting in more uniform application of the law, providing clarity to this issue will reduce the amount of time the adjudicators must spend evaluating such claims.

Finally, the Departments propose to make clear that pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim. *See Matter of A–B–,* 27 I&N Dec. at 336 n. 9 (''On this point, I note that conclusory assertions of countrywide negative cultural stereotypes, such as *A–R–C–G–*'s broad charge that Guatemala has a 'culture of machismo and family violence' based on an unsourced partial quotation from a news article eight years earlier, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.''). Accordingly, the proposed rule would bar consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes were offered in support of an alien's claim to show that a persecutor conformed to a cultural stereotype.

5. Internal Relocation

Under current regulations, an applicant for asylum or statutory withholding of removal who could avoid persecution by internally relocating to another part of his or her country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and who can reasonably be expected to do so, may not be granted these forms of protection.[33] 8 CFR 208.13(b)(1)(i)(B), (2)(ii), 1208.13(b)(1)(i)(B), (2)(ii) (asylum); 8 CFR 208.16(b)(1)(i)(B), (2), 1208.16(b)(1)(i)(B), (2) (statutory withholding). The regulations further prescribe a nonexhaustive list of factors for adjudicators to consider in making internal relocation determinations and delineate burdens of proof in various related situations. 8 CFR 208.13(b)(1)(ii), (3), 1208.13(b)(1)(ii), (3); 8 CFR 208.16(b)(1)(ii), (3), 1208.16(b)(i)(ii), (3).

The Departments have determined that the current regulations regarding internal relocation inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate. For instance, the utility of the catch-all list of factors in 8 CFR 208.13(b)(3) and 1208.13(b)(3) is undermined by its unhelpful concluding caveats that the factors ''may, or may not'' be relevant to an internal relocation determination and that the factors ''are not necessarily determinative of whether it would be reasonable for the applicant to relocate.'' Such caveats provide little practical guidance for adjudicators considering issues of internal relocation raised by asylum claims. Moreover, some factors—*e.g.,* administrative, economic, or judicial infrastructure—do not have a clear relevance in assessing the reasonableness of internal relocation in many cases, while others insufficiently appreciate as a general matter that asylum applicants have often already relocated hundreds or thousands of miles to the United States regardless of such factors. Accordingly, the Departments propose a more streamlined presentation in the regulations of the most relevant factors for adjudicators to consider in determining whether internal relocation is a reasonable option.

The current regulations also outline different scenarios for assessing who bears the burden of proof in establishing or refuting the reasonableness of internal relocation. In situations in which the persecutor is the government or a government-sponsored actor, it is presumed that relocation would not be reasonable (as the persecution is presumed to be nationwide). In situations in which a private actor is the persecutor, however, there is no apparent reason why the same presumption should apply, as a private individual or organization would not ordinarily be expected to have influence everywhere in a country. Moreover, as an asylum applicant generally bears the burden of proving eligibility for asylum, it is even more anomalous to shift that burden in situations in which there is no rational presumption that the threat of persecution would occur nationwide. Consequently, the Departments have determined that the regulatory burdens of proof regarding internal relocation should be assigned more in line with these baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions. Thus, the Departments propose to amend the regulations to presume that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be. This presumption would apply regardless of whether an applicant has established past persecution. For ease of administering these provisions, the Departments would also provide examples of the types of individuals or entities who are private actors.

6. Factors for Consideration in Discretionary Determinations

Asylum is a discretionary relief, and an alien who demonstrates that he or she qualifies as a refugee must also demonstrate that he or she deserves asylum as a matter of discretion. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (''The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures [they establish] * * * if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee * * *.'' (emphasis added)); *Stevic,* 467 U.S. at 423 n.18 (''Meeting the definition of 'refugee,' however, does not entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a).''). Eligibility for asylum is not an automatic entitlement. Rather, after demonstrating statutory and regulatory eligibility, aliens must further meet their burden of showing that the Attorney General or the Secretary of Homeland Security should exercise his discretion to grant asylum. *See Matter of A–B–,* 27 I&N Dec. at 345 n.12; *Matter of Pula,* 19 I&N Dec. 467, 474 (BIA 1987).

The BIA in *Matter of Pula* examined the sorts of factors immigration judges should consider when determining whether asylum applicants merit the relief of asylum as a matter of discretion. The BIA ultimately directed that that discretionary determination should be based on the totality of the

[33] In limited instances, asylum can be granted without the need to establish a well-founded fear of persecution. An alien who has suffered past persecution but does not warrant being granted asylum due either to a fundamental change in circumstances such that the alien no longer has a well-founded fear of persecution or the alien's reasonable ability to internally relocate to avoid future persecution may nevertheless be granted asylum in the discretion of the decisionmaker if the alien is not barred from asylum pursuant to 8 CFR 208.13(c) and 1208.13(c) and if the applicant has demonstrated compelling reasons for being unwilling or unable to return arising out of the severity of the past persecution or the applicant has established a reasonable possibility of other serious harm upon removal. 8 CFR 208.13(b)(1)(iii), 1208.13(b)(1)(iii). This regulatory exception is frequently labeled ''humanitarian asylum.''

circumstances and provided a lengthy list of possibly relevant factors for consideration, such as, whether the alien passed through any other countries en route to the United States, the living conditions and level of safety in the countries through which the alien passed, and general humanitarian considerations. *Matter of Pula,* 19 I&N Dec. at 473–75.

To date, the Secretary and Attorney General have not provided general guidance in agency regulations for factors to be considered when determining whether an alien merits asylum as a matter of discretion. Nevertheless, the Departments have issued regulations on discretionary considerations for other forms of relief, *e.g.,* 8 CFR 212.7(d), 1212.7(d) (discretionary decisions to consent to visa applications, admission to the United States, or adjustment of status, for certain criminal aliens), and the Departments believe it is similarly appropriate to establish criteria for considering discretionary asylum claims. This proposed regulation would build on the BIA's guidance regarding discretionary asylum determinations and codify specific factors in the regulations for the first time.

Accordingly, the Departments propose three specific but nonexhaustive factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion:

(1) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country;

(2) subject to certain exceptions, the failure of an alien to seek asylum or refugee protection in at least one country through which the alien transited before entering the United States; and

(3) an alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

The adjudicator must consider all three factors, if relevant, during every asylum adjudication. If one or more of these factors applies to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination, though the adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion. The Departments believe that the inclusion of the proposed factors in the rule will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.

First, an alien's unlawful entry, or attempted unlawful entry, has been a longstanding factor that adjudicators may consider as a matter of discretion. *Matter of Pula,* 19 I&N Dec. at 473 (''[A]n alien's manner of entry or attempted entry is a proper and relevant discretionary factor to consider'' as ''one of a number of factors * * * balanced in exercising discretion''). In addition to rendering an alien inadmissible in general, it is a federal criminal offense to enter or attempt to enter the United States other than at a time and place designated by immigration officers. *See* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A); INA 275(a)(1), 8 U.S.C. 1325(a)(1). The Departments remain concerned by the significant strain on their resources required to apprehend, process, and adjudicate the cases of the growing number of aliens who illegally enter the United States putatively in order to seek asylum. *See, e.g.,* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934; *see also United States ex rel. Hintopoulos* v. *Shaughnessy,* 353 U.S. 72, 78 (1957) (observing that where the statute ''does not state what standards are to guide the Attorney General in the exercise of his discretion'' in adjudicating a discretionary benefit request, ''[s]urely it is not unreasonable for him to take cognizance of present-day conditions'' and relevant congressional enactments).[34]

Second, as previously explained, the Departments believe that the failure to seek asylum or refugee protection in at least one country through which an alien transited while en route to the United States may reflect an increased likelihood that the alien is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection. *See* Asylum Eligibility and Procedural Modifications, 84 FR at 33831. As a result, the Departments would consider the failure to seek protection in such a third country to be a significant adverse factor. The applicant may, however, present evidence regarding the basis for the failure to seek such relief for the adjudicator's consideration as outlined in 8 CFR 208.13(c)(4), 1208.13(c)(4).

Third, an alien who uses fraudulent documents to effect entry to the United States is inadmissible, INA 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C), and the Departments are concerned that the use of fraudulent documents makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources. The Departments accordingly propose to consider such use of fraudulent documents a significant adverse discretionary factor for the purposes of asylum unless an applicant arrived in the U.S. directly from the applicant's home country.[35]

Furthermore, the Departments propose nine adverse factors, the applicability of any of which would ordinarily result in the denial of asylum as a matter of discretion, similar to how discretion is considered for other applications. *See, e.g.,* 8 CFR 212.7(d), 1212.7(d) (waiver of certain grounds of inadmissibility). If the adjudicator determines that any of these nine circumstances apply during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum

[34] The Departments note that this adverse factor does not conflict with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), which provides that ''[a]ny 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.'' The consideration of the alien's unlawful manner of entry as a discretionary negative factor does not limit the alien's right or ability to apply for asylum. Instead, an alien who has unlawfully entered the United States is at risk of the same discretionary denial of asylum as any other applicant. The related issue of whether a regulatory bar to asylum eligibility based on manner of entry is ''consistent'' with section 208(a)(1)'s ''irrespective'' clause is currently being litigated. *See supra* note 14.

[35] For aliens from countries contiguous to the United States or who arrive directly (such as by air) from their home country—*i.e.,* countries in which the use of fraudulent documents to escape persecution may be coterminous with the use of such documents to enter the United States— this factor does not impact case law that the use of fraudulent documents to escape the country of persecution should not itself be a significant adverse factor. *See Lin* v. *Gonzales,* 445 F.3d 127, 133 (2d Cir. 2006) (noting a distinction ''between the presentation of a fraudulent document in immigration court in support of an asylum application and the use of a fraudulent document to escape immediate danger or imminent persecution''); *Matter of Pula,* 19 I&N Dec. at 474 (noting a difference between ''[t]he use of fraudulent documents to escape the country of persecution'' and ''entry under the assumed identity of a United States citizen, with a United States passport, which was fraudulently obtained''). For all other aliens, however, the use of fraudulent documents would be a significant adverse factor. To the extent that this provision may conflict with any prior holdings by the Board of Immigration Appeals, this rule would supersede such decisions if it is finalized as drafted.

would result in an exceptional and extremely unusual hardship to the alien. *Cf. id.* These factors build on prior precedent from the Attorney General. *See Matter of Jean,* 23 I&N Dec. 373, 385 (A.G. 2002) (providing that aliens who have committed violent or dangerous offenses will not be granted asylum as a matter of discretion absent extraordinary circumstances or a showing of exceptional and extremely unusual hardship); *see also Matter of Castillo-Perez,* 27 I&N Dec. 664, 670–71 (A.G. 2019) (noting that aliens with multiple driving-under-the-influence convictions would likely be denied cancellation of removal as a matter of discretion due to the seriousness and repeated nature of the offenses).

Each of the nine factors addresses issues that the adjudicators might otherwise spend significant time evaluating and adjudicating. First, this rule would require a decision-maker to consider whether an alien has spent more than 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States. Second, this rule would make transit through more than one country prior to arrival in the United States a significant adverse factor. Both of these factors are supported by existing law surrounding firm resettlement and aliens who can be removed to a safe third country. *See* INA 208(a)(2)(A), (b)(2)(A)(vi), 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(vi); *see also Yang* v. *INS,* 79 F.3d 932, 935–39 (9th Cir. 1996) (upholding a discretionary firm resettlement bar, and rejecting the premise that such evaluation is arbitrary and capricious or that it prevents adjudicators from exercising discretion). Recognizing that individual circumstances of an alien's presence in a third country or transit to the United States may not necessarily warrant adverse discretionary consideration in all instances, the proposed rule does acknowledge exceptions to these two considerations where an alien's application for protection in the relevant third country has been denied, where the alien is a victim of a severe form of human trafficking as defined in 8 CFR 214.11, or where the alien was present in or transited through only countries that were, at the relevant time, not parties to the Refugee Convention, Refugee Protocol, or CAT.

Third, adjudicators should consider criminal convictions that remain valid for immigration purposes as significant adverse factors. A conviction remains valid for immigration purposes despite a reversal, vacatur, expungement, or modification of conviction or sentence if the alteration is not related to a procedural or substantive defect in the underlying criminal proceedings. *See Matter of Thomas & Thompson,* 27 I&N Dec. 674, 674–75 (A.G. 2019) (holding that state court orders unrelated to the merits of an underlying criminal proceeding have no effect on the validity of the conviction for immigration purposes); *see also Matter of Pickering,* 23 I&N Dec. 621, 624–25 (BIA 2003) (holding that a conviction that is vacated for reasons solely related to rehabilitation or immigration hardships is not eliminated for immigration purposes), *rev'd on other grounds, Pickering* v. *Gonzales,* 465 F.3d 263, 267–70 (6th Cir. 2006).[36] Circuit courts of appeals have consistently accepted this principle, deeming *Pickering* reasonable and consistent with congressional intent. *See, e.g., Saleh* v. *Gonzales,* 495 F.3d 17, 23–25 (2d Cir. 2007) (collecting cases). As the Attorney General has explained, giving effect to judicial decisions that modified sentences in some manner for the sole purpose of mitigating immigration consequences would frustrate Congress's intent in setting forth those consequences for aliens convicted of certain crimes. *See Matter of Thomas & Thompson,* 27 I&N Dec. at 682 (explaining that by enacting the definition of ''conviction'' at section 101(a)(48) of the INA, 8 U.S.C. 1101(a)(48), ''Congress made clear that immigration consequences should flow from the original determination of guilt. In addition, Congress ensured uniformity in the immigration laws by avoiding the need for immigration judges to examine the post-conviction procedures of each State''); *see also Saleh,* 495 F.3d at 25 (''When a conviction is amended nunc pro tunc solely to enable a defendant to avoid immigration consequences, in contrast to an amendment or vacatur on the merits, there is no reason to conclude that the alien is any less suitable for removal.'').

Fourth, unlawful presence of more than one year's cumulative duration prior to filing an application for asylum would be considered a significant adverse factor, consistent with the unlawful presence bar, INA 212(a)(9)(B)(i)(II), 8 U.S.C. 1182(a)(9)(B)(i)(II), and the permanent bar under section 212(a)(9)(C) of the INA, 8 U.S.C. 1182(a)(9)(C). *See also Matter of Diaz & Lopez,* 25 I&N Dec. 188, 189 (BIA 2010).

Fifth, failure to file taxes or fulfill related obligations would be another adverse factor. Subject to some exceptions, aliens are generally required to file federal income tax returns, as either a resident or nonresident alien. 26 U.S.C. 6012, 7701(b); 26 CFR 1.6012–1(a)(1)(ii), (b).[37] This rule would hold all asylum applicants to the same standards as most individuals in the United States who are required to file federal, state, and local taxes, as individuals who are required to file taxes are subject to negative consequences should said filings and associated obligations not be met. *See, e.g.,* Md. Code, Tax-Gen. 10–804, 10–805(a) (2013) (subject to exclusion of certain types of income, a Maryland resident required to file a federal income tax return is also required to file a state income tax return); Ind. Code, 6–3–4–1 (2019) (persons whose income meets federal filing threshold are required to file a state return).

Sixth, this rule would consider as an adverse factor having had two or more prior asylum applications denied for any reason.

Seventh, the rule would also consider as an adverse factor having withdrawn with prejudice or abandoned an asylum application. This rule would thereby disfavor abusive prior or multiple applications. Asylum applications take a significant portion of processing time and already constitute half of the docket in immigration court. This rule would minimize abuse of the system—and allow for meritorious claims to be heard more efficiently—by disfavoring repeated applications when prior

[36] The Departments published a joint rule on December 19, 2019, that, inter alia, would provide regulatory guidance regarding the immigration consequences of criminal convictions that have been vacated, expunged, or modified. *See* Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640 (Dec. 19, 2019) (proposed amendments to 8 CFR 208.13 and 1208.13).

[37] The Internal Revenue Service (''IRS'') uses two tests to determine whether an alien is considered a resident alien of the United States for tax purposes: The ''green card'' test and the ''substantial presence'' test. An alien meets the ''green card'' test if USCIS has issued the alien a registration card, Form I–551, designating the alien as a lawful permanent resident. IRS, *Alien Residency—Green Card Test, https://www.irs.gov/individuals/international-taxpayers/alien-residency-green-card-test* (last updated Feb. 20, 2020). An alien meets the ''substantial presence'' test if he or she has been physically present in the United States for 31 days of the current year *and* 183 days during the three-year period that includes the current year and the two years immediately prior, including all of the following: (1) All days an alien was present in the current year, (2) one-third of the days the alien was present in the first year before the current year, and (3) one-sixth of the days the alien was present in the second year before the current year. IRS, *Substantial Presence Test, https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test* (last updated Jan. 15, 2020). There are certain exceptions to this rule. *Id.* Non-resident aliens who pass the ''substantial presence'' test are treated as resident aliens for tax purposes.

applications have been abandoned or withdrawn.

Eighth, DHS already may dismiss the case of an alien who fails to attend his or her asylum interview, without prior authorization or in the absence of exceptional circumstances. INA 208(d)(5)(A)(v), 8 U.S.C. 1158(d)(5)(A)(v). Such an applicant may also ''be otherwise sanctioned for such failure.'' *Id.* The Departments' consideration of an alien's failure to attend the asylum interview,[38] unless the alien demonstrates by a preponderance of the evidence the existence of exceptional circumstances or that the interview notice was not mailed to the last address provided by the alien or the alien's representative (and neither the alien nor the alien's representative received notice of the interview), as an adverse discretionary factor is a reasonable additional sanction under section 208(d)(5)(A)(v) of the INA, 8 U.S.C. 1158(d)(5)(A)(v). As with the failure to appear in immigration court, failure to appear for an asylum interview before DHS wastes government resources that could have been used to adjudicate other applications. *See* DHS, *Affirmative Asylum Application Statistics and Decisions Annual Report* 3 (June 20, 2016) (reporting 2,439 cases that USCIS referred to immigration judges because asylum applicants failed to appear for interviews or withdrew their applications and were not in lawful immigration status during Fiscal Year 2015).

Ninth, aliens who are subject to a final order of removal may file a motion to reopen their proceedings before an immigration judge to seek asylum if there is a change in country conditions and the underlying evidence of changed conditions is material and was not available or could not have been discovered at the time of the prior hearing. INA 240(c)(7), 8 U.S.C. 1229a(c)(7). In such situations, adjudicators should consider as a significant adverse factor the failure to file such a motion within one year of the change in country conditions. *See* INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii); 8 CFR 1003.2(c)(3)(ii), 1003.23(b)(4)(i). The Departments believe that such a factor would appropriately incentivize aliens to exercise due diligence with regard to their cases, as is otherwise required for motions to reopen, and aid in the efficient processing of asylum applications before EOIR. *Cf.* INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B); *Wang* v. *BIA,* 508 F.3d 710, 715–16 (2d Cir. 2007) (discussing the requirement of acting with due diligence in order to establish equitable tolling of the filing deadline for motions to reopen asylum proceedings premised upon an allegation of ineffective assistance of counsel).

The factors set forth in this rule do not affect the adjudicator's ability to consider whether there exist extraordinary circumstances, such as those involving national security or foreign policy considerations, or whether the denial of asylum would result in an exceptional and extremely unusual hardship to the alien. *Cf. Matter of Jean,* 23 I&N Dec. at 385 (''I am highly disinclined to exercise my discretion—except, again, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of relief would result in exceptional and extremely unusual hardship—on behalf of dangerous or violent felons seeking asylum.''). This approach supersedes the Board's previous approach in *Matter of Pula* that past persecution or a strong likelihood of future persecution ''should generally outweigh all but the most egregious adverse factors.'' 19 I&N Dec. at 474. Especially given that an applicant may still seek non-discretionary statutory withholding of removal and protection under the CAT regulations, the Departments believe that the inclusion of the proposed adverse discretionary factors in the rule will ensure that immigration judges and asylum officers properly consider, in all cases, whether every applicant merits a grant of asylum as a matter of discretion, even if the applicant has otherwise demonstrated asylum eligibility.

7. Firm Resettlement

By statute, an alien who ''was firmly resettled in another country prior to arriving in the United States'' is ineligible for asylum. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). This bar to asylum was first included in the asylum laws by IIRIRA in 1996, but Congress added it as a prohibition to entry as a refugee from abroad in 1980. Refugee Act of 1980, sec. 201(b), 94 Stat. 103 (adding INA 207(c)(1), 8 U.S.C. 1157(c)(1)).[39] Before IIRIRA's enactment, the Attorney General also included firm resettlement as a bar to asylum under section 208 of the INA, 8 U.S.C. 1158, by regulation. *See* Aliens and Nationality; Refugee and Asylum Procedures, 45 FR 37392, 37394 (June 2, 1980) (adding part 208 to chapter I of 8 CFR, including the instruction at 8 CFR 208.8(f)(1)(ii) that a request for asylum would be denied if the alien ''has been firmly resettled in a foreign country'');[40] *see also Yang,* 79 F.3d at 935–39 (according *Chevron* deference to the inclusion of firm resettlement as a bar to asylum in the regulations).

DOJ first defined ''firm resettlement'' in the context of asylum applications in 1990. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 FR 30674, 30683–84 (July 27, 1990) (adding 8 CFR 208.15 to part 208 of chapter 1 of 8 CFR). At the time, DOJ did not provide an explanation for the chosen definition, although it was similar to the existing definition of firm resettlement for refugees. *Id.* at 30678. Aside from technical edits, and minor updates to ensure gender neutrality and change references from ''nation'' to ''country,'' the definition of firm resettlement has remained the same for nearly 30 years. *See* 8 CFR 208.15, 1208.15.

Due to the increased availability of resettlement opportunities[41] and the interest of those genuinely in fear of persecution in attaining safety as soon as possible, the Departments now

[38] On November 14, 2019, DHS proposed modifications to the asylum process, including changes to the provisions related to failing to appear for an asylum interview. *See* Asylum Application, Interview, and Employment Authorization for Applicants, 86 FR 62374 (Nov. 14, 2019). The Departments do not believe the proposals conflict, but welcome public comment.

[39] The firm resettlement concept has an even longer history in the immigration laws. *See Rosenberg* v. *Woo,* 402 U.S. 49, 54–55 (1971) (discussing the inclusion of firm resettlement considerations in the Displaced Persons Act of 1948 and Refugee Relief Act of 1953, and the subsequent history).

[40] DOJ also included a definition of ''firm resettlement'' in the context of refugee status determinations under section 207 of the INA, 8 U.S.C. 1157, in 1980, providing generally that a refugee is considered to be ''firmly resettled'' if he had been offered resident status, citizenship, or some other type of permanent resettlement by another nation and has travelled to and entered that nation as a consequence of his flight from persecution. A refugee will not be considered ''firmly resettled,'' however, if he establishes, to the satisfaction of the federal official reviewing the case, that the conditions of his residence in that nation have been so substantially and consciously restricted by the authorities of that nation that he has not in fact been resettled. *See* Aliens and Nationality; Refugee and Asylum Procedures, 45 FR at 37394. This definition continues to apply in substantially similar form to DHS determinations regarding the admission of refugees. 8 CFR 207.1(b). The Departments do not propose any changes to the definition or application of the firm resettlement bar for refugees in this rule.

[41] Forty-three countries have signed the Refugee Convention since 1990. *See* United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html* (last visited May 20, 2020).

propose to revise the definition of firm resettlement that applies to asylum adjudications at 8 CFR 208.15 and 1208.15. Specifically, the Departments propose to specify three circumstances under which an alien would be considered firmly resettled:

(1) The alien either resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status, *cf. Matter of K–S–E–,* 27 I&N Dec. 818, 819 (BIA 2020) (''Permanent resettlement exists where there is an available offer that realistically permits an individual's indefinite presence in the country.''); *Matter of A–G–G–,* 25 I&N Dec. 486, 502 (BIA 2011) (''The existence of a legal mechanism in the country by which an alien can obtain permanent residence *may* be sufficient to make a prima facie showing of an offer of firm resettlement * * *. Moreover, a determination of firm resettlement is not contingent on whether the alien applies for that status.'' (citations and footnote omitted));

(2) the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

(3) (i) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or (ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States.

These proposed changes would expand the firm resettlement bar to include forms of relief that were available to an alien in a country in which he or she resided before traveling to the United States, even if the alien did not affirmatively apply for or accept such relief. If an alien was legally ''entitled to permanent refuge in another country'' in which the alien resided, that entitlement may result in the alien being firmly resettled there, even if the alien ''fail[ed] to take advantage of [that country's] procedures for obtaining [such] relief.'' *Matter of A–G–G–,* 25 I&N Dec. at 502 (quoting *Elzour* v. *Ashcroft,* 378 F.3d 1143, 1152 (10th Cir. 2004). It follows *a fortiori,* then, that an alien to whom an offer of permanent legal status was actually made may be considered to have firmly resettled, *Matter of K–S–E–,* 27 I&N Dec. at 819–20, and that such an offer may not be ''negated by the alien's unwillingness or reluctance to satisfy the [reasonable] terms for acceptance,'' *id.* at 821. Not only do these changes recognize that an alien fleeing persecution would ordinarily be expected to seek refuge at the first available opportunity in another country where they would not have a reasonable fear of persecution or torture, but they will also ensure that the asylum system is used by those in genuine need of immediate protection, not by those who have chosen the United States as a destination for other reasons and then rely on the asylum system to reach that destination. *See Matter of A–G–G–,* 25 I&N Dec. at 503 (clarifying that the purpose of the firm settlement bar is to ''limit refugee protection to those with nowhere else to turn'').

The Departments further propose to specify that the firm resettlement bar applies ''when the evidence of record indicates that the firm resettlement bar may apply,'' and to specifically allow both DHS and the immigration judge to first raise the issue based on the record evidence. This proposal would make clear that the alien would continue to bear the burden to demonstrate that the firm resettlement bar does not apply, consistent with 8 CFR 1240.8(d). Finally, the Departments propose that the firm resettlement of a parent or parents with whom a child was residing at the time shall be imputed to the child. Although the Departments have had no prior settled policy necessarily imputing the firm resettlement of parents to a child, *Holder* v. *Martinez Gutierrez,* 566 U.S. 583, 596 n.4 (2012), the imputation proposed in this rule is consistent with both case law and recognition of the practical reality that a child generally cannot form a legal intent to remain in one place. *See, e.g., Matter of Ng,* 12 I&N Dec. 411 (Reg. Comm'r 1967) (firm resettlement of father is imputed to a child who resided with his resettled family); *Vang* v. *INS,* 146 F.3d 1114, 1116–17 (9th Cir. 1998) (''We follow the same principle in determining whether a minor has firmly resettled in another country, *i.e.,* we look to whether the minor's parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute the parents' status to the minor.'').

To the extent any BIA decisions relied on prior regulatory language and remain inconsistent with the proposed new regulatory language, the proposed changes would expressly overrule those BIA decisions.

8. Rogue Officials

In order to demonstrate eligibility for withholding of removal or deferral of removal under the CAT regulations, an alien must demonstrate that it is more likely than not that he or she will be tortured in the country of removal. *See* 8 CFR 1208.16(c)(2). Torture is defined as causing ''severe pain or suffering, whether physical or mental,'' and it must be intentionally inflicted ''by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,'' among other requirements. 8 CFR 1208.18(a)(1). The regulations do not provide further guidance for determining what sorts of officials constitute ''public officials,'' including whether an official such as a police officer is a public official for the purposes of the CAT regulations if he or she acts in violation of official policy or his or her official status—in other words, a ''rogue'' police official.

When faced with questions of such ''rogue'' officials, the federal courts have generally implied from the lack of further explanation regarding the definition of ''public official'' that no exception excluding ''rogue'' officials from the definition exists. The Ninth Circuit Court of Appeals recently provided a particularly detailed explanation of this point:

> The statute and regulations do not establish a ''rogue official'' exception to CAT relief. The regulations say that torture, for purposes of relief, has to be ''at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'' The four policemen were ''public officials,'' even though they were local police and state or federal authorities might not similarly acquiesce. Since the officers were apparently off-duty when they tortured Barajas-Romero, they were evidently not acting ''in an official capacity,'' but the regulation does not require that the public official be carrying out his official duties, so long as he is the actor or knowingly acquiesces in the acts. The regulation uses the word ''or'' between the phrases ''inflicted by * * * a public official'' and ''acting in an official capacity.'' The word ''or'' can only mean that either one suffices, so the torture need not be both by a public official and also that the official is acting in his official capacity. An ''and'' construction would require that the conjunction be ''and.'' The record leaves no room for doubt that the four policemen were public officials who themselves inflicted the torture.

Barajas-Romero v. *Lynch,* 846 F.3d 351, 362–63 (9th Cir. 2017); *see also Rodriguez-Molinero* v. *Lynch,* 808 F.3d 1134, 1139 (7th Cir. 2015) (''Nor is the issue, as the immigration judge opined, whether the police officers who tortured the petitioner 'were rogue officers individually compensated by Jose to engage in isolated incidents of retaliatory brutality, rather than evidence of a broader pattern of governmental acquiescence in torture.' It is irrelevant whether the police were rogue (in the sense of not serving the interests of the Mexican government) or not.''). *But see Suarez-Valenzuela* v. *Holder,* 714 F.3d 241, 248 (4th Cir. 2013) (upholding the BIA's finding that a rogue police officer who harmed the respondent ''acted out of fear that the government would punish him and not with any form of government approval''); *Wang* v. *Ashcroft,* 320 F.3d 130, 144 (2d Cir. 2003) (''Moreover, although the BIA was bound to consider any past torture inflicted upon Wang by Chinese officials, 8 CFR 208.16(c)(3), Wang failed to establish that his alleged previous beating was anything more than a deviant practice carried out by one rogue military official.'').

The Departments propose revising 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) to clarify (1) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (*i.e.* under ''color of law'') and (2) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law (*i.e.,* a ''rogue official'') does not constitute a ''pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,'' even if such actions cause pain and suffering that could rise to the severity of torture. Nothing in CAT or the CAT regulations issued pursuant to the implementing legislation indicates that any violent action of someone who happens to be employed by a government entity always constitutes inflicting, instigating, consenting to, or acquiescing in severe harm or suffering by a public official even when that employee is off-duty or not acting in any official governmental capacity. Indeed, the U.S. ratification history of the CAT specifically approves of a ''color of law'' analysis. *See, e.g.,* S. Exec. Rep. No. 101–30, at 14 (1990) (''Thus, the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted 'under color of law.'''). Further, the Federal statute partially implementing CAT in the criminal law context uses a color of law descriptor as well. *See* 18 U.S.C. 2340(1) (''[T]orture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.''). As the BIA has explained, ''the key consideration in determining if a public official was acting under color of law is whether he was able to engage in torturous conduct because of his government position or if he could have done so without any connection to the government. Issues to consider in making this determination include whether government connections provided the officer access to the victim, or to his whereabouts or other identifying information; whether the officer was on duty and in uniform at the time of his conduct; and whether the officer threatened to retaliate through official channels if the victim reported his conduct to authorities.'' *Matter of O–F–A–S,* 27 I&N Dec. 709, 718 (BIA 2019). This proposed amendment to 8 CFR 208.18 and 1208.18 clarifies that the requirement that the individual be acting in an official capacity applies to both a ''public official,'' such as a police officer, and an ''other person,'' such as an individual deputized to act on the government's behalf.

The Departments also propose to clarify the definition of ''acquiescence of a public official'' at 8 CFR 208.18(a)(7) and 1208.18(a)(7). *See Scarlett* v. *Barr,* ____F.3d ____, 2020 WL 2046544, *13–14 (2d Cir. April 28, 2020) (discussing the need for further agency guidance concerning certain aspects of the ''acquiescence'' standard). The current definition provides that the ''official acquiescence'' standard ''requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.'' 8 CFR 208.18(a)(7), 1208.18(a)(7). The Departments propose to clarify that, as several courts of appeals and the BIA have recognized, ''awareness''—as used in the CAT ''acquiescence'' definition—requires a finding of either actual knowledge or willful blindness. *See, e.g., Silva-Rengifo* v. *Att'y Gen. of U.S.,* 473 F.3d 58, 70 (3d Cir. 2007); *Matter of J–G–D–F–,* 27 I&N Dec. 82, 90 (BIA 2017); *see also* S. Exec. Rep. No. 101–30, at 9. The Departments further propose to clarify in this rule that, for purposes of the CAT regulations, ''willful blindness'' means that ''the public official or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.'' Proposed 8 CFR 208.18(a)(7), 1208.18(a)(7). This proposed definition is drawn from well-established legal principles. *See, e.g., Global-Tech Appliances, Inc.* v. *SEB S.A.,* 563 U.S. 754, 769–70 (2011); *United States* v. *Hansen,* 791 F.3d 863, 868 (8th Cir. 2015); *United States* v. *Heredia,* 483 F.3d 913, 918 n.4, 924 (9th Cir. 2007) (en banc); *Roye* v. *Att'y Gen. of U.S.,* 693 F.3d 333, 343 n.13 (3d Cir. 2012).

Additionally, the rule clarifies the second part of the two-part test for acquiescence set out in the Senate's understanding in the CAT ratification documents. *See* 136 Cong. Rec. S17486–01, 1990 WL 168442 (Oct. 27, 1990). In the ratification process, the United States government was concerned that the definition of torture needed to be clear enough to give officials due process notice of what conduct was criminal. *See Convention Against Torture: Hearing Before the S. Foreign Relations Comm.,* S. Hrg. No. 101–718, 101st Cong., 2d Sess. 14 (1990) (testimony of Mark Richard, Deputy Assistant Att'y Gen., Criminal Division, U.S. Department of Justice). The two steps of the acquiescence requirement, corresponding to a mens rea and an actus reus requirement, were included in the list of understandings to clarify that ''to be culpable under the [CAT] * * * the public official must have had prior awareness of [the activity constituting torture] and must have breached his legal responsibility to intervene to prevent the activity.'' *Id.* The rule clarifies that acquiescence is not established by prior awareness of the activity alone, but requires an omission of an act that the official had a duty to do and was able to do. *Cf.* Model Penal Code sec. 2.01(1) (''A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.''). First, the official or other person in question must have been charged with preventing the activity as part of his or her duties. So,

for instance, an official who is not charged with preventing crime or who is outside his or her jurisdiction would not have a legal responsibility to prevent activity constituting torture, even if that person was aware of the activity. *See, e.g., Ramirez-Peyro* v. *Holder,* 574 F.3d 893, 905 (8th Cir. 2009) (remanding for further analysis by the Board on whether police officers breached their legal duty to intervene when they declined to arrest themselves, their co-workers, and other individuals who assaulted the applicant). Second, such a person does not breach a legal duty to intervene if the person is unable to intervene, or if the person intervenes, but is nevertheless unable to prevent the activity. *See, e.g., Martinez Manzanares* v. *Barr,* 925 F.3d 222, 229 (5th Cir. 2019); *Zaldana Menijar* v. *Lynch,* 812 F.3d 491, 502 (6th Cir. 2015); *Garcia* v. *Holder,* 746 F.3d 869, 873–74 (8th Cir. 2014); *Garcia-Milian* v. *Holder,* 755 F.3d 1026, 1034 (9th Cir. 2014); *Ferry* v. *Gonzales,* 457 F.3d 1117, 1131 (10th Cir. 2006); *Reyes-Sanchez* v. *U.S. Att'y Gen.,* 369 F.3d 1239, 1243 (11th Cir. 2004). This aspect of the rule is meant to supersede any judicial decisions that could be read to hold that an official actor could acquiesce in torturous activities that he or she is unable to prevent. *See, e.g., Pieschacon-Villegas* v. *Att'y Gen.,* 671 F.3d 303, 311–12 (3d Cir. 2011); *Sarhan* v. *Holder,* 658 F.3d 649, 657–60 (7th Cir. 2011) (holding that the government's ineffectiveness at protecting women from honor killings showed governmental acquiescence); *see generally Nat'l Cable & Telecomms. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 982 (2005).

D. Information Disclosure

The regulations at 8 CFR 208.6 and 1208.6 govern the disclosure of information contained in or pertaining to an asylum application, credible fear records, and reasonable fear records. The nondisclosure provisions in 8 CFR 208.6(a)–(b) and 1208.6(a)–(b) cover ''[i]nformation contained in or pertaining to any asylum application,'' records pertaining to any credible fear or reasonable fear determination, and other records kept by the Departments that indicate that a specific alien has applied for asylum or received a credible fear or reasonable fear interview or review thereof. The ''asylum application'' includes information pertaining to statutory withholding of removal, 8 U.S.C. 1231(b)(3), and protection under the CAT regulations. *See* 8 CFR 208.3(b), 1208.3(b). The regulations prohibit disclosing protected information to unauthorized ''third parties'' but are silent, save by exception, as to who constitutes an unauthorized third party. Under the exceptions for nondisclosure contained in 8 CFR 208.6(c) and 1208.6(c), certain limited categories of persons and entities may receive otherwise-confidential asylum-related or other pertinent information for certain purposes. This includes a disclosure to any U.S. government official or contractor having a need to examine information in connection with the adjudication of an asylum application or consideration of a credible fear or reasonable fear claim. 8 CFR 208.6(c)(1)(i)–(ii) and 1208.6(c)(1)(i)–(ii). Accordingly, DHS and EOIR employees, and aliens' representatives of record, are not considered unauthorized third parties for purposes of the existing regulation.[42] Further, the Attorney General and Secretary of Homeland Security have the discretion to disclose any such information to any party. 8 CFR 208.6(a), 1208.6(a).

The Departments propose changes to 8 CFR 208.6 and 8 CFR 1208.6 to clarify that information may be disclosed in certain circumstances that directly relate to the integrity of immigration proceedings, including situations in which there is suspected fraud or improper duplication of applications or claims. An alien's decision to apply for asylum necessarily entails the alien's decision to provide the Government with information necessary to determine whether the person deserves refuge in the United States. Within the immigration system in the United States, such information does not exist in a vacuum, and there is a clear need to ensure that the confidentiality provisions are not being used to shield fraud and abuse that can only be uncovered by comparing applications and information across proceedings. Further, there is need to ensure that other types of criminal activity are not shielded from investigation and prosecution due to the confidentiality provisions. Furthermore, the proposed changes allow the information to be disclosed where it is necessary to the Government's defense of any legal action relating to the alien's immigration or custody status. Aliens routinely file suit in both district courts and courts of appeals raising an assortment of challenges to their immigration and custody status. Although the current regulation allows disclosure where the suit arises from the adjudication of an asylum application or of which the asylum application ''is a part,'' there is no clear exception covering disclosures in other civil immigration litigation in which it is necessary for the Government to disclose this information in order to fully defend the Government's position.

As such, the Department proposes to amend 8 CFR 208.6 and 8 CFR 1208.6 to specify that to the extent not already specifically permitted, and without the necessity of seeking the exercise of the Attorney General's or Secretary's discretion under paragraphs 208.6(a) and 1208.6(a), respectively, the Government may disclose[43] all relevant and applicable information in or pertaining to the application for asylum, statutory withholding of removal, and protection under the CAT regulations as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien's immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.

E. Severability

The Departments are proposing severability provisions in each of the new 8 CFR parts. The Departments believe that the provisions of each new part function sensibly independent of other provisions. However, to protect the goals for which this rule is being proposed, the Departments are codifying their intent that the provisions be severable so that, if necessary, the regulations can continue to function without a stricken provision.

V. Regulatory Requirements

A. Regulatory Flexibility Act

The Departments have reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and have determined that this rule will not have a significant economic impact on a substantial number of small entities. This regulation affects only individual aliens and the Federal Government.

[42] Further, the sharing of information between the Departments regarding an alien in immigration proceedings does not constitute a disclosure under these regulations and is otherwise excepted pursuant to 8 CFR 208.6(c) and 1208.6(c). As DHS is a party to all proceedings before EOIR, any records related to an aliens in such proceedings possessed by EOIR are also necessarily already possessed by DHS.

[43] Nothing in the proposed rule would prohibit agencies from placing additional restrictions on the disclosure of information consistent with internal policies as long as those policies do not conflict with the proposed regulatory language.

Individuals do not constitute small entities under the Regulatory Flexibility Act.

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Congressional Review Act

This proposed rule is anticipated not to be a major rule as defined by section 804 of the Congressional Review Act. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804(2).

D. Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The proposed rule is considered by the Departments to be a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 because it raises novel legal or policy issues. Accordingly, the regulation has been submitted to the Office of Management and Budget (''OMB'') for review.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The proposed rule would change or provide additional clarity for adjudicators across many issues commonly raised by asylum applications and would potentially streamline the overall adjudicatory process for asylum applications. Although the proposed regulation would provide clarity to asylum law and operational streamlining to the credible fear review process, the proposed regulation does not change the nature of the role of an immigration judge or an asylum officer during proceedings for consideration of credible fear claims or asylum applications. Notably, immigration judges will retain their existing authority to review *de novo* the determinations made by asylum officers in a credible fear proceedings, and will continue to control immigration court proceedings. In credible fear proceedings, asylum officers will continue to evaluate the merits of claims for asylum, withholding of removal, and CAT protection for possible referral to the immigration judge. While this rule expands the bases on which an asylum officer may determine that a claim does not merit referral (and, as a consequence, make a negative fear determination), the alien will still be able to seek review of that negative fear determination before the immigration judge.

Immigration judges and asylum officers are already trained to consider all relevant legal issues in assessing a credible fear claim or asylum application, and the proposed rule does not propose any changes that would make adjudications more challenging than those that are already conducted. For example, immigration judges already consider issues of persecution, nexus, particular social group, frivolousness, firm resettlement, and discretion in assessing the merit of an asylum application, and the provision of clearer standards for considering those issues in the proposed regulation does not add any operational burden or increase the level of operational analysis required for adjudication. Accordingly, the Departments do not expect the proposed changes to increase the adjudication time for immigration court proceedings involving asylum applications or for reviews of negative fear determinations.

Depending on the manner in which DHS exercises its prosecutorial discretion for aliens potentially subject to expedited removal, the facts and circumstances of each individual alien's situation, and the Departments' interpretation and implementation of the relevant regulations by individual adjudicators, the proposed changes may decrease the number of cases of aliens subject to expedited removal that result in a full hearing on an application for asylum. In all cases, however, an alien will retain the opportunity to request immigration judge review of DHS's initial fear determination.

The Departments propose changes that may affect any alien subject to expedited removal who makes a fear claim and any alien who applies for asylum, statutory withholding of removal, or protection under the CAT regulations. The Departments note that the proposed changes are likely to result in fewer asylum grants annually due to clarifications regarding the significance of discretionary considerations and changes to the definition of firm resettlement. However; because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application, neither DOJ nor DHS can quantify precisely the expected decrease. As of April 24, 2020, EOIR had 527,927 cases pending with an asylum application. In FY 2019, at the immigration court level, EOIR granted 18,816 asylum applications and denied 45,285 asylum applications. An additional 27,112 asylum applications were abandoned, withdrawn, or otherwise not adjudicated. As of January 1, 2020, USCIS had 338,931 applications for asylum and for withholding of removal pending.[44] In FY 2019, USCIS received 96,861 asylum applications, and approved 19,945 such applications.[45]

The Departments expect that the aliens most likely to be impacted by this rule's provisions are those who are already unlikely to receive a grant of asylum under existing law. Assuming DHS places those aliens into expedited removal proceedings, the Departments assess that it will be more likely that they would receive a more prompt adjudication of their claims for asylum or withholding of removal than they would under the existing regulations. Depending on the individual circumstances of each case, this rule would mean that such aliens would likely not remain in the United States—for years, potentially—pending resolution of their claims.

An alien who is ineligible for asylum may still be eligible to apply for the protection of withholding of removal

[44] *See* USCIS, *Number of Service-wide Forms Fiscal Year to Date, by Quarter and Form Status, Fiscal Year 2020, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY2020Q1.pdf* (last visited May 28, 2020).

[45] *See* USCIS, *Number of Service-wide Forms Fiscal Year to Date, by Quarter, and Form Status, Fiscal Year 2019, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY19Q4.pdf* (last visited May 28, 2020).

The data in this report only include approvals or denials (*i.e.,* asylum applicants otherwise in lawful status who were not found eligible for asylum by USCIS). Denials do not include out-of-status cases that were not found eligible for asylum and then were referred by USCIS to immigration court.

under section 241(b)(3) of the INA or withholding of removal under regulations issued pursuant to the legislation implementing U.S. obligations under Article 3 of CAT. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 208.17 through 18, 1208.16, and 1208.17 through 18. For those aliens barred from asylum under this rule who would otherwise be positively adjudicated for asylum, it is possible they would qualify for withholding (provided a bar to withholding did not apply separate and apart from this rule). To the extent there are any direct impacts of this rule, they would almost exclusively fall on that population.[46] Further, the full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DHS nor DOJ collects such data at such a level of granularity.

Overall, the Departments assess that operational efficiencies will likely result from these proposed changes, which could, inter alia, reduce the number of meritless claims before the immigration courts, provide the Departments with the ability to more promptly grant relief or protection to qualifying aliens, and ensure that those who do not qualify for relief or protection are removed more efficiently than they are under current rules.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

[46] Because statutory withholding of removal has a higher burden of proof, an alien granted such protection would necessarily also meet the statutory burden of proof for asylum, but would not be otherwise eligible for asylum due to a statutory bar or as a matter of discretion. Because asylum applications may be denied for multiple reasons and because the factual bases relevant for application of the proposed changes are not tracked at a granular level, there is no precise data on how many otherwise grantable asylum applications may be denied under this rule and, thus, there is no way to calculate precisely how many aliens will nevertheless be granted withholding. Further, because the immigration judge would have to adjudicate the application in either case, there is no cost to DOJ.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

DOJ and DHS invite comment on the impact to the proposed collection of information. In accordance with the Paperwork Reduction Act, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted until August 14, 2020. All submissions received must include the OMB Control Number 1615–0067 in the body of the submission. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Asylum and for Withholding of Removal.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–589; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Form I–589 is necessary to determine whether an alien applying for asylum or withholding of removal in the United States is classified as refugee, and is eligible to remain in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–589 is approximately 114,000, and the estimated hour burden per response is 18 hours per response. The estimated number of respondents providing biometrics is 110,000, and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection of information in hours is 2,180,700.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $46,968,000.

H. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Fees, Freedom of Information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1235

Administrative practice and procedure, Aliens, Immigration,

Reporting and recordkeeping requirements.

Department of Homeland Security

Accordingly, for the reasons set forth in the preamble, the Department of Homeland Security proposes to amend 8 CFR parts 103, 208, and 235 as follows:

PART 103—IMMIGRATION BENEFITS; BIOMETRIC REQUIRMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1356b, 1372; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Public Law 112–54, 125 Stat 550.

■ 2. Amend § 103.5 by
■ a. Revising paragraph (a) introductory text;
■ b. Revising the first full sentence of paragraph (a)(1)(i); and
■ c. Adding paragraph (d).

The revisions and addition read as follows:

§ 103.5 Reopening or reconsideration.

(a) Motions to reopen or reconsider proceedings or decisions on benefit requests in other than special agricultural worker and legalization cases—

(1) * * *

(i) *General.* Except where the Board has jurisdiction and as otherwise provided in 8 CFR parts 3, 210, 242, and 245a, when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision regarding the benefit request. * * *

* * * * *

(d) The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

* * * * *

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 3. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; 8 CFR part 2.

■ 4. Amend § 208.1 by adding paragraphs (c), (d), (e), (f), and (g) to read as follows:

§ 208.1 General.

* * * * *

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of screening or adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe

economic harm or property damage, though this list is nonexhaustive. The existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus*—(1) *General.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application or withholding of removal under section 241(b)(3) of the Act, the Secretary, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

(i) Interpersonal animus or retribution;

(ii) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(iii) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;

(iv) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(v) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(vi) Criminal activity;

(vii) Perceived, past or present, gang affiliation; or,

(viii) Gender.

(2) [Reserved]

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender, and offered to support the basis of an alleged fear of harm from the individual or country shall not be admissible in adjudicating that application.

■ 5. Amend § 208.2 by adding paragraph (c)(1)(ix) to read as follows:

§ 208.2 Jurisdiction.

* * * * *

(c) * * *

(1) * * *

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with § 208.30, and §§ 1003.42 or 1208.30 of this title.

* * * * *

■ 6. Amend § 208.5 by revising the first sentence of paragraph (a) to read as follows:

§ 208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear or reasonable fear determination under §§ 208.30 or 208.31, and except in the case of an alien who is in custody pending a credible fear determination under § 208.30 or a reasonable fear determination pursuant to § 208.31. * * *

* * * * *

■ 7. Amend § 208.6 by—

■ a. Revising paragraphs (a) and (b); and

■ b. Adding paragraphs (d), (e), and (f).

The revisions and additions read as follows:

§ 208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Secretary.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

* * * * *

(d)(1) Any information contained in an application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws,

(ii) As part of any state or federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any state or federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

(v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and

(vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status including petitions for review filed in accordance with 8 U.S.C. 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees and officers of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the Department of Labor, or a U.S. national security agency having a need to examine the information for an official purpose; or

(2) Where a United States Government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

■ 8. Amend § 208.13 by:

■ a. Revising paragraph (b)(3) introductory text;

■ b. Revising paragraph (b)(3)(ii);
■ c. Adding paragraphs (b)(3)(iii) and (iv), and (d).

The revisions and additions read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i), (ii), and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (b)(3)(iii) of this section, persecutors who are private actors—including persecutors who are gang members, rogue officials, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) *Significant adverse discretionary factors.* The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an alien merits a grant of asylum in the exercise of discretion:

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(C) Such country or all such countries were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Secretary, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) Such country was, at the time of the transit, not a party to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and received a final judgment denying the alien protection in that country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) All such countries were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ;

(C) Would otherwise be subject to § 208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States prior to filing an application for asylum;

(E) At the time the asylum application is filed with DHS has:

(*1*) Failed to timely file (or timely file a request for an extension of time to file) any required federal, state, or local income tax returns;

(*2*) Failed to satisfy any outstanding federal, state, or local tax obligations; or

(*3*) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(*1*) Exceptional circumstances prevented the alien from attending the interview; or

(*2*) The interview notice was not mailed to the last address provided by the alien or his or her representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of those changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Secretary, in extraordinary circumstances, such as those involving

national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i) of this section. Depending on the gravity of the circumstances underlying the application of paragraph (d)(2)(i) of this section, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

■ 9. Revise § 208.15 to read as follows:

§ 208.15 Definition of "firm resettlement."

(a) An alien is considered to be firmly resettled if:

(1) The alien either resided or could have resided in any permanent legal immigration status or any non-permanent, potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution or torture, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or

(ii) The alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless the alien establishes that he or she could not have derived any permanent legal immigration status or any potentially indefinitely renewable temporary legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) from the alien's parent.

■ 10. Amend § 208.16 by:

■ a. Revising paragraph (b)(3) introductory text;

■ b. Revising paragraph (b)(3)(ii);

■ c. Adding paragraphs (b)(3)(iii) and (iv).

The revisions and additions read as follows:

§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b)(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under the totality of the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including but not limited to persecutors who are gang members, rogue officials, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

■ 11. Amend § 208.18 by revising paragraphs (a)(1) and (7) to read as follows:

§ 208.18 Implementation of the Convention Against Torture.

(a) * * *

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law (''rogue official'') shall not constitute pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the rogue official.

* * * * *

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have

breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

* * * * *

■ 12. Revise § 208.20 to read as follows:

§ 208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An alien knowingly files a frivolous asylum application if:

(1) The application is described in paragraph (c) of this section; and

(2) The alien filed the application with either actual knowledge, or willful blindness, of the fact that the application was described in paragraph (c) in this section.

(b) For applications filed on or after [EFFECTIVE DATE OF FINAL RULE], an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. Such finding will be made only if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For any application referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph 1208.20(c).

(c) For purposes of this section, beginning on [effective date of final rule], an asylum application is frivolous if it:

(1) Contains a fabricated essential element;

(2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

(3) Is filed without regard to the merits of the claim; or

(4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolousness finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may also be found frivolous unless:

(1) The alien wholly disclaims the application and withdraws it with prejudice;

(2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien knowingly filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

■ 13. Add § 208.25 to read as follows:

§ 208.25 Severability.

The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

■ 14. Amend § 208.30 by:

■ a. Revising the section heading;

■ b. Revising paragraphs (a), (b), (c), and (d);

■ c. Revising (e) introductory text, (e)(1) through (5), (e)(6) introductory text, (e)(6)(ii), (e)(6)(iii) introductory text, (e)(6)(iv), the first sentence of the introductory text of paragraph (e)(7), (e)(7)(ii); and

■ d. Revising paragraphs (f) and (g).

The revisions read as follows:

§ 208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) of the Act, DHS has exclusive jurisdiction to make the determinations described in this subpart B. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Process and authority.* If an alien subject to section 235(a)(2) or 235(b)(1) of the Act indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with this section. An asylum officer shall then screen the alien for a credible fear of persecution, and as necessary, a reasonable possibility of persecution and reasonable possibility of torture. An asylum officer, as defined in section 235(b)(1)(E) of the Act, has the authorities described in § 208.9(c) and must conduct an evaluation and make a determination consistent with this section.

(c) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

(1) Arrived in the United States concurrently with the principal alien; and

(2) Desires to be included in the principal alien's determination. However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

(d) *Interview.* The asylum officer will conduct the interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution, reasonable possibility of persecution, or

reasonable possibility of torture. The asylum officer shall conduct the interview as follows:

(1) If the officer conducting the interview determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview.

(2) At the time of the interview, the asylum officer shall verify that the alien has received in writing the relevant information regarding the fear determination process. The officer shall also determine that the alien has an understanding of the fear determination process.

(3) The alien may be required to register his or her identity.

(4) The alien may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, and may present other evidence, if available. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process. Any person or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and on the length of the statement.

(5) If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language the alien speaks and understands, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter must be at least 18 years of age and may not be the alien's attorney or representative of record, a witness testifying on the alien's behalf, a representative or employee of the alien's country of nationality, or, if the alien is stateless, the alien's country of last habitual residence.

(6) The asylum officer shall create a summary of the material facts as stated by the alien. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct any errors therein.

(e) Procedures for determining credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture.

(1) An alien establishes a credible fear of persecution if there is a significant possibility the alien can establish eligibility for asylum under section 208 of the Act. ''Significant possibility'' means a substantial and realistic possibility of succeeding. When making such a determination, the asylum officer shall take into account:

(i) The credibility of the statements made by the alien in support of the alien's claim;

(ii) Such other facts as are known to the officer, including whether the alien could avoid any future harm by relocating to another part of his or her country, if under all the circumstances it would be reasonable to expect the alien to do so; and

(iii) The applicability of any bars to being able to apply for asylum or to eligibility for asylum set forth at section 208(a)(2)(B)–(C) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act.

(2) An alien establishes a reasonable possibility of persecution if there is a reasonable possibility that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal. When making such determination, the officer will take into account:

(i) The credibility of the statements made by the alien in support of the alien's claim;

(ii) Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another party of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so; and

(iii) The applicability of any bars at section 241(b)(3)(B) of the Act.

(3) An alien establishes a reasonable possibility of torture if there is a reasonable possibility that the alien would be tortured in the country of removal, consistent with the criteria in §§ 208.16(c), 208.17, and 208.18. The alien must demonstrate a reasonable possibility that he or she will suffer severe pain or suffering in the country of removal, and that the feared harm would comport with the other requirements of § 208.18(a)(1) through (8). When making such a determination, the asylum officer shall take into account:

(i) The credibility of the statements made by alien in support of the alien's claim, and

(ii) Such other facts as are known to the officer, including whether the alien could relocate to a part of the country of removal where he or she is not likely to be tortured.

(4) In all cases, the asylum officer will create a written record of his or her determination, including a summary of the material facts as stated by the alien, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. An asylum officer's determination will not become final until reviewed by a supervisory asylum officer.

(5)(i)(A) Except as provided in paragraphs (e)(5)(ii) through(iii), (e)(6), or (e)(7) of this section, if an alien would be able to establish a credible fear of persecution but for the fact that the alien is subject to one or more of the mandatory bars to applying for asylum or being eligible for asylum contained in section 208(a)(2)(B)–(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, then the asylum officer will enter a negative credible fear of persecution determination with respect to the alien's eligibility for asylum.

(B) If an alien described in paragraph (e)(5)(i)(A) of this section is able to establish either a reasonable possibility of persecution (including by establishing that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, then the asylum officer will enter a positive reasonable possibility of persecution or torture determination, as applicable. The Department of Homeland Security shall place the alien in asylum-and-withholding-only proceedings under § 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture.

(C) If an alien described in paragraph (e)(5)(i)(A) of this section fails to establish either a reasonable possibility of persecution (including by failing to establish that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).

(ii) If the alien is found to be an alien described in 8 CFR 208.13(c)(3), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under § 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture, if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

(iii) If the alien is found to be an alien described in § 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under § 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding of deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (''Agreement''). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph (e)(6). The asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

* * * * *

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture under paragraph (d) of this section.

(iii) An alien qualifies for an exception to the Agreement if the alien is not being removed from Canada in transit through the United States and:

* * * * *

(iv) As used in paragraphs (e)(6)(iii)(B), (C) and (D) of this section only, ''legal guardian'' means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien's behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

(7) When an immigration officer has made an initial determination that an alien, other than an alien described in paragraph (e)(6) of this section and regardless of whether the alien is arriving at a port of entry, appears to be subject to the terms of an agreement authorized by section 208(a)(2)(A) of the Act, and seeks the alien's removal consistent with that provision, prior to any determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether the alien is ineligible to apply for asylum in the United States and is subject to removal to a country (''receiving country'') that is a signatory to the applicable agreement authorized by section 208(a)(2)(A) of the Act, other than the U.S.-Canada Agreement effectuated in 2004. * * *

* * * * *

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the applicable agreement, or would more likely than not be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or tortured, in the receiving country, the asylum officer shall make a written notation to that effect, and may then proceed to determine whether any other agreement is applicable to the alien under the procedures set forth in this paragraph (e)(7). If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of each of the applicable agreements, or would more likely than not be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or tortured, in each of the prospective receiving countries, the asylum officer shall make a written notation to that effect, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, under paragraph (d) of this section.

* * * * *

(f) *Procedures for a positive fear determination.* If, pursuant to paragraph (e) of this section, an alien stowaway or an alien subject to expedited removal establishes either a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture:

(1) DHS shall issue a Notice of Referral to Immigration Judge for asylum-and-withholding-only proceedings under § 208.2(c)(1).

(2) Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and 8 CFR 212.5 of this chapter.

(g) *Procedures for a negative fear determination.* (1) If, pursuant to paragraphs (e) and (f) of this section, an alien stowaway or an alien subject to expedited removal does not establish a credible fear of persecution, reasonable possibility of persecution, or reasonable

possibility of torture, DHS shall provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative determination, in accordance with section 235(b)(1)(B)(iii)(III) of the Act and this § 208.30. The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(i) If the alien requests such review, DHS shall arrange for detention of the alien and serve him or her with a Notice of Referral to Immigration Judge, for review of the negative fear determination in accordance with paragraph (g)(2) of this section.

(ii) If the alien is not a stowaway and does not request a review by an immigration judge, DHS shall order the alien removed with a Notice and Order of Expedited Removal, after review by a supervisory officer.

(iii) If the alien is a stowaway and the alien does not request a review by an immigration judge, DHS shall complete removal proceedings in accordance with section 235(a)(2) of the Act.

(2) Review by immigration judge of a negative fear determination.

(i) Immigration judges shall review negative fear determinations as provided in 8 CFR 1208.30(g).

(ii) DHS shall provide the record of any negative fear determinations being reviewed, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based, to the immigration judge with the negative fear determination.

■ 15. Amend § 208.31 by revising paragraph (f), the introductory text of paragraph (g), and paragraphs (g)(1) and (2) to read as follows:

§ 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and Withholding of Removal.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 16. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1365b, 1379, 1731–32; Title VII of Public Law 110–229; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458); Public Law 112–54.

■ 17. Amend § 235.6 by
■ a. Revising paragraphs (a)(1)(ii), (a)(2)(i), and (iii); and
■ b. Adding paragraph (c).

The revisions and addition read as follows:

§ 235.6 Referral to immigration judge.

(a) * * *

(1) * * *

(ii) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident or refugee, or granted asylum, or, upon review pursuant to § 235.3(b)(5)(iv), an immigration judge determines that the alien was once so admitted or granted asylum, provided that such status has not been terminated by final administrative action, and the Service initiates removal proceedings against the alien under section 240 of the Act.

* * * * *

(2) * * *

(i) If an asylum officer determines that the alien does not have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, and the alien requests a review of that determination by an immigration judge; or

* * * * *

(iii) If an immigration officer refers an applicant in accordance with the provisions of 8 CFR 208.30 or 8 CFR 208.31.

* * * * *

(c) The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

* * * * *

Department of Justice

Accordingly, for the reasons set forth in the preamble, the Attorney General proposed to amend 8 CFR parts 1003, 1208 and 1235 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 18. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No.

2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Public Law 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Public Law 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Public Law 106–554, 114 Stat. 2763A–326 to –328.

■ 19. Amend § 1003.1 by revising paragraph (b)(9) to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(b) * * *

(9) Decisions of Immigration Judges in asylum proceedings pursuant to § 1208.2(b) and (c) of this chapter.

* * * * *

■ 20. Amend § 1003.42 by:

■ a. Revising the section heading;

■ b. Revising paragraphs (a), (b), (d) through (g), and (h)(1), and the third sentence of pargraph (h)(3); and

■ c. Adding paragraph (i).

The revisions and addition read as follows:

§ 1003.42 Review of credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations.

(a) *Referral.* Jurisdiction for an immigration judge to review a negative fear determination by an asylum officer pursuant to section 235(b)(1)(B) of the Act shall commence with the filing by DHS of the Notice of Referral to Immigration Judge. DHS shall also file with the notice of referral a copy of the written record of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.

(b) *Record of proceeding.* The Immigration Court shall create a Record of Proceeding for a review of a negative fear determination. This record shall not be merged with any later proceeding involving the same alien.

* * * * *

(d) *Standard of review.* (1) The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to applying for asylum or being eligible for asylum under section 208(a)(2)(B)–(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, and such other facts as are known to the immigration judge, that the alien could establish his or her ability to apply for or be granted asylum under section 208 of the Act. The immigration judge shall make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act, and such other facts as are known to the immigration judge, that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal, consistent with the criteria in 8 CFR 1208.16(b). The immigration judge shall also make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, that the alien would be tortured in the country of removal, consistent with the criteria in 8 CFR 1208.16(c), 8 CFR 1208.17, and 8 CFR 1208.18.

(2) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the Immigration Judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) prior to any further review of the asylum officer's negative fear determination.

(3) If the alien is determined to be an alien described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(iii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) prior to any further review of the asylum officer's negative fear determination.

(e) *Timing.* The immigration judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the supervisory asylum officer has approved the asylum officer's negative credible fear determination issued on the Record of Negative Credible Fear Finding and Request for Review.

(f) *Decision.* (1) The decision of the immigration judge shall be rendered in accordance with the provisions of 8 CFR 1208.30(g)(2). In reviewing the negative fear determination by DHS, the immigration judge shall apply relevant precedent issued by the Board of Immigration Appeals, the Attorney General, the federal circuit court of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court.

(2) No appeal shall lie from a review of a negative fear determination made by an Immigration Judge, but the Attorney General, in the Attorney General's sole and unreviewable discretion, may direct that the Immigration Judge refer a case for the Attorney General's review following the Immigration Judge's review of a negative fear determination.

(3) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in § 1003.1(f). Such decision by the Attorney General may be designated as precedent as provided in § 1003.1(g).

(g) *Custody.* An immigration judge shall have no authority to review an alien's custody status in the course of a review of a negative fear determination made by DHS.

(h) * * *

(1) *Arriving alien.* An immigration judge has no jurisdiction to review a determination by an asylum officer that an arriving alien is not eligible to apply for asylum pursuant to the 2002 U.S.-Canada Agreement formed under section 208(a)(2)(A) of the Act and should be returned to Canada to pursue his or her claims for asylum or other protection under the laws of Canada. *See* 8 CFR 208.30(e)(6). However, in any case where an asylum officer has found that an arriving alien qualifies for an exception to that Agreement, an immigration judge does have jurisdiction to review a negative fear finding made thereafter by the asylum officer as provided in this section.

* * * * *

(3) * * * However, if the asylum officer has determined that the alien may not or should not be removed to a third country under section 208(a)(2)(A) of the Act and subsequently makes a negative fear determination, an immigration judge has jurisdiction to review the negative fear finding as provided in this section.

* * * * *

(i) The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

* * * * *

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 21. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229.

■ 22. Amend § 1208.1 by adding paragraphs (c), (d), (e), and (f) to read as follows:

§ 1208.1 General.

* * * * *

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harm and must also have existed independently of the alleged persecutory acts or harm that forms the basis of the claim. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or, status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of government laws or policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus*—(1) *General.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, the Attorney General, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

(i) Interpersonal animus or retribution;

(ii) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(iii) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;

(iv) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(v) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(vi) Criminal activity;

(vii) Perceived, past or present, gang affiliation; or,

(viii) Gender.

(2) [Reserved]

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender, and offered to support the basis of an

alleged fear of harm from the individual or country shall not be admissible in adjudicating that application.

■ 23. Amend § 1208.2 by adding paragraph (c)(1)(ix) to read as follows:

§ 1208.2 Jurisdiction.

* * * * *

(c) * * *

(1) * * *

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with § 208.30 of this title, § 1003.42 of this chapter or § 1208.30.

* * * * *

■ 24. Amend § 1208.5 by revising the first sentence of paragraph (a) to read as follows:

§ 1208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31, and except in the case of an alien who is in custody pending a credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31. * * *

* * * * *

■ 25. Amend § 1208.6 by revising paragraph (b) and adding paragraphs (d) and (e) to read as follows:

§ 1208.6 Disclosure to third parties.

* * * * *

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

* * * * *

(d)(1) Any information contained in an application for asylum, withholding of removal under section 241(b)(3) the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws,

(ii) As part of any state or federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any state or federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

(v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and

(vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status, including petitions for review filed in accordance with 8 U.S.C. 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the Department of Labor, or a U.S. national security agency having a need to examine the information for an official purpose; or

(2) Where a United States government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

■ 26. Section 1208.13 is amended by:

■ a. Revising paragraph (b)(3) introductory text;

■ b. Revising paragraph (b)(3)(ii);

■ c. Adding paragraphs (b)(3)(iii) and (b)(3)(iv); and

■ d. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i), (ii), and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department of Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) *Significant adverse discretionary factors.* The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an

alien merits a grant of asylum in the exercise of discretion:

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(C) Such country or countries were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Attorney General, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) Such country was, at the time of the transit, not a party to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) All such countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(C) Would otherwise be subject to paragraph (c) of this section but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States prior to filing an application for asylum;

(E) At the time the asylum application is filed with the immigration court or is referred from DHS has:

(*1*) Failed to timely file (or timely file a request for an extension of time to file) any required federal, state, or local income tax returns;

(*2*) Failed to satisfy any outstanding federal, state, or local tax obligations; or

(*3*) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his or her asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(*1*) Exceptional circumstances prevented the alien from attending the interview; or

(*2*) The interview notice was not mailed to the last address provided by the alien or the alien's representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of the changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Attorney General, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i) of this section. Depending on the gravity of the circumstances underlying the application of paragraph (d)(2)(i) of this section, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

(e) *Prima facie eligibility.* (1) Notwithstanding any other provision of this part, upon oral or written motion by the Department of Homeland Security, an immigration judge shall, if warranted by the record, pretermit and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law. An immigration judge need not conduct a hearing prior to pretermitting and denying an application under this paragraph (e)(1) but must consider any response to the motion before making a decision.

(2) Notwithstanding any other provision of this part, upon his or her own authority, an immigration judge shall, if warranted by the record, pretermit and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law, provided that the immigration judge shall give the parties at least 10 days' notice prior to entering such an order. An immigration judge need not conduct a hearing prior to pretermitting and denying an application under this paragraph (e)(2) but must consider any filings by the parties within the 10-day period before making a decision.

■ 27. Amend § 1208.14 by

■ a. In paragraphs (c)(4)(ii) introductory text and (c)(4)(ii)(A), removing the words ''§ 1235.3(b) of this chapter'' and adding, in their place, the words ''§ 235.3(b) of this title''; and

■ b. In paragraph (c)(4)(ii)(A), removing the citations ''§ 1208.30'' and

''§ 1208.30(b)'' and adding, in their place, the words ''§ 208.30 of this title''.

■ 28. Section 1208.15 is revised to read as follows:

§ 1208.15 Definition of "firm resettlement."

(a) An alien is considered to be firmly resettled if:

(1) The alien either resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States; or

(ii) The alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either the Department of Homeland Security or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless he or she could not have derived any permanent legal immigration status or any non-permanent legal immigration status potentially indefinitely renewable (including asylee, refugee, or similar status but excluding status such as of a tourist) from the alien's parent.

■ 29. Amend § 1208.16 by;

■ a. Revising paragraph (b)(3) introductory text;

■ b. Revising paragraph (b)(3)(ii); and

■ c. Adding paragraphs (b)(3)(iii) and (b)(3)(iv).

The revisions and addition read as follows:

§ 1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (b)(3)(iii) of this section, persecutors who are private actors, including persecutors who are gang members, officials acting outside their official capacity, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

■ 30. Amend § 1208.18 by revising paragraphs (a)(1) and (7) to read as follows:

§ 1208.18 Implementation of the Convention Against Torture.

(a) * * *

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law (''rogue official'') shall not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the rogue official.

* * * * *

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

* * * * *

■ 31. Revise § 1208.20 to read as follows:

§ 1208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, an applicant is subject to

the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An alien knowingly files a frivolous asylum application if:

(1) The application is described in paragraph (b) of this section; and

(2) The alien filed the application with either actual knowledge, or willful blindness, of the fact that the application was described in paragraph (b).

(b) For applications filed on or after [INSERT EFFECTIVE DATE OF FINAL RULE], an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. Such finding will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For applications referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph (a) of this section.

(c) For purposes of this section, beginning on [INSERT EFFECTIVE DATE OF FINAL RULE], an asylum application is frivolous if it:

(1) Contains a fabricated essential element;

(2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

(3) Is filed without regard to the merits of the claim; or

(4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolous finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may be found frivolous unless:

(1) The alien wholly disclaims the application and withdraws it with prejudice;

(2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien filed a knowingly frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

■ 32. Add § 1208.25 to read as follows:

§ 1208.25 Severability.

The provisions of part 1208 are separate and severable from one another. In the event that any provision in part 1208 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

■ 33. Amend § 1208.30 by:

■ a. Revising the section heading; and

■ b. Revising paragraphs (a), (b) introductory text, (b)(2), (e), and (g).

The revisions read as follows:

§ 1208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) and 8 CFR 208.30, DHS has exclusive jurisdiction to make fear determinations, and the immigration judges have exclusive jurisdiction to review such determinations. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section and 8 CFR 208.30 are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act and 8 CFR 208.30. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

* * * * *

(2) *Desires to be included in the principal alien's determination.* However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

* * * * *

(e) *Determination.* For the standards and procedures for asylum officers in conducting credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture interviews and in making positive and negative fear determinations, see 8 CFR 208.30. The immigration judges will review such determinations as provided in paragraph (g) of this section and 8 CFR 1003.42.

* * * * *

(g) *Procedures for negative fear determinations*—(1) *Review by immigration judge of a mandatory bar finding.* (i) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or § 1208.13(c)(3) and is determined to lack a credible fear of persecution or a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or § 1208.13(c)(3). If the immigration judge finds that the alien is not described in 8 CFR 208.13(c)(3) or § 1208.13(c)(3), then the immigration judge shall vacate the order of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under § 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described in 8 CFR 208.13(c)(3) or § 1208.13(c)(3), the immigration judge will then review the asylum officer's negative determinations regarding credible fear and regarding reasonable possibility made under 8 CFR 208.30(e)(5)(iv) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution findings under the reasonable possibility standard

instead of the credible fear standard described in paragraph (g)(2) of this section.

(ii) If the alien is determined to be an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or § 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(v), the immigration judge shall first review de novo the determination that the alien is described as ineligible for asylum in 8 CFR 208.13(c)(4) or § 1208.13(c)(4). If the immigration judge finds that the alien is not described as ineligible for asylum in 8 CFR 208.13(c)(4) or § 1208.13(c)(4), then the immigration judge shall vacate the order of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under § 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or § 1208.13(c)(4), the immigration judge will then review the asylum officer's negative decision regarding reasonable possibility made under 8 CFR 208.30(e)(5)(v) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g)(2) of this section.

(2) *Review by immigration judge of a negative fear finding.* (i) The asylum officer's negative decision regarding a credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture shall be subject to review by an immigration judge upon the applicant's request, in accordance with section 235(b)(1)(B)(iii)(III) of the Act. If the alien refuses to make an indication, DHS will consider such a response as a decision to decline review.

(ii) The record of the negative fear determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative fear determination.

(iii) A fear hearing will be closed to the public unless the alien states for the record or submits a written statement that the alien is waiving that requirement; in that event the hearing shall be open to the public, subject to the immigration judge's discretion as provided in 8 CFR 1003.27.

(iv) Upon review of the asylum officer's negative fear determinations:

(A) If the immigration judge concurs with the determination of the asylum officer that the alien has not established a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the case shall be returned to DHS for removal of the alien. The immigration judge's decision is final and may not be appealed.

(B) If the immigration judge finds that the alien, other than an alien stowaway, establishes a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the immigration judge shall vacate the Notice and Order of Expedited Removal, and DHS may commence asylum-and-withholding-only proceedings under § 1208.2(c)(1), during which time the alien may file an application for asylum and withholding of removal in accordance with § 1208.4(b)(3)(i). Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(C) If the immigration judge finds that an alien stowaway establishes a credible fear of persecution, reasonable possibility of torture, or reasonable possibility of torture, the alien shall be allowed to file an application for asylum and for withholding of removal before the immigration judge in accordance with § 1208.4(b)(3)(iii). The immigration judge shall decide the application as provided in that section. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph. Such decision on that application may be appealed by either the stowaway or DHS to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, and deferral of removal has not otherwise been granted pursuant to § 1208.17(a), the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum, withholding of removal, or, as pertinent, deferral of removal becomes final, DHS shall terminate removal proceedings under section 235(a)(2) of the Act.

■ 34. Amend § 1208.31 by revising paragraph (f), (g) introductory text, (g)(1) and (2) to read as follows:

§ 1208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by Immigration Judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to the Immigration Judge. The record of determination, including copies of the Notice of Referral to the Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to the Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and Withholding of Removal. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(i) The immigration judge shall consider only the alien's application for withholding of removal under § 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's

decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under § 1208.16.

PART 1212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 35. The authority citation for part 1212 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458); Title VII of Public Law 110–229.

■ 36. Add § 1212.13 to read as follows:

§ 1212.13 Severability.

The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

■ 37. Amend § 1212.14(a)(1)(vii), by removing the words ''§ 1235.3 of this chapter'' and adding, in their place, the words ''§ 235.3 of this title''.

PART 1235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 38. The authority citation for part 1235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32; Title VII of Public Law 110–229; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458).

§§ 1235.1, 1235.2, 1235.3 and 1235.5 [Removed]

■ 39. Remove and reserve §§ 1235.1, 1235.2, 1235.3, and 1235.5.

■ 40. Amend § 1235.6 by:

■ a. Removing paragraphs (a)(1)(ii) and (iii);

■ b. Redesignating paragraph (a)(1)(iv) as paragraph (a)(1)(ii);

■ c. Revising newly redesignated paragraph (a)(1)(ii), and paragraphs (a)(2)(i), and (iii); and

■ d. Adding paragraph (c).

The revisions and addition read as follows:

§ 1235.6 Referral to immigration judge.

(a) * * *

(1) * * *

(ii) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident or refugee, or granted asylum, or, upon review pursuant to § 235.3(b)(5)(iv) of this title, an immigration judge determines that the alien was once so admitted or granted asylum, provided that such status has not been terminated by final administrative action, and the Service initiates removal proceedings against the alien under section 240 of the Act.

* * * * *

(2) * * *

(i) If an asylum officer determines that an alien does not have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, and the alien requests a review of that determination by an immigration judge; or

* * * * *

(iii) If an immigration officer refers an applicant in accordance with the provisions of § 208.30 or § 208.31.

* * * * *

(c) The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

* * * * *

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

Dated: June 4, 2020.

William P. Barr,

Attorney General.

[FR Doc. 2020–12575 Filed 6–10–20; 4:15 pm]

BILLING CODE 4410–30–P; 9111–97–P

EXHIBIT 3

DECLARATION OF NAOMI A. IGRA

OOD
PM 21-09

Effective: January 11, 2021

To: All of EOIR
From: James R. McHenry III, Director
Date: December 11, 2020

JAMES MCHENRY
Digitally signed by JAMES MCHENRY
Date: 2020.12.11 12:57:23 -05'00'

GUIDANCE REGARDING NEW REGULATIONS GOVERNING PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL AND CREDIBLE FEAR AND REASONABLE FEAR REVIEWS

PURPOSE:	Establishes EOIR policy and procedures regarding new regulations about credible fear and reasonable fear review screenings and the adjudication of asylum, statutory withholding of removal, and protection under the Convention Against Torture claims.
OWNER:	Office of the Director
AUTHORITY:	8 U.S.C. §§ 1225, 1158; 8 CFR §§ 1003.0(b), 1003.1, 1003.42; 1208.1, 1208.2, 1208.5, 1208.6, 1208.13, 1208.15, 1208.16, 1208.18, 1208.20, 1208.25, 1208.30, 1208.31; 1212.13; 1235.6; and 1244.4.
CANCELLATION:	None

On December 11, 2020, the Department of Justice and Department of Homeland Security (DHS) published a joint final rule, 85 FR 80274, amending the standards and procedures for credible fear and reasonable fear review screenings and for adjudicating applications for asylum, statutory withholding of removal, and protection under the Convention Against Torture (CAT). Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020). The final rule amends 8 CFR Parts 208, 235, 1003, 1208, and 1235, as discussed below. Although this Policy Memorandum (PM) provides an overview and summary of that rulemaking, all Immigration Judges and Appellate Immigration Judges are strongly encouraged to review both the complete final rulemaking and the Notice of Proposed Rulemaking (NPRM), *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (Jun. 15, 2020), each of which extensively details the applicable law upon which the rule is based.

The rule is effective on January 11, 2021. The changes to the credible fear review procedures and reasonable fear review procedures apply to all aliens apprehended or otherwise encountered by DHS on or after that effective date. The remaining provisions of the rule apply only to asylum, statutory withholding of removal, and protection under CAT applications filed on or after the effective date. As detailed in the NPRM and the final rule, many parts of the rule merely incorporate established principles of existing statutory or case law into the regulations applicable

to EOIR. Accordingly, nothing in the rule precludes the appropriate application of existing law—independently of the rule—to cases with pending asylum applications. *See also* Section X, *infra* (discussing the difference between the prospective application of the rule itself and the application of existing law which is incorporated into the regulations by the rule).

I. Standard of Proof for Withholding of Removal and Torture-Related Fear Determinations in Expedited Removal Proceedings and Stowaways

The rule amends 8 CFR §§ 208.30, 1003.42, and 1208.30 to raise the standards of proof in statutory withholding of removal and torture-related screenings for stowaways or aliens in expedited removal proceedings from a "significant possibility" to a "reasonable possibility" that the alien would be persecuted on account of a protected ground, or tortured. Immigration Judges will apply the "reasonable possibility" standard when reviewing negative fear determinations related to potential eligibility for statutory withholding of removal and protection under CAT. The "significant possibility" standard for potential asylum eligibility in credible fear proceedings continues to apply.

II. Consideration of Internal Relocation and Mandatory Eligibility Bars in the Credible Fear Screening Process

The rule amends 8 CFR §§ 208.30, 1003.42, and 1208.30 relating to the consideration of internal relocation and mandatory eligibility bars during the credible fear screening process and subsequent Immigration Judge review. The rule requires asylum officers to consider internal relocation and mandatory asylum and statutory withholding of removal eligibility bars when making fear determinations during the credible fear screening process.

During the credible fear screening process, when determining whether the alien has established a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture, asylum officers will be required to consider whether the alien could avoid future harm by internally relocating within his or her country. If the asylum officer determines that the alien could reasonably relocate, then the officer will issue a negative fear determination.

Similarly, during the credible fear screening process, asylum officers will determine whether a mandatory asylum or statutory withholding of removal eligibility bar applies pursuant to INA § 208(a)(2)(B)–(D), INA § 208(b)(2), or established by regulation under section 208(b)(2)(C). Previously, an alien who received a positive fear determination but appeared subject to a mandatory eligibility bar would be placed in full INA § 240 removal proceedings. Under this rule, if a mandatory eligibility bar applies, the officer will enter a negative credible fear of persecution determination or a negative reasonable possibility of persecution determination, as applicable. However, if a mandatory eligibility bar applies to one form of relief, it does not preclude the asylum officer from making a positive determination regarding another form of relief.

If an asylum officer enters a negative fear finding and the alien requests Immigration Judge review, any determinations made by an asylum officer relating to internal relocation or mandatory eligibility bars are subject to review by the Immigration Judge as part of a *de novo* review. If an asylum officer enters a negative fear determination based on a mandatory eligibility bar, the

Immigration Judge should first review the applicability of the bar. If the Immigration Judge finds that the bar does not apply, the Immigration Judge should vacate the asylum officer's determination, and DHS may commence asylum-and-withholding-only proceedings. If the Immigration Judge finds that the bar does apply, the Immigration Judge should then review the asylum officer's negative fear determination.

Lastly, if an asylum officer issues a negative fear determination, the asylum officer currently inquires as to whether the alien wishes to have an Immigration Judge review the determination. This rule will now treat an alien's refusal to indicate whether he or she desires such review as declining to request such review.

III. Consideration of Precedent When Reviewing Credible Fear Determinations

The rule amends 8 CFR § 1003.42(f) to specify that an Immigration Judge is required to consider all applicable legal precedent when reviewing an asylum officer's negative fear determination. In particular, the rule codifies a "law of the circuit" standard, only requiring Immigration Judges to consider precedential decisions of the Federal circuit court in the jurisdiction where the Request for Review is filed, rather than precedent from all Federal circuits. The rule also codifies existing standards requiring Immigration Judges to consider precedential decisions of the Board of Immigration Appeals ("BIA"), Attorney General, and the Supreme Court.

IV. Asylum-and-Withholding-Only Proceedings

The rule amends 8 CFR §§ 208.2, 208.30, 235.6, 1003.1, 1003.42, 1208.2, 1208.30, and 1235.6 to modify existing procedures so that aliens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture—either in front of an asylum officer or on review by an Immigration Judge—will be placed into asylum-and-withholding-only-proceedings before an Immigration Judge, similar to proceedings applicable to other categories of asylum applicants such as aliens utilizing the Visa Waiver Program. Aliens maintain appeal rights to the Board of Immigration Appeals in asylum-and-withholding-only proceedings. In addition, when the alien first expresses a fear of persecution or harm, DHS will be required to provide the alien with the necessary application forms and notice regarding the right to counsel at no expense to the Government and the consequences of knowingly filing a frivolous asylum application.

V. Frivolous Asylum Applications

An asylum applicant is subject to the penalty provisions of INA § 208(d)(6) only if the alien received the notice required by INA § 208(d)(4)(A) and a final order by an Immigration Judge or the Board specifically finds that the alien knowingly filed a frivolous asylum application. The rule revises the definition of a "frivolous" asylum application. An asylum application is frivolous if it: (1) contains a fabricated material element; (2) is premised on false or fabricated evidence unless the application would have been granted without such evidence; (3) is filed without regard to the merits of the claim; or, (4) is clearly foreclosed by applicable law.

The rule also allows asylum officers adjudicating affirmative asylum applications to make frivolous findings and to refer cases on that basis to Immigration Judges (for aliens not in lawful

status) or to deny the applications (for aliens in lawful status). However, a finding by an asylum officer that an asylum application is frivolous is not binding on the Immigration Judge or the Board. Rather, the Immigration Judge or Board must make a separate finding on the issue of frivolousness upon *de novo* review of the application.

The rule codifies the principle, consistent with Federal case law, that once an alien has been provided a warning of the consequences of knowingly filing a frivolous application, as required by INA § 208(d)(4)(A), no further warning is necessary; thus, an Immigration Judge or the Board is not required to give the alien additional opportunities to account for any frivolousness issues prior to the entry of a frivolous finding. *See, e.g.*, *Niang v.Holder*, 762 F.3d 251, 254–55 (2d Cir. 2014)

Finally, the rule, consistent with case law, codifies the principle that an application may be found frivolous even if the application is untimely or withdrawn. However, the alien can avoid a frivolousness finding and the associated penalties on a withdrawn application if the alien (1) withdraws the application with prejudice; (2) accepts an order of voluntary departure for a period of no more than 30 days; (3) withdraws all other applications for relief or protection with prejudice; and (4) waives any rights to file an appeal, motion to reopen, and motion to reconsider.

VI. Pretermission of Applications for Asylum, Withholding of Removal, or Protection Under the Convention Against Torture

The rule amends 8 CFR § 1208.13 to specify procedures for an Immigration Judge to follow if an application for asylum, statutory withholding of removal, or protection under CAT warrants pretermission due to the failure to establish a *prima facie* claim. Immigration Judges may pretermit an asylum application following an oral or written motion by DHS or on the Immigration Judge's own authority. Before the Immigration Judge pretermits an application based on a DHS motion, the alien must have an opportunity to respond. If the Immigration Judge intends to pretermit the application on his or her own authority, the parties must be given notice and at least ten days to respond.

VII. Standards for Adjudicating Applications for Asylum, Statutory Withholding of Removal, and Protection Under the Convention Against Torture

As discussed below, for purposes of asylum, statutory withholding of removal, or protection under CAT, the rule clarifies and codifies adjudicatory definitions and standards regarding the following: membership in a particular social group, political opinion, persecution, nexus, internal relocation, firm resettlement, public officials acting under color of law, evidence based on stereotypes, and the exercise of discretion.

A. Membership in a Particular Social Group

The rule amends 8 CFR §§ 208.1 and 1208.1 to codify the requirements, consistent with case law, that a particular social group must be (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct in the society in question. In addition, the rule reiterates the longstanding principle that a particular social group cannot be

defined exclusively by the alleged persecutory acts or harm and clarifies that the group must also have existed independently of the alleged persecutory acts or harm that form the basis of the claim.

Additionally, regarding the composition of particular social groups, the rule articulates nine specific but non-exhaustive bases that would not, in general, result in a favorable adjudication:[1]

(1) Past or present criminal activity or association (including gang membership);

(2) Presence in a country with generalized violence or a high crime rate;

(3) Being the subject of a recruitment effort by criminal, terrorist, or persecutory groups;

(4) The targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence;

(5) Interpersonal disputes of which governmental authorities were unaware or uninvolved;

(6) Private criminal acts of which governmental authorities were unaware or uninvolved;

(7) Past or present terrorist activity or association;

(8) Past or present persecutory activity or association; or

(9) Status as an alien returning from the United States.

The rule also requires the alien to articulate on the record, or provide a basis on the record for determining, the definition and boundaries of any proposed particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an Immigration Judge waives any claim based on that particular social group for all purposes under the INA, including on appeal. Any waived claim on this basis cannot serve as the basis for that alien's motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel, unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group both constituted egregious conduct and was not a strategic choice.

B. Political Opinion

[1] The rule notes types of claims premised on membership in a particular social group that "in general" do not warrant favorable adjudication, but nothing in the rule should be construed as categorically barring claims in every case. Whether a proposed group has—*see, e.g.*, *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (designated as precedent by Attorney General Order No. 1895-94 (June 12, 1994)) (homosexuals in Cuba may be a particular social group)—or has not—*see, e.g.*, *Matter of Vigil*, 19 I&N Dec. 572, 575 (BIA 1988) (young, male, urban, unenlisted Salvadorans do not constitute a particular social group)—been recognized in other cases is not dispositive of whether the proposed particular social group in an individual case is cognizable. Recognition in one case does not mean recognition in all cases. *See S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 556 (3d Cir. 2018) ("Consequently, it does not follow that because the BIA has accepted that one society recognizes a particular group as distinct that all societies must be seen as recognizing such a group."). Other sections of the rule referring to concepts "in general" should similarly not be construed as categorical determinations.

The rule amends 8 CFR §§ 208.1 and 1208.1 to define "political opinion" as an opinion expressed by, or imputed to, an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof.

In addition, the rule also states that, in general, adjudicators will not favorably adjudicate political opinion claims defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.

The rule also expressly incorporates a statutory expansion of the definition of political opinion into the regulations by stating that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

C. Persecution

Consistent with case law, the rule amends 8 CFR §§ 208.1 and 1208.1 to define "persecution" as requiring an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. The rule reiterates that, for purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat.

In addition, based on case law, the rule provides a list of non-exhaustive circumstances that do not constitute persecution, including (1) generalized harm that arises out of civil, criminal, or military strife in a country; (2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional; (3) intermittent harassment, including brief detentions; (4) threats with no actual effort to carry out the threats, except that particularized threats of a severe harm of an immediate and menacing nature made by an identified entity may constitute persecution; and (5) non-severe economic harm or property damage. The rule provides that the existence of government laws or policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

D. Nexus

The rule amends 8 CFR §§ 208.1 and 1208.1 to provide a non-exhaustive list of circumstances that will, in general, not be sufficient to establish nexus for purposes of asylum or statutory withholding of removal. The list includes:

(1) Interpersonal animus or retribution;

(2) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;

(4) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(5) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(6) Criminal activity;

(7) Perceived, past or present, gang affiliation; or

(8) Gender.[2]

E. Evidence Based on Stereotypes

The rule amends 8 CFR §§ 208.1 and 1208.1 to make clear that, for purposes of adjudicating applications for asylum or statutory withholding of removal, evidence offered in support of such applications which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, is not admissible. However, the rule does not prohibit the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

F. Internal Relocation

The rule amends 8 CFR §§ 208.13, 208.16, 1208.13, and 1208.16 to revise the standards governing internal relocation determinations. The rule adopts a "totality of the circumstances" test for determining the reasonableness of internal relocation and provides a non-exhaustive list of

[2] Although the rule lists "gender" as an example under the groupings regarding nexus, it may also be appropriately considered under the definition of "particular social group" as many courts have done. *See, e.g., Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("Like the traits which distinguish the other four enumerated categories-race, religion, nationality and political opinion-the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."); *Da Silva v. U.S. Att'y Gen.*, 459 F. App'x 838, 841 (11th Cir. 2012) ("The BIA determined that 'women' was too broad to constitute a particular social group. We agree that such a group is too numerous and broadly defined to be considered a 'social group' under the INA."). The lists in the rule under each definition are non-exhaustive.

considerations in making this determination, including (1) the size of the country of nationality or last habitual residence; (2) the geographic locus of the alleged persecution; (3) the size, reach, or numerosity of the alleged persecutor; and (4) the applicant's demonstrated ability to relocate to the United States in order to apply for asylum or statutory withholding of removal.

The rule also revises the presumptions applicable in assessing the reasonableness of internal relocation. In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under the totality of the circumstances, it would be reasonable for the applicant to relocate. In cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, regardless of whether an applicant established past persecution, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

G. Firm Resettlement

The rule amends 8 CFR §§ 208.15 and 1208.15 to revise the definition of "firm resettlement." Under the new definition, an alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim, at least one of three circumstances applies.

First, the alien will be considered to be firmly resettled if the alien resided in a country through which the alien transited prior to arriving in or entering the United States and (1) received or was eligible for any permanent legal immigration status in that country; (2) resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or (3) resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country.

Second, the alien will be considered to be firmly resettled if the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States. However, time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to INA § 235(b)(2)(C) or after being subject to metering is not counted for purposes of this ground.

Third, the alien will be considered to be firmly resettled if (1) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, or (2) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

The rule also clarifies that, consistent with 8 CFR § 1240.8(d), the Immigration Judge must consider the firm resettlement bar when the evidence of record indicates that the alien may have

been firmly resettled. Either DHS or the Immigration Judge may raise the issue of whether the firm resettlement bar applies based on the evidence of record and regardless of which party introduced the evidence into the record. If the evidence of record indicates that the bar may apply, the alien bears the burden of proving the bar does not apply.

Finally, the rule imputes the firm resettlement of an alien's parent(s) to the alien if the resettlement occurred before the alien turned 18 and the alien resided with his or her parent(s) at the time of the firm resettlement unless he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) from his or her parent(s).

H. Public Officials Acting Under Color of Law

The rule amends 8 CFR §§ 208.18 and 1208.18 to provide guidance regarding "public officials" for purposes of applications for protection under CAT. The rule clarifies that, for purposes of defining "torture" under CAT, pain or suffering inflicted by a public official who is not acting under color of law does not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity. The rule further states that a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

The rule further clarifies that demonstrating a public official's awareness of the underlying activity constituting torture requires a finding of actual knowledge of, or willful blindness to, the activity. The rule further defines "willful blindness" as an awareness of a high probability of activity constituting torture and deliberately avoiding learning the truth—the definition does not include negligently failing to inquire, being mistaken, or having reckless disregard for the truth.

Regarding "acquiescence," the rule also clarifies that, in order for a public official to breach his or her legal responsibility to intervene to prevent an activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. Under the rule, no person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

The rule also removes all references to the term "rogue official" in 8 CFR §§ 208.16, 208.18, and 1208.18, and replaces it with references to a "public official who is not acting under color of law."

I. Discretionary Factors in Asylum Determinations

The rule amends 8 CFR §§ 208.13 and 1208.13 to provide adjudicators with factors to consider when determining whether an alien merits asylum relief as a matter of discretion. The rule includes three significant adverse discretionary factors that adjudicators must consider in all asylum cases:

(1) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a

contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

(2) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR § 214.11; or

(C) Such country or countries were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or CAT; and

(3) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

An Immigration Judge must address these factors, if applicable, in each asylum case, but these factors do not constitute categorical bars to the granting of an asylum application.

The rule also includes nine additional adverse discretionary factors for adjudicators to apply, as applicable, when the alien:

(1) Immediately prior to his or her arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(A) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR § 214.11; or

(C) Such country was, at the time of the alien's transit, not a party to the 1951 United Nations Convention relating to the Status of Refugees the 1967 Protocol, or CAT;

(2) Transits through more than one country between his or her country of citizenship, nationality, or last habitual residence and the United States unless:

(A) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and the alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR § 214.11; or

(C) All such countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or CAT;

(3) Would otherwise be subject to § 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(4) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;

(5) At the time the asylum application is filed with the immigration court or is referred from DHS has:

(A) Failed to timely file (or timely file a request for an extension of time to file) any required Federal, State, or local income tax returns;

(B) Failed to satisfy any outstanding Federal, State, or local tax obligations; or

(C) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(6) Has had two or more prior asylum applications denied for any reason;

(7) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(8) Failed to attend an interview regarding his or her asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(A) Exceptional circumstances prevented the alien from attending the interview; or

(B) The interview notice was not mailed to the last address provided by the alien or the alien's representative and neither the alien nor the alien's representative received notice of the interview; or

(9) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of the changes in country conditions.

If any of the nine adverse discretionary factors apply, the adjudicator may favorably exercise discretion only in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the asylum application would result in exceptional and extremely unusual hardship to the alien. However, depending on the gravity of the circumstances underlying the adverse discretionary factor, a showing of extraordinary circumstances may still be insufficient to warrant a favorable exercise of discretion.

VIII. Information Disclosure

The rule amends 8 CFR §§ 208.6 and 1208.6 to specify the grounds upon which information contained in an application for asylum, statutory withholding of removal, or protection under CAT, as well as any relevant and applicable information supporting such applications, any information regarding the applicant, or any relevant and applicable information regarding an alien subject to a credible fear or reasonable fear determination, may be disclosed. Specifically, such information may be disclosed:

(1) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws;

(2) As part of a State or Federal criminal investigation, proceeding, or prosecution;

(3) Pursuant to any State or Federal mandatory reporting requirement;

(4) To deter, prevent, or ameliorate the effects of child abuse;

(5) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; or

(6) As part of the Government's defense of any legal action relating to the alien's immigration or custody status, including petitions for review filed in accordance with INA § 242.

In addition, the rule clarifies that nothing in 8 CFR §§ 208.6 or 1208.6 prohibits the disclosure of such information among specified government employees with a need to examine such information for official purposes, or where a government employee or contractor has a good faith and reasonable belief that the disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

IX. Removing and Reserving DHS-Specific Procedures From EOIR Regulations

The rule removes and reserves DHS-specific procedures regarding examinations at ports of entry, parole for deferred inspection, expedited removal procedures, and preinspection of passengers and crew from EOIR's regulations at 8 CFR §§ 1235.1, 1235.2, 1235.3, and 1235.5. The regulations

regarding withdrawals of applications for admission at 8 CFR § 1235.4 and the referral of cases to Immigration Judges at 8 CFR § 1235.6 remain unchanged.

X. Application of the New Regulations

As discussed, *supra*, the rulemaking itself is not retroactive. The regulatory changes apply only prospectively—*i.e.*, to all asylum applications (including applications for statutory withholding of removal and protection under the CAT regulations) filed on or after its effective date[3] and, for purposes of the changes to the credible fear and related screening procedures and reasonable fear review procedures, to all aliens apprehended or otherwise encountered by DHS on or after the effective date. Nevertheless, although the rulemaking itself is not retroactive, nothing in the rule precludes adjudicators from applying existing authority codified by the rule to pending cases, independent of the prospective application of the rule.[4] Accordingly, the statutory authority and case law incorporated into the rule, as reflected in both the NPRM and the final rule, would continue to apply if the rule itself does not go into effect as scheduled.[5]

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing herein should be construed as mandating a particular outcome in any specific case. Nothing in this PM limits an Immigration Judge's or Appellate Immigration Judge's independent judgment and discretion in adjudicating cases or an Immigration Judge's or Appellate Immigration Judge's authority under applicable law.

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[3] The concept of firm resettlement also operates as a bar to the adjustment of status of an asylee. INA § 209(b)(4); 8 C.F.R. § 1209.2(a)(1)(iv). Consistent with the prospective nature of the rule, EOIR will apply the revised regulatory definition of "firm resettlement" in 8 C.F.R. § 1208.15 for purposes of INA § 209(b)(4), only to aliens who apply for asylum, are granted asylum, and then subsequently apply for adjustment of status, where all of these events occur on or after the effective date of this rule.

[4] For example, the rule states that the Secretary or Attorney General, subject to an exception, will not favorably exercise discretion in adjudicating an asylum application for an alien who has failed to satisfy certain tax obligations. 8 C.F.R. § 1208.13(d)(2)(i)(E). That provision applies only to asylum applications filed on or after the effective date of the rule. However, the rule does not preclude the consideration of unfulfilled tax obligations as a discretionary factor in adjudicating a pending asylum application based on established case law that may be applied to pending applications. *See, e.g.*, *Matter of A-H-*, 23 I&N Dec. at 782–83 ("Moreover, certain additional factors weigh against asylum for respondent: Specifically, respondent testified that he received money from overseas for his political work, yet he never filed income tax returns in the United States and his children nevertheless received financial assistance from the Commonwealth of Virginia. Respondent's apparent tax violations and his abuse of a system designed to provide relief to the needy exhibit both a disrespect for the rule of law and a willingness to gain advantage at the expense of those who are more deserving." (footnote omitted)).

[5] The rule is scheduled to take effect on January 11, 2021. Most recent immigration-related rulemakings have been challenged in litigation. *See, e.g.*, *Pangea Legal Services v. U.S. DHS*, 2020 WL 6802474 (N.D. Cal. 2020); *City and County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019); *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019); *East Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018), Many of these rulemakings have been restrained or enjoined initially, *see id.*, though the scope of the injunctions—nationwide or more limited—has varied, and some of the injunctions have later been stayed by higher courts. The rule discussed in this PM will likely be challenged through litigation as well. If litigation alters the effective date of the rule in any part, the Office of General Counsel, in consultation with the Office of the Chief Immigration Judge and the Office of the Director, will provide further guidance as appropriate.

Please contact your supervisor if you have any further questions regarding the final rule.

EXHIBIT 4

DECLARATION OF NAOMI A. IGRA

CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

NATIONAL OFFICE
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Submitted via www.regulations.gov

July 15, 2020

Lauren Alder Reid, Assistant Director,
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Office of Information and Regulatory Affairs,
Office of Management and Budget,
725 17th Street NW, Washington, DC 20503;
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum

Table of Contents

I. INTRODUCTION

The Catholic Legal Immigration Network, Inc. (CLINIC)[1] submits these comments in strong opposition to the proposed rules, which would essentially end asylum in the United States. As discussed below, these sweeping rules are largely unlawful and contradict the Immigration and Nationality Act (INA) as well as U.S. obligations under international law. Moreover, the rules are immoral and would slam the door of protection on thousands of vulnerable asylum seekers for no reason other than to score political points and implement an anti-immigrant agenda, which would close the border to asylum seekers who are primarily people of color. The rule would implement a wish list of changes that have been endorsed by anti-immigrant hate groups such as the Center for Immigration Studies.[2]

CLINIC embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with approximately 375 affiliates in 49 states and the District of Columbia. Through its affiliates, CLINIC advocates for the just and humane treatment of asylum seekers through direct representation, pro bono referrals, and engagement with policy makers.

CLINIC submits this comment urging the Department of Justice (DOJ) and Department of Homeland Security (DHS) to withdraw these proposed rules in their entirety. CLINIC believes that U.S. policies on immigration should reflect the country's core moral values and historical practice of welcoming immigrants and refugees fleeing persecution. Immigration policies should ensure justice, offer protection, and treat immigrants humanely. People of faith have consistently stood by the principle that all immigrants, especially the most vulnerable among us, including asylum seekers, deserve an immigration system that is fair and humane.

As Pope Francis has said, "I ask leaders and legislators and the entire international community to confront the reality of those who have been displaced by force, with effective projects and new approaches in order to protect their dignity, to improve the quality of their life and to face the challenges that are emerging from modern forms of persecution, oppression and slavery."[3] CLINIC likewise believes that the most vulnerable among us need greater protections and opportunities, including the ability to work to support themselves and their families. In this vein, CLINIC submits the following comments in opposition to the proposed changes.

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[1] These comments were primarily authored by Victoria Neilson, Managing Attorney of CLINIC's Defending Vulnerable Populations (DVP) Program. Reena Arya, Senior Attorney in CLINIC's Training and Legal support Program, Luis Guerra, Strategic Capacity Officer, Tania Guerrero, *Estamos Unidos* Asylum Project Attorney, Victor Andres Flores, *Estamos Unidos* Asylum Project Volunteer Coordinator, and DVP law student interns Caya Simonsen and Angelicca Telles also wrote or contributed to sections of the comment.

[2] *See* Andrew Arthur, Center for Immigration Studies, *Proposed Rules Would Speed Asylum, Withholding, and CAT Claims Regulation: the slower, more complex alternative to certification* (June 11, 2020), https://cis.org/Arthur/Proposed-Rules-Would-Speed-Asylum-Withholding-and-CAT-Claims. The Southern Poverty Law Center has listed the Center for Immigration Studies (CIS) as a hate group due to its "decades-long history of circulating racist writers, while also associating with white nationalists." https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies.

[3] Pope Francis, *Address to Participants in the Plenary of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People*, (May 24, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/may/documents/papa-francesco_20130524_migranti-itineranti.html.

In addition to the substance of the comments we submit below, we are adamantly opposed to the process of publishing this proposed rule. The Notice of Proposed Rulemaking (NPRM) is over 160 pages long with the proposed rules themselves comprising over 60 pages of text, and the government has given a mere 30 days to comment. It is impossible to adequately discuss every element of asylum law that these regulations seek to rewrite.

Moreover, we are concerned by the immigration prosecutor, DHS, issuing rules jointly with the adjudicator, DOJ. Congress created these two agencies to have very different missions. DHS "has a vital mission: to secure the nation from the many threats we face."[4] Whereas the "primary mission of the Executive Office for Immigration Review (EOIR) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws."[5] The independence of these two distinct agencies is called into question when they issue joint regulations, especially regulations such as these which appear designed to result in denials of applications rather than fair adjudications.

During the 30-day comment period for this proposed rulemaking, DHS and DOJ issued another proposed rule which would also result in the denial in many, if not most, applications for asylum and withholding of removal. This second NPRM, entitled "Security Bars and Processing" would create new security bars for those fleeing persecution based on their potential exposure to communicable diseases.[6] With this second, complex rule being published less than a week before the 30-day comment period ends for the current proposed rule, it is impossible to consider the potential interplay between these two rules. For this reason alone, the current rulemaking should be withdrawn and, at a minimum, reissued with sufficient time to adequately consider the consequences of the two NPRMs if both were to be in effect in the future.

Throughout the NPRM, DHS and DOJ make sweeping statements, often supported by a single federal court of appeals case quoted without context, or given no support at all. Agencies are required to support rulemaking with reasoned analysis and, where applicable, relevant data. This NPRM is almost entirely devoid of relevant and necessary data to explain why these extraordinary changes to accepted law are necessary.[7]

Therefore, we want to be completely clear—the government should withdraw these regulations in their entirety. The fact that there may be issues that our comment does not discuss or only touches upon briefly, is by no means intended to be an endorsement of the proposed change. Moreover, the fact that we are submitting a long comment does not mean that the 30-day comment period was adequate. There are many sections of the proposed rule, which we have necessarily addressed in a cursory manner or not addressed at all. Though we have shifted workloads and devoted substantial staff time to writing this comment, 30 days was not nearly enough time for us to comment fully on the enormous and radical changes proposed in this

[4] Homeland Security, Mission, https://www.dhs.gov/taxonomy/term/2763/all/feed.
[5] Department of Justice, EOIR Mission, https://www.justice.gov/eoir/about-office.
[6] *See* DHS and DOJ, 85 Fed. R. 41201 (Jul. 9, 2020).
[7] *See United States v. Nova Scotia Food Products Corp*, 568 F.2d 240, 251 (2d Cir. 1977) ("'It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that (in) critical degree, is known only to the agency.'")

rulemaking. We are adamantly opposed to these rules, which, if finalized in their current form, would shut out almost all asylum seekers from our protection system.

II. CLINIC STRONGLY OBJECTS TO THE NPRM PROCESS, WHICH ONLY ALOWED 30 DAYS FOR COMMENTS IN THE MIDST OF A PANDEMIC

As discussed below, the proposed regulations would eviscerate asylum protections. These regulatory changes seek to rewrite the laws adopted by Congress and would be the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act, Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). The NPRM is over 160 pages long with more than 60 of those pages being the proposed regulations themselves—including dense, technical language and sweeping new restrictions that have the power to send the most vulnerable back to their countries where they may face persecution, torture, or death. Any one of the sections of these regulations, standing alone, would merit 60 days for the public to fully absorb the magnitude of the proposed changes, perform research on the existing rule and its interpretation, and respond thoughtfully. Instead, the agencies have allowed a mere 30 days to respond to multiple, unrelated changes to the asylum rules, issued in a single, mammoth document.

The Administrative Procedures Act (APA) § 553 requires that the public "interested persons" have "an opportunity to participate in the rule making." In general, the agencies, must afford "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[8] Courts have found that for the agencies to comply with this participation requirement the comment period they give must be "adequate" to provide a "meaningful opportunity."[9] Given the importance of the public's participation in the rule-making process, Executive Order 12866 specifies that "in most cases should include a comment period of not less than 60 days."[10]

While the NPRM acknowledges that the this rule is a significant rule pursuant to Executive Order 12866 and Executive Order 13563,[11] it is completely silent on why it is only offering 30 days to comment rather than the 60 days required by Executive Order. Executive Order 13563 explicitly states, "To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should **generally be at least 60 days."**[12]

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this extensive, but the challenges to timely respond to the NPRM are currently magnified by the ongoing COVID-19 pandemic. Already during the comment

[8] *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).
[9] *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).
[10] *See* Exec. Order No. 12866, § 6(a), 58 Fed. R. 51,735 (October 4, 1993).
[11] 85 Fed. R. 36289 (proposed June 15, 2020).
[12] *See* Executive Order 13563 -- Improving Regulation and Regulatory Review (Jan. 18, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review. [emphasis added].

period, the United States has twice broken its own record for surges in the coronavirus[13] and states that had planned to reopen have had to abruptly halt those plans due to public health concerns.[14]

For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.[15] Moreover, if it wishes to reissue the rules, it should do so in individual sections, not rewriting the asylum rules wholesale through a rulemaking that does not give the public a meaningful opportunity to address each proposed change. Many asylum experts have made the difficult decision to write in depth on a single topic within the 60 pages of proposed regulations within the rules. The purpose of notice and comment is to allow the public a meaningful opportunity to comment. The government should welcome suggestions from experts in the field; instead the length of the proposed rule coupled with the brevity of the comment period has left experts unable to comment on most of the substance of the proposed changes.

III. CLINIC STRONGLY OBJECTS TO THE SUBSTANCE OF THE PROPOSED RULES, WHICH WOULD REWRITE ASYLUM LAW AND RENDER MOST APPLICANTS FOR ASYLUM, WITHHOLDING OF REMOVAL, AND CONVENTION AGAINST TORTURE PROTECTION INELIGIBLE

Although we object to the agencies' unfair 30-day timeframe in which to submit a comment to the proposed rule, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations, which would gut asylum[16] protections. Overall, the proposed rules would result in virtually all asylum applications being denied, by removing due process protections, imposing new bars, heightening legal standards, changing established legal precedent, and creating sweeping categories of near-mandatory discretionary denials. In a best case scenario, the result of these changes would be to leave a higher percentage of those fleeing harm in a permanent state of limbo, if they are able to meet the higher legal standard to qualify for withholding of removal under INA § 241(b)(3). Since those who qualify for withholding of removal have no ability to petition for derivative beneficiaries, these rules would result in permanent family separations.

In the context of the administration's "zero tolerance" family separation policy implemented during the summer of 2018, Bishop Daniel E. Flores of the Diocese of Brownsville, Texas, said "separating immigrant parents and children as a supposed deterrent to immigration is

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[13] *See*, for example, *U.S. Sets Another Single-Day Record for New Coronavirus Cases*, WASHINGTON POST, June 25, 2020, https://www.washingtonpost.com/nation/2020/06/25/coronavirus-live-updates-us/; *Stay Home on July 4, Health Officials Urge, as Caseload Hits Record*, THE NEW YORK TIMES, July 1, 2020, https://www.nytimes.com/2020/07/01/world/coronavirus-live-updates.html?action=click&module=Top%20Stories&pgtype=Homepage.

[14] Nicole Chavez and Madeline Holcombe, *12 States Are Pausing Reopening Over the Surge in US Coronavirus Cases*, June 27, 2020, CNN, https://www.cnn.com/2020/06/27/health/us-coronavirus-saturday/index.html.

[15] In other contexts, the administration has extended existing 60-day regulatory comment periods by an additional 60 day or more citing the coronavirus as the reason for additional time. *See* 85 Fed. R. (May 21, 2020).

[16] Many of the proposed rules would harm those seeking withholding of removal and protection under the Convention Against Torture (CAT) as well. These comments frequently use the term "asylum seeker" but the reader should construe the term to encompass those seeking withholding or CAT protection as well if the rule discussed also affects those forms of protection.

a cruel and reprehensible policy. Children are not instruments of deterrence, they are children. A government that thinks any means is suitable to achieve an end cannot secure justice for anyone."[17] These words ring equally true in the context of these proposed rules where many deserving asylum seekers would be unable to win asylum based on discretionary bars and would therefore be unable to petition for follow to join benefits for their spouse or children.

Furthermore, there are currently over 300,000 asylum cases pending before the asylum offices[18] while there are nearly 1.2 million pending cases in U.S. immigration courts, many of which include asylum applications.[19] Nowhere in the proposed rules or NPRM do the departments clarify whether the proposed rules would apply retroactively to the hundreds of thousands of pending cases filed by asylum seekers who relied on settled law and procedures when they submitted their applications. At a bare minimum, if any of these proposed rules are finalized, the departments must clarify that they will not be applied retroactively.

As noted above, CLINIC will not be able to cover every topic that merits analysis with the depth that it should be given because of the constricted timeframe in which to respond.

A. 8 CFR § 1208.13 (e)—The Proposed Rule Would Deprive Asylum Seekers of Their Day in Court

1. Proposed 8 CFR § 1208.13(e) Violates the Plain Language of the Immigration and Nationality Act, Which Guarantees Asylum Seekers the Right to Present Testimony at a Hearing

The proposed rule would amend 8 CFR § 1208.13 to allow immigration judges to pretermit and deny asylum, withholding of removal, and Convention Against Torture (CAT) applications without a hearing if the applicant "has not established a prima facie claim for relief."[20] Under the proposed rule, an immigration judge may pretermit applications upon a motion by DHS[21] or *sua sponte*.[22] The only procedural protection provided by the rule would be that the immigration (IJ) must consider any filings by the applicant made within ten days of the notification of possible pretermission.[23] The proposed rule would deprive many asylum, withholding, and CAT applicants

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[17] Rhina Guidos, *Catholic Bishops Across U.S. Condemn Separation of Migrant Children*, AMERICA, THE JESUIT REVIEW, June 18, 2018, https://www.americamagazine.org/politics-society/2018/06/18/catholic-bishops-across-us-condemn-separation-migrant-children.

[18] USCIS, *Asylum Office Workload*, (Sep. 2019), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PEDAffirmativeAsylumStatisticsFY2019.pdf. There were 339,836 cases pending in September 2019, the last date for which statistics are publicly available. These numbers have likely grown substantially since the asylum offices have been unable to conduct interviews as a result of COVID-19 closures.

[19] Transactional Records Access Clearinghouse. *Immigration Court Backlog Tool*, (May 2020), https://trac.syr.edu/phptools/immigration/court_backlog/. [hereinafter, "TRAC Immigration Court Backlog Tool."]

[20] Proposed 8 CFR § 1208.13(e).

[21] Proposed 8 CFR § 1208.13(e)(1).

[22] Proposed 8 CFR § 1208.13(e)(2).

[23] Proposed 8 CFR § 1208.13(e)(2), regarding pretermission *sua sponte*, specifies that "the immigration judge shall give at least 10 days notice before entering" a pretermission order. Proposed 8 CFR § 1208.13(e)(1), regarding pretermission upon a motion by DHS, does not establish a timeframe for the applicant to make a response, however,

of a hearing on the merits of their case, risking profound harm to these asylum seekers who would face removal without ever having the opportunity to explain their fear of persecution or torture to a judge.

Proposed 8 CFR § 1208.13(e) violates the plain language of the INA. In INA § 240(b)(1), Congress mandated that "[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses." Proposed 8 CFR § 1208.13(e) violates this statutory mandate by requiring immigration judges to abandon their essential function of examining the noncitizen about their application for relief.[24] Immigration judges have a duty to fully develop the record, "[o]therwise, such aliens would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal."[25]

Additionally, proposed 8 CFR § 1208.13(e) violates INA § 240(b)(4)(B), which requires that in proceedings under INA § 240 "the alien shall have a reasonable opportunity to examine evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government." An asylum seeker's testimony is the quintessential, and sometimes sole, form of evidence in an asylum case, due to the hurried and precarious nature of many asylum seekers' escape from persecution.[26] Credible testimony alone is sufficient to satisfy the burden of proof in an asylum case.[27] Proposed 8 CFR § 1208.13(e) violates the statutory right of noncitizens in removal proceedings to present and examine evidence, including presenting their own testimony, in order to establish their eligibility for relief from removal.

Further, proposed 8 CFR § 1208.13(e) violates INA § 240(c)(4), regarding applications for relief from removal. INA § 240 (c)(4)(A) states that "An alien applying for relief or protection from removal has the burden of proof to establish that the alien – (i) satisfied the applicable eligibility requirements." Importantly, the applicant's testimony is a statutorily protected means via which the applicant may meet this burden of proof: "In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record."[28] The proposed rule would unlawfully prevent asylum, withholding of removal or CAT applicants from establishing their eligibility for this relief through their testimony, because the rule allows immigration judges to deny applications before the applicant has the opportunity to present their testimony. The agencies do not have the statutory authority to allow immigration judges to make an eligibility determination without first weighing whether the applicant's credible testimony establishes eligibility for relief from removal.[29] In sum, the

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the NPRM notes that "a similar timeframe would apply if DHS moves to pretermit, under current practice." 85 Fed. R. 36277.

[24] Proposed 8 CFR § 1208.13(e). (The NPRM uses mandatory language that evinces immigration judges' obligation to deprive asylum seekers of hearings in qualifying cases: "an immigration judge *shall*, if warranted by the record, pretermit and deny any application for asylum…) (emphasis added).

[25] *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004).

[26] *See Matter of Mogharrabi* in which the Board "recognize[s], as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution." 19 I. & N. Dec. 439, 445 (BIA 1987).

[27] 8 C.F.R. § 208.13(a); § 1208.13(a).

[28] INA § 240(c)(4)(B).

[29] *See* INA § 240(c)(4)(B).

proposed rule is *ultra vires* because it directly contradicts several provisions of the INA that require a hearing.

2. Proposed 8 CFR § 1208.13(e) Violates Current Regulations That Mandate That the Application for Asylum and Withholding of Removal Be Decided After an Evidentiary Hearing

The NPRM attempts to justify the new regulation allowing pretermission by stating that "[n]o existing regulation requires a hearing when an asylum application is legally deficient."[30] This claim is false; multiple existing regulations provide asylum applicants the right to a hearing.[31] First, 8 C.F.R. § 1240.1(c) provides that "[t]he immigration judge shall receive and consider material and relevant evidence....." An asylum seeker's testimony is often their most important form of evidence,[32] but immigration judges would never have the opportunity to consider this important evidence in cases they pretermit under the new regulations.

Second, 8 CFR § 1240.11(c)(3)(iii) provides that: "[d]uring the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf." DOJ and DHS's (the Departments') proposed regulations would prevent asylum applicants whose applications are pretermitted from presenting evidence and witnesses, as is their right under current regulations. Further, although the burden of proof is on the applicant to establish their eligibility for asylum, "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."[33] The new regulation unlawfully deprives the applicant of the opportunity to use their testimony to sustain the burden of proof, because it allows judges to find against them before hearing testimony from the applicant.

Third, 8 CFR § 1240.11(c)(3) states that "[a]pplications for asylum and withholding of removal so filed will be decided by the immigration judge… after an evidentiary hearing to resolve factual issues in dispute." The NPRM states that the word "*factual*" means that a hearing is not required if the asylum application is legally deficient.[34] This interpretation is incorrect; the dispositive phrase is "after an evidentiary hearing," a requirement that should not be read out of the regulations because of the stated purpose of this hearing. Also, this interpretation completely disregards the reality that factual issues and legal issues in an asylum case are highly interconnected. A purported "legally deficient" application could be cured by the development of facts at a hearing that establish the legal sufficiency of any number of facial weaknesses, including the applicant's past persecution, fear of future persecution, and membership in a particular social group, among others.[35]

To justify proposed 8 CFR § 1208.13(e), the NPRM states that "current regulations expressly note that no further hearing is necessary once an immigration judge determines that an

[30] 85 Fed. R. 36277 (proposed June 15, 2020).
[31] *See* 8 CFR §§ 1240.1(c), 1240.11(c)(3), 1240.11(c)(3)(iii).
[32] *See Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).
[33] 8 CFR § 1208.13(a).
[34] 85 Fed. R. 36277. [emphasis in original].
[35] INA § 101(a)(42)(A).

asylum application is subject to certain grounds for mandatory denial."[36] This statement is erroneous for two reasons. First, the regulatory language at issue, that "[a]n evidentiary hearing extending beyond issues related to the basis or a mandatory denial… is not necessary,"[37] demonstrates through its own language that a hearing must indeed occur in the first place. Second, this clause refers to mandatory denials under 8 CFR § 1208.14 and 8 CFR § 1208.16, but the proposed regulation would apply to all asylum, withholding of removal, and CAT applicants. The NPRM never acknowledges or seeks to justify why proposed 8 CFR § 1208.13(e) contravenes various parts of the current regulatory framework.

3. Proposed 8 CFR § 1208.13(e) Contradicts *Matter of Fefe*, Controlling BIA Precedent That Requires Immigration Judges to Take Testimony in Asylum and Withholding Cases

Proposed 8 CFR § 1208.13(e) directly contradicts *Matter of Fefe*, a precedential BIA opinion that immigration judges must follow.[38] In *Matter of Fefe*, the Board of Immigration Appeals (BIA or Board) stated that:

> *[a]t a minimum*, we find that the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct. We would not anticipate that the examination would stop at this point unless the parties stipulate that the applicant's testimony would be entirely consistent with the written materials and that the oral statement would be believably presented.[39]

In the proposed rule, the Departments' attempt to sidestep this precedential ruling by stating that "the regulations at issue in *Matter of Fefe* are no longer in effect."[40] However, the regulations interpreted by the Board in *Matter of Fefe,* 8 C.F.R. § 208.6 (1988), and 8 C.F.R. §§ 236.3(a)(2), 242.17(c) (1988), now appear in a substantially similar form at 8 C.F.R. § 1240.11(c)(3) and 8 C.F.R. § 1240.11(c)(3)(iii). In *Matter of E-F-H-L*, the Board found that the current regulations:

> do[] not differ in any material respect from that in the prior regulations. [The Board] therefore see[s] no reason to disturb our conclusion in *Fefe*, which, in turn, provides strong support for concluding that a full evidentiary hearing is ordinarily required prior to the entry of a decision on the merits of an application for asylum, withholding of removal under the Act or the Convention Against Torture, or deferral of removal under the Convention Against Torture.[41]

Although *Matter of E-F-H-L* was vacated by the Attorney General in 2018, the Attorney General's reasoning for doing so was that *E-F-H-L* later withdrew the underlying application for

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[36] 85 Fed. R. 36277.
[37] 8 CFR § 1240.11(c)(3).
[38] *See Matter of Fefe*, 20 I. & N. Dec. 116 (BIA 1989).
[39] *Id.* at 118 (emphasis added).
[40] 85 Fed. R. 36277 (June 15, 2020).
[41] *Matter of E-F-H-L* 6 I. & N. Dec. 319, 323 (BIA 2014), vacated, 27 I. & N. Dec. 226, 226 (A.G. 2018).

asylum and withholding, which "effectively mooted" the issue; the attorney general never questioned the underlying reasoning of the Board in *E-F-H-L*.[42] The legal conclusion of the Board that 8 C.F.R. § 1240.11(c)(3) and 8 C.F.R. § 1240.11(c)(3)(iii) do "not differ in any material respect"[43] from the regulations in *Matter of Fefe* has not been called into question.[44] *Matter of Fefe* remains good law, and federal circuit courts continue to rely on *Matter of Fefe* even after the reorganization of the regulations.[45]

> As noted in *Matter of Fefe*:
>
> the full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself… there are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.[46]

Proposed 8 CFR § 1208.13(e) disregards the reality that many applicants will establish eligibility through their oral testimony rather than their written application.

In addition, the proposed rule contradicts another precedential Board opinion, *Matter of Ruiz*, which holds that the decision in a motion to reopen cannot be contingent upon the applicant establishing a *prima facie* case for asylum because to do so would violate the statutory right to a hearing on the asylum claim.[47] The pretermission provision proposes exactly what was held unlawful in *Matter of Ruiz*—requiring an asylum applicant to establish *prima facie* eligibility before a hearing—and will therefore deny asylum seekers the "statutory right to an opportunity to present his asylum claim at a hearing."[48] Proposed 8 CFR § 1208.13(e) contradicts Board precedent binding on immigration judges, and therefore violates the Administrative Procedures Act because it is "not in accordance with law."[49]

4. Proposed 8 CFR § 1208.13(e) Violates the Due Process Clause of the Fifth Amendment

Proposed 8 CFR § 1208.13(e) violates the due process clause of the Fifth Amendment. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[50] Procedural protections in removal proceedings are especially important because deportation is a "particularly severe penalty."[51] The need for due process protections is even greater in asylum cases where the noncitizen "makes a claim that he or she will be subject to death

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[42] *Matter of E-F-H-L-*, 27 I. & N. Dec. 226, 226 (A.G. 2018).
[43] *Matter of E-F-H-L*, 26 I. & N. Dec. 319, 323 (BIA 2014), vacated, 27 I. & N. Dec. 226, 226 (A.G. 2018).
[44] *See Matter of E-F-H-L-*, 27 I. & N. Dec. 226, 226 (A.G. 2018).
[45] *See, e.g. Oshodi v. Holder*, 729 F.3d 883, 898 (9th Cir. 2013).
[46] *Matter of Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989).
[47] *Matter of Ruiz*, 20 I. & N. Dec. 91, 92–93 (BIA 1989).
[48] *Id*.
[49] 5 USC § 706(2)(A).
[50] *Reno v. Flores*, 507 U.S. 292, 306 (1993).
[51] *Padilla v. Kentucky,* 559 U.S. 356, 365 (2010) (internal citations omitted).

or persecution if forced to return to his or her home country."[52] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[53] The right of asylum seekers in removal proceedings to testify at a hearing is a due process right.[54] The Court of Appeals for the Ninth Circuit, in holding there is a statutory, regulatory, and due process right for the asylum applicant to testify fully as to the merits of their case, emphasized that "[t]he importance of an asylum or withholding applicant's testimony cannot be overstated, and the fact that [the applicant] submitted a written declaration outlining the facts of his persecution is no response to the IJ's refusal to hear his testimony."[55] Circuit courts consistently find due process violations when the asylum seekers' testimony is even partially curtailed in a hearing.[56] Since it is a due process violation for asylum seekers' testimony to be partially denied, the new regulation's proposal to allow and potentially mandate that immigration judges deny cases without any hearing at all is clearly unconstitutional.

5. Proposed 8 CFR § 1208.13(e) Would Cause Particularly Grave Harm to *Pro Se* Asylum Seekers

The proposed rule violates the immigration judge's affirmative duty to elicit the testimony of *pro se* asylum seekers. Numerous federal court decisions have held that "immigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel."[57] This is particularly important because the applicant "may not possess the legal knowledge to fully appreciate which facts are relevant. Yet a full exploration of all the facts is critical to correctly determine whether the alien does indeed face persecution in their homeland."[58] Judges' responsibility to fully develop the record is also crucial because many asylum seekers face

[52] *INS v. Cardoza–Fonseca,* 480 U.S. 421, 449 (1987).
[53] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citations omitted).
[54] *See, e.g., Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001).
[55] *Oshodi v. Holder*, 729 F.3d 883, 889–90 (9th Cir. 2013).
[56] *See, e.g. Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020) (holding there was a due process violation where the IJ deprived an asylum applicant of the opportunity to testify on remand); *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 540 (7th Cir. 2005) (holding there was a due process violation where the IJ only allowed the applicant to testify for one hour, and did not allow her expert witnesses to testify, which denied her a meaningful opportunity to be heard on her asylum case); *Kerciku v. I.N.S.*, 314 F.3d 913, 918 (7th Cir. 2003) (finding that "the immigration judge violates due process by barring complete chunks of oral testimony that would support the applicant's claims"); *Colmenar v. I.N.S.*, 210 F.3d 967, 971–72 (9th Cir. 2000) (holding there was a due process violation when IJ did not give applicant a "full and fair" hearing on his asylum case, because IJ prejudged the asylum application as non-meritorious and prevented the applicant from providing testimony, which could have established that he was targeted on the basis of his imputed political opinion).
[57] *Jacinto v. I.N.S.*, 208 F.3d 725, 734 (9th Cir. 2000); *see also Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013); *Na Zheng v. Holder*, 507 F. App'x 755, 762 (10th Cir. 2013) (unpublished); *Abdurakhmanov v. Holder*, 735 F.3d 341, 346, n.4 (6th Cir 2012); *Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010); *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) ("Given that IJs have a duty to develop the administrative record, and that many aliens are uncounseled, our removal system relies on IJs to explain the law accurately to *pro se* aliens. Otherwise, such aliens would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal."); *Mekhoukh v. Ashcroft*, 358 F.3d 118, n.14 (1st Cir. 2004); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002); *In Re J.F.F.*, 23 I. & N. Dec. 912, 922 (A.G. 2006); *cf. Higgs v. Atty. Gen. of the U.S.*, 655 F.3d 333, 340 (3d Cir. 2011), *as amended* (Sept. 19, 2011) (explaining that *pro se* pleadings must be construed liberally because "the immigration system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes.") (internal citations omitted).
[58] *Jacinto* 208 F.3d at 734.

language barriers.[59] Indeed, courts have found due process violations where an IJ fails to fully develop the record of an unrepresented applicant.[60] "Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts."[61]

Increasing numbers of asylum seekers are unrepresented, and would be disproportionately affected by the proposed rule's abdication of immigration judges' responsibility to fully develop the record. More than half of all individuals in removal proceedings in South Carolina, Oklahoma, North Carolina, South Dakota, Georgia, and Maine are unrepresented.[62] In Texas, 46.3 percent of individuals in removal proceedings, or 48,952 individuals are currently unrepresented.[63] Individuals with cases filed within the past three months are even more likely to be unrepresented—in every state except New Hampshire, over half of these individuals are unrepresented.[64] Other disparities to representation exist: individuals who are detained are five times less likely to be represented than non-detained individuals, and individuals in rural areas or small cities are four times less likely to be represented than individuals in large cities.[65] For individuals subject to the so-called Migrant Protection Protocols (MPP) program, which requires certain individuals in removal proceedings to remain in Mexico during the entirety of their removal proceedings[66]—the number of unrepresented individuals is even more dire. Of the 32,188 individuals currently in MPP removal proceedings, 31,964 individuals are unrepresented, and a mere 224 individuals are represented.[67]

Representation is a critical factor in obtaining relief: one extensive study of 1.2 million removal cases found that the odds were five-and-a half times greater that represented immigrants were able to prove their eligibility for relief from removal compared to unrepresented immigrants.[68] In sum, this data shows the incredibly vast effect the proposed rule's foreclosure of the immigration judge's obligation to fully develop the record would have—both on the sheer number of individuals it would impact, and because it would likely lead to a widening of the already disparate outcomes between represented and unrepresented individuals. Under the proposed rule, due process violations may occur in thousands of cases where the asylum seeker is unrepresented and the case is pretermitted without the judge's inquiry into critical facts of the respondent's case, as required by the Fifth Amendment. Further, the administration recently

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[59] *Id.*
[60] *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004); *Agyeman v. I.N.S.*, 296 F.3d 871, 877 (9th Cir. 2002).
[61] *Agyeman* 296 F.3d at 877.
[62] *Representation in Immigration Court by State and County*, Transactional Records Access Clearinghouse (Feb. 2019), *available at* https://trac.syr.edu/phptools/immigration/addressrep/.
[63] *Id.*
[64] *Id.*
[65] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32, 41 (2015-2016). [hereinafter, Eagly, "Access to Counsel*."*]
[66] *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration,* DEPARTMENT OF HOMELAND SECURITY (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.
[67] *Details on MPP (Remain in Mexico) Deportation Proceedings*, Transactional Records Access Clearinghouse (May 2020), *available at* https://trac.syr.edu/phptools/immigration/mpp/.
[68] *See,* Eagly "Access to Counsel," *supra* note 65, at 57.

published new regulations, 8 CFR § 208.3(c)(3), which lengthen the time to 365 days after filing for asylum, before an asylum seeker may file for an employment authorization document (EAD) and amending 8 CFR § 208.7 to remove the requirement that USCIS process EAD applications within 30 days. The inability to work lawfully in the United States would only widen the representation gap since there is no right to counsel in immigration court proceedings for those who cannot afford counsel.[69]

CLINIC has established a program, *Estamos Unidos*,[70] in Ciudad Juarez Mexico, aimed at providing Know Your Rights information to asylum seekers who are stranded in Mexico as a result of the MPP and asylum metering.[71] CLINIC's *Estamos Unidos* legal team has provided mass community education presentations that could have up to 100 participants. In these conversations CLINIC staff talk about the importance of providing details in the oral testimony that asylum seekers would provide at their hearings. A large majority of the individuals for whom CLINIC provides these presentations are trauma survivors who face extreme difficulties in prioritizing which traumatic experience to highlight. Even with the Know Your Rights model that CLINIC employs in Juarez, it often takes multiple meetings with asylum seekers suffering the ongoing effects of trauma, for CLINIC staff to begin to understand what happened in the asylum seeker's country of origin and to help the asylum seeker understand what portions of their story are relevant to their claim for asylum. In these instances, it may seem after the first meeting that the individual may not be *prima facie* eligible for asylum, but after CLINIC staff takes more time with the individual—the equivalent of taking testimony in court—the individual often begins to describe details of persecution that they were not able to immediately discuss.

CLINIC staff in Juarez have described the ability of a pro se asylum seeker to fully complete a Form I-589, Application for Asylum and for Withholding of Removal, in English as "a miracle." The barriers imposed by lack of access to counsel, lack of access to competent translators, lack of access to printers and copiers, and lack of access to funds to pay for any of these necessities even if they do exist, combine to make it nearly impossible for pro se asylum seekers to fully complete their I-589 application. It is unconscionable that an immigration judge would render a decision on an asylum application, denying the opportunity to provide testimony, based solely on the I-589 submitted in such circumstances.

These concerns are further magnified for indigenous language speakers where it is often impossible to find competent assistance to translate from the asylum seekers first language into English. Often indigenous language speakers must attempt to communicate in Spanish even when they are not fluent in Spanish. For example, CLINIC's *Estamos Unidos* staff has assisted a 21-year-old Guatemalan asylum seeker who speaks Mam, has continued to attempt to share her testimony with immigration officials at the ports of entry to receive a fear screening to be removed from MPP. Although, she expressed that she is fluent in Mam and is not comfortable in Spanish,

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[69] *See CLINIC, CLINIC Submits Comment Opposing the Proposed Elimination of the 30-Day Processing Requirement for Asylum Applicants' Initial Applications for Employment Authorization*, Nov. 5, 2019, https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comment-opposing-proposed-elimination-30.

[70] CLINIC, *"Estamos Unidos," We Are United: CLINIC to Launch Legal Guidance Program at Border in Ciudad Juarez* (Jul. 1, 2019) https://cliniclegal.org/press-releases/estamos-unidos-we-are-united-clinic-launch-legal-guidance-program-border-ciudad.

[71] *See* section III H 4 *infra* for a further discussion of the effect of these programs on asylum seekers.

she was interviewed by an immigration official in Spanish and a decision to keep her in the program was reached through her testimony in a non-native language. During court she has continued to proceed with interpretation in Spanish, despite that not being the language in which she is fluent. It is very unlikely that she would understand what was happening in court if DHS or the immigration judge voiced an intent to pretermit the case based on her inability to make out a *prima facie* asylum case. This asylum seeker, and hundreds of other rare language speakers, could be removed without ever receiving a full court hearing.

The judge's obligation to consider filings made in response to the notice of possible pretermission does nothing to remedy the proposed rule's authorization of judges abandoning their obligation to fully develop the record. *Pro se* asylum seekers attempting to respond to a motion of possible pretermission would face the same lack of legal knowledge, language barriers, and lack of facility in making a written filing as they face in completing the initial application. The proposed rule would result in the denial of cases, without a hearing, of unrepresented asylum seekers who do not have the specialized immigration knowledge and omit critical facts from their asylum application. This in turn would cause the removal of unrepresented asylum seekers with legally meritorious claims to the countries where they face persecution.

6. Proposed 8 CFR § 1208.13(e) Violates International Standards for Refugee Adjudication

International refugee guidelines based on the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees state that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application."[72] Proposed 8 CFR § 1208.13(e) disregards these international standards for adjudicating asylum cases. An allegedly legally deficient asylum application that is pretermitted before a hearing prevents immigration judges from ascertaining potentially relevant facts, which could establish the applicant's eligibility for relief. It is the intent of Congress that U.S. asylum law should be in line with the Refugee Convention.[73] The pretermission of applications proposed in 8 CFR § 1208.13(e) fails to meet international obligations for refugee adjudication, and belies the intent of Congress to follow the Refugee Convention.

B. 8 CFR § 208.1(c); 8 CFR § 1208.1(c)—The Proposed Rule Would Make it Virtually Impossible to Prevail on a Particular Social Group Claim

Applicants for asylum and withholding of removal are legally required to demonstrate that the persecution they fear is on account of a protected characteristic: race, religion, nationality, membership in a particular social group (PSG), or political opinion.[74] Membership in a particular social group was designed to allow the refugee definition to be flexible and capture those who do not fall within the other listed characteristics. Thus, United Nations High Commissioner on

[72] U.N. High Comm'r For Refugees, Handbook On Procedures and Criteria for Determining Refugee Status, ¶ 196 (1979, Rev. 1992).
[73] *Grace v. Whitaker*, 344 F. Supp. 3d 96, 123–24 (D.D.C. 2018).
[74] INA § 101(a)(42).

Refugees Guidelines state that the "term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[75]

During the past three years, the adjudication of asylum applications has become increasingly politicized with attorneys general issuing decisions that appear designed to limit asylum eligibility for asylum seekers from Central America.[76] The attorney general has weaponized the self-certification process,[77] issuing nine precedential decisions in the past three years, that have constricted eligibility for relief for noncitizens, and there are an additional four self-certified decisions pending.[78] By way of contrast, in the eight years of the prior administration, the attorneys general issued only four precedential decisions none of which restricted noncitizens' eligibility for relief.[79] During the past three years, approximately 83 percent of published BIA decisions have found against respondents whereas 56.5 percent found against respondents in the prior eight years.[80]

Since 2017, the asylum adjudication system has become increasingly politicized, with the administration using the appellate process[81] to eliminate the cognizability of PSGs that had long been recognized under prior agency and federal court decisions. Specifically, these decisions have undercut asylum seekers' ability to pursue asylum based on domestic violence,[82] family membership,[83] and land ownership.[84] These decisions seemed calculated to eliminate the recognition of PSGs that form the basis for common forms of persecution that force asylum seekers to flee their countries, thereby greatly reducing the number of applicants who can qualify for asylum. The proposed regulations further set forth a laundry list of common factual scenarios that lead Central American and Mexican asylum seekers to flee their countries, and then adds them to a list of disqualifying facts that are loosely tied to particular social group membership. Contrary to

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[75] United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (May 7, 2002), https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html.

[76] Although it was not necessary to the outcome of the decision, in *Matter of A-B-*, the attorney general opined, that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018).

[77] *See,* Southern Poverty Law Center and Innovation Law Lab, *The Attorney General's Judges How The U.S. Immigration Courts Became A Deportation Tool* at 4 (June 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf. [hereinafter "SPLC, *Attorney General's Judges*"].

[78] DOJ, AG / BIA Decisions Listing, https://www.justice.gov/eoir/ag-bia-decisions. The case outcome analysis cited in the text is based on analysis of precedential decisions over the past 11 years performed internally by CLINIC.

[79] *Id.*

[80] *Id.*

[81] The attorney general appears to have taken a page from former attorney general Alberto Gonzalez's law review article, Alberto R. Gonzalez and Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa Law Review 841 (2016), to use an appellate process to implement political policy goals. ("Attorney General referral and review . . . could play an efficacious role in the executive branch's development and implementation of its immigration policy.")

[82] *Matter of A-B-,* 27 I&N Dec. 316 (A.G. 2018).

[83] *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

[84] *Matter of E-R-A-L-*, 27 I&N Dec. 767 (BIA 2020).

its stated purpose, the proposed rule does not provide clarity to existing definitions, but rather virtually eliminates particular social group as a basis for asylum.

1. The government Should Adopt the *Acosta* Standard for Analyzing PSGs

For the first time, the proposed rule would codify the restrictive definition of particular social group announced in *Matter of M-E-V-G—* that is an applicant must show that the PSG is immutable; defined with particularity; and socially distinct.[85] The *M-E-V-G-* definition is confusing at best, and in many instances has led to applicants with viable claims being denied.[86] The Court of Appeals for the Seventh Circuit has specifically declined to defer to *M-E-V-G-*'s three-prong PSG test.[87] If the Departments go forward in codifying the PSG definition, they should use the definition in *Matter of Acosta.* In that landmark decision, the BIA held that PSG should be interpreted consistently with the other four protected characteristics laid out in the INA, stating that "[e]ach of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[88]

Notably, in laying out the first prong of the PSG standard, the proposed rule shortens the accepted definition that was laid out in *Acosta* to state merely, that the group is "based on an immutable or fundamental characteristic."[89] At a minimum, the rule should specify that this shorthand also includes a characteristic that "is so fundamental to individual identity or conscience that it ought not be required to be changed."[90] CLINIC suggests that this language constitute the entirety of the PSG definition because the requirement to prove particularity and social distinction is confusing and places an unfair and often impossible evidentiary burden on asylum applicants.[91]

2. The Proposed Rule Misconstrues the Concept of Particular Social Group

When the attorney general issued the self-certification in *Matter of A-B-*, the question he presented for amicus briefing was, "Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."[92] The construction of this question did not

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[85] *Matter of M-E-V-G-,* 26 I. & N. Dec. 227, 237 (BIA 2014).

[86] *See,* Lauren Cherney, *Return to Acosta: How In re A-B- Exemplifies the Need to Abolish the "Socially Distinct" and "Particularity" Requirements for a Particular Social Group*, 38 LAW & INEQ. 169 (Summer 2020), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1637&context=lawineq.

[87] *See* e.g. *W.G.A. v. Sessions*, 900 F.3d 957, 964, 964 n.4 (7th Cir. 2018), and has instead published decisions analyzing PSGs without requiring the groups to satisfy these additional factors. *See e.g., Salgado Gutierrez v. Lynch*, 834 F.3d 800 (7th Cir. 2016); *Lozano-Zuniga v. Lynch*, 832 F.3d 822, 827 (7th Cir. 2016) ("This circuit defines social group as a group 'whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change.'").

[88] *Matter of Acosta,* 19 I. & N. Dec. 211, 233 (BIA 1985).

[89] *See* Proposed 8 CFR § 208.1(c); 8 CFR § 1208.1(c).

[90] For example, an asylum seeker could divorce a spouse or renounce a religion but should not be required to do so because doing so would conflict with their individual identify or conscience.

[91] In *Matter of A-B-*, the attorney general opines at length about groups that are not socially distinct but the only example he gives of a group that could meet the definition is a tribe or a clan. *Matter of A-B-*, 27 I&N Dec. at 336. Of course, a tribe or clan could potentially qualify under race as a protected characteristic.

[92] *Matter of A-B-,* 27 I&N Dec. 227 (A.G. 2018).

make sense to asylum attorneys since the question of what constitutes a protected characteristic is distinct from the question of persecution, which is the level of harm based on the protected characteristic. In fact, DHS, the agency charged with enforcing immigration law, was also sufficiently confused to make a motion to the attorney general seeking clarification of the question; that motion was denied.[93]

These proposed rules similarly insert legal issues unrelated to the cognizability of particular social group into the new, regulatory definition of PSG. Analyzing each element of an asylum claim to determine eligibility is already extremely complex, particularly as asylum has been in a near-constant state of flux since this administration came into office. By adding unrelated issues to the PSG cognizability analysis, asylum seekers, their counsel, and adjudicators are going to face increasing confusion in separately analyzing each element of the asylum claim, as the regulations would require analysis of issues unrelated to the concepts of PSG in adjudicating PSG-based asylum claims.

For example, the new rule would deny claims where the PSG is based on "presence in a country with generalized violence or a high crime rate."[94] This language is not necessary in that it would probably be difficult if not impossible to meet the three prong *M-E-V-G-* test with a PSG that is defined in this way. Instead language like this, which is not directly related to the PSG definition at issue, but is restrictive in nature, is likely to lead adjudicators to deny asylum based on the fact that an applicant comes from a country with a high crime rate, even if that applicant articulates a PSG that is not related to the crime rate.

Likewise, the proposed rule would limit PSGs based on both "interpersonal disputes of which governmental authorities were unaware or uninvolved" and "private criminal acts of which governmental authorities were unaware or uninvolved."[95] Again, it is difficult to imagine a PSG that is framed in this way being found cognizable, but by laying out this fact pattern as a limiting concept, it is likely that adjudicators would import this concept into its persecution analysis and deny asylum based on this language, even though the regulation specifies that this language applies in the context of analyzing a PSG.

Under the rule the agencies would also generally not find a cognizable PSG based on "status as an alien returning from the United States."[96] However, there are circumstances where Westernized Iraqi citizens have faced persecution and potential torture based on their perceived ties to the United States. Each asylum application, and each proposed PSG should be evaluated on a case-by-case basis and not subject to general rules like those laid out in the proposed rule, that would result in blanket denials.

The primary articulated reason for adding this laundry list of PSGs that would generally be denied, while disingenuously mentioning the notion that each claim must be independently evaluated, is that the new rule "will reduce the amount of time the adjudicators must spend

[93] *Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018).
[94] *See* Proposed 8 CFR § 208.1(c); 8 CFR § 208.1(c).
[95] *Id.*
[96] *Id.*

evaluating such claims."[97] Stated more bluntly, the purpose of the proposed rule is to allow IJs to deny claims by consulting this laundry list, rather than performing the case-by-case analysis that they are required to perform under the law.

3. The Proposed Rule Would Deny Due Process Rights by Forcing Asylum Seekers to Articulate Every PSG Before the IJ

One of the most unfair aspects of this proposed rule, is its requirement that an asylum seeker state with exactness every PSG before the immigration judge, and that:

> A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.[98]

This section of the proposed rule appears to codify the BIA decision *Matter of W-Y-C-*[99] but takes those restrictions even further. In *Matter of W-Y-C-*, the BIA held that because the analysis of a PSG is a mixed question of fact and law, the applicant cannot articulate a new PSG on appeal that was not raised before the IJ.[100]

First, CLINIC strongly believes that *Matter of W-Y-C-* was wrongly decided. CLINIC has grave concerns about forcing an asylum seeker to accurately articulate a PSG before the IJ or forever be barred from offering a different formulation of the PSG. Applying for asylum is not a word game; asylum seekers' lives are on the line with every application that an adjudicator decides. The NPRM itself acknowledges that the "definition of 'particular social group' has been the subject of considerable litigation and is a product of evolving case law."[101] With the ever-changing landscape of what the attorney general, BIA, and federal circuit courts find to be cognizable PSGs, forcing asylum seekers to articulate a PSG at their hearing with no right to ever seek to reopen based on changes in the law deprives them of the right to due process.

Second, the proposed regulations go a step beyond *Matter of W-Y-C-*, which at least included some safeguards for asylum seekers. In *Matter of W-Y-C-*, the BIA specified that, "If an applicant is not clear as to the exact delineation of the proposed social group, the Immigration Judge should seek clarification, as was done in this case."[102] The proposed rule has no similar requirement that IJs ensure that the PSG is clarified for the record. Instead, the proposed rule would allow IJs to pretermit asylum applications without even holding an evidentiary hearing and thus not ever giving asylum seekers an opportunity to clarify their proposed PSGs.[103]

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[97] *See* 85 Fed. R. 36279.
[98] *See* Proposed 8 CFR § 208.1(c); 8 CFR § 1208.1(c).
[99] *Matter of W-Y-C & H-O-B-,* 27 I&N Dec. 189 (BIA 2018).
[100] *Id.* at 191.
[101] 85 Fed. R. 36278.
[102] *Id.*
[103] *See* proposed 8 CFR 1208.13(e); 8 CFR 1208.13(e).

CLINIC is especially concerned about the impact this requirement would have on unrepresented asylum seekers, especially those subjected to MPP. Experienced immigration attorneys struggle to keep up with the ever-changing rules on PSG cognizability and consider how to best craft a cognizable PSG. Often attorneys hire expert witnesses and work with the expert to fully understand conditions in the country and society in question to articulate an accurate PSG. This type of preparation is completely out of reach for pro se respondents who rely on IJs to assist in developing the record.[104]

Asylum seekers often have to navigate this complex web of rules and evidentiary burdens without counsel. As the overall number of cases has grown, the number of asylum seekers unable to secure legal representation has also grown. By March 2020, 22.5 percent of asylum seekers who had a merits hearing on their applications for asylum, lacked legal representation during their immigration court proceedings.[105] Those subjected to MPP are represented in fewer than 10 percent of the cases in which a merits hearing was held,[106] and in fewer than .01 percent of cases overall. [107]Without an increase in the immigration bar's capacity, the number of *pro se* applicants would continue to increase.

The asylum process is already sufficiently complex to render the process impenetrable for unrepresented applicants, many of whom speak little English and have no legal training. As a result of these challenges, respondents with counsel were "ten-and-a-half times more likely to succeed" in their case when compared to *pro se* litigants.[108] Adding the obstacles posed by these proposed regulations to the already often-insurmountable barriers faced by *pro se* respondents would likely lead to many, if not most, PSG-based asylum claims filed by *pro se* respondents being denied.

Making matters even worse, the proposed rule would forever punish asylum seekers who were the victims of ineffective assistance of counsel explicitly stating, "any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including

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[104] *See Jacinto v. INS*, 208 F.3d 725 (9th Cir. 2000) (Finding asylum adjudicators have a duty to develop the record.)

[105] *See Fact Sheet: June 2020*, Human Rights First at 8 (June 11, 2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf. [hereinafter "HRF, Fact Sheet."] It is likely that many *bona fide* asylum seekers without representation gave up on their claims before reaching a merits hearing. It is very difficult for unrepresented asylum seekers to complete an application for asylum in English and unrepresented asylum seekers are less likely to understand how to find out when and where their immigration court hearings are scheduled. *See* ASAP & CLINIC, *Denied a Day in Court: The Government's Use of* In Absentia *Removal Orders Against Families Seeking Asylum* at 15 (Updated 2019), https://cliniclegal.org/resources/removal-proceedings/denied-day-court-governments-use-absentia-removal-orders-against. (Finding a clear correlation between lack of representation and in absentia removal orders.) Reasons unrepresented families did not attend hearings included: "received no notice for their hearing(s); received incorrect hearing dates from the immigration court; erroneously believed they could only attend the hearing with a lawyer; hesitated to attend due to news regarding immigration raids; confused their immigration court hearing with their ICE check-in; or faced other obstacles, including medical and transportation issues." *Id*. at 16.

[106] Accessing counsel is even more difficult given new regulations at the border forcing asylum seekers to remain in Mexico awaiting hearings or go through expedited proceedings in border tent courts. As of March 2020, only 9.3 percent of respondents subject to the Migrant Protection Protocols were represented. HRF Fact Sheet, *supra* note 105, at 8-9.

[107] TRAC, *Details on MPP (Remain in Mexico) Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/. Only 224 out of 31,949 asylum seekers subject to MPP were represented.

[108] *See* Eagly "Access to Counsel," *supra* note 65, at 49.).

a claim of ineffective assistance of counsel."[109] The government cannot write a waiver of due process rights into its regulations.[110] The right to effective assistance of counsel in immigration proceedings stems from the Fifth Amendment's guarantee of due process.[111] The BIA has recognized that ineffective assistance of counsel can violate a noncitizen's constitutional right to due process.[112]

The government should remove this egregious provision from the proposed rule. Even those noncitizens who are fortunate enough to find an attorney who practices in their geographic region and have the ability to pay for counsel under a regime that has intentionally set up barriers to asylum seekers obtaining employment authorization,[113] there is an unfortunate possibility that that counsel may provide ineffective assistance. In one study that surveyed New York immigration judges, they concluded that 47 percent of counsel performed inadequately or grossly inadequately.[114] In addition to the problem of inadequate counsel, many noncitizens are defrauded by immigration consultants or "*notarios*" who have no specialized training in immigration law and are not authorized to practice law.[115] Leaving noncitizens with no option to move to reopen or reconsider proceedings violates the statutory right to counsel[116] and the constitutional right to due process.

Finally, this section of the rule makes no exceptions for asylum seekers who are minors, mentally ill, or otherwise lacking competency. Just as it is manifestly unfair to prevent an individual who was unrepresented or ineffectively represented from raising new PSGs in the future, the regulations should not forever hold those who lack competency to the PSGs they articulated before the IJ. Holding respondents with mental illness to a legal standard that many experienced attorneys are unable to meet would violate their rights under the Rehabilitation Act.[117]

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[109] Proposed 8 CFR § 208.1(c); 8 CFR § 1208.1(c).

[110] "The Fifth Amendment guarantees that '[n]o person ... shall be deprived of life, liberty, or property' without due process of law.7 Aliens—including those who have entered or remained in the United States in violation of federal immigration law—have been found to be encompassed by the Fifth Amendment's usage of 'person,' and removal can be seen as implicating an alien's interest in liberty. Thus, courts have historically viewed access to counsel at one's own expense as required to ensure "fundamental fairness" in formal removal proceedings." Kate M. Manuel, Congressional Research Service, *Aliens' Right to Counsel in Removal Proceedings: In Brief,* at 2 (Mar. 17, 2016), https://fas.org/sgp/crs/homesec/R43613.pdf.

[111] *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005).

[112] *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) and *Matter of Compean,* 24 I. & N. Dec. 710 (A.G. 2009. *See also*, *Correa-Rivera v. Holder*, 706 F.3d 1128, 1130-31 (9th Cir. 2013); *Yi Long Yang v. Gonzales*, 478 F.3d 133, 142 (2d Cir. 2007).

[113] *See* 8 CFR § 274a.12; *See also*, CLINIC, *CLINIC Submits Comment Opposing the Proposed Elimination of the 30-Day Processing Requirement for Asylum Applicants' Initial Applications for Employment Authorization* (Nov. 5, 2019), https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comment-opposing-proposed-elimination-30.

[114] *See* New York Immigrant Representation Study, Accessing Justice, The Availability and Adequacy of Counsel in Immigration Proceedings, Dec. 2011, https://www.ils.ny.gov/files/Accessing%20Justice.pdf.

[115] *See* Delaney Smith, '*Notarios' Scamming Immigrants at Record Numbers*, SANTA BARBARA INDEPENDENT, Jul. 30, 2019, https://www.independent.com/2019/07/30/notarios-scamming-immigrants-at-record-numbers/.

[116] *See* INA § 292. ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.")

[117] *See* Rehabilitation Act § 504; *see also Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

This section of the proposed rule appears designed to make asylum seekers lose; it should be withdrawn.

C. 8 CFR § 208.1(d); 8 CFR § 1208.1(d)— The Proposed Rule Would Redefine Political Opinion Contravening Long-Established Principles

1. The Proposed Rule's Definition of Political Opinion Violates the INA Because Congress's Intent in Passing the Refugee Act Was to Encompass a Broad Conception of the Political Opinion Ground

The proposed rule would severely limit the definition of political opinion, which contravenes Congress's clear intent when passing the Refugee Act. The statutory definition of a refugee in the Refugee Act of 1980, codified in the INA at INA § 101(a)(42), should be interpreted in light of Congress's purpose to bring the U.S. definition of a refugee in line with our international obligations under the Protocol Relating to the Status of Refugees.[118] When passing the Refugee Act of 1980, Congress sought to give "statutory meaning to our national commitment to human rights and humanitarian concerns."[119]

In legislating the definition of a refugee at INA § 101(a)(42), Congress intended to construe the political opinion ground broadly in order to be responsive to a wider array of geographic and ideological characteristics of refugees than under the previous definition, as well as to ensure the statute's flexibility to changing world conditions.[120] The House Report for the Refugee Act of 1980 states that:

> The Committee feels that the definition of 'refugee' in present law, which is limited to those fleeing communist countries or the Middle East, is clearly unresponsive to the current diversity of refugee populations and does not adequately reflect the United States' traditional humanitarian concern for refugees throughout the world… [the new definition] will finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the 1951 United Nations Refugee Convention and Protocol which our government ratified in 1968… The Committee believes it is essential to give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.[121]

In contrast to the prior definition, the refugee definition in the 1980 Act "eliminates the geographical and ideological restrictions [previously] applicable."[122] Thus, the political opinion ground should be read in line with Congress's intent to create broad and flexible grounds for protection applicable to a variety of country-specific contexts and changing world conditions. The extremely narrow conception of political opinion in the proposed rule, recognizing only "an ideal

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[118] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432–33 (1987); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 123–24 (D.D.C. 2018).
[119] S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, *reprinted in* 1980 U.S.C.C.A.N. 141, 144.
[120] H.R. Rep. No. 608, 96th Cong., 1st Sess. 1, 9 (1979).
[121] *Id.*
[122] S. Rep. No. 256, 96th Cong., 1st Sess. 1, 4 (1979).

or conviction in furtherance of a discrete cause related to political control of a state or unit thereof"[123] does not reflect the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[124]

The Supreme Court has interpreted statutory asylum terms in light of the Protocol and United Nations' guidance on refugee adjudication.[125] As the BIA itself has noted, because of Congress's intent to comply with international humanitarian obligations, asylum and refugee law should be interpreted "to afford a generous standard for protection in cases of doubt."[126] The proposed rule conflicts with the United Nations High Commissioner on Refugees' (UNHCR) legal guidance on refugee adjudication, authority that the Supreme Court has concluded "provides significant guidance in construing the [relevant treaties], to which Congress sought to conform."[127] UNCHR Guidelines on International Protection state that:

> The political opinion ground is broader than affiliation with a particular political movement or ideology; it concerns 'any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged.' Moreover, it covers both the holding of an actual political opinion and its expression, political neutrality as well as cases where a political opinion is imputed to the applicant even if he or she does not hold that view. The latter can arise in cases where the State, or a non-State armed group, attributes to the individual a particular political view.[128]

Furthermore, international law recognizes the validity of anti-gang political opinion claims, as seen in UNHCR Guidelines:

> Gang-related refugee claims may also be analysed on the basis of the applicant's actual or imputed political opinion vis- -vis gangs, and/or the State's policies towards gangs or other segments of society that target gangs (e.g. vigilante groups). In UNHCR's view, the notion of political opinion needs to be understood in a broad sense…The 1951 Convention ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin. In certain contexts, activities of gangs or to the State's gang-related policies may be considered as amounting to an opinion that is critical of the methods and policies of those in power and, thus, constitute a 'political opinion' within the meaning of the refugee definition.[129]

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[123] Proposed 8 CFR § 208.1(d); 8 CFR § 1208.1(d).
[124] Pub. L. No 96-212, § 101(a), 94 Stat. 102 (1980).
[125] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432–33 (1987).
[126] *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996).
[127] *Cardoza-Fonseca,* 480 U.S. at 439 n.22. In *Cardoza Fonseca,* the Court relied on the UNHCR Handbook to guide its interpretation of the Refugee Act. The UNHCR Guidelines on International Protection referenced in this paragraph complement the UNHCR Handbook and "provide legal interpretative guidance for governments…carrying out mandate refugee status determination." UNHCR, *Guidelines on International Protection No. 10*, U.N. Doc. HCR/GIP/13/10/Corr. 1. (Nov. 12, 2014); UNHCR, *Guidelines on International Protection No. 12*, U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016).
[128] UNHCR, *Guidelines on International Protection No. 10*, ¶ 51, U.N. Doc. HCR/GIP/13/10/Corr. 1. (Nov. 12, 2014).
[129] UNHCR, *Guidance on Refugee Claims Relating to Victims of Organized Gangs*, ¶ 45-46 (March 2010).

Additionally, UNHCR Guidance on gender-related persecution within the context of the 1951 Convention and 1967 Protocol recognizes that feminist political opinion claims fall within the political opinion ground:

> [Political opinion] may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her... A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods.[130]

The proposed rule is antithetical to the international law to which Congress intended to conform because the proposed rule purports to limit the political opinion ground to those "related to political control of a state or unit thereof,"[131] rather than recognizing that a political opinion may be related to society, policy, or non-state actors who exercise political control. Thus, the proposed rule violates the statute, which interpreted in light of its legislative history and the international law with which it is meant to comply, clearly encompasses a broad range of opinions that the proposed regulation attempts to erase through fiat.

2. The Proposed Rule Violates the Agency's Own Precedent on the Meaning of Political Opinion

The Departments attempt to justify the proposed rule by claiming that "BIA case law makes clear that a political opinion involves a cause against a state or political entity, rather than against a culture."[132] In fact, the proposed rule would upset more than twenty-five years of agency precedent recognizing a broad conception of political opinion.[133] The only BIA case law the NPRM cites for its claim is *Matter of S-P-*, with a quote from that case that: "[h]ere we must examine the record for direct or circumstantial evidence from which it is reasonable to believe that those who harmed the applicant were in part motivated by an assumption that his political views were antithetical to those of *government.*"[134] This quotation is completely taken out of context—it comes in *Matter of S-P-* s' discussion of nexus, rather than a discussion of the meaning of a political opinion.[135] The nexus inquiry is always a factual inquiry specific to the case being adjudicated.[136] The NPRM misconstrues this quote because in *S-P-* the relevant inquiry was whether the respondent was persecuted for an imputed anti-government political opinion when he was captured by government soldiers after having been forced into a rebel group's work camp.[137] The Board's statement quoted in the NPRM is analyzing whether there was a nexus to his

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[130] UNCHR, *Guidance on International Protection: Gender-Related Persecution*, ¶ 32, U.N. Doc. HCR/GIP/02/01(May 7, 2002).
[131] Proposed 8 CFR § 208.1(d); 8 CFR § 1208.1(d).
[132] 85 Fed. R. 36279.
[133] *See, e.g., Matter of N-M-*, 21 I. & N. Dec. 526, 528 (BIA 2011); *Matter of S-P-*, 21 I. & N. Dec. 486, 494 (BIA 1996); *Matter of D-V-*, 21 I. & N. Dec. 77, 79 (BIA 1993).
[134] *Id.* (quoting *Matter of S-P-*, 21 I. & N. Dec. 486, 494 (BIA 1996) (emphasis added in NPRM)).
[135] Immediately following the quotation taken out of context by the Departments in the proposed rule, *Matter of S-P-* discusses *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), and the issue of how to prove that the persecution is "on account of" the protected ground. 21 I. & N. Dec. at 494. The quoted language by the Board is in a section of the case entitled "Proving Motive." *Id.*
[136] "This motivation issue involves questions of fact." *Id.* at 490.
[137] *Matter of S-P-*, 21 I. & N. Dec. 486, 487–88 (BIA 1996).

persecution by government soldiers in the facts of that case, but does not stand for the proposition that a political opinion solely means an opinion antithetical to government. In fact, *Matter of S-P-* stands for the proposition that political opinion should be construed broadly, because the Board emphasizes that Congress's intent was to "give statutory meaning to our national commitment to human rights and humanitarian concerns," states that the international obligations underlying the Refugee Act warrant an approach "designed to afford a generous standard for protection in cases of doubt," and cautions that because "a grant of political asylum is a benefit under asylum law, not a judgment against the country in question," political considerations and international relations are "not a reason for narrowly applying asylum law."[138] Thus although the NPRM states that BIA case law supports the exceedingly narrow definition of political opinion that would be codified in the proposed rule, it cites only one BIA decision that stands for the opposite proposition supporting a broad reading of the political opinion ground.

The Board expressed a broad understanding of the political opinion ground in *Matter of D-V-*, in which the agency recognized a political opinion claim of a respondent who was a member of a church group that provided funds for projects endorsed by former Haitian President Aristide.[139] The BIA reversed the IJ's determination that the respondent "had failed to demonstrate a well-founded fear of persecution on the basis of her political opinion because the evidence did not show her to be a prominent supporter of Aristide."[140] The BIA held that the political opinion ground encompassed her opinion as expressed through her membership in a church group.[141] The proposed rule, in limiting political opinion to "a discrete cause related to political control of a state"[142] contradicts this precedent, which had overturned a similarly narrow reading to what the Departments now propose.

The Board also expressed a broad conception of political opinion in *Matter of N-M-*, finding that "opposition to state corruption may provide evidence of an alien's political opinion or give a persecutor reason to impute such beliefs to an alien,"[143] and favorably citing *Zhang v. Gonzales,* which rejects "any categorical distinction between opposition to extortion and corruption and other disputes with government policy or practice."[144] In *Matter of N-M-*, the Board further found "that exposing or threatening to expose government corruption to higher government authorities, the media, or nongovernmental watchdog organizations could constitute the expression of a political opinion."[145] The Board's recognition of whistleblowing as a political opinion in *Matter of N-M-* is broader than the proposed rule's definition of political opinion as "a discrete cause related to political control of a state."[146] In sum, the proposed rule would radically depart from decades of BIA case law, which supports a broad conception of political opinion based on the United States' international humanitarian obligations.

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[138] *Id.* at 492–93.
[139] *Matter of D-V-*, 21 I. & N. Dec. 77, 79 (BIA 1993).
[140] *Id.*
[141] *Id.* at 79–80.
[142] Proposed 8 CFR § 208.1(d); 8 CFR § 1208.1(d).
[143] *Matter of N-M-*, 21 I. & N. Dec. 526, 528 (BIA 2011).
[144] *Zhang v. Gonzales*, 426 F.3d 540, 547 (2d Cir. 2005).
[145] *Matter of N-M-*, 21 I. & N. Dec. at 528.
[146] Proposed 8 CFR § 208.1(d); 8 CFR § 1208.1(d).

3. The Agency's Proposed Rule Contradicts the Great Weight of Existing Federal Precedent on Political Opinion

The proposed rule attempts to wholly disqualify certain types of political opinion claims without engaging in the complex factual inquiry necessary to understand the political nature an opinion may have in a particular country's context. As the Second Circuit has cautioned:

> a claim of political persecution cannot be evaluated in a vacuum… without reference to the relevant circumstances in which the claim arises. We have repeatedly emphasized the fallacy of this approach and have on several occasions remanded cases in which the agency denied an application for asylum based on its failure to properly engage in the 'complex and contextual factual inquiry' that such claims often require.[147]

The proposed rule's definition of political opinion as the "ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof"[148] is a huge departure from federal precedent interpreting the political opinion ground. The NPRM, in contrast to the weight of authority, dismisses political opinions related to society and culture.[149] Federal courts recognize that a "political opinion encompasses more than electoral politics or formal political ideology or action" and includes opinions about societal problems.[150] Federal courts have recognized the legitimacy of feminist political opinions, for example, finding that "opposition to the male-dominated social norms in El Salvador and …taking a stance against a culture that perpetuates female subordination and the brutal treatment of women" was a political opinion because "law enforcement systems that would normally protect women—police, prosecutors, judges, officials—do not have the resources or desire to address the brutal treatment of women, and the Salvadoran justice system favors aggressors and assassins and punishes victims of gender violence."[151]

Federal courts also recognize that labor organizing can constitute a political opinion, for example, in *Osorio v. I.N.S.* the Second Circuit stated that the respondent's:

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[147] *Castro v. Holder*, 597 F.3d 93, 106 (2d Cir. 2010).
[148] Proposed 8 CFR § 208.1(d); 8 CFR § 1208.1(d).
[149] 85 Fed. R. 36279.
[150] *Ahmed v. Keisler*, 504 F.3d 1183, 1193 (9th Cir. 2007) (finding that "[the applicant] has a definite political opinion—he believes that the Biharis are treated very poorly in Bangladesh and he wishes to leave Bangladesh for Pakistan."); *see also Regalado-Escobar v. Holder*, 717 F.3d 724, 729 (9th Cir. 2013) (finding that the BIA erred as a matter of law in not recognizing that a political opinion claim can be based on opposition to the use of violence by a political organization because "[w]hen a political organization has a pattern of committing violent acts in furtherance of, or to promote, its politics, such strategy is political in nature; it advances a political goal through certain means rather than others. Therefore, opposition to the strategy of using violence can constitute a political opinion that is a protected ground for asylum purposes."); *Nyamu v. Holder*, 490 F. App'x 39, 41 (9th Cir. 2012) (unpublished) ("The BIA also erred in finding that [the applicant] had not established that the persecution he suffered was 'on account of' his political opinion. [The applicant's] preaching and advocacy regarding the pollution caused by businesses in his region of Kenya clearly constituted a political opinion."); *Al-Saher v. I.N.S.*, 268 F.3d 1143, 1146 (9th Cir. 2001), *amended*, 355 F.3d 1140 (9th Cir. 2004) ("[The applicant's] statements regarding the unfair distribution of food in Iraq resulted in Iraqi officials imputing an anti-government political opinion to [the applicant.]")
[151] *Hernandez-Chacon v. Barr*, 948 F.3d 94, 102–03 (2d Cir. 2020) (internal quotation marks and citations omitted).

> activities clearly evince the political opinion that strikes by municipal workers should be legal and that workers should be given more rights….Consequently, the BIA decision incorrectly stands for the proposition that if a government persecutes a national or resident on account of such person's political beliefs, but the individual is a union organizer whose fame and mode of communication comes through the organization of a labor movement, the individual is not eligible for political asylum because such activity is predominantly economic, not political… This interpretation of the Act contradicts the plain meaning of the Act.[152]

Similarly, federal courts recognize that supporting a student organization may constitute a political opinion within in the meaning of the INA.[153] In *Ndonyi v. Mukasey*, the Seventh Circuit found past persecution on the basis of the applicant's political opinion, when the applicant had demonstrated with a student group against the University's discrimination of Anglophone students in Cameroon.[154] The court took error with the BIA's determination that "the demonstration was not political, and they were only protesting the University's discrimination," stating that "it is difficult…to understand how a large group protesting a pattern of discrimination targeted at a specific minority could be apolitical—to us such a demonstration epitomizes political speech."[155]

Federal courts recognize political opinions that arise in opposition to gang control or guerilla movements after the applicant faces extortion.[156] An individual may also hold a political opinion in opposition to a gang or guerilla group where they resist that group's efforts to recruit them.[157] For example, the Second Circuit, in holding the applicant who resisted becoming a FARC informant was persecuted on the basis of his anti-FARC political opinion, stated that "[t]o

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[152] *Osorio v. I.N.S.*, 18 F.3d 1017, 1030–31 (2d Cir. 1994); *see also Zhiqiang Hu v. Holder*, 652 F.3d 1011, 1017 (9th Cir. 2011) (finding that a "political opinion encompasses more than just participation in electoral politics or holding a formal political ideology" and that the applicant's "pro-labor position constituted a protected political opinion").

[153] *See, e.g., Sharma v. Holder*, 729 F.3d 407, 413 (5th Cir. 2013) (finding that the applicant's political opinion was expressed through his statements that he supported the Nepal Student Union, a student group opposed to the Maoists); *Ndonyi v. Mukasey*, 541 F.3d 702, 711 (7th Cir. 2008).

[154] *Ndonyi*, 541 F.3d at 711.

[155] *Id.*

[156] *See, e.g. Alvarez Lagos v. Barr*, 927 F.3d 236, 254–55 (4th Cir. 2019) (remanding to give full consideration to an imputed anti-gang political opinion claim when the applicant did not pay the gang and fled to the U.S.); *Gonzales-Neyra v. I.N.S.*, 122 F.3d 1293, 1296 (9th Cir. 1997), *amended*,133 F.3d 726 (9th Cir. 1998) (finding that the applicant established past persecution on account of his political opinion, which he had expressed through inquiring if the individuals collecting extortion payments were Shining Path guerrillas and telling them he would not pay extortion in the future because he "was not going to collaborate with a group that was trying to destroy [his] country.").

[157] *See, e.g. Espinosa-Cortez v. Attorney Gen. of U.S.*, 607 F.3d 101, 111–12 (3d Cir. 2010); *Martinez-Buendia v. Holder*, 616 F.3d 711, 716–17 (7th Cir. 2010) (holding that the applicant was persecuted on the basis of her imputed political opinion because it was clear that she refused to cooperate with the FARC because she politically opposed the FARC, and because of her refusal to cooperate the FARC viewed her as a political opponent); *Delgado v. Mukasey*, 508 F.3d 702, 707 (2d Cir. 2007) (remanding to consider the applicant's imputed political claim because although she was initially recruited to the FARC because of her computer skills, she believed "she would be targeted by the FARC in the future for betraying them, which, when coupled with the government's unwillingness to control the FARC, could well qualify as persecution for an imputed political opinion."); *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 992 (9th Cir. 2000) (finding "any reasonable factfinder would have to conclude that Petitioner suffered persecution, at least in part, due to this imputed political opinion," when the petitioner worked as a government employed teacher, which gave her a "'presumed affiliation' with the Guatemalan government-an entity the guerrillas oppose-is the functional equivalent of a conclusion that she holds a political opinion opposite to that of the guerrillas, whether or not she actually holds such an opinion.").

conclude, as the BIA did, that there was 'no political link to the FARC's threats,' would require either that one turn a blind eye to the factual circumstances surrounding the FARC's pursuit of [the applicant], or that one adopt an impermissibly narrow construction of the term 'political opinion.'"[158] In sum, the proposed rule's narrow definition of political opinion goes against the great weight of federal court authority regarding the broad contours of the political opinion ground.

4. The Proposed Rule Contains an Impermissible Definition of Expressive Behavior, Which Contradicts the INA

The proposed rule states that claims will not be adjudicated favorably where the political opinion claim is based on opposition to "criminal, terrorist, gang, guerilla, or other non-state organizations *absent expressive behavior* in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."[159] In the NPRM, expressive behavior is defined as "public behavior commonly associated with political activism," followed by a list of examples, but does not generally include activities such as "reporting a crime, or assisting law enforcement in an investigation."[160]

Nowhere does the plain language of INA § 208(b) suggest that the protected grounds must be expressed in any particular way. Furthermore, the statute states that political opinion, not political activity, is a protected ground,[161] which is in direct contrast to the proposed rule's language about "expressive behavior"[162] and the NPRM's list of political activities purportedly necessary to display a political opinion.[163] UNHCR Guidance regarding interpretation of the Protocol to which the refugee definition is meant to conform provides that:

> Expressing objections or taking a neutral or indifferent stance to the strategies, tactics or conduct of parties in situations of armed conflict and violence, or refusing to join, support, financially contribute to, take sides or otherwise conform to the norms and customs of the parties involved in the situation may—in the eyes of the persecutor—be considered critical of the political goals of the persecutor, or as deviating from the persecutor's religious or societal norms or practices….Persons pursuing certain trades, professions or occupations may be at risk for reasons of, for example, their real or perceived political opinion….[164]

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[158] *Espinosa-Cortez* at 111–12.
[159] Proposed 8 CFR § 208.1(d); 8 CFR § 1208.1(d) (emphasis added).
[160] 85 Fed. R. 36280.
[161] *See* INA § 208(b).
[162] Proposed 8 CFR § 208.1(d); 8 CFR § 1208.1(d).
[163] 85 Fed. R. 36280.
[164] UNHCR, *Guidelines on International Protection No. 12*, ¶ 37, U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016). As the UNHCR has noted in its Guidelines on Organized Gangs, "[a] refusal to give in to the demands of a gang is viewed by gangs as an act of betrayal and gangs typically impute anti-gang sentiment to the victim whether or not she voices actual gang opposition." UNHCR, *Guidance on Refugee Claims Relating to Victims of Organized Gangs*, ¶ 51 (March 2010).

Furthermore, the proposed rule's mandate that the asylum seeker must have engaged in expressive behavior is antithetical to the concept of an imputed political opinion[165] against a non-state organization such as a gang or guerilla group.[166] Additionally, this aspect of the proposed rule contravenes federal case law, which specifically recognizes political opinions against gangs and guerilla groups that are expressed or imputed to the applicant via means that fall outside of the NPRM's definition of expressive behavior.[167] More broadly, there is robust support for political opinion to take a wide range of expressions,[168] and there is no support in the statute for the

[165] *See Matter of S-P-*, 21 I. & N. Dec. 486, 489 (BIA 1996) (" Persecution for 'imputed' grounds (e.g., where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect) can satisfy the 'refugee" definition.'").

[166] *See, e.g. Silaya v. Mukasey*, 524 F.3d 1066, 1072 (9th Cir. 2008) (finding that substantial evidence compelled the conclusion that the applicant was persecuted by a communist rebel group on account of her imputed political opinion, which was imputed to her due to her relationship with her father who had government ties); *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 992 (9th Cir. 2000) (holding that petitioner suffered persecution on account of her imputed political opinion, which the guerillas had imputed to her because she was a government-employed teacher and stating that "[e]ach of the BIA's attempts to nullify the political overtones of Petitioner's experiences overlooks both the fact that she was affiliated with the government and the obvious inference that her continued teaching meant opposition to the guerrillas' goals.").

[167] *See, e.g., Martinez-Buendia v. Holder*, 616 F.3d 711, 716–17 (7th Cir. 2010) (holding that the FARC imputed an anti-FARC political opinion to the applicant because she refused to allow the FARC to take credit for her humanitarian work in the Health Brigades); *Mayorga-Esguerra v. Holder*, 409 Fed. Appx. 81, 83 (9th Cir. 2010) (unpublished) (noting that where rejection of membership in a guerilla organization "is understood by guerillas to be motivated by political objection to the rebels' cause, we have held many times that the persecution that results *is* 'on account of' political opinion.") (emphasis in original); *Rivas-Martinez v. I.N.S.*, 997 F.2d 1143, 1148 (5th Cir. 1993) (holding that guerillas may have persecuted an asylum applicant on account of her political opinion regardless of the fact that she gave non-political excuses for refusing to assist them, because the guerillas could learn of her political opposition through extraneous evidence, e.g., her working for the opposition, her utterances against the guerrillas, or the affiliation of her family members with the government). Courts have recognized that even neutrality may constitute a political opinion in certain circumstances. *See, e.g., Velasquez-Valencia v. I.N.S.*, 244 F.3d 48, 50 (1st Cir. 2001) ("'neutrality' could itself be a persecutable opinion"); *Novoa-Umania v. I.N.S.*, 896 F.2d 1, 3 (1st Cir. 1990) ("We assume, as the Board apparently did, that in appropriate circumstances "neutrality" may fall within the scope of the statute's words 'on account of ... political opinion.'").

[168] *See, e.g. Singh v. Barr*, 935 F.3d 822, 826 (9th Cir. 2019) (reiterating that whistleblowing "may constitute political activity sufficient to form the basis of persecution on account of political opinion"); *Zavala Meza v. Barr*, 773 Fed. Appx. 977, 977 (9th Cir. 2019) (unpublished) (holding that rejecting a job offer from a corrupt police department constituted "an anti-corruption political opinion"); *Khudaverdyan v. Holder*, 778 F.3d 1101, 1108 (9th Cir. 2015) (holding that perceived whistleblowing could be an imputed political opinion "if he or she shows that the persecutor *thought* that the applicant was attempting to expose corruption in a governing institution") (emphasis in original); *Mandebvu v. Holder*, 755 F.3d 417, 429 (6th Cir. 2014) (finding that a political opinion may be expressed affirmatively or negatively); *Perez-Ramirez v. Holder*, 648 F.3d 953, 957 (9th Cir. 2011), *overruled on other grounds by Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015) (finding that "the BIA erred in holding that petitioner did not qualify as a whistleblower because he did not expose the government corruption to an outside agency… Petitioner's exposure of the government corruption to his supervisor… and his refusal to accede to …corrupt demands, are acts that constitute political activity"); *Antonyan v. Holder*, 642 F.3d 1250, 1255 (9th Cir. 2011) (finding that "the record compels with conclusion that [the applicant] expressed a political opinion in her unsuccessful attempts to have [a criminal with corrupt government ties] prosecuted"); *Castro v. Holder*, 597 F.3d 93, 106-07 (2d Cir. 2010) (finding fundamental error in the BIA's determination that Guatemalan police officer who reported police corruption within the police ranks and to an international human right organization had not expressed a political opinion within the meaning of the Act); *Reyes-Guerrero v. I.N.S.*, 192 F.3d 1241, 1245–46 (9th Cir. 1999) (finding indisputable persecution based on political opinion and reversing BIA determination that threats were simply a case of "a prosecutor who was prosecuting" when "[t]he decision to prosecute and the retaliation for that decision were highly politically charged."); *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 485, 490 (1st Cir. 1994) (reversing BIA and IJ decision that applicant did not have a plausible political opinion claim because he was a rank and file member of a religious organization

proposed rule to require particular expressive behaviors for certain types of political opinion claims.

5. The Proposed Rule Reverses Course on the Agency's Previous Interpretation of Political Opinion and Endangers the Reliance Interests of Thousands of Individuals

When an agency changes its policy it must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."[169] The proposed rule's interpretation of political opinion as "political control of a state"[170] reverses course on the understanding of the political opinion ground as encompassing a wide range of political opinions. This change puts at risk serious reliance interests. There are 1,191,028 pending cases in U.S. immigration courts.[171] Thousands of these cases are individuals with pending political opinion asylum claims who made the decision to enter the United States and make their life here in reliance upon the likelihood of success of their claims under the previous agency policy and federal case law's understanding of political opinion. These individuals have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance"[172] on the statutory political opinion ground and body of case law recognizing a wide breadth of political opinions. The proposed rule frustrates the reliance interests of thousands of individuals who had plausible claims for relief on the basis of their political opinions with the previous understanding of political opinion, but who would have a much lower likelihood of obtaining relief under the proposed rule.

D. 8 CFR § 208.1(e); 8 CFR § 1208.1(e)—The Proposed Rule Would Narrowly Define Persecution, Impermissibly Altering the Accepted Definition

The definition of refugee in the INA centers on the applicant's "persecution or a well-founded fear of persecution" on account of a protected characteristic.[173] Persecution has never been defined by regulation and instead has developed through case law, as a result, the term has been interpreted flexibly based on the particular circumstances of the applicant.[174]

The proposed rule would codify an inflexible definition with its primary feature being "severity," using this word three times in a single sentence, "For purposes of evaluating the *severity* of the level of harm, persecution is an extreme concept involving a *severe* level of harm that

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focused on poverty relief, rather than a leader of the religious organization, because "[t]he record is replete with references to incidents of politically, socially or religiously motivated persecution of precisely the sort of non-prominent lay or volunteer workers, like Cordero, who carried out the missions for social change to which they or their organizations are committed.").

[169] *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2126 (2016) (internal quotation marks and citations omitted); *see also Department of Homeland Security et al. v. Regents of the University of California et al.* No. 18-587, slip op. at 23 (2020); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (stating that agencies should "take account of legitimate reliance on prior interpretation").

[170] Proposed 8 CFR § 208.1(d); 8 CFR § 1208.1(d).

[171] *See* TRAC Immigration Court Backlog Tool, *supra* note 19.

[172] *Department of Homeland Security et al. v. Regents of the University of California et al.* No. 18-587, slip op. at 24 (2020).

[173] INA § 101(a)(42).

[174] *See I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 449, 107 (1987) (emphasizing "flexibility" in the asylum standard).

includes actions so *severe* that they constitute an exigent threat."[175] CLINIC has grave concerns about the limitations imposed by this new definition and fears that many *bona fide* asylum seekers who cannot meet this heightened standard of "severity" would be denied despite having suffered or fearing significant harm.

1. The Proposed Rule's Definition of Persecution Improperly Limits Asylum Based on Threatened Harm

The proposed rule would explicitly exclude "threats with no actual effort to carry out the threats" from the definition of persecution.[176] But it does not explain what steps a persecutor would have to take to "carry out" the threat, nor does it explain what degree of harm a victim must endure before fleeing for safety.

In *I.N.S. v. Cardoza-Fonseca,* the U.S. Supreme Court provided the fundamental framework for the asylum well-founded fear standard. That case involved the applicant's fear of harm to herself based on the Nicaraguan government's mistreatment of her brother. In that case, the Supreme Court famously quoted 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966) to conclude:

> Let us ... presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp.... In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return.[177]

In its lengthy analysis of what constitutes a well-founded fear of future persecution, the Supreme Court never states that the applicant must wait for the persecutor to make an "effort to carry out the threat."

The NPRM acknowledges that many federal courts[178] have found persecution based on threats of harm but invokes *Brand X* stating cryptically, "The Departments' proposed rule would warrant re-evaluation in appropriate cases under well-established principles."[179] The regulations cannot write asylum protection out of the statute. The language requiring efforts to carry out the threat, particularly where the threatened harm is death, would mean that asylum seekers could not qualify unless the persecutor made a concrete effort toward killing them. As the Court of Appeals for the Sixth Circuit has recently held, "It cannot be that an applicant must wait until she is dead to show her government's inability to control her perpetrator."[180] Through these regulations the government seeks to impose a standard that conflicts with the Supreme Court's well-founded fear definition and would require asylum seekers' to remain in harm's way to qualify for relief.

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[175] Proposed 8 CFR § 208.1(e); 8 CFR § 1208.1(e). [emphasis added].
[176] *Id.*
[177] *Cardoza-Fonseca,* 480 U.S. at 431.
[178] *See* for example, *Tairou v. Whitaker*, 909 F.3d 702, 707–08 (4th Cir. 2018) ("the threat of death alone constitutes persecution").
[179] 85 Fed. R. 36281 at n. 32.
[180] *Juan Antonio v. Barr*, 959 F.3d. 778, 794 (6th Cir. 2020).

2. The Proposed Rule's Definition of Persecution Improperly Fails to Take Cumulative Harm into Effect

While emphasizing the required "severity" the harm must have to qualify as persecution, the proposed rule nowhere states that adjudicators must consider the cumulative harm experienced by the asylum seeker. Instead the rule states in its non-exhaustive list, that among other harms that do not qualify as persecution are "brief detentions" and "intermittent harassment."[181] Thus an adjudicator could deny asylum to an asylum seeker who has been detained repeatedly for months or years, if each detention is considered "brief" under this undefined standard.

This proposed rule contradicts federal court[182] and BIA precedent, which require adjudicators to consider cumulative harm. In *Matter of O-Z-*[183] the BIA analyzed harm that the applicant, a Jewish man from Ukraine, had suffered in the aggregate. While legacy Immigration and Naturalization Services argued that none of the harm the applicant suffered was sufficiently severe to constitute persecution, the BIA disagreed, finding that beatings, vandalism, and threats, taken together, did amount to persecution.[184] The proposed rules would likely lead to the denial of Mr. O-Z-'s case since no single incident of harm was "severe." Likewise, since there did not appear to be evidence in the record that the anti-Semitic threats he received in his home were coupled with "an actual effort to carry them out," it is likely that an adjudicator would discount the effect of these threats. Analyzing one of the few precedential agency decisions in which asylum was granted through the lens of these proposed rules, shows the proposed rules' extraordinary reach and how difficult it is to envision anyone qualifying for asylum.

In a recent decision by the Court of Appeals for the Third Circuit, the court chastised the BIA for failing to consider cumulative harm to the applicant, a political activist fleeing harm from Nicaragua's Sandinista government. The court stated, "Both the IJ and BIA failed to give the proper weight to the cumulative effect of Petitioner's experiences. The IJ's analysis began by considering the incidents one at a time and concluding that none of the incidents, standing alone, rose to the level of past persecution."[185] The proposed rule would allow adjudicators to engage in precisely this type of "one at a time" analysis without considering what the overall harm is when each incident is aggregated. The Third Circuit, in no uncertain terms, rejected this approach. "Even if the IJ was correct that no single incident in isolation rose to the level of past persecution, he was still required to analyze whether the cumulative effect of these incidents constituted a severe 'threat to life or freedom.'"[186] Likewise, in a decision by the Court of Appeals for the Fourth Circuit, the court remanded the case of a gay man from Benin who had been beaten and threatened repeatedly citing the BIA's failure to consider cumulative harm.[187]

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[181] Proposed 8 CFR § 208.1(e); 8 CFR § 1208.1(e).
[182] *See Herrera-Reyes v. Attorney Gen. of United States*, 952 F.3d 101, 109 (3d Cir. 2020) ("Even if the IJ was correct that no single incident in isolation rose to the level of past persecution, he was still required to analyze whether the cumulative effect of these incidents constituted a severe 'threat to life or freedom.'").
[183] *See Matter of O-Z- &I-Z-*, 22 I&N Dec. 23 (BIA 1998
[184] *Id.* at 26.
[185] *Herrera-Reyes v. Attorney Gen. of United States*, 952 F.3d 101, 109 (3d Cir. 2020).
[186] *Id.*
[187] *Tairou v. Whitaker*, 909 F.3d 702, 707 (4th Cir. 2018).

CLINIC's *Estamos Unidos* project staff have likewise seen the importance of assessing cumulative harm in asylum cases. For example, CLINIC worked with a 49-year-old Cuban asylum seeker currently in Juarez because of MPP while facing removal proceedings in the El Paso immigration court. He has suffered extensive, cumulative "minor harm" and should be granted protection under the current definition of persecution but might struggle to meet the new standard. This individual and his family have been targeted by the government for almost 20 years. His political views have resulted in being fired from his job in 2001, detained for a couple of days in 2006, fired from another job in 2014, as well as extensive other harm, where each individual incident to himself and his family could be characterized as "minor." As a result, he and his family were ostracized and could no longer continue to live in Cuba. This family is terrified of returning to Cuba, but would likely lose their application for asylum under the new rule.

The proposed regulation, as written, with no reference to aggregate or cumulative harm would allow persecutors to subject their victims to a lifetime of beatings, detentions, and threats, so long as no one incident could be characterized as "severe." This rule would contradict the protections guaranteed under the INA and must be rescinded.

3. The Proposed Rule's Definition of Persecution Improperly Fails to Instruct Adjudicators to Consider Persecution from the Perspective of Children or Other Vulnerable Asylum Seekers

While the proposed rule specifies types of harm that would not be considered sufficiently "severe" to meet the new definition of persecution, it does not instruct adjudicators to take into consideration specific vulnerabilities of particular asylum seekers, especially children. The Asylum Office has training materials specific to claims brought by children.[188] Citing numerous international law guidance including The Universal Declaration of Human Rights, Convention on the Rights of the Child, The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, and the United Nations High Commissioner for Refugees,[189] the training module gives guidance specific to adjudicating claims by children. Specifically, these training materials state, "The harm a child fears or has suffered may still qualify as persecution despite appearing to be relatively less than that necessary for an adult to establish persecution."[190]

Federal courts of appeals[191] have likewise underscored the different perception of harm by children and required the BIA to take children's special vulnerabilities into consideration. Thus, the Ninth Circuit has found that "[a]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution." [192] The Court of Appeals for the Seventh Circuit remanded the case of a child asylum seeker, reprimanding the BIA because:

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[188] *See* USCIS, *RAIO Directorate – Officer Training, Children's Claims* (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/files/nativedocuments/Childrens_Claims_LP_RAIO.pdf.
[189] *Id*. at 12-16.
[190] *Id.* at 44-45.
[191] *See Jorge-Tzoc v. Gonzales,* 435 F.3d 146, 150 (2d Cir. 2006) ("This combination of circumstances could well constitute persecution to a small child totally dependent on his family and community.").
[192] *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007).

> the BIA had an obligation to evaluate the impact of these actions on a child between the ages of eight and thirteen. It does not appear, however, that, in addressing the question of past persecution, the BIA considered Mr. Kholyavskiy's age at the time these events occurred—a factor that, we have noted, 'may bear heavily on the question of whether an applicant was persecuted.'[193]

Defining "persecution" for the first time, without any mention of the need to consider the specialized harm that children suffer would be a significant departure from established practice and lead to many children being returned to harm's way.

4. **The Proposed Rule's Definition of Persecution Improperly Discounts the Effects of the Criminalization of Protected Characteristics**

The proposed rule also specifies that adjudicators should not find persecution based on "government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally."[194] This rule would place a nearly impossible evidentiary burden on asylum seekers who fear their government because a protected characteristic has been criminalized.

For example, there are currently more than a dozen countries world-wide that impose the death penalty for same-sex, sexual relations.[195] It is likely that those penalties are "infrequently enforced" because sexual minorities in countries imposing the death penalty are likely to remain in the closet, hiding a fundamental part of themselves rather than risking death. The Court of Appeals for the Ninth Circuit has held that it would be impermissible for the U.S. government to force a gay man to hide who he is to life safely in his home country of Lebanon. The Court explained:

> even if there were a guarantee that Karouni would not be persecuted for his past homosexual acts, the Attorney General appears content with saddling Karouni with the Hobson's choice of returning to Lebanon and either (1) facing persecution for engaging in future homosexual acts or (2) living a life of celibacy. In our view, neither option is acceptable. As the Supreme Court has counseled, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." *Lawrence v. Texas,* 539 U.S. 558, 567, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).[196]

Under the proposed regulation, someone who feared even the death penalty based on a protected characteristic would bear an additional evidentiary burden of proving that their government is "likely" to enforce its law.

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[193] *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008).
[194] Proposed 8 CFR § 208.1(e); 8 CFR § 1208.1(e).
[195] Hristina Byrnes, *13 Countries Where Being Gay Is Legally Punishable by Death*, USA TODAY, June 14, 2019, https://www.usatoday.com/story/money/2019/06/14/countries-where-being-gay-is-legally-punishable-by-death/39574685/.
[196] *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

Asylum seekers who come from countries that criminalize same-sex activity or identity, or for other protected characteristics, may reasonably fear seeking police protection if they know the police could arrest them based on who they are. Laws criminalizing fundamental aspects of people's identities, understandably lead to distrust of the government and disbelief that the government values those individuals or will provide protection. The proposed rule requiring asylum seekers to ascertain whether they are individually likely to face prosecution under a particular law imposes an impossible burden on them and discounts conditions that may put them at risk. When considering this section of the proposed rule in combination with the section that prohibits evidence of cultural stereotypes,[197] it is unclear what types of evidence an asylum seeker could rely on to establish a well-founded fear of persecution.

E. 8 CFR § 208.1(f); 8 CFR § 1208.1(f)— The Proposed Rule Would Impose a Laundry List of Anti-Asylum Measures Under the Guise of "Nexus"

Some of the most restrictive aspects of the proposed rule are laid out in the section titled "Nexus." Rather than include a reasoned analysis of the meaning of "on account of" as laid out in the INA, the proposed rule provides a list of common fact patterns that it instructs adjudicators to usually deny based on "nexus" grounds.[198] In *Matter of A-B-*, the attorney general faulted the BIA for having relied on "concessions" by DHS in previous precedent requiring that the IJ engage in individualized analysis in each case.[199] The government cannot have its cake and eat it too. If it is wrong for an adjudicator to decide cases favorably because the facts are similar to those in precedential decisions, it cannot now write a rule instructing adjudicators to deny common fact patterns without engaging in the "rigorous" analysis required by *Matter of A-B-*.[200] The government's justification for issuing a list that would lead to blanket denials is that the new rules "would further the expeditious consideration of asylum and statutory withholding claims."[201] The proposed rules would continue to implement the administration's goals of speeding up proceedings.[202] Throughout the NPRM, the government emphasizes efficiency and expediency over fairness, due process, and basic humanity.

In justifying each of these blanket denial provisions, the NPRM cherry-picks a single case from different circuits to support its "conclusion." Beyond citing to this single case most of the blanket areas that would require denial have no explanation whatsoever. It is clear that the only goal of this section of the proposed rules is to give adjudicators a laundry list of reasons to swiftly deny applications.[203]

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[197] *See* section III F *supra*.
[198] *See* proposed 8 CFR § 208.1(f); 8 CFR § 1208.1(f).
[199] *Matter of A-B-,* 27 I&N Dec. 316, 333 (A.G. 2018).
[200] *Id.* at 340.
[201] 85 Fed. R. 36281.
[202] "Under the Trump administration, the attorney general has abused his power by instructing new judges to decide their cases in ways that further the Department of Justice's enforcement and deterrence goals, prioritizing speed over fair case-by-case adjudication." *See* SPLC, *Attorney General's Judges* at 18, *supra* note 77.
[203] As with the decisions issued by the attorney general under this administration that are designed to severely restrict asylum, the government is careful in the NPRM to allow for the "possibility" of granting asylum despite the regulations plain text that would appear to eliminate asylum in most instances. The NPRM states, "the regulation does not foreclose that, at least in rare circumstances, such facts could be the basis for finding nexus, given the fact-specific nature of this determination." 85 Fed. R. 36279. The attorney general decision in *Matter of A-B-* contains similar

1. The Proposed Regulation Would Improperly Require Denials of Asylum Based on "Interpersonal Animus or Retribution"

The proposed rule would generally require denials based on "interpersonal animus or retribution."[204] The NPRM reaches this sweeping conclusion based on citation to a single federal court of appeals case that is 12 years old.[205] That case involved a business deal gone bad that involved a member of the royal family in United Arab Emirates.[206] In that decision, the court upheld the finding that speech concerning a business deal did not amount to political speech simply because one of the actors in the deal was part of the royal family.[207] Extrapolating from the unusual facts of that case that neither "interpersonal animus" nor "retribution" can lead to a finding of nexus is arbitrary and irrational.

While CLINIC disagrees with the addition of this language to the rule at all, we are particularly concerned with the phrase, "(i) interpersonal animus or retribution." It is unclear from this phrase whether the word "interpersonal" is intended to modify only animus or also "retribution." The dictionary definition of "retribution" is "the dispensing or receiving of reward or punishment especially in the hereafter."[208] Under the newly proposed definition of persecution in these rules, persecution involves "an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control."[209] This targeting for severe harm, is clearly synonymous with "dispensing punishment." Therefore the proposed nexus rule, which states that nexus cannot be tied to "retribution," is confusing and contrary to the ordinary language use of the word.

Likewise, adding the word "interpersonal" to the nexus definition as a disqualifying factor also makes little sense. All harm from one person to another is "interpersonal."[210] It seems that the government's intent is to limit the ability to find nexus where there is private actor harm, but this would be contrary to the definition of persecution in the proposed regulations, which specifically recognizes that private actor harm can constitute persecution if the government is "unable or unwilling to control" the private actor.[211]

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qualifying language, 27 I&N Dec. 316, 317 (A.G. 2018)(stating "there may be exceptional circumstances when victims of private criminal activity could meet these requirements"), yet data analysis has shown that asylum grant rates have dropped following the decision. *See* Human Rights First, *Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees* at 3 (June 2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf.

[204] Proposed 8 CFR § 208.1(f)(i); 8 CFR § 1208.1(f)(i).

[205] *Zoarab v. Mukasey*, 524 F.3d 777 (6th Cir. 2008).

[206] *Id.*

[207] *Id.*

[208] *See* Meriam Webster Dictionary, https://www.merriam-webster.com/dictionary/retribution. (Note, the definition above is the second listed definition. The first definition, "recompense or reward" is clearly inapposite.)

[209] Proposed 8 CFR 208.1(e); 8 CFR 1208.1(e).

[210] *See* Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/interpersonal defining "interpersonal" as "being, relating to, or involving relations between persons."

[211] This language derives from the statutory refugee definition found at INA § 101(a)(42).

2. The Proposed Regulation Would Improperly Require Denials of Asylum if the Applicant Cannot Prove that Other Members of the Same Proposed PSG Suffered the Same Harm

The proposed rule then goes on to limit asylum further, stating that there is generally no nexus where "(ii) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue."[212] This element of the proposed rule would impose an impossible and arbitrary burden on an asylum seeker. If an asylum seeker is fleeing violence or potential death, it would be absurd to force that asylum seeker to investigate whether their persecutor has harmed other people. And there is no logical reason why this should matter; under the proposed rules, a persecutor would be given a "free pass" to persecute one person before the individual would have the ability to seek asylum. There is no rational basis to give persecutors this free pass.

Furthermore, this section of the rule is irrational in that it applies specifically to persecution based on particular social group membership. In *Matter of Acosta* the BIA applied the concept of *ejusdem generis* to conclude that words "of the same kind" should be construed similarly.[213] The attorney general cited this concept favorably in *Matter of L-E-A-*.[214] The NPRM does not articulate any reason, let alone a rational one, for why those claiming asylum based on membership in a PSG would be held to a completely different and higher evidentiary standard than those claiming asylum based on the other four protected characteristics. This provision is therefore irrational and should be withdrawn.

3. The Proposed Regulation Would Improperly Require Denials of Asylum in Cases That Do Not Involve an Applicant's Desire to Change Control Over the State

The proposed rule would further limit asylum based on an applicant's "[g]eneralized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state."[215] This section of the rule is clearly designed to eliminate asylum for those fleeing the international criminal organizations that have seized control of large swathes of the Northern Triangle of Central America. The rule disregards substantial evidence that in many parts of El Salvador, Honduras, and Guatemala, these "gangs" are acting as quasi-governments. Thus, in many instances there is no reason for the asylum seeker to engage in "expressive behavior that is antithetical to the state" because the state has no real authority.[216]

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[212] Proposed 8 CFR § 208.1(f)(ii); 8 CFR § 1208.1(f)(ii).
[213] *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).
[214] *Matter of L-E-A-,* 27 I&N Dec. 581, 592 (A.G. 2019).
[215] Proposed 8 CFR § 208.1(f)(iii); 8 CFR § 1208.1(f)(iii).
[216] *See* Paul J. Angelo, Council on Foreign Relations, *Why Can't Central America Curb Corruption?* (Feb. 6, 2020), https://www.cfr.org/in-brief/why-cant-central-america-curb-corruption.

Likewise, the next section of the proposed rule,[217] which would categorically deny asylum to those who resist recruitment, does not take into account the power held by the transnational criminal organizations that function as de facto governments.

4. The Proposed Regulation Would Improperly Require Denials of Asylum in Cases Where the Applicant Is Targeted for Financial Gain

The proposed rule would require adjudicators to deny asylum cases on nexus grounds based on "The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence."[218] To justify this sweeping exclusion, the NPRM again cites to a single federal Court of Appeals decision, *Aldana-Ramos v. Holder*.[219] However, in citing in passing to this decision, the government does not acknowledge that the primary holding of that decision is that even if a persecutor seeks to harm an asylum seeker for financial gain, the BIA must engage in a mixed motive analysis to determine whether the protected characteristic "was also a central reason for the persecution."[220] The Court of Appeals for the First Circuit therefore remanded *Aldana-Ramos v. Holder* because the BIA had impermissibly focused on the wealth of the applicant as a possible motivating factor for the persecutor. The First Circuit states:

> In either case, we are aware of no legal authority supporting the proposition that, if wealth is one reason for the alleged persecution of a family member, a protected ground—such as family membership—cannot be as well. To the contrary, the plain text of the statute, which allows an applicant to establish refugee status if the protected ground is "at least one central reason" for the persecution, clearly contemplates the possibility that multiple motivations can exist, and that the presence of a non-protected motivation does not render an applicant ineligible for refugee status.[221]

Through this proposed regulation, the government seeks to do exactly what the *Aldana-Ramos* decision states it should not have done in that case. And now the government relies on that decision as its sole justification to implement a blanket rule against asylum seekers who may be targeted, in part, based on wealth or perceived wealth, with no regulatory requirement that adjudicators engage in mixed motive analysis, as is required under the Real ID Act as codified in the INA.[222] This proposed rule is arbitrary and irrational and should be withdrawn.

5. The Proposed Regulation Would Improperly Require Denials of Asylum in Cases Where the Applicant Is Subjected to "Criminal Activity"

The proposed rule next states that there cannot be a nexus based on "criminal activity."[223] This proposed language, as written, is completely irrational. The types of harm that have been found to rise to the level of persecution in the past include murder, rape, and severe beatings. In

[217] Proposed 8 CFR § 208.1(f)(iv); 8 CFR § 1208.1(f)(iv).
[218] Proposed 8 CFR § 208.1(f)(v); 8 CFR § 1208.1(f)(v).
[219] *Aldana-Ramos v. Holder*, 757 F.3d 9 (1st Cir. 2014), as amended (Aug. 8, 2014).
[220] *Id.* at 18.
[221] *Id.* at 18-19.
[222] *See* INA §208(b)(1)(B)(i)
[223] Proposed 8 CFR § 208.1(f)(vi); 8 CFR § 1208.1(f)(vi).

most countries throughout the world, each of those harms is a crime. Finding that there is no nexus to a harm that can be defined as a "criminal activity" would leave virtually all asylum seekers who have experienced past harm without protection. This broad reading of the word "criminal activity" may not be what the government intended, but including sweeping language in the regulations without clarification would undoubtedly lead to mass denials of claims by those who have *bona fide* asylum claims.

Again, the NPRM cites to a single federal court of appeals case, *Zetino v. Holder,* to justify this extraordinarily broad ground to deny asylum claims. In that case, the asylum seeker was detained and unrepresented before the immigration court and the BIA.[224] It was not until he had filed a pro se petition for review that he obtained counsel, and most of his appeal centered on procedural defects in the proceedings below.[225] The NPRM provides no explanation for the need to implement a blanket rule, instead simply pulling a sentence fragment quotation from this decision, without further explanation, to justify the rule.[226] The government should withdraw the language of this section of the proposed rule, which could result in the denial of all asylum claims. At a minimum, the government should clarify that long-accepted forms of harm that are nearly always criminalized in the asylum seekers' countries of origin, cannot categorically be found to lack nexus to a protected characteristic.

6. The Proposed Regulation Would Improperly Require Denials of Asylum in Cases Where the Applicant Is Persecuted for Being Perceived as a Gang Member

The proposed rule would codify denials on nexus grounds for applicants who are wrongly perceived as being gang members.[227] Codifying the inability of someone who is perceived as a gang member to meet the nexus definition may result in twice victimizing asylum seekers. There is no rationale for denying asylum based on perceived gang membership, which, unlike actual gang membership, does not involve any wrongdoing on the part of the applicant.

7. The Proposed Regulation Would Improperly Require Denials of Asylum in Cases Based on Gender

The proposed rule would also virtually categorically eliminate gender as a ground for asylum, stating explicitly that "gender" cannot be considered a nexus to persecution.[228] Again, the NPRM provides no analysis as to why adjudicators must categorically find that there cannot be a nexus between gender and harm. The Departments again cite to a single, 15-year old federal circuit court decision, *Niang v. Gonzales,* in support of this radical change in the law.[229] While the government pulls a single phrase from that case expressing "concern" over the use of gender as a PSG, in fact that decision favored a more expansive view of nexus than was taken in *Matter of Kasinga.*[230] In *Niang,* the Tenth Circuit remanded the case for further proceedings, and explicitly

[224] *Zetino v. Holder*, 622 F.3d 1007 (9th Cir. 2010).
[225] *Id.* at 1011.
[226] 85 Fed. R. 36281. "("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground * * * .")"
[227] Proposed 8 CFR § 208.1(f)(vii); 8 CFR § 1208.1(f)(vii).
[228] Proposed 8 CFR § 208.1(f)(viii); 8 CFR § 1208.1(f)(viii).
[229] *Niang v. Gonzales*, 422 F.3d 1187, 1199–1200 (10th Cir. 2005).
[230] *Matter of Kasinga,* 21 I&N Dec. 357 (BIA 1996).

stated that for cases involving female genital mutilation "that opposition to FGM need not be proved to establish nexus."[231] Instead the Court of Appeals specified that it agreed with a Ninth Circuit decision[232] that it is not necessary for survivors of FGM to prove that they opposed the practice. Instead:

> We believe that opposition is not required in order to meet the "on account of" prong in female genital mutilation cases. The persecution at issue in these cases—the forcible, painful cutting of a female's body parts—is not a result of a woman's opposition to the practice but rather a result of her sex and her clan membership and/or nationality. That is, the shared characteristic that motivates the persecution is not opposition, but **the fact that the victims are female** in a culture that mutilates the genitalia of its females.[233]

Clearly women continue to be targeted around the world based solely on the fact that they are female. There is no rational basis to deny asylum because someone has been targeted on account of their gender.

By way of example, CLINIC's *Estamos Unidos* project in Ciudad Juarez recently assisted a 22-year-old woman from Guatemala whose primary language is Mam. The *Estamos Unidos* legal team helped her to prepare for a *pro se* hearing before the El Paso immigration court. In CLINIC's multiple consultations with her she shared a terrifying narrative about facing persecution because she is a woman and is seen as property of the MS-13 gang. Under the proposed rule, she would be categorically barred from prevailing on her asylum case because the reason she has been targeted is her gender. The government cannot simply publish a rule for the purpose of reducing the number of asylum seekers who would qualify for relief when so many of these claims are *bona fide*. This portion of the rule must be withdrawn. It is arbitrary to base a rule that would categorically deny protection based on gender on a case that reached the opposite conclusion.

8. The Proposed Regulation Improperly Fails to Include Any Requirement for Adjudicators to Engage in Mixed Motive Analysis

The proposed rule codifies nexus for the first time in the regulations. Yet, contrary to the statute,[234] the regulations do not require adjudicators to consider mixed motives in their nexus analysis and as such are *ultra vires*. The legislative history to the REAL ID Act that added the "one central reason" standard to the INA makes clear that, "Consistent with current law, this language allows for the possibility that a persecutor may have mixed motives. It does not require that the persecutor be motivated solely by the victim's possession of a protected characteristic."[235] Courts have affirmed that the statutory "one central reason" standard requires adjudicators to engage in a mixed motives analysis.[236]

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[231] *Niang* 422 F.3d at 1201.
[232] *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir.2005).
[233] *Niang v. Gonzales*, 422 F.3d at 1201, citing *Mohammed v. Gonzales* 400 F.3d at 797 n. 16. [Emphasis added].
[234] *See* INA § 208(b)(1)(B)(i) laying out the "one central reason" standard.
[235] 109th Congress, *Making Emergency Supplemental Appropriations For The Fiscal Year Ending September 30, 2005, and for Other Purposes, Conference Report,* at 163 (May 3, 2005), https://www.congress.gov/109/crpt/hrpt72/CRPT-109hrpt72.pdf#page=163.
[236] *See Singh v. Holder*, 764 F.3d 1153, 1162 (9th Cir. 2014).

CLINIC has grave concerns that adjudicators, motivated financially to complete cases quickly,[237] could seize on one factor from the regulations as grounds to deny asylum cases, rather than engaging in a nuanced mixed motives analysis as required by law. As written, an adjudicator could conclude that one aspect of the harm the applicant feared is precluded by the regulations, such as "criminal activity" and deny the claim without engaging in a searching analysis of the reasons for the criminal activity and whether the persecutor was motivated by one central reason to commit a crime against the applicant on account of a protected characteristic.

As discussed above, the nexus regulations should be withdraw in their entirety because they are ill-reasoned and do not contain any rational support in the rulemaking. Moreover, it is irrational for the government to codify the legal standard for nexus for the first time and not include the statutory language that requires adjudicators to consider mixed motives.

F. 8 CFR § 208.1(g); 8 CFR § 1208.1(g) —The Proposed Rule Would Exclude Evidence that Asylum Seekers Need to Support Their Claims

The proposed rule explicitly prohibits consideration of evidence based on "cultural stereotypes."[238] The rule itself does not define "cultural stereotypes" stating that "evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender, and offered to support the basis of an alleged fear of harm from the individual or country shall not be admissible in adjudicating that application."[239] In the NPRM, citing only to *Matter of A-B-*, the government refers to such evidence as "pernicious."[240] While the government seems to take offense that asylum seekers fleeing states that do not afford them protection would offer evidence about the cultural context for the harms they face, it fails to address what evidence would be admissible in court or before the asylum office. In fact, the U.S. Department of State Human Rights Report for Guatemala, the country of feared harm in *Matter of A-B-*, explicitly describes human rights concerns using the word "culture," including the statement, "**A culture of indifference** to detainee rights put the welfare of detainees at risk."[241] Later the DOS report states, "Participation of Women and Minorities . . . Traditional and **cultural practices**, in addition to discrimination and institutional bias, however, limited the political participation of women and members of indigenous groups."[242] And again, the report notes, "Indigenous

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[237] *See* Statement of Judge A. Ashley Tabaddor, President National Association of Immigration Judges Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System" at 8 (Apr. 18, 2018), https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf. ("A numeric quota or time-based deadline pits the judge's personal livelihood against the interests both the DHS and the respondent. Every decision will be tainted with the suspicion of either an actual or subconscious consideration by the judge of the impact his or her decision would have regarding whether or not he or she is able to fulfill a personal quota or a deadline.")

[238] 8 CFR § 208.1(g); 8 CFR § 1208.1(g).

[239] *Id.*

[240] 85 Fed. R. 36282.

[241] U.S. Department of State, 2019 Country Reports on Human Rights Practices – Guatemala, at 6, (Mar. 11,. 2020), https://www.state.gov/wp-content/uploads/2020/02/GUATEMALA-2019-HUMAN-RIGHTS-REPORT.pdf. [Emphasis added].

[242] *Id.* at 12. [Emphasis added].

communities were underrepresented in national politics and remained largely outside the political, economic, social, and **cultural mainstream**."[243]

The use of "cultural stereotypes" in the Department of State's own country conditions reports highlights the reality that it would be impossible to discuss conditions in any country without discussing its culture and without engaging in at least some stereotyping.[244] Asylum seekers must demonstrate both a subjective fear of harm and that the harm is objectively reasonable. To prove each of these elements it is not only appropriate but necessary for the asylum seeker to present evidence about conditions in their countries of origin. Additionally, asylum seekers claiming persecution based on membership in a particular social group must provide evidence as to why the proposed PSG is socially distinct within their society. This type of evidence could also include "cultural stereotypes," for example, that indigenous communities in Guatemala remain outside of mainstream culture there.

Throughout the proposed regulations, the government identifies unacceptable evidence and legal theories without providing examples of how asylum seekers can prove their cases or what fact types of claims could potentially succeed. Likewise, this sweeping prohibition on most forms of country conditions evidence (apparently even including parts of the Department of State Human Rights Reports) would make it close to impossible for asylum seekers to carry their burden of proof as much of the evidence they would need to prove their cases would be considered inadmissible under this new rule.

G. 8 CFR § 208.6; 8 CFR § 1208.6—The Proposed Rule Would Decimate Privacy Protections for Asylum Seekers

The proposed rule would allow the government greater ability to disclose confidential information from asylum seekers' applications to other government entities, potentially having a chilling effect on asylum seekers who fear that their confidential information would receive less protection than in the past. This proposed change appears linked to the government's overall view that asylum is a "loophole"[245] and would likely be used to needlessly expend further government resources on trying to find cases of fraud in the asylum system. Rather than use additional government resources to detect fraud when systems are already in place to verify the identity and check the background of asylum seekers, the administration should focus on adjudicating pending asylum applications to ensure that those fleeing persecution, either at the hands of their own government or because their government was unable or unwilling to provide protection, are not returned to harm by the U.S. government.

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[243] *Id.* at 22. [Emphasis added].

[244] The Merriam Website Dictionary defines stereotype as "something conforming to a fixed or general pattern." *See* https://www.merriam-webster.com/dictionary/stereotype. Note, this is the second definition for the noun, with the first definition "a plate cast from a printing surface," being irrelevant here.

[245] White House, *President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis*, (Apr. 29, 2019)https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/. ("The biggest loophole drawing illegal aliens to our borders is the use of fraudulent or meritless asylum claims to gain entry into our great country.").

H. 8 CFR § 208.13(b)(3); 1208.16; 8 CFR § 208.13(b)(3); 1208.16—The Proposed Rule Would Redefine the Internal Relocation Standard, Greatly Increasing the Burden on Those Seeking Protection

The proposed rule would unlawfully change the internal relocation analysis and place many asylum seekers with meritorious asylum claims in grave risk of harm. Under long-established law, the internal relocation analysis consists of two steps: (1) "whether an applicant could relocate safely," and if so (2) "whether it would be reasonable to require the applicant to do so." For an applicant to be able to safely relocate internally, "there must be an area of the country where he or she has no well-founded fear of persecution."[246] To determine the reasonableness of relocation, adjudicators must consider, *inter alia*: potential harm in the suggested relocation area, ongoing civil strife in the country, and social and cultural constraints.[247]

The NPRM lays out a standard for analyzing the reasonableness of internal relocation that almost no applicant for asylum, withholding of removal or CAT protection would be able to meet. Under the proposed rule, the adjudicator only assesses the safety of internal relocation based on a limited number of factors, which mostly pertain to the persecutor, and the adjudicator would not be required to assess the many other factors, in addition to lack of safety, that may make internal relocation unreasonable.[248] The new rule, without any legal justification, is a complete reversal from prior agency regulations and established legal precedent. Aspects of this proposed rule are legally unjustifiable at best and morally unacceptable at worst. Asylum applications must be adjudicated on a case-by-case basis, and the regulations should not suggest justifications to deny applications of *bona fide* asylum seekers.

Counter to decades of jurisprudence, the proposed rule would require the adjudicator to analyze the size of the country, the location, size, reach, or "numerosity" of the persecutor as well as the asylum applicant's ability to journey to the United States.[249] The proposed rule also implies that if an asylum seeker comes from a large country, or if the persecutor is only one person the applicant should be able to relocate internally. The clear implication of this language is that if an asylum seeker is able to travel to reach the United States, any testimony about the unreasonableness of relocating within their country of origin can be discounted because they were able to make a long journey in search of safety. This implied reasoning is nonsensical and no case has ever considered the ability to travel in its internal relocation analysis. The NPRM offers no reasoning[250] as to this element in the "totality of the circumstances" determination of internal relocation analysis, and it seems that the purpose of adding this factor is simply to give adjudicators grounds to deny virtually all asylum applications since, by definition, an asylum seeker must have traveled to the United States in order to seek asylum here.[251]

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[246] *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28, 33 (BIA 2012); *Afriyie v. Holder*, 613 F.3d 924, 934 (9th Cir. 2010); 8 CFR § 208.13(b)(1)(i)(B) & (b)(2)(ii); 8 C.F.R. § 1208.13(b)(1)(i)(B) & (b)(2)(ii).
[247] Proposed 8 C.F.R. § 208.13(b)(1)(i)(B); § 1208.13(b)(1)(i)(B).
[248] Proposed 8 CFR § 208.13(b)(3); 8 CFR § 1208.13(b)(3).
[249] *Id.*
[250] *See* 85 Fed. R. 36282.
[251] INA § 208(a)(1). ("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 and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum…").

By redefining the term "safety," the proposed rule would constrict the adjudicator's ability to perform a case-by-case analysis. Both the BIA and federal courts have analyzed this prong of the internal relocation test for years without the need for additional, more constricting guidance as in the proposed rule.[252] Moreover, to the extent regulations and case law do not offer guidance on the level of specificity required of the government in identifying a proposed relocation area once an asylum applicant has established past persecution, the proposed rule falls short as well.[253] The proposed rule does not require the adjudicator to consider specific cities or areas depending on the aspects each case. The proposed rule only prescribes a "one size fits all" analysis assuming the size of the country, location of the persecution (not the persecutor) and the geographic reach and "numerosity" of the persecutor would even aid adjudicators in determining the safety prong of the internal relocation analysis.

CLINIC is also extremely concerned that the proposed rule,[254] would completely delete the reasonableness analysis. Currently adjudicators must consider numerous factors, including, "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties."[255] The new rule would force adjudicators to make decisions in a vacuum ignoring the overall context of an asylum applicant's plight and dangerous conditions throughout the country, which may not be related to the asylum claim. The NPRM asserts that there is "unhelpful" language in the regulation, minimizing the need for the entire section.[256] The language in the existing regulation is not unhelpful or vague, as indicated in the NPRM, but instead offers adjudicators the tools and flexibility to approach the internal relocation analysis on a case by case basis.[257]The NPRM references the purportedly unhelpful language in the rule as a caveat, which "provide[s] little practical guidance for adjudicators considering issues of internal relocation raised by asylum claims."[258] Nothing could be further from the truth.

The BIA and the federal courts of appeals have nearly unanimously endorsed the language in the existing regulation. In *Matter of M-Z-M-R-,* the BIA concluded that "[f]or an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of persecution."[259] In other words, the circumstances must be "substantially better than those giving rise to a well-founded fear of persecution on the basis of the original claim."[260]

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[252] *Matter of M-Z-M-R-,* 26 I. & N. Dec. 28 (BIA 2012); *Doe v. AG of the United States*, 956 F.3d 135, 154 (3d Cir. 2020) ("Relocation is not reasonable if it requires a person to "liv[e] in hiding."); *Singh v. Sessions*, 898 F.3d 518, 522 (5th Cir. 2018) ("The case law is clear that an alien cannot be forced to live in hiding in order to avoid persecution."); *Agbor v. Gonzales*, 487 F.3d 499, 505 (7th Cir. 2007).

[253] *Singh v. Whitaker*, 914 F.3d 654, 660 (9th Cir. 2019) ("In numerous immigration cases however, DHS proposed specific cities or regions within the applicant's country of origin.") (Internal citations omitted).

[254] Proposed 8 CFR § 208.13(b)(3) and 8 CFR § 1208.13(b)(3),

[255] *Id*.

[256] *See* 85 Fed. R. 36282.

[257] The "unhelpful concluding caveats" are "factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 85 Fed. R. 36282.

[258] *Id.*

[259] *Matter of M-Z-M-R-,* 26 I&N Dec. 28, 33 (BIA 2012).

[260] *Id.*

The BIA remanded the case to the IJ to determine whether the risk of persecution to the respondent in another part of Sri Lanka, "falls below the well-founded fear level and whether that proposed area is practically, safely, and legally accessible to him" and if no, then whether it would even be reasonable for the applicant to internally relocate.[261] The BIA analyzed the regulations without mention of any "unhelpful" caveats, lacking of "practical guidance" or irrelevance of the reasonableness factors.[262]

Similarly, in *Antonio v. Barr*, the Sixth Circuit concluded that a domestic violence survivor of Mam Mayan ethnicity could not internally relocate.[263] In applying the reasonableness factors, the court concluded:

> [T]he record indicates that Maria's native language is that of the Mayan indigenous group, she wears Mayan clothing, and has lived in the Aldea Village her entire life, with the exception of her time in the United States. Maria has no formal education and she cannot read or write. Moreover, because Maria is unwilling to cede custody of her children to Juan, it is unclear by what sort of arrangement she might be bound if she returned to Guatemala. The government has not presented any evidence suggesting that she would be able to take her children to another part of Guatemala without fearing persecution by Juan or anyone he hired to harm her. Thus, considering all the circumstances, the Board's conclusion that the government showed by a preponderance of the evidence that Maria could internally relocate and that it would be reasonable to expect her to do so is not supported by substantial evidence on the record.[264]

Federal courts have offered important, consistent interpretation to the reasonableness standard, consistently deferring to the existing rules and finding them to be reasonable.[265] The language in the current regulation allows for the adjudicator to view every case individually in order to determine whether internal relocation is reasonable, but does not strictly prescribe all

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[261] *Id.* at 34.

[262] *Id.* at 35. ("As the Attorney General stated in regard to the regulation, the reasonableness language 'is nearly identical to the language used in the relevant section of the UNHCR Handbook, paragraph 91,' and 'is consistent' with the general standard for adjudicating well-founded fear claims." 65 Fed. R. at 76127 (Supplementary Information)).

[263] *Antonio v. Barr,* 959 F.3d 778 (6th Cir. 2020).

[264] *Id.* at 797.

[265] *See Hagi-Salad v. Ashcroft,* 359 F.3d 1044, 1049 (8th Cir. 2004) ("We likewise defer to the agency's ,reasonable interpretation of governing Department of Justice regulations." "("In other words, under § 208.13(b)(3), the internal relocation issue does not turn on the finding by the IJ and the BIA that Hagi-Salad does not reasonably fear countrywide clan-based persecution. Rather, the inquiry turns on whether relocation would be reasonable under a potentially broad range of relevant factors, including whether Hagi-Salad would face "other serious harm" in areas of Somalia where the Darood clan or his Majerteynia sub-clan are dominant."). *Id.* at 1048-1049. *See* also *Essohou v. Gonzales,* 471 F.3d 518 (4th Cir. 2006) (Relocation within the Republic of Congo was found unreasonable where petitioner relocated without being harmed, but was in hiding and in constant fear for her life); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214-15 (9th Cir. 2004) (remanding to the BIA the issue of reasonableness of internal relocation due to its failure to account for several factors outlined in 8 C.F.R. § 1208.13(b)(3)); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003) ("Given that Melkonian established a well-founded fear of future persecution at the hands of Abkhaz separatists, the IJ should have inquired whether the evidence presented by Melkonian established that it is unreasonable to expect him to relocate to another region within Georgia. The new regulations list, without limitation, some of the factors an IJ should consider when evaluating reasonableness…").

factors must be considered, unless they weigh against the applicant.[266] The NPRM provides absolutely no justification, case law, or published commentary as to why the regulation should no longer include a reasonableness determination the internal relocation analysis.[267] The NPRM does not cite to any examples or cases where courts or the BIA have held the regulatory text to be irrelevant, unhelpful, or lacking in practical guidance. In fact, the opposite is true, as many cases have been remanded to the agency precisely so that adjudicators could apply the reasonableness test to internal relocation scenarios.[268] In conclusion, the NPRM's reasoning behind changing the internal relocation analysis is flawed, unsupported, and lacking in forethought.

The proposed rule also changes burdens of proof for those who establish that they have already suffered persecution if the persecutor is deemed "non-governmental."[269] This change would be a radical departure from the established rule that if an asylum seeker establishes past persecution, regardless of whether the persecutor is a state actor, the asylum seeker is entitled to a presumption of a well-founded fear of future persecution.[270] Under current rules, the burden shifts in past persecution cases to DHS to prove the asylum applicant cannot internally relocate if the persecutor is a non-state actor, as the inability of internal relocation is presumed where the persecutor is a state actor.[271] This burden shifting is a critical part to the fairness of the asylum process.

First it is unfair, and unconscionable, to apply a presumption that internal relocation would be safe and reasonable where the persecutor is a non-state actor. Second, it is unfair to impose this greater evidentiary burden on asylum seekers who have already undergone persecution and proven that the government is unable or unwilling to protect them. The NPRM does not offer any justification for this additional evidentiary burden imposed on asylum seekers, who have already established past persecution.[272] Under the existing rules, the government can always offer information establishing that an asylum applicant could internally relocate and the asylum applicant must respond, there is no justification to change this long-established system of burden-shifting.

This extra burden is unnecessary and unfairly targets Central American and Mexican asylum seekers.[273] The proposed rule states that family members, neighbors, rogue officials (who

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[266] *Khattak v. Holder*, 704 F.3d 197, 207 (1st Cir. 2013) ("And while the IJ and BIA do not necessarily have to address each of the reasonableness factors explicitly, . . . the agency must explain why the factors that cut against the asylum applicant outweigh the factors in his favor.").
[267] *See* 85 Fed. R. 36282.
[268] *Singh v. Whitaker*, 914 F.3d 654, 661 (9th Cir. 2019) ("…the BIA must conduct a reasoned analysis with respect to a petitioner's individualized situation to determine whether… it is reasonable to relocate, considering the factors set forth in 8 C.F.R. § 1208.13(b)(3). Here, in determining Singh could safely and reasonably relocate "outside Punjab," the BIA failed to conduct such an individualized analysis, and we remand this claim to the BIA to determine anew whether relocation is appropriate for Singh.").
[269] Proposed 8 CFR § 208.13(3)(iv); 8 CFR § 1208.13(3)(iv).
[270] Current 8 C.F.R. § 208.13(b)(1); 8 C.F.R. § 1208.13(b)(1.
[271] Current 8 CFR § 208.13(b)(3)(ii; 8 CFR § 1208.13(b)(3)(ii).
[272] *See* 85 Fed. R. 36282.
[273] International Crisis Group (ICG), *Life Under Gang Rule in El Salvador*, (Dec. 26, 2018), https://www.refworld.org/docid/5c07a4f94.html; Human Rights Watch, *Why Families Flee Central America to the United States,* (June 25, 2018), https://www.refworld.org/docid/5b87de3a3.html; Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), 2018 Global Report on Internal Displacement -

normally work on behalf of cartels and gangs), and gang members who are not government officials, would be considered to be private non-state actors for purposes of the presumption for internal relocation.[274] Most of the listed "non-state actors" are prototypical persecutors in Central American or Mexican asylum case.[275] The asylum regulations have never specifically articulated characteristics of a persecutor with regard to the asylum definition. To the extent this section of the proposed rule attempts to aid in the "administrating [of] these provisions" by providing examples, this section would only cause confusion, delay, and inconsistency among adjudicators. Under the proposed rule, victims of gang or cartel members who operate with the acquiescence of the law enforcement, would have the presumed ability to *safely* relocate anywhere in their home country unless proven otherwise.[276]The NPRM does not offer any reasoning for the increased burden on asylum seekers. Furthermore, the inclusion of specific types of persecutors deemed "non-state actors" is a thinly veiled form of discrimination against Central American and Mexican asylum seekers.

I. 8 CFR § 208.13; 8 CFR § 1208.13—The Proposed Rule Would Impose a Laundry List of Anti-Asylum Measures Under the Guise of "Discretion"

Through a lengthy new section labeled "Discretion" the proposed rule would require adjudicators to consider factors irrelevant to the asylum application and exercise discretion to deny most asylum applications.[277] The establishment of regulations requiring near-mandatory discretionary denials by adjudicators is inconsistent with long-established precedent established by the BIA[278] and federal courts of appeals.[279]

After an asylum seeker has established statutory eligibility for asylum, an adjudicator must make a discretionary determination before granting asylum.[280] In *Matter of Pula,*[281] the BIA's seminal case on discretionary determinations within the context of asylum, the BIA held that adjudicators must balance both favorable and unfavorable factors and evaluate the "totality of the circumstances."[282] The BIA stated, "[t]he danger of persecution should generally outweigh all but

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Spotlight: Northern Triangle of Central America, (May 16, 2018), https://www.refworld.org/docid/5b28b7232.html; International Crisis Group (ICG), Saving Guatemala's Fight Against Crime and Impunity, (Oct. 24, 2018), https://www.refworld.org/docid/5be1adc64.html; UN High Commissioner for Refugees (UNHCR), UNHCR Submission for the Universal Periodic Review – Honduras – UPR 36th Session (2019), (Oct. 2019), https://www.refworld.org/docid/5e174937328.html.

[274] Proposed 8 CFR § 208.13(b)(3)(iv); 8 CFR § 1208.13(b)(3)(iv).

[275] Amelia Cheatham, Council on Foreign Relations, *Central America's Turbulent Northern Triangle: The U.S. Government Is Struggling to Respond to Another Large Wave of Migrants Fleeing Poverty, Violence, and Corruption in the Central American Region* (Oct. 1, 2019), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle; Wendy Fry, *Cartel Violence Drives Surge of Mexican Asylum-Seekers to Border Towns,* THE SAN DIEGO TRIBUNE, Nov. 11, 2019, t https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-11-11/mexican-asylum-seekers-waiting-in-line-behind-thousands-in-tijuana.

[276] Proposed 8 CFR § 208.13(b)(3)(iv); 8 CFR § 1208.13(b)(3)(iv).

[277] Proposed 8 CFR §§ 208.13(d); 1208.13(d).

[278] *See Matter of Marin,* 16 I&N Dec. 581, 584 (BIA 1978) (quoting *Matter of L-*, 3 I&N Dec. 767 (BIA 1949; A.G.1949)) (establishing the balancing test for discretionary determinations in waiver adjudications).

[279] *See, e.g.*, *Huang v. INS*, 436 F.3d 89, 97 (2d Cir. 2006).

[280] INA § 208(b)(1)(A).

[281] *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987).

[282] *Id.* at 473.

the most egregious of adverse factors."[283] In recognition of the compelling humanitarian factors in asylum cases, "the BIA has established—and federal courts have enforced—extensive limitations on an [immigration judge's] exercise of discretion in the context of asylum-eligible asylum seekers."[284] The BIA has likewise stressed the importance of context in other discretionary determinations, such as temporary protected status.[285]

The BIA has been clear that "there is no inflexible standard for determining who should be granted discretionary relief, and each case must be judged on its own merits."[286] Courts have recognized the "undesirability and 'difficulty, if not impossibility, of defining any standard in discretionary matters of this character.'"[287] This aversion to bright-line rules in discretionary determination extends to other discretionary forms of relief, such as waivers of inadmissibility grounds,[288] and is not limited to the asylum context. The new proposed codification of discretionary factors is incompatible with the principles of case-by-case review and balancing all of the equities, because it creates a standard that compels a negative discretionary determination in many, if not most, asylum cases.[289]

The proposed regulations provide two separate lists of discretionary factors that must be considered by adjudicators: (1) three significantly adverse factors,[290] and (2) nine adverse factors that would "ordinarily result" in the denial of as a matter of discretion.[291] The weight adjudicators must attribute to factors depends on which subsection the factors are located. The burden of proof on an asylum seeker differs based on the subsection as well.

Three "significant adverse factors"

The proposed rule would codify three specific non-exhaustive factors that adjudicators must consider when determining whether an asylum seeker warrants a favorable exercise of discretion:

[283] *Id.* at 474.
[284] *Huang*, 436 F.3d at 97 (collecting cases from federal circuit courts and the BIA). *See also Patpanathan v. Att'y Gen.,* 553 F. App'x 261, 265–66 (3d Cir. 2014) (unpublished) ("In the asylum context, 'discretion' does not mean 'unfettered discretion.'").
[285] *Matter of D-A-C-*, 27 I&N Dec. 575, 578 (BIA 2019) (establishing that the adverse conditions of an applicant's home country should be considered in discretionary determinations "since the purpose of TPS is to provide protection based on adverse conditions in an alien's home country").
[286] *Id.* at 577 (citing *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998)).
[287] *Zuh v. Mukasey*, 547 F.3d 504, 511 (4th Cir. 2008) (quoting *Matter of Marin,* 16 I&N Dec. 581, 584 (BIA 1978)).
[288] *Matter of Edwards,* 20 I&N Dec. 191, 195 (BIA 1990) ("The exercise of discretion in a particular case necessarily requires consideration of all the facts and circumstances involved.") (discussing discretionary determinations on 212(c) waivers).
[289] *See INS v. Yueh-Shaio Yang*, 519 U.S. 26, 31(1996) (stating that a narrow application of discretion by the Attorney General brings up the possibility that the Attorney General is "not exercising the conferred discretion at all, but . . . making a nullity of the statute").
[290] Proposed 8 CFR § 208.13(d)(1); § 1208.13(d)(1).
[291] 85 Fed. R. at 36284–85, 36293–94, 36302; proposed 8 CFR § 208.13(d)(2); § 1208.13(d)(2).

1. "unlawful entry or unlawful attempted entry into the United States *unless* such entry or attempted entry was made in *immediate* flight from persecution in a contiguous country"[292]
2. "failure . . .to apply for protection from persecution or torture in at least one country . . .through which the alien transited before entering the United States"[293] with limited exceptions; and
3. "use of fraudulent documents to enter the United States, *unless* the alien arrived in the United States by air, sea, or land directly from the applicant's home country *without* transiting through any other country."[294]

The proposed regulations label these three factors as "significant adverse discretionary factors"[295] and would require adjudicators to consider all three significantly adverse factors in each adjudication.[296] The NPRM states that while the presence of one of the three factors is significantly adverse, adjudicators should also consider any other relevant facts and circumstances in making a discretionary determination.[297] The NPRM claims that listing these factors in a regulation would ensure that adjudicators properly consider, in all cases, whether asylum seekers merit asylum as a matter of discretion.[298]

In explaining its reasoning and new procedures, the NPRM simultaneously cherry-picks language from *Matter of Pula* to justify its focus on specific factors *and* overrules *Pula's* principal holding—discretionary determinations in asylum cases must carefully consider the totality of the circumstances on a case-by-case basis, and "[t]he danger of persecution should generally outweigh all but the most egregious of adverse factors."[299] The NPRM disregards BIA's reasoning in *Pula* and thereby irrationally fails to consider "an important aspect of the problem."[300]

1. The Proposed Regulation Would Improperly Result in Denials of Asylum Applications for Asylum Seekers Who Enter Between Ports of Entry

The proposed rule would result in adjudicators denying asylum to most asylum seekers who enter the United States between ports of entry. [301] The NPRM selectively quotes from *Pula* to justify the inclusion of unlawful entry, also known as "entry without inspection,"[302] as a significant adverse factor and as support for the assertion that manner of entry is a longstanding factor in considerations of discretion.[303] However, classifying unlawful entry as a significantly adverse

[292] Proposed 8 CFR § 208.13(d)(1)(i); § 1208.13(d)(1)(i) (emphases added).
[293] Proposed 8 CFR § 208.13(d)(1)(ii), § 1208.13(d)(1)(ii).
[294] Proposed 8 CFR § 208.13(d)(1)(iii); § 1208.13(d)(1)(iii) (emphases added).
[295] 85 Fed. R.at 36293, 36301–02; proposed 8 CFR § 208.13(d)(1); § 1208.13(d)(1).
[296] 85 Fed. R. at 36283.
[297] *Id.*
[298] *Id.*
[299] *Matter of Pula,* 19 I&N Dec. at 474.
[300] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[301] 85 Fed. R. 36293, 36301–02; proposed 8 CFR § 208.13(d)(1)(i); § 1208.13(d)(1)(i).
[302] INA § 212(a)(6)(A).
[303] 85 Fed. R. at 36283. (omitting the words not underlined in the following: "Yet while we find that an alien's manner of entry or attempted entry is a proper and relevant discretionary factor to consider in adjudicating asylum applications, we agree with the applicant that *Matter of Salim*, supra, places too much emphasis on the circumvention of orderly refugee procedures. This circumvention can be a serious adverse factor, but it should not be considered in such a way

factor in discretionary determinations is fundamentally incompatible with the holding of *Pula*. In *Matter of Pula*, the BIA overruled *Matter of Salim*[304] because it accorded an applicant's manner of entry so much weight that the practical effect was to deny relief in virtually all cases.[305] Specifically, the BIA reversed *Salim* "insofar as it suggests that the circumvention of orderly procedures alone is sufficient to require the most unusual showing of countervailing equities."[306] Additionally, federal courts of appeals have recognized the particular hardships and fears faced by asylum seekers fleeing persecution, stating "it would be anomalous for an asylum seeker's means of entry to render him ineligible for a favorable exercise of discretion."[307] Thus, courts have noted adjudicators have given manner of entry "little to no weight" in discretionary determinations.[308] In fact, courts have found that "circumvention of procedures is insufficient to require the unusual showing of countervailing equities."[309] The Second Circuit has stated, "[I]f illegal manner of flight and entry were enough independently to support a denial of asylum, we can readily take notice, from the facts in numerous asylum cases that come before us, that virtually no persecuted refugee would obtain asylum."[310] The NPRM's determination that an asylum seeker's manner of entry should be afforded significant adverse weight is contrary to precedent.

The codification of unlawful entry as a significantly adverse factor in discretionary determinations also contradicts recent federal court decisions striking down similar regulations by the agencies. In November 2018, the Departments of Justice and Homeland Security adopted an interim final rule, which, coupled with a presidential proclamation issued the same day, stripped asylum eligibility from every individual who crossed into the United States between designated ports of entry.[311] The Ninth Circuit Court of Appeals[312] and the District Court for the District of Columbia (D.C.)[313] found that this categorical bar was inconsistent with the INA and contrary to the intent of Congress.[314] The District Court for D.C. held that the bar exceeded "the authority that Congress conferred on the [Departments] to 'establish additional limitations and conditions' on asylum that are 'consistent with' [INA § 208, INA § 208(b)(2)(C)]" and, thus, the rule was "'not in accordance with law' and 'in excess of statutory . . . authority.'"[315] The Ninth Circuit found the rule an arbitrary and capricious interpretation of the statute and an infringement upon treaty commitments.[316] The NPRM does not address how the purpose of INA § 208(a) is effectuated by

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that the practical effect is to deny relief in virtually all cases. This factor is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case.") (*Matter of Pula*, 19 I&N Dec. at 473).

[304] *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982).

[305] *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987) (overruling *Matter of Salim*).

[306] *Id.* at 473.

[307] *Gulla v. Gonzales*, 498 F.3d 911, 917 (9th Cir. 2007). *See also E. Bay Sanctuary Covenant v. Trump,* 950 F.3d 1242, 1274 (9th Cir. 2020) ("The most vulnerable refugees are perhaps those fleeing across the border through the point physically closest to them."); *Hussam F. v. Sessions,* 897 F.3d 707, 718 (6th Cir. 2018) (unpublished) ("[A]lthough the BIA may consider an alien's failure to comply with established immigration procedures, it may not do so to the practical exclusion of all other factors.").

[308] *Zuh v. Mukasey*, 547 F.3d 504, 511 n. 4 (4th Cir. 2008).

[309] *Gulla*, 498 F.3d at 917.

[310] *Huang v. INS*, 436 F.3d 89, 100 (2d Cir. 2006).

[311] *E. Bay Sanctuary Covenant*, 950 F.3d at 1259.

[312] *Id.*

[313] *O.A. v. Trump*, 404 F.Supp.3d 109, 147 (D.D.C. 2019).

[314] *See E. Bay Sanctuary Covenant*, 950 F.3d at 1272; *O.A.*, 404 F.Supp.3d at 150.

[315] *O.A.*, 404 F.Supp.3d at 151 (quoting 5 U.S.C. § 706(2)(A), (C)).

[316] *E. Bay Sanctuary Covenant*, 950 F.3d at 1277 (9th Cir. 2020) ("[T]he the Rule

inclusion of unlawful entry as a significant adverse discretionary factor. Instead the Departments appear to seek a way around the courts' decisions that "Asylum Ban 1.0" is unlawful by injecting the same rule into the adjudicators' discretionary analysis.

The NPRM justifies codifying unlawful entry as a significant adverse discretionary factor because of the "significant strain on . . . resources" required to adjudicate the "growing number" of applications submitted by asylum seekers.[317] Expediency is an inappropriate consideration when making a determination that would dictate the relief available to an asylum seeker. Additionally, "even if there was evidence of thousands of others seeking asylum, all refugees who have clear evidence of significant persecution and abuse should be eligible for asylum. Hypothetical numbers of potential asylum applicants is not a basis for denying relief to someone who has a demonstrated valid claim."[318] While unlawful entry is a federal misdemeanor,[319] "it is not ordinarily considered a serious crime."[320] Penalizing an asylum seeker for their manner of entry "would limit asylum to refugees from nations contiguous to the United States or to those wealthy enough to afford to fly here in search of refuge. The international obligation our nation agreed to share when we enacted the Refugee Convention into law knows no such limits."[321] Finally, the fact that an asylum seeker "crosses a land border instead of a port-of-entry says little about the ultimate merits" of their asylum application.[322] The proposed regulation would invalidate over thirty years of case law and "would have the practical effect" [323] of leading adjudicators to deny relief in virtually all asylum cases brought by asylum seekers who entered unlawfully.

2. The Proposed Regulation Would Improperly Result in Denials of Asylum Applications for Those Who Travel Through Third Countries

The proposed rule would result in adjudicators denying asylum to most asylum seekers who travel through third countries and do not apply for protection in at least one transit country.[324] The asylum seeker would not be penalized if they (1) received final judgement denying protection in such country; (2) are able to meet the definition of "victim of severe form or trafficking persons;"[325] or (3) the transit countries were not parties to the Convention.[326]

The NPRM claims that the failure to seek asylum protection in at least one transit country while *en route* to the United States "may reflect an increased likelihood" that the asylum seeker is "misusing the asylum system as a mechanism to enter and remain in the United States rather than

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flouts this court's and the BIA's discretionary, individualized treatment of refugees' methods of entry, and infringes upon treaty commitments we have stood by for over fifty years.").

[317] 85 Fed. R. at 3283.

[318] *Gulla v. Gonzales*, 498 F.3d 911, 919 (9th Cir. 2007).

[319] 85 Fed. R. at 36283.

[320] *E. Bay Sanctuary Covenant*, 950 F.3d at 1276 (9th Cir. 2020) (citing to *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968), which states that "the statute criminalizing entry into the United States 'is not based on any common law crime, but is a regulatory statute enacted to assist in the control of unlawful immigration by aliens' and 'is a typical mala prohibita offense'").

[321] *Ali v. Ashcroft*, 394 F.3d 780, 790 (9th Cir. 2005).

[322] *E. Bay Sanctuary Covenant*, 950 F.3d at 1274 (9th Cir. 2020).

[323] *Id.* at 1273 (9th Cir. 2020) (citing *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

[324] 85 Fed. R. at 36293, 36302; proposed 8 CFR § 208.13(d)(1)(ii), § 1208.13(d)(1)(ii).

[325] Proposed 8 CFR § 214.11; 8 CFR § 1214.11.

[326] *Id.*

legitimately seeking urgent protection."[327] This claim is based on the faulty premise that there is a real opportunity to seek asylum in all countries party to the Convention and "that legitimate asylum seekers can reasonably be expected to apply for protection there."[328] Even though many asylum seekers from the Northern Triangle have transited through third countries before arriving to the United States,[329] the NPRM fails to consider the inadequate asylum systems in Mexico, Guatemala, Honduras, and El Salvador.[330]

Mexico's asylum system "is restrictive, severely underfunded and underdeveloped, and faces significant staffing and infrastructure limitations."[331] In June 2019, the Guatemalan Institute for Migration "had not processed any asylum cases in more than a year."[332] Furthermore, Guatemala's Office of International Migration Relations, a specialized unit for the processing of asylum claims, had "a staff of three caseworkers, three investigators, and one supervisor."[333] Honduras's asylum system has been described as "nascent."[334] In fact, from January 2008 to July 2019, "only 299 requests for asylum were registered with the Honduran National Institute for Migration, and only 50 were recognized as refugees."[335] El Salvador's asylum system is also underdeveloped and its President has acknowledged that the country does not have "asylum capacities."[336] Along with rudimentary asylum systems, asylum seekers in Mexico and the Northern Triangle face targeted violence at the hands of government and transnational criminal organizations.[337]

It is disingenuous to expect those fleeing violence from Central America's Northern Triangle to seek "safety" by applying for asylum in one of the countries through which they travel en route to the United States. The United States currently cautions U.S. citizens to reconsider

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[327] 85 Fed. Reg at 36283.

[328] *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2020 WL 3637585, at *21 (9th Cir. July 6, 2020) (Miller J., concurring in part).

[329] Cong. Research Serv., R45489, *Recent Migration to the United States from Central America: Frequently Asked Questions* 1 (2019), https://fas.org/sgp/crs/row/R45489.pdf.

[330] Refugees International, *Comment Letter on Proposed Rule to Implement Asylum Cooperative Agreements Under The Immigration And Nationality Act* (Nov. 19, 2019), https://www.refugeesinternational.org/reports/2019/12/23/refugees-international-opposes-asylum-cooperative-agreements-with-guatemala-el-salvador-and-honduras.

[331] Dan Kosten, National Immigration Forum, *Mexico's Asylum System Is Inadequate*, (Oct. 28, 2019), https://immigrationforum.org/article/mexicos-asylum-system-is-inadequate/.

[332] Human Rights Watch, *Deportation with a Layover* (May 19, 2020), https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative (finding that Guatemala "has a cumbersome and ineffectual asylum system and fails to ensure adequate social support while asylum seekers' claims are pending.").

[333] *Id.*

[334] Human Rights First, *Is Honduras Safe for Refugees and Asylum Seekers?* (May 2020), https://www.humanrightsfirst.org/sites/default/files/IsHondurasSafeforRefugeesandAsylumSeekersFINAL.pdf. [hereinafter "HRF, *Is Honduras Safe?*"].

[335] *Id.*

[336] Sharyn Alfonsi, *El Salvador's President on the Problems Facing His Country,* CBS NEWS (Dec. 15, 2019), https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/.

[337] *See E. Bay Sanctuary Covenant v. Barr,* No. 19-16487, 2020 WL 3637585, at *21 (9th Cir. July 6, 2020) (Miller J., concurring in part) (noting that "[t]orture is inflicted by governmental security actors, while criminal organizations inflict extreme degrees of violence on these already vulnerable populations"). *See also* HRF, *Is Honduras Safe*, *supra* note 334 ("In 2019, two Nicaraguan refugees were among those murdered in Honduras; other Nicaraguan asylum seekers have reportedly been tracked by persecutors and killed in Honduras.").

traveling to El Salvador, Honduras, or Guatemala because of violent crime in those countries and the governments' inability to provide protection.[338] Likewise, the United States has given its highest warning against travel—Level 4, Do Not Travel—to five Mexican states, with another 11 states carrying a "reconsider travel" warning and the remaining 16 states carrying an "exercise increased caution" warning.[339] These travel warnings mean that conditions in several Mexican states are comparably dangerous to those in Syria[340] and Iraq.[341]

CLINIC's *Estamos Unidos* project staff has heard first-hand of the extreme dangers that asylum seekers face in Mexico as they are forced to await their U.S. immigration hearings there. For example, a 50-year-old Venezuelan woman became visibly upset when CLINIC staff asked about her experience in Mexico. She had already requested a fear interview with U.S. immigration authorities in November. Despite telling them about the xenophobic treatment and assaults she experienced in Mexico, she was returned to Ciudad Juarez. She expressed fear of being in Mexico because she, like many, was targeted for being a foreigner. Since she was returned to Mexico, she was targeted by local law enforcement as she asked for directions to a market in downtown Ciudad Juarez. The officers heard her accent, identified her as a foreigner and requested to see her permit to be in Mexico. She was calm and confident that she had everything in order. She showed them her papers proving her legal status in Mexico, and they accused her of having false documents. They threatened to detain her unless she paid them. She did not have the money they demanded. The two local police officers in broad daylight forced her onto their official truck and told her to provide payment in-kind, and sexually assaulted her. She tried to fight but could not; after some time, she started vomiting and the officers pushed her out. She has no faith that the Mexican government would give fair consideration to an asylum application nor would she feel safe remaining in Mexico even if she were granted permanent status there.

CLINIC's *Estamos Unidos* project worked with another young woman fleeing from El Salvador who arrived in Chihuahua, Mexico, in August 2019 and was kidnapped before making it to the U.S. border. She was kept locked up in a warehouse for a month. Those responsible beat her until she gave them her father's phone number, who paid the ransom. After weeks, she was dumped in a ditch near the Rio Grande. It took all her might to walk, as she had no idea where she was. Men on horseback helped her. She later realized they were U.S. officials. They asked her what

[338] The U.S. Department of State has the same warning regarding all three Northern Triangle countries "Violent crime, such as homicide and armed robbery, is common. Violent gang activity, such as extortion, violent street crime, rape, and narcotics and human trafficking, is widespread. Local police and emergency services lack the resources to respond effectively to serious crime." Honduras and El Salvador have "reconsider travel" warnings while Guatemala has an "exercise increased caution" warning generally, and a "reconsider travel" warning for six departments, including the most populous one. *See* U.S. Department of State, Honduras Travel Advisory (June 24, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/honduras-travel-advisory.html; U.S. Department of State, El Salvador Travel Advisory (Jan. 29, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/el-salvador-travel-advisory.html; U.S. Department of State, Guatemala Travel Advisory (Feb. 28, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/guatemala-travel-advisory.html.

[339] U.S. Department of State, Mexico Travel Advisory, (Dec. 17, 2019) ,https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

[340] U.S. Department of State, Syria Travel Advisory, (Nov. 4, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/syria-travel-advisory.html.

[341] U.S. Department of State, Iraq Travel Advisory, (Mar. 26, 2020), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/iraq-travel-advisory.html.

happened to her, and she explained. They asked her questions about herself and handed her papers she did not understand. After a couple of days, she was told by one of the officers to come back on the date the paper said and to tell her story when she came back. U.S. immigration authorities returned her to Ciudad Juarez under MPP. Esperanza was returned after dark and with nowhere to go, leaving her vulnerable to the violence and insecurity from which she had just escaped. She was kidnapped a second time. This time there were three other women and two children with her. Her father was again contacted in Guatemala, but he was not able to pay. Tears streamed down her face as she told them her family had nothing to exchange for her release… for her life. The perpetrators forced her to repeatedly watch a video of a woman being tortured. she believed she was going to end up the same. Fortunately for her, a woman helped her escape, however, she has no reason to believe that she could remain safely in Mexico even if she were granted permanent status there.

CLINIC's *Estamos Unidos* staff have also worked with a young woman from Guatemala who is seeking asylum in the United States and has been subjected to MPP. She is a survivor of gender-based violence who fled gang violence with her mother and younger brother. She suffers from frequent nightmares and night sweats. Though she started receiving some psychological support at the shelter where she was staying, a gang member from Guatemala recently approached her and threatened her, plunging her back into a state of constant fear. The gang member threatened to "make her suffer" if she told anyone he was in a gang. She was brave and told someone about the threats, and the gang member was eventually removed from the shelter but now she lives in constant fear that the gang would seek her out in Mexico, and she has no faith that the Mexican police would be able to protect her.

In another example, CLINIC's staff worked with an elderly woman who fled her home country in Central America due to gang violence. On her journey north, she was kidnapped by a cartel in Mexico. Her family was able to pay her ransom, but money did not save her from the beatings and assault. The men took all her documents and her cellphone, along with all her personal information. She was placed under MPP in December 2019, her family members were contacted and told she was detained in the United States and on her way out, which was a lie. When the family became suspicious and confronted the caller, the man openly identified himself as the one responsible for her previous kidnapping. He knew exactly where she was in Mexico and threatened to harm her if he did not receive the sum of money he demanded. She is terrified of remaining in Mexico and fears that even if she were to be granted asylum there, she would not be safe.

Similarly, CLINIC's *Estamos Unidos* staff worked with a Honduran woman who fled gang-based violence along with her teenage daughter. She was a teacher for more than 15 years. Gang members had threatened to harm her and her colleagues many times at school. The threats and attacks against her colleagues became so severe that most teachers requested extended leaves and moved to other places to keep safe. The threats reached a tipping point when they were no longer directed at her, but at her teenage daughter. The family decided to flee so she and her daughter traveled to seek protection in the United States. However, once they entered the United States, CBP officials placed them under MPP and returned them to Ciudad Juarez, Mexico, to wait for their initial master calendar hearing in January 2020. In Ciudad Juarez, members of organized crime kidnapped the mother and daughter for five days and six nights. They were forced to stay in

a small room in a house where people came and went, music always played loudly and drugs were strewn in plain sight. The daughter remembers seeing a man snorting white powder. She said she saw very bad things — things she never had imagined before. They were able to escape, but had nowhere to go or any idea where they were. They crawled through desert-like empty lots and hid in a ditch before reaching a public area where they sought help. They are now staying in a shelter, but rarely leave out of fear that they could be kidnapped again. They do not know what would become of them — but understand that they are easy prey and never safe while being stuck in Mexico.

These are just a few examples of the daily horror stories CLINIC's staff in Ciudad Juarez hear from those who are trying to find safety in the United States but, instead, are stuck in one of the most dangerous cities in Mexico. These U.S. asylum seekers do not seek asylum in Mexico because they live in fear every day they must remain in Mexico, knowing the possibility that they will be kidnapped, held for ransom, or assaulted because they are clearly not from Mexico. Denying asylum seekers to those who travel through Mexico based on their not having sought asylum in that country, makes a mockery of the U.S. asylum system. The proposed rule is designed to force adjudicators to deny asylum to *bona fide* asylum seekers.

The exceptions outlined in the NPRM are identical to the July 16, 2019, interim final rule,[342] which categorically denied asylum to asylum seekers arriving at the southern border unless they had first applied for, and have been denied, asylum in Mexico or another country through which they have traveled.[343] On July 6, 2020, the Ninth Circuit Court of Appeals held that this rule was inconsistent with the statute and arbitrary and capricious.[344] Specifically, the Court found that the rule:

> [I]gnores a long line of cases holding that aliens are not required to apply for asylum in countries they pass through on their way to the United States; ignores the fact that a preference for asylum in the United States rather than Mexico or Guatemala is irrelevant to the merits of an alien's asylum claim; and ignores extensive evidence in the record documenting the dangerous conditions in Mexico and Guatemala that would lead aliens with valid asylum claims to pursue those claims in the United States rather than in those countries.[345]

The NPRM does not consider the fact that an adjudicator does not reach the consideration of discretion until asylum seekers have already demonstrated that they have suffered persecution or have a well-founded fear of future persecution. While the NPRM does not impose a categorical bar on eligible asylum seekers, it does require adjudicators to accord significant weight to the fact that an asylum seeker did not apply for asylum in a transit country. This approach, coupled with the focus on "efficiency," would compel adjudicators to make negative discretionary determinations. By virtually conditioning a grant of asylum on an asylum seeker's journey, the

[342] 85 Fed. R. at 36293 ("The applicant may, however, present evidence regarding the basis for the failure to seek such relief for the adjudicator's consideration as outlined in 8 CFR 208.13(c)(4), 1208.13(c)(4).").
[343] *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (codified at 8 C.F.R. §§ 208, 1003, 1208).
[344] *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2020 WL 3637585, at *20 (9th Cir. July 6, 2020)
[345] *Id.* at *16.

proposed regulations would limit asylum to those wealthy enough to fly directly to the United States.[346]

3. The Proposed Regulation Would Improperly Result in Denials of Asylum Applications for Asylum Seekers Who Enter with Fraudulent Documents

The proposed rule would result in adjudicators denying asylum to most asylum seekers based on their "use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country."[347] The NPRM claims there are concerns "that the use of fraudulent documents makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources."[348] The NPRM does not provide any data or evidence for this stated concern nor does it specify how asylum seekers are draining these resources. Under INA § 208(d)(5)(A)(i), an asylum seeker cannot be granted asylum until they have undergone a background check and their identity "has been checked against all appropriate records or databases." This background check is mandatory for every applicant, regardless of whether they entered with real or fraudulent documents. Classifying the use of fraudulent documents as a significant adverse factor would not reduce the amount of resources the agencies must expend to comply with the statutory requirement.

Congress has addressed concerns of fraud within the asylum context. On May 1, 1996, the Senate debated an immigration bill that would have summarily deported individuals who use false documents to enter the United States.[349] After it was discovered that this bill would have a disproportionate effect on asylum seekers, Senator Patrick Leahy proposed an amendment removing the use of "summary exclusion procedures for asylum applicants."[350] Senator Leahy stressed that the asylum context deserves recognition when implementing a bar against individuals entering with fraudulent documents. He stated:

> The reality of the situation is that people [fleeing persecution] are probably going to get a forged or a false passport. They are not going to go on a flight that will go directly to the United States because that is something the government may be watching. They are going to go to another country—maybe a neighboring country, maybe two or three countries—and then make it to the United States.[351]

In explaining his support for the amendment, Senator Orrin Hatch stated, "Many asylum applicants fleeing persecution may have to destroy their documents for various reasons and may have to present fraudulent documents."[352] The amendment received support from across the ideological

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[346] *Ali v. Ashcroft*, 394 F.3d 780, 790 (9th Cir. 2005).
[347] 85 Fed. Reg. at 36293, 36302; proposed 8 CFR §§ 208.13(d)(1)(iii), 1208.13(d)(1)(iii)).
[348] 85 Fed. Reg at 36283.
[349] 142 CONG. REC. S4457–66 (daily ed. May 1, 1996).
[350] *Id.* at S4490 (statement of Senator Orrin Hatch).
[351] *Id.* at S4459 (statement of Senator Patrick Leahy).
[352] *Id*. at S4491(statement of Senator Orrin Hatch).

spectrum and passed.[353] The proposed regulations are contrary to congressional intent and fails "to consider an important aspect of the problem."[354]

Case law from the federal courts of appeals has long recognized the need by asylum seekers to sometimes use fraudulent documents to flee persecution.[355] When an asylum seeker is fleeing a government persecutor obtaining travel documents may be impossible or place the asylum seeker in greater danger. In *Gulla v. Gonzales*,[356] the Court of Appeals for the Ninth Circuit found that an immigration judge had abused his discretion when he denied asylum to Mr. Gulla, an Iraqi asylum seeker. After suffering persecution on account of his religion at the hands of the government, Mr. Gulla used forged Iraqi and Danish passports to quickly flee Iraq and seek asylum in the United States.[357] The Court stated that in the case of an individual "who fears deportation to his country of origin uses false documentation or makes false statements to gain entry to a safe haven, that deception 'does not detract from but supports his claim of fear of persecution.'"[358]

The NPRM points out that *Matter of Pula* delineates a difference between "[t]he use of fraudulent documents to escape the country of persecution" and "entry under the assumed identity of a United States citizen, with a United States passport, which was fraudulently obtained."[359] However, the BIA explained that these two circumstances would be weighed much differently from each other in a totality of the circumstances approach.[360] It is disingenuous for the NPRM to distort the BIA's reasoning in *Matter of Pula*. Thus, it is wrong for the proposed regulations to codify the use of fraudulent documents as a significantly adverse factor in discretionary determinations.

Nine Adverse Factors Ordinarily Resulting in a Discretionary Denial

In addition to the factors discussed above, the proposed rule would add nine additional discretionary factors that adjudicators must consider and that would "ordinarily result" in denial of the cases.[361] If any of the nine adverse factors listed applies to the case, the adjudicator would not favorably exercise discretion *unless* there are extraordinary circumstances, or the applicant demonstrates by clear and convincing evidence that a discretional denial would result in exceptional and extremely unusual hardship to the. Furthermore, even if an applicant meets the

[353] The Leahy amendment passed with votes from both the Republican and Democratic Parties, totaling 51 yeas. *See* U. S. Senate, *Roll Call Vote 104th Congress - 2nd Session*, Vote Summary, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00100.

[354] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[355] *See Zuh v. Mukasey*, 547 F.3d 504, 511 (4th Cir. 2008); *Gulla v. Gonzales*, 498 F.3d 911, 917 (9th Cir. 2007) ("We have recognized that, to secure entry to the United States and to escape their persecutors, genuine refugees may lie to immigration officials and use false documentation.").

[356] *Gulla*, 498 F.3d at 911.

[357] *Id.* at 914.

[358] *Id.* at 917 (quoting *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir.1999)).

[359] *See* 85 Fed. Reg. 36264, 36283 (parenthetical stating that the Board in *Pula* was "noting a difference between "[t]he use of fraudulent documents to escape the country of persecution" and "entry under the assumed identity of a United States citizen, with a United States passport, which was fraudulently obtained").

[360] *Matter of Pula,* 19 I&N Dec. 467, 474 (BIA 1987).

[361] Proposed 8 CFR 208.13 (d)(2)(i)(A); 8 CFR 1208.13 (d)(2)(i)(A) (allowing for discretionary asylum grants only in "extraordinary circumstances" where one or more of the factors is present.

burden, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion, depending on the gravity of the circumstances underlying the nine adverse factors.

According to the NPRM, the proposed nine adverse factors address various circumstances "adjudicators might otherwise spend significant time evaluating and adjudicating."[362] An adjudicator would be able to deny based on discretion any asylum application that has one of the nine adverse factors present *unless* the applicant demonstrates by clear and convincing evidence that a denial of asylum would result in exceptional and extremely unusual hardship to the applicant. Per the NPRM, "This approach supersedes the Board's previous approach in *Matter of Pula* that past persecution or a strong likelihood of future persecution 'should generally outweigh all but the most egregious adverse factors.'"[363] Even without all of the other restrictions that the proposed rule would impose, this rule on its own would lead to the denial of most asylum claims.

Moreover, under the proposed rule, asylum seekers who present one or more adverse factors would have to demonstrate exceptional and extremely unusual hardship to qualify for asylum.[364] As discussed above, adjudicators do not even reach a discretion analysis until the asylum seeker has proven that they meet the legal standard for asylum. Thus, a showing of having suffered past persecution or having a well-founded fear of future persecution should, *per se* meet the exceptional and extremely unusual hardship standard.

According to the NPRM, the proposed nine adverse factors address issues "that the adjudicators might otherwise spend significant time evaluating and adjudicating."[365] Given that an applicant would have to prove extraordinary circumstances or would need to prove by clear and convincing evidence that denial of asylum would result in exceptional and unusual hardship—where meeting either standard would require its own hearing—the "significant time" justification does not hold up. Furthermore, the proposed rules do not seem to take into account that persecution is necessarily exceptional hardship, this proposed rule would require adjudicators to devote substantial resources to conducting hearings similar to those in which noncitizens seek cancellation of removal. This proposed rule would place an added burden on asylum seekers and require adjudicators to devote substantial time to conducting secondary hearings on hardship.

4. The Proposed Regulation Would Improperly Require Denials of Asylum Based on an Asylum Seeker Spending 14 Days in a Country En Route to the United States

The proposed rule would result in adjudicators denying asylum to most asylum seekers who "[i]mmediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country."[366] The only exceptions under the proposed rule would be for those who applied for and were denied asylum in that country, can prove that they are victims of human

[362] 85 Fed. Reg. at 36284.
[363] *Id.*.
[364] Proposed 8 CFR § 208.13 (d)(2)(i)(A); 8 CFR § 1208.13 (d)(2)(i)(A).
[365] 85 Fed. R. 36284.
[366] Proposed 8 CFR 208.13 (d)(2)(i)(A); 8 CFR 1208.13 (d)(2)(i)(A).

trafficking, or can demonstrate that the country is not a party to the United Nations Refugee Protocols.[367]

There is no explanation at all—none—as to how the Departments arrived at the 14-day cutoff. The justifications for this change in the NPRM are in no way related to the imposition of a 14-day rule. First the NPRM cites the Safe Third Country Agreement provision (STCA) of the INA.[368] The United States currently only has a (STCA) in effect with Canada. The STCA is simply not relevant here. There is nothing in the INA that indicates that spending 14 days in a country brings that country within the ambit of the STCA section of the INA. The STCA was painstakingly negotiated with Canada and monitored to ensure that asylum seekers in either country that was a signatory would receive reciprocal rights under the country's asylum system.[369]

The second justification is the Firm Resettlement provision of the INA.[370] There is no explanation in the NPRM, however, about how spending 14 days in a country of flight would equate to a safe offer of permanent settlement. Instead, 14-day rule appears to be completely arbitrary. The one federal court case that is cited in the NPRM to justify the new 14-day rule, involved a family of refugees from Laos who spent 14 *years* in France in refugee status.[371] Using a case where the asylum seeker had a permanent, indefinite status that had lasted for 14 years, to justify denying all asylum applications for anyone who spent 14 days in another country without having to have had any kind of lawful status, is irrational.

This proposed rule is clearly designed to prevent asylum seekers who appear at the southern border from being eligible for asylum. It is especially cruel to prevent asylum seekers from qualifying for asylum when the primary reason asylum seekers are forced to remain in Mexico en route to the United States is as a direct result of unlawful U.S. policies. The United States Customs and Border Protection (CBP) has "metered" entry of asylum seekers into the United States since at least 2016 thereby creating "backlogs" on entering the country.[372] Human Rights First has reported that hundreds of asylum seekers have been forced to remain in Mexico pursuant to this metering policy.[373] This policy is being challenged in a federal district court, which has held that those metered have a cause of action under the INA.[374] The Court of Appeals for the Ninth Circuit has also refused to allow DHS to apply a second punitive rule, the third country travel ban, against those who presented at the border before its effective date and were refused entry pursuant to metering.[375] The proposed regulations would likewise punish asylum seekers for time spent in

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[367] *Id.*
[368] INA § 208(a)(2)(A).
[369] *See* UNHCR, Monitoring Report Canada - United States "Safe Third Country" Agreement, 29 December 2004 – (Dec. 28, 2005), https://www.uscis.gov/sites/default/files/archive/appendix-a.pdf.
[370] INA § 208(b)(2)(A)(vi).
[371] *Yang v. I.N.S.*, 79 F.3d 932, 933 (9th Cir. 1996).
[372] DHS Office of the Inspector General, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* at 5-6 (Sep. 27, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf, [hereinafter "DHS OIG, *Family Separation Issues"*].
[373] *See* Human Rights First, *Barred at the Border: Wait "Lists" Leave Asylum Seekers in Peril at Texas Ports of Entry*, at 3 (Apr. 2019), https://www.humanrightsfirst.org/sites/default/files/BARRED_AT_THE_BORDER.pdf.
[374] *See Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019).
[375] *See Al Otro Lado v. Wolf,* 952 F.3d 999, 1003 (9th Cir. 2020), (refusing to apply third country transit ban to those who were subjected to metering).

Mexico based solely on their compliance with U.S. policies. For this reason alone, the proposed rule must be withdrawn.

In addition to metering, the United States is further requiring asylum seekers to spend more than 14 days, often weeks or months, in Mexico pursuant to MPP. Under MPP asylum seekers who present themselves at ports of entry are served with a Notice to Appear, given a tear sheet with information about MPP, and forced to wait, often for months, for their court dates in Mexico.[376] The asylum seekers have no control over this forced exile, yet under the proposed rules, those subject to MPP would be ineligible for asylum as there is no mention of an exception for MPP. In fact, nowhere in the 161 pages of the NPRM is MPP or metering mentioned at all.

Likewise, the administration has used the COVID-19 pandemic as a pretext to fully close the Mexican border to asylum seekers. Those subject to expulsions are not given any asylum screening prior to being forcibly removed from the United States.[377] Those are expelled or who choose to not present themselves at a port of entry for fear of expulsion would also be found ineligible for asylum under the proposed rule.

Finally, there are no exceptions in the proposed rule for children or other vulnerable populations who may have no control over the time it takes to transit through Mexico or other countries to the United States. It is unfair to forever punish children for the time their parents spend in another country.

5. The Proposed Regulation Would Improperly Require Denials of Asylum Based on an Applicant's Transit Through a Third Country En Route to the United States

The proposed rule would also require adjudicators to deny asylum to those who "[t]ransi[t] through more than one country between his country of citizenship, nationality, or last habitual residence."[378] Through this proposed rule, the administration is seeking, for the second time, to implement the third country transit ban as a matter of discretion at the same time that the prior regulation has been struck down by a federal district court. See the discussion above for why this rule should be withdrawn.

6. The Proposed Regulation Would Improperly Require Denials of Asylum Based on Criminal Convictions That Have Been Expunged or Vacated

The proposed rule would require adjudicators to deny most asylum applications where the asylum applicant would "otherwise be subject to § 208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty."[379] The agencies should not adopt a categorical rule concerning convictions that have been vacated,

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[376] *See* HRF, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* (Oct. 2019), https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf.

[377] *See* Amnesty International, *Explainer on U.S. Deportations and Expulsions During the COVID-19 Pandemic* (May 21, 2020), ("Under an order issued by the CDC in March, the U.S. is automatically expelling tens of thousands of people arriving at the border without any process to Mexico or their home countries, including asylum-seekers and unaccompanied children, in violation of U.S. legal obligations.").

[378] Proposed 8 CFR § 208.13 (d)(2)(i)(B); 8 CFR § 1208.13 (d)(2)(i)(B).

[379] Proposed 8 CFR § 208.13 (d)(2)(i)(C); 8 CFR § 1208.13 (d)(2)(i)(C).

especially in the context of the application of discretion to asylum decisions. The same compelling circumstances that may lead to a state court expunging or modifying a conviction or sentence may provide strong positive equities that an adjudicator should consider in whether or not to exercise discretion on behalf of an asylum seeker. Such decisions should be made on a case-by-case basis and not subject to a rule that would "ordinarily result" in the denial of the application.

7. The Proposed Regulation Would Improperly Require Denials of Asylum Based on Having Been Unlawfully Present in the United States for One Year

a. The Proposed Rule Is *Ultra Vires* Because it Makes INA § 208(a)(2)(D) Moot and Is Antithetical to the Express Intent of Congress to Create the Changed Circumstances and Extraordinary Circumstances Exception

The proposed rule would require adjudicators to deny most asylum applications where the asylum seeker has been unlawfully present in the United States for more than one year.[380] The proposed rule stats that, except as provided in 8 CFR § 208.13(d)(2)(ii),[381] the Secretary will not favorably authorize discretion to grant asylum for cases in which the noncitizen "[a]ccrued more than one year of unlawful presence in the United States prior to filing an application for asylum."[382] This proposed rule is clearly *ultra vires* to the asylum statute.[383] INA § 208(a)(2)(D) states that regardless of the one year filing deadline in INA § (a)(2)(B):

> An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).[384]

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[380] Proposed 8 CFR § 208.13(d)(2)(i)(D); 8 CFR § 1208.13(d)(2)(i)(D).

[381] The exception in 8 CFR § 208.13(d)(2)(ii) allows for a favorable exercise of discretion if there are "extraordinary circumstances, such as those involving national security or foreign policy considerations, or in cases where the alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship…." This exception does not rectify the *ultra vires* nature of proposed 8 § CFR 208.13(d)(2)(i)(D); 8 § CFR 208.13(d)(2)(i)(D).While the asylum statute creates a positive entitlement for applications to be considered beyond one year of arrival in cases of extraordinary or changed circumstances that are proved "to the satisfaction" of the adjudicator, the proposed rule uses discretion to presumptively deny applications filed after a year even if they meet the statutory exceptions to the one-year filing deadline, and would only grant relief if the applicant meets the very high burden to overcome a presumptive denial of discretion in addition to proving that an exception in INA § 208(a)(2)(D) applies. Of note, proposed 8 CFR § 208.13(d)(2)(ii); 8 CFR § 1208.13(d)(2)(ii) is the same standard for obtaining a favorable exercise of discretion as is currently in place for a 212(h)(2) waiver of inadmissibility involving violent or dangerous crimes. 8 CFR § 1212.7(d). This is nonsensical because by definition, waiver applicants are statutorily ineligible for relief and are requesting a favorable exercise of discretion to forgive the inadmissibility ground whereas adjudicators do not consider discretion in asylum cases until they are found statutorily eligible for asylum, including for those who have been in the United States for more than a year, meeting an exception to the one-year filing deadline based upon changed or extraordinary circumstances.

[382] Proposed 8 CFR § 208.13(d)(2)(i)(D); 8 CFR § 1208.13(d)(2)(i)(D).

[383] *See* INA § 208(a)(2)(D).

[384] *Id.*

The effect of the proposed rule would be to nullify the plain meaning of the statute–because individuals who have accrued more than a year of unlawful presence but meet the statutory changed or extraordinary circumstances exceptions would have their applications denied through the proposed rule's instruction that the Secretary "will not favorably exercise discretion under section 208 of the Act."[385]

In addition to violating the plain language of INA § 208(a)(2)(D), the proposed rule would violate the express intent of Congress. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[386] The legislative history of the one-year filing deadline makes clear that Congress expressly intended to preserve eligibility for asylum for qualifying individuals who are not able to meet the deadline because of an extenuating circumstance. Originally, the Senate had proposed a thirty-day filing deadline, but Senators Dewine, Kennedy,[387] Feingold, and Abraham introduced the amendment to strike the thirty-day deadline because "the persons most deserving of asylum status—those under threat of retaliation, those suffering physical or mental disability, especially when abuse resulting from torture—would most be hurt by the imposition of any filing deadline, and particularly so, if the deadline was thirty days."[388] After the committee agreed to strike the 30-day deadline, the committee voted to pass a one-year filing deadline, "but permitted persons to file later than one year if they can show good cause for not filing sooner."[389]

The House version of the bill originally only provided an exception to the filing deadline for changed country conditions, however Representative Barney Frank, a member of the Judiciary Committee, introduced the exception for a change in the applicant's "personal circumstances," which was passed by the Committee. [390] Senators instrumental to passing the bill repeatedly discussed the importance of the changed circumstances and extraordinary circumstances exceptions to provide flexibility as needed in light of the one-year filing deadline and to protect the rights of asylum seekers. Senator Orrin Hatch, "who was the floor manager of the bill and played an instrumental role in its passage"[391] stated that:

> The way in which the time limit was rewritten in the conference report—with [the changed circumstances and extraordinary circumstances exceptions]—was intended to provide adequate protections to those with legitimate claims of

[385] Proposed 8 CFR § 208.13(d)(2)(i); 8 CFR § 1208.13(d)(2)(i).
[386] *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 at fn. 9 (1984).
[387] Senator Edward Kennedy stated: "[those] whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward [before authority figures]. They are individuals who have been, in most instances, severely persecuted…[and] brutalized by their own governments… Many of them are so traumatized by the kinds of persecution and torture that they have undergone [that] they are psychologically unprepared to [participate in any legal process]." 142 Cong. Rec. 7300 (1996) (statement of Sen. Kennedy), cited in Philip P. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 671–72 (2010).
[388] Committee on the Judiciary Report No. 104-249, at 43 (1996).
[389] *Id.*
[390] *See* Leena Khandwala, et al, *The One Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, 05-08 IMMIGR. BRIEFINGS 1 (Aug. 2005). [hereinafter, "Khandwala, Denying Protections."]
[391] *Id.*

> asylum…[The changed circumstances exception] is intended to deal with circumstances that changed after the applicant entered the United States and that are relevant to the applicant's eligibility for asylum. The changed circumstances provision will deal with situations like those in which the situation in the alien's home country may have changed, the applicant obtains more information about likely retribution he or she might face if the applicant returned home, and other situations that we in Congress may not be able to anticipate at this time.[392]

Senator Abraham, who was the Chair of the Senate's Immigration Subcommittee, then stated that "It is my understanding that [the extraordinary circumstances exception] relates to legitimate reasons excusing the alien's failure to meet the 1-year deadline. Is that the case?"[393] to which Senator Hatch responded:

> Yes, the extraordinary circumstances exception applies to reasons that are, quite literally, out of the ordinary and that explain the alien's inability to meet the 1-year deadline. Extraordinary circumstances excusing the delay could include, for instance, physical or mental disability, unsuccessful efforts to seek asylum that failed due to technical defects or errors for which the alien was not responsible, and other extenuating circumstances.[394]

Congress was concerned that the one-year deadline could prevent *bona fide* asylum seekers from receiving protection and recognized that the most vulnerable asylum seekers would be most affected by a strict filing deadline. The legislative history demonstrates that Congress was acutely intent on creating broad exceptions to the one-year deadline to mitigate against arbitrary denials of asylum because of the filing deadline.[395] This intent was so noteworthy that senators who debated the bill promised to "pay close attention to how this provision is interpreted" in order to ensure that the exceptions provided "sufficient protection to aliens with bona fide claims of asylum."[396]

The legislative history demonstrates that Congress had the specific intent for individuals with changed or extraordinary circumstances (interpreted broadly) to maintain their eligibility for asylum despite filing an application after one year of unlawful presence. However, the proposed rule creates presumptive denials even in cases where the applicant can demonstrate changed or extraordinary circumstance within the meaning of the statute.[397] The proposed rule defies Congress's intent "[to ensure] that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies."[398] As the proposed rule would in effect deny the availability of exceptions to the filing deadline in INA § 208(a)(2)(D)—and contradict

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[392] 142 Cong. Rec. S11840 (Sep. 30, 1996) (statements by Senators Hatch and Abraham shortly before the passage of IIRIRA).
[393] *Id.*
[394] *Id.*
[395] *See* Karen Musalo & Marcelle Rice, Center for Gender and Refugee Studies, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 695–96 (2008).
[396] *Id.*
[397] *See* proposed 8 CFR § 208.13(d)(2)(i)(D); 8 CFR § 1208.13(d)(2)(i)(D).
[398] 142 Cong. Rec. S11840 (Sept. 30, 1996) (statements by Senators Hatch and Abraham shortly before the passage of IIRIRA).

Congress's intent to protect vulnerable asylum seekers' right to pursue their cases—it is clearly *ultra vires* and unlawful.

b. The Proposed Rule Contradicts the Agency's Own Regulations and Policy

The proposed rule reverses course on current agency policy and interpretations of the law. Indeed, according to the BIA, the "failure to meet the 1-year deadline does not give rise to an absolute bar to filing an asylum application."[399] Existing regulations[400] provide a broad definition of the changed circumstances exception, listing, among other possible factors that could constitute changed circumstances, "[c]hanges in conditions in the applicant's country of nationality" and "changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution." [401] Similarly, 8 CFR § 208.4(a)(5); 8 CFR § 1208.4(a)(5) provide a broad definition of "extraordinary circumstances" exception, which "include[s] [but is not] limited to serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period prior to arrival," ineffective assistance of counsel, or that the applicant held Temporary Protected Status, among many other possible factors.

According to current regulations, the applicant must establish an exception to the one year filing deadline "to the satisfaction of the" adjudicator."[402] USCIS guidance has stated that "the satisfaction" standard is a "reasonableness" standard lower than the clear and convincing evidence standard,[403] which again reflects the agency's prior understanding that exceptions to the one-year filing deadline were intended by Congress to be broadly available.

c. The Proposed Rule Violates International Law

The proposed rule contravenes the United States' obligation under the 1967 Protocol to provide protection for anyone who qualifies as a refugee.[404] The UNCHR's Executive Committee states that "[w]hile asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration."[405] UNHCR opposed the United States' one-year filing deadline when it was being considered because of the "grave impact on the ability

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[399] *Matter of Y-C-*, 23 I. & N. Dec. 286, 287 (BIA 2002).
[400] *See* 8 CFR § 208.4(a)(4); 8 CFR § 1208.4(a)(4).
[401] *C.f. Zambrano v. Sessions*, 878 F.3d 84, 88 (4th Cir. 2017) (holding that "[n]ew facts that provide additional support for a pre-existing asylum claim can constitute a changed circumstance. These facts may include circumstances that show an intensification of a preexisting threat of persecution or new instances of persecution of the same kind suffered in the past.").
[402] 8 CFR § 208.4(a)(2)(B); 8 CFR § 1208.4(a)(2)(B); *see* also USCIS, *Asylum Officer Basic Training Course: One-Year Filing Deadline* (May 6, 2013), https://www.uscis.gov/sites/default/files/files/nativedocuments/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf.
[403] *See* Khandwala, Denying Protections, *supra* note 390.
[404] *C.f. E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1275 (9th Cir. 2020) ("The categorical bars on eligibility in the INA are interpreted with lenience toward migrants to avoid infringing on the commitments set forth in the 1951 Convention and 1967 Protocol.")
[405] UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, Conclusion No. 1 – 109 at 19 (Dec. 2009), https://www.unhcr.org/en-us/578371524.pdf.

of the United States to offer protection to those fleeing from persecution."[406] President Clinton opposed the one-year deadline as well, stating when he signed IIRIRA into law that "I will seek to correct provisions in this bill that are inconsistent with international principles of refugee protection, including the imposition of rigid deadlines for asylum applications."[407] Given this interpretation that the one-year bar, even with the robust changed circumstances and extraordinary circumstances exceptions, violated international law—the practical effect of the proposed rule, which in essence nullifies the changed and extraordinary circumstances exceptions by mandating denial of asylum after a year of unlawful presence—is certainly a violation of international law. The proposed rule's instruction to deny the discretionary grant of asylum to individuals with over a year of unlawful presence—but legitimate reasons for the delay in filing such as PTSD or changed country conditions—will result in the *refoulment* of individuals to the countries where they fear persecution.[408]

8. 8 CFR 208.13 (d)(2)(i)(D)—The Proposed Regulation Would Improperly Require Denials of Asylum Based on Failure to File Income Taxes

The proposed rule would require adjudicators to deny asylum applications where the asylum seeker failed to file federal, state, or local taxes, has an outstanding tax obligation, or had income that would result in tax liability.[409] This proposed rule does not take into account the unique circumstances of asylum seekers who often arrive in the United States with no economic resources. While the purported reason for proposing many of the new rules in this NPRM is to increase the efficiency of proceedings, adding this additional element to the adjudication of asylum claims would require more time before asylum officers or the immigration court.

USCIS has recently published regulations that would require asylum seekers to wait more than a year after filing for asylum before they can apply for an Employment Authorization Document (EAD).[410] Unlike, for example, asylum seekers in Canada[411] who receive government assistance if they need it, U.S. asylum seekers are not eligible for federal benefits, nor are they appointed counsel. With no ability to obtain an EAD and no government assistance, asylum seekers would increasingly be forced to work in the underground economy, performing low wage jobs with few protections and generally being paid in cash.[412]

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[406] Letter from Rene van Rooyen, UNHCR Representative, to Sen. Henry Hyde (Aug. 25, 1995), cited in Khandwala, Denying Protections *supra* note 390.
[407] Omnibus Consolidated Appropriations Act, 1997 (weekly ed. Oct. 7, 1996) (Statement of President William J. Clinton), reprinted in 1996 U.S.C.C.A.N. 3388, 3392.
[408] *C.f.* Khandwala, Denying Protections *supra* note 390. (discussing how the one-year filing deadline, even with the extraordinary and changed circumstances exceptions intact, leads to the *refoulement* in violation of international law).
[409] Proposed 8 CFR § 208.13 (d)(2)(i)(E); 8 CFR § 208.13 (d)(2)(i)(E).
[410] 8 CFR § 208.7(a)(1)(ii).
[411] Verity Stevenson, *What Refugee Claimants Receive from the Government*, CBC, Aug. 18, 2017, https://www.cbc.ca/news/canada/montreal/asylum-seekers-support-housing-1.4252114.
[412] *See* Yael Schacher, *Why Forbidding Asylum Seekers from Working Undermines the Right to Seek Asylum*, The Washington Post, Nov. 18, 2019, https://www.washingtonpost.com/outlook/2019/11/18/why-forbidding-asylum-seekers-working-undermines-right-seek-asylum/. ("Others would be forced into the underground economy, where exploitation is rife and whose existence undermines the ability of all workers to secure fair pay and decent working conditions.").

Under the proposed rule, asylum seekers would be required to file taxes, though, with the restrictive new EAD rules, most would be unable to obtain a social security number prior to filing. While some noncitizens without work authorization have been able to obtain an Individual Taxpayer Identification Number (ITIN) for the purpose of filing taxes,[413] nothing on the Internal Revenue Service website indicates that asylum seekers who are not yet eligible to apply for an EAD can apply for an ITIN.[414] Furthermore, without a government-issued EAD, asylum seekers, who often must flee their countries without obtaining identification documents, and who may be scared to communicate with their governments after flight, may be unable to secure the types of identity documents necessary to obtain an ITIN.[415]

As vulnerable asylum seekers feel the need to file taxes under a complex system that they have been shut out of through the inability to obtain an EAD and a social security number, there is a real danger that they would be defrauded by "*notarios*" and unqualified tax preparers.[416] Since unqualified "*notarios*" often offer both tax services and immigration services, asylum seekers face a double risk of being defrauded in filing taxes and in obtaining immigration legal advice or representation from providers who are not authorized or qualified to assist them with their applications for asylum.

Finally, this section of the proposed rule would require asylum seekers who are not required to pay taxes to prove that they are not required to do so. This provision would force asylum seekers to understand the tax law sufficiently to know whether they are required to pay taxes or not at the same time they are navigating the increasingly complex U.S. asylum system. For those who are not working, or those who work minimally and are paid in cash, the new rule would require them to prove a negative—that they have not earned sufficient income to be required to pay taxes under the U.S. tax code. Asylum seekers who have been shut out from applying for EADs by the new

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[413] See American Immigration Council, The Facts About the Individual Taxpayer Identification Number (ITIN) (July 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_facts_about_the_individual_tax_identification_number.pdf.

[414] The website includes the following information, none of which pertains to a noncitizen with an asylum application pending:

Do I need an ITIN?

Does the following apply to you?:

1. You do not have an SSN and are not eligible to obtain one, and
2. You have a requirement to furnish a federal tax identification number or file a federal tax return, and
3. You are in one of the following categories.

- Nonresident alien who is required to file a U.S. tax return
- U.S. resident alien who is (based on days present in the United States) filing a U.S. tax return
- Dependent or spouse of a U.S. citizen/resident alien
- Dependent or spouse of a nonresident alien visa holder
- Nonresident alien claiming a tax treaty benefit
- Nonresident alien student, professor or researcher filing a U.S. tax return or claiming an exception

Internal Revenue Service, *Individual Taxpayer Identification Number*, page last reviewed or updated Apr. 16, 2020, https://www.irs.gov/individuals/individual-taxpayer-identification-number.

[415] *See* Internal Revenue Service, Instructions for Form W-7, (Rev. Sep. 2019) at 3, https://www.irs.gov/pub/irs-pdf/iw7.pdf.

[416] *See* Internal Revenue Service, *IRS: Choose Tax Preparers Carefully; Tax Return Preparer Fraud Makes IRS' 2019 "Dirty Dozen" List of Tax Scams*, (Mar. 7, 2019) https://www.irs.gov/newsroom/irs-choose-tax-preparers-carefully-tax-return-preparer-fraud-makes-irs-2019-dirty-dozen-list-of-tax-scams.

DHS EAD rule, would almost always be paid "off the books" in cash. It is unclear how an asylum seeker would be able to prove that they earned too little money to have to pay taxes. Having to meet this additional evidentiary burden would lead to longer asylum interviews and hearings, undermining the regulations' purported interest in promoting "efficiency" in adjudications.

9. The Proposed Regulation Would Improperly Require Denials of Asylum Based on Having Two or More Asylum Applications Denied

The proposed rule would further require adjudicators to deny asylum applications where the applicant "[h]as had two or more prior asylum applications denied for any reason."[417] There is no justification for the imposition of this rule in the NPRM and as such, it is arbitrary.

There may be reasons that an applicant would submit a *bona fide* asylum application after two have been denied. The asylum seeker could have been the victim of ineffective assistance of counsel. The asylum seeker could suffer from a mental disability that made it impossible to adequately set forth their claim. The applicant could have been unrepresented and not understood how best to present their claim. Following any of the above scenarios, or combination of scenarios, the applicant could now have a claim based on changed country conditions. If the asylum seeker could meet all of the statutory requirements for asylum on their third claim there is no reason that such a claim should categorically be denied as a matter of discretion.

10. The Proposed Regulation Would Improperly Require Denials of Asylum Based on Having Withdrawn an Asylum Application With Prejudice or Abandoning an Application

The proposed rule would likewise require the denial of applications based on an applicant having "withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application."[418] The NPRM states that this rule would "minimize abuse of the system,"[419] but fails to account for legitimate reasons that an asylum seeker would withdraw an asylum application, such as pursuing a family-based immigrant visa petition or a petition for Special Immigrant Juvenile Status.

CLINIC acknowledges the problem of "*notarios*" and some unscrupulous attorneys filing weak asylum applications as a means to have clients placed in removal proceedings to pursue cancellation of removal, but it is unfair to punish asylum seekers for the unscrupulous, and in some instances, criminal,[420] conduct of their representatives. In many cases, the representatives do not even tell their clients that they are filing an application for asylum, telling them instead that they are applying for a "ten year visa"[421] and necessarily never discuss with them whether they have an

[417] Proposed 8 CFR § 208.13 (d)(2)(i)(F); 8 CFR § 1208.13 (d)(2)(i)(F).
[418] Proposed 8 CFR § 208.13 (d)(2)(i)(G); 8 CFR § 1208.13 (d)(2)(i)(G).
[419] 85 Fed. R. 36284.
[420] *See* Liz Robbins, *Immigrants Claim Lawyers Defrauded Them and They May Be Deported*, THE NEW YORK TIMES, May 3, 2018, https://www.nytimes.com/2018/05/03/nyregion/immigrants-lawyers-defrauded-deportation.html?searchResultPosition=1.
[421] *See* Max Siegelbaum, *How Immigration Fraud Victims Get Put on Track To Deportation Unscrupulous Attorneys Promise Green Cards but File Asylum Claims Instead, Putting Immigrants at Risk,* DOCUMENTEDNY, Jan. 23, 2019, https://documentedny.com/2019/01/23/how-immigration-fraud-victims-get-put-on-track-to-deportation/.

actual fear of returning to their home country or whether they might qualify for an exception to the one year filing deadline. It is unfair to mandate denials of asylum applications on discretionary grounds when the asylum applicant was often the victim of fraud.

Making matters worse, over the past several years, Asylum Offices have piloted projects encouraging representatives who have filed "ten year visa applications" to waive asylum interviews and have cases referred directly to immigration court. [422] Asylum seekers may have relied on this action by asylum offices to assume that the government did not object to their having filed the asylum application for the purpose of being placed in removal proceedings. Rather than punish asylum seekers in this situation, Immigration and Customs Enforcement should agree to initiate removal proceedings for noncitizens who seek to be placed into removal proceedings if they have a compelling reason to pursue cancellation of removal.

11. The Proposed Regulation Would Improperly Require Denials of Asylum Based on Having Missed an Asylum Interview

The proposed rule would further require most applications to be denied where the asylum seeker "failed to attend an interview regarding his asylum application with DHS."[423] While the proposed rule does include two potential exceptions, one for "exceptional circumstances" and another if neither the applicant nor the representative received notice even though the correct address was on file, the rule is still arbitrary and unfair.

Asylum offices have traditionally taken an expansive approach to allowing asylum seekers to reopen their asylum application if they miss the interview and quickly file to reopen after receiving notice. There are many reasons that an asylum seeker may miss an interview that may not rise to the undefined level of "extraordinary circumstances." Currently the USCIS website states a lower standard for reopening an asylum case after an applicant misses an interview—"good cause or extraordinary circumstances."[424] Under this guidance, an asylum seeker who requests scheduling with 45 days after the date of the interview need only meet the lower "good cause" standard. Asylum offices wait until the 46th day after the missed interview to refer the case to immigration court.[425] This standard allows for reasonable, case-by-case decision-making by the asylum office on whether or not to reschedule a case. Issues may arise on the day of the asylum interview such as lack of childcare, public transportation issues, medical issues, or cancellation by an interpreter, which might not meet the "extraordinary circumstances" requirement but still offer good cause. Allowing asylum seekers to reopen their cases is appropriate given the important issues involved in asylum cases. Moreover, asylum offices have learned to factor in the number of "no shows" expected to ensure that interview slots are not wasted. The proposed rule would only serve to further increase the immigration court backlog that already stands at nearly 1.2 million cases,[426] by referring cases to immigration court that could be resolved by rescheduling the

[422] USCIS Asylum Division Quarterly Stakeholder Meeting at 14-15 (May 1, 2018), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_StakeholderPrivateAgenda_05012018Meeting.pdf.
[423] Proposed 8 CFR § 208.13 (d)(2)(i)(H); 8 CFR § 1208.13 (d)(2)(i)(H).
[424] USCIS, Establishing Good Cause or Exceptional Circumstances, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/establishing-good-cause-or-exceptional-circumstances.
[425] *Id.*
[426] *See* TRAC Immigration Court Backlog Tool, *supra* note 19.

interview, the government is irrationally choosing to increase an overloaded court system simply to be punitive towards asylum seekers.

Likewise, the exception in the proposed rule that discretion would not be exercised against an asylum seeker if both the asylum seeker and their representative failed to receive the interview notice, is also unfair. This rule requires the asylum seeker to prove a negative. There is no way for the asylum seeker or their representative to prove whether the government mailed the notice to the correct address. Furthermore, the interview notice should be mailed to **both** the asylum seeker and their representative.[427] It is unfair to the asylum seeker to penalize them if USCIS mails the notice to the representative and not to the asylum seeker. The asylum seeker may be the victim of ineffective assistance of counsel or may have a dispute over payment with the representative who may simply never tell the asylum seeker about the appointment. Moreover, the COVID-19 pandemic has forced many physical offices to close and asylum seekers' representatives may not be able to physically retrieve mail on a timely basis.

Conversely, an asylum seeker who is represented may rely on their representative to alert them to upcoming immigration appointments and interviews. Thus an asylum seeker may receive an interview notice and disregard it. Most asylum seekers are not fluent English speakers and many read languages that use different alphabets or may not be written languages. Finally, many asylum seekers live in poverty, and this situation would only be exacerbated by new rules that would prevent them from obtaining EADs for at least a full year after filing for asylum.[428] As a result, asylum seekers may have insecure housing, including sharing rental spaces with other unrelated people. It is common in such settings for mail to be misdelivered or mistakenly discarded. It is a fairer approach to continue the current procedure, allowing such asylum seekers to move to reopen with the asylum office within 45 days of missing an interview. The proposed rule as written is arbitrary and would punish asylum seekers when USCIS errs by not properly sending the interview notice to both the asylum seeker and their representative.

12. The Proposed Regulation Would Improperly Require Denials of Asylum Based on Not Filing a Motion to Reopen Based on Changed Country Conditions Within a Year of the Changed Conditions

The proposed rule would further require most applications to be denied where the asylum seeker "[w]as subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of those changes in country conditions."[429] This proposed rule directly contradicts INA § 240(c)(7)(C)(ii), which states:

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[427] USCIS, *Affirmative Asylum Procedures Manual* at 8-9 (May 17, 2016), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf. ("If an applicant's representative is recorded in RAPS, RAPS generates an identical Interview Notice to the representative of record.").

[428] 8 CFR § 274a.12(c)(8).

[429] Proposed 8 CFR § 208.13 (d)(2)(i)(I); 8 CFR § 1208.13 (d)(2)(i)(I).

(ii)Asylum
There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 208 or 241(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding. [Emphasis added.]

The outright contradiction between the proposed rule and the statute renders the proposed rule *ultra vires.* If Congress had wanted to impose a one-year filing deadline on motions to reopen based on changed country conditions, it could have done so, as it did with asylum applications, but it did not. The agencies cannot contradict the will of Congress through regulations.

Again, the primary reason cited in the NPRM for creating this restriction is to preserve "efficient processing of asylum applications before EOIR,"[430] but the NPRM does not explain why adjudicating a motion to reopen filed 13 months after a changed country condition would be less "efficient" than adjudicating a similar motion filed 11 months after the change.

The NPRM cites to a single federal court of appeals case[431] to justify the proposed regulation. That case, *Wang v. Bd. of Immigration Appeals,* involved a motion to reopen by an asylum seeker that was not based on changed country conditions. In that case, the asylum seeker was subject to a statutory 90-day limit on filing a motion to reopen, and was arguing for equitable tolling based on ineffective assistance of counsel.[432] It is irrational for the government to cite to a single case concerning a different provision of the INA to justify a new regulation that conflicts with the statute. This regulation must be withdrawn as *ultra vires* to the statute.

Overall, the discretion portion of the proposed rules would lead to the denial of most asylum cases, rather than provide guidance to adjudicators on factors to consider in good faith in exercising discretion, as the BIA did in the foundational *Matter of Pula* decision. The NPRM states, "This approach supersedes the Board's previous approach in that past persecution or a strong likelihood of future persecution 'should generally outweigh all but the most egregious adverse factors.'"[433] Thus through the rulemaking, DOJ and DHS are willing to overturn a 33-year old foundational BIA decision that has been cited more than 100 times by the BIA and federal courts of appeals [434] and replace that framework with a discretionary system that would require adjudicators to deny most applications. The proposed rule would require adjudicators to deny asylum applications for 12 different reasons, placing the onus on the asylum seekers to prove that they qualify despite falling under any of these mandatory negative factors. This result clearly contradicts Congressional intent in establishing a robust asylum adjudication and such is *ultra vires* to the statute.

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[430] 85 Fed. R. 36285.
[431] *Wang v. Bd. of Immigration Appeals*, 508 F.3d 710, (2d Cir. 2007).
[432] *Id.* at 712.
[433] 85 Fed. R. 36284.
[434] The number of citations is drawn from Westlaw. It is also worth noting that the NPRM itself cites to *Matter of Pula* six times.

J. 8 CFR § 208.15; 8 CFR § 1208.15—The Proposed Rule Would Redefine "Firm Resettlement" to Include Those Who Have Not Found Permanent Safety

1. The Proposed Rule Unjustly Reverses Decades of Case Law And Statute

The proposed regulation would unlawfully expand the definition of firm resettlement and would essentially create another "asylum ban" contrary to international law, long-standing domestic precedent, and the intent of Congress. Currently, an asylum seeker "is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement."[435]The federal courts of appeals have interpreted the term "firm resettlement" to be permanent resident status.[436] Moreover, the firm resettlement doctrine has an extremely long and storied history in the United States. Congress first used the term "firmly resettled" in the Displaced Persons Act of 1948, and continued it to use this term for decades as it further developed asylum law. [437] For example, Congress again explicitly included language covering those "not … firmly resettled" in its 1950 Act to Amend the Displaced Persons Act of 1948.[438] The amendments to the Displaced Persons Act of 1948 include language that resolutely establishes the importance of permanency in the firm resettlement analysis:

> "Eligible displaced person" means a displaced person as defined in subsection (b) above (1) who on or after September 1, 1939, and on or before January 1, 1949, entered Germany, Austria, or Italy, and who on January 1, 1949, was in Italy or the American sector, the British sector, or the French sector of either Berlin or Vienna, or in the American zone, the British zone, or the French zone of either Germany or Austria, or who had temporarily absented himself therefrom for reasons which, in accordance with regulations to be promulgated by the Commission, show special circumstances justifying such absence, and who has not been firmly resettled; or a person who, having resided in Germany or Austria, was a victim of persecution by the Nazi government and was detained in, or was obliged to flee from such

[435] 8 C.F.R. § 208.15; 8 C.F.R. § 1208.15; INA § 208(b)(2)(A)(vi) (the [asylum seeker] was firmly resettled in another country prior to arriving in the United States.).

[436] *See Sall v. Gonzales*, 437 F.3d 229, 235 (2d Cir. 2006) (finding that the passage of four years alone was not sufficient to prove firm resettlement and the "the IJ should consider the totality of the circumstances, including whether Sall intended to settle in Senegal when he arrived there whether he has family ties there, whether he has business or property connections that connote permanence, and whether he enjoyed the legal rights—such as the right to work and to enter and leave the country at will—that permanently settled persons can expect to have"); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004) (concluding that even though Guatemalan spent 16 years in Mexico before seeking asylum in the United States, he was not subject to firm resettlement bar because he did not have an offer of permanent residence and he was subject to restrictive conditions while residing there); *Abdille v. Ashcroft*, 242 F.3d 477, 487 (3rd Cir. 2000) (finding that if DHS cannot obtain direct evidence of an offer of firm resettlement, "the IJ or BIA may find it necessary to rely on non-offer-based factors, such as the length of an alien's stay in a third country, the alien's intent to remain in the country, and the extent of the social and economic ties developed by the alien, as circumstantial evidence of the existence of a government-issued offer").

[437] S. Rep. No. 80-950, at 50

[438] See Pub. L. No. 81-555, § 2(c), 64 Stat. 219 (1950).

> persecution and subsequently returned to, one of these countries, and who has not been firmly resettled…[439]

The amendments to the Displaced Persons Act, one of the bedrocks of asylum law, clearly establish that those who fled Nazi persecution, and temporarily resided in parts of Europe before heading onward to the United States, are entitled to protection on American soil. The proposed regulations in their current form would deny refugees fleeing Nazi persecution—the very refugees that the U.S. asylum system was created to protect.

> The firm resettlement doctrine originated in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to which the United States is a signatory. These conventions enunciate the basic international framework for the protection of asylum seekers and explicitly articulate that those who are "firmly resettled" are excluded from the refugee definition. "Firmly resettled" is defined as any "person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country"; and second, any person who, though once a refugee, "has acquired a new nationality, and enjoys the protection of the country of his new nationality."[440] There is no question that the Refugee Conventions only intended to exclude refugees based on being firmly resettled and having been afforded the same rights as nationals or, at least, protection from deportation in the third country.[441]

The Refugee Act of 1980 made firm resettlement a statutory bar to refugee status, but not to asylum.[442] In 1990, the Attorney General amended the regulations and extended the firm resettlement bar to asylum cases.[443] Congress codified firm resettlement as a statutory bar to asylum by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.[444] As a result, under INA § 208(b)(A)(vi), an applicant is ineligible for asylum if he or she was "firmly resettled in another country prior to arriving in the United States."[445] Since Congress enacted laws to protect refugees, it has intended for refugees to be excluded from protection only if their stay in a third country was permanent or if the refugee was given similar rights to third country nationals. The proposed rule is an affront to Congressional intent.

In 2011, the BIA issued *Matter of A-G-G-,*[446] which established a four-step analysis in making a firm resettlement determination. First, DHS bears the burden of presenting *prima facie* evidence of an offer, or pathway to an offer, of firm resettlement. An offer of firm resettlement can be supported with direct evidence such as evidence of a foreign immigration law. If direct evidence is unavailable then indirect evidence can be used as evidence. Indirect evidence includes the immigration laws or refugee process of the country of proposed resettlement; the length of stay and intent of stay in third country, family, social and economic ties, receipt of government

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[439] *Id.*
[440] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 156.
[441] The Handbook of the U.N. High Commissioner for Refugees (UNHCR); *see also* Robert D. Sloane *Article: An Offer Of Firm Resettlement,* 36 GEO. WASH. INT'L L. REV. 47 (2004).
[442] INA § 207(c)(1).
[443] 8 CFR § 208.15; 8 CFR § 1208.15.
[444] Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-691; INA §208(b)(2)(A)(vi).
[445] INA § 208(b)(A)(vi).
[446] *Matter of A-G-G-,* 25 I&N Dec. 486 (BIA 2011).

assistance such as rent, food, and transportation; and legal rights, such as the right to work, and travel freely. The BIA specifically noted that if the asylum applicant chooses not to accept the offer that would not undermine the *prima facie* evidence of an offer.[447] Second, if there is proof of a *prima facie* offer of firm resettlement, then the asylum applicant can rebut DHS's *prima facie* evidence of an offer of firm resettlement with a showing by a preponderance of the evidence that such an offer has not, in fact, been made or that the asylum applicant would not qualify for it.[448] Third, the IJ will consider the totality of the evidence presented to determine if the asylum applicant has rebutted DHS's evidence of an offer of firm resettlement.[449] Fourth, if the IJ determines that the asylum applicant has been firmly resettled, then the burden shifts again to the asylum applicant to establish that an exception to firm resettlement applies by a preponderance of the evidence.[450]

2. The Proposed Rule Unfairly Redefines "Firm Resettlement" So That Thousands Of Asylum Seekers Who Were Once Stranded All Over The World Would Never Gain Asylum

The proposed rule[451] unjustifiably, without mention of federal or BIA case law, proposes to redefine "firm resettlement." First, under the proposed rule, if the asylum seeker has resided in another country for one year, even if there is no offer or pathway to permanent status, the asylum seeker would be considered firmly resettled. Second, if the asylum seeker resided, or could have resided, in a permanent or *non-permanent* legal immigration status, including as an asylee or refugee, they would be considered firmly resettled. Finally, if the asylum seeker is a dual national and passes through their second country of nationality after fleeing persecution, they would be considered firmly resettled.[452]

The proposed rule would redefine "firm resettlement" to allow resettlement that is "unstable" or "temporary." This section of the rule runs contrary to the intent of Congress, which was to bar asylum only if the resettlement was permanent, firm and not temporary.[453] Moreover, the proposed rule ignores established case law requiring an offer of permanent, not temporary, resettlement.[454] While many countries are signatories the 1951 Convention and 1969 Protocol, rights of asylees in these countries differ greatly. For example freedom of movement is a right that should be afforded to all asylees and refugees, and is one that is adhered to in the United States and most western nations. However, in some parts of the world, where there are limited national resources or legal frameworks for protecting refugees, even signatories the 1951 Conviction restrict freedom of movement to asylees. For example, Kenya and Ethiopia specify in their national

[447] *Id.* at 501.
[448] *Id* at 502.
[449] *Id* at 503.
[450] *Id.* at 503.
[451] Proposed rule 8 CFR § 208.15; 8 CFR § 1208.15.
[452] *Id*.
[453] *See* INA §208 (b)(2)(A)(vi).
[454] *Bonilla v. Mukasey*, 539 F.3d 72 (1st Cir. 2008) (remanding for BIA to determine whether an expired resident document was sufficient to demonstrate offer of permanent residence); *Abdille v. Ashcroft*, 242 F.3d 477 (3rd Cir. 2000) (remanding case because it was error to conclude that a renewable two year grant of asylum was sufficiently permanent to invoke firm resettlement bar); *Mengstu v. Holder*, 560 F.3d 1055 (9th Cir. 2009)(Court concluded that an Ethiopian national who spent two years in a Sudanese refugee camp was not firmly resettled. The government failed to meet its burden of an offer with either direct or indirect evidence.).

laws that the movement of refugees throughout the country may be restricted and that refugees may be limited to living in designated areas, namely refugee camps.[455] Likewise, in Turkey, which currently hosts thousands of Syrian refugees, refugees are not able to easily obtain permanent resident status or citizenship.[456] In sum, asylees and refugees who afforded refugee protection from a 1951 Convention signatory or country, would not necessarily enjoy the same benefits ad protections of asylees in the United States. The proposed rule would bar asylum to meritorious asylum seekers who happened to pass through countries that only offer temporary or restricted rights to asylees.

Finally, the section of the proposed rule would effectively ban asylum seekers from protection if they have traveled through a third country and stayed there at least one year.[457] This section of the rule is clearly, undoubtedly, aimed at excluded asylum seekers who are forced to live in Mexico under the so-called "Migrant Protection Protocols."[458] Almost every asylum seeker forced to live in danger, fear, squalor and destitution under the MPP has been in Mexico for at least one year. Most asylum seekers under MPP would be barred from asylum under this proposed rule.

CLINIC's *Estamos Unidos* project staff have witnessed firsthand the effects of MPP on asylum seekers. CLINIC worked with a young married couple who left Cuba a year ago and were subjected to the metering system at the border for six months. The metering system in Ciudad Juarez forced them to sign up on a Mexican government run list to await their turn to present themselves at the El Paso port of entry. When Mexican officials finally called their names, they were allowed into the United States, processed and placed under MPP to be returned to Ciudad Juarez. As they tried to move around Juarez, they received threats from a cartel whose members followed them constantly. The couple reached out to Mexican authorities, but were told nothing could be done because there was no way to track who was threatening them. The couple has lived in constant fear since their return to Ciudad Juarez. They have now been forced to survive and be in hiding in Mexico for close to a year. Under this proposed rule, they would be barred from asylum because they would have lived in Mexico for over a year by the time they have an individual hearing.

CLINIC also worked with a family of three—father, son and daughter—who fled Venezuela to Panama due to political persecution, after they opposed the ruling party. Upon arrival in Panama, they applied for protection, but were harassed, abused and constantly targeted because of increased xenophobia against Venezuelan nationals. Local residents threatened the son and beat him badly. In addition, officials denied the family access to education and health care. As a result,

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[455] National Refugee Proclamation, No. 409/2004, art. 21(2) (Eth.); Refugees Act (2014) Cap. 173 § 12(3) (Kenya).
[456] International Crisis Group (ICG), Turkey's Refugee Crisis: The Politics of Permanence (Nov. 30, 2016), Europe Report N°241, https://www.refworld.org/docid/583ee6014.html.
[457] Proposed 8 CFR § 208.15(a)(2); 8 CFR § 1208.15(a)(2).
[458] DHS, Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols. ("Certain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim. Instead, these aliens will be given a "Notice to Appear" for their immigration court hearing and will be returned to Mexico until their hearing date. While aliens await their hearings in Mexico, the Mexican government has made its own determination to provide such individuals the ability to stay in Mexico, under applicable protection based on the type of status given to them.").

they fled Panama, traveling through Central America and Mexico to seek asylum in the United States. Upon arrival, Mexican authorities mistreated and extorted them by unlawfully retaining their passports. Both father and son survived beatings, abuse, and attempted kidnapping in Mexico. The teenaged daughter experienced an attempted sexual assault, from which she suffers continued signs of trauma and possible mental health complications. Eventually, the family crossed the border to the United States, and immigration authorities placed them under MPP. Fearing more persecution and violence, they now spend all their time at a shelter in Ciudad Juarez. This family would be barred from asylum under the proposed rule even though they still have not found safety in any country.

Under *Matter of A-G-G-* and the current regulations, there are exceptions to a firm resettlement finding when the asylum seeker faces restrictive conditions or lack of significant ties to the country through which they traveled.[459] If an asylum seeker's entry into the third country was a necessary consequence of their flight from persecution, and they remained in that country only as long as was necessary to arrange onward travel, then they did not establish significant ties in that country. Additionally, if the government of the third county so substantially and consciously restricted the conditions of the asylum seeker's residence in that country, then the resettlement bar does not apply. Restrictive conditions include lack of housing, employment opportunities, country conditions, the ability to own property, travel and access education as well as evidence of persecution or discrimination by the government of the third country.[460] Again, the proposed rule appears to specifically target Central Americans to prevent their ability to ever establish asylum eligibility in the United States.[461]

The proposed rule does away with the exceptions to the firm resettlement bar. Under the proposed rule there would no longer be any exceptions (restrictive conditions or lack significant ties) to the firm resettlement bar. Under the proposed rule, asylum seekers, especially those in MPP who have often suffered horrendous persecution including rape, torture, and kidnapping, en route to the United States would be considered firmly resettled and barred from asylum in this country. The NPRM does not offer a scintilla of evidence or rationale for the elimination of the exceptions to the firm resettlement bar. Ignoring decades of case law, including *Matter of A-G-G-*, the proposed rule reverses course without any explanation.[462]

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[459] 8 C.F.R. § 208.15(a) & (b) & 1208.15(a) & (b).

[460] *Id.*

[461] *Central Americans Sent To Mexico By U.S. Increasingly Victims Of Kidnappings: Aid Group*, THE WASHINGTON POST, Feb. 11, 2020, https://www.reuters.com/article/us-usa-immigration-mexico/central-americans-sent-to-mexico-by-us-increasingly-victims-of-kidnappings-aid-group-idUSKBN20526Z. ("The vast majority of asylum seekers are attempting to escape violence and poverty in the region's so-called Northern Triangle, comprising Honduras, Guatemala, and El Salvador.").

[462] *See Arrey v. Barr,* 916 F.3d 1149, 1160 (9th Cir. 2019) (remanding to BIA where Board had denied asylum for a Cameroonian woman who had received an offer of refugee status in South Africa but had not adequately considered the restrictive conditions she faced there); *Gwangsu Yun v. Lynch*, 633 F. App'x 29, 30 (2d Cir. 2016) (unpublished) (finding no "significant ties" for North Korean asylum seeker based on length of stay in South Korea alone "unless there is substantial evidence that two years was longer than 'necessary to arrange onward travel'"); *Siong v. INS*, 376 F.3d 1030, 1040 (9th Cir. 2004) ("Because of the evidence that Siong may not have 'found a haven from persecution' in France, . . . Siong also has established at least a plausible claim that he is not firmly resettled in France." (internal citation omitted); *Yang v. INS*, 79 F.3d 932, 939 (9th Cir.1996).

3. The Proposed Rule Unnecessarily Shifts the Burden of Proof to the Asylum Seeker

The proposed rule would shift the burden of proof to the asylum seeker, if raised by DHS or the IJ, to prove that the asylum seeker could not obtain permanent status in the third country.[463] This rule would greatly increase the evidentiary burden on asylum seekers to research and provide evidence on foreign immigration laws. Requiring this level of research of unrepresented asylum seekers, particularly those who are detained, would likely result in many unjust denials. This section of the proposed rule would do away with the framework laid out in *Matter of A-G-G-* of establishing that "evidence indicates" that a mandatory bar to relief applies. [464] Furthermore, in *Matter of A-G-G-* DHS did not dispute that it bears the initial burden of making a *prima facie* showing that the respondent had firmly resettled before seeking asylum in the United States. As with all mandatory bars to asylum relief, DHS has always borne the initial burden once the asylum applicant establishes asylum eligibility. Again, without offering explanation, clarity or reasoning, the proposed rule does away with decades of case law. This reverse burden shifting would make is practically impossible for *pro se* asylum seekers with no resources to establish asylum eligibility.

CLINIC's *Estamos Unidos* project staff have worked with *bona fide* asylum seekers who would not be eligible for asylum under the proposed rule. For example, CLINIC worked with an asylum-seeking couple from Honduras who fled with their seven-year-old child after being persecuted by organized crime. The mother's father was recently murdered and most of their family is either dead or fleeing for their lives. The family was placed into MPP and have been awaiting a hearing in Ciudad Juarez. Over the course of several meetings, CLINIC staff have witnessed the asylum seeking mother break into tears when describing her fear of being in Mexico. The men that have been hunting down her family have tried to find the family in Mexico as well. They have tried to find a safe place to wait for their hearing, but she knows they would never be safe in Mexico where organized crime exerts extraordinary control over every part of daily life. The family has already escaped two kidnapping attempts in Mexico. In the most recent attempt, the mother fell trying to escape one of the men and suffered a miscarriage. She prays for her family to stay alive and be able to appear before a U.S. immigration court in December.

K. 8 CFR § 208.18; 8 CFR § 1208.18—The Proposed Rule Would Impose a Nearly Impossible Evidentiary Burden on Those Seeking CAT Protection

The proposed rule would unjustly, without explanation or reason reverse decades of precedent with respect to the Convention Against Torture (CAT). Under this proposed rule many who have been tortured, or fear torture, would be turned away from the United States without protection, in violation of international treaty obligations.[465] Under the existing regulations torture is defined as:

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[463] Proposed 8 CFR § 208.15(b); 8 CFR § 1208.15(b).

[464] *Matter of A-G-G-* 25 I&N Dec. at 501 ("As previously discussed, the circuit courts of appeals have held that the DHS bears the initial burden where DHS has the initial burden of proof.").

[465] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 3(1), Dec. 10, 1983, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[466]

The proposed rule significantly alters the final section of this definition by severely limiting the interpretation of "by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." As with many aspects of the proposed rule, the proposed change appears designed to limit typical claims from Central America and where many are tortured at the hands of non-state actors such as gangs and cartels and where government actors are frequently complicit in these actions.

1. The Proposed Rule Would Create an Impossible Standard Regarding "Rogue Officials"

Under the proposed regulation, an applicant would have to prove that a government official who has inflicted torture has done so "under color of law" and is not a "rogue official."[467] The NPRM reasons nonsensically that since there is currently no law excluding "rogue officials" from the definition, that an exception must exist.[468] Under the proposed rule, if a government official, not acting under the "color of law" tortures a person, that person would not obtain protection under CAT.[469] Established precedent suggests otherwise.

Case law clearly establishes that the key inquiry in CAT claims is whether a government official committed torture, not whether the applicant for protection could prove that the government official was not acting in a "rogue" capacity.[470] The Court of Appeals for the Ninth Circuit very recently held that the Petitioner established all the elements for CAT protection, when he was tortured by the Zeta Cartel with the acquiescence of the Mexican government. In *Xochihua-Jaimes v. Barr*, the Ninth Circuit found that even a "rogue official" is still a public official for purposes of CAT. [471] In this case, the Court found, that:

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[466] *See* 8 CFR § 208.18(a)(1); 8 CFR § 1208.18(a)(1). This first sentence of the rule would not be changed by the proposed rule.
[467] Proposed additional language at 8 CFR § 208.18(a)(1); 8 CFR § 1208.18(a)(1).
[468] 85 Fed. R. 36286-7.
[469] 8 CFR §§ 208.18(a)(1), (7) & 1208.18(1), (7).
[470] *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015) ("Evidence that Mexican police participate as well as acquiesce in torture is found in abundance in this case as it was in *Rodriguez-Molinero*. Nor does it matter if the police officers who will torture Mendoza-Sanchez if he's forced to return to Mexico are 'rogue officers individually compensated by [a gang member] to engage in isolated incidents of retaliatory brutality, rather than evidence of a broader pattern of governmental acquiescence in torture.'. . . It is irrelevant whether the police are 'rogue' (in the sense of not serving the interests of the Mexican government)." (internal citations omitted).
[471] *Xochihua-Jaimes v. Barr,* No. 18-71460, 2020 WL 3479669, (9th Cir. June 26, 2020*)* ("We rejected BIA's 'rogue official' exception as inconsistent with Madrigal [v. Holder, 716 F.3d 499, 506 (9th Cir. 2013]").

> [t]he country conditions evidence shows that corruption of government officials, especially of the police with regard to drug cartels, and specifically with regard to Los Zetas, remains a major problem in Mexico. The country conditions evidence certainly does not indicate that low-level government corruption has been so rectified as to render insufficient Petitioner's testimony regarding acquiescence by specific police officers in Petitioner's specific circumstances.[472]

Other circuits have also interpreted "official capacity" under the "under color of law" standard, to mean that "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," should be considered acting "under color of law."[473] Thus even if the official is not acting in an official capacity, they are nevertheless acting "under color of law." The "under color of law" analysis "includes considerations such as whether the officers are on duty and in uniform, the motivation behind the officer's actions, and whether the officers had access to the victim because of their positions, among others."[474] In other words, the focus is whether the official uses their position of authority to further their actions, even if for "personal" motives.[475] Under this reasoning, an off-duty police officer, who uses their gun, immunity and uniform to harm someone, would be considered operating "under color of law." Without the resources gained by being a government official, this police officer would not be able to actually harm anyone and escape prosecution. Protecting torturer survivors who have been harmed in these situations is the intent of the CAT convention.

The proposed regulation ignores the actual circumstances under which people flee for their lives. The rule would codify a BIA decision from December 2019, *Matter of O-F-A-S-*, which held that actions taken by so-called "rogue officials" are not covered under CAT.[476] In that case, armed men wearing Guatemalan National Police uniforms hit the respondent with their guns, handcuffed him, ransacked his house, and threatened to cut off his fingers.[477] The BIA upheld the denial of his claim for protection under CAT because "carry his burden to show that the men were acting under color of law at the time of the attack."[478] The proposed regulations would require the same possible burden of proof for the CAT applicant. Clearly, if an official claims to be acting in an official capacity, is wearing an official uniform, or otherwise makes it known to the applicant that they are a government official, a CAT applicant would have no reason to know whether the official is acting

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[472] *Id.* at *8.

[473] *See Iruegas-Valdez v. Yates, 8*46 F.3d 806, 812-13 (5th Cir. 2017) (finding that the IJ and the BIA ignored evidence that police officers actively participated in the massacre and the local governor was a close ally of the cartel and the public official in question need not be high-level or follow "an officially sanctioned state action"); *Garcia v. Holder*, 756 F.3d 885, 891-92 (5th Cir. 2014); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900-901 (8th Cir. 2009).

[474] *See Madrigal v. Holder*, 716 F.3d 499, 506-507 (9th Cir. 2013) ("Significant evidence in the record calls into doubt the Mexican government's ability to control Los Zetas. The available country conditions evidence demonstrates that violent crime traceable to drug cartels remains high despite the Mexican government's efforts to quell it. . . . Furthermore, notwithstanding the superior efforts of the Mexican government at the national level, corruption at the state and local levels 'continue[s] to be a problem.' Many police officers are 'involved in kidnapping, extortion, or providing protection for, or acting directly on behalf of, organized crime and drug traffickers,' which leads to the 'continued reluctance of many victims to file complaints.' . . . [C]orruption is also rampant among prison guards, and [Zetas] prisoners can and do break out of prison with the guards' help.").

[475] *Ramirez-Peyro* at 900-901

[476] *Matter of O-F-A-S-,* 27 I&N Dec. 709 (BIA 2019).

[477] *Id.* at 710.

[478] *Id.* at 719.

lawfully or as a "rogue" official. Requiring an applicant for protection to obtain this kind of detailed information from a government official who has tortured or threatened the applicant with torture is unreasonable and, in most cases, impossible. Incredibly, on July 14, 2020, the attorney general issued his own decision in *Matter of O-F-A-S-*,[479] rejecting the BIA's reliance on the concept of a "rogue official"—the very concept that the attorney general would be codifying through these proposed rules. This sequence of events illustrates the impossibility of providing accurate comments on the proposed rule when the agency that promulgated the NPRM is changing the existing law one day before comments are due. It also demonstrates that the proposed rule is irrational, given that the attorney general himself just issued a decision rejecting the use of the term "rogue official" which the proposed rule would codify.[480]

Similarly, the proposed rule would raise the requirement for an applicant to prove "government acquiescence" in the torture to a nearly impossible level. Applicants would now not only have to show that the government turned a blind eye to the torture, the applicant must additionally show that the government official had an official duty to act and breached that duty. Again, it would be virtually impossible for most applicants under CAT to present evidence on the specific legal duty to act of foreign government officials. Many CAT applicants seek protection in the United States from torture in Central American and Mexico.[481] In this region, gangs and cartels have exacted de facto control over large swathes of the country making police corruption rampant.[482]

2. The Proposed Rule Would Create an Impossible Standard Regarding Acquiescence

The current regulations state that "[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."[483] Despite the text of the regulations, the BIA held in *Matter of S-V-* that it is insufficient that "officials are aware of the activity constituting torture but are powerless to stop it."[484] Rather, acquiescence requires officials to "willfully accept[]" the private actors' activity. Federal courts of appeals that have decided this issue have disposed of the "willful acceptance" requirement, but instead require

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[479] *Matter of O-F-A-S-,* 28 I&N Dec. 35 (A.G. 2020).

[480] *Id.* at 38. ("[C]ontinued use of the "rogue official" language by the immigration courts going forward risks confusion, not only because it suggests a different standard from the "under color of law" standard, but also because "rogue official" has been interpreted to have multiple meanings.")

[481] *See* DHS, Credible Fear Cases Completed and Referrals for Credible Fear Interview: 2018, https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview#, (Top Five Countries for Credible Fear referrals are Honduras Guatemala, El Salvador, India, and Mexico).

[482] *Entire Police Forces Continue to be Arrested in Mexico*, InsightCrime, (Aug. 21, 2019) https://www.insightcrime.org/news/brief/entire-police-forces-continue-arrested-mexico/. (An average of 1,688 corruption cases were registered for every 1,000 active-duty police officers in Mexico in 2017, according to a survey conducted by the National Institute of Statistics and Geography (INEGI). That translates to 1.6 acts of corruption for every police officer at the national level.); ESCIS, "Guatemala/El Salvador/Honduras: Corruption And Organized Crime In Central America's Northern Triangle Countries Impact On Migration Crisis Worsening Regional Instability" (July 16, 2019), http://www.esisc.org/upload/publications/briefings/corruption-and-organized-crime-in-central-americas-countries/CORRUPTION%20AND%20ORGANIZED%20CRIME%20IN%20CENTRAL%20AMERICA%E2%80%99S%20NORTHERN%20TRIANGLE%20COUNTRIES.pdf.

[483] 8 C.F.R. § 208.18(a)(7); § 1208.18(a)(7).

[484] *Matter of S-V-* , 22 I. & N. Dec. 1306, 1312 (B.I.A. 2000).

only that the public official be "willfully blind."[485] Likewise, the U.N. Committee Against Torture implicitly endorses the "willfully blind" standard.[486]

Despite clear guidance from the courts, the proposed rule would impose an extremely limited interpretation of "willful blindness," requiring that "the public official or other person acting an official capacity was aware of a high probability of activity constituting torture and deliberately avoided *learning* the truth, it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth or negligently failed to inquire."[487] The NPRM states that this concept is "drawn from well-established legal principles," and in support of this assertion cites to *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, (2011)—a patent case and three non-CAT related, criminal cases.[488] The proposed rule would impermissibly change the long-accepted "willful blindness" standard to an elevated standard more akin to a "willful acceptance" standard. The words of the proposed regulation would require that the public official be "aware of a high probability of activities constituting torture and deliberately avoided learning the truth."[489] Again, the clear result of this heightened standard would be to elevate the standard of proof for those seeking protection to a nearly impossible level.

The proposed rule would also absolve government officials who were "unable" to intervene or did intervene but were unable to stop the torture unless they were "charged with preventing the activity as part of his or her duties and have failed to intervene."[490] Under this proposed scheme, the "acquiescence" prong of CAT protection would be eviscerated, and the burden of proof placed on an applicant—who would need to understand the legal duties of the government official who did not act and whether that official was charged with preventing those actions but did not act—would be nearly impossible to meet. Many torture survivors would not be able establish, to a preponderance of the evidence, that their torturer acted under the acquiescence of someone who was "charged" with protecting them. For many, just the sight of a uniform, could indicate that the person wearing it was charged to protect and serve anywhere, and would fulfill their duties regardless of whether they were in the actual jurisdiction where they work.[491] Moreover, the

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[485] See, *Suarez-Valenzuela v. Holder,* 714 F.3d 241, 245-47 (4th Cir. 2013); *Pieschacon-Villegas v. U.S. Att'y Gen*. 671 F.3d 303, 311-13 (3d Cir. 2011); *Hakim v. Holder*, 628 F.3d 151, 156-67 (5th Cir. 2010); *Delgado v. Mukasey* 508 F.3d 702, 708-09 (2d Cir. 2007); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006); *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005); *Khouzam v. Ashcroft* 361 F.3d 161, 171 (2nd Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003).

[486] U.N. Committee Against Torture, General Comment No. 2, at ¶ 18, https://www.refworld.org/pdfid/47ac78ce2.pdf, ("… the State's indifference or inaction provides a form of encouragement and/or de facto permission" for non-state actors to act with impunity.).

[487] Proposed rule 8 CFR § 208.18(a)(7); 8 CFR § 1208.18(a)(7).

[488] *See* 85 Fed. R. 36287. The NPRM does cite to footnote 14 in *Roye v. AG of the United States*, 693 F.3d 333, 343 (3d Cir. 2012), where the court mentions "willful blindness" and refers to *Global-Tech Appliances*. However, this decision is from an entirely different context from the regulation and provides no justification for the significant departure from settled law in the proposed rule.

[489] Proposed 8 CFR § 208.18(a)(7); 8 CFR § 1208.18(a)(7).

[490] *Id*.

[491] *See Xochihua-Jaimes v. Barr*, at *8 ("Petitioner testified that she was personally beaten severely and threatened with death at gunpoint by a member of Los Zetas, while Mexican police officers looked on and did not nothing but laugh. This testimony, which the IJ found credible, establishes the acquiescence of public officials in a past instance of torture.").

NPRM cites to the Model Penal Code[492] in an effort to show that public officials who do not provide protection might not be subject to prosecution for failure to act, but that Code is completely irrelevant to what transpires in a foreign country, and, in any event, does not change the result that the torture survivor was tortured and the public official did nothing to protect them. Placing this high evidentiary burden on torture survivors and those who fear torture is inhumane, unjust, and unnecessary.

A CLINIC staff member recalls the case of a former client who suffered horrendous torture, and would not be eligible for CAT protection under the proposed rule. The torture survivor is a transgender woman from Mexico. She was frequently harassed by local Mexican police when she exited nightclubs and bars in the state of Quintana Roo. She tried to avoid them, and did not know who they were but remembered that they wore police uniforms on occasion. She did not know if they worked in the local area or if they were from a different part of the states or country or if they were even on duty. On more than one occasion, sometimes while dressed in a uniform and sometimes not, several of the police officers raped her while others watched. She was granted deferral of removal under CAT in 2012, but under this proposed rule she would not be granted such protection because it would be impossible for her to prove whether the rapists were "rogue officials" or whether the officers who watched were under a legal duty to provide protection. In short, this proposed rule would eliminate CAT protection in virtually all cases.

L. 8 CFR § 208.20; 8 CFR § 1208.20— The Proposed Rule Would Radically Redefine the Definition of Frivolous and May Prevent Asylum Seekers from Pursuing Meritorious Claims

The NPRM proposes numerous changes to the current regulatory framework pertinent to determinations of frivolous applications. These changes upend years of immigration law practices and would contradict case law at both the BIA and federal circuit court levels.

As a preliminary matter, the severe consequences of a frivolous finding cannot be overstated. The statute is "one of the 'most extreme provisions' in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and, once imposed, it 'may not be waived under any circumstances.'"[493] A finding of frivolousness is "the veritable death sentence of immigration proceedings."[494] Given the long-lasting impact of a frivolous finding, an immigration judge or the BIA must follow stringent substantive and procedural requirements.[495]

The current regulations and established case law acknowledge the severity of these consequences. Currently, in order to make a frivolousness finding, an adjudicator must: (1) provide notice of the consequences of filing a frivolous application; (2) make a specific finding that the applicant knowingly filed a frivolous application; (3) find a preponderance of the evidence in the

[492] *See* 85 Fed. R. 36287, with reference to the Model Penal Code sec. 201(1).
[493] *Luciana v. Att'y Gen.*, 502 F.3d 273, 278 (3d Cir. 2007) (quoting *Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2005). *See also Khadka v. Holder*, 618 F.3d 996, 1002 (9th Cir. 2010); *Biao Yang v. Gonzales*, 496 F.3d 268, 274 (2d Cir. 2007)(stating that the court was especially inclined to exercise its discretion "given the harsh consequences attached to frivolousness findings").
[494] *Yousif v. Lynch*, 796 F.3d 622, 627 (6th Cir. 2015) (internal quotations omitted).
[495] *See Yan Liu v. Holder*, 640 F.3d 918, 927 (9th Cir. 2011); *Matter of Y–L–*, 24 I&N Dec. 151, 155 (BIA 2007) (establishing the framework for frivolous findings).

record to support the finding that a material element of the application was deliberately fabricated; and (4) afford the applicant sufficient opportunity to account for discrepancies or implausible aspects of the claim.[496] Under the existing regulations, a frivolousness determination can only be made by an immigration judge or the BIA.[497] Immigration judges must make explicit findings based on convincing reasoning that "material aspects of the claim were deliberately fabricated."[498] Furthermore, immigration judges must separately address how explanations for inconsistencies or discrepancies have a "bearing on the materiality and deliberateness requirements unique" to a frivolousness determination.[499] These requirements recognize asylum seekers' Fifth Amendment right to due process.[500]

1. The Proposed Rule Would Improperly Redefine "Knowingly"

The NPRM proposes defining "knowingly" as either actual knowledge of the frivolousness or willful blindness toward it.[501] "Knowingly" is not currently defined by either statute or regulation."[502] According to the NPRM, "willful blindness" means the applicant "was *aware* of a high probability that his or her application was frivolous and deliberately avoided learning *otherwise*."[503] In support of this new definition of "knowingly," the NPRM cites *Global-Tech Appliances, Inc. v. SEB S.A.*,[504] a Supreme Court patent infringement case between two large international companies. The case clarified that "willful blindness" requires that an individual (1) subjectively believes that there is a high probability that a fact exists and (2) takes deliberate actions to avoid learning of that fact.[505] *Global-Tech Appliances, Inc.* involved sophisticated litigants represented by attorneys familiar with the intricacies of American patent law. It would be inappropriate to hold asylum seekers, who are new to the American judicial system and many times are appear *pro se,* to the same "willful blindness" standard. Finally, the NPRM does not adequately explain how this standard differs from recklessness or negligence.[506]

CLINIC'S *Estamos Unidos* project in Juarez frequently meets with individuals and families who have fled generalized violence in their countries. The complexities of asylum law make it impossible for many of these individuals to self-assess their own *prima facie* eligibility for a meritorious asylum claim. Asylum seekers should not be penalized for the very real fear of potential harm if they are returned to their country based on their inability to understand the increasingly opaque U.S. asylum system. CLINIC has significant concerns that cases like these

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[496] *See Matter of Y–L–,* 24 I&N Dec. at 155. (referring to these requirements as procedural safeguards that account for the harsh consequences of a frivolousness finding).
[497] 8 CFR §§ 208.20, 1208.20 (2020).
[498] *Matter of B–Y–*, 25 I&N Dec. 236, 241 (BIA 2010).
[499] *Id.* at 240.
[500] *See Reno v. Flores*, 507 U.S. 292, 306 (1993); *Sosa-Perez v. Sessions*, 884 F.3d 74, 83 (1st Cir. 2018) ("It is well established that the Fifth Amendment entitles [immigrants] to due process of law in deportation proceedings.").
[501] Proposed 8 CFR § 208.20 (a)(2); § 1208.20(a)(2).
[502] *See* INA § 208(d)(6)*;* 8 CFR § 208.20, § 1208.20.
[503] 85 Fed. R. at 36273 (emphasis added). This definition is unclear and seemingly requires an asylum applicant to actively seek out proof that their application is *not* frivolous.
[504] *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).
[505] *Id.*
[506] *Compare* 85 Fed. R. at 36273 (devoting four sentences to explain the new proposed definition) *with Global-Tech,* 563 U.S. at 770 (detailing how "willful blindness" is limited in scope by elaborating on the various standards and parsing through definitions formulated by the circuit courts).

would be punished and categorized as frivolous when the intent was never to "game" the asylum system but rather pursue a form of protection because they believe that they qualify. Individuals who don't present a strong case should not be considered as de facto frivolous claims as the result in practice would be that meritorious asylum seekers would be afraid to come forward due to the consequences of losing their case and the potential of being accused of submitting a frivolous application.

2. The Proposed Rule Would Improperly Broaden the Definition of Frivolous

The NPRM claims that broadening the definition of "frivolous" would "root[] out" "unfounded or otherwise abusive claims."[507] Yet, the NPRM does not provide any evidence of large numbers of frivolous applications currently pending. The proposed regulations list four grounds under which an asylum application would be deemed frivolous: (1) it contains a fabricated essential element; (2) it is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence; (3) it is filed without regard to the merits of the claim; or (4) it is clearly foreclosed by applicable law.[508] These regulations would require asylum seekers to make a complex, legal determination, and would conflict with existing regulations grounded in a representative's duties to advocate for their client.

The first ground of the rule removes two current requirements: (1) that a fabrication be deliberate and (2) that the deliberate fabrication be related to a material element of the case. The standards of "deliberate" and "materiality" establish parameters that immigration judges must follow before imposing the permanent bar.[509] The new regulation suggests that asylum seekers who are unaware that an "essential element" is fabricated would be permanently barred from immigration benefits. The NPRM does not define "essential" and the cases it cites focus on fabricated material evidence.[510] Material evidence is "evidence having *some logical* connection with the facts of the case or the legal issues presented."[511] An element however is a "*constituent* part of a claim that *must be* proved for the claim to succeed."[512] Given these different standards, courts have held that "fabrication of material evidence does not necessarily constitute fabrication of a material element."[513]

Considerations regarding the merits of a claim and applicable law require an understanding of immigration law. Immigration laws are "second only to the Internal Revenue Code in complexity."[514] The NPRM claims that an asylum applicant "already . . . knows whether the application is . . . meritless and is aware of the potential ramifications."[515] This logic presumes that asylum seekers, including those without representation, have analyzed labyrinthine statutes, case law, and regulations before applying for asylum.[516] This presumption discounts the fact that

[507] 85 Fed. R. at 36274.
[508] *Id.* at 36303–04 (to be codified at 8 CFR §§ 208.20 (c)(1)-(4), 1208.20(c)(1)-(4)).
[509] *Liu v. U.S. Dept. of Justice,* 455 F.3d 106, 112 (2nd Cir. 2006).
[510] 85 Fed. R. at 36276.
[511] Black's Law Dictionary (11th ed. 2019) (emphasis added).
[512] *Id.* (emphasis added).
[513] *Khadka v. Holder*, 618 F.3d 996, 1004 (9th Cir. 2010).
[514] *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004).
[515] 85 Fed. R. at 36276.
[516] *See Lok v. INS,* 548 F.2d 37, 38 (2d Cir. 1977) (comparing the INA to the "labyrinth of ancient Crete").

applicants "often lack the legal knowledge to navigate their way successfully through the morass of immigration law."[517] The NPRM does not acknowledge this reality. Instead, the NPRM focuses on deterring applications for asylum and adjudicating applications expeditiously.[518] Declaring that an application for asylum is frivolous if it is "clearly foreclosed by applicable law" ignores the ever-shifting landscape of immigration law.[519]

Furthermore, the regulations contradict existing regulations grounded in a representative's duty to advocate for their client. The existing regulations covering professional conduct state that a representative is subject to disciplinary sanctions if they "engage in frivolous behaviors" by submitting applications that have no merit.[520] Representatives are permitted to put forth a "good faith argument for the extension, modification, or reversal of existing law or the establishment of new law."[521] These regulations closely mirror the American Bar Association's (ABA) Model Rule of Professional Conduct. Comment 1 of ABA Model Rule 3.1 states that an advocate must take account of "the law's ambiguities and potential for change" when determining the scope of advocacy.[522] The model rules also permit advocates to make good faith arguments in support of their client's position, even if the advocate believes the client would ultimately not prevail.[523] Threatening to impose a permanent bar on applicants who put forth claims that challenge existing law deters representatives from putting forth nuanced arguments. These regulations place representatives in the untenable position of needing to fulfill their ethical obligations to make every argument on their client's behalf, including for the purpose of arguing to expand the law, and potentially subjecting their client to the permanent bar.

"Applicable law" in asylum law is in constant flux[524] and an attorney's ability to make good faith arguments has been crucial to modifying and expanding the law. In *Grace v. Whitaker*,[525] representatives effectively argued that *Matter of A-B-*[526] was an impermissible interpretation of the INA and contrary to Congress' intent to comply with the Protocol.[527] The court held that the attorney general had failed to stay "within the bounds of his statutory authority."[528] Other circuits have declared that the *Grace* decision abrogates *Matter of A-B-*.[529] Good faith arguments by representatives allow asylum seekers to pursue "a claim to the full extent of the law."[530]

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[517] *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002).
[518] 85 Fed. R. at 36275.
[519] *See Agyeman,* 296 F.3d at 877.
[520] *See* 8 CFR § 1003.102(j).
[521] 8 CFR § 1003.102(j)(1).
[522] MODEL CODE OF PROF'L CONDUCT r. 3.1 cmt (AM. BAR ASS'N 2020).
[523] *Id.*
[524] *See* National Immigrant Justice Center., *A Timeline of the Trump Administration's Efforts to End Asylum*, (Jan. 2017), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2019-08/Asylum_Timeline_August2019.pdf.
[525] *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).
[526] *Matter of A–B–*, 27 I&N Dec. 316 (A.G. 2018).
[527] *Grace*, 344 F. Supp. 3d at 126.
[528] *Id.* (quoting *District of Columbia v. Dep't of Labor*, 819 F.3d 444, 449 (D.C. Cir. 2016)) (internal quotations omitted).
[529] *See Juan Antonio v. Barr,* 959 F.3d 778, 791 (6th Cir. 2020).
[530] *Matter of Cheung,* 16 I&N Dec. 244, 245 (BIA 1977) ("We should be loath to quickly attach a label of frivolousness . . . a respondent's vigorous and persistent exercise of his legal rights. . . . This is especially so when the respondent's legal actions are based. . . on a claim to refugee status.").

Taken together, these new grounds for declaring an application frivolous would severely penalize *pro se* respondents, pressure many applicants to abandon their cases and take voluntary departure, create an enormous amount of additional confusion, likely require attorneys to violate their ethical duties, and raise serious due process concerns.

3. The Proposed Rule Would Improperly Change the Role of Asylum Officers, Requiring Them to Make Frivolous Findings

For the first time, the proposed regulations would allow asylum officers adjudicating affirmative asylum applications to make frivolous determinations and refer the cases solely on that basis to immigration judges (for applicants not in lawful status) or to deny the applications (for applicants in lawful status).[531] Furthermore, asylum officers would not be required to "provide opportunities for applicants to address discrepancies or implausible aspects of their claims in all cases."[532] The NPRM claims asylum officers are equipped to make frivolous determinations because of their experience with making credibility determinations.[533] However, credibility and frivolous determinations differ significantly.[534] First, while the applicant has the burden of demonstrating credibility, it is the government that bears the burden in a frivolousness determination.[535] Furthermore, the existing regulations "demand a separate assessment of the explanations for inconsistencies and discrepancies . . .[since] explanations offered may have a bearing on the determination of materiality or deliberateness of fabrication."[536] These regulations reflect the harsh consequences of a frivolous finding.[537]

The NPRM asserts that allowing asylum officers to refer cases to immigration judges based solely on frivolousness would lead to efficiencies without ever explaining how or providing evidence of a significant issue of frivolous applications in the asylum system.[538] Additionally, the NPRM claims that the goal of these changes is to "better allocate limited resources and time and more expeditiously" move through the adjudication process.[539] However, expediency is inappropriate when making a determination that would subject the applicant to one of the harshest penalties in immigration law. Courts have acknowledged that "requiring a more comprehensive opportunity to be heard in the frivolousness context makes sense in light of what is at stake in a frivolousness decision, for both the [applicant] and the government."[540] The BIA has stated that

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[531] 85 Fed. R. at 36274–75.
[532] *Id.*
[533] *Id.* at 36275.
[534] *See Matter of Y–L–*, 24 I&N Dec. at 156 ("[A] finding of frivolousness does not flow automatically from an adverse credibility determination.") (quoting *Liu v. U.S. Dept. Of Justice*, 455 F.3d 106, 113 (2nd Cir. 2006)) (internal quotations omitted).
[535] *See Matter of B–Y–*, 25 I&N Dec. 236, 240 (BIA 2010).
[536] *Id.*
[537] *See Liu*, 455 F.3d at 155 (2nd Cir. 2006) (concluding that federal courts "require a heightened evidentiary standard in evaluating frivolousness").
[538] 85 Fed. R. at 36274-75.
[539] *Id.* at 36,275.
[540] *Liu,* 455 F.3d at 114, n. 3.

"immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost."[541]

Since the denial of an asylum applicant filed by someone in lawful status is not referred to an immigration judge, these applicants would not be provided with the opportunity to address discrepancies in their applications before their applications are denied. Applicants not in lawful status would be referred to an immigration judge who would review the asylum officer's frivolous finding *de novo* so there is no reason for the asylum officer to make that finding at all.[542] Forcing asylum officers to consider whether asylum applications are frivolous, and therefore whether to apply this severe penalty, improperly changes their role from considering humanitarian relief, to being an enforcement agent.

The proposed regulations would also allow immigration judges to make a frivolous finding *without* providing an applicant "any additional or further opportunity to account for any issues with his or her claim."[543] This proposed regulation applies to applicants before asylum officers, immigration judges, and the BIA and is not limited to cases where an asylum officer has made a frivolous determination. The NPRM states that asylum officers who can adjudicate frivolousness would get to focus more on it in the interview and develop a more robust record of frivolousness indicators for an immigration judge.[544] Therefore, while not bound by the asylum officer's frivolous finding, under the proposed regulations, an immigration judge would not be required to allow the applicant to meaningfully address the "robust record of frivolousness indicators."[545] The NPRM states that the statute only requires that applicants be given notice of the consequences of filing a frivolous application and therefore judges need not provide an opportunity for applicants to explain any perceived discrepancies or implausibility.[546] But this claim ignores that "the goal in every case is to assure that the respondent has a fair opportunity to address any discrepancies that may form the basis of the frivolousness determination."[547] Finally, this proposed change is based on the assumption that applicants know what a judge would consider "meritless" or implausible.

The proposed regulations conflict with established BIA case law that requires an immigration judge to "afford the applicant sufficient opportunity to account for discrepancies or implausible aspects of the claim."[548] In fact, adjudicators making credibility determinations are required to provide applicant with the opportunity to respond to and explain any apparent inconsistencies, misrepresentations, or omissions.[549] Failure to do so violates an applicant's due

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[541] *Matter of S–M–J–*, 21 I&N Dec. 722, 727, 743 (BIA 1997) (emphasizing that legacy INS had an obligation to uphold international refugee law and "extend protection to those who demonstrate by even a significant degree less than a preponderance of the evidence a possibility of persecution" under the INA).
[542] 85 Fed. R. at 36275.
[543] *Id.* at 36295, 36304 (to be codified at 8 CFR §§ 208.20(d), 1208.20(d)).
[544] *Id*. at 36275.
[545] *Id.*
[546] *Id.* at 36276.
[547] *Matter of B–Y–*, 25 I& N Dec. at 243.
[548] *Matter of Y–L–*, 24 I&N Dec. at 155.
[549] *See, e.*g., *Bhattarai v. Lynch*, 835 F.3d 1037, 1040 (9th Cir. 2016) (holding that inconsistencies in the applicant's testimony and supporting documents did not support an adverse credibility finding where the immigration judge did not provide the applicant an opportunity to present corroborating evidence explaining the inconsistencies); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091–93 (9th Cir. 2009); *Kaita v. Att'y Gen.*, 522 F.3d 288, 299–300 (3d Cir. 2008); *Pang v. USCIS*, 448 F.3d 102, 109–11 (2d Cir. 2006).

process right.[550] The NPRM claims "there is no legal or operational reason" to provide asylum seekers with an additional opportunity to address "problematic aspects" in their claim.[551] This claim ignores the fact that the current procedural safeguards were a response to circuit court decisions holding that immigration judges deprived asylum applicants of due process.[552]

4. The Proposed Rule Does Not Adequately Consider the Grave Consequences of a Frivolous Finding

The proposed regulations do not adequately account for the gravity of a frivolous finding.[553] In the discussion of regulatory history, the NPRM fails to mention that legacy INS explicitly considered whether the current, narrow definition provided appropriate safeguards to applicants.[554] The only other area of immigration law where an applicant faces a permanent ban on immigration benefits is in the context of marriage fraud. Congress has reserved the harshest punishment for those who intentionally engage in a fraudulent act. Under INA section 204(c), any person who "attempted or conspired to enter into a marriage" in order to receive permanent resident status in the United States, or who at any time immigrated based on a fraudulent marriage, is permanently barred from immigration benefits.[555]

In a marriage petition, a petitioner has the burden to prove by a preponderance of the evidence that the marriage is *bona fide.*[556] If there is evidence of fraud, the petitioner must be advised of any derogatory evidence.[557] Because of the severe consequences attached to a marriage fraud finding, the BIA has concluded that the degree of proof required for a finding of marriage fraud sufficient to support the denial of a visa petition under section 204(c) is "substantial and probative," a standard "higher than a preponderance of the evidence and closer to clear and convincing evidence."[558] The NPRM does not demonstrate a thorough consideration of the severity of a frivolous finding nor does it state what measures would be taken by adjudicators to ensure asylum seekers are not erroneously subjected to the permanent bar.

While a frivolous finding does not bar an applicant from seeking statutory withholding of removal or protection under CAT, it does foreclose the individual's ability to obtain permanent relief from removal. Furthermore, the standard for being granted withholding of removal or CAT protection is higher than the standard for being granted asylum.[559] Individuals who are granted

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[550] *Stoyanov v. INS*, 172 F.3d 731, 735 (9th Cir. 1999) (holding that the BIA violated an applicant's right to due process by *sua sponte* raising credibility as an issue and not providing the applicant with notice).
[551] 85 Fed. R. at 86276.
[552] *See Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (finding that the immigration judge violated the applicant's due process rights by relying on two State Department reports in finding that the applicant's asylum application was frivolous); *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005) (finding that an asylum applicant was deprived of due process when an immigration judge imposed a frivolous finding after refusing to allow further testimony based on " her assessment of [the applicant's] credibility").
[553] *See* 85 Fed. R. 36264.
[554] *See* Asylum Procedures, 65 Fed. R. 76121, 76128 (Dec. 6, 2000).
[555] INA § 204(c). This bar applies to any petitions filed on or after November 10, 1986.
[556] *Matter of P. Singh*, 27 I&N Dec. 598, 605 (BIA 2019).
[557] *See* 8 CFR § 103.2(b)(16)(i).
[558] *Matter of P. Singh*, 27 I&N Dec. at 607.
[559] *See* 8 CFR §§ 208.16(b)(1)(iii), 208.17.

asylum have a pathway to U.S. citizenship, are able to travel outside the United States, and certain family members are also eligible for protection.[560]

The proposed regulations would not impose a frivolous finding on applicants that withdraw their asylum applications if: (1) the applicant wholly disclaims the application and withdraws it with prejudice; (2) the applicant is eligible for and accepts an order of voluntary departure for a period of no more than 30 days; (3) the applicant withdraws any and all other applications for relief or protection with prejudice; *and* (4) the applicant waives his or her rights to appeal *and* any rights to file, *for any reason,* motion to reopen or a motion to reconsider.[561] This provision is further limited since the proposed regulations reiterate that an asylum application "may still be deemed frivolous even if it is withdrawn."[562] Thus, under these proposed regulations, the only way an asylum seeker can avoid a frivolous finding is by leaving the country, which places them in danger of returning to a country where they suffer persecution.

5. The Proposed Rule Contravenes Legislative Intent

The NPRM states these changes are consistent with congressional intent and rely on the Senate's committee report on Immigration Control and Financial Responsibility Act of 1996.[563] However, the NPRM fails to acknowledge the weight of the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol) and Congress's reliance on UNHCR guidance when it legislates on matters of asylum and refugee protection.[564]

In developing IIRIRA in 1996, Congress was aware that the term "frivolous" has a very specific meaning within the context of refugees and asylum seekers.[565] In questioning Chris Sale, INS Acting Commissioner at the time, Representative Ira William McCollum referenced the UNHCR when discussing frivolous claims.[566] The frivolous standard was "the functional equivalent of the international standard 'manifestly unfounded.'"[567] Thus, Congress's use of the word "frivolous" in INA § 208(d)(6) is best understood as referencing the UNHCR's guidance on manifestly unfounded or abusive applications.

The UNHCR has stressed that the determination that an application is manifestly unfounded or abusive requires "a substantive evaluation" similar to the determination of refugee status given the serious consequences for a rejected applicant of an erroneous determination.[568]

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[560] *See* Dree Collopy, AILA'S ASYLUM PRIMER 1423 (8th ed. 2019).
[561] *See* 85 Fed. R. at 36925; proposed 8 CFR §§ 208.20(f)(1)-(4), 1208.20(f)(1)-(4)) (emphasis added).
[562] *Id.*
[563] *Id.* at 36275.
[564] *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 436-37 (1987); *Grace v. Whitaker,* 344 F. Supp. 3d 96*,* 126 (D.D.C. 2018).
[565] *See Asylum and Inspection Reform: Hearing Before the Subcomm. on Int'l Law, Immigration and Refugees of the H. Comm. on the Judiciary*, 103rd Cong. at 2 (1993).
[566] *Id.* at 124.
[567] *Id.* at 171–72 (statement by Robert Rubin, Assistant Director at Lawyer's Committee for Civil Rights of the San Francisco Bay Area).
[568] *See* UNHCR, *Follow-up on Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status with Regard to the Problem of Manifestly Unfounded or Abusive Applications*, (Aug. 26, 1983), https://www.unhcr.org/en-us/excom/scip/3ae68cd30/follow-up-earlier-conclusions-sub-committee-determination-refugee-status.html.

The UNCHR has continued to emphasize that a claim "should not be rejected as 'manifestly unfounded' even if it does not fall under the 1951 Convention definition, if it is also evident that the applicant is in need of protection for other reasons and thus may qualify for the granting of asylum."[569] The UNHCR definition thus clearly encompasses applications that an immigration judge may find "lack merit" but that may be found by a court of appeals to establish a protection claim.

The proposed regulations on frivolous findings do not address UNHCR's guidance. Thus, the proposed rule ignores Congress's commitment to the Protocol, a treaty that represents the U.S.'s tradition of being "a beacon of hope, and of light . . . the country where people could come to when they [are] persecuted."[570] Accordingly, these proposed regulations do not accurately reflect Congress's intent, are inconsistent with the U.S.'s treaty obligations under the Protocol, and should be withdrawn.

The proposed rule would also redefine the meaning of a "frivolous" asylum application. Under the new rule an asylum seeker could be charged with filing a "frivolous" application, and thereby be subject to one of the harshest bars in immigration law (*see* INA § 208(d)(6)), and rendered ineligible for any form of immigration relief in the future, if the adjudicator determines that it lacks "merit" or is "foreclosed by existing law." However, as discussed above, "existing law" in asylum is in a state of constant flux. Moreover, 8 C.F.R. 1003.102(j)(1), specifically states that a filing is not frivolous if the applicant has "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose." Under the proposed rule, an asylum seeker whose application would likely be denied under a restrictive interpretation of asylum by the BIA or attorney general precedent, who intends to challenge that precedent in federal court, must risk a finding that would forever bar any immigration relief if that appeal is unsuccessful.

Furthermore, for the first time, asylum officers could determine that an application is frivolous and refer the case to the immigration court on this ground. This enforcement role for asylum officers is contrary to their mission to extend protection to refugees, not enforce immigration laws, and unnecessary. They can already refer cases to immigration court if the applicant lacks credibility. It is more appropriate for the immigration judge, in a full adversarial hearing, to determine whether the asylum seeker has filed a frivolous claim.

M. 8 CFR § 208.20; 8 CFR § 1208.20— The Proposed Rule Would Impermissibly Heighten the Legal Standards for Credible and Reasonable Fear Interviews and Would Turn Away Bona Fide Asylum Seekers Without Providing Them a Full Hearing

The expedited removal process became law with the enactment of IIRIRA.[571] Noncitizens who arrive at a port of entry without valid documents, or those who have not been in the United

[569] UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, (Dec. 1, 1992) https://www.refworld.org/docid/3ae6b31d83.html.
[570] 142 CONG. REC. S4,466 (daily ed. May 1, 1996) (statement by Senator Richard Michael DeWine).
[571] *See* INA § 235.

States for two years prior to apprehension are subject to the expedited removal framework.[572] Asylum seekers who are subject to expedited removal, can obtain a credible fear interview by an asylum officer if they voice a fear of returning to their country of origin.[573] Concerned by the limited access to due process that those subject to expedited would receive, Congress intentionally set the threshold for passing a credible fear interview low; an asylum seeker need only demonstrate a "significant possibility" of establishing eligibility for asylum to be permitted a full hearing in immigration court.[574]

Despite this intentionally low standard, which Congress designed to filter out economic migrants from asylum seekers, USCIS has changed the credible fear process substantially throughout the years via changes to the Credible Fear Lesson Plan for asylum officers and internal policy guidance.[575] Under the proposed rule, the Departments would redefine the broad "significant possibility" standard to mean "a substantial and realistic possibility of succeeding." This language contradicts the clear language of "significant possibility" that Congress set forth at INA § 235(b)(1)(B)(v) and is therefore *ultra vires*.

The legislative history confirms Congress's intention to ensure *bona fide* asylum seekers' access to protection. The Judiciary Committee report to the House version of the bill explained that:

> Under this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution. The initial screening, which should take place in the form of a confidential interview, will focus on two questions: is the alien telling the truth; and does the alien have some characteristic that would qualify the alien as a refugee. As in other cases, the asylum officer should attempt to elicit all facts relevant to the applicant's claim.[576]

Senator Hatch stated:

> The credible fear standard applied at the screening stage would be whether, taking into account the alien's credibility, there is a significant possibility that the alien would be eligible for asylum. The Senate bill had provided for a determination of whether the asylum claim was 'manifestly unfounded,' while the House bill applied a 'significant possibility' standard coupled with an inquiry into whether there was a substantial likelihood that the alien's statements were true. The conference report struck a compromise by rejecting the higher standard of credibility included in the House bill. The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.[577]

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[572] 8 CFR § 235.3(b).
[573] 8 CFR § 235.3(b)(4).
[574] *See* INA § 235 (b)(1)(v).
[575] *See* CLINIC and AILA Updated Credible Fear Lesson Plans Comparison Chart,(May 2019), https://www.aila.org/infonet/updated-credible-fear-lesson-plans-comparison.
[576] 142 Cong. Rec. 25347 (1996).
[577] H.R. Rep. No. 104-469, at 158 (1996).

Given the low screening threshold Congress initially prescribed, the proposed rule flies in the fact of Congress's clearly expressed intent. Attempting to raise the "significant possibility" standard by redefining it, once again, does not carry out the intent of Congress. A "realistic and substantial likelihood" is a standard that slides closer to the "reasonable possibility" standard, and not the lower "significant possibility" standard. Meritorious asylum seekers will be screened out of the asylum system – a reality Congress expressly prohibited.

1. Requiring Asylum Officers Who Conduct Credible Fear Interviews to Perform More Legal Analysis Is Burdensome, and Runs Contrary to the Initial Intent of Congress

The proposed rule would require asylum officers to consider bars to asylum, including consideration of the internal relocation bar, in conducting initial fear screenings.[578] The proposed rule seems to build off a change in analysis USCIS posted without going through an NPRM last summer: an "Asylum and Internal Relocation Guidance" in which the acting director of USCIS called for increased internal relocation analysis in response to what he called "a crisis at the southern border."[579] That online "guidance" incorrectly articulated the legal standard for analyzing internal relocation as being whether internal relocation is "possible" in cases involving private violence rather than whether it is "reasonable."[580] The proposed rule would force asylum seekers to explain why they did not relocate internally before fleeing harm in their country of origin, or lose the chance to ever put their case forward before an IJ. Most credible fear applicants are *pro se* and do understand the intricacies of the internal relocation analysis, especially under the heightened standard in the proposed rule. Asylum seekers would likely have to include detailed country conditions materials in support of their credible fear claim to prove why other parts of their country would not be safe. This evidentiary burden would likely be impossible for unrepresented and detained asylum seekers to meet shortly after arriving in the United States. Moreover, asylum officers conduct multiple credible fear interviews each day and adding an additional research burden on them would not be efficient. This proposed rule runs contrary to Congressional intent, which was designed to screen asylum seekers in—not screen them out.

The proposed rule would also require asylum officers to determine "(1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under INA 208(a)(2)(B)–(D) and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the CAT regulations."[581]The mandatory bars—persecutor bar, serious nonpolitical bar, particularly serious crime bar, danger to security of the United States, and firm resettlement bar—all require intensive legal analysis and research to determine their application in a particular case.[582] Requiring asylum officers to consider each

[578] Proposed 8 CFR § 208.30(e)(1)(ii) & (iii); 8 CFR § 1208.30(e)(1)(ii) & (iii).
[579] USCIS, *Asylum and Internal Relocation Guidance, A message sent by the acting director to USCIS asylum officers regarding asylum and internal relocation guidance*, (July 26, 2019), https://www.uscis.gov/news/news-releases/asylum-and-internal-relocation-guidance.
[580] *Id.*
[581] Proposed 8 CFR § 208.30(e)(1)(iii); 8 CFR § 1208.30(e)(1)(iii).
[582]Rachel D. Settlage, *Article: Affirmatively Denied: The Detrimental Effects Of A Reduced Grant Rate For Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61, 84 (2009) ("Asylum law is increasingly complex. While some of the laws that raise bureaucratic obstacles to the granting of valid asylum claims were implemented prior to 9/11, in the wake of 9/11, the law became increasingly complicated and restrictive, leading to even greater uncertainty for

mandatory bar within a quick, screening interview would result in the return of many asylum seekers to harm's way, while burdening the United States credible fear process. Asylum officers have not been required to consider mandatory bars during the credible fear process precisely because of the complicated legal and factual requirements needed in assessing each bar.[583]

The "material support" bar to asylum requires asylum officers to engage in intensive analysis, factual and legal research to determine if the asylum seeker is barred. If subject to the bar, the asylum applicant may be eligible for an exemption from the bar.[584] Asylum officers cannot conduct this analysis adequately and thoroughly in a quick screening interview. The "serious non-political crime" bar not only requires intensive interviewing, but also intensive factual investigation into the laws of the asylum applicant's home country.[585] The "particularly serious crime" bar also requires research and analysis with regard to whether a conviction is deemed an "aggravated felony" in the asylum and withholding of removal context. This complicated analysis requires research into state criminal laws as well as immigration law.[586] Moreover, the firm resettlement bar, which can unfairly bar asylum seekers because of the stringent requirements, requires a level of analysis asylum officers cannot conduct during a credible fear interview.[587] An asylum officer conducting a screening interview, often by phone, who is tasked with making a decision that same day, will almost never have the time, expertise, or resources to fully explore this bar, or any bar, during the credible fear process.[588] As a result, the government may expend needless resources detaining asylum seekers who will have to wait longer for credible fear interviews, or asylum officers may simply deny asylum seekers at these screenings rather than conduct the necessary analysis.

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asylum-seekers. As a result, asylum officers are now, more than ever, faced with cutting-edge issues or fine points of law.").

[583] *Id*. at 88-89 ("Since 9/11, new legislation has broadened the definition of 'terrorist group' and 'terrorist activities,' thereby increasing the number of people who are inadmissible, and changed some of the standards and requirements for establishing an asylum claim, thereby increasing the level of proof required of asylum seekers.")

[584] *Id* at. 92.

[585] Nadia Yakob, *Note: Political Offender or Serious Criminal? Challenging the Interpretation of "Serious, Nonpolitical Crimes" in INS V. Aguirre-Aguirre*, 14 GEO. IMMIGR. L.J. 545, 570, (2000) ("First, a particularly serious crime in the host state is distinct from a serious nonpolitical crime in another country prior to arrival in the host state. Second, neither the Protocol nor the Handbook suggests that particularly serious crimes in the host states be analyzed according to the persecution feared upon return. Article 33 of the Convention specifically relieves states of their obligation not to return a refugee to a situation where he or she would face persecution if that refugee has committed a particularly serious crime in the host country that would render the refugee a danger to the state's community. The Handbook only recommends a balancing test where the refugee is considered to have committed a serious nonpolitical crime prior to arriving in the host state.").

[586] Fatma Marouf, *Article: A Particularly Serious Exception To The Categorical Approach*, 97 B.U.L. REV. 1427, 1427, (2017) ("The current test, which combines an examination of the elements with a fact-specific inquiry, has led to arbitrary and unpredictable decisions about what types of offenses are "particularly serious.").

[587] David Norris, *Note: Total[Ity] Recall: Firm Resettlement Determinations After In Re A-G-G-,* 26 GEO. IMMIGR. L.J. 425, 449 (2012) ("The firm resettlement bar is premised upon a refugee no longer needing international protection because the refugee has resettled in another country where he or she enjoys the protection of the citizen-state relationship. The A-G-G- framework is capable of upholding that principle. Adjudicators just need to ensure that this citizen-state relationship exists first, because the consequences of erroneously denying an asylum applicant are grave.").

[588] Asylum Abuse: Is It Overwhelming Our Borders?: Hearing Before the Comm. on the Judiciary, 113th Cong. 143 (2013) at 189, statement of Lori Scialabba, Deputy Director, U.S. Citizenship and Immigration Services, (*see,* discussion on the nature of the credible fear process and time afforded to asylum officers to conduct screening interviews).

2. Heightening the Withholding and CAT Burden of Proof Standard to Reasonable Possibility in the Credible Fear Process Is Contrary to the Intent of Congress

The proposed rule would also raise the burden of proof in screening for statutory withholding of removal and the torture-related screening standard under the CAT regulations from "significant possibility" to "reasonable possibility."[589] The current rule requires that the "significant possibility" standard be used for evaluating claims for asylum, withholding of removal and CAT protection. Congress initially stated that the screening standard for the credible fear process be low in order to screen in eligible asylum seekers.[590]

The NPRM does not provide any justification for raising the standard for withholding of removal and CAT protection adjudication to "reasonable possibility." While, IJs do have to assess these protection applications at a higher standard at a full hearing, asylum officers do not have the resources to quickly jump from applying the "significant possibility" standard to the "reasonable possibility" standard during a short interview. Noncitizens seeking humanitarian protection are more likely to obtain counsel in immigration court, where they will have an opportunity to present complete applications and evidence in applying for withholding of removal and CAT protection than during the initial screening process.[591] It is clear from reviewing Congressional testimony that Congress's intent was that the lower threshold should apply to all forms of relief in the initial screening context.[592]

3. Asylum Seekers and Others Who Pass Initial Fear Screenings Should Be Placed in Full Removal Proceedings, not "Asylum-Only" or "Withholding-Only" Proceedings

"Asylum-only" proceedings have been used where crewmen, visa waiver entrants and stowaways seek asylum in the United States. Under these limited proceedings, asylum seekers cannot challenge their removal or seek other relief; they are only able to apply for asylum or withholding. Within these limited scope proceedings, both parties, including DHS, are prohibited from raising "any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief."[593] The NPRM does not provide adequate justification for this rule change. It does not include any data concerning the number of

[589] Proposed rule at 8 CFR § 208.30(b); 8 CFR § 1208.30(b)..

[590] Scott Rempell, *Symposium: Stalemate On Immigration Reform: Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337, 345 (Spring 2015) ("The 'significant possibility' language was meant to serve as a compromise standard. The original House version mandated a 'substantial likelihood' that the alien could establish asylum eligibility, while the original Senate version merely required the asylum officer to determine whether the asylum claim was "manifestly unfounded."). *See also* CLINIC and AILA Updated Credible Fear Lesson Plans Comparison Chart, (May 2019), https://www.aila.org/infonet/updated-credible-fear-lesson-plans-comparison.

[591] *See* TRAC Immigration, *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court "Women with Children" Cases*, (Jul. 15, 2015), https://trac.syr.edu/immigration/reports/396/.

[592] Eunice Lee, *Article: Regulating The Border*, 79 MD. L. REV. 374, 425 (2020) ("First, and most critically, Congress specified a low screening threshold for credible fear. The statute requires an applicant at this stage to show only a 'significant possibility' that they will prove their asylum claim at a full hearing.").

[593] Proposed 8 C.F.R. § 208.2(c)(3)(i); 8 C.F.R. § 1208.2(c)(3)(i)..

asylum seekers who are placed into removal proceedings under INA § 240 after passing a credible fear interview, nor does it provide data on how many of these proceedings result in the respondent applying for or being granted some form of relief other than asylum or withholding of removal. Without including this data, it is difficult to assess any purported reason the Departments may have for proposing this rule other than to be punitive towards asylum seekers.

This proposed rule effectively destroys due process rights of asylum seekers. Under the proposed rule, asylum seekers would not be allowed to contest removability where there are egregious due process violations, where there are defects in the service and content of the Notice to Appear, or when the respondent has a mental impairment that affects competency.[594] Noncitizens can only contest removability in regular INA §240 proceedings, but not in these quasi-judicial asylum and withholding-only proceedings. This reduction of rights for noncitizens subject to expedited removal is especially troubling given that the president has announced an intention to expand expedited removal to the interior of the United States.[595] While those who are apprehended at the border may have fewer ties to the United States and therefore fewer options to seek other forms of relief in immigration proceedings, under the expanded rule, noncitizens who have been in the United States for up to two years could be subject to expedited removal and may be more likely to have other forms of relief to pursue, such as family-based cases, U visas, or Special Immigrant Juvenile Status.

Further, the justification for this rule change is faulty at best and baseless at worst. The NPRM states that Congress intended for the expedited removal process quick and that "referring aliens who pass a credible fear for section 240 proceedings runs counter to those legislative aims."[596] For this proposition, the NPRM cites to the dicta in *Matter of M-S-*,[597] where the BIA mentions in passing that evidence in the Congressional record "does not compel the current policy." The Congressional record cited above belies this assertion. Moreover, had Congress intended to strip asylum-seekers of their due process rights, it would have expressly said so as it when Congress created "withholding-only proceedings" for those subject to reinstatement of removal.[598] The fact that Congress chose not to direct DHS to place asylum seekers into "asylum-only" proceedings when it did create such a mandate for those only eligible for withholding of

[594] U.S. Department of Justice Executive Office for Immigration Review Statistics Yearbook Fiscal Year 2018, https://www.justice.gov/eoir/file/1198896/download (nearly one third, 2400, of removal cases ended in termination of removal proceedings); *see also* Jennifer Lee Koh, *Article: Rethinking Removability*, 65 FLA. L. REV. 1803 (2013).
[595] *See* White House, *Executive Order: Border Security and Immigration Enforcement Improvements* (Jan. 25, 2019), https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/.
[596] 85 Fed. R. 36267.
[597] *Id.* at fn. 9.
[598] 8 U.S.C. § 1231(a)(5) (Supp. II 1996) (If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated . . . and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.); 8 U.S.C. § 1231(b)(3) (2012) (Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.); *See also* Hilary Gaston Walsh, *Article: Forever Barred: Reinstated Removal Orders And The Right To Seek Asylum*, 66 CATH. U.L. REV. 613 (2017).

removal, indicates Congress's intent that asylum seekers be placed in full INA § 240 removal proceedings.

4. The Proposed Rule Would Require Asylum Officers to Treat an Asylum Seekers' Silence as a Reason to Deny IJ Review of Negative Credible Fear Interviews

One of the bedrock principles of the credible fear process is full review of a negative credible fear determination by an immigration judge to insure full due process. When an asylum officer gives a negative credible fear determination to an applicant, the asylum officer must explain the due process rights available to the asylum seeker. One of these core rights is that the applicant can seek review with the immigration judge. During this explication process, many asylum seekers do not completely understand what is going on, many are still tired and traumatized from their journeys, and some have been separated from their children and families by the U.S. government.[599] During this time, many asylum seekers, mostly unrepresented, will not understand what it means to seek "IJ review" and many will simply not answer the question.[600] That indication, historically, has meant asylum officers must request this review on behalf of the asylum seekers. The proposed rule would reverse existing policy and force asylum officers to mark that the asylum applicant does not want "IJ review" when the asylum seekers are understandably unresponsive.[601]

As with many aspects of the proposed rule, the only justification for this change is the Departments' desire for "expeditious resolution of fear claims."[602] The NPRM does not include any statistics on how many asylum seekers succeeded in their credible fear claims before the IJ without having articulated a desire for IJ review to the asylum officer. Nor does it contain any data on how many of these IJ reviews are, "expeditiously" resolve after the IJ explains the asylum seeker's rights and the asylum seeker may choose to not pursue IJ review.

CLINIC has grave concerns that asylum officers will increase denials of credible fear interviews and bona fide asylum seekers will never receive a day in court, not even to have their credible fear interview denial reviewed by an IJ. These concerns are magnified by the administration's decision to allow CBP officers to conduct credible fear interviews rather than fully trained USCIS asylum officers.[603]

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[599] *See* SPLC, *Family Separation Policy Continues Two Years After Trump Administration Claims It Ended* (June 18, 2020), https://www.splcenter.org/news/2020/06/18/family-separation-policy-continues-two-years-after-trump-administration-claims-it-ended.

[600] NPR, *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes* (Feb. 25, 2018), https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes.

[601] One of the authors of this comment, and CLINIC employee, was an asylum officer for five years and conducted hundreds of credible interviews. During the service of a negative decision to an applicant, many did not understand the "IJ review" process, so in an abundance of caution and respect for due process asylum officers were always instructed to request review on behalf of the applicant. Most credible fear applicants do understand the process, especially the "IJ review" process, however this rule will turn away some of the most vulnerable asylum seekers who will never even understand the process to which they have been subjected or what rights they could have exercised in the United States.

[602] 85 Fed. R. 36273.

[603] *See* Molly O'Toole, *Border Patrol Agents, Rather than Asylum Officers, Interviewing Families for 'Credible Fear,'* LOS ANGELES TIMES, Sep. 19, 2019, https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear.

In creating the expedited removal system, Congress repeatedly voiced its concerns about protecting the rights of asylum seekers. As Senator Patrick Leahy aptly stated in discussing the case of Fauziya Kasinga:

> The bill gives virtually final authority to immigration officers at 300 ports of entry to this country. Each is directed to interview people seeking asylum and exclude them if he finds that they do not have 'a credible fear of persecution.' That phrase is unknown to international law. The officer's summary decision is subject only to 'Immediate review by a supervisory office at the port.' The bill prohibits further administrative review, and it says, 'no court shall have jurisdiction' to review summary denials of asylum or to hear any challenge to the new process. (Our present system for handling asylum applications works efficiently, so there is no administrative need for change.) Stripping away the protection of the courts may be the most alarming feature of the legislation. [604]

Requiring an asylum applicant to ask for immigration review of a negative credible fear decision would, in many cases, effectively bar them from receiving independent review. Giving one agency unfettered power to decide whether an asylum seeker ever has a day in court goes against the intent of Congress. [605] Review by an immigration judge is critical to ensure the due process rights of asylum seekers in credible fear cases, and preventing unrepresented asylum seekers the opportunity to request review is wrong, unfair, and against the intent of Congress.[606]

IV. CONCLUSION

Until recently, the United States was seen around the world as a beacon of hope for those fleeing harm. The United States had been the world leader in resettling refugees until 2018, when Canada, a country with just 12 percent of the U.S. population,[607] surpassed the United States in offering protection to the world's most vulnerable.[608]

Any one of the proposed rules, on its own, would dramatically alter the asylum system and send many refugees to harm's way. Taken together, the proposed rules are worse than the sum of their parts, penalizing asylum seekers for virtually every action they take to escape harm. Those who wait at the border, as required by CBP under its metering program, would face denials for being in a country en route to the United States for more than 14 days. Those who are aware of this rule and seek to enter unlawfully, would be denied under the provision that denies asylum to

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[604] 142 Cong. Rec. S4461 (daily ed. May 1, 1996) (statement of Sen. Leahy).
[605] *See* Katherine Shattuck, *Comment: Preventing Erroneous Expedited Removals: Immigration Judge Review And Requests For Reconsideration Of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459, 459 (2018).
[606] TRAC Immigration, *Findings of Credible Fear Plummet Amid Widely Disparate Outcomes by Location and Judge* (June 2018), https://trac.syr.edu/immigration/reports/523/ (immigration judges find a credible fear in 20-40 percent of cases).
[607] *See* Worldometer, Countries in the world by population (2020), https://www.worldometers.info/world-population/population-by-country/.
[608] Jynnah Radford and Phillip Connor, Pew Research Center, *Canada Now Leads the World in Refugee Resettlement, Surpassing The U.S.* (June 19, 2019), https://www.pewresearch.org/fact-tank/2019/06/19/canada-now-leads-the-world-in-refugee-resettlement-surpassing-the-u-s/.

those who enter between ports of entry.[609] The list goes on endlessly. The intent of these regulations is not to "clarify" standards or increase "efficiency" it is to cruelly deny asylum to *bona fide* asylum seekers.

CLINIC's Board member, Bishop Mark Seitz recently published an op-ed reminding us:

> In the aftermath of World War II, the United States committed itself to never again return refugees to places of danger, as it did when a boat full of refugees was sent back to their deaths under the Nazis. We are in danger of forgetting the lessons of history.
>
> But faith and hope tell us that the machinery of darkness which our immigration enforcement has become is not permanent. Faith teaches us that there will be a day when all of this pain will be no more, when walls of hatred come tumbling down and when grace transforms the dark present into something better.
>
> This darkness is ours to undo.[610]

These regulations would plunge the United States into moral darkness. Without seeking input from Congress, the agencies would undo the asylum protections guaranteed under the INA and under international law. The administration has published these sweeping changes in the midst of a pandemic that has uprooted the lives of many Americans, and made it more difficult to work effectively, yet given a mere 30 days to respond to scores of pages of dense, technical regulatory changes. These changes would make it nearly impossible for asylum seekers to enter the United States as they are subjected to heightened standards for credible fear and reasonable fear interviews; would prevent them from having a livelihood if they are paroled out of detention; would radically alter established substantive definitions of protected characteristics, persecution, and nexus; and would require adjudicators to deny virtually all asylum applications based on discretion.

If published in their current form, these proposed regulations would essentially end asylum. CLINIC implores the Departments to "to end the darkness" and withdraw this proposed

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[609] In its OIG report, DHS admits that its own policy of metering has likely led to an increase in entries without inspection. DHS OIG, *Family Separation Issues*, *supra* note 372 at 4. ("For instance, while the Government encouraged all asylum seekers to come to ports of entry to make their asylum claims, CBP managed the flow of people who could enter at those ports of entry through metering, which may have led to additional illegal border crossings.") *See also, id.*at 7, "The fact that both aliens and the Border Patrol reported that metering leads to increased illegal border crossings strongly suggests a relationship between the two."

[610] Mark J. Seitz, *The U.S. Commitment to Asylum-Seekers Is Eroding Away amid COVID-19*, DALLAS NEWS, Jul. 5, 2020, https://www.dallasnews.com/opinion/commentary/2020/07/05/the-us-commitment-to-asylum-seekers-is-eroding-away/.

rulemaking in its entirety.

Thank you for your consideration of these comments. Please do not hesitate to contact Jill Marie Bussey, Director of Advocacy, at jbussey@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,

Anna Gallagher
Executive Director

EXHIBIT 5

DECLARATION OF NAOMI A. IGRA

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July 15, 2020

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Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW, Washington, DC 20503
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

Our organization, Pangea Legal Services, presents this comment insisting that the Department of Justice (DOJ) and Department of Homeland Security (DHS) withdraw these proposed rules. Asylum remains one of the strongest forms of protection sought by migrants seeking refuge from around the globe, and these proposed regulations violate the Immigration and Nationality Act, decades of circuit court precedent, the Due Process Clause of the United States Constitution, and the United States' treaty obligations. Moreover, these rules, which would prevent access to asylum for most asylum seeking individuals, are fundamentally inhumane and shockingly cruel in their effects. This administration cannot in good conscience permit so many migrants to endure this devastating loss of legal access to their statutory and constitutional rights.

I. Pangea Legal Services is a non-profit immigration defense organization, whose clients would be severely prejudiced by the proposed regulations.

Pangea Legal Services ("Pangea") is a non-profit organization dedicated to protecting the fundamental right to move, by providing direct legal representation, policy advocacy, education, and legal and community empowerment. The focus of our direct representation is deportation defense, and nearly all of our clients are in removal proceedings. We represent immigrants, both detained and non-detained, in their bond proceedings, removal hearings, before Immigration and Customs Enforcement ("ICE") and U.S. Citizenship and Immigration Services ("USCIS") officials, and in related legal actions in state and federal court. We seek to empower our clients in their communities to become immigration advocates themselves and share their stories. Pangea also advocates for policy change on behalf of migrants at the local, state, national, and international levels. Due to these commitments, Pangea is deeply concerned about the likely effects of these proposed regulations on the immigrants we work to support, advocate for, and empower. As will be documented below, due to the radical, harsh, and at times illegal nature of the proposed regulations, the enactment of these regulations would force Pangea to divert considerable resources into bolstering its clients' cases, appealing negative decisions, and potentially litigating due process violations as they occur as a direct result of these regulations.

While we contest the egregiously unrealistic 30-day window the agency has allowed for comment submissions, we still have chosen to comment on the regulations for their exceedingly detrimental effects on the access of migrants to asylum. A majority of meritorious asylum claims would be rejected, migrants would lose due process protections, unrealistic legal standards of proof would be mandated, new bars would present new barriers to migrants accessing legal protection, established legal precedent would be replaced in clear usurpation of Congress's lawmaking authority, and new classes of sweeping denials would come into play. At the very least, a large majority of migrants fleeing persecution would be left without any pathway to permanent protected status in the United States. The administration would be directly responsible for causing society's most vulnerable this compounded and continued torment.

II. A Thirty Day Comment Period on These Regulations Is Inadequate and We Urge These Regulations Be Rescinded on That Basis

These proposed rules are a vast, sweeping revision of the entire asylum framework as it has existed for the past forty years. In an act of mere agency interpretation, these modifications would be the most significant and severe transformations to asylum law in the decades since the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) was passed by Congress in 1996. The 160-page proposed rule contains 60 pages of alterations to the asylum law, written in confusing and convoluted language that creates comprehensive constraints on access to relief. At the least, *each part* of these proposed rules requires a 60-day comment period to elicit a range of considerate responses from the public regarding their deleterious results. However, the administration has only given the public 30 days to consider the effects of the *entire* proposed rules' multifaceted changes to asylum.

Such an abbreviated comment period is unjust for proposed rules in any context. Yet in light of the ongoing COVID-19 pandemic, the challenges to the public's ability to proffer adequate comments on the proposed rules are compounded. Like many other organizations, Pangea's staff has been working from home since the pandemic began, which presents unprecedented difficulties in our immigration advocacy and direct representation work, particularly in advocacy for detained clients. Staff face losses in productivity and increased childcare and similar burdens as they attempt to provide competent representation to clients without access to office technology. Legal deadlines remain. Immigration courts, USCIS offices, and ICE offices have been closed and reopened with short notice, increasing the workload of Pangea's staff as it navigates these changes. Jails and ICE detention facilities are COVID-19 hotspots, causing Pangea to invest significant resources in advocating for clients' immediate release, including federal litigation, to prevent loss of life. In short, the global pandemic has had a significantly deleterious impact on Pangea's ability to respond to these regulations on short notice. Springing these regulatory changes on organizations like Pangea, during a global health crisis, and permitting only 30 days to comment, is unconscionable.

Thus, we ask the agencies to withdraw the proposed regulations. If the administration chooses to recirculate the proposed changes, the least it can do is provide the public with a full and standard 60-day comment period.

III. The Proposed Rules Abrogate the Due Process Rights of Asylum Seekers, Contravene the Article III Authority of Circuit Courts, and Impermissibly Rewrite the Asylum Statutes

A. 8 CFR § 1208.13(e)—The Proposed Rule Would Deprive Asylum Seekers of Their Opportunity to Be Heard, in Violation of Their Due Process Rights

i. The Proposed Rule Is Unconstitutional and Discordant with Existing Circuit Case Law

Proposed section 8 CFR § 1208.13(e) would give adjudicators the ability to "pretermit" an asylum application—without any additional review or due process—if adjudicators decide that the asylum seeker has no claim on the face of their asylum application. As a result of this rule, immigration judges could effectively deny migrants their right to seek humanitarian protection in the United States without ever having their day in court.

Courts have long held that noncitizens in removal proceedings are entitled to fundamentally fair proceedings, to ensure their right to due process under the Fifth Amendment of the United States Constitution. *See, e.g.*, *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) ("Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process."); *see also Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012); *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) ("[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf."). With this proposed rule, the administration seeks to unseat this long-held understanding of the Fifth Amendment.

In particular, courts have found—time and again—that when an immigration judge disallows a noncitizen from fully developing his claims in immigration court, this action violates the Due Process Clause. *See, e.g.*, *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019) ("The Due Process Clause of the Fifth Amendment guarantees that aliens in removal proceedings have 'a full and fair opportunity to be represented by counsel, to prepare an application for ... relief, and to present testimony and other evidence in support of [that] application.'" (citation omitted)); *Lacsina Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009)(finding a due process violation when the immigration judge prevented full examination of the applicant; *Cano-Merida v. I.N.S.*, 311 F.3d 960, 964-65 (9th Cir. 2002) (finding a due process violation where the IJ pressured a noncitizen to drop an asylum claim before developing facts); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010) (finding a petitioner was denied due process where the petitioner was denied a continuance and limitations were placed on her testimony, thereby preventing petitioner from fully and fairly presenting her case); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058–59 (9th Cir. 2005) (IJ violated due process in refusing to hear relevant expert testimony regarding domestic violence, where the testimony could have affected the IJ's assessment of credibility); *Agyeman v. INS*, 296 F.3d 871, 884–85 (9th Cir. 2002) (pro se noncitizen was prejudiced by IJ's failure to explain adequately how to prove existence of marriage, grant time to develop the noncitizen's claim, failure to sufficiently *sua sponte* develop the record); *Kehila v. Mukasey*, 267

F. App'x 580, 581 (9th Cir. 2008) (A petitioner's due process rights are violated if he does not have a "reasonable opportunity to offer an explanation of any perceived inconsistencies that form the basis of a denial of asylum.") *see also Mei v. Gonzales*, 153 F. App'x 457, 458 (9th Cir. 2005) (finding the Immigration Judge's choice to prevent the applicant from "presenting testimony regarding the heart of his asylum claim…violated [his] due process rights…").

The proposed rule would, by executive fiat, thoroughly eviscerate these protections. In addition to plainly violating the Fifth Amendment, this rule usurps the judiciary's centuries old responsibility under Article III to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 2 L. Ed. 60 (1803).

ii. In Practice, Allowing Immigration Judges to "Pretermit" Claims Would Wholly Prevent Eligible Asylum Seekers from Presenting Their Proof of Eligibility

In our experience, if adjudicators are given the ability to "pretermit" applications, they will effectively be preventing asylum seekers from receiving a "full examination" of their claims. *C.f. Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) ("[W]e consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.")

For many migrants, English is not their first language; they lack access to an attorney and are forced to represent themselves *pro se*. Additionally, asylum law is a thicket of highly complex legal concepts that are challenging for any layperson. In our experience as immigration defense attorneys, asylum seekers who attempt to complete the I-589 application *pro se*—especially when they are detained—have extreme difficulty overcoming these barriers. First, only an English-language version of the I-589 is accepted in immigration court. For those who are not literate in English or are learning the language, completing a legal document in a manner acceptable to court is incredibly challenging; often the best option is obtaining the assistance of a bilingual fellow detainee, a complete stranger with no duty to keep personal life details confidential. Luck and wishful thinking are inadequate methods for securing an asylum seeker's statutory and due process rights. Second, asylum law is a complex web of regulations, statutes, and case law, such that it is incredibly difficult for a non-attorney to present a coherent claim without adequate time and assistance. We have frequently met asylum seekers who had viable asylum claims—some of whom ended up winning with Pangea's representation—who struggled initially to articulate what had happened to them using the legal terminology appropriate to the immigration court.

Moreover, among the thousands of asylum seekers that Pangea's staff has represented, screened, provided advice to, and conducted workshops for, it is our experience that the majority have typically endured severe trauma, including child abuse, beatings, detention, rape, torture, death threats, and witnessing the abuse and murder of others. It is an incredibly challenging task for these individuals to share delicate and personal past traumas without adequate support. Indeed, without a supportive client-centered, trauma-informed approach, the process of an applicant sharing their story may be nearly impossible, if not at the very least, deeply retraumatizing. Katrin Shock, et. al., *Impact of Asylum Interviews on the Mental Health of*

Traumatized Asylum Seekers, European Journal of Psychotraumatology, 6 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4558273/pdf/EJPT-6-26286.pdf ("As traumatized refugees and survivors of torture are a highly vulnerable group, many need time to process past traumatic events and to establish a sufficient level of trust and confidence before they are able to reveal the potentially painful…details of their experiences."; *see also* National Center on Domestic Violence, Trauma, & Mental Health, *Trauma-Informed Legal Advocacy (TILA) in Asylum and Immigration Proceedings*, (September 2016), http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/08/TILA_bib_for_immigration_asylum_attorneys_final.pdf ("Many individuals who have experienced trauma and/or who work as legal advocates have commented on the retraumatizing impact of the legal system as a whole…Many of these individuals are survivors of trauma who may experience asylum proceedings as compounding their prior trauma.")

This proposed rule will certainty result in not only in the denial of worthy claims for protection, but will victimize asylum seekers being returned to countries where many certainly will face severe abuse, beatings, rape, kidnappings, and even death. Knowing the proposed regulations' undeniably deadly results, we oppose "pretermitting" by IJs vigorously and whole-heartedly.

iii. The Proposed Rule Would Exclude Many of Our Former and Current Clients from Asylum Eligibility Despite the Well-Documented Persecution that They Faced

Many of Pangea's clients who have since won asylum would likely have had their applications denied under the new "pretermit" proposed rule.

One client of ours experienced years of sexual abuse at the hands of her father. As incest is a particularly painful and shame-inducing type of persecution, our client was not comfortable telling anyone about her trauma until well over a year into our representation of her. Therefore, this claim was not part of her initially submitted I-589 application or her first declaration submitted to court. Our client received a year of intensive therapy before she was emotionally and psychologically prepared to discuss the details of what had happened, which were integral to her ultimately providing the testimony needed to show she qualified for asylum.

Another client of ours had been persecuted as an indigenous woman in her home country, which was the claim proffered on her initially submitted I-589 application. After she began having regular meetings with a Pangea attorney to discuss her life story in preparation for her hearings, that she revealed several more forms of persecution she had suffered on account of other protected grounds: she had endured physical and sexual abuse by her father as a child, rape as a minor by a former partner. She also revealed that she was a lesbian who hid her sexuality and relationship with her partner for fear of harm. This targeted violence constituted severe persecution under existing case law, and formed the basis of additional grounds of protection.

A third client was also an indigenous woman who fled gang-based persecution in Guatemala. In her first interviews with her Pangea legal representative, she had to cut meetings

short, as she was extremely traumatized by the violence she had experienced and could only attest to threats she endured by a gang leader in her initial I-589 filing. After more than a year and a half of intensive psychotherapy and dozens of meetings with her attorney, she was able to detail the severe physical and sexual violence she suffered as a child and young adult because of her race. At her individual hearing, she submitted a detailed declaration explaining additional details and claims that she had not been able to present on her I-589. Her claim was so strong that the immigration judge granted asylum after approximately 30 minutes of testimony and the attorney for the Department of Homeland Security waived appeal.

Under the proposed rule, none of these clients would have had the opportunity to process their trauma, access mental health services, feel comfortable telling these formidable truths to their legal representatives, and ultimately present their testimony to the immigration court.

B. 8 CFR § 208.1(f); 8 CFR § 1208.1(f)—The Proposed Rules Sweep Away the Right to Individualized Legal Determinations in Asylum Proceedings, in Defiance of Statute and Case Law.

Under the guise of simplifying the "nexus" requirement of asylum eligibility, the proposed regulations mandate the categorical rejection of certain claims. This section of the proposed regulations categorically excludes certain acts of persecution from being "on account of" a protected ground; this is a factual and legal absurdity, as it presupposes that the administration can know in advance whether an act committed by a persecutor was on the basis of a protected ground, without viewing record evidence in a given case. The categories the proposed rules describe include: ones where "interpersonal animus" is present; claims that deal with resistance to gangs or terrorists; claims in which the wealth or perceived wealth of the victim is a reason for persecution; perceived, present, or past gang membership; and persecution based on gender.

This proposed "nexus" requirement contravenes long-standing court of appeal precedent stating that each asylum claim be adjudicated on a fact-dependent, case-by-case, individualized, basis. *See, e.g., Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) ("In some cases, the factual circumstances alone may provide sufficient reason to conclude acts of persecution were committed on account of…one of the…protected grounds…where there appears to be no other logical reason for the persecution at issue".)

Significantly, in addition to depriving asylum applicants of individualized adjudication, the proposed rules controvert the plain language of the statute at INA § 208(b)(1)(B)(i). Section 208(b)(1)(B)(i) states that a protected ground must be "at least one central reason" for persecution. Courts have elaborated on this standard, making clear that a person may be eligible for asylum even if a persecutor may have mixed motives for harming an applicant, so long as a persecutor's motives were formed *at least in part* by animus related to a protected ground; *see also Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (pre-REAL ID application); *see also Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *see also Ayala v. Holder*, 640 F.3d 1095, 1098 (9th Cir. 2011).

Thus, in seeking to overhaul decades of case precedent that conforms with the INA, one of the foremost pieces of immigration legislation, the agency seeks to rewrite its own role in immigration matters, destroying asylum seeking applicants' international and domestic right to a pathway to protection in the process.

IV. The Proposed Regulations Would Prevent Eligible Asylum Seekers from Obtaining Protection in the United States, Contravening Treaty Obligations, Statute, and Case Law

A. 8 CFR § 208.1(d); 8 CFR § 1208.1(d)—The Proposed Rule Redefines Political Opinion to Exclude Political Activity Aimed at Societal Change

The regulations also seek to radically change the definition of "political opinion" as a protected ground, in complete contradiction to the 1980 Refugee Act, Immigration and Naturalization Act, and 1967 Protocol. The proposed regulations state that political opinion claims can only succeed when the asylum applicant has acted in "furtherance of a discrete cause related to political control of a state or a unit thereof."

Courts have firmly established that political opinion is defined broadly, to include more than express statements about political control of a state. S*ee, e.g., Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007) ("[P]olitical opinion encompasses more than electoral politics or formal political ideology or action."); *see also Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (recognizing refusal to support Salvadoran guerillas a political opinion); *see also Gonzalez-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997) (refusal to make payments to the Shining Path guerilla movement as a political opinion) *see also Mendonza Perez v. INS*, 902 F.2d 760 (9th Cir. 1990) (involvement with Salvadoran land reform organization as a political opinion).

Moreover, the Board of Immigration Appeals has long recognized that feminism, an advocacy movement that in some cases is not directly related to political control of the state, constitutes a political opinion, and thus, a protected ground. *Lazo-Majano v. Immigration & Naturalization Serv.*, 813 F.2d 1432, 1433 (9th Cir. 1987) *overruled on other grounds by Fisher v. Immigration & Naturalization Serv*., 79 F.3d 955, 963 (9th Cir.1996) (finding that the applicant was "exposed to persecution for her assertion" for her opposition to her persecutor's belief that "a man has a right to dominate" and constituting a political opinion).

By seeking to redefine political opinion so narrowly, the administration would foreclose the claims of feminist political activists and any civil society activists who participate in liberation movements that are not directly related to "political control of a state." Some of the most powerful and integral past and ongoing social movements would not fall within this restrictive definition of political opinion, including the past and present United States civil rights movements for racial equality, the gay and trans liberation movement, labor movements, the ongoing climate justice movement, and so on. The ramifications of the agency making these changes to this protected ground would be sweeping. Once again, the administration seeks to upend years of established federal court precedent, along with such courts' role in interpreting asylum law, to devastate the right of countless migrants to seek protection via this ground.

B. The Proposed Rules Sweepingly Prohibits Asylum Eligibility Based on "Gender" as a Particular Social Group and Would Virtually End Asylum for Survivors of Gender-Based Violence

As previously mentioned, the proposed rules broadly prohibit finding nexus for persecution on account of gender-specific harms. Yet, courts have long recognized that gender-based violence can be persecution on account of a protected ground. See, e.g., *Mohammed v. Gonzalez*, 400 F.3d 785, 798 (9th Cir. 2005) (recognizing that female genital mutilation constitutes persecution on account of membership in a PSG; accepting a PSG comprised of young women in the Benadiri clan or Somalian females); *see also Perdomo v. Holder,* 611 F.3d 662 (9th Cir. 2010)(remanding to the BIA to consider whether women in Guatemala constitute a particular social group, clarifying that Ninth Circuit precedent does not require a particular social group to be narrowly defined); *Silaya v. Mukasey*, 524 F.3d 1066, 1070-71 (9th Cir. 2008) (finding that rape and physical abuse of the applicant by New People's Army in the Philippines members constituted persecution and was on account of her imputed political opinion); *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004) (finding the applicant's gender-specific harm as a Guatemalan woman who was gang raped by soldiers to be on account of her imputed political opinion); *see also Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004); *see also Lopez-Majano v. INS*, 99 F.3d 954, 959-60 (9th Cir. 1996); *see also Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). Here, as elsewhere in the proposed regulations, the administration seeks to create a bar to a well-established avenue to protection relied upon by female migrants for decades in blatant usurpation of clear precedent.

i. The Proposed Rule Would Exclude Many of Our Former and Current Clients from Asylum Eligibility Despite the Well-Documented Persecution that These Women Face

Many of Pangea's clients have experienced gender-specific persecution that constituted the basis for their successful applications for asylum. One of our clients suffered decades of harsh abuse at the hands of two different male domestic partners. She tried to do many things to escape the violence, including going to the local family court and seeking a restraining order. The restraining order was completely ignored by her partner and not enforced by the police, due to the well-documented reality that the judicial and law enforcement system in her country did not take familial gender-based violence seriously, and that the state was unable and unwilling to protect her. Despite it all, she made her way to the United States on her own and presented herself at the border for protection. She won asylum a few years later.

Another client was subject to years of physical and sexual abuse at the hands of her father, with all five of her children being a product of incest. Her daughter, who was also an asylum seeker, had also been sexually abused by her father/grandfather. Again, due to pervasive and widely documented patriarchal attitudes among state actors in their country of origin, these clients could not receive protection from their government despite this extremely severe harm. Both received grants of asylum in the United States.

Under the new regulations, because of the ban on gender-specific nexus framing and related barriers to protection, these women would be barred from asylum in spite of the extreme suffering they experienced and their governments' manifest unwillingness to aid or protect them.

C. 8 CFR § 208.1(e); 8 CFR § 1208.1(e)— The Proposed Rule Defines Down Persecution to Exclude Many Cases in which Individuals Have Suffered Serious Harm

The proposed rule sets forth such a narrow definition of persecution as to exclude many cases in which a person is likely to have their life or freedom threatened if they are forced to return to their home country. While the INA does not define "persecution," circuit courts have set its parameters through a broad body of precedent developed over decades. The Ninth Circuit notes that persecution is broadly defined, and recognizes that it covers a range of acts and harms. *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) ("[T]he determination that actions rise to the level of persecution is very fact-dependent.").

Moreover, courts have firmly established that the effect of harms that might not individually rise to the level of persecution may meet the standard when considered cumulatively. *See, e.g., Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998 (finding persecution where a Ukrainian Jew witnessed violent attacks and then suffered extortion, harassment and threats by ant-Semitic ultra-nationalists); *see also Guo v. Ashcroft*, 361 F.3d 1194, 2203 (9th Cir. 2004) (The court "look[s] at the totality of the circumstances in deciding whether a finding of persecution is compelled.").

The proposed rule does not discuss the long-standing principle of cumulative harm, and gives the impression that applicants who have suffered several discrete beatings or detentions would likely fail to meet the new requisite showing for persecution. This absurd result would defeat deserving asylum claims, based on an invalid exercise of administrative authority.

D. 8 CFR § 208.13(b)(3); 1208.16; 8 CFR § 208.13(b)(3); 1208.16—The Proposed Rule Narrowly Redefines the Internal Relocation Standard

The regulation's new internal relocation standard is so high that any migrant seeking asylum, withholding of removal, or Convention Against Torture (CAT) relief will find its threshold impossible to satisfy. The proposed rule mandates that an immigration judge consider "the applicant's demonstrated ability to relocate to the United States in order to apply for asylum," and places the burden on an asylum applicant to show they cannot internally relocate if they have suffered past persecution by a non-state actor.

Long-standing principles for analyzing the internal relocation requirement—which are undone by this proposed rule—emphasize the *reasonableness* of internal relocation for the precise reason that safe internal relocation is irrevocably tied to a person's ability to safely reside long-term in their new location. *See, e.g., Knezevic v Ashcroft*, 367 F.3d 1206, 1214-1215 (9th Cir. 2004) ("The reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographic limitations; and social and cultural constraints, such as age, gender, health, and social and family ties" should also be considered); *see also Singh v. Whitaker*, 914 F.3d 654, 659 (9th Cir. 2019) (remanding the case for the BIA's failure to perform a sufficiently individualized analysis of the applicant's ability to

relocate). That is, the ability of a person to flee their home and trek to the United States is totally irrelevant to the question of whether a person can *live* safely and without persecution in another part of their country. That the new regulation elides this obvious difference is deeply worrying, as it gives *carte blanche* to adjudicators to deny asylum applications even when an asylum applicant could not realistically live elsewhere in their country of origin.

E. 8 CFR § 208.15; 8 CFR § 1208.15— The Proposed Rule Redefines "Firm Resettlement" to Include Those Who Merely Pass Through a Third Country

The proposed regulations mandate that the firm resettlement bar be redefined to include those who are not firmly resettled and shift its burden of proof from the government to the applicant; if a migrant lived *or could have* lived in permanent *or non-permanent* legal status in a different country for a year or longer, the applicant qualifies as being firmly resettled, despite their obvious continued displacement, creating a permanent bar to their asylum application.

Once more, the agency seeks to blatantly controvert statutory mandate and established court of appeal precedent; under existing law, to constitute an offer of firm resettlement barring an asylum seeker from protection, the government must (1) present "evidence of an offer of some type of permanent resettlement" and, thereafter *and only* thereafter, the (2) "burden shifts to the applicant to show that the nature of his [or her] stay and ties [were] too tenuous, or the conditions of his [or her] residence too restricted for him [or her] to be firmly resettled." 8 C.F.R. § 1208.15; *see also Maharaj v. Gonzales*, 450 F.3d 961, 976-77 (9th Cir. 2006); *see also Mengstu v. Holder*, 560 F.3d 1055, 1059 (9th Cir. 2009); *see also Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 819 (9th Cir. 2004).

Additionally, in one of its most cruel and punishing passages, the rule creates a new bar which prevents the majority of migrants who spent two weeks in any other country on their way to the United States from asylum eligibility.

This new legal mandate is directly at odds with firm resettlement, barring most asylum seeking individuals who make their way through Mexico, as the administration concurrently forces asylum seekers to stay there for months on end in perilously dangerous conditions as they seek to appeal for protection at ports of entry. National Immigrant Justice Center, *Systemic Rights Abuses on the Border: The Real Problems and What Will Fix Them*, (9 July 2019), https://immigrantjustice.org/staff/blog/systemic-rights-abuses-border ("At least 13,000 people are waiting in Mexico subject to metering and more than 15,000 have been returned to Mexico through MPP [Migrant Protection Protocols], all at constant risk of robbery, assault, extortion, kidnapping, and homicide in parts of Mexico notoriously dangerous for migrants…These policies are routinely forcing migrants who cannot wait safely in Mexico to cross between ports, risking death and criminal prosecution.").

Thus, these rules inhumanely place asylum seekers in an untenable situation; should they wait on port of entry "metering," they will be barred from their international and domestic right to seek asylum, yet if they cross the border in pursuit of legal refuge and protection, they will also be denied their fundamental right.

Moreover, the revised firm resettlement rule would bar migrants from asylum whom the government forces to wait at the Mexican border in inhumane and highly precarious conditions of squalor under the administration's current Migrant Protection Protocols; in the context of the current, deadly COVID-19 epidemic, the dangers and cruelty of this policy have only been compounded. American Civil Liberties Union, *Asylum Seekers Stranded in Mexico Face a New Danger: COVID-19*, (26 March 2020) https://www.aclu.org/news/immigrants-rights/asylum-seekers-stranded-in-mexico-face-a-new-danger-covid-19/ ("[M]any asylum seekers have been stuck in dangerous border cities for months waiting for [their] hearings. Health workers say that now they are vulnerable to the COVID-19 pandemic in ways that would have been avoided if they had been admitted and released into the U.S. for their proceedings…For the past year, advocates have criticized the MPP as a cruel policy meant to deter people from seeking asylum in the U.S. by forcing them to stay in dangerous areas during a long, drawn-out legal process. Many…who return to Mexico…wind up in overcrowded migrant shelters or in some cases, sprawling tent camps near the border."); *see also* Human Rights First, *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger*, (13 May 2020) https://www.humanrightsfirst.org/campaign/remain-mexico ("As of May 13, 2020, there are at least 1,114 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to return to Mexico by the Trump Administration under this illegal scheme. Among these reported attacks are 265 cases of children returned to Mexico who were kidnapped or nearly kidnapped."); *see also* National Immigrant Justice Center, *Systemic Rights Abuses on the Border: The Real Problems and What Will Fix Them*, (9 July 2019) https://immigrantjustice.org/staff/blog/systemic-rights-abuses-border.

F. 8 CFR § 208.1(c); 8 CFR § 1208.1(c)— The Proposed Rule Places Irrational Limitations on Particular Social Group Analysis, Which Will Prevent Asylum Seekers From Winning Asylum On This Basis

The proposed rules radically restrict what groups are cognizable as "particular social groups" under asylum law. Currently, to establish a cognizable PSG requires: (1) establishing the presence of a shared immutable or fundamental characteristic between members of the group, (2) the group having social distinction in the given society, and (3) the group being particular, with discrete and definable boundaries. *Rios v. Lynch*, 807 F.3d 1123, 1127 (9th Cir. 2015); *see also Matter of M-E-V-G--*, 26 I&N Dec. 227 (BIA 2014).

Yet the proposed regulations' section on PSGs prohibits a favorable adjudication of a PSG asylum claim that meets these three prongs, based on issues wholly unrelated to its cognizability, such as: "presence in a country with generalized violence or a high crime rate," and "interpersonal disputes of which [the government is]…unaware or uninvolved," among others. In so doing, the administration gives adjudicators the power to use irrelevant facts to deny asylum claims, facts that have no bearing on whether a person is a member of a socially distinct group as understood in case law, or whether they have suffered persecution on account of their membership in that group. Moreover, it is contrary to court precedent which holds that conditions of general civil strife on their own do not preclude an applicant from relief. *Sinha v. Holder*, 564 F.3d 1015, 1022-23 (9th Cir. 2009) (noting that the suggestion that "violence directed against one individual is somehow *less* 'on account of' his race because many other

individuals of his ethnic group are *also* being targeted on account of their race" was nonsensical and without case law support.)

Additionally, singling out migrants fleeing persecution from "a country with a generalized violence or high crime rate" as prohibited from favorable adjudication on the basis of their valid PSG asylum claim seems to directly target Central American and Mexican asylum seekers. This decision proves bitterly ironic, given the United States' central role in creating the conditions of instability and violence in those countries that vulnerable individuals are now forced to flee. Julian Borger, The Guardian, *Fleeing A Hell the US* [sic] *Helped Create: Why Central Americans Journey North*, (19 December 2018) https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy ("US [sic] intervention in the affairs of these small…states has been deliberate, motivated by profit, ideology, or both…The destabilization in the 1980s—which was very much part of the US Cold War effort—was incredibly important in creating the kind of political and economic conditions that exist in those countries today."); *see also* Stephen Kinzer, Boston Globe, *Who's Responsible for the Border Crisis? The United States*, (20 June 2019) https://www.bostonglobe.com/ideas/2019/06/20/who-responsible-for-border-crisis-the-united-states/K0qVm5AVf6SOaZGK1KwheO/story.html.

G. 8 CFR § 208.13; 8 CFR § 1208.13—The Proposed Rule Grants Wide Discretion to Deny Asylum Applications Outside the Bounds of Existing Precedent

The proposed rules throttle the ability of asylum applicants to actually win asylum, by granting adjudicators new opportunities to deny applicants on discretion—often for reasons that are understandable or unavoidable for the typical asylum seeker.

First, under the proposed rules, an adjudicator would have the discretion to deny asylum to any individual who enters or tries to enter the United States without inspection. In addition, any applicant who spends more than 14 days in a third country while en route to the United States could be barred from asylum. As a corollary, the proposed regulations would give adjudicators the ability to reject an asylum claim if an applicant used or attempted to use false documents to come into the United States, unless they did not pass through any other country other than that of their one of origin in their journey to the United States. The effect of these rules is to deny asylum to individuals who often cannot access valid travel documents because they rightfully fear an oppressive government. Essentially, the proposed rule makes it virtually impossible for many asylum seekers to actually win asylum, by virtue of how they fled their oppressive country of origin. Notably, circuit court precedent already holds that the use of false documents is not a valid reason to deny an applicant asylum. *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (an applicant's entry into the U.S. through the use of fraudulent documents is worth little if any weight in a balancing analysis of positive and negative factors); *see also Gulla v. Gonzales*, 498 F.3d 911, 917-19 (9th Cir. 2007).

In addition, the proposed regulations directly contravene the plain statutory language of INA § 208(a)(2)(d), which permits exceptions to overcome the one-year filing deadline on account of changed or extraordinary circumstances. *See Singh v. Holder*, 656 F.3d 1047, 1052 (9th Cir. 2011) ("[T]he Government [sic] may still consider a late application if the applicant

establishes (1) changed circumstances that materially affect the applicant's eligibility for asylum or (2) extraordinary circumstances directly related to the delay in filing an application.") Contrary to this established law, the proposed rule would practically eliminate exceptions to the one-year filing deadline. The ramifications of eviscerating these exceptions to the one-year bar would be devastating to many asylum seekers; numerous individuals face formidable, extraordinary circumstances that prevent them from pursing their asylum applications earlier, including trauma-induced post-traumatic stress disorder, poverty, ineffective assistance of counsel, lack of notice, and affirmative misadvise from others.

Both statutory mandate and court of appeal precedent have recognized circumstances such as these are valid reasons that merit overcoming the one-year bar. 8 CFR § 208.4(a)(5)(ii) (Identifying "serious illness of mental or physical disability, including any effects of persecution or violent harm suffered in the past" as extraordinary circumstances); *see also Mukamusoni v. Ashcroft* 390 F.3d 110 112, 126 (1st Cir. 2004) (finding the PTSD the applicant experienced as a result of the psychological trauma induced from the rapes she suffered to be an extraordinary circumstance); *see also* Catholic Immigration Network, Inc., *Practice Advisory: Overcoming the One-Year Filing Deadline for Asylum*, (28 February 2018), https://cliniclegal.org/resources/asylum-and-refugee-law/practice-advisory-overcoming-asylum-one-year-filing-deadline-daca. Additionally, the proposed rule would prevent asylum applicants from presenting legally recognized valid changed circumstances, including changed country conditions in their nation of origin or a "coming out" experience for LGBT asylum seekers, to overcome the one-year bar. Catholic Immigration Network, Inc., *Practice Advisory: LGBTI DACA Recipients and Options for Relief Under Asylum Law* (25 June 2020), https://cliniclegal.org/resources/asylum-and-refugee-law/practice-advisory-lgbti-daca-recipients-and-options-relief-under.

Further, the proposed regulations would mandate the rejection of asylum claims if an applicant did not file taxes before seeking asylum. This an unreasonable and undue burden to place on applicants; moreover, there is no correlation between the likelihood that a person experienced persecution in their country of origin upon the payment of taxes. Additionally, many asylum seekers have no choice but to work in the informal economy, because they cannot obtain work authorization, especially now, in a climate where the administration continues to further restrict migrants' eligibility for this benefit. Indeed, the administration just enacted newfound restrictions on asylum seekers' ability to ever obtain work authorization. For migrants who are still eligible, the regulations delay their ability to file for a year after applying for asylum. *See* 8 CFR 208.7(a)(1)(ii).

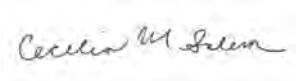
These restrictions add up to a nearly impossible burden thrust upon asylum seekers. The unfettered and unlawful actions of the agency in preventing individuals fleeing persecution from their right to seek this benefit are unconscionable.

V. Conclusion

As immigration attorneys and advocates, Pangea Legal Services asks that the administration wholly rescind the proposed regulations. These proposed rules not only unlawfully overturn plain statutory language and decades of precedent, they are cruel, inhumane, and fundamentally unjust in the burdens they place upon asylum seeking individuals in pursuing their international and domestic right to protection under the law. Altogether, the regulations would destroy the asylum system that has been enshrined via rule of law for the past forty years. As a result, thousands of vulnerable migrants seeking refuge in the United States will be deported to both their countries of origin and their deaths. The United States government will be directly responsible for this extraordinary and inhumane loss of their lives.

As a country and as a people, the United States has domestic, international, and moral obligations to provide asylum seeking individuals with a safe, secure, and compassionate approach to the adjudication of their legal claims. Societies are most carefully and accurately judged by the way they treat the most vulnerable individuals seeking access to their borders; migrants seeking their international and domestic right to protection via asylum law should be no exception.

Sean Lai McMahon
Co-Director | Immigration Attorney



Cecilia Salem
Legal Intern
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EXHIBIT 6

DECLARATION OF NAOMI A. IGRA

July 15, 2020

Submitted via *https://www.regulations.gov*

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
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RE: Comments in Opposition to the DHS/USCIS AND DOJ/EOIR Joint Notice of Proposed Rulemaking (NPRM or "Proposed Rule") entitled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review;* RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020

Dear Assistant Director Reid:

Dolores Street Community Services ("Dolores Street") is submitting the following comments to DHS/USCIS and DOJ/ EOIR in response and opposition to the above-referenced NPRM issued by the Departments on June 15, 2020. Dolores Street strongly opposes the Proposed Rule because it will prevent current and future asylum seekers from getting the protection they merit and deserve under domestic and international law. All of the proposed changes contained in the NPRM are ultra vires and would eviscerate asylum and the due process protections guaranteed in the asylum process. As highlighted below, we are particularly concerned by the provisions

This NPRM is the most comprehensive, ultra vires, and inhumane assault on the right to asylum yet seen, among a barrage of anti-asylum policies and regulations. We urge EOIR and DHS to withdraw the Rule in its entirety and ensure that a full and fair asylum system is made accessible to all those who seek refuge in the United States.

Dolores Street Community Services, established in 1982, is a 501(c)(3) non-profit organization that serves low-income and unstably housed individuals in and around San Francisco, California. Dolores Street provides free services and support in the areas of housing, tenants' rights, workers' rights, and immigration/deportation defense. The organization's first program, the Dolores Housing Program, was established to provide basic services to refugees fleeing war

and famine in Central America. Since 2008, our Deportation Defense and Legal Advocacy Program has provided free legal representation to individuals facing deportation, many of whom are seeking asylum.

In addition to full-scope representation, Dolores Street supports individuals who are navigating the asylum process pro se. Particularly in recent years, the volume of asylum seekers has far outpaced the availability of quality and affordable legal representation, and Dolores Street seeks to fill that gap through a variety of programs. Through free community-based consults and clinics, our team helps individuals assess the validity of their claims; prepare Forms I-589, and prepare evidence for merits hearings. This year, in partnership with another legal services organization, Dolores Street piloted a six-part course to train asylum seekers to prepare and present their own claims in court, when no attorney is available to represent them.

Since 2008, our team has successfully represented hundreds of individuals and families pursuing claims for asylum. Our clients are survivors of community and domestic violence; workplace exploitation and human trafficking; and homelessness or housing instability. They have suffered severe trauma that touches every aspect of their lives. The process of fleeing their home countries and seeking asylum here compounds that trauma, but for those who are successful, offers a modicum of stability that allows our clients to finally heal.

The U.S. asylum process is already fraught with gaps and loopholes that deprive many of the protection they need and are guaranteed under international law. The proposed regulation would gut this already limited relief, condemning bona fide asylum seekers to persecution and death in their home countries. The regulation will have a disproportionate impact on the most vulnerable immigrants: women, LGBTQI individuals, the mentally ill, and the poor. It will impact nearly all of Dolores Street's clients.

1) Frivolousness and Pretermission Provisions Will Deny Asylum Seekers Their Day in Court

The Immigration and Nationality Act (INA) has long imposed grave consequences when an Immigration Judge determines an asylum application is "frivolous": not only is the instant application automatically denied, the individual is rendered *permanently* ineligible for asylum benefits. INA § 208(d)(6). A four-part test laid out by the Board of Immigration Appeals (BIA) in 2007 requires that a finding of frivolity be entered only if: 1) the applicant has received notice of the consequences of the finding; 2) the Judge has found the frivolity was knowing; 3) a material element of the claim was deliberately fabricated; and 4) the applicant has been given a sufficient opportunity to account for discrepancies or implausibilities in the claim. *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007).

The Proposed Rule would dramatically **lower the bar for findings of frivolous applications**, subjecting a wide array of asylum seekers to summary denials, including if the adjudicator simply determines the claim is without merit. The Proposed Rule would remove the existing requirements that a fabrication be "deliberate" and "material" and would add a vague substitute that may confound adjudicators and spur legal battles; encourage adjudicators to enter a finding of frivolity for applications submitted "without regards to the merit" or "clearly foreclosed by

applicable law;" and strike the requirement that asylum seekers be provided with the opportunity to explain any discrepancy or inconsistency in their submissions or arguments.

In essence, the Proposed Rule overturns the safeguards provided by the Board in *Matter of Y-L-* and adds vague, irrelevant and punitive grounds for frivolity findings, made all the more dangerous by the complex and rapidly evolving nature of U.S. asylum law. The proposal will inevitably result in findings of frivolity for asylum seekers regardless of the validity or truthfulness of their claims, raising considerable concerns under the Due Process Clause.

The profound consequences of these new frivolity rules will be most damaging to pro se asylum seekers, who often lack the language capacity, education, legal background, and access to evidence to prepare complete asylum applications on their own. Asylum law is already highly complex and often confounds even the most experienced attorneys; the obstacles faced by pro se litigants are already nearly insurmountable. Through Dolores Street's training program for pro se asylum seekers, we regularly see that applicants--who are often deeply traumatized and have little education or English-language ability--often do not understand the intricate requirements for asylum and the subtleties of making out a viable claim. The NPRM would gravely penalize pro se applicants who have a legitimate fear of return but may not meet the legal requirements for asylum, or may not understand the nuances of the law sufficiently to demonstrate their eligibility to the court. The bars to seeking relief that result from a frivolous finding are disproportionate to the types of errors and misunderstandings that such a finding would penalize.

We are also deeply concerned at the effect of this lowered frivolity standard on applicants who fall victim to Notario Fraud. It is well known that *notarios*, non-attorneys who purport to represent litigants or prepare immigration applications for a fee, take advantage of vulnerable asylum seekers by filing fraudulent applications containing false information, without the applicant's knowledge. Notario fraud is so pernicious and rampant that EOIR itself has a "Fraud & Abuse Prevention Program" specifically designed to prevent and combat this abuse. *See https://www.justice.gov/eoir/fraud-and-abuse-prevention-program*. Under the revised frivolity standard, individuals who are victims of Notario Fraud could be penalized for filing a "frivolous" application, since no knowledge or intent would be required.

Finally, this new standard would be particularly damaging to unaccompanied minors and other child asylum seekers. Even more so than adult applicants, child asylum seekers face unique challenges to communication, obtaining evidence, and articulating their claims in court. The unique vulnerabilities of child asylum seekers have been widely recognized by the Departments, circuit courts, and in international law. Under the proposed standard, a child who is so deeply traumatized that she cannot tell her story would not only lose her case, but would be penalized and prevented from ever seeking immigration relief in the future.

Pretermission is a limited procedure under asylum law wherein an Immigration Judge may summarily deny an asylum claim before the asylum seeker has a chance to present the merits of their claim in court. The Proposed Rule would vastly **expand the circumstances under which such summary pretermissions are permitted**. Specifically, the Rule would allow an Immigration Judge to pertermit an application for asylum, withholding of removal, or relief under the Convention Against Torture (CAT) upon finding that the asylum seeker failed to

establish a *prima facie* claim for relief based solely on what is alleged in the I-589 application form itself, without hearing live testimony from the applicant or any witnesses. The applicant would only be given ten-days' notice prior to dismissal of their application—hardly enough time to cure any defects and certainly not enough time for a full evidentiary asylum hearing.

Allowance of pretermission under the proposed rule is a direct attack on lawful policies that allow unrepresented respondents to submit I-589s, Applications for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture, that are skeletal or not completed. This is no reflection of the applicant's credibility. There are not enough legal service providers to meet the numbers of unrepresented respondents. The government should provide more funding for legal services rather than implement these draconian regulations that punish newly arrived asylum applicants who are trying to meet all of their legal obligations and also trying to survive. Immigration Attorneys often serve as a door for applicants to secure additional wraparound services such as job access, housing, and an access to education - all factors that allow respondent's to pursue the American Dream. Often, applicants are too traumatized to initially assist their attorneys in full development of their claims. However, after securing valid work authorization and housing, our attorneys have often witnessed a transformation in our clients where they are able to re-enter the attorney-client relationship from a place of safety and confidence, better resourced having had time to heal from the traumas they fled their home countries to escape.

It takes months and countless hours to develop a thorough asylum case, particularly for applicants who are severely traumatized and may never have told their story before. The effects of trauma on our memory and functioning in the world are biological and well-documented--indeed, the agencies themselves have settled policies and practices designed to accommodate the challenges that traumatized applicants face in recalling and presenting their stories (for example, trauma-related exception to the one-year filing deadline for asylum; psychological trauma as a basis to reopen an *in absentia* removal order; and recognition of psychological harm as a form of "hardship" across many forms of relief). We regularly represent clients who are disclosing their past harm for the first time in their legal meetings, and even then only after repeated interactions that develop a sense of comfort and rapport. For example, victims of sexual violence are often afraid or ashamed to disclose their experiences, and this critical information is often not revealed until case preparations are well under way. Similarly, abused children whose cries for help were ignored, disregarded, or punished in their countries of origin will often hide their experiences fearing similar reprisals from counsel or their caregivers here in the U.S. Under the NPRM, all of these applicants would be vulnerable to pretermission.

Further, implementation of pretermission would again greatly disadvantage respondents without counsel. Ten days is a woefully inadequate window for unrepresented respondents to respond within. There is no lawful precedent for such a short time frame for a reply. The only time period where a party is made to respond under such a short time frame is in the context of a reply brief in support of a motion; in that scenario, however, the litigant has already made her primary arguments in the original motion and is anticipating a response. In contrast, if a pro se litigant is notified that their application is incomplete, 10 days (more likely less, as such notice will presumably be sent by mail, shortening the time even further) is woefully inadequate to gather the evidence necessary to correct the alleged deficiency. No logic guides pro se litigants being

held to such a rapid response time, and the agencies impose no such time frame in any other context: for example, USCIS allows 90 days to respond to Requests for Evidence and 30 days for Notices of Intent to Deny. For its part, EOIR allows all litigants to file supporting documents as late as 15 days before a merits hearing; there is simply no logic to hold asylum seekers, in particular unrepresented, to a unique, prejudicial, and obviously hostile standard.

In other words, the proposed rule would deprive many applicants of the opportunity to fully supplement their I-589 application with evidence and live testimony through a typical asylum hearing. Existing asylum law specifically recognizes that an asylum applicant will often face insurmountable challenges in obtaining corroborating evidence. Many refugees are forced to flee their home countries in a rush, with little or no time to gather evidence that might later be necessary to prove their claims. Others may not be able to access such evidence in their home countries, often because of the very status or situation that exposes them to persecution in the first place. For these reasons, the law provides that an applicant can meet her burden through credible testimony alone, and thus a hearing is required to provide an opportunity to present that testimony. Under the NPRM, such applicants would face possible pretermission if an immigration judge determines that their initial evidence is not sufficient to state a claim, even if they could likely develop and obtain the evidence if given more time.

In one case, an attorney at Dolores Street represented an indigenous woman, Jane*, who was brutally raped and beaten by her town's mayor. She woke up in the hospital and immediately fled with her oldest daughter, leaving her younger children behind--along with any proof of the devastating harm she had suffered. Once in the U.S., Jane contacted family members to help her obtain police reports and medical records, but the family was too afraid to take any action, fearing retaliation from the mayor or his associates. As a result, Jane had no evidence other than her own word. Fortunately, through her credible testimony, Jane was able to establish her eligibility for asylum and was granted, allowing her and her daughter a measure of security and safety for the first time in many years. Under the NPRM, however, her application may have been pretermitted without an opportunity to tell her story.

The NPRM would also have devastating consequences for mentally ill applicants or applicants with cognitive challenges. For example, Dolores Street currently represents a young girl, Sara*, who was a victim of sex trafficking in her home country. Sara has filed her asylum application, but due to severe cognitive deficits (which are exacerbated by the extreme trauma she suffered), she struggles to tell her story in her own words. Instead, Dolores Street staff is working diligently to obtain information and corroborating evidence from family members, both in the U.S. and in her home country, to help explain to the court her reasons for seeking asylum. Under the proposed rule, however, Sara's application would likely be pretermitted, because she could not provide this information in her initial filing.

The Departments argue that such an extension is permissible because current regulations require hearings only to resolve factual issues in dispute and not for legally deficient applications. However, the examples provided in the Proposed Rule itself demonstrate that the majority of issues or questions facing an Immigration Judge assessing an I-589 application are inherently mixed questions of fact and law that require credibility determinations and detailed fact finding allowed only in a full asylum hearing. The lack of an opportunity to present live testimony and

witnesses to address these mixed questions of law and fact raises significant due process concerns and will almost certainly place the United States in violation of its obligations under Article 31 of the Refugee Convention, which prohibits states from returning individuals to harm on the basis of a protected ground.

Nearly every requirement for asylum involves mixed questions of law and fact that cannot be properly assessed without a full hearing. For example, whether an applicant has suffered harm rising to the level of persecution is a multi-part analysis that requires the IJ to consider the applicant's credibility--did she really suffer the harm she claims?; the severity of the harm--was it sufficiently extreme? Were threats credible in the social context?; and whether the cumulative effect of multiple harms was sufficiently grave. These questions cannot fairly be answered on the papers alone, but require an in-person assessment of the applicant's demeanor, her account of how the harms were inflicted and perhaps the physical and psychological effect those harms have had on her life.

Similarly, whether an applicant is subject to the one-year filing deadline,or qualifies for an exception, is a mixed question that cannot be fairly adjudicated without testimony. For example, it was undisputed that our client, Susana*, had been present in the U.S. for over a decade before finally applying for asylum. She had survived domestic violence in two relationships in her country of birth, and suffered from severe depression and PTSD for many years after her arrival here. Whether she qualified for the "exceptional circumstances" exception to the filing deadline required assessment of whether her past trauma had affected her so deeply that it prevented her from filing her application. She won her case, but under the NPRM, this assessment likely never would have happened.

The procedural changes suggested under the proposed rule are supposed to center "efficiency," but they curtail due process on the front end and leave the door open for Motions to Reopen, Motions to Reconsider and Appeals that will only further confuse the court system, litigants, and respondents alike.

2) Changes to the Definition of Particular Social Group Exclude Bona Fide Asylum Seekers

To qualify for asylum, an individual must demonstrate a well-founded fear of persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A). The BIA first defined the term "particular social group" (PSG) in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), requiring an immutable characteristic. For approximately two decades, Circuit Courts of Appeal and the BIA applied *Acosta*'s immutable characteristics test to determine whether proposed social groups were cognizable for asylum purposes.

In recent years, however, the PSG determination has become increasingly challenging for asylum seekers as the BIA and Attorney General attempted to add two confusing and illogical additional requirements, referred to as "social distinction" and "particularity." *See Matter of C-A-*, 23 I. & N. Dec. 951, 956–57 (BIA 2006); *See Matter of S-E-G-*, 24 I. & N. Dec. 579, 586 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594–95 (BIA 2008).

This NPRM proposes to **codify the requirements of social distinction and particularity**, citing *Brand X* to assert that the new rules will supersede existing circuit court precedent. *See* n. 1 of the NPRM (citing *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982 (2005)). The social distinction and particularity requirements have been incredibly harmful in their application, leaving applicants, attorneys, and judges alike confused and resulting in the return to harm of countless asylum seekers. Specifically, these new standards seek to disqualify women and LBGTQI people fleeing domestic- and gender-based violence, and to read those fleeing gang-related violence entirely out of the refugee definition. Codifying them here is particularly damaging because there is no *need* for further definition of the PSG standard given the enduring strength of the *Acosta* test.

The Departments further propose a **"nonexhaustive" list of characteristics that would generally be insufficient to establish a PSG**: past or present criminal activity or associations; past or present terrorist activity or association; past or present persecutory activity or association; presence in a country with generalized violence or a high crime rate; the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; and status as an immigrant returning from the United States.

The Departments' proposed list of groups that are *per se* not PSGs unlawfully reads PSG out of the statute and improperly conflates the asylum elements. The Departments cannot, by regulation, issue blanket orders indicating whole classes of people are not eligible for asylum and ordering the BIA and immigration judges not to exercise their discretion and judgment in a given case. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

First, the NPRM's attempt to categorically exclude certain types of social groups flies in the face of settled circuit-court precedent that asylum cases must be adjudicated on a case-by-case basis and on the particular record evidence before the court. This is because whether a group constitutes a "particular social group" depends largely on the society in question and the prevailing culture and attitudes within that society. A group that is cognizable in one country may not be so in another country, depending on the particular context and evidence in the record.

Moreover, the NPRM's "nonexhaustive" list of ineligible PSGs risks adjudicators erroneously placing claims with certain fact patterns or applicants with certain characteristics into one of the "prohibited" categories, without regard for the particular circumstances of the case. For example, a claim that may superficially resemble a "wealth-based" PSG may, upon deeper investigation, actually constitute a political-opinion claim, but because of its appearance may be disregarded by an adjudicator who has been told to exclude that particular category of applicants.

Finally, the asylum statute and regulations already categorically exclude certain applicants from asylum eligibility, based on criminal history or dangerous affiliations. The proposed list of claims that will "generally" not be sufficient would only create more confusion and duplication, ultimately resulting in the judicial waste, extensive litigation, and frustration for asylum adjudicators.

The proposed list of "generally" ineligible characteristics would be devastating for many adult applicants, but especially for children who have been forcibly recruited by criminal organizations. For example, one of our clients, Samuel*, was a Salvadoran youth with cognitive deficits who was forcibly recruited by a criminal gang. Samuel was vulnerable to recruitment because of his intellectual disability, but he nevertheless tried to escape several times, seeking protection in the evangelical church. Each time, the gang forced him to rejoin, and he suffered worsening consequences after each attempted escape. Finally, when Samuel was just 16 years old, the gang shot him when he refused to murder someone on their behalf. Samuel managed to escape and come to the U.S. Samuel's case was complex and unique, and required a nuanced analysis of his eligibility in light of the existing bars to asylum. Under the proposed NPRM, Samuel would almost certainly be barred from relief based on a blanket rule, and he would be denied the detailed and case-sensitive analysis that should be guaranteed under the statute.

3) The Proposed Redefinition of "Political Opinion" is Retrogressive

The Rules propose to redefine "political opinion" as "an ideal or conviction in support of the **furtherance of a discrete cause related to political control of a state** or a unit thereof." To students of this administration's approach to asylum law and policy, it is clear that this redefinition is a naked attempt to cripple the United States asylum system by shutting off asylum access for women, survivors of gender-based harm, and victims of gang violence. The Proposed Rule's authors, however, clumsily argue that their reasoning is in fact rooted both in BIA precedent and in United Nations High Commissioner for Refugees (UNHCR) guidance. The Proposed Rule cites two sources for their justification, and incorrectly describes the significance and findings of both.

The proposed new definition of political opinion is far more restrictive than the clear intent of the statute and longstanding interpretations of that ground. The NPRM's citation to *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1986) is disingenuous; *S-P-* required that a political opinion be "antithetical to [the views] of the government," but did not take the additional, drastic step of requiring that a political opinion be tied to "political or state control." This additional requirement would bar relief for many political opinions that are central to human and political identity today.

For example, here in the U.S., abortion access is perhaps the most divisive political issue in our society today. Politicians are not taken seriously unless they take a firm stand on the question; legislators battle over the issue constantly and publicly; and protestors on both sides regularly demonstrate on behalf of their position, engaging their constitutional right to free speech. Few would argue that one's position on abortion access is not a "political opinion," and yet it would not pass muster under the NPRM because it does not relate to "political or state control." Advocates for or against abortion access who are targeted in their home countries would be barred from asylum.

Similarly, advocates for LGBTQI rights would also be barred under the NPRM, even after fleeing countries where the government takes an explicit position against such rights. For example, Dolores Street represents a transgender woman, Elizabeth*, who was active in an

LGBTQI organization in her country which advocated for better LGBTQI healthcare and protection from the government. The organization's headquarters were burned down, and our client suffered threats and physical harm because of her advocacy. Under the NPRM, her activities would not qualify as a "political opinion" because they did not oppose a particular political party or government official, and she would be barred from relief.

Going even further, the Departments propose that the definition of political opinion be *explicitly defined* to **almost categorically exclude those fleeing gang-related violence and other harms by non-state actors**. Toward this end, the Rule proposes that immigration adjudicators be admonished against the favorable adjudication of asylum claims brought by those fleeing persecution on account of a political opinion "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations…." These specific instructions clash directly with UNHCR guidance and constitute a retrogressive view of political opinion. In today's reality, non-state actors often have significant control over neighborhoods, state actors are often unable or unwilling to intervene, and the geopolitical landscape often renders distinctions between opposition to the state and views regarding culture meaningless.

4) The Rule Cruelly Redefines Persecution to Exclude Many Serious Harms

The Proposed Rule attempts to restrict asylum eligibility by establishing, for the first time ever, **a regulatory definition of "persecution" that excludes fact-specific analysis.** Under the new definition, "persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization the government was unable or unwilling to control." The Proposed Rule further defines persecution as needing to include "actions so severe that they constitute an exigent threat," but not including "generalized harm that arises out of civil, criminal or military strife . . . intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or non-severe economic harm or property damage." Finally, the Proposed Rule asserts that "the existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally."

Asylum cases are inherently fact-specific and perhaps no part of an asylum claim is more individualized than the specific way in which one person has been or may be harmed by another. By establishing a strict, regulatory definition of persecution, the Proposed Rule significantly undercuts the necessary flexibility of the current framework and will ultimately result in the erroneous denial of protection to bona fide asylum seekers. The Proposed Rule provides no rationale for such a significant departure from the current manner of interpreting this term.

The proposed redefinition of persecution will create duplication and confusion in the asylum analysis; the definition appears to fold in other elements of the refugee definition, which will inevitably confuse litigants and adjudicators and result in judicial waste. For example, to win asylum, an applicant must establish that she was persecuted *on account of* a protected ground, but the new definition would add that the persecution must also be with an "intent to target a belief or characteristic." It is unclear how these two requirements would differ or interact, but at

a minimum they appear to raise the bar for persecution to requiring a kind of specific intent, which is not required under the current framework.

Moreover, the proposed new definition would appear to undercut widespread, longstanding precedent that adjudicators must consider the cumulative effect of harms when determining if persecution has occurred. For example, an individual who suffers a single brief detention, or who loses their job once, may not have suffered persecution, but the cumulative effect of repeated detentions, threats, and economic harms over a prolonged period would likely meet the current standard in most circuits. *Baharona v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008); P*oradisova v. Gonzales*, 420 F.3d 70, 79-80 (2d Cir. 2005); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998). See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 201 (Geneva 1992) ("The cumulative effect of the applicant's experience must be taken into account."). Under the new standard, many asylum seekers would be foreclosed from gaining asylum despite suffering lifetimes of persistent, substantial harms.

The NPRM also purports to undermine years of settled precedent that threats can rise to the level of persecution when accompanied by some evidence that the threat is serious and credible. *See Cedillos-Cedillos v. Barr*, 2020 WL 3476981 *2 (4th Cir., June 26, 2020); *Scarlett v. Barr*, 957 F.3d 316, 328 (9th Cir. 2020); *Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020); *N.L.A. v. Holder*, 744 F.3d 425, 431 (7th Cir. 2014); *Javed v. Holder*, 715 F.3d 391, 395-96 (1st Cir. 2013); *Chavarria v. Gonzalez*, 446 F.3d 508, 518 (3d Cir. 2006); *Coradov. Ashcroft*, 384 F.3d 945 (8th Cir. 2004); *Vatulev v. Ashcroft*, 354 F.3d 1207 (10th Cir. 2003). This new obstacle effectively means that if an asylum seeker is somehow able to escape her persecutors before suffering potentially fatal harm, she will not qualify for protection because their threats were never carried out. For example, a Dolores Street attorney represented two unaccompanied-minor brothers, who had suffered repeated threats in their home country because gang members believed they were collaborating with law enforcement. Fortunately, the brothers were able to flee to the U.S. before these threats were acted upon, but months after their arrival, their parents were brutally attacked, requiring hospitalization. The brothers were granted asylum, and are now both enrolled in college in the U.S. Under the NPRM, however, these brothers would not have qualified for asylum because they fled before suffering the physical harm that ultimately befell their parents.

5) List of Claims that Preclude a Finding of "Nexus" are Nonsensical and Dangerous

In asylum law and adjudications, "nexus" refers to the requirement that an asylum applicant's persecution be on account of one or more protected grounds. Once again, the NPRM delivers on the administration's political goal of excluding as many applicants as possible from protection by outlining a list of eight specific types of claims that categorically preclude a finding of nexus.

This list of **disqualifying claims** includes those based on: 1) personal animus or retribution;" 2) "interpersonal animus;" 3) "generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in

furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;" 4) "resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations"; 5) "the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;" 6) "criminal activity;" 7) "perceived, past or present, gang affiliation;" and 8) "gender."

As a threshold matter, the proffering of a list of categories that cannot support a finding of nexus makes absolutely no sense, and conflates nexus with the definition of the protected grounds. Nexus concerns whether a person is persecuted "on account of" their group—not the group itself. By confusing nexus and PSGs with this list, the Departments' analysis unravels and defies the statutory definition that provides their mandate.

This proposed change in particular will have devastating effects for women and children who have suffered domestic violence in countries where such violence is widely accepted or condoned. Because this type of harm is perpetrated by a relative or intimate partner, it would be characterized as "personal animus" or retribution and therefore barred from asylum. This is clearly what the current administration intends--as demonstrated by the President and Attorney Generals' repeated public statements vilifying victims of domestic violence--but it is wholly inconsistent with decades of precedent. Indeed, prior to the Attorney General's decision in *Matter of A-B-*, both EOIR and the Department of Homeland Security were in agreement that certain victims of domestic violence qualified for asylum. This agreement was the result of decades of advocacy, negotiation, and policymaking. The NPRM would, in a single sweep, eliminate these years of inter-agency discussion in favor of a highly political rule.

The Departments further undermine the meaning of the nexus requirement by stating that "machismo" and "pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim." This insidious provision, cloaked in progressive-sounding language, is actually a dangerous restriction on asylum adjudicators' ability to consider some of the most important evidence in any asylum claim—the societal norms informing a persecutor's intent. This proposal is particularly concerning in light of the proposal to codify the "social distinction" requirement for particular social group: prevailing social and cultural norms in the society in question, such as attitudes regarding gender, sexuality, and race, are often the most critical evidence for establishing that a particular group is recognized as distinct in that society.

For example, Dolores Street recently represented a gender nonbinary person, Alex*, who suffered constant harassment, discrimination, and abuse throughout their life. Alex's family rejected them because of their gender identity, subjecting Alex to beatings, verbal abuse, and even sexual abuse throughout Alex's childhood. Outside the home, Alex faced similar abuse from neighbors, classmates, and teachers, who called Alex names and refused to protect them out of a pervasive disapproval for their nonbinary identity. Even Alex's supposed friends, who loved and supported Alex, felt unsafe speaking out or protecting Alex out of fear that they themselves would be harmed. Anti-LGBTQI sentiment and prevailing cultural norms about gender and sexuality are so deeply engrained in Alex's society, that there was nowhere they could turn to for support or protection. Leaving this critical evidence out of the record would

have made it nearly impossible for Alex to establish that, as a gender nonbinary person, they were a member of a socially distinct group in that society. Alex's is just one of many clients that Dolores Street has helped that would have been denied protection under the proposed NPRM.

6) Changes in Internal Relocation Provisions Place an Impossible Burden on Asylum Seekers

Current regulations require that adjudicators determine whether "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country" and if so, whether "under all the circumstances, it would be reasonable to expect the applicant to do so." 8 CFR § 208.13(b)(1)(i)(B) and (b)(2)(ii). A finding that internal relocation could be reasonably expected is fatal to an asylum claim, but current regulations presume that relocation is not reasonable if an asylum seeker has experienced past persecution or where the government is the persecutor.

The proposed regulations would essentially **convert the internal relocation rule into a nearly universal bar to asylum** for anyone fleeing non-state actors by presuming that relocation is reasonable for those fleeing persecutors who are not state or state-sponsored. The NPRM also excludes gangs, "rogue officials", family members, and neighbors from the category of government-sponsored persecutors and revises the list of factors for reasonableness determinations. Disturbingly, the NPRM further modifies the current regulations by requiring adjudicators to consider the asylum seeker's **ability to flee to the United States** to seek asylum when determining the asylum seeker's ability to relocate within his or her home country.

These changes are confusing, inconsistent with binding precedent, and tailored to harm a large category of asylum seekers. The internal relocation bar already serves as a challenging hurdle for many applicants who struggle to find evidence to prove that they could not safely relocate elsewhere in their country, even as they know it to be true. Expanding the bar places a cruel burden on asylum applicants to prove more than they could reasonably be expected to prove with regard to a hypothetical relocation.

The NPRM will place asylum seekers in the untenable position of having to essentially prove a negative, which completely ignores the realities of many of our clients' lives in their home countries. This rule would be particularly devastating for unaccompanied minors and other child asylum seekers. If a 13-year-old child manages to escape his home country and seek asylum in the U.S., how can he be expected to demonstrate that he could not relocate to any other part of his country? Prior to fleeing, many such children have never even left their hometown, let alone attempted to live or survive in another city or town. Many children--particularly those who cannot obtain counsel--will lack the tools and awareness to articulate why they could not relocate safely within their country under this new standard.

Moreover, the suggestion that "ability to flee" is relevant to one's ability to relocate is ludicrous; it discounts completely the many financial, cultural, social, and political factors that would make it impossible for, for example, a single woman or a member of a racial minority to live safely in their home country. Asking adjudicators to consider this fact when determining the reasonableness of relocation sends a not-so-subtle message that effectively *all* asylum applicants

should be denied protection. While this may be the agencies' intended result, it is not supported by the statute.

7) NPRM Uses "Discretion" to Add Countless New De Facto Bars to Asylum

The INA provides that asylum is a discretionary benefit. Under both domestic and international law, however, it is well-established that a negative discretionary factor must be significantly egregious to result in a denial of asylum for an asylum seeker who has met the refugee definition. In *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), the BIA emphasized that the discretionary determination in an asylum case requires an examination of "the totality of the circumstances," both positive and negative; the BIA held that within this "totality of the circumstances" analysis, "the danger of persecution should generally outweigh all but the most egregious of adverse factors."

The Proposed Rule, however, seeks to **subvert entirely this precedent** by creating two lists of discretionary factors, the first of which are presumptively "significantly adverse" to an exercise of discretion and the second of which preclude entirely a grant of asylum. As a preliminary matter, the framing of these factors as presumptively significantly adverse makes them de facto bars to asylum, taking away what little remains of IJs' discretion to grant or deny asylum. Under the auspices of the Department of Justice, EOIR is already a highly politicized judiciary, the fact of which has been particularly stark during the present administration. The NPRM would strip IJs of the jurisdiction to review asylum cases holistically, an approach that was specifically contemplated by Congress, codified in existing regulations, and supported by well settled case precedent.

The Proposed Rule first lists three factors that, if present, adjudicators are required to consider as "significantly adverse" for purposes of the discretionary determination: 1) unauthorized entry or attempted unauthorized entry, unless "made in immediate flight from persecution or torture in a contiguous country"; 2) failure to seek asylum in a country through which the applicant transited, and 3) the use of fraudulent documents to enter the United States, unless the person arrived in the United States without transiting through another country. This three-factor test quite simply sets asylum seekers up to be denied protection and deported back to harm *because* they were able to successfully navigate an escape route from persecution to the United States. It flips *Matter of Pula* on its head and contravenes Article 33 of the Refugee Convention, which prohibits states from penalizing asylum seekers for their manner of entry.

The first and third of these factors penalize asylum seekers who enter the U.S. either without inspection or with fraudulent documents, failing to recognize that these manners of entry are often the only options for many asylum seekers. For example, Dolores Street has seen countless examples of asylum seekers from non-contiguous countries who had no choice but to flee their home countries using fake identity or travel documents. For example, women fleeing certain countries may not be able to obtain a passport or purchase a plane ticket without their father's or husband's consent. But if seeking her father's consent would place the woman in greater danger, she may have no choice but to obtain fake documents in order to circumvent this consent requirement. Under the proposed NPRM, this erroneous requirement would have the perverse effect of condemning her to continued persecution.

Separately but equally disturbing, the U.S.'s own recently enacted policies of forcing asylum seekers to remain in Mexico leave many applicants with no choice but to enter unlawfully. By now it is well known that makeshift refugee camps along the Mexico-U.S. border are hotbeds for crime, sexual violence, exploitation and trafficking, not to mention illness and lack of sanitation. Under the MPP and metering policies, asylum seekers--including pregnant women, children, and the elderly--are being forced to wait in Mexico for months. The Mexican government is ill-equipped and unmotivated to improve conditions or safety in these camps. These inhumane policies have forced many asylum seekers to attempt to cross between ports of entry because they were denied the opportunity to present their claim through "regular" admission procedures. This proposal in the NPRM is a particularly transparent attempt to erase asylum completely by cutting off all access points.

As egregious as the first list is, the NPRM goes on to even more audaciously propose a list of ten factors that entirely preclude the adjudicator from favorably exercising asylum. These **de facto bars** would eliminate access to asylum for asylum seekers who: 1) spent more than 14 days in any one country immediately prior to her arrival in the United States or en route to the United States; 2) transited through more than one country en route to the United States; 3) would otherwise be subject to one of the criminal conviction-based asylum bars at 8 C.F.R. § 208.13(c) but for the reversal, vacatur, expungement, or modification of the conviction or sentence; 4) accrued more than one year of unlawful presence prior to applying for asylum; 5) failed to timely file or request an extension of the time to file any required income tax returns, 6) failed to satisfy any outstanding tax obligations, or has failed to report income that would result in a tax liability; 7) has had two or more asylum applications denied for any reason; 8) has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application; 9) failed to attend an asylum interview, with limited exceptions; or 10) did not file a motion to reopen of a final order of removal based on changed country conditions within one year of those changes.

These additional discretionary factors are completely invented, contravene very explicit binding precedent and statutory language, and would create unimaginable confusion and judicial waste in the courts. For example, the proposed bar (3) above, which would penalize certain vacated criminal convictions, is directly inconsistent with the definition of "conviction" under INA section 101(a)(48)(A). Moreover, this bar would contravene *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), which the *Attorney General himself* most recently upheld in 2019. *See Matter of Thomas & Thompson*, 27 I&N Dec. 674 (AG 2019). There is no rational explanation for disregarding vacaturs and modifications in the context of asylum where they are explicitly recognized and upheld in all other aspects of immigration law.

The proposed bars (1) and (2) above, which would penalize transitory presence in third countries prior to entry, will do nothing more than create confusion with the already mind-boggling firm-resettlement bar. A similar regulation, 84 Fed. Reg. 33,829 (July 16, 2019), codified at 8 C.F.R. § 208.13(c)(4), was recently enjoined by the Ninth Circuit Court of Appeals in *East Bay Sanctuary Covenant v. Barr*, No. 19-16-16487 (July 6, 2020). This ruling shows that this type of bar is plainly contrary to the statute.

Moreover, the real-life consequences for asylum applicants of this back-door transit ban are significant and devastating. For example, a Dolores Street attorney represented a woman, Sofia*, who traveled from Guatemala through Mexico before arriving in the U.S. She was pregnant in transit, and she became unable to travel and actually gave birth in Mexico before arriving in the U.S. As a result of having to give birth and recover en route, Sofia was in Mexico for longer than two weeks; under the NPRM she would have been barred from obtaining asylum. Even if Sofia could win withholding of removal--she was granted asylum--under the NPRM, she would have been precluded from petitioning for her other minor children, whom she had left behind in Guatemala when she fled. Sofia is just one of many, many of our clients for whom these factors would have devastating family consequences.

8) Changes to Standards for Protection Under the Convention Against Torture (CAT) Will Return Survivors to Further Torture

Protection known as withholding or deferral of removal under the Convention Against Torture (CAT) provides critical protections for individuals who face torture in their country of origin and would be otherwise barred from asylum protections. The Proposed Rule proposes modifying the standard for protection under CAT to **limit the accountability of foreign governments as to the torturous conduct inflicted either at the hand of government actors directly or by private individuals**, acting with the government's acquiescence.

Specifically, the Rule seeks to eliminate accountability for torture inflicted by "rogue" government actors and curtail accountability for torture inflicted by private actors. Under the Proposed Rule, pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (i.e. under "color of law"). Additionally, the Rule provides that only a government actor who is acting "under color of law" can acquiesce in torturous conduct by private actors.

The definition of "acquiescence" currently requires a finding of actual knowledge or willful blindness; the Proposed Rule redefines "willful blindness" to require that the official be "aware of a high probability of activity constituting torture and deliberately avoided learning the truth." A reckless or negligent disregard for the truth is not enough.

The standard for CAT protection is already very difficult to meet; imposing a "willful blindness" requirement fails to acknowledge the reality on the ground in many countries, and would effectively prevent most victims of torture from obtaining protection in the U.S., in violation of our obligations under international law. Importantly, nearly every circuit to address the concept of "willful blindness" in the CAT context has settled on an approach that is more permissive than the one in this Proposed Rule. *See Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2003); *Khouzam v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004); *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006); *Silva-Rengifo v. Attorney General*, 473 F.3d 58, 69 (3d Cir. 2007); *Hakim v. Holder*, 628 F.3d 151, 157 (5th Cir. 2010).

In today's world, most countries technically have laws on the books that prohibit torture, and yet torturous practices go unchecked due to corruption, powerful organized crime, and lack of resources, infrastructure, and transparency in government. For example, many of our clients come from rural areas where gangs and vigilante groups practice torture as a means of controlling, intimidating, or even eliminating communities altogether. Institutional and historical racism and misogyny are just two of the many factors that may allow torture to take place with impunity, even where local officials may not be specifically "aware of a high probability of" torture. The NPRM would completely ignore these realities that exist in many countries, and would deeply undermine the U.S.'s compliance with its long-settled international obligations.

This will disproportionately impact applicants for CAT who are fleeing violence based on their gender or sexual orientation. It is not unusual for local law enforcement to turn away in cases where it is known that a person is being tortured. For example, one DSCS client, Fabianna*, suffered "corrective rapes" for years at the hands of her drug lord cousin on account of her sexual orientation. It is clear under the circuit case laws that rape rises to the level of torture. Nonetheless, the local police in Fabianna's home country chose to look the other way, casually referring to Fabianna as his cousin's "bitch," because of the pernicious homophobia within the community. Under the NPRM, Fabianna may not have met the unreasonably high standard because the police may not have had actual awareness of the high likelihood that Fabianna was being tortured.

9) Weakened Confidentiality Protections Undermine the Integrity of the Asylum System

The Proposed Rule includes changes to expressly allow the disclosure of information in an asylum application "as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the asylum seeker's immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse." Without any valid justification, the Rule proposes changes that would allow the government to **use a person's fear-based claim against them**, in ways that could prevent them from obtaining other benefits or concessions, and hinder them from seeking asylum due to fear of reprisal.

When we begin to prepare an asylum case with clients, inevitably the client always asks us, "Who will find out what is in my application?" This question is borne out of a deep and very reasonable fear that seeking asylum could expose one to even further harm if confidence is not maintained. Our clients fear that their claims could be exposed, either intentionally or inadvertently, to violent intimate partners, gang members, local government officials or police officers in their home countries, or others who could use the information to locate or harm them. Many of our clients have been explicitly threatened that if they ever report what has happened to them, they will be tortured or killed. Under existing law, we can at least offer our clients the small comfort that the U.S. government will maintain their confidentiality and protect them against disclosure, even if they are not ultimately granted protection. The NPRM would shatter this confidence and deter many bona fide applicants from seeking protection.

For example, Dolores Street attorneys represent survivors of sexual violence who have never shared their experiences with spouses or other family out of fear, shame, and deep-rooted cultural stigmatization. For example, a client, Susana*, an indigenous Mayan from Guatemala, was brutally raped by non-indigenous men who called her racial slurs and threatened to kill her if she ever disclosed the rape. Before retaining counsel, Susana never told anyone about the rape--including her husband or extended family--out of fear that her rapists would kill her, or that her family would reject her. With the assurance that her asylum application would remain confidential, Susana was able to tell her story in court and was granted protection for herself and her two small children. Had Susana not had this assurance, however, she may not have felt safe enough to tell her story, which could have put her and her two children at serious risk.

10) Changes in Expedited Removal Undermine the Purpose of Threshold Fear Screenings

Credible Fear Interviews (CFI) are preliminary screenings for individuals subject to expedited removal proceedings at or near the border. Those who pass can proceed with their claim to asylum. However, the Trump administration has proposed to expand "expedited removal" away from the borders, allowing immigration agents to pick up any person anywhere in the country and deport them without judicial review unless the person can convince the immigration agent that they are a citizen, or that they have some lawful status in the United States. Although this expansion was enjoined by a federal judge in September 2019, last month, a federal court of appeals lifted the injunction, setting the stage for draconian implementation nationwide.

While the administration seeks to dramatically expand the *use* of expedited removal proceedings, the Proposed Rule **restricts *even further* the rights of those facing these proceedings**. Under the current system, anyone subject to expedited removal must prove that they have a "credible fear" of persecution in their country of origin; those who make that showing to an asylum officer get referred to an immigration judge for "full" removal proceedings. In these full removal proceedings, the applicant can apply for any relevant form of relief from removal—including, for example, adjustment of status (a green card) if the applicant is married to a U.S. citizen and otherwise eligible. The Proposed Rule would dramatically change this process by pigeon-holing those who pass their CFIs into "asylum-and-withholding-only proceedings," where they would be prohibited from seeking any form of relief other than asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

This dramatic limitation on asylum seekers' day in court would **restrict access to many of the avenues of relief** currently available under the INA, in violation of congressional intent. U.S. immigration laws should be implemented in a manner that makes relief as accessible as possible to those who are eligible, yet the Proposed Rule operates in exactly the opposite manner, unnecessarily excluding those who meet the statutory guidelines for relief.

First, the NPRM violates clear congressional intent and the plain text of the statute. The text of INA § 240 allows respondents who pass the credible-fear stage to seek any form of relief for which they are eligible; there are no limitations placed on any individuals who find themselves in Section 240 proceedings. Other sections of the Act, however, limit the relief that certain, specific types of individuals can access before an immigration judge: individuals subject to a reinstated removal order can seek only withholding of removal or CAT relief (INA § 241(a)(5));

and individuals admitted under the visa waiver program can seek only asylum (INA § 217(b). If Congress intended to limit the availability of relief to asylum seekers who have passed the CFI, it would have expressly included such a limitation in the Act, as it did for individuals with prior removals or who arrived under the VWP. Absent such congressional intent, however, the NPRM is *ultra vires* and nothing more than a clear attempt to streamline the deportation of bona fide asylum seekers.

Moreover, the NPRM would bar asylum seekers from other forms of relief for which they may become eligible during their proceedings, not only prejudicing those applicants but the community at large. For example, the U visa is designed to protect immigrant victims of crime in the U.S., but it serves an equally important public-safety goal by encouraging victims of crime to report to and cooperate police. Similarly, the T visa is designed not only to protect victims of trafficking, but to help law enforcement identify and shut down trafficking operations in this country. Asylum seekers in particular are often vulnerable to crime and human trafficking, due to poverty, unfamiliarity with their new communities, and mental health issues stemming from past trauma. Preventing them from seeking alternative forms of relief simply because they first arrived here seeking asylum would be devastating not only for the applicants themselves but for their families and communities as well.

For example, Dolores Street currently represents a young mother, Ana*, who fled her home country after suffering years of domestic violence there. In the U.S., Ana became a victim of human trafficking, being forced to work as a housecleaner under threat of harm or deportation for many months. With Dolores Street's help, Ana has been able to pursue a T visa and help bring her trafficker to justice. Under the NPRM, however, she would be barred from doing so. Our staff has represented countless individuals in similar situations; if these clients were not able to seek U and T status after passing the CFI stage, the consequences for them, their families, and their larger community would be devastating.

The Proposed Rule would further **heighten the already difficult burden of proof required of asylum seekers** at the CFI stage and also empower asylum officers to deny applicants at the CFI stage if an officer believes one of the complex bars to asylum may apply. Specifically, the Rule is designed to limit most people to lesser forms of protection like withholding of removal, which require applicants to demonstrate a "clear probability" of persecution or torture. The Rule adds insult to injury by requiring asylum seekers to show they are likely to meet this higher burden in a screening interview that would occur within hours or days of entry to the United States and generally without access to counsel. Taken together, these restrictions render the CFI process a gauntlet that will be unnavigable for even those with the strongest asylum claims. Such machinations contravene the purpose of CFIs, which are threshold screenings intended to preserve the ability of arriving asylum seekers to develop and present their claims to a judge.

Already, the vast majority of asylum seekers are detained and unrepresented when they undergo their CFIs. Many of our clients report that, at the time of their CFI, they are suffering from illness, malnutrition, or fatigue as a result of their journey; and they are traumatized from both the harm they suffered in their home country and on their journey to the U.S., including rape, kidnapping, and trafficking. We have clients who were far along in pregnancy at the time of their interviews, or who had just recently been separated from their family. We have clients who

were interviewed in a language they do not fully understand because no interpreter is available to translate into their rare indigenous dialect. We have transgender and gay clients who are interviewed in detention centers, where they are afraid to reveal their sexuality or gender identity where other detainees may overhear. Others of our clients often receive misinformation en route to the U.S., so that they fear they cannot tell their whole story when interviewed at the border. All of these are very real and serious obstacles that already exist at the CFI stage; the NPRM would make these even more insurmountable. Also, because there is no right to counsel at the CFI stage, most applicants will be forced to shoulder this higher burden alone, making it even less likely that they will be able to meet the heightened standard.

The Departments' proposed changes to the expedited removal process would also have the consequence of eliminating entirely the ability of asylum seekers to seek **release from detention** on bond during their court proceedings. Asylum-seekers who are forced to pursue relief in detention face substantial obstacles to preparing their cases. Most ICE detention centers are located in rural areas where access to legal counsel is extremely limited. Detainees have little or no access to law libraries where they can gather country conditions evidence or learn the law, and are often unable to communicate with family abroad who could gather critical evidence for their cases. These obstacles often prevent them from adequately presenting their cases, resulting in asylum denials despite bona fide bases for relief.

For example, Dolores Street represented Alicia*, a Muslim woman from Togo who was brutally tortured and threatened by her father when she rejected a forced marriage and attempted to enter a mixed-religion marriage. When Alicia arrived in the U.S., she was detained throughout her proceedings and was denied asylum. When our office took on appellate representation, we discovered that Alicia had been denied certain important procedural protections because she had been in detention. Alicia was detained in an ICE facility in rural California, and she never had a chance to consult with an attorney before her hearing. Without legal advice, Alicia did not realize that she had a right to testify in her native Togolese language, so instead she testified in French, which she does not speak fluently. Alicia also did not realize that critical aspects of her case were even relevant to her claim, so she did not explain to the IJ all of her reasons for fleeing Togo. With our office's help, Alicia successfully reopened her case and was provided a second merits hearing at which she presented her full case. Being detained during her initial proceedings was highly prejudicial to Alicia's case, and created substantial judicial waste. Detaining all asylum seekers without the possibility of release will not only prevent applicants from presenting their cases fairly, but will waste massive government resources.

Conclusion

For all of these reasons, Dolores Street Community Services strongly opposes the proposed rule because it violates the existing statutory framework and mandate of the Departments to protect and provide fair process to asylum seekers. The rule will effectively gut asylum, stripping protections primarily from communities of color, low-income asylum seekers, women, and children. While this may be the Departments' desired result for political reasons, it flies in the face of international and U.S. refugee law and should not be enacted. The Departments should immediately rescind the NPRM.

Thank you for considering these comments in response and opposition to this NPRM, and please contact our team to provide any additional information you might need. We look forward to your response.

/s/ Kate Mahoney
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EXHIBIT 7

DECLARATION OF NAOMI A. IGRA

CAPITAL AREA IMMIGRANTS' RIGHTS COALITION
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July 15, 2020

Submitted via www.regulations.gov

Lauren Alder Reid, Assistant Director
Office of Policy, Executive Office for Immigration Review
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Falls Church, VA 22041

Re: 85 FR 36264; EOIR Docket No. 18-0002, A.G. Order No. 4714-2020; RIN 1125-AA94, Comments in Response to Joint Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

Dear Ms. Reid:

The Capital Area Immigrants' Rights Coalition ("CAIR Coalition") respectfully submits these comments in response to the Joint Notice of Proposed Rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, published in the Federal Register on June 15, 2020 (85 Fed. Reg. 36,264) (hereinafter "NPRM" or "Proposed Rule") by the Department of Justice and the Department of Homeland Security (the "Departments").

CAIR Coalition strongly opposes the Proposed Rule because it is inconsistent with the Immigration Nationality Act ("INA"), is incompatible with the Departments' stated aims, and inimical to the fulfillment of our long-standing national values and international commitments to provide a safe refuge for those fleeing persecution and torture. Additionally, CAIR Coalition opposes this Proposed Rule because it is arbitrary and capricious, violates constitutional due process, and it fails to protect the vulnerable populations we serve.

CAIR Coalition's Expertise in Serving the Immigrant Community
Established in 1999, CAIR Coalition strives to ensure equal justice for all immigrant adults and children at risk of detention and deportation in the D.C. metropolitan area and beyond through direct legal representation, know-your-rights presentations, impact and advocacy litigation, and the enlistment and training of attorneys to defend immigrants.

Our work with asylum seekers cuts across all our programs, and most significantly in our Detained Adult and Detained Children's Programs. Indeed, approximately more than seventy-five percent of our work with immigrants involves assisting adults and children applying for asylum, withholding of removal under INA § 241(b)(3), and protection under the Convention Against Torture.

Through our Detained Adult Program, we help detained immigrants navigate the credible fear and reasonable fear interview processes, understand their rights through the removal process and as they put forth their cases in Immigration Court, and learn about and apply for various forms of

immigration relief, including asylum and withholding of removal. This program also helps people connect with pro bono attorneys if they are unable to pay an attorney to represent them in removal proceedings.

Our Detained Children's Program provides legal services to unaccompanied immigrant children detained by the Office of Refugee Resettlement (ORR) at juvenile facilities in Maryland and Virginia. The facilities include ORR long-term foster care programs, large shelter programs, and secure detention facilities. Our staff also routinely represent minors who have been reunified with a sponsor in the region and have pending asylum applications.

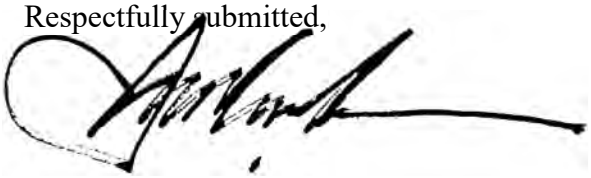
Additionally, our Immigration Impact Lab has been involved in judicial appeals and federal court challenges that have established significant precedent on several issues raised by the NPRM, including asylum and credibility findings, CAT acquiescence, eligibility bars to asylum, and the significance of an applicant's membership in a particularized social group.

CAIR Coalition's comments to the NPRM focus on the procedural due process rights implicated by the proposed changes to the credible fear interview process, the referral of immigrants for asylum-only proceedings in lieu of placement in Section 240 removal proceedings, and the redefinition of certain substantive elements of asylum and withholding of removal and their analytical standards. We note, however, that the large number of changes contemplated by the long, complex, and comprehensive NPRM have rendered it impossible to address each issue in the depth warranted.

The issues presented cut across a broad range of substantive and procedural questions at the heart of the asylum regime, and together threaten a sea change – one that would, in every respect, work to disadvantage asylum seekers and raise the risk that the United States will send immigrants to countries in which they will face death, torture, or other forms of persecution. CAIR Coalition believes that the thirty-day comment period here was inadequate, and that a longer time frame would have allowed for more robust discussion of the wide range of issues presented, especially as to the significant reliance interests and problems that the Departments failed to account for, addressed inadequately, or ignored in promulgating the NPRM.

For the reasons described in our comments, we strongly urge the Departments to withdraw the Proposed Rule.

Respectfully submitted,



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INTRODUCTION

The Capital Area Immigrants' Rights Coalition ("CAIR Coalition") respectfully provides these comments in response to the June 15, 2020 Notice of Proposed Rulemaking ("NPRM")[1] issued by the Department of Justice and the Department of Homeland Security (the "Departments").[2]

For the reasons described below, the CAIR Coalition opposes ***all*** of the changes proposed in the NPRM. These changes seem designed at every step to truncate the procedural options for those seeking asylum and to narrow the class of immigrants eligible for asylum. They are, moreover, almost invariably unconstitutional, contrary to the terms of the Immigration Nationality Act ("INA"), incompatible with the Departments' stated aims, and inimical to the fulfillment of our national values and international commitments. Accordingly, the Departments should reject the proposed changes.

I. THE NPRM IS WRACKED BY FLAWED LOGIC, A LACK OF EVIDENCE IN SUPPORT OF ITS PROPOSALS, AND REPEATED FAILURE TO CONSIDER RELEVANT EVIDENCE, ENSURING THAT ANY RULES ADOPTED WILL BE ARBITRARY AND CAPRICIOUS.

Before addressing the NPRM's particular proposals, it is critical to note an over-arching and fatal problem. The NPRM repeatedly fails to account for relevant evidence, relies on flawed logic that contradicts settled case law, and fails to consider relevant aspects of the issues presented. Any rules adopted based on the instant NPRM would therefore be arbitrary and capricious. The Departments simply cannot move forward on the basis of this NPRM.

The Administrative Procedure Act ("APA") requires agencies to provide notice of its proposed rules and the proposed legal bases for those rules.[3] Notice must afford interested parties "reasonable opportunity to participate in rule-making process."[4] Where notice is inadequate, an agency's consideration of comments received in response thereto, no matter how careful, cannot cure the initial defect.[5] In matters of textual interpretation, "some indication of the regulatory intent that overcomes plain language must be referenced in the published notices

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[1] Joint Notice of Proposed Rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, Department of Homeland Security, Department of Justice Executive Office for Immigration Review, 85 Fed. Reg. 36264 (rel. June 15, 2020) ("NPRM").

[2] Where relevant, the term "Departments" used herein includes the former Immigration and Naturalization Service ("INS").

[3] 5 U.S.C. § 553.

[4] *Forester v. Consumer Product Safety Com.*, 559 F.2d 774, 787 (D.C. Cir. 1977) (citing *S. Terminal Corp. v. EPA*, 504 F.2d 646, 656-59 (1st Cir. 1974); *Cal. Citizens Band Assn. v. United States*, 375 F.2d 43, 48-49 (9th Cir.), *cert. denied*, 389 U.S. 844, 19 L. Ed. 2d 112, 88 S. Ct. 96 (1967); *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24, 28 (1954); *Willapoint Oysters, Inc. v. Ewing* 174 F.2d 676 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949)).

[5] *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (internal citations omitted).

that accompanied the rulemaking process," for "[o]therwise, interested parties would not have the meaningful opportunity to comment on proposed regulations that the APA contemplates . . . because they would have had no way of knowing what was actually proposed."[6] Notice that lacks "reasonable specificity" as to key matters is inadequate because it "will not lead to better-informed agency decision making."[7] And an agency commits "serious procedural error when it fails to reveal portions of technical basis for a proposed rule in time to allow for meaningful commentary."[8]

Notice of this type is necessary if an agency is to satisfy the familiar *State Farm* framework.[9] Under *State Farm*, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[10] Its decision must be "based on a consideration of the relevant factors" to survive review, will be deemed arbitrary "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."[11] "When an administrative agency sets policy, it must provide a reasoned explanation for its action."[12]

These fundamental precepts doom any effort to adopt the NPRM's proposals. Far from permitting comment on the Departments' proposed logic and the bases for their legal authority, the NPRM is replete with perfunctory and conclusory assertions – where it even bothers to describe the Departments' thinking at all. Often, as detailed below, its proposed logic has been repudiated by federal courts, foreclosing the "reasoned decision making" that is "the touchstone of 'arbitrary and capricious' review."[13] On other occasions, the NPRM relies on blatantly contradictory claims – such as when it indicates that a higher standard of proof for fear interviews will reduce administrative costs, even while insisting that the modification will have no effect because the "ultimate" standard remains unchanged. And nowhere – *nowhere* – does the NPRM consider how any purported benefits of the proposed rule changes would be offset by the catastrophic harms they would impose, both on immigrants fearing removal to countries where they are likely to face murder, torture, or other forms of persecution and on the United States itself, which has committed, both morally and legally, to the protection of such refugees.

In short, in issue after issue, the NPRM fails to provide commenters sufficient guidance as to the true bases on which the Departments propose to amend their rules, or to provide a basis on which the Departments could formulate a lawful final order. The Departments should

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[6] *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1098 (9th Cir. 2007).

[7] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

[8] *Connecticut Light & Power Co. v. NRC* 673 F.2d 525, 530-31 (D.C. Cir.), *cert. denied*, 459 U.S. 835, 103 S. Ct. 79 (1982).

[9] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)

[10] *Id*. at 43 (internal quotation and citation omitted).

[11] *Id.*

[12] *Judulang v. Holder*, 565 U.S. 42, 45 (2011).

[13] *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1080 (9th Cir. 2019), *quoting State Farm*, 463 U.S. at 52.

therefore reconsider their approach, and recommit to ensuring that the United States remains open to refugees and committed to the non-refoulement principle at the heart of the global asylum framework.

II. THE CONSTITUTION, THE INA, AND SOUND POLICY DEMAND THAT IMMIGRANTS SUBJECT TO EXPEDITED REMOVAL BE PLACED INTO SECTION 240 HEARINGS WHEN THEY HAVE DEMONSTRATED CREDIBLE FEAR OF PERSECUTION OR TORTURE.

The NPRM proposes fundamental modification to the treatment of asylum applicants who are subject to expedited review but who demonstrate credible fear of persecution or torture if returned to their home country. Since the inception of the expedited review process in 1996, the Departments have placed these applicants into hearings before Immigration Judges ("IJ") pursuant to Section 240 of the INA also codified at 8 U.S.C. § 1229a. The Departments now propose to place such individuals into Section 235 asylum-and-withholding-only proceedings, which would afford them fewer procedural protections and fewer remedies. This Proposed Rule would deprive applicants within the United States of their constitutional due process rights, would contradict the statute's requirements, and would make for poor public policy. For these reasons, the Departments should reject these proposed regulatory changes.

A. The Constitution Demands that Asylum Seekers that Demonstrate A Credible Fear of Persecution or Torture Receive the Process Associated with Section 240 Removal Proceedings, Not the Limited Process of Asylum-only Proceedings

The Departments' proposal to place applicants who have demonstrated a credible fear of persecution or torture into asylum-only proceedings rather than Section 240 hearings would deprive immigrants of their constitutional due process rights, and must therefore be rejected.

It has long been recognized that non-citizens who are physically in the U.S., even if unlawfully, are "persons" under the Fifth Amendment's Due Process Clause, and therefore are entitled to that clause's protections. "[O]nce an alien enters the country, [her] legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether or not their presence here is lawful, unlawful, temporary, or permanent."[14] This principle has been affirmed repeatedly in a "long line of precedent [that] admits of no exception: an alien who has entered the United States is guaranteed due process protections."[15]

Other commitments further cement the due process rights of asylum applicants. The United States is bound by treaty and customary international law requiring the protection of refugees and asylum-seekers. The United States has acceded to the 1967 Protocol to the Status

[14] *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

[15] *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014). Recently, the Supreme Court outlined the scope of due process afforded to a limited class of asylum seekers: those caught as close as 25 feet from the border. Importantly, however, the Court left unchanged its decades of rulings affirming due process for noncitizens more broadly. *See D.H.S. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

of Refugees,[16] which gives the provisions of the Refugee Convention force of law. Under the Protocol (and the Convention), the U.S. may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[17] The purpose of the Refugee Act of 1980 was "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern of the United States."[18] Similarly, as a party to the Convention Against Torture, the United States has committed not to "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[19] The U.S. has also ratified the International Covenant on Civil and Political Rights ("ICCPR"), which binds it to provide all persons "a fair and public hearing by a competent, independent and impartial tribunal established by law" when their "rights and obligations" are in question.[20] Asylum seekers are therefore entitled to a full and adequate process under international law by virtue of the fact that they seek protection from the worst possible violations of human rights: deprivations of life, liberty, and freedom from torture. Numerous treaties and other statements of principle protect the right to a fair trial, including the Universal Declaration of Human Rights, the ICCPR, and the Convention on the Rights of the Child.[21]

The Proposed Rule here would affect asylum applicants who have entered the United States.[22] It therefore will survive constitutional scrutiny only if it affords such applicants due process of law. Unfortunately, the Proposed Rule fails this test because it does not provide

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[16] Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("Protocol"). Pursuant to Art. I(1) of the Protocol, "[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined." *Id*. at 606 U.N.T.S. 268.

[17] Convention Relating to the Status of Refugees art. 33, cl. 1, Jul. 28, 1951, 189 U.N.T.S. 137 ("Refugee Convention" or "Convention").

[18] Pub. L. 960212, tit. I, § 101(b), 94 Stat. 102 (1980).

[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, cl. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Convention Against Torture").

[20] International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR").

[21] *See* Universal Declaration of Human Rights art. 6, 7, 10 and 11, Dec. 10, 1948, G.A. Res. 217 (III); American Declaration on the Rights and Duties of Mankind art. II, XVII, and XXVI, May 2, 1948, Ninth International Conference of American States, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); ICCPR art. 14 and 16 and Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3.

[22] Whereas the D.C. Circuit approved the expedited removal statute in 2000's *AILA v. Reno*, that case presumed that the expedited proceedings would be applied only to arriving non-citizens who were not entitled to constitutional due process protections. 199 F.3d 1352, 1356 (D.C. Cir. 2000). The decision is therefore inapposite here, where the Departments propose to place applicants who are already within the U.S. – and who therefore enjoy Fifth Amendment rights – into Section 235 proceedings.

Section 240 proceedings as Congress intended and asylum-only proceedings are an inadequate substitute.[23] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[24] "Due process always requires, at a minimum, notice and an opportunity to respond."[25] In the immigration context, the Fifth Amendment demands "that aliens in removal proceedings have 'a full and fair opportunity to be represented by counsel, to prepare an application for ... relief, and to present testimony and other evidence in support of [that] application.'"[26] Thus, for example, the Third Circuit has held that an asylum procedure is constitutionally inadequate if it "fails to provide … the most basic of due process protections," which include a neutral judge, a complete record of the proceeding, and a translator if need be.[27]

The Proposed Rule does not provide applicants the requisite legal process. Rather, it denies applicants of their right to a full hearing where crucial facts and legal theories can be developed. In place of that full hearing, complete with right to counsel and other procedural safeguards, the Departments propose only to afford applicants with credible-fear determinations processes subject to higher standards that contradict statutory language.

Subjecting applicants to these proposed processes would have the effect of front-loading highly fact-specific and complex legal issues during a time when immigrants commonly face both logistically and emotionally difficult circumstances that make it difficult for them to put their best case forward. Moreover, judicial review is especially important in the immigration context, where the introductory and hearing stages of the process are rife with reversible error.[28] Rather than fix the substantive errors or allow them to be fixed later by IJs, the Departments simply seek to sweep them under the rug by presuming immigrants have rejected IJ review of negative decisions of their credible fear interviews. Moreover, on the off-chance immigrants are able to obtain a positive credible fear finding immigrants will be prevented from putting forward all their claims for relief if they are placed into asylum-only hearings rather than full Section 240 proceedings. In short, these processes are designed to set applicants up for failure.

Given the critical liberty interests at stake, Section 235 asylum-only hearings do not afford due process to immigrants within the United States.

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[23] *See Thuraissigiam*, 140 S. Ct. at 1963-1964 (holding that immigrants with significant ties to the U.S. are entitled to due process rights in deportation proceedings and for immigrants at the threshold of initial entry due process is what Congress provided).

[24] *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation and citation omitted).

[25] *Raya-Vaca*, 771 F.3d at 1204, *citing Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985).

[26] *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019) (internal citations omitted); *see also Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1162–63 (9th Cir. 2005) ("[F]ailing to afford petitioner an evidentiary hearing on his serious allegations of having been unlawfully stopped and expelled from the United States, aborting his pending immigration proceedings and the relief available to him at the time, violated his right to due process of law.").

[27] *Marincas v. Lewis*, 92 F.3d 195, 203-04 (3rdCir. 1996).

[28] *See Zuh v. Mukasey*, 547 F.3d 504, 514 (4th Cir. 2008) (observing that that various Circuit Courts of Appeal have observed the "staggering" high rates of reversals by the Board as well as the downright incompetence IJs across the country).

B. The INA Demands that Asylum Seekers Who Demonstrate A Credible Fear of Persecution or Torture Receive Section 240 Removal Proceedings, Not Asylum-only Proceedings.

The Proposed Rule would also violate the governing statutory text, which requires that immigrants who have demonstrated a credible fear of persecution be placed into Section 240 proceedings.

The NPRM justifies referring asylum seekers who pass a credible fear for asylum-only proceedings by stating that "the INA … instructs only that an alien who is found to have a credible fear 'shall be detained for further consideration of the application for asylum,' and neither mandates that an alien who demonstrates a credible fear be placed in removal proceedings in general nor in section 240 proceedings specifically."[29] This myopic focus on the language of Section 235(b)(B)(2), without any consideration of either the remainder of the provision or the statute as a whole, however, is improper.[30] It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[31] Here, Congress specifically noted where it believed applicants should be subject to asylum-only proceedings, and it did not do so with respect to applicants with positive credible-fear assessments.

Moreover, throughout the INA, Congress demonstrated its clear understanding of the various situations in which noncitizens might find themselves, and where Congress intended for them to be subject to truncated proceedings, it specified as much. For instance, in Section 241(a)(5), Congress specified that immigrants who were previously deported and re-entered the United States would be subject to reinstatement of removal and *ineligible to apply* for certain forms of relief.[32] In Section 238(b)), Congress likewise specified that the Attorney General had the option of removing non-lawful permanent resident immigrants convicted of aggravated felonies under a truncated expedited removal process known as "administrative removal," in which immigrants do not go before an immigration judge at all.[33] Congress did the same with respect to "stowaways" allowing them to apply for asylum but providing that "in no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 240."[34]

Here, the Departments misapply this canon of interpretation, proposing to place immigrants into asylum-only proceedings in circumstances where Congress did *not* direct that outcome. The Departments appear to infer that, simply because Section 240 proceedings are required by Section 235(b)(2), they are not necessarily part of the "further consideration" provided for in 235(b)(1) and are therefore entirely unavailable to noncitizens to whom 235(b)(1)

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[29] NPRM at 36266.

[30] *See, e.g., King v. Burwell*, 576 U.S. 473 (2015).

[31] *Id.* (internal quotations omitted); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ….").

[32] *See* 8 U.S.C. § 1231(a)(5).

[33] *See id.* § 1228(b).

[34] *See* INA § 235(a)(2); 8 U.S.C. § 1225(a)(2).

applies.[35] In other words, the Departments misunderstand the permissive language of Section 235(b)(1) to be antipodal to Section 235(b)(2)'s mandatory language.[36]

But the language of section 235 of the INA is not so ambiguous as the Departments suggest. The INA's language and structure make clear that Congress intended for asylum seekers e who demonstrate a credible fear to be afforded Section 240 hearings. Section 235 itself, of course, provides that, subject to specific exceptions, "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title [*i.e.*, Section 240]."[37] Section 235 likewise prescribes Section 240 hearings for immigrants arriving from contiguous countries and for instances in which an immigration officer challenges another officer's positive credible fear determination.[38] It would be patently absurd for Congress to have afforded more process to immigrants facing removal than to those who had already demonstrated a credible fear of persecution and thus are presumptively eligible for asylum. It would be even more absurd for Congress to have afforded Section 240 proceedings to those whose positive credible-fear assessments have been challenged by another immigration officer but *not* to those whose positive credible-fear assessments are uncontested.[39] In other words, the mistake the Departments make in proposing this change is assuming that Section 240 proceedings should only be provided where Congress clearly references this type of proceeding, when the text of the statute in Section 235 and other sections support the view that Congress acted on a presumption of providing Section 240 proceedings and delineated, rather, when immigrants should *not* be afforded Section 240 proceedings.

The legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996's ("IIRIRA's") also supports this view, and reveals Congress's intent that applicants who have demonstrated credible fear of persecution be placed into Section 240 hearings. Congress's decision to adopt an "expedited removal" system in 1996 was prompted by its concern that "thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter the U.S."[40] Section 235's purpose was "to expedite the removal from the United States of aliens who *indisputably have no authorization to be admitted*… while providing an opportunity for such an alien who claims asylum to have the merits of his or her

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[35] *See* INA § 235(b)(1), (2); 8 U.S.C. §§ 1225(b)(1), (2)

[36] Indeed, "differences in language [generally] convey differences in meaning.'' *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1723 (2017); *see* NPRM at 36266.

[37] 8 U.S.C. § 1225(b)(2)(A).

[38] *Id*. at §§ 1225(b)(2)(C), (b)(3) (emphasis added).

[39] "The absurdity doctrine rests on the intuition that some such outcomes are so unthinkable that the federal courts may safely presume that legislators did not foresee those particular results and that, if they had, they could and would have revised the legislation to avoid such absurd results. Therefore, if a particular application of a clear statute produces an absurd result, the Court understands itself to be a more faithful agent if it adjusts the statute to reflect what Congress would have intended had it confronted the putative absurdity." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2394 (2003); *see also Landstar Express Am., Inc. v. FMC*, 569 F.3d 493, 498 (D.C. Cir. 2009) ("A statutory outcome is absurd if it defies rationality.").

[40] H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

claim promptly assessed by officers with full professional training in adjudicating asylum claims."[41]

Congress was clear that it meant to distinguish between these two classes of immigrants: (1) immigrants with no discernible basis for admission, who were to be subject to an expedited process, and (2) refugees who could demonstrate credible fear of persecution, who were to be afforded Section 240 proceedings. As Representative Hyde (R-IL) stated, explaining the compromise reached by the Conference Committee, Section 235 was meant to deter unlawful entry and abuse of the asylum process while retaining access to more robust review for those demonstrating credible fear.[42] In other words, Congress specifically intended that immigrants who are able to demonstrate a credible fear "qualify for more elaborate procedures" than those unable to make that showing.[43] The latter class is subject to Section 235's expedited review. The "more elaborate procedures" to which Representative Hyde referred could only have meant those set out in Section 240.

In contrast, while the Departments acknowledge the dual objectives identified in the legislative history of Section 235 —efficiency on the one hand, and protecting bona fide refugees on the other— their reasoning conveniently emphasizes one objective over the other. But that is not what Congress intended when it identified both objectives as equally instructive.

Furthermore, with little explanation other than to say that prior "INS analysis at the time was very limited,"[44] the Departments take a position that is at odds with their prior interpretation and current litigating positions on Section 235. In 1997, consistent with both the statutory text and IIRIRA's legislative history, the Department of Justice and the Immigration and Naturalization Service ("INS") recognized that Congress would not have contemplated stingier process and relief for immigrants with positive credible fear assessments than for other immigrants. Indeed, implementing the newly enacted Section 235, DOJ and INS correctly observed that placing immigrants into Section 235 proceedings after they had demonstrated a credible fear of persecution would be nonsensical:

> Once an alien establishes a credible fear of persecution, the purpose behind the expedited removal provisions of section 235 of the Act to screen out arriving aliens with fraudulent documents or no documents and with no significant possibility of establishing a claim to asylum has been satisfied. Therefore, the further consideration of the application for asylum by an alien who has

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[41] H.R. Conf. Rep. No. 104-828, at 209 (1996).

[42] "The conferees also struggled with the issue of how to fairly and expeditiously adjudicate asylum claims of persons arriving without documents or fraudulent documents," and "recognized that layering of prolonged administrative and judicial consideration can overwhelm the immigration adjudicatory process, serve as a magnet to illegal entry, and encourage abuse of the asylum process." "At the same time, we recommended major safeguards against returning persons who meet the refugee definition to conditions of persecution. Specially trained asylum officers will screen cases to determine whether aliens have a 'credible fear of persecution' – and thus qualify for *more elaborate procedures*." *See* H.R. Rep. No. 2202, at H1081 (1996) (Conf. Rep.).

[43] *Id.*

[44] NPRM at 36266.

> established a credible fear of persecution will be provided for in the context of removal proceedings *under section 240 of the Act.*[45]

Most recently, the current Administration recognized that asylum applicants are entitled to Section 240 process. While the Administration's Migrant Protection Protocol ("MPP") program was adopted pursuant to Section 235,[46] even this program presumes that immigrants detained in Mexico to await consideration of their asylum claims are to be afforded Section 240 hearings.[47] This is yet another instance in which the NPRM's proposals would be arbitrary and capricious: as there is no basis for a rule that treats similarly situated asylum applicants so disparately, under which one class of immigrants who are returned to Mexico are provided Section 240 proceedings but another class of asylum seekers, who pass a credible fear interview, get less.

The courts, too, have recognized that the INA affords asylum seekers a right to a full hearing under Section 240 – and to the full array of relief made available by that provision. Earlier this year, in rejecting the MPP program, the Ninth Circuit noted that "[i]f a §(b)(1) applicant [*i.e.*, an arriving alien or one who has not been admitted or paroled] passes his or her credible fear interview, he or she will be placed in regular removal proceedings under 8 U.S.C. § 1229a [*i.e.*, Section 240]."[48] While the Ninth Circuit cited to the current version of the 8 C.F.R. § 208.3(f) in its decision, which the Departments seek to change, it also made clear that this approach was the "statutorily prescribed procedure[]."[49]

Finally, the Departments' rationale for proposing this rule change does not square with the stated purpose of the asylum application process. While the Departments acknowledge that the fundamental purpose of an asylum application is to determine whether the immigrant is entitled to relief or protection from removal, in the same breath they reimagine the proposed changes as affecting only "whether the alien should be admitted or otherwise entitled to immigration benefits."[50] In so doing, the Departments conflate procedure with the outcome of relief to support their determination that section 240 proceedings are only available to section 235(b)(2) applicants. Taking this position not only beggars incredulity as a matter of statutory interpretation, it also undermines the very statutory purpose it acknowledges – determining who is entitled to relief (asylum) or protection from removal – by preserving only the most expedient and least thorough methods of so doing. Again, the Departments acknowledge that the NPRM will adversely affect the outcomes of these applications, but ignores that it does so by crippling

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[45] *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10320 (Mar. 6, 1997).

[46] *See Migrant Protection Protocols,* Dept. of Homeland Sec. (Jan. 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[47] *See Implementation of the Migrant Protection Protocols,* U.S. Immigration and Customs Enforcement (Feb. 12, 2019), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf .

[48] *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1084 (9th Cir. 2020).

[49] *Id.*

[50] NPRM at 36266.

the application procedure itself.

In short, the INA requires that immigrants who have demonstrated credible fear of persecution be afforded full hearings under Section 240. The statutory text, legislative history, the Departments' contemporaneous application of Section 235, and precedent all demand this result.

C. The Proposed Change Fails to Consider Settled Reliance Interests

"When an agency changes course … it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'"[51] Whether it concludes that those interests are not entitled to legal protection, or that they are outweighed by policy concerns, it is the agency's duty to consider those interests in the first instance.[52] Specifically, in order to comply with the APA, the Departments are "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[53] Yet, the only time any such interests are mentioned in the NPRM is a cursory acknowledgement of their existence in connection with the proposed changes to evidentiary standards, followed by a list of competing policy concerns that are themselves unsupported by evidence.[54] But mere mention of reliance will not suffice. As to policy concerns, "[t]hese disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review."[55] By virtue of the agencies' failure to acknowledge or assess the strength of the reliance claims at stakes meaningfully (if at all), the NPRM violates the APA, and any rules adopted based on the NPRM would therefore be arbitrary and capricious.

Even if the NPRM had otherwise duly followed the requirements of the APA, the proposed amendment would unlawfully disturb the settled reliance interest of various stakeholders. Here, the Departments' proposed change in course from placing asylum seekers in 240 proceedings to asylum-only proceedings, a practice that has been ongoing for more than over 20 years' in the Immigration Courts, and relied upon by legal service providers, private practitioners, and applicants, in favor of a new regime would upset important interests of this type.

In hundreds or thousands of cases currently in process, asylum applicants and their counsel might well have based their strategic decisions on the availability of a full Section 240 hearing following a credible-fear interview. For example, an applicant might have relied on the availability of specific procedural protections that will be unavailable in asylum-only proceedings when gathering evidence to put forward their case. Or they may have set on a specific course of action relying on the assumption they would be able to apply for a specific form of non-asylum relief while in Section 240 proceedings. This is especially the case for victims of domestic violence or trafficking, who in addition to being asylum eligible may become eligible for adjustment or cancellation of removal under the Violence Against Women Act ("VAWA") in the course of their cases and failed to apply with U.S. Citizenship and

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[51] *D.H.S. v. Regents of the Uni. Of C.A.*, 591 U.S. ____ (slip op., at 23) (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. ____, ____ (slip op., at 9) (2016)).

[52] *Regents of the Uni. Of C.A.*, 591 U.S. ____ (slip op., at 25).

[53] *Regents of the Uni. Of C.A.*, 591 U.S. ____ (slip op., at 26).

[54] NPRM at 36271.

[55] *Regents of the Uni. Of C.A.*, 591 U.S. ____ (slip op., at 25).

Immigration Services ("USCIS") on the basis their VAWA claims could be heard simultaneously with their asylum claims.

Likewise, organizations such as the CAIR Coalition, which serve asylum-seekers, must often make difficult decisions regarding how best to allocate limited resources. Such organizations, which often manage caseloads of in excess of 1,000 applicants every year, are likely to have prepared or reserved resources to help people apply in Section 240 hearings – hearings that will never transpire if the proposed amendments are adopted. Indeed, the CAIR Coalition operates large-scale jail visit programs to detained immigrants, many whom are asylum seekers, and are going through or have gone through the credible fear interview process. In order to scale up efforts to serve this population, the CAIR Coalition has refined staff and volunteer training, *pro se* assistance, and workshop materials, all suited to assist asylum seekers navigate Section 240 proceedings.

But it is not only the reliance concerns of organizations such as the CAIR Coalition that are at stake – so are the Department's own immigration court system and programs. The CAIR Coalition is part of group of nonprofits around the nation that provide services through the Legal Orientation Program ("LOP"). This is a program funded through Congressional appropriations to the Department of Justice Executive Office for Immigration Review ("EOIR") to promote court efficiency, save costs, and safeguard fundamental due process interests of noncitizens in an overburdened immigration system.[56] The LOP program was created initially as a way to identify and provide information to people navigating their cases in Section 240 proceedings. While its scope of services may be broader now in light of the Departments' increased use of reinstatement process and withholding-only proceedings, the cornerstone of this program has been and continues to be to assist immigrants in Section 240 proceedings. Yet, the Departments fail to account how the Proposed Rule will affect this congressionally appropriated program and the immigration courts and judges that rely on its services.

Accordingly, the Departments must consider detrimental reliance on the part of applicants and service organizations alike before they eviscerate the current framework in favor of the one proposed in the NPRM.

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[56] In 1994, the Senate passed a bipartisan resolution requesting the Attorney General to implement a legal orientation pilot program carried out by nonprofits, to increase efficiency and save costs in immigration proceedings, highlighting the Florence Project as a "good model." S. Res. 284 (103d Congress, 2d. Session, Oct. 8, 1994), https://bit.ly/2qCj5vv. In 1998, EOIR collaborated with nonprofit organizations, including the Florence Project, to implement 90-day pilot programs in facilities in three locations: Port Isabel, Texas; Florence, Arizona; and San Pedro, California. Nearly 3,000 individuals participated in the pilot program. U.S. Dep't of Justice, EOIR, *Evaluation of the Rights Presentation* 3-4 (1998). https://bit.ly/2J2tRTn. Following a $1 million congressional appropriation, EOIR formally launched LOP in 2003 with the stated aim of creating efficiencies in immigration courts. U.S. Dep't of Justice, EOIR, News Release, *New Legal Orientation Program Underway To Aid Detained Aliens* (Mar. 11, 2003), https://bit.ly/2IYHink. During this initial period, EOIR established LOP sites at six different facilities: Eloy, Arizona; Port Isabel, Texas; El Paso, Texas; Tacoma, Washington; Lancaster, California; and Aurora, Colorado. Since LOP's launch in 2003, EOIR has periodically evaluated, and consistently expanded, the program. Based on LOP's efficiencies and successes, LOP grew from six facilities in 2003 to approximately 39 facilities by 2018. EOIR at 8-9.

D. The Proposed Change Would Waste, Not Conserve, Administrative Resources.

Finally, the proposed amendment would lead to further waste, not conservation, of administrative resources. To begin with, any suggestion that placing applicants into asylum-only proceedings rather than Section 240 hearings preserves administrative resources contradicts the NPRM's claim that "'asylum-and-withholding-only' proceedings generally follow the same rules of procedure that apply in section 240 proceedings."[57] But whereas an IJ in a Section 240 hearing may consider all relief to which the applicant is entitled, an IJ in a Section 235 proceeding can only consider asylum claims. Thus, an applicant who has obtained a positive credible-fear assessment but who (pursuant to the Proposed Rule) is placed into an asylum-only hearing will need to seek any other relief to which she might be entitled through a separate forum. If the NPRM is adopted, it is not clear what proceedings these would be, which may lead to increased federal litigation, ultimately requiring the Departments to expend additional time, costs, and litigation resources on matters that would have been relevant and appropriately addressed in Section 240 removal proceedings.

The Proposed Rule would also waste no less resources even when an immigrant's additional claims would already have required processing by another entity. As the Attorney General has recognized, when a respondent is pursuing collateral relief in another forum that could affect her removal, an IJ will often need to grant one or more continuances to allow the other matter to proceed.[58] For example, if a person in a Section 240 hearing is eligible to adjust their status with USCIS because they have parole and have married a U.S. citizen, or because they have been a victim of trafficking or spousal battery, they could obtain continuances to hold proceedings in abeyance while they changed their status. In asylum-only proceedings, however, this relief would be unavailable because the statute requires such matters to be concluded within seven days of the immigrant's detention, and it is unclear whether asylum-only proceedings would allow judges to consider continuances based on pending collateral immigration relief that are not fear-based. And so the applicant would need to seek a separate stay of removal before DHS, beginning an entirely new process and consuming additional administrative resources if their case at the credible fear interview process is denied, or while they go through the process of appealing their case to the United States Court of Appeals if they are denied by an Immigration Judge and the BIA sustains that decision. At best, then, the Proposed Rule would shift the burden of considering alternative relief from one agency to another – one that is less well-suited to adjudicate these types of claims and subject to no judicial oversight.[59] At worst, it will require duplicative efforts and require multiple decision-makers to become involved in the facts of a single applicant's case.

For the reasons stated above, the Departments should not modify their rules as proposed. Rather, they should continue to afford all applicants who demonstrate a credible fear of

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[57] NPRM at 36267.

[58] *See, e.g.*, *Matter of L-A-B-R- et al*, 27 I&N Dec. 405 (A.G. 2018) ("Respondents often request continuances because they are pursuing collateral relief in other forums that may affect the outcome of their removal proceedings.").

[59] ICE's grant or denial of a stay of removal is within the sole discretion of DHS and cannot be appealed. 8 U.S.C. § 1252((2)(B)(ii); 8 CFR § 241.6(a), (b); *see also Application for a Stay of Deportation or Removal,* DHS and ICE, https://www.ice.gov/doclib/forms/i246.pdf.

persecution the Section 240 hearings that the Constitution requires and that Congress intended.

III. THE DEPARTMENTS SHOULD NOT RAISE THE STANDARD OF PROOF APPLIED IN CREDIBLE FEAR ASSESSMENTS.

The Departments propose to change the standard of proof applied during credible fear interviews for individuals in expedited removal cases and for stowaways. It proposes increasing the current standard of proof for withholding of removal and the CAT claims from a "significant possibility" to a "reasonable possibility" and redefines the "significant possibility" standard to mean "a substantial and realistic possibility of succeeding".[60] While the NPRM claims that the proposed change "would provide numerous benefits," the Departments cite what amounts to only one – that the higher, and thus harder to meet, standard will better "screen out" purportedly non-meritorious claims before they reach an immigration judge, allowing them to "more efficiently and promptly" identify which claims are more likely to ultimately succeed.[61] If the proposed rules are adopted, individuals in expedited removal proceedings and stowaways would have to satisfy difficult standards in order to have their asylum, withholding of removal, or CAT-based claims fully considered. These changes would harm countless people by leading to premature and erroneous rejection of legitimate claims due to applicants' inability to produce sufficient evidence at an early stage, without the time or assistance of counsel needed to put together a case.

The Departments' questionable assertions of purported administrative efficiencies do not justify imposing such real harms on people who risk removal to countries where they would be unsafe. Nor do they warrant the attendant harms that would be imposed on American national interests: namely, our interest in upholding our international obligations and commitments and the domestic statutes that implement them[62] – especially the duty of non-refoulment of refugees with legitimate fears of persecution and torture.

There is both a humanitarian and a national interest in ensuring that those seeking the protection of the United States are not returned to countries where they will face torture or persecution, and our treaty obligations under the Protocol and the CAT acknowledge our nation's obligation to protect these vulnerable people. The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ("Handbook"), for example, instructs examiners that "[t]he requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself." Paragraph 202 of the Handbook cautions that, because only basic information is frequently given in the first instance, "such basic information will normally not be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required."[63] The Handbook is, of course, familiar to U.S. asylum law. In the Supreme Court's words, "if one thing is clear from the entire

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[60] NPRM at 36268-71.

[61] *See* NPRM at 36271. *See also* NPRM at 36270 (changes are proposed "to maintain operational efficiency").

[62] *E.g.*, Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

[63] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* [hereinafter "*Handbook*"] para. 197 and 202, https://www.unhcr.org/4d93528a9.pdf.

1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968."[64] Consequently, courts have long looked to the Handbook for guidance.[65])

For that reason, the standards of proof for credible fear screenings historically have been, and should be low as the Handbook instructs. Congress acknowledged that fact when it enacted IIRIRA, establishing screening standards in the context of asylum seekers. For instance, Senator Hatch emphasized that the standard adopted in conference was "intended to be a low screening standard for admission into the usual full asylum process," and that procedural safeguards included in the final bill were designed to "prevent the potential … for erroneous decisions by lower level immigration officials" (*i.e.*, asylum officers making initial credible-fear determinations).[66]

The NPRM, however, gives inadequate weight to the risk of erroneous denials at the screening stage and, in fact, increases the risk of such errors by undermining the ability of individuals who could, in fact, satisfy the lower threshold standard of "significant possibility" currently applied to all forms of fear-based relief at the credible fear interview stage. This position further contravenes the principles outlined in the Handbook. More concerning is that despite acknowledging the Handbook's importance in understanding our commitments to the Protocol, the Departments do not address the Handbooks instructions at all with regards to the asylum screening process.[67] As the Supreme Court has held, when interpreting the Refugee Act in accordance with the meaning intended by the Protocol, the INA should be read consistently with the United Nations' interpretation of refugee standards, specifically the portions of the Handbook interpreting the Convention and the Protocol.[68]

Any consideration of the appropriate standards for credible fear screenings must acknowledge the circumstances in which those screenings take place. A person in a credible fear screening situation almost certainly has not arrived in the United States with either an organized portfolio of documents and evidence or a thorough understanding of our immigration laws, much less both. It is far more likely that he or she has limited documentation readily at hand.[69] Indeed, asylum seekers often travel long distances, leaving their homes with little or no notice at

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[64] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citations omitted).

[65] *M.A. A26851062 v. United States INS*, 858 F.2d 213, 214 (4th Cir. 1988) (explaining that although the "Handbook had not yet been published when Congress passed the Refugee Act of 1980, we follow the lead of the other courts in recognizing that the Handbook provides significant guidance in interpreting the Refugee Act"); *accord Damaize-Job v. INS*, 787 F.2d 1332, 1336 n.5 (9th Cir. 1986) ("the United Nations definition of what factors are relevant in determining refugee status are particularly significant in analyzing [asylum] claims").

[66] 142 Cong. Rec. S11491 (Sept. 27, 1996).

[67] *See* NPRM at 36279 (discussing paragraphs in the Handbook but only as to "political opinion" claims).

[68] *See Grace v. Whitaker*, 344 F.Supp.3d 96 (D.D.C. 2018) (citing *INS v. Cardoza-Fonseca*, 408 U.S. at 438-39).

[69] "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." *Handbook*, at para. 196.

all, and bringing with them little more than the clothes they were wearing at the moment it became apparent they needed to escape. In addition, these persons may be experiencing significant physical, emotional, and psychological effects of the trauma that they are fleeing, making it extremely difficult if not impossible for them to accurately recall on the spot the details of the events they experienced in past.[70] Many CAIR Coalition clients, in fact, have reported that they were unable to give a complete and accurate account of their experiences at the credible-fear interview because they were paralyzed by fear and anxiety. CAIR Coalition has witnessed firsthand how, especially in the context of sexual violence, shame and trauma compound, leaving asylum seekers unable to readily express their very real fears. Often, it takes months of building a trusting relationship before such clients feel comfortable detailing their experiences. Raising the evidentiary standard unfairly prejudices these and so many other clients who are bona fide refugees, just because they simply—and understandably—may not be immediately prepared to provide a deeply detailed account of the traumas from which they have fled.

CAIR Coalition has also witnessed how, oftentimes, these traumas result in injuries that prevent a full initial recounting of legitimate persecution. This can occur in the context of mental health, such as clinically diagnosable post-traumatic stress disorder, and even as the result of direct injuries. For example, one recent CAIR Coalition client was suffering from a traumatic brain injury ("TBI"); inflicted by a violent transnational gang in his home country that affected his ability to place events chronologically and even, at times, recall them at all. As a result, he was initially given a negative finding of reasonable fear, a finding that was later vacated by an immigration judge based on the strength of his testimony and supporting evidence that he was only able to develop fully before an immigration judge with counsel.

Similarly, CAIR Coalition has witnessed how education levels, adequacy and availability of interpreters, and the absence of medical professionals prevent bona fide refugees from testifying to the satisfaction of an evidentiary standard such as that suggested by the NPRM. Staff members at the organization had a client who never went to school and therefore did not understand how the calendar worked. This client received a positive credible fear assessment, but was denied asylum because her testimony was deemed not credible based on her inability to describe her story in a chronological manner that adhered to an understanding of the Gregorian calendar, mainly because she did not understand the concept of a month. This decision was only later overturned when these circumstances were pointed out on appeal.

For many, especially for asylum seekers whose first (and likely only) fluent native language is an indigenous language, interpreters are often unavailable. In some cases, USCIS will misjudge an applicant's limited proficiency in a more common language, for example,

[70] "A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case." *Id.* at para. 198.

Spanish, and conduct the interview in that second or third language.[71] Similarly, cognitive disabilities, or injuries or mental health conditions as described above, regularly go unnoticed at the credible fear stage, as it is often not until the applicant can be seen by a professional or specialist that these conditions are diagnosed or even identified. Here, again, raising the evidentiary standard at the credible fear stage will exclude bona fide refugees.

Moreover, even under the current standards, there are serious concerns that potentially meritorious claims never make it to an IJ, because applicants have been incorrectly screened out at the first step of the process. For instance, non-English speakers often face inadequacies in interpretation, notwithstanding rules that require asylum officers to arrange for the assistance of an interpreter. Such deficiencies are widespread and well documented.[72]

Other systemic failures also plague the credible fear interviews, even today. For instance, almost all credible fear interviews are conducted telephonically or by video teleconference with an asylum officer. As a result, there is no effective means by which *pro se* individuals can present documentary evidence. Moreover, this process makes it difficult for individuals to present witnesses on their behalf – even if they are aware that they are permitted to do so (which often they are not).

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[71] *See* Rachel Nolan, *A Translation Crisis at the Border,* THE NEW YORKER (Dec. 30, 2019), https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border; *Processing Credible Fear Cases when a Rare Language Interpreter is Unavailable*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/July%202013/Processing-CF-RareLanguageInterpreter-Unavailable.pdf; Tom Jawetz, *Language Access Has Life-or-Death Consequences for Migrants*, Center for American Progress (Feb. 20, 2019), https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/.

[72] *See, e.g.*, U.S. Dep't of Homeland Sec. Advisory Comm. on Family Residential Ctrs., Report of the DHS Advisory Committee on Family Residential Centers (2016), at 96-100 (discussing inadequate or nonexistent interpretation services during credible fear interviews and immigration judge reviews of negative credible fear determinations); Borderland Immigration Council, Discretion to Deny Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border (2017), at 13 (describing interpretation failures during CFIs); U.S. Comm'n on Int'l Religious Freedom, Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal (2016), at 28 (describing case of a detained Ethiopian asylum seeker who was denied an interpreter); American Civil Liberties Union, American Exile: Rapid Deportations That Bypass the Courtroom (Dec. 2014), at 34 ("Most of the individuals interviewed . . . stated that they were given forms to sign in English, which most did not speak or read, and often were not interviewed by an immigration officer who fluently spoke their language or through an interpreter."); Interior Immigration Enforcement Legislation: Hearing Before the H. Judiciary Subcomm. on Immigration & Border Sec. 5 (Feb. 11, 2015) (statement of Eleanor Acer, Dir., Refugee Protection, Human Rights First) ("In some cases, interviews are sometimes rushed, essential information is not identified due to lack of follow up questions, and/or other mistakes are made that block genuine asylum seekers from even applying for asylum and having a real chance to submit evidence and have their case fully considered.").

Lack of access to counsel to prepare for a screening interview also prevents people from putting forth their best cases during the screening process. As the American Civil Liberties Union has documented, individuals seeking protection may be held incommunicado during the screening process, prevented from reaching attorneys and others who could help them prepare and gather evidence.[73] This is even more problematic than it would be outside the immigration context. New arrivals are especially unlikely to be familiar with the intricacies of American asylum law, including the relevant grounds for relief, applicable standards of proof, evidentiary requirements, and other matters that could make the difference between a positive and negative assessment, even on the very same underlying facts. The expedited removal process does not even provide counsel for people who are struggling with mental illness or disability, placing such individuals at an even greater disadvantage.[74]

Notwithstanding all of the above, in proposing to increase the evidentiary standards used in the credible fear process, the Departments completely ignore these principles by front-loading this process. The inevitable result will be the return of deserving asylum applicants to their home countries, where they will face persecution (including but not limited to murder) on account of their race, religion, nationality, membership in a particular social group, or political opinion. Taking a system that already runs such a risk of unfairly denying a hearing to people with legitimate claims, and then *increasing* the burden of what those people must demonstrate, would unquestionably lead to even more erroneous denials of protection. As noted, applicants seeking protection have often been forced to leave their home countries on short notice, unable to bring with them the evidence needed to meet an increased burden, such as records documenting past persecution or torture. For this reason, when CAIR Coalition staff represent a client on a credible fear review, one of the first things staff does is work with the refugee's family and friends in the home country to obtain any evidence of past harm and persecution. Given how difficult and time-consuming this process can be, it is difficult to imagine how most individuals would be able to gather the kind of evidence necessary to meet an increased standard of proof at this initial inquiry stage even under more dire and expedient circumstances.

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[73] Kate Huddleston, *We're Suing to Make sure that CBP Can't Keep Asylum Seekers from Their Lawyers*, ACLU (Dec. 18, 2019), https://www.aclu.org/news/immigrants-rights/were-suing-to-make-sure-that-cbp-cant-keep-asylum-seekers-from-their-lawyers/; *see also ACLU Files Emergency Lawsuit to Give Imprisoned Immigrants Access to Lawyers*, ACLU (June 20, 2018), https://www.aclusocal.org/en/press-releases/aclu-files-emergency-lawsuit-give-imprisoned-immigrants-access-lawyers.

[74] The Departments argue that the "reasonable possibility" standard can be applied more broadly as they propose here because it is already used for fear determinations made under 8 C.F.R. § 208.31 and 8 C.F.R. § 1208.31. NPRM at 36270 ("The 'reasonable possibility' standard has long been used for fear determinations made under 8 CFR 208.31 and 8 CFR 1208.31, which cover certain classes of aliens who are ineligible for asylum but who are eligible for statutory withholding of removal and protection under the CAT regulations."). But both of those provisions, unlike the rule at issue here, give the individual being interviewed the right to be represented by counsel or an accredited representative. *See* 8 CFR 208.31(c); 8 CFR 1208.31(c). The Departments' current proposal effectively would require individuals in a truncated, error-prone screening process without a right to counsel to make the same showing as others must make in a proceeding affording the subject more process protections. It is unreasonable to believe that the same standard suits both circumstances.

The Departments assert that making it more difficult to make a credible fear showing in statutory withholding of removal and CAT cases "would provide numerous benefits." In the end, though, those asserted benefits amount to a simple (though faulty) syllogism: the Departments will save resources on immigration hearings if they reject more individuals' claims at the initial screening, without giving them the opportunity to present a full and considered case.

The Departments also claim that increasing the burden will allow them "to better screen out non-meritorious claims," to "focus limited resources on claims much more likely to be determined to be meritorious by an immigration judge" and to "more efficiently and promptly" distinguish between individuals whose claims are more or less likely to be meritorious.[75] But the NPRM itself admits that the claimed efficiencies are suspect. In the very same paragraph in which the Departments claim resource savings, they also acknowledge that asylum officers will sometimes have to spend *additional* time to elicit more detailed testimony from individuals to account for the higher standard of proof.[76] The NPRM's only response to this reality is to dismiss the effects of that increased burden, without basis or explanation, as "minimal."[77] Moreover, as the Departments later acknowledge (in claiming that the heightened standard is innocuous because the "ultimate" standard remains unaffected), an applicant who fails to meet the new credible fear standard would still be entitled to dispute the negative finding before an IJ (even if under Section 235's expedited process). Because the new standard would result in more negative initial assessments, it likely would result in the need for *more* IJ hearings, undermining any claimed administrative efficiencies.

Even if there *are* administrative efficiency and cost savings associated with the NPRM's proposal, the Departments do nothing to balance those alleged benefits against the very real costs imposed by sending individuals with meritorious claims back to be killed, tortured, or otherwise persecuted in their home countries. Congress recognized as much when it adopted asylum procedures in IIRIRA. As noted above, when the House of Representatives took up the Conference Report on the bill, Representative Hyde noted that the conferees "recognized that layering of prolonged administrative and judicial consideration can overwhelm the immigration adjudicatory process," but nevertheless "recommended major safeguards against returning persons who meet the refugee definition to conditions of persecution."[78]

Such returns harm not only the refugee but also the interests of the United States, which has acceded to and/or ratified treaties expressing its deep commitment to non-refoulement. As noted above, as a party to the Protocol, the United States has committed not to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[79] And as a party to the Convention Against Torture, it has committed not to "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to

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[75] NPRM at 36271.

[76] *Id.*

[77] *Id.*

[78] 134 Cong. Rec. H11071, 11080 (Sept. 25, 1996).

[79] Refugee Convention, art. 33, cl. 1.

torture."[80] Procedures that dramatically increase the likelihood of returning persons who will be killed, tortured, or otherwise persecuted would violate not only these legal commitments but the core American values that led to their adoption in the first place.

The Departments justify this change by asserting that no one would be harmed by the change in standard because the ultimate eligibility standards would remain the same.[81] This claim carries little, if any, weight. For one thing, applicants in expedited removal processes (*i.e.*, those at issue here) who receive negative credible-fear assessments under the Proposed Rule would only be entitled asylum-only proceedings, not the more robust Section 240 processes. Thus, even if they ultimately are afforded a hearing before an IJ subject to the same standard of proof that applies today, such applicants will (if the proposed rules are adopted) be entitled to fewer procedural safeguards, and far less time, than other applicants enjoy – regardless of whether the "ultimate standard" is the same.[82]

The Departments also impermissibly propose to require asylum officers to take into account "criminal" bars to relief at the credible fear screening stage.[83] The Departments are currently considering classifying numerous minor "criminal convictions" as such bars.[84] The combined effect of this NPRM and the pending criminal conviction NPRM would impose nearly insurmountable hurdles to asylum applicants, in violation of the INA.

Moreover, the NPRM's assertion misses the critical point that the credible fear screening is an entirely different *process* than an ultimate immigration hearing. The standard of proof for the initial screening is meant to be – and *should* be – substantially lower than the standard for the ultimate determination. The final decision is made in a court hearing where the applicant is given time to consult with a lawyer, gather evidence, and prepare a case. In contrast, the initial credible fear screening happens quickly, frequently without counsel, and often absent sufficient mechanisms to ensure that the applicant fully understands the questions being posed and can respond intelligibly notwithstanding any language barriers. Given these differences, it is apparent that the standard applied before an immigration judge is not, and should not be, relevant.

In sum, while the focus of the proposal is on purported administrative efficiencies, it is unclear, if not downright unimaginable, that the proposed modifications would achieve those efficiencies. Even if the proposed rules could plausibly increase efficiency, by pursuing that goal

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[80] Convention Against Torture, art. 3, cl. 1.

[81] Notice at 36271.

[82] To the extent the Departments believe that the processes available under Section 235 are equivalent to those available under Section 240, and that IJ review of negative credible-fear assessments will remain equally available to applicants facing expedited removal under the revised rules, this view eviscerates the Departments' contention that raising the standard of proof will conserve administrative resources.

[83] NPRM at 36296 (the asylum officer shall take into account "The applicability of any bars to being able to apply for asylum or to eligibility for asylum set forth at section 208(a)(2)(B)–(C) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act").

[84] Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security; Joint Notice of Proposed Rulemaking, 84 Fed. Reg. 69,640.

the Departments lose sight of critical issues of fairness, and of the national and humanitarian interest in not sending refugees back to countries where they will be persecuted or tortured. This NPRM, which would make it harder for asylum seekers to get a full and fair hearing of their cases and contravenes congressional intent and principles under the Protocol and the CAT, should be abandoned.

IV. THE DEPARTMENTS ARE LEGALLY PROHIBITED FROM ALLOWING IMMIGRATION JUDGES TO CONSIDER A PARTICULAR CIRCUIT'S LEGAL PRECEDENT IF THERE IS MORE LENIENT PRECEDENT IN ANY OTHER CIRCUIT.

The NPRM proposes to amend DOJ rules to "specify that an immigration judge will consider applicable legal precedent when reviewing a negative fear determination," requiring in particular that IJs "apply all applicable law, including administrative precedent from the BIA, decisions of the Attorney General, decisions of the federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits, and decisions of the Supreme Court."[85] This proposal would unambiguously contradict the 2018 federal district court decision in *Grace v. Whitaker*.[86] The Departments should not adopt this unlawful proposal.

In *Grace*, the court considered asylum seekers' arguments challenging a DHS Policy Memorandum that (among other things) directed asylum officers to "apply precedents of the [BIA], and, if necessary, the circuit where the alien is physically located during the credible fear interview."[87] Among other challenges, the asylum applicants argued that this directive violated both the APA and the INA. "Specifically, Plaintiffs argue that this policy conflicts with the low screening standard for credible fear determinations established by Congress, and therefore violates the APA and INA. The credible fear standard, plaintiffs argue, requires an immigrant to be afforded the benefit of the circuit law most favorable to his or her claim because there is a possibility that the eventual asylum hearing could take place in that circuit."[88] The court agreed. Consulting IIRIRA's legislative history, the court noted that "[w]hen Congress established expedited removal proceedings in 1996, it deliberately established a low screening standard so that 'there should be no danger that an alien with a genuine asylum claim will be returned to persecution.'"[89] Congress's intent forbade an approach that applied to applicants anything but the most favorable standard in effect nationwide:

> In light of the legislative history, the Court finds plaintiffs' position to be more consistent with the low screening standard that governs credible fear determinations. The statute does not speak to which law should be applied during the screening, but rather focuses on eligibility at the time of the removal proceedings. And as the government concedes, these removal proceedings could occur anywhere in the United States. Thus, if there is a disagreement among the circuits on an issue, *the alien should get the benefit of that disagreement since, if the removal proceedings*

[85] NPRM at 36267.

[86] *Grace,* 344 F. Supp. 3d 96 (D.D.C. 2018).

[87] *Id.* at 110, *quoting* DHA Policy Memorandum.

[88] *Id*. at 138.

[89] *Id*. at 139, *quoting* H.R. REP. No. 104-469, pt. 1, at 158.

> *are heard in the circuit favorable to the aliens' claim, there would be a significant possibility the alien would prevail on that claim*. The government's reading would allow for an alien's deportation, following a negative credible fear determination, even if the alien would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading [allowing application of a particular circuit's precedent even though the applicant's appeal might be decided in another circuit] leads to the exact opposite result intended by Congress.[90]

The rule change proposed here would merely replicate the regime rejected in *Grace v. Whitaker*, requiring an IJ to apply the precedent of a particular circuit, even though an appeal of the IJ's decision might ultimately reach a different federal appellate court with a more lenient standard than the one applied. As the *Grace* court explained, this result would be "the exact opposite" of what Congress intended, "allow[ing] for an alien's deportation, following a negative credible fear determination," even if the applicant would ultimately be able to prove eligibility for asylum. The Departments should reject this approach.

V. THE DEPARTMENTS MAY NOT TREAT AN ALIEN'S INABILITY TO REQUEST FURTHER REVIEW OF A NEGATIVE FEAR DETERMINATION AS A DECISION TO DECLINE SUCH REVIEW.

The NPRM notes that "8 CFR 208.30(g) provides that when an alien receives notice of a negative [credible fear] determination, the asylum officer inquires whether the alien wishes to have an immigration judge review the decision," and that currently, "[i]f that alien refuses to indicate whether he or she desires such review, DHS treats this as a request for review by an immigration judge."[91] The Departments propose, however, to now "treat an alien's refusal to indicate whether he or she desires review by an immigration judge as declining to request such review" – both with regard to credible fear assessments and the reasonable fear assessments proposed elsewhere in the NPRM.[92] This proposed modification would deprive asylum applicants of their constitutional and statutory rights to have negative fear assessments scrutinized by an IJ. Specifically, many applicants simply cannot understand the offer of further review well enough to respond affirmatively, and the courts have made clear that a waiver of one's rights cannot be effective unless willingly and knowingly made.[93] In short, in many

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[90] *Id*. at 139-40 (emphasis added) (internal citations omitted).

[91] NPRM at 36273.

[92] *See id.*; *see also supra* Part III (opposing proposed modification to credible fear standard of review in certain cases).

[93] A waiver of appeal must be "the result of considered judgments by respondents," *United States v. Mendoza-Lopez,* 481 U.S. 828, 840 (1987), and "must be 'knowingly and intelligently made.'" *Narine v. Holder,* 559 F.3d 246, 249 (4th Cir. 2009) (quoting *Matter of Rodriguez-Diaz,* 22 I&N Dec. 1320, 1322 (BIA 2000)); *see also Matter of Patino,* 23 I&N Dec. at 76 ("Given the profound ramifications of such a waiver, it is important that the waiver be knowingly and intelligently made."). Deprivation of the right to appeal based on a purported waiver that was

instances, an immigrant's inability to respond affirmatively cannot lawfully be interpreted as a choice to forego review by an IJ.

In CAIR Coalition's experience, a substantial proportion of asylum applicants face language barriers, lack of access to counsel, or other complicating circumstances during their credible fear assessments, meaning that they often cannot understand an inquiry as to whether they desire further review of a negative fear assessment, and/or are unable to respond affirmatively. In our experience, approximately ninety percent of asylum applicants in credible fear interviews do not speak English as a first language. From that number, approximately one-fifth of applicants speak a third language, that is not Arabic, French, or Spanish and lack access to or have difficulty getting an interpreter competent in their primary language. This is especially true for applicants who speak Mayan languages or who are from Western African countries that have various regional dialects or tribal languages. Moreover, in our experience approximately seventy-five percent of applicants undergo their credible fear interview without any legal representation. Individuals in these circumstances cannot be expected to understand questions regarding their desire for further review, both because they may not be able to ask what this means and/or formulate a response and also because they may not even understand, or have any familiarity with, the concept and significance of judicial review. In fact, we have often encountered individuals who receive a negative decision and are unaware or unclear about what is likely to happen next, even though later we learn that they had a phone call with an asylum officer in which they apparently requested review of the decision before a judge. In short, a substantial number of applicants with negative credible fear determinations must be assumed not to understand, or not to be capable of responding to questions regarding their desire for additional review.

The fact that so many applicants cannot understand the question or appropriately respond must doom any effort to treat failure to respond affirmatively as a choice to waive IJ review. It is a bedrock principle of American law that a person may not be understood as having waived her rights unless she has done so both willingly and knowingly. In the Supreme Court's words, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[94] These requirements apply in the criminal and civil contexts alike.[95] "Indeed, in the civil no less

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"not considered or intelligent" constitutes a "deprivation of judicial review" in violation of the respondent's "rights to due process." *Mendoza-Lopez,* 481 U.S. at 839-40; *see also Biwot v. Gonzales,* 403 F.3d 1094, 1098 (9th Cir. 2005) ("A waiver of the right to appeal a removal order must be 'considered and intelligent' or it constitutes a deprivation of the right to appeal and thus of the right to a meaningful opportunity for judicial review.").

[94] *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case . . .").

[95] *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) ("In the civil area, the Court has said that 'we do not presume acquiescence in the loss of fundamental rights,' *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307.").

than the criminal area, 'courts indulge every reasonable presumption against waiver.'"[96]

Courts have applied this principle in the immigration context as well. Just last month, the Seventh Circuit made clear that the Visa Waiver Program, which requires the visitor to waive the right to contest removal, except based on asylum, "[i]mplicat[es] both constitutional due process concerns and statutory rights," and so such a waiver is only valid "if it is made knowingly and voluntarily."[97] In 2012, the Ninth Circuit considered a matter presenting issues directly on point here, holding that the right to further review in the course of the removal process is among those rights that may only be waived knowingly, and cannot be knowingly waived when the immigrant does not understand the language in which the option for additional review is presented. "Even in expedited removal proceedings . . . an alien's waiver of the right of appeal must be both considered and intelligent in order to be valid."[98] Moreover, "[a] waiver of rights cannot be found to have been considered or intelligent where there is no evidence that the detainee was first advised of those rights in a language he could understand."[99]

As these decisions make clear, a regime in which immigrants would be deemed to have waived additional review of a negative fear holding even when they did not respond at all would be contrary to well-settled understandings of waiver, and hence unlawful. It also would disserve the aims of the asylum framework itself. In adopting IIRIRA, Congress made clear that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution."[100] By presuming a waiver when an applicant may simply be unable to understand or respond to questions posed by an asylum officer, the Proposed Rule would ensure that there is a *significant* danger of refoulement. To effectuate the statute, and to conform with well-settled black-letter law regarding waiver of one's rights, the Departments should refuse to adopt the proposed rule change.

VI. ADOPTION OF DISCRETIONARY, NON-STATUTORY BARS TO ASYLUM WOULD BE UNLAWFUL.

As a matter of both law and public policy, the Departments may not adopt the proposed discretionary, non-statutory bars to asylum.[101] The Proposed Rule would have the effect of denying many or most asylum applications on discretionary grounds and severely limiting the actual discretion that asylum adjudicators may exercise. The NPRM would thus contravene the United States' obligations pursuant to the Refugee Protocol, as well as Congressional intent. Further, the specific bars under consideration (which are clearly meant as bars, even if thinly disguised as "significantly adverse" and "adverse" factors) plainly contradict the statute and judicial precedent – as courts have previously made clear. In addition, many of these proposed adverse factors either completely ignore the realities of how applicants traveled to the U.S. (such as the fact that there are few direct flights from many countries to the U.S.) or are not offenses

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[96] *Fuentes*, 407 U.S. at 94 n.31, *quoting Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

[97] *Ferreyra v. Barr*, Nos. 18-3021, 19-2055, 2020 U.S. App. LEXIS 18881 at *5 (7th Cir. June 16, 2020).

[98] *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1043 (9th Cir. 2012).

[99] *Id.* at 1044.

[100] H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

[101] NPRM at 36282-85.

that should rise to the level of disqualification (such as the use of fraudulent documents, which may be the only mechanism for an asylum seeker to exit their home country).[102] Codifying these factors in federal regulation would gut the entire notion of asylum, replacing the long-standing, worldwide commitment to protecting those who are persecuted with a punitive system in the U.S., based on a barely rebuttable presumption that people seeking asylum are not welcome. Rather than adopting the proposed factors, discretionary denials of asylum should remain "exceedingly rare," and the danger of persecution should continue to "generally outweigh all but the most egregious of adverse factors," as it has for decades under U.S. and international law.[103]

A. Imposition of New Bars to Asylum Would Contravene the Letter and Spirit of the Refugee Convention's and the Protocol's Prohibitions on Refoulment.

The Departments' proposed rule would ensure that the U.S. effectively become a serial refouler by setting forth a laundry list of "significantly adverse" and "adverse" factors such that *nearly all* applications would "ordinarily result in the denial of asylum as a matter of discretion."[104] If it is nearly impossible to meet the criteria set forth by the Departments, then the Departments will have created a system, which will *de facto* and automatically refoul refugees – a system that would be wholly inconsistent with the Refugee Protocol. Moreover, reliance on the idea that an asylum seeker may still be eligible for withholding of removal or protection under CAT disregards the reality that these forms of protections are not true and full substitutes for asylum, as they severely limit a person's ability to travel and to have access to medical or social welfare benefits that may assist them with resettlement, and provide no mechanism for derivative family members who may themselves have suffered persecution to reunite with their principal family member.[105]

With respect to the "significantly adverse" factors, the Departments wish to unlawfully impose "penalties on account of [an applicant's] illegal entry or presence."[106] The Departments first propose a range of specific factors that an adjudicator would be required to consider in reviewing a claim for asylum relief. These include (1) unlawful entry or unlawful attempted entry; (2) failure to seek asylum or refugee protection in another country transited *en route* to the U.S.; and (3) use of fraudulent documents.[107] The Protocol and other international instruments reflect the United States' obligations to permit refugees to seek asylum in its borders, to impose

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[102] *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (an agency may not make a rule that runs counter to the evidence before the agency).

[103] *Shantu v. Lynch*, 654 Fed.Appx. 608 (2016) (citing *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008), *quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987)); *id.* at 610 (citing *Dankam v. Gonzales*, 495 F.3d 113, 119 n.2 (4th Cir. 2007)); *see also Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987) ("[I]n light of the unusually harsh consequences which may befall a [noncitizen] who has established a well-founded fear of persecution[,] the danger of persecution should generally outweigh all but the most egregious of adverse factors.").

[104] NPRM at 36283.

[105] *Zambrano v. Sessions*, 878 F.3d 84 n.1 (4th Cir. 2017).

[106] Refugee Convention, Art. 31, cl. 1. As noted above, the U.S. has acceded to the Refugee Convention through adoption of the Protocol, and these commitments have the force of law.

[107] NPRM at 36283.

no penalties on asylum seekers based on their unlawful status, and to prevent the return of individuals to countries where they would face persecution or torture. In particular, Article 31(1) of the Protocol provides:

> The Contracting States *shall not impose penalties, on account of their illegal entry or presence*, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, *enter or are present in their territory without authorization*, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[108]

The "significantly adverse" factors primarily involve either "illegal entry or presence" (unlawful entry/attempted entry) or presence "without authorization" (fraudulent documents).[109] The Proposed Rules would require such factors to be considered by an adjudicator and to be held against an asylum seeker, which would constitute a "penalty." Thus, there is no way to reconcile the clear constraints of Article 31 on a nation's consideration of asylum claims with the specific factors proposed to be codified as "significantly adverse," and the proposed factors must be rejected.

B. Congress Determined that the New Grounds Under Consideration Should *Not* Bar Asylum Claims.

Although the Proposed Rules describe them as new "factors" that adjudicators must "consider," it is clear that the "significantly adverse" and "adverse" factors are intended to serve as complete or nearly complete bars on asylum claims. For the purposes of asylum, there is no "technical difference[] between applying for and eligibility for asylum" with respect to interpreting the statute.[110] The NPRM is incorrect to claim otherwise.[111]

The NPRM's proposals are impermissibly at odds with the statutory scheme established by Congress. As the Supreme Court has held, a pattern in which Congress enacts topic-specific legislation revealing a limited conception of an agency's authority, and repeatedly considers but rejects legislation that would expand that authority, "preclude[s] an interpretation" of the governing statutes that grants the agency the very powers Congress has declined to confer.[112] Here, Congress made clear that all noncitizens may apply for asylum, regardless of how or where they entered into the U.S. In particular, 8 U.S.C. §1158(a)(1) provides that "[a]ny 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* and including an alien who is brought to the United States after having been interdicted in international or United States waters), *irrespective of such alien's status*, may

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[108] Optional Protocol, Art. 31.1 (emphasis added).

[109] As noted above, there are few direct flights from many countries to the U.S. Thus, penalizing individuals for having to travel through a third country is equivalent to penalizing these applicants for the way they, necessarily, must enter the U.S.

[110] *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1247-48 (9th Cir. 2018); *see also O.A. v. Trump*, 404 F. Supp. 3d 109, 149 (D.D.C. 2019).

[111] NPRM at 36283 n.34.

[112] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-56 (2000).

apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title."[113] The Departments may not cavalierly dismiss Congress's clear intent to allow immigrants entering through means other than designated ports of entry to apply and, if appropriate, be granted asylum.

In addition, because Congress did not establish "significantly adverse" or "adverse" factors in its comprehensive statutory scheme to define asylum eligibility, and only permitted the Attorney General to add new factors that were consistent with Section 208,[114] the Departments may not substitute their own judgment and attempt to supersede legislative intent with these new presumptions, which are clearly contrary to the INA's text and underlying Congressional intent. Congress identified in the INA offenses that automatically remove an applicant from consideration of discretion,[115] and the Proposed Rules add factors that are not relevant to such identified offenses. The proposals thus cannot be reconciled *with* the plain text of the INA. The fact that the Attorney General has *some* discretion in creating new bars to asylum does not mean that he can impose a rule "contrary to the will of Congress."[116]

C. The Courts Have Made Clear That It Would Be Unlawful to Bar Asylum on the Bases Under Consideration Here.

Even if the Departments' proposals to add new discretionary bars to asylum did not violate national treaty obligations and contravene Congressional intent, most of the specific bases for excluding applicants have already been declared unlawful. Here, again, the Departments may not resurrect via regulation requirements that the courts have found to violate the INA. The Departments first list "three specific but non-exhaustive factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion."[117] Each of these three is unlawful:

1. Proposed Bar: Unlawful entry or attempted entry except in immediate flight from persecution or torture. This proposed bar is incompatible with Section 208 of the INA, which provides that asylum shall be available to any person who is "physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival. . .)."[118] And while the INA permits the Attorney General to establish "additional limitations and conditions . . . under which an alien shall be ineligible for asylum," those limitations and conditions must be "consistent with [the remainder of Section 208]."[119] A bar on asylum for those who arrive at a place that is not a designated port of arrival – whether "discretionary" or not – would contradict Section 208(a)(1), which expressly provides that such applicants are eligible for asylum. For this reason, the United States District Court for the District of Columbia

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[113] 8 U.S.C. § 1158(a)(1) (emphases added).

[114] *See* 8 U.S.C. § 1158(b)(2)(C); 8 U.S.C. § 1158(d)(5)(B).

[115] *See* 8 U.S.C. § 1158(b)(2)(A)(ii).

[116] *See, e.g.*, *Akram v. Holder*, 721 F.3d 853, 865 (7th Cir. 2013); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (When Congress speaks clearly through a statute, the plain meaning of that statute governs.).

[117] NPRM at 36283.

[118] 8 U.S.C. § 1158(a)(1).

[119] *Id.* § 1158(b)(2)(c).

found last year that a rule barring asylum for applicants arriving at the border at a location other than an authorized point of entry was flatly incompatible with the INA.[120] In the court's view, the position that applicants might be excluded on the basis of their unlawful entry or attempted entry was "untenable."[121] This is no less so now that the Departments are seeking to make this a "discretionary" bar, especially when there is no mechanism to account for how often this "discretionary" factor will be utilized to exclude applicants from asylum; the possibility itself is enough to make it unlawful.

Moreover, applicants must often enter the United States at unauthorized points of entry for reasons outside their control. For example, some asylum seekers are unaware that designated ports of entry exist. In other cases, designated ports of entry are difficult to access, causing migrants to attempt unauthorized border crossings. Even when immigrants reach a designated port of entry, they still encounter problems accessing the U.S. through the port of entry. Most recently, Customs and Border Patrol ("CBP") officers only allow the asylum seeker to cross the international line if space is available in the port of entry ("metering").[122] In other instances, CBP officers have turned asylum seekers away by claiming "we're not doing asylum here" or telling migrants the port of entry is "full." A September 2018 report by the U.S. Office of Inspector General ("OIG") found that metering and the Administration's "Zero Tolerance Policy" "likely resulted in additional illegal border crossings."[123] The report concluded that "OIG saw evidence that limiting the volume of asylum-seekers entering at ports of entry leads some aliens *who would otherwise seek legal entry into the United States to cross the border illegally*."[124] In these circumstances, the Departments – not asylum seekers – are responsible for creating the exact behavior that will render immigrants ineligible for asylum.

2. Proposed Bar: Failure to seek asylum in intermediate country, more than 14 days spent in third country where asylum application was possible, and **transit through more than one country.** These proposed discretionary bars would also be unlawful. In *East Bay Sanctuary Covenant v. Barr*,[125] the Ninth Circuit expressly rejected the proposition that passage through an intermediate country could bar an individual's asylum claim in the U.S. As the court explained, the INA provides two specific scenarios in which transit through a third country might bar asylum: when the applicant has traversed a "safe third country" (which requires (1) an agreement between the United States and the third country to which the person would be removed and not subject to persecution, and (2) the opportunity for the applicant to receive full and fair procedure for determining eligibility for asylum or similar protection); and when the applicant has "firmly resettled" in another country before arriving in the United States (which requires that the other country have offered the applicant a formal offer of official status

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[120] *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019).

[121] *Id*. at 147.

[122] *See Al Otro Lado, Inc. v. Wolf*, 952 F.3d 999 (9th Cir. 2020) (challenging the government's metering practices at the southern border).

[123] Department of Homeland Security Office of Inspector General, *Special Review- Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* at 6 (Sept. 27, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.

[124] *Id*. at 7 (emphasis added).

[125] 2020 U.S. App. LEXIS 21017 (9th Cir. 2020).

allowing indefinite residence in the country).[126] When neither of these doctrines applies, the applicant cannot be assured of safety in the country through which she traveled and is eligible for asylum in the United States.[127]

> We have held in a long line of cases that the failure to apply for asylum in a country through which an alien has traveled has no bearing on the validity of an alien's claim for asylum in the United States. For example, we wrote in *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986), that an asylum applicant's "failure to apply for asylum in any of the countries through which he passed or in which he worked prior to his arrival in the United States does not provide a valid basis for questioning the validity of his persecution claims." The fact that an alien might prefer to seek asylum in the United States rather than Mexico or Guatemala may be reflective of the relative desirability of asylum in these countries, but it has no bearing on the validity of the alien's underlying asylum claim.[128]

Accordingly, where the circumstances set out in the INA's provisions regarding "safe third country" and "firm resettlement" are not present, the Departments may not treat passage through a third country as a basis for denying asylum. An applicant's presence in another country for 14 days does not satisfy either of these criteria,[129] nor does the fact that an applicant traveled through more than one country before reaching the U.S. Thus, none of these proposed bars is lawful.

3. Proposed Bar: Use of fraudulent documents to enter United States except when alien arrived by air, sea, or land directly from home country. This proposed bar would also be unlawful. Specifically, it would not be "consistent with [Section 208]," and thus would violate the INA.[130] Section 208 specifically delineates which category of crimes will foreclose asylum – namely, "particularly serious crime[s]," which the INA defines to mean "aggravated felon[ies]."[131] Use of fraudulent documents, however, is not an aggravated felony. The INA defines "aggravated felony" to include an enumerated list of offenses, including "murder, rape, or sexual abuse of a minor," illicit trafficking in controlled substances or firearms, non-political violent crimes, and similarly heinous acts.[132] The provisions of the criminal code relevant to fraudulent documents – namely, 18 U.S.C. § 1546 (Fraud and misuse of visas, permits, and other

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[126] *See id.* at *19-*21.

[127] *See id.* at *42-*43.

[128] *Id*. at *48-*49.

[129] The 14-day bar is especially pernicious to the extent that an applicant is being forcibly held in a third country (*e.g.*, Mexico) to await asylum proceedings. In that case, an applicant might forfeit eligibility for asylum as a result of a government policy that keeps her in the third country against her will.

[130] *Id*. § 1158(b)(2)(C).

[131] *Id*. §§ 1158(b)(2)(A)(2), (b)(2)(B)(i).

[132] *Id*. § 1101(a)(43).

documents) and 18 U.S.C. § 1543 (Forgery or false use of passport) – are not listed among those constituting aggravated felonies.[133] If Congress wanted these particular crimes to be *per se*, rather than discretionary, bars to asylum, it could have done so by defining "particularly serious crimes" to include them for purposes of an asylum claim review,[134] but it did not.

The INA "reserves [the severe consequences of a total bar to asylum] for those criminal offenses that make an alien so 'danger[ous] to the community of the United States' that we are not willing to keep him here, notwithstanding the persecution he may face at home."[135] As Judge Reinhardt explained, it is impossible to "imagine that when Congress added the 'particularly serious crime' exception to our immigration law . . . it envisioned that everyday offenses of this sort could be included within that term."[136] The Departments should continue to rely on individualized analysis to ensure that asylum seekers are not unduly penalized and that only those individuals who have been convicted of truly serious crimes (*i.e.*, aggravated felonies) – and who present a continued risk – are potentially subject to refoulement. Denial of asylum on the basis of other crimes would be inconsistent with Section 208 and thus unlawful.

4. Proposed Bar: Valid criminal convictions, even if reversed, vacated, expunged, or modified for certain reasons. This bar would impose nearly insurmountable hurdles to asylum applicants – even those who have been wrongly convicted and those whose convictions have been nullified for a variety of reasons. As an initial matter, this ground could be interpreted to bar an applicant for conviction even of crimes that fall well below the "particularly serious" threshold established by Section 208. Further, the proposal forces into the interview irrelevant considerations: a past criminal conviction does not have any bearing on whether someone's fear is significantly or reasonably likely to come to pass. To the extent that such crimes *may* be "particularly serious," the NPRM would jam complex legal questions regarding what constitutes an aggravated felony, a particularly serious offense, or a serious nonpolitical crime into a limited interview process where the respondent is unlikely to be unrepresented, understand, or have access to resources to push back against these difficult questions of law.

Even if it were limited to the aggravated felonies that constitute particularly serious crimes for INA purposes, this ground would improperly prejudice those who were erroneously convicted, including in cases in which a court has recognized that the conviction was the result of unconstitutional conduct. Additionally, there are numerous reasons why an innocent defendant might seek reversal or expungement of her conviction even when the expressed basis for that action would not relate to a substantive or procedural infirmity in her case – for the wrongly accused, the end result (freedom) is far more important than the specific procedural basis for the court's decision. The proposed bar, however, would leave such persons at the risk of dire consequences – namely, return to a country in which they face death, torture, or other persecution. This outcome would violate the applicant's rights as well as our international

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[133] The INA also includes a definition for "serious crimes," 8 U.S.C. § 1101(a)(h), which is broader than the definition for aggravated felonies. However, Section 208 limits the class of crimes that can bar asylum to "particularly serious crimes," a term that is addressed not in the INA's definitional provision but rather in Section 208 itself (*i.e.*, as "aggravated felonies").

[134] 8 U.S.C. § 1158(b)(2)(B)(i) ("[A]n alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.").

[135] *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (Reinhardt, J., concurring).

[136] *Id.*

commitments.

The proposed bar would raise especially troubling due process concerns in the cases of indigent people who have been convicted of crimes. Criminal defendants frequently lack legal representation in post-conviction proceedings.[137] Therefore, they may not have the knowledge, means, or will to fight their conviction until they are advised to do so when they are in removal proceedings. By applying the presumption against the validity of an overturned or modified conviction or sentence, the proposed rules hold asylum seekers to a higher standard than those seeking other forms of relief in removal proceedings, by forcing only asylum seekers to rebut the presumption despite the existence of actual defects in their underlying criminal proceedings. The proposed rules therefore compound the harm to asylum seekers who, in addition to facing persecution in their home countries, have been denied constitutionally compliant process in the United States criminal legal system.

5. Proposed Bar: Presence for more than one year pre-filing. It would also be unlawful to bar an applicant on the basis that she had been in the United States for more than a year before filing for asylum if the applicant otherwise met the exceptions set out in the INA. Section 212(a)(9)(B)(i)(II) bars any applicant who "has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States," but Section 212 also provides a variety of exceptions – for example, for certain victims of trafficking.[138] The Departments may not by regulation countermand these exemptions by establishing a presumption that any applicant present in the country for more than one year before filing is ineligible.

The proposed discretionary bar is particularly problematic given the role that the government often plays in undercutting applicants' understandings of the relevant deadlines or even forcing applicants to accrue time awaiting other decisions. For example, in *Del Carmen Mendez Rojas v. Johnson*, the U.S. District Court for the Western District of Washington concluded that Section 212 was not by itself "reasonably calculated to apprise [applicants] of the one-year time period," and that the federal government's failure to inform applicants of this limitations period and to provide mechanisms ensuring they could comply with the deadline violated applicants' due process rights.[139] This problem is further exacerbated by new regulations recently adopted by the Departments that have dramatically extended the period during which an applicant must wait to obtain employment authorization to 365 days.[140] This rule will have the effect of pushing applicants to stay within the United States unlawfully for up to a year – which in turn, under the bar proposed here, will likely render them ineligible for asylum. That "heads I win, tails you lose" approach is fundamentally unfair and – as the *Mendez Rojas* court recognized – incompatible with applicants' due process and statutory rights.

VII. THE CONSTITUTION AND THE INA PROHIBIT THE DEPARTMENTS FROM ALLOWING IMMIGRATION JUDGES TO PRETERMIT ASYLUM

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[137] *See Pennsylvania v. Finley*, 481 U.S. 551 (1997) (providing that the right to appointed counsel extends only to the "first appeal of right," but not to further collateral attacks on a conviction).

[138] 8 U.S.C. §§ 1182(a)(8)(B)(i)(II), 1182(a)(8)(B)(iii).

[139] *Del Carmen Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 at *20 (W.D. Wa. 2018).

[140] *See* Department of Homeland Security, Asylum Application, Interview, and Employment Authorization for Applicants, Final Rule, 85 Fed. Reg. 38532 (rel. June 26, 2020).

PROCEEDINGS OR LIMIT PARTICULAR SOCIAL GROUP CLAIMS TO THOSE ARTICULATED AT THE I-589 STAGE.

Imposing a Rule 12(b)(6)-type decision-on-the-pleadings regime by allowing pretermission based entirely on material in the applicant's Form I-589 would be both unlawful and inappropriate for applicants seeking asylum, withholding of removal, and protection under the CAT.[141] Further, precluding applicants from later asserting membership in a particular social group ("PSG") not presented at the I-589 completion stage would impermissibly penalize applicants for their failure to arrive in the United States with a full command of American asylum law or for errors outside their control, such as a change in the law or ineffective assistance of counsel.[142]

A. The Departments May Not Assume that Applicants Are Capable of Putting Forth a Fully Formed Legal Case at the Form I-589 Stage

As an initial matter, the Departments should continue their longstanding practice of treating Form I-589 as a *first step* – a roadmap for asylum officers and immigration judges to guide their interviews and hearings, respectively – and *not* a vehicle permitting final determinations by IJs.[143] This principle is consistent with the Handbook, which explains: "[B]asic information is frequently given, in the first instance, by completing a standard questionnaire. Such basic information will normally not be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required."[144] In the same way, the I-589 form is precisely that: a standard questionnaire, which will only elicit basic or foundational information, but will not be enough to provide a complete universe of a person's story. This is especially true because asylum and withholding cases raise complex issues that are often mixed questions of fact and law.

This complexity is evident on the face of Form I-589. For instance, one question asks, "Are you afraid of being subjected to torture in your home country…" While that question may seem straightforward, it is not. The word "torture" is a legally defined concept and the question is asking someone about the possibility of facing *future* torture. Thus, the question touches on

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[141] *See* 85 Fed. Reg. 36177 (proposing a new rule allowing immigration judges to pretermit and deny an application for asylum, statutory withholding of removal, or protection under the CAT regulations based on Form I-589 (and any supporting evidence) if the alien has not established a prima facie claim for relief or protection under the applicable laws and regulations); FRCP 12(b)(6) (permitting judges in Federal district court proceedings to dismiss a case for failure to state a claim).

[142] *See* 85 Fed. Reg. 36179 (proposing to require applicants to define their proposed particular social group as part of the asylum application or otherwise in the record, removing the possibility of an applicant later receiving relief based on a particular social group formulation that was not advanced at the initial application stage).

[143] *See Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989) ("We note that there are often significant differences (either discrepancies or meaningful omissions) between the written and oral statements in an asylum application; these differences cannot be ascertained unless an applicant is subjected to direct examination.").

[144] *Handbook* at para. 200.

complexities of both whether the activity at issue would constitute torture as a legal matter and the probability that it will occur.[145]

Mixed questions such as these, or questions that are purely legal, can only be answered through appropriate interviewing conducted by an official, in this case, an IJ, who is legally trained. Such individuals are in the best position to sort through these questions as part of the process of assessing whether the applicant is entitled to the relief sought. The Form I-589 by itself is therefore not an adequate substitute for that process.

Applicants already face high barriers in explaining their background and asserting their legal grounds for asylum or withholding of removal; these barriers often persist during the later stages in the process as well, such as a hearing. The Departments may not penalize applicants for lacking a fully formed legal case at the application stage. At this juncture in the process, applicants are often dealing with trauma and subject to various limitations that severely inhibit them from setting forth their best cases. Applicants are often forced to leave their home country at a moment's notice and thus unable to take anything with them, including records and documentation. Making matters worse, applicants often must fill out the Form I-589 without the aid of either an interpreter or legal counsel.[146] These factors together mean that the information on the form often reflects only a truncated, incomplete recitation of the relevant facts, which may fail to support an asylum grant on their own, even when the applicant's circumstances will ultimately be shown to warrant relief.

CAIR Coalition's experience demonstrates the importance of the immigration hearing in developing an applicant's factual record, which will then inform the applicant's legal strategy and the IJ's assessment. For instance, we assisted a former police officer from a Central American country in his application for withholding of removal. Despite completing high school and the equivalent of a master's degree, the former officer provided only a part of his story on the I-589, explaining that while working the border inspecting dairy products, he had learned of drug trafficking schemed and had warned his higher-ranking officer of this activity. The officer proceeded on his asylum application to explain that he feared retaliation and harm by the gangs and narco-trafficking groups involved. At first glance, the basis for his claim was unclear. Only when we asked him to write out a detailed 20-page declaration and when he answered questions from the IJ did it become clear that his case was a "whistleblower" former police officer case. During the trial, he made clear that when he had registered this tip with his unit, he had stated that the gangs were working with someone "inside," but his supervisor had not registered this tip, and that is how he had learned that his supervisor was working with these criminal groups. The facts in this persons' case were nuanced, involved him explaining a lot of internal government specific information, something that only came out during testimony.

In another case, we had a client who tersely stated on his I-589 (which he completed *pro se*) that he was afraid of the gangs because they wanted money from him. Only after careful probing questions made by counsel prior to and at trial did the client explain that the last time the gang had hurt him and extorted him they had called him by a childhood nickname, which in his

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[145] *Kaplun v. Att'y Gen*., 602 F.3d 260, 271 (3d. Cir 2010) (holding that an assessment of the likelihood of torture involves a two distinct parts: (1) what is likely to happen, focused on facts, and (2) whether what is likely to happen "amount[s] to the legal definition of torture," which is a legal question).

[146] *See Aguilera-Cota v. U.S. INS*, 914 F.2d 1375, 1382 (9th Cir.1990) (observing that asylum "[f]orms are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel").

language referred to the fact that he was "slow" and "child-like" – a reference to his visibly apparent mental health disability. In this case, especially given the client's cognitive disability, there would have been no way for him to have provided a precise account of his story and articulated a particular social group, but that is exactly what the NPRM seeks to require -- unrealistic standards.

These are only a handful of examples where human complexities and dynamics were not completely captured by a two-dimensional form. Indeed, they could not have been captured, because the form does not account for factors such as the length of one's story, deceit to which the applicant has been subjected, or the applicant's lack of education or understanding. Moreover, at twenty-six pages, including fourteen pages of small-print instructions, the Form I-589 is an intimidating document even if the individuals filling the form out were not especially vulnerable or using an unfamiliar language.[147] Indeed, the instructions admit that "[i]mmigration law concerning asylum and withholding of removal or deferral of removal is complex."[148] Allowing IJs to pretermit and deny applications on the basis of a "labyrinth[ine]" intake form[149] is a recipe for ensuring that arriving immigrants with well-founded fears of persecution will be sent back to their home countries to face that persecution – a violation of core American values and of our international commitment to non-refoulement.

B. The Constitution Entitles Applicants to Hearing Before an Immigration Judge.

As detailed above, the Fifth Amendment's Due Process Clause affords immigrants within the United States the right to a meaningful hearing.[150] While the proposal to place applicants with positive credible-fear assessments into asylum-only proceedings would violate those applicants' due process rights, the proposal to pretermit applications based on information provided in their Forms I-589 would reflect an equally if not more grievous denial of due process.

Due process demands that asylum applicants be afforded a hearing during which they can develop and present evidence in support of their claim. Indeed, a hearing before an IJ is even more important in the immigration context than elsewhere, because IJs play a unique role in the asylum process. Immigration courts are unlike Article III courts, in which the judge is a passive adjudicator; rather, IJs actively solicit information from applicants based on the information

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[147] *See* I-589, Application for Asylum and for Withholding of Removal, https://www.uscis.gov/system/files_force/files/form/i-589.pdf?download=1; I-589, Application for Asylum and for Withholding of Removal: Instructions, https://www.uscis.gov/system/files_force/files/form/i-589instr.pdf?download=1.

[148] *Id.* at 4.

[149] *Castro-O'Ryan v. I.N.S.*, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.") (citations omitted).

[150] *See supra* Part II.A.

contained in the Form I-589 and, indeed, IJs have a duty to develop the record.[151] As explained in the Handbook – a party determining refugee status should not place the burden on the asylum applicant to determine whether his circumstances meet the standard for refugee protection.

Paragraphs 66 and 67 of the Handbook state the following:

> 66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. ***Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.***
>
> 67. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect...[152]

Further, the Handbook explains that "the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner"[153] and that an examiner must "[e]nsure that the applicant presents his case as fully as possible and with all available evidence."[154]

The Handbook guidance is pertinent to the role of IJs in determining claims for protection. In the U.S. immigration system, IJs act in the role of the "examiner" in the parlance of the Handbook. As explained by former IJ Jeffrey S. Chase, "asylum adjudicators are required to share the burden of documenting the asylum claim … [and] once the facts are ascertained, it is the adjudicator who should identify the reasons for the feared persecution and determine if such reasons bear a nexus to a protected ground." [155] Accordingly, while the burden of providing facts lies with the respondent, it is the IJ's obligation to: (i) make sure the factual record is fully developed and adequate for appellate review and (ii) apply those facts to the law.[156]

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[151] *Yang v. McElroy*, 277 F. 3d 158, 162 (2nd Cir. 2002) ("[T]he IJ …, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.").

[152] *Handbook*, at para. 66-67.

[153] *Id.* ¶ 196, at 47.

[154] *Id.* ¶ 205(b)(i), at 49.

[155] Jeffrey S. Chase, *The Proper Role of IJs as Asylum Adjudicators*, Jeffrey S. Chase Blog, (Feb. 4, 2018), https://www.jeffreyschase.com/blog/2018/2/4/the-proper-role-of-immigration-judges-as-asylum-adjudicators.

[156] The NPRM claims that, under the proposed rule, an IJ "would only be able to pretermit an asylum application after first allowing the alien opportunity to respond" to DHS's motion or an IJ's *sua sponte* order.85 Fed. Reg. 36277. This promise offers asylum seekers no comfort, because the opportunity to "respond" in this way cannot substitute for a complete record developed by a trained IJ with a court interpreter in which the IJ applies the facts presented to the law.

Importantly, applicants at the Form I-589 completion stage, where the proposed rule would insert this new method of pretermission, often do not have legal representation.[157] The presence of counsel is a strong predictor of whether an applicant will ultimately be successful in their application.[158] The IJ's duty to help determine the existence of a legal basis for relief does not depend on whether a respondent is represented by counsel, but the role of the IJ becomes particularly important when the respondent appears *pro se*. As the courts have held:

> Because [non-citizens] appearing *pro se* often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts."[159]

Without access to counsel, a *pro se* respondent is on her own to develop her legal arguments for relief eligibility, gather evidence that is often located in her country of origin and accessible only there, complete application forms and court filings in English, and present a thorough and compelling case to the IJ. This process can be particularly difficult for applicants whose native language is not English, who are detained, or who suffer from physical or mental disabilities and/or psychological trauma.[160] The proposed rule would absolve IJs of their duties by placing these substantial burdens on the applicant when filling out the Form I-589 and attempting to respond to either a DHS motion or *sua sponte* decision by the IJ. Such an approach would deny applicants their constitutional due process rights and would result in the illegal return of asylum seekers to countries where they face persecution.

C. The INA Entitles Applicants to a Hearing Before an Immigration Judge.

In addition to violating constitutional due process rights, the proposed rule would impermissibly strip applicants of their "statutory procedural right to a meaningful or fair

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[157] https://trac.syr.edu/immigration/reports/491/#f1

[158] *Id.* ("Odds of Gaining Asylum Five Times Higher When Represented").

[159] *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (quoting *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000)); *see also Jacinto*, 208 F.3d at 733 (quoting *Key v. Heckler*, 754 F.2d 545, 1551 (9th Cir.1985)) (Judges "'must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited'" in the cases of *pro se* litigants.).

[160] *See* Exec. Office for Immigration Review, *FY 2016 Statistics Yearbook* at E-1, Figure 9 (2017), https://www.justice.gov/eoir/page/file/fysb16/download (approximately 90 percent of immigrants in removal proceedings do not have a sufficient grasp of the English language and require a translator to participate in their proceedings); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L. J. 363, 368 (2014) (noting that "[t]he social isolation and uncertain duration of mandatory immigration detention cause well-documented psychological and physical harm").

evidentiary hearing."[161] For example, IJs that pretermit applications at the Form I-589 completion stage would fail to administer oaths, receive evidence, and interrogate, examine, and cross-examine applicants and any witnesses, in violation of the INA. Section 240 provides that "[a]n immigration judge *shall* conduct proceedings for deciding the inadmissibility or deportability of an alien."[162] It further states that "[t]he immigration judge *shall* administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."[163] There is no doubt that Congress used the term "shall" in its ordinary, mandatory sense, particularly given that, in the very next sentence, it employed the permissive "may" to describe the IJ's prerogative to "issue subpoenas for the attendance of witnesses and presentation of evidence."[164] Thus, Congress was clear that the IJs *must* interview applicants. Likewise, the text of the INA requires the IJ to base her decision on "testimony" – testimony that would be unavailable if a case were pretermitted based solely on the Form I-589.[165] Indeed, in *INS v. Cardoza-Fonseca*,[166] the Supreme Court interpreted the INA to provide that an applicant could demonstrate a well-founded fear of persecution based *entirely* on her testimony at hearing[167] – again, presuming the very hearing that the Departments propose to short-circuit here. The Departments may not, however, override these statutory directives via regulation. The INA prohibits the NPRM changes.[168]

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[161] *Gutierrez-Rogue v. I.N.S.*, 954 F.2d 769, 772-3 (D.C. Cir. 1992) (internal citations omitted). The Departments must also uphold the general requirement IJs bear "the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim." *Matter of S-M-J-*, 21 I&N Dec. 722, 723 (BIA 1997).

[162] 8 U.S.C. § 1129a(a)(1).

[163] 8 U.S.C. § 1229a(b)(1) (emphasis added).

[164] *Id.*

[165] 8 U.S.C. § 1158(b)(1)(B); *see also* 8 C.F.R. § 1208.16 ("The *testimony* of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.") (emphasis added).

[166] 480 U.S. 421 (1987).

[167] *See id.* at 424-25 ("Both respondent and her brother testified that they believed the Sandinistas knew that the two of them had fled Nicaragua together and that even though she had not been active politically herself, she would be interrogated about her brother's whereabouts and activities. Respondent also testified that because of her brother's status, her own political opposition to the Sandinistas would be brought to that government's attention. Based on these facts, respondent claimed that she would be tortured if forced to return."). *See also id.* at 469 (Powell, J., dissenting) (observing that the claim the Court's majority had found sufficient to warrant relief "rested solely on [the applicant's] testimony").

[168] In this regard, it is irrelevant whether current *regulations* require hearings in particular cases, *see NPRM* at 36277, because statute itself requires such hearings. Likewise, the NPRM is incorrect in stating that pretermission "is akin to a decision by an immigration judge or the BIA denying a motion to reopen to apply for asylum on the same basis," *id.*, because in such cases the applicant has received the statutorily mandated hearing. In the current context, the alien would be denied that hearing entirely.

Moreover, adoption of the proposed pretermission rule would upset the well-founded reliance interests of thousands of current applicants, who have completed their I-589s under a regime in which they could expect to present more fulsome evidence to an IJ, perhaps with the benefit of counsel.[169] Having acted on the reasonable understanding that they would be able to supplement their initial showings at statutorily mandated hearings at which they would be able to provide testimony and other evidence, these applicants cannot now be subjected to a "bait and switch" in which the Form I-589 is treated as though it reflected the entirety of their case.

D. Forcing Applicants to Articulate All Particular Social Groups Claims at the Application Stage Would Violate Due Process

The Departments' proposal would further deny an applicant due process by requiring her to articulate all PSG claims at the Form I-589 or forfeit the ability to later present appropriate PSGs. Forcing an applicant to articulate all PSG claims at the application stage – when she is unlikely to have any knowledge of the complex law surrounding PSGs and therefore might not even realize that her membership in a particular PSG could entitle her to asylum – would again punish the applicant for errors outside of her control. The PSG jurisprudence, in particular, has been rife with ambiguities, inconsistent applications, and circuit splits.[170] It would be manifestly unfair and violate due process to penalize applicants because they arrived in the United States without mastery of PSG law, or because their legal strategy was based on good law when submitted, only for the law to change after critical filings had been submitted. In light of the complexity of PSG jurisprudence and the various access-to-justice barriers that applicants must navigate in immigration court generally, it is essential that the Departments preserve applicants' ability to clarify and modify proposed PSGs designations at stages beyond the application stage, including on appeal.

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[169] *See D.H.S. v. Regents of the Uni. Of C.A.*, 591 U.S. ____ (slip op., at 23) (2020) ("[W]hen an agency changes course, … it must 'be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"); *FCC v. Fox*, 556 U.S. 502, 515 (2009) (agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its prior policy has engendered serious reliance interests that must be taken into account," and "[i]t would be arbitrary or capricious to ignore such matters").

[170] *See, e.g.*, *Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013) ("We have recognized that the phrase 'particular social group' is ambiguous.") (citing *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc)); *Rojas-Pérez v. Holder*, 699 F.3d 74, 81-82 (1st Cir. 2012) (noting a "growing circuit split on the" social visibility requirement for articulating a valid PSG); *Fatin v. I.N.S.*, 12 F.3d 1233, 1238 (3d Cir. 1993) ("Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended."); Bernardo M. Velasco, *Who Are the Real Refugees? Labels as Evidence of a "Particular Social Group,"* 59 ARIZ. L. REV. 235, 235 & 252 (2017) ("PSG doctrine is unnecessarily complicated and inconsistent ... Perhaps courts are simply incapable of reliably making PSG determinations—at least following the current approach.").

Courts have long made clear that PSG claims may be modified throughout the asylum process. This can occur even while a case is on appeal either by reviewing appellate courts[171] or by a motion by the applicant in response to intervening law or new facts. Administrative immigration decisions "must reflect meaningful consideration of the relevant substantial evidence supporting the alien's claims."[172] As such, applicants have been, and must continue to be, permitted to amend their PSG claims during a pending proceeding, as the law evolves or the applicant learns the significance of a relevant PSG. A particular applicant's PSG descriptions are often revised in response to the continually shifting PSG law, not only by the applicant and her counsel, but also by IJs, the Board, and the courts. Indeed, it is *often* the decision-maker (not the applicant) who identifies and applies a relevant PSG claim. The proposed rule would overturn years of precedent and common practice under which IJs and Board members, in light of the circumstances of individuals coming before them and their own obligations to administer justice, have frequently clarified applicants' proposed PSGs.[173] By substituting for this regime a new "use-it-or-lose-it" PSG requirement, the NPRM would create an impermissible and insurmountable burden for asylum applicants seeking to obtain relief due to valid membership in a relevant PSG.

The NPRM's reliance on the *Matter of W-Y-C-* to defend the proposed rule change is misplaced. That case involved an individual who was "represented by counsel below," and its logic is grounded in a presumption of such representation.[174] *Pro se* applicants present different concerns not addressed by *W-Y-C-*. In CAIR Coalitions experience as LOP providers, many *pro se* applicants do not understand the concept of a PSG; much less even read or understand the constantly evolving case law. Requiring a *pro se* individual to articulate fully formed PSG in their asylum application is an impossible hurdle. It also belies the IJs burden to develop the record to identify potential grounds for relief. [175] IJs owe a heightened duty to *pro se* applicants, which the Department cannot regulate away. Indeed, the Ninth Circuit has instructed IJs, especially in cases involving *pro se* applicants, to "scrupulously and conscientiously probe into,

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[171] The Board need not adopt the precise particular social group advocated by the applicant. *See, e.g., Matter of Kasinga*, 21 I&N Dec. 357, 365 (1996); *see also Cece v. Holder,* 733 F.3d 662, 670 (7th Cir. 2013).

[172] *Abdel-Masieh v. I.N.S.*, 73 F.3d 579, 585 (5th Cir. 1996) (internal quotations and citations omitted); *see also Matter of A-R-C-G-*, 26 I&N Dec. 388, 390-91 (BIA 2014) ("The question whether a group is a 'particular social group' within the meaning of the Act is a question of law that we review de novo.").

[173] *See, e.g.*, *Nat'l Immigrant Justice Ctr., Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R* 6 (2016), https://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf ("[A] former child soldier who fears persecution in her home country because of that former affiliation will not know the duration of membership necessary to formulate a PSG—she only knows that people in her country wish to harm her for something she cannot change.").

[174] 85 Fed. Reg. 36279; *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 192 (BIA 2018).

[175] Jeffrey S. Chase, *The Proper Role of IJs as Asylum Adjudicators*, Jeffrey S. Chase Blog, (Feb. 4, 2018), https://www.jeffreyschase.com/blog/2018/2/4/the-proper-role-of-immigration-judges-as-asylum-adjudicators.

inquire of, and explore for all the relevant facts."[176] Such an exploration naturally extends to eliciting and clarifying the facts needed to discern whether an applicant is asserting all appropriate PSGs, irrespective of whether the applicant had used the appropriate "magic words" describing relevant PSGs at the application stage. For *represented* parties, *Matter of W-Y-C-* creates dual responsibilities for the applicant, on the one hand, and the IJ, on the other. The applicant bears the burden of submitting the relevant facts to put an IJ on notice of their PSG. The IJ must then clarify applicants' PSGs on the record and articulate those PSGs in their written opinions.[177] For this reason, the proposed rule would be unconstitutional even with respect to represented applicants.[178] But when a party is *not* represented, she cannot be expected to divine the proper means of describing the basis for feared persecution – rather, the applicant must rely on counsel and/or the IJ to help identify and flesh out relevant PSG claims during a hearing.[179]

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[176] *Dent v. Holder*, 627 F.3d 365, 373–74 ("[A]liens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.") (quoting *Agyeman v. I.N.S.*, 296 F.3d 871, 877 (9th Cir. 2002) (quotations omitted)).

[177] *Matter of W-Y-C-*, 27 I. & N. Dec. at 191 ("If an applicant is not clear as to the exact delineation of the proposed social group, the Immigration Judge should seek clarification.").

[178] A represented applicant could be doubly denied due process if she experienced ineffective assistant of counsel. Such an applicant would be denied a fair hearing in the first instance – due to ineffective counsel – and then would not be able to fix this injustice once obtaining effective counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) (a key element of whether a hearing is fair the right to seek a remedy when counsel does not provide effective assistance); *see also* American Immigration Counsel, Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases, Practice Advisory n. 4 (Jan. 2016) (explaining that "[a]lthough the Attorney General overruled *Matter of Lozada* in *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009) ('*Matter of Compean I*'), that decision was vacated less than six months later in *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009) ('*Matter of Compean II*'). In *Matter of Compean II*, the Attorney General directed the immigration judges and the BIA to apply pre-*Compean I* standards to motions to reopen based on ineffective assistance of counsel, thus restoring *Matter of Lozada*. 25 I&N Dec. at 3.").

[179] It is especially difficult for detained *pro se* applicants to learn about possible claims for relief because the law libraries at detention facilities often have inadequate legal resources that are not up-to-date and have not been translated into the immigrant's native language. *See, e.g.*, Penn State Law Ctr. for Immigrants' Rights Clinic, *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers* 25 (2017), http://projectsouth.org/wpcontent/uploads/2017/06/Imprisoned_Justice_Report-1.pdf.

The Departments may not remove the IJ's critical role in this regard.[180]

In light of the above, the Proposed Rule modification would violate both the governing statute and the Due Process Clause of the Fifth Amendment by denying applicants an opportunity to update their claims based on an intervening change in the law.[181] If an applicant put forward a PSG based on governing precedent, but that precedent was later overruled, the proposed rule would foreclose the IJ and Board from considering new or revised PSG claims, even though the change in law had dramatically altered the applicant's evidentiary burden, through no fault of her own. This would deny applicants "a full and fair hearing on [their] claims."[182] As explained by the D.C. Circuit, "a hearing is not truly meaningful if a critical issue is effectively excluded from consideration."[183] And in the Seventh Circuit's words, when the government "pull[s]" the "proverbial rug" out from under an applicant, the applicant must be given "the opportunity to respond to the government's critical shift in position."[184] The proposed rule would exclude the critical issue of whether the applicant is a member of a relevant PSG, as recognized by the updated law, and would deny the applicant the opportunity to respond to the shift in governing standards. A well-informed applicant would surely craft her case differently if she had known that a change in law would change the requisite factual showing. Instead, the proposed rule would deny the applicant the opportunity to conform to the new law, not only denying due process but also wasting resources by forcing applicants to continue with an unexpectedly non-meritorious claim – or, worse, forcing applicants to disregard meritorious claims their facts may support.

The proposed rule would also violate the constitutional requirement that applicants receive individualized determinations.[185] An applicant receives an individualized determination only if she has the opportunity to supplement the factual record in light of intervening changes in law. When an IJ or the Board denies the applicant that opportunity, they necessarily presume that the factual record developed in the intervening case would apply equally in the applicant's

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[180] Like *pro se* applicants, represented applicants also encounter significant barriers to effectively connecting to their counsel, such as accessing telephones in detention facilities. *See, e.g.*, Dep't of Homeland Security Office of Inspector General, *Management Alert on Issues Requiring Immediate Action at the Theo Lacy Facility in Orange, California* 7 (2017) (identifying "telephone problems [at one detention facility that included] low volume and inoperable phones").

[181] *Chen v. Holder*, 578 F.3d 515, 517-18 (7th Cir. 2009) (holding that it is an abuse of discretion for the Board to rely on an intervening change in law that would have altered how the asylum applicant developed the factual record without giving the applicant the opportunity to supplement that record); *accord He v. Holder*, 749 F.3d 792, 798 (9th Cir. 2014) (Reinhardt, J., concurring) (expressing the view that the Board reversibly errs if it denies an applicant's request for a remand to introduce evidence in light of an intervening change in law).

[182] *Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002); *see also* 8 U.S.C. § 1229a(b)(4)(B).

[183] *Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992).

[184] *Chen*, 578 F.3d at 517.

[185] *See* UNHCR Handbook ¶ 44 ("refugee status must … be determined on an individual basis"); *id.* ¶ 43 ("The situation of each person must … be assessed on its own merits.").

case.[186] This is wrong; "whether a social group is cognizable is a fact-based inquiry" that must be made "on a case-by-case basis." [187] The fact that a particular PSG has been rejected in one applicant's case does not mean it should be rejected in another's case, and IJs must be able to take this into account to make each applicant's individualized determination.

For the foregoing reasons, the Departments should not adopt its proposal to allow IJs to pretermit applications at the Form I-589. Further, the Departments should continue to allow applicants and practitioners to conform their advocacy to changing PSG law.

VIII. THE NPRM'S PROPOSED MODIFICATIONS TO THE RULES "PERSECUTION" AND "POLITICAL OPINION" ARE UNLAWFUL.

The Departments propose to modify their definitions of "persecution" and "political opinion" to further restrict the class of applicants eligible for asylum. CAIR Coalition, which serves applicants in the capital region (principally in Virginia, Maryland, and Washington, DC), has extensive experience operating with the jurisprudence of the United States Court of Appeals for the Fourth Circuit. The Departments' proposals as to persecution and imputed political opinion are arbitrary and contravene Fourth Circuit precedent – and the precedent of other Circuits – and must be rejected.

A. Persecution.

The Departments propose to amend their rules (at 8 C.F.R. §§ 208.1 and 1208.1, respectively) to narrowly cabin the circumstances constituting "persecution" for purposes of asylum. Specifically, the amended rules would provide that "persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control," and would not include "intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage, though this list is non-exhaustive."[188]

The proposed changes would be incompatible with precedent in the Fourth Circuit's rulings, and also those of other Circuits, which have roundly rejected a checklist approach. In particular, they would conflict with repeated holdings that threats – whether or not immediately acted upon – can constitute persecution. For example, in *Tairou v. Whitaker*,[189] the Fourth Circuit noted that its "binding precedent explicitly holds that a threat of death constitutes persecution."[190] Thus, threats of death alone will render an applicant eligible for asylum: "Because Tairou experienced multiple death threats in Benin, we hold Tairou established that he was subjected to past persecution. We therefore grant the petition for review and remand to

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[186] *See Valdiviezo-Galdamez v. Att'y Gen. of the U.S.*, 663 F.3d 582, 619 (3d Cir. 2011) (Hardiman, J., concurring in the judgment) (an applicant's appeal should not be decided based on "facts and arguments raised by other applications in cases other than his own").

[187] *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) ((quoting *Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017))

[188] Proposed rule 8 C.F.R. § 1208.1(e); 8 C.F.R. § 1208.1(e), at *NPRM* 36291-92, 36300.

[189] 909 F.3d 702 (2018).

[190] *Id*. at 704.

allow the BIA to consider whether, in light of Tairou's demonstrated past persecution, he has a well-founded fear of future persecution."[191] Similarly, in *Liu v. Gonzalez*, the court noted that, "[f]or purposes of gaining asylum, persecution is construed as involving ''the infliction *or threat* of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds in the refugee definition."[192] Most recently, the Fourth Circuit has held that extortion may constitute persecution extending its analysis on persecution to economic activity that implicates someone's life and safety.[193] In short, the Fourth Circuit and other courts have made clear that certain conduct including death threats and extortion *are* sufficient to establish persecution under the INA. To require additional fact-finding to determine whether the threats will actually be carried out would inject immediacy or temporal requirements that have little to do with the severity of the harm experienced or threatened, or invite checklist comparisons that do not consider an applicant's situation on a case-by-case basis.[194] It would also lead to absurd results under which an applicant may be denied for not staying around until their persecutor actually harms them or threatens them again[195] – positions that have been rejected by multiple circuit courts.

Additionally, the proposed changes violate the well-settled principle that asylum cases must be decided on their individual facts.[196] They would treat all asylum seekers the same, even though it is established that violence that rises to the level of persecution when directed against children may not when directed against adults.[197] The changes also ignore that various harms

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[191] *Id*. *See also id*. at 707-08 ("Contrary to the BIA's reasoning, the threat of death alone constitutes persecution, and Tairou was not required to additionally prove long-term physical or mental harm to establish past persecution.").

[192] 405 F.3d 171, 177 (4th Cir. 2005) (*quoting Kondakova v. Ashcroft*, 383 F.3d 792, 797 (8th Cir. 2004)) (emphasis added).

[193] *Oliva v. Lynch,* 807 F.3d 53 (4th Cir. 2015) ("Extortion itself can constitute persecution, even if the targeted individual will be physically harmed only upon failure to pay."); *Zavaleta-Policiano v. Sessions***,** 873 F.3d 241, 247 (4th Cir. 2017).

[194] *See Herrera Reyes v. Att'y Gen. of the U.S.,* 952 F.3d 101, 110 (3rd Cir. 2020) (finding that BIA erred when it placed undue emphasis on whether the respondent actually experienced harm, rejecting a check-list approach, and any focus on temporal limits to determine severity).

[195] *Martinez de Artiga v. Barr*, 961 F.3d. 586, 591 (2nd Cir. 2020)

[196] Handbook at § 51.

[197] *See, e.g.*, *Santos-Guaman v. Sessions*, 891 F.3d 12, 18 (1st Cir. 2018); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 105 (2d Cir.2006); *Liu v Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004)

can cumulatively amount to persecution.[198] These modifications to the persecution analysis undercuts the Departments' own findings and other Circuit precedent on cumulative harm by creating an incentive to focus on individual conduct that would not meet the Department's definition of persecution in isolation. The Departments may not overturn its own findings without a reasoned explanation, and it may not overturn the courts' holdings for the same reason.[199]

B. Imputed Political Opinion.

The Departments propose to amend their rules to provide that "a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof."[200] They further propose to specifically exclude "fear[s] of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."[201]

Here, again, the proposed changes would conflict with Fourth Circuit precedent. For example, in *Lopez Ordonez v. Barr*,[202] decided just this year, the court held that an applicant's imputed opposition to perceived human rights abuses by a unit of the Guatemalan military (the "G-2") was a political opinion warranting asylum, even where that opposition had nothing to do with "political control of a state or a unit thereof":

> The record in this case indicates that the G-2 imputed to Lopez Ordonez a political opinion in opposition to military acts "condemned by the international community as contrary to the basic rules of human conduct." When G-2 soldiers ordered Lopez Ordonez to kill an infant, he refused and threatened to report them to human rights organizations. As a result, they beat him with the infant until the infant died – horrific conduct that "violate[s]

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[198] *See, e.g.*, *Karki v. Holder*, 715 F.3d 792, 805 (10th Cir. 2013); *Fei Mei Cheng v. Att'y Gen. of the U.S.*, 623 F.3d 175, 192-94 (3d Cir. 2010); *Bracic v. Holder*, 603 F.3d 1027, 1036 (8th Cir. 2010); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008); *De Santamaria v. U.S. Att'y Gen.*, 525 F.3d 999, 1008 (11th Cir. 2008); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1048-49 (9th Cir. 2005); *Porodisova v. Gonzales*, 420 F.3d 70, 79-80 (2d Cir. 2005).

[199] *See De Niz Robles v. Lynch*, 803 F.3d 1165, 1174 n. 7 (10th Cir. 2015) (Gorsuch J) ("[A]n agency [interpreting ambiguous statutory language] may enforce its new policy judgment only with judicial approval"); *see also Pereira v. Sessions,* 138 S.Ct. 2105, 2121 (Kennedy, J., concurring) (expressing concern about "reflexive deference" to agency interpretation and noting that a determination of an agency's power should accord with "constitutional separation-of-powers principles and the function and province of the Judiciary") (internal citations omitted).

[200] Proposed rule 8 C.F.R. § 1208.1(d); 8 C.F.R. § 1208.1(d), at *NPRM* 36291, 36300.

[201] Proposed rule 8 C.F.R. § 208.1(d); 8 C.F.R. § 1208.1(d), at *NPRM* 36291, 36300.

[202] *Lopez Ordonez v. Barr*, 956 F.3d 238 (4th Cir. 2020).

> standards of human decency" by any measure.
> …
> Although Lopez Ordonez had been beaten for refusing to obey orders to torture and kill in the past, his threats to report the Guatemalan military for killing children showed a concrete escalation in his opposition to the G-2's activities. This caused a corresponding escalation in the G-2's response, which cannot be ignored when determining whether he met the nexus requirement. Accordingly, the political opinion the G-2 imputed to Lopez Ordonez was not merely incidental or tangential to any other reason for his punishment – indeed, the evidence shows the opinion motivated the G-2 to persecute him in an unprecedented and atrocious way.
> …
> In sum, we conclude that Lopez Ordonez established that the past persecution he suffered at the hands of the Guatemalan military was on account of a statutorily protected ground: his imputed political opinion.[203]

Moreover, in *Lagos v. Barr*, the Fourth Circuit held that opposition to a *gang* could constitute a political opinion that renders an applicant eligible for asylum. "[T]he record evidence compels the conclusion that if, as Alvarez Lagos alleges, Barrio 18 has imputed to her an anti-gang political opinion, then that imputed opinion would be a central reason for likely persecution if she were returned to Honduras."[204] The Fourth Circuit's interpretation as to what constitutes political opinion is also shared by other Circuits. As the Second Circuit recently noted, "analysis of what constitutes political expression for these purposes involves a 'complex and contextual factual inquiry' into the nature of the asylum applicant's activities in relation to the political context in which the dispute took place."[205] In other words, the proposed rule seeks to undercut the case-by-case country-specific analysis required for asylum withholding cases by imposing narrow definitions focused on specific conventional western norms of political activity that are not tethered to the situation on the ground. Thus, the NPRM's proposed narrowing of the types of "political opinion" that might be grounds for asylum must be rejected.

CONCLUSION

For the reasons discussed above, the Departments should decline to adopt the various proposed changes set out in the NPRM.

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[203] *Id*. at 244-45.

[204] *Lagos v. Barr*, 927 F.3d 236, 251 (4th Cir. 2019).

[205] *Hernandez Chacon v. Barr,* 948 F.3d 94, 103 (2nd Cir. 2020) (*citing Castro v. Holder*, 597 F.3d 93, 101 (2d Cir. 2010)). *See generally Castro*, 597 F.3d at 101 (collecting cases).

EXHIBIT 8

DECLARATION OF NAOMI A. IGRA

July 15, 2020

Submitted via Federal eRulemaking Portal

Lauren Alder Reid
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RE: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review - EOIR Docket No. 18-0002; RIN 1125-AA94

To Whom it May Concern:

The Association of Pro Bono Counsel respectfully submits these comments in opposition to the Department of Homeland Security ("DHS") and Department of Justice's ("DOJ") Notice of Proposed Rulemaking and Request for Comment on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, EOIR Docket No. 18-00-2, RIN 1125-AA94, issued June 15, 2020 ("NPRM").

The Association of Pro Bono Counsel (APBCo) is a mission-driven membership organization of more than 260 attorneys and practice group managers who manage and implement pro bono practices in over 130 of the world's largest law firms. APBCo was founded in an effort to provide greater public access to justice through pro bono legal services by (1) promoting and encouraging the development of full-time law firm pro bono counsel, (2) augmenting the professional development of pro bono counsel, and (3) representing the greater law firm pro bono community. As discussed below, APBCo members help recruit volunteers within their firms for pro bono matters, including asylum cases. APBCo members often manage and mentor those pro bono cases, as well.

CHALLENGES TO PRO BONO REPRESENTATION OF ASYLUM SEEKERS

Relevant to this specific proposed regulation, the members of APBCo all participate in placing pro bono clients with volunteer lawyers at their law firms. One area in which U.S. law firms nationally provide thousands of

hours of pro bono assistance is assisting in all aspects of immigration applications, particularly asylum cases. While every part of the NPRM directly affects these clients, there are several provisions that directly impact the ability for pro bono counsel to provide assistance. As explained below, APBCo believes that the proposed rules would have serious, adverse effects on the legal community's ability to provide pro bono counsel to persons seeking asylum, withholding of removal or protection under the Convention Against Torture.

Asylum seekers are entitled to counsel, not at government expense, both in interview before the Asylum Office and in hearings before the Immigration Courts. *See* 8 CFR § 292.5(b) (right to counsel in DHS interviews); 8 U.S.C. § 1362 (right to counsel in removal proceedings). Many asylum applicants rely on pro bono counsel to obtain legal representation, both because they cannot afford paid counsel and cannot obtain counsel from federally-funded legal aid organizations. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504(a)(18), 110 Stat. 1321, 50 (1996) (barring use of Legal Services Corporation funds for representation of undocumented immigrants who have not yet obtained asylum).

Accordingly, pro bono counsel from the private sector have long played a pivotal role in the representation of asylum seekers. The Executive Office for Immigration Review (EOIR), the branch of the Department of Justice that runs the immigration trial courts in the United States, has long espoused the value of having pro bono attorneys present throughout the asylum process:

> "Pro bono representation benefits both the respondent and the court, providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented. A capable pro bono representative can help the respondent navigate court rules and immigration laws and thereby assist the court in understanding the respondent's circumstances and interests in relief, if any is available. Pro bono representation in immigration court thus promotes the effective and efficient administration of justice."[1]

The Immigration Court has made clear that the utilization of pro bono attorneys only helps the administration of justice for respondents, including asylum seekers hoping to present their cases clearly and efficiently to the tribunal.

Several hundred large law firms, including the majority of APBCo's member law firms in the United States, have incorporated immigration work into their pro bono programs. The rate of representation of immigrants has been increasing, and part of that increase in representation has been attributed to vigorous pro bono efforts.[2] Though only a fraction of those law firms maintain billable immigration practices, attorneys at these firms have represented thousands of asylum seekers in partnership with community-based legal services providers.

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[1] U.S. Department of Justice, Executive Office of Immigration Review. "Memorandum: Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services. March 10, 2008.
[2] Ingrid V. Eagly & Steven Shafer. *A National Study of Access to Counsel in Immigration Court.* 164 U. Pa. L. Rev. 17 (2015).

In order for attorneys at most large law firms to participate zealously in asylum representation, many factors must be in place. First, attorneys must receive adequate and up-to-date training on asylum law. The ever-changing nature of immigration law during the most recent administration has reinforced the need for thorough training, which is often provided by the community legal services organizations. Once trained, a pro bono attorney must then be matched with an appropriate asylum matter. This matching process takes many factors into consideration—prior experience of the volunteer, personal circumstances of the client, timing and capacity, complexity of the immigration case, proximity to deadlines and hearing dates, and other collateral factors. Legal services organizations thoroughly vet potential pro bono placements for all of these factors to ensure a smoother pro bono experience for both attorney and client.

Immigration judges have also recognized the value of having pro bono attorneys represent asylum seekers. Recognizing that many pro bono attorneys do not have vast experience in immigration laws and procedures, EOIR has established "pro bono liaison judges" and in some cases entire pro bono committees to help develop policies that are beneficial to pro bono attorneys and clients.[3] "The pro bono liaison judge, together with the court administrator, should meet regularly with local pro bono legal service providers to discuss improving the level and quality of pro bono representation at the court. Such meetings should be used to develop and refine local procedures to encourage pro bono representation, bearing in mind the particular needs and circumstances of each court."[4]

Pro bono attorneys are differentiated from private, paid immigration attorneys in court throughout the court process. The E-28 entry of appearance form contains a field for attorneys to identify themselves as representing their client pro bono.[5] Judges are encouraged to be mindful of the inherent difficulties in the recruiting of pro bono representatives and the burdens pro bono representatives assume for the public good. To facilitate pro bono representation, judges are encouraged to give pro bono representatives priority scheduling at master calendars when requested in recognition of the special staffing and preparation constraints faced by pro bono counsel.[6] Immigration judges are also encouraged to provide flexibility to pro bono attorneys with regard to pre-hearing statements and conferences, telephonic or video conference hearings, access to client files, and the representation of minors.[7]

Given the variations in experience outlined above (along with the need to balance paid work with pro bono work), pro bono attorneys also require more time than most private immigration attorneys to prepare an asylum case for an individual hearing. Once a pro bono attorney is trained and receives the case referral from a legal services organization, the attorney needs time to clear a conflict check, draft an engagement letter, review the case file, review relevant

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[3] *See* U.S. Department of Justice, Executive Office of Immigration Review. "Memorandum: Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services. March 10, 2008.
[4] *Id.*
[5] https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf, p. 2.
[6] *See* U.S. Department of Justice, Executive Office of Immigration Review. "Memorandum: Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services. March 10, 2008.
[7] *See id.*

immigration law, and schedule multiple interviews with the client in order to elicit information—a process that can be challenging and time-consuming. Asylum seekers are by definition traumatized from fleeing persecution, and often do not present fact in a linear fashion, particularly when confronted by a pro bono attorney whom they have never met before.[8]

Pro bono attorneys then require additional time to prepare the asylum case fully for presentation to the immigration court. This preparation time can stretch for months, sometimes even years. Attorneys need adequate time to craft detailed client declarations, witness statements (many times from witnesses who do not have access to the technology on which we rely for quick communications), and legal briefs. They need to research immigration law, gather secondary sources for country conditions, and engage experts to opine on the political, social, and cultural structures that lead to persecution. Experts may also be necessary to evaluate clients for psychological trauma stemming from the persecution that is the basis of their asylum claims.[9]

This entire process is often undertaken with clients, witnesses and resources who often do not speak the same language as the pro bono attorney, requiring additional time to secure interpretation and translation services. The language barrier can lead to a longer time necessary to build rapport with a client, which is essential toward eliciting their testimony for a declaration and the legal brief. Cultural barriers and prior trauma can also lengthen the time necessary to gather important information to present a case fully and ethically to the Court. Then, preparing clients and witnesses for trial while utilizing interpreters often adds more time to the preparation of a case.[10]

Immigration representation, and asylum representation in particular, remain a major focus of the pro bono programs of the majority of the law firms whose pro bono counsel are members of APBCo. In order to maintain such a broad representation of vulnerable asylum seekers and their families, processes must remain tailored to facilitate pro bono representation.

I. SUMMARY OF COMMENTS

The NPRM issued by DHS and DOJ would amend numerous provisions of the existing regulations governing the standards and procedures for adjudicating and processing asylum claims, withholding of removal, and protection under the Convention Against Torture (CAT) regulations. The NPRM has a sweeping scope, covering, among other things, credible fear determinations and the processing of applications for relief under US refugee law.

DHS and DOJ claim that the objective of the proposed changes to existing regulations is to save the resources needed to process baseless claims and in many cases the NPRM claims simply to

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[8] https://immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-10/NIJC%20Asylum%20Manual_final%2007%202018.pdf, p. 5-8.
[9] *See id.*, p. 28-36.
[10] *See* https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf

be clarifying existing standards. But it is clear that the primary objective is, in fact, to cut back dramatically on the number of refugees that can bring claims for asylum, withholding of removal and protection under the CAT and the ability of a wide range of refugees to obtain relief under US law. DHS/DOJ propose to make fundamental changes in who will receive protection under U.S. asylum law and how the United States will treat refugees, while hiding behind the pretext of saving adjudicatory resources and weeding out "baseless" claims. In doing so, DHS/DOJ are also limiting the ability of pro bono counsel to effectively assist such refugees in large part by significantly heightening the standards imposed on the credible fear interview and the submission of the I-589. Pro bono counsel is rarely present or available at the credible fear stage and in many instances even the I-589 has been submitted prior to a refugee obtaining pro bono counsel. These problems are exacerbated further by the NPRM rendering bond for refugees almost impossible, thus further limiting their access to pro bono counsel, many of whom work in locations far from the most populated detention centers.

II. THE PROPOSED PROCEDURAL CHANGES ARE INAPPROPRIATE AND WOULD HAVE A DRAMATIC EFFECT ON THE ABILITY OF PRO BONO COUNSEL TO ASSIST ASYLUM SEEKERS AND OTHER REFUGEES

A. Waiver of PSG Claims

The NPRM proposes to force asylum-seekers to define every potential particular social groups ("PSGs") in their asylum applications. Any claims based on PSGs not advanced would be waived, along with any motions to reopen or reconsider based on membership in PSGs that could have been brought at the prior hearing.[11]

This provision is both unjust and contrary to existing law in light of the NPRM's proposals on pretermitting asylum claims. (Pretermitting of claims is discussed below.) The NPRM implies that it is only codifying existing law, including *Matter of W–Y–C– & H–O–B–*, 27 I&N Dec. 189, 190–91 (BIA 2018). Yet that decision permitted applicants to raise PSGs during their *individual calendar hearings – i.e.*, at trial - even if they had failed to do so when their asylum applications had been filed. Under the NPRM, there would be no individual hearing in many cases. Its use of the phrase "as part of the asylum application *or otherwise in the record*" appears to be a meaningless attempt to suggest process that it does not provide. This rule will effectively deny asylum seekers the opportunity to fully explain the basis on which they fear persecution and instead will empower denial of legitimate asylum claims merely because a non-lawyer (potentially non-English-speaking) refugee without any understanding of American cultural context failed to include specific phrasing.

The proposed rule makes no efforts to carve out exceptions for pro se applicants and explicitly mandates that the waiver apply, even where the asylum seeker received ineffective assistance of counsel. This means that an applicant who receives grossly negligent representation would nonetheless have her claims waived, which conflicts with existing precedent, including *Matter of Lozada*, 19 I.&N. Dec. 637 (BIA 1988).

[11] NPRM, 85 F.R. at 36279

The lack of exception to this broad waiver is even more concerning because of the ability to pretermit claims. Ineffective assistance is particularly likely in pretermitted claims, given ICE's current practice of severely restricting attorneys' access to their clients.

For all of the reasons explained above, these proposed restrictions also hamper the ability of pro bono counsel to effectively assist these refugees. Because the process by which pro bono counsel is assigned, and the amount of time typically involved in obtaining pro bono counsel, it is common for a refugee to submit an I-589 application without the assistance of pro bono counsel. There are also many situations where by the time pro bono counsel is available, there is a rush to meet the deadline for filing the I-589. Both of these potential situations lead to the possibility that the I-589 will not include all possible bases upon which to seek asylum or other relief. Ascertaining all relevant details to determine on what grounds a refugee may have a claim is a time-consuming and painstaking process. It is exacerbated by language and cultural barriers, as well as by the fact that the refugees are frequently victims of trauma that is difficult to talk about with strangers. All of these challenges become insurmountable impediments when the current flexibility in adding or amending PSGs is removed from the process as the NPRM proposes.

B. Pretermitting Asylum Applications

The proposed rules permit judges to pretermit asylum applications without a hearing, denying applicants their longstanding right to have their day in court. The NPRM expressly allows pretermission if the asylum seeker "has not established a prima facie claim for relief or protection" based on the applicant's I-589 and supporting evidence.[12] Refugees seeking protection under US immigration laws should have their applications decided on the merits, not technicalities.

Under the proposed regulation, an immigration judge may pretermit an asylum application in two circumstances: (1) following an oral or written motion by DHS, and (2) *sua sponte* upon the immigration judge's own authority.[13] Asylum applicants whose applications are pretermitted *sua sponte* could be given as little as ten days' notice of the immigration judge's order.[14]

The proposed rule attempts to justify pretermission of asylum applications by equating I-589 applications to "other immigration applications" subject to pretermission and motions to reopen asylum applications.[15] This is a flawed comparison. Initial asylum applications are unique and have long been considered so under immigration law. An I-589 application is markedly different from a motion to reopen. In a motion to reopen or suspension of deportation case, the applicant

[12] NPRM, 85 F.R. at 36302
[13] NPRM, 85 F.R. at 36277
[14] *Id.*
[15] *Id.*

has significantly more time to collect evidence, meet with experts, and obtain counsel.[16] This is not the case with initial asylum application filings.

Additionally, pretermitting applications on the I-589 ignores the potential to amend the I-589 or add information as it becomes available, including expert and psychological reports, which may not be obtained by the time the individual has to make the initial filing to meet the one-year deadline.

Finally, pretermission fails to take into consideration cultural differences that could severely impact the success of an application, especially when the applicant does not have access to counsel. For example, refugees may not use the correct English phrase to describe their persecution or may not be as explicit as an asylum officer or immigration judge wants. Just because a refugee doesn't come up with the exact phraseology expected by the asylum officer or immigration judge, doesn't change the actual lived experience of persecution for that person. Consequently, it should not deny a refugee the ability to seek the protections of asylum merely because of wording.

Under the current system, pro bono counsel has the time and resources to assist the refugee client in putting forward the best, most-detailed account of his or her experience in order to assist the court in determining whether the standards for relief are met. Allowing pretermission based solely on the I-589, deprives an applicant of the assistance of pro bono counsel simply by virtue of the facts that there are many instances when pro bono counsel is not engaged when the I-589 is filed or pro bono counsel must rush to file the I-589. Under the current system, the applicant may amend or expand her application after filing the initial I-589, thus providing pro bono counsel the time to fully assist her.

The NPRM purports to level this playing field by allowing the refugee an opportunity to respond. The refugee "would be able to address any inconsistencies or legal weaknesses in the asylum application in the response to the judge's notice of possible pretermission."[17] But if the refugee has not had sufficient time to obtain pro bono counsel, it is highly unlikely that the refugee will understand his rights at this point, much less have the necessary expertise and resources to exercise such rights. The NPRM exacerbates this situation further by assuming that a failure to request review or respond essentially constitutes waiver.

C. Change to Credible Fear

The NPRM amends the regulations regarding the standard of proof for credible fear proceedings. While that standard previously was a finding that there was a "significant possibility" that a refugee could establish eligibility for relief, the NPRM proposes raising that to "reasonably possibility." DHS has interpreted the "significant possibility" standard as requiring that a

[16] *See, e.g., Karageorgious v. Ashcroft*, 374 F.3d 152 (2d Cir. 2004).
[17] NPRM, 85 F.R. at 36277

refugee "demonstrate a substantial and realistic possibility of succeeding" in immigration court which is a lower standard than required to show "reasonable possibility."
The NPRM also proposes that asylum officers, rather than the court, determine whether the refugee is subject to one or more bars to asylum. The proposed rule purports to support this change in order to "eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate the waste of adjudicatory resources currently expended in vain."[18] Instead, the proposed change works to deprive refugees from full access to the courts and their determinations of these issues.

Because of the timing of credible fear interviews and their locations, it is highly unlikely that a refugee will have access to pro bono counsel at the time that she undergoes the interview or at the time that she receives the determination by the asylum officer as to whether she has sufficiently fulfilled the requirements of credible fear. By imposing higher bars earlier in the process, the NPRM effectively works to thin the pool of refugees without giving them a chance to obtain the assistance of pro bono counsel to properly prove their claims in court.

The sweeping changes in U.S. asylum law proposed in the NPRM are designed to cut back on the legal protection that the United States has guaranteed for refugees fleeing violence in their home countries. They cause a particular impediment to obtaining pro bono counsel to assist with these complicated and life changing matters. They frustrate the stated goals of the Executive Office of Immigration Review – to increase and encourage the number of pro bono attorneys in Immigration Court to help with the efficient administration of due process. The proposed rule changes are wrong as a matter of law and policy, and APBCo urges DHS/DOJ to withdraw them in full.

Sincerely,

Steven H. Schulman
Co-President

[18] NPRM, 85 F.R. at 36272

EXHIBIT 9

DECLARATION OF NAOMI A. IGRA

State of California
Office of the Attorney General
XAVIER BECERRA
ATTORNEY GENERAL
July 15, 2020

Via Federal eRulemaking Portal
Chad Wolf, Acting Secretary
Department of Homeland Security
Hon. William Barr
Attorney General
Assistant Director Lauren Alder Reid
Office of Policy
Executive Office for Immigration Review
Department of Justice
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Falls Church, VA 22041

RE: Comments on *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (Proposed June 15, 2020), RIN: 1125–AA94

Dear Acting Secretary Wolf, Attorney General Barr and Assistant Director Reid:

We, the Attorneys General of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia (the States), write to urge the U.S. Department of Homeland Security (DHS) and U.S. Department of Justice (US DOJ) (collectively, the Departments) to withdraw the Joint Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (proposed June 15, 2020), RIN: 1125–AA94 (Proposed Rule or the Rule). The Proposed Rule introduces numerous sweeping changes to the asylum system that effectively nullify the meaningful right to apply for humanitarian protection in the United States. Consequently, it inflicts serious harm on asylum seekers and the States that welcome them. The Proposed Rule further undermines the Constitutional promise of due process and runs counter to the asylum protections provided for by Congress in the Immigration and Nationality Act.

The States have a significant interest in the Proposed Rule because every year, they welcome thousands of potential asylees who have suffered persecution in their home

countries.[1] In 2015-2017, the most recent years for which this data is available, the States signatory to this letter constituted six of the top ten states of residence for individuals whose affirmative asylum applications were granted.[2] Combined, these six States were home to 68 percent of the total number of individuals granted affirmative asylum applications in the United States.[3] In fiscal year (FY) 2019, immigration courts in the States issued approximately 42,700 asylum decisions.[4] There is a backlog of over 180,000 immigration cases pending in California immigration courts alone, many of which are asylum cases.[5]

The Proposed Rule will have an immeasurable impact on thousands of the States' current and future asylum seeking residents. By severely restricting asylum eligibility and eliminating several procedural protections, the Proposed Rule will result in the deportation of bona fide asylum seekers who are certain to face persecution or torture in their home countries. These consequences will fall hardest on survivors of trauma, and victims of gender, gang, and homophobic, violence. Because of the increased risk of deportation attendant with applying for asylum under the Rule, many otherwise eligible asylum seekers will be relegated to the shadows where they are more likely to face exploitation or other abuses. The Departments are leaving asylum seekers—many of whom journeyed thousands of miles just to reach safety—without any safe options.

By harming the States' current and future residents, the Proposed Rule also harms the States themselves. Immigrants are integral to the States' social fabric and economic success. These contributions have been especially evident during the COVID-19 crisis, where immigrants have served in essential positions that keep the States' communities running. In recognition of the contributions that asylum seekers and asylees add to the States, the States invest significant resources to provide education, health care, and other services, enabling them to thrive in the States' communities. The Proposed Rule undermines these investments, while burdening State programs that serve these populations. The Proposed Rule also hinders the States' ability to enforce their own labor and civil rights laws, by pushing putative asylees into the underground economy.

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[1] Dep't of Homeland Sec., *2017 Yearbook of Immigration Statistics* 43 tbl.16 (Apr. 1, 2019), https://www.dhs.gov/immigration-statistics/yearbook/2017/table16; Nadwa Mossad, Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* (Mar. 2019), https://tinyurl.com/MossadReport2019.
[2] Mossad, *supra* note 1, at tbl. 13.
[3] *Id.*
[4] TRAC Immigration, Asylum Decisions, https://trac.syr.edu/phptools/immigration/asylum/.
[5] TRAC Immigration, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.

Finally, the Proposed Rule is unlawful. Significantly, the Proposed Rule would result in systemic due process violations. The Rule would also violate the Administrative Procedure Act because the Departments failed to engage in reasoned decision making and several aspects of the Proposed Rule are contrary to the text of the Immigration and Nationality Act. For these reasons, the States urge the Departments to withdraw the Proposed Rule. [6]

I. THE PROPOSED RULE UPENDS THE CURRENT ASYLUM SYSTEM AND HARMS ASYLUM SEEKERS

Giving asylum seekers a safe haven from persecution is an essential value of the United States. The purpose of the Refugee Act of 1980, which established the present asylum system, was to codify "one of the oldest themes in America's history—welcoming homeless refugees to our shores." S. Rep. No. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141. The Proposed Rule introduces a litany of changes to asylum eligibility standards and the asylum process. While the Rule changes a variety of aspects of the asylum system, all of the changes share a common theme: making asylum extremely difficult, if not impossible, for many applicants to obtain. The following is a non-exhaustive list of the Proposed Rule's changes to the asylum process:

Heightens eligibility standards. The Proposed Rule heightens substantive and procedural asylum eligibility standards in at least the following ways: (1) effectively bars claims based upon gender-based violence, gang-violence, or other violence at the hands of private actors, regardless of whether the government is unable or unwilling to that violence, *see* 85 Fed. Reg. 36,279, 36,281; (2) heightens the severity of harm that an applicant must have suffered in the past to be eligible, *id.* at 36,280; (3) creates a presumption that an applicant can internally relocate to avoid persecution, such that more applicants will be denied on that basis, *id.* at 36,282; (4) broadens the "firm resettlement" mandatory bar to asylum so that it will apply to any applicant who passed through any country with a refugee processing system, *id.* at 36,286; and (5) makes it more difficult for applicants to obtain protection under the Convention Against Torture (CAT), by specifying that applicants must prove their torturer was a public official acting under the "color of law," *id.* at 36,287.

Vastly increases the frequency of discretionary denials. The Proposed Rule enumerates three "significantly" adverse discretionary factors: (1) unlawful entry; (2) the applicant's failure to apply for humanitarian protection in at least one country that was

[6] The States also note that a 30-day comment period for a proposed rule of this magnitude is unreasonable. As set forth in this letter, the Proposed Rule contains numerous provisions that fundamentally reshape the asylum process. Thirty days is simply insufficient for commenters to fully account for the potential effects of the Proposed Rule.

transited through en route to the United States; and (3) the use of fraudulent documents. *See* 85 Fed. Reg. 36,283. The Proposed Rule further codifies nine negative discretionary factors that must result in denial, unless the applicant can establish "extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the [applicant] demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the [applicant]." *Id.* at 36,293-94. These nine factors include: (1) 14-days of presence in any country that has an asylum or refugee processing system; (2) transiting through more than one country en route to the United States; (3) any criminal conviction, regardless of its severity; (4) one year or more of unlawful presence prior to the filing of the application; (5) failure to file taxes; (6) having two or more asylum applications denied for any reason; (7) having withdrawn a prior asylum application; (8) failure to attend an asylum interview; and (9) failure to file a motion to reopen an asylum case based on changed country conditions within one-year of the conditions changing. *Id.* at 36,293.

Creates a riskier and less fair asylum process. The Proposed Rule would allow immigration judges to pretermit cases and order deportation if the asylum application form does not illustrate prima facie eligibility. 85 Fed. Reg. 36,277. Thus, under the Proposed Rule, judges can terminate cases and order deportation without allowing an opportunity for the applicant to testify. The Rule then limits applicants' ability to file motions to reopen based on new grounds for asylum that were not articulated on the application, even when such motions are based on ineffective assistance of counsel. *See id.* at 36,279, 36,291. The Proposed Rule also expands upon when the Federal Government can label an application "frivolous," which will result in the applicant being permanently banned from receiving any immigration benefit. *Id.* at 36,273.

Makes the credible fear process more onerous. The Proposed Rule makes a host of changes that make it harder for applicants to pass the credible fear screening, including: (1) limiting the circuit law that immigration judges can consider when reviewing negative credible fear findings, so that judges need not consider the law most beneficial to the applicant; (2) raising the standard for the screening of CAT claims; (3) applying mandatory bars and considering whether internal relocation is reasonable; and (4) requiring applicants to affirmatively state their intent to appeal a negative credible fear finding. 85 Fed. Reg. 36,265-72. Additionally, the Proposed Rule would place applicants who received a positive credible fear screening into streamlined "asylum only" proceedings. *Id.* at 36,265-67.

Undermines confidentiality protections. The Proposed Rule "clarifies" that the confidential information contained in an asylum application can be disclosed "in certain circumstances that directly relate to the integrity of immigration proceedings, including situations in which there is suspected fraud or improper duplication of applications or claim." 85 Fed. Reg. 36,288.

When taken together, these provisions drastically reform the asylum system to an unrecognizable process in which only a narrow few can attain protection. The harms that the Proposed Rule's restrictive and punitive measures will inflict on asylum seekers are numerous and incalculable. The States highlight just a few of the Rule's cruel effects: (1) by making asylum out of reach, especially for particularly vulnerable applicants, the Proposed Rule will deliver asylum seekers into the hands of their persecutors; (2) the Proposed Rule encourages applicants to pursue asylum in dangerous countries that are not equipped to handle their claims; (3) the Proposed Rule effectively forces applicants to rely on withholding of removal and protection under the CAT, which are more difficult to receive, and encompass fewer benefits than asylum; and (4) the Proposed Rule discourages applicants from seeking asylum, resulting in more asylum seekers embarking on dangerous crossings and living in the shadows as undocumented immigrants.

A. Asylum Seekers Will Be Delivered into the Hands of Their Persecutors

Asylum seekers hail from dangerous and politically unstable countries all over the world. Such countries often include those with a high prevalence of organized criminal groups, like Honduras, El Salvador, and Guatemala, (collectively, the Northern Triangle), and Mexico; conflict-torn African countries like the Democratic Republic of Congo; and countries with governments intolerant of sexual or religious minorities, such as Iran. Not only does the Proposed Rule make the asylum process more difficult for most of these asylum seekers, but it will pose an even greater barrier to protection for those who may need it the most—such as women, unaccompanied children, and Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) persons. As a result of these changes, many bona fide asylum seekers will be deported and "deliver[ed] into the hands of their persecutors." *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011).

The States first discuss the Rule's outsized impact on these groups, and then describe the persecution that many will face if they are deported as a result of the Proposed Rule.

i. The Proposed Rule Will Preclude Women, Unaccompanied Children, and LGBTQ Persons From Protection and Result in Further Persecution

As set forth below, several of the Proposed Rule's changes to the asylum process will make it more difficult for women, unaccompanied children, and LGBTQ persons to obtain protection.

Nexus. The Proposed Rule reinterprets the nexus element in an extremely restrictive manner, so that women, LGBTQ persons, and unaccompanied children, are more likely to be denied protection and deported. To be eligible for asylum, an applicant

must establish that the harm they experienced, or would experience in the future, has a "nexus" to a protected ground. Statutory protected grounds include race, nationality, religion, political opinion, and membership in a particular social group.[7] 8 U.S.C. § 1101(a)(42). Courts have routinely recognized that gender-based violence, gang violence, and acts such as hate crimes committed by non-governmental actors, have a nexus to the protected grounds of membership in a particular social group and/or political opinion. For example, in *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014), the Ninth Circuit held that "persons taking concrete steps to oppose gang membership and gang authority" may be a particular social group, such that persecution due to gang opposition could be grounds for asylum. The Fourth Circuit has held that an applicant's opposition to a gang was a political opinion. *Alvarez Lagos v. Barr*, 927 F.3d 236, 250-51 (4th Cir. 2019). Recently, the Second Circuit found that opposition to male-dominated social norms could be a political opinion. *Hernandez-Chacon v. Barr*, 948 F.3d 94, 105 (2d Cir. 2020). The Ninth Circuit has also found that "all women in Guatemala" could be a cognizable particular social group. *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010); *see also Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (suggesting that "young girls in the Benadiri clan" and "Somalian females" could constitute particular social groups); *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (holding that young Albanian women living alone are a particular social group). And for many years, the courts and the US DOJ's Board of Immigration Appeals (BIA) have recognized female genital mutilation as persecution on the basis of particular social groups defined by gender and societal practices. *Matter of Kasinga*, 21 I&N Dec. 357, 368 (BIA 1996) ("young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice" is a cognizable particular social group).

The Proposed Rule reinterprets the terms "political opinion" and "particular social group" to foreclose upon claims involving "interpersonal disputes," "private criminal acts," or opposition to "non-state organizations." *See* 85 Fed. Reg. 36,279, 36,281. This interpretation is likely to block many applicants who suffered persecution at the hands of private actors, such as victims of domestic violence, hate crimes, gender-based violence, and violence related to gangs. In fact, the Rule says as much, explicitly stating that despite circuit court recognition, gender related claims and claims involving opposition to a gang or other non-governmental group, including terrorist and guerrilla groups, have no

[7] To be cognizable, a particular social group must be (1) based on a common, immutable characteristic; (2) defined with particularity, meaning that it is defined by characteristics that "provide a clear benchmark for determining who falls within the group"; and (3) socially distinct, meaning that the group is perceived by the society in question as a group. *Matter of W-G-R-*, 26 I&N Dec. 208, 212-13 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014).

nexus to a protected ground. Such a narrow construction of these elements means many applicants—who will undoubtedly suffer extreme forms of harm if they are deported—will be denied protection in the United States.

The Meaning of Persecution. The Proposed Rule strips the meaning of persecution, making common forms of harm suffered by members of these groups not severe enough to be considered persecution. Specifically, the Rule provides that the existence of a persecutory law is not sufficient to establish past harm or a reasonable fear of future harm, unless there is credible evidence that the law has been or would be applied to an applicant personally. 85 Fed. Reg. 36,280. Thus, a law criminalizing same-sex relationships may no longer be the basis for asylum, unless the applicant could establish that they personally would be charged with a crime. Additionally, the Proposed Rule states that death threats alone are not sufficiently severe to constitute persecution.[8] Death threats are a common basis for asylum.[9]

Unlawful Presence Discretionary Factor. Under the Proposed Rule applicants who apply for asylum after one year of unlawful presence in the United States will ordinarily be denied on discretionary grounds, which will harm victims suffering from post-traumatic stress disorder (PTSD). It is well-recognized that PTSD can hinder an applicant's ability to file a timely application. *See Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004) ("During the April 27, 2000 hearing, the [immigration judge (IJ)] excused Mukamusoni's late filing of her asylum application because the IJ found her to be suffering from PTSD during the year that she was in the United States, and that this constituted 'extraordinary circumstances' justifying the late filing."). PTSD is highly prevalent among victims of domestic violence, childhood abuse, and hate crimes.[10] This discretionary factor will be yet another obstacle to these applicants' ability to receive relief.

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[8] U.S. Citizenship & Immigration Servs., Refugee, Asylum, and International Operations Directorate, *Definition of Persecution and Eligibility Based on Past Persecution* at 24, https://tinyurl.com/USCISPersection ("receipt of threats over a prolonged period of time, causing the applicant to live in a state of constant fear" and "imminent threat of death" can amount to persecution).

[9] *Gomez-Saballos v. I.N.S.*, 79 F.3d 912, 913 (9th Cir. 1996); Molly Hennessy-Fiske, *For transgender migrants fleeing death threats, asylum in the U.S. is a crapshoot*, L.A. TIMES (Oct. 19, 2019), https://tinyurl.com/LATimesHennessyFiske.

[10] Guila Ferrari & Gene Feder et al., *Psychological advocacy towards healing (PATH): A randomized controlled trial of a psychological intervention in a domestic violence service setting*, PLOS ONE (2018), https://tinyurl.com/psychdv; International Society for Traumatic Stress Studies, *Global Perspectives on the Trauma of Hate-Based Violence*, https://tinyurl.com/traumaviolence.

Third Country Transit. The Proposed Rule, through its numerous discretionary factors and its expansion of the firm resettlement bar, dooms asylum applicants who transited through a third country but did not apply for relief there. As set forth in the States' prior comment letters regarding related rules, this will have a particularly negative impact on women, unaccompanied children, and LGBTQ persons, for whom applying in a third country may not be feasible or safe.[11]

Discretionary factors' application to children. The Proposed Rule applies its numerous discretionary factors to unaccompanied children making them more likely to be denied asylum. Congress expressly recognized the vulnerabilities of unaccompanied children and their unique need for protection in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. Pub. L. No. 110-457, 122 Stat. 5044 (TVPRA). Significantly, under the TVPRA, children are entitled to present their claims during non-adversarial interviews at the U.S. Citizenship and Immigration Services (USCIS) Asylum Office in the first instance instead of in immigration court. *Id.* at § 235(d)(7)(C), 122 Stat. at 5081. USCIS officers "are trained to conduct non-adversarial interviews and to apply child-sensitive and trauma-informed interview techniques," which can facilitate a child's testimony. *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 372 (D. Md. 2019). With the benefit of non-adversarial interviews, many unaccompanied children have been granted asylum.[12] Indeed, in FY 2017, 5,361 children under the age of twenty were granted affirmative asylum as principal applicants, comprising approximately 44 percent of all principal applicants granted affirmative asylum.[13]

The Proposed Rule will subject many unaccompanied children to discretionary denials of asylum for minute—but common—issues, like failing to file an application within one-year or entering unlawfully, thereby rendering the TVPRA's protections irrelevant. With asylum off the table, these unaccompanied children will be forced to present claims for withholding of removal and protection under the CAT, which can only

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[11] Attachment 2, Administrative Record for *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (proposed July 16, 2019) at AR1205. Administrative Record for *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994 (proposed Nov. 19, 2019) at USCIS AR79.

[12] U.S. Citizenship & Immigration Servs., *RAIO Combined Training Course* 56 (Nov. 30, 2015), https://www.aila.org/File/Related/18022100_Part3.pdf (instructing officers on the possible types of cognizable claims that children have); Mossad, *supra* note 1, at 7 ("In 2017, the three leading countries of nationality of persons granted either affirmative or defensive asylum were China (21 percent), El Salvador (13 percent), and Guatemala (11 percent) (Table 7). Nationals of these countries accounted for 45 percent of all persons granted asylum.").

[13] Dep't of Homeland Sec., *supra* note 1, at tbl.18,

be granted by an immigration court. 8 C.F.R. § 208.16. In these adversarial proceedings, unaccompanied children are subject to cross-examination about the worst moments of their lives, without guaranteed legal counsel. *C.J.L.G. v. Barr*, 923 F.3d 622, 629, n.7 (9th Cir. 2019) (discussing the Court's determination to not rule on whether minors have a constitutional right to appointed counsel). As Congress recognized in enacting the TVPRA, immigration court is not the proper venue for children to present their claims for humanitarian protection. *See J.O.P.*, 409 F. Supp. 3d at 372 (citing 8 U.S.C. §§ 1158, 1232(d)).

Confidentiality. The Proposed Rule modifies the Departments' confidentiality requirements. Asylum applications often involve sensitive and traumatic topics, particularly for children, and victims of gender-based and homophobic violence. Relaxing confidentiality protections will make applicants less willing to fully testify about their experiences, which will be detrimental to their claims.

ii. Women, Unaccompanied Children, and LGBTQ Asylum Seekers Are Likely to Face Persecution in Their Home Countries

As set forth above, the Proposed Rule makes it particularly difficult for women, unaccompanied children, and LGBTQ persons to obtain protection, and as a result, many members of these groups will be deported, only to face harrowing forms of persecution in their home countries.[14]

Gender-based violence. Women around the world live in repressive and perilous conditions. For example, "[f]emale genital mutilation has been documented in 30 countries, mainly in Africa, as well as in the Middle East and Asia."[15] In Afghanistan, women experience honor killings, violent attacks as they try to attend school or work, and forced marriages.[16] Per Amnesty International, "87 [percent] of Afghan women are illiterate, while 70-80 [percent] face forced marriage, many before the age of 16." And in the Democratic Republic of Congo, "[a]rmed militias and members of state forces are notorious for brutal gang rapes as well as sexual and human trafficking."[17]

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[14] For purposes of this letter, the States mostly focus on the dangers that asylum seekers face in the Northern Triangle and Mexico, as asylum seekers are most commonly fleeing these areas, but the States also note particularly egregious forms of persecution worldwide.
[15] World Health Org., *Female genital mutilation (FGM)*, https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/.
[16] Amnesty Int'l, *The World's Worst Places To Be A Woman*, https://www.amnestyusa.org/the-worlds-worst-places-to-be-a-woman/.
[17] *Id*.

Mexico and the Northern Triangle countries, the countries from which most asylum seekers hail, also suffer from extremely high levels of gender-based violence.[18] El Salvador ranks first globally for rates of female homicide, with Guatemala ranking third, and Honduras seventh.[19] According to some reports, a woman is murdered every 16 hours in Honduras, every 18 hours in El Salvador, and two women are killed each day in Guatemala.[20] According to a report in 2018, Mexico ranks sixth for gender crimes, globally.[21]

Gangs intentionally target women for violence and sexual abuse. Gangs are known to force girls and women to become their "girlfriends" and subject them to gang rape.[22] In a report documenting the stories of asylum seekers from the Northern Triangle and Mexico, "[w]omen described life-threatening and degrading forms of domestic violence, including repeated rapes, sexual assaults, and violent physical abuse, such as beatings with baseball bats and other weapons. Women repeatedly emphasized that the police could not protect them from harm."[23] It is for these, among other reasons, that the U.N. High Commissioner on Refugees (UNHCR) finds that women and girls in the Northern Triangle countries "may be in need of international refugee protection on the basis of their membership of a particular social group, and/or their (imputed) political opinion."[24] *See also Hernandez-Chacon*, 948 F.3d at 103.

Moreover, even when government actors are not the explicit perpetrators of gender-based violence, governments are often unable or unwilling to prevent violence

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[18] Mossad, *supra* note 1, at 7.
[19] UNHCR, *Women on the RUN: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* 2 (Oct. 2015), https://www.unhcr.org/5630f24c6.html.
[20] Kids in Need of Defense (KIND), *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet* 2 (Apr. 2018), https://tinyurl.com/KIND-SGBV.
[21] María Encarnación López, London School of Economics, *Femicide in Ciudad Juárez is enabled by the regulation of gender, justice, and production in Mexico* (Feb. 15, 2018) https://tinyurl.com/MexicoGenderViolence; Kate Linthicum, *Why Mexico is giving out half a million rape whistles to female subway riders*, L.A. Times (Oct. 23, 2016), https://tinyurl.com/Linthicum-LATimes.
[22] *Women on the RUN*, *supra* note 19, at 16.
[23] *Id*. at 4.
[24] UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras* 56 (July 2016), https://www.refworld.org/docid/579767434.html; UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* 38 (Mar. 2016), https://www.refworld.org/docid/56e706e94.html; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of asylum-seekers from Guatemala* 48-49 (Jan. 2018), https://www.refworld.org/docid/5a5e03e96.html.

perpetrated by private actors such as gangs or domestic abusers.[25] *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 128–30 (D.D.C. 2018); 8 U.SC. § 1101(a)(42). Despite these conditions, in a sweeping statement, the Proposed Rule disregards all claims based on gender.

Violence Against Unaccompanied Children. Unaccompanied children predominantly migrate from the Northern Triangle to escape severe forms of violence at the hands of gangs, as well as domestic and sexual abuse.[26] In a study of 180-asylum seeking children, 89 percent of whom fled the Northern Triangle, the organization Physicians for Human Rights found that children suffered widespread abuses in their home countries: 78 percent survived direct physical violence; 71 percent suffered threats of violence or death; 59 had witnessed acts of violence; and 18 percent had been sexually abused.[27]

It is well documented that children face severe forms of gang violence and threats in the Northern Triangle. In fact, in the Physicians for Human Rights study, 60 percent of children suffered gang-related violence.[28] In all three Northern Triangle countries, "children [are] targeted for recruitment, abuse and even murder."[29] Gangs target children when they are as young as twelve years old.[30] Due to the upsurge in gang violence since the early 2010's, El Salvador has the highest rate of homicide among children and adolescents in the world, with homicide as the leading cause of death among adolescent boys in the country.[31] Between the years of 2008 and 2016, approximately one child was murdered each day in Honduras.[32] Moreover, almost half of Honduran children living in

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[25] *See* Molly O'Toole, *Judge overturns Trump policy limiting asylum claims by victims of gangs and domestic violence*, LA TIMES (Dec. 19, 2018) https://tinyurl.com/OTooleGrace.
[26] Mossad, *supra* note 1.
[27] Physicians for Human Rights, *"There Is No One Here to Protect You" Trauma Among Children Fleeing Violence in Central America* (June 10, 2019), https://tinyurl.com/PhysiciansforHumanRightsNTC-1.
[28] *Id.*
[29] UNICEF, *Children returned to Central America and Mexico at heightened risk of violence, stigma and deprivation* (Aug. 15, 2018), https://tinyurl.com/UNICEFNorthernTriangle.
[30] Ion Grillo, *Childhood Stolen by street gangs*, UNHCR (Dec. 8, 2016), https://tinyurl.com/ChildhoodStolen.
[31] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* 35 (March 2016), https://www.refworld.org/docid/56e706e94.html.
[32] UNICEF, *supra* note 29.

neighborhoods with criminal gangs do not have access to education.[33] In Guatemala, too, children are targets of recruitment by criminal gangs,[34] and 942 children were murdered in 2017 alone.[35]

While the Proposed Rule discounts the gang violence experienced by unaccompanied children as non-political, there is voluminous evidence of the political power that organized criminal groups hold in some parts of the Northern Triangle, where they often control basic governmental functions. One report details how in areas it controls, MS-13 will "act as an effective arbiter in domestic or neighborly disputes; participate directly in community associations or non-governmental organizations; provide votes (or impede them) in elections as well as other services for local political actors; and open the door to economic opportunity."[36] In a recent example of their quasi-governmental role, in the wake of COVID-19, Salvadoran gangs enforced the national curfew, and coordinated across the country to establish schedules for stores to open residents to obtain food.[37] Opposition to these gangs is more than mere fear of private criminal acts—in many case, it is political in nature.

There are also startling levels of domestic and sexual abuse in the Northern Triangle. The Physicians for Human Rights' study found that 47 percent of child asylum seekers suffered violence perpetrated by a family member.[38] In Guatemala, child sexual exploitation and sex tourism remain a significant problem.[39] In Honduras, child abuse, including the commercial sexual exploitation of children, remains a serious problem and Honduras is a destination for child sex tourism.[40] Remarkably, Honduras does not have a

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[33] Norwegian Refugee Council, *Violence Has Pushed Thousands of Children in Honduras and El Salvador Out of School*, (May 16, 2019), https://tinyurl.com/NorwegianRefugeeCouncil.
[34] United Nations Human Rights, Office of the High Comm'r, *Committee on the Rights of the Child examines report of Guatemala* (Jan. 17, 2018), https://tinyurl.com/UNHR-Guatemala-Children.
[35] UNICEF, *supra* note 29.
[36] InSight Crime, *MS13 in the Americas* 49 (Feb. 2018), https://tinyurl.com/InSightCrime.
[37] The Armed Conflict Location & Event Data Project, *Central America and COVID-19: The Pandemic's Impact on Gang Violence*, https://tinyurl.com/ACLEDData.
[38] *Id.*
[39] U.S. Dep't of State, *Guatemala 2019 Human Rights Report* 17-18 (Mar. 2020) https://tinyurl.com/Guate2019Rep.
[40] U.S. Dep't of State, *Honduras 2019 Human Rights Report* 17 (Mar. 2020) https://tinyurl.com/Hond2019Rep.

statutory rape law.[41] In all three Northern Tringle countries, girls are frequently kidnapped and victimized by repeated gang rape.[42]

Under the Rule, despite the distressing violence and abuse unaccompanied children suffer, their claims are more likely to be denied as involving "private criminal acts," or because of the presence of discretionary factors like unlawful entry.

Violence Against LGBTQ Persons. LGBTQ persons are subject to discrimination and persecution in many parts of the world. "There are still more than 80 countries with sodomy laws, and punishment can include flogging, imprisonment, and in about a dozen jurisdictions, the death penalty."[43] As noted above, troublingly, under the Proposed Rule, the existence of such laws in an applicant's home country would be insufficient for them to obtain asylum.

LGBTQ migrants face special dangers in the Northern Triangle and Mexico, where homophobic and transphobic violence is widespread. In El Salvador, organizations reported violence and discrimination against LGBTQ people by public officials and police forces.[44] Moreover, LGBTQ persons reported that, when attempting to make allegations of violence committed against them, they were harassed by the Salvadoran national police and attorney general, including by being subjected to strip searches.[45] In Honduras, LGBTQ individuals are routinely subjected to physical violence.[46] In Guatemala, almost one third of transwomen identified police officers as their main persecutors, and LGBTQ women experience forced pregnancies through what is known as "corrective rape."[47] And in Mexico, two police officers were arrested in connection with the kidnapping, torture, and execution of a young gay couple.[48] In addition to these disturbing types of violence, discrimination in aspects of civil society is also common. In Mexico, El Salvador, and Honduras, the law prohibits discrimination

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[41] *Id*.
[42] Kids in Need of Defense (KIND), *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet* 2 (Apr. 2018), https://tinyurl.com/KIND-SGBV.
[43] Amnesty Int'l, *7 Discriminatory (Or Deadly) Countries For LGBT People*, https://tinyurl.com/Amnesty7Countries.
[44] U.S. Dep't of State, *El Salvador 2019 Human Rights Report* 22 (Mar. 2020), https://tinyurl.com/ElSalv2019Rep.
[45] *Id*.
[46] Dep't of State – *Honduras 2019, supra* note 40 at 19.
[47] Organización Trans Reinas de la Noche, *Human Rights Violations Against Transgender Women in Guatemala* at 7 (Feb. 2018), https://tinyurl.com/OTRN-LGBT; Dep't of State – *Guatemala 2019*, *supra* note 39, at 22.
[48] Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Mexico: Sexual Orientation and Gender Identity (SOGI)* 20 (May 2017), http://www.refworld.org/docid/5937f12d4.html.

based on gender identity or sexual orientation, but abuses are rampant.[49] Notably, in Guatemala, legal protections against anti-LGBTQ discrimination do not even exist.[50]

In light of the rampant abuses that befall LGBTQ asylum seekers, they have long been considered to merit asylum protection. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005). But, as discussed above, under the Proposed Rule, many could see their claims denied due to discretionary and other reasons.

B. The Proposed Rule Requires Asylum Seekers to Request Protection in Dangerous and Ill-Equipped Countries

Through its codification of several discretionary factors and its broad reinterpretation of the firm resettlement bar, the Proposed Rule makes the failure to apply for protection in a third country a determining factor in an applicant's case. But, applying for relief in a third country is often a fruitless endeavor that can also be extremely dangerous. In previous comment letters opposing similar regulations, the States addressed the harms that applicants would suffer if forced to apply for protection in the third countries of Mexico, Guatemala, Honduras, or El Salvador. The States further discussed the inadequacy of these asylum systems. The States have attached those comment letters for the Departments' reference and maintain that forcing asylum seekers to apply for protection in a third country will have dangerous, trauma-inducing consequences.[51]

C. Applicants Will Be Deprived of Adequate Humanitarian Protection

The Proposed Rule makes it so many otherwise eligible applicants will be denied asylum because of new discretionary and reformulated mandatory bars. Such applicants will have to rely on the alternative forms of relief of withholding of removal and protection under the CAT. However, the availability of withholding of removal and CAT does little to protect bona fide asylum seekers. *First*, many will be denied withholding of removal and CAT protection because these forms of relief have much higher standards of proof than asylum. 8 U.S.C. § 1231(b)(3); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *INS v. Stevic*, 467 U.S. 407, 424 (1984). For reference, in 2016, less than five

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[49] Dep't of State – *El Salvador 2019, supra* note 44, at 22; Dep't of State – *Honduras 2019, supra* note 40 at 19; U.S. Dep't of State, *Mexico 2019 Human Rights Report* 27 (Mar. 2020) https://tinyurl.com/Mex2019Rep.
[50] Dep't of State – *Guatemala 2019, supra* note 39 at 22.
[51] Attachment 2, Administrative Record for *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (proposed July 16, 2019) at AR1205. Administrative Record for *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994 (proposed Nov. 19, 2019) at USCIS AR79.

percent of CAT claims and only six percent of withholding of removal claims were granted.[52] By comparison, that same year, 48 percent of asylum cases were granted.[53]

Second, even the few applicants who are granted these alternative forms of relief will face additional trauma and obstacles because, unlike asylum, neither withholding of removal nor CAT offer any protection to an applicant's family members (like children or spouses). 8 U.S.C. § 1158(b)(3)(A); *see also* 84 Fed. Reg. at 33,832 (listing benefits of asylee status). The Rule could thus result in absurd situations where a parent is granted protection, but the child who does not have a separate claim is ordered removed. As the Second Circuit described, even in obtaining this relief, "[t]he result is an almost impossible choice: live in safety while separated from one's family and their perilous life a world away, or join them in their peril and risk the probability of death or imprisonment." *Haniffa v. Gonzales*, 165 F. App'x 28, 29 (2d Cir. 2006).

Third, individuals granted withholding of removal and CAT are in a constant state of limbo because they cannot obtain permanent residency and are at constant risk of removal to a third country.[54] This uncertainty is exactly what Congress intended to eliminate in adopting the Refugee Act of 1980. S. Rep. No. 96-256, at 9 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 149 (explaining that the Act was meant to remedy the fact that previous "practice ha[d] often left the refugee in uncertainty as to his own situation").

D. Asylum Seekers Will be Forced into Unsafe Situations

i. The Proposed Rule Results in Dangerous Crossings

The Proposed Rule's severe narrowing of the grounds for claiming asylum results in asylum becoming out of reach for many asylum seekers. Thus, the Rule discourages asylum seekers from presenting themselves and asking for asylum at a port of entry. This is particularly so at the southern border, given DHS's "metering" policy, which keeps asylum seekers waiting for several weeks or even months in dangerous conditions in Mexico before they can ask for asylum in the United States, along with the Migrant Protection Protocols that force asylum seekers to remain in Mexico during the pendency

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[52] Human Rights First, *Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk* (Nov. 9, 2018), https://tinyurl.com/HRF-Withholding-CAT.

[53] Dep't of Justice, Exec. Office of Immigration Review (EOIR), *FY 2016 Statistics Yearbook* K6, fig.21 (Mar. 2017), https://www.justice.gov/eoir/page/file/fysb16/download.

[54] EOIR, *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections* 6 (Jan. 15, 2009), https://tinyurl.com/EOIR-FactSheet.

of their cases.[55] The effect of the Proposed Rule in the context of DHS policy puts asylum seekers in dangerous and vulnerable situations.[56]

With the prospect of a prolonged wait in Mexico to present a case that is likely to fail, many in desperate situations will choose to make a harrowing trek into the United States between ports of entry, without inspection. We have already seen the deadly consequences that can result from this calculus. For example, in June 2019, a Salvadoran father and his infant daughter drowned trying to cross the Rio Grande River after waiting two months in Mexico for the opportunity to ask for asylum.[57] Nine people drowned trying to cross near the El Paso canals in June of 2019 alone.[58] Authorities also found the bodies of a mother, her one year old son, and two other infants, who crossed the river only to die of dehydration.[59] These heartbreaking stories are corroborated by evidence in the administrative record,[60] as well as in a report prepared by DHS's Inspector General,[61] which demonstrate that dangerous crossings have become more common-place due to other restrictive asylum policies.

Furthermore, the prospect of a prolonged wait and the Proposed Rule's significant hurdles to obtaining asylum may also increase the risk of asylum seekers being trafficked across the border. Notably, "[w]ould-be migrants turn to smugglers when legal pathways

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[55] Dara Lind, *Asylum Seekers That Followed Trump Rule Now Don't Qualify Because of New Trump Rule*, PROPUBLICA (July 22, 2019), https://tinyurl.com/Lind-ProPublica.
[56] The States recognize that at this time, no individual can apply for asylum at the southern border due to restrictions the federal administration has imposed because of COVID-19. Dep't of Homeland Sec., *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus* (March 23, 2020), https://tinyurl.com/DHS2020Coronavirus.
[57] Daniella Silva, *Family of Salvadoran migrant dad, child who drowned say he 'loved his daughter so much'*, NBC NEWS (June 26, 2019), https://tinyurl.com/Silva-NBCNews.
[58] Riane Roldan, *June has been a deadly month for migrants crossing the border into Texas*, Tex. Trib. (June 28, 2019), https://tinyurl.com/Rolden-TexTribune.
[59] Molly Hennessy-Fisk, *Migrants contemplate dangerous crossings despite border deaths and detention conditions*, L.A. TIMES (June 30, 2019), https://tinyurl.com/Hennessy-Fisk-LATimes.
[60] *See* Administrative Record for *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) at AR664 (The irony of [the metering measure] is that it is going to drive people who are trying to apply for asylum at ports of entry and do things the right way into the mountains and deserts).
[61] Office of Inspector Gen., U.S. Dep't of Homeland Sec., *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5-7 (Sept. 2018), https://tinyurl.com/OIGSpecial.

are limited, routes are dangerous to cross, and border controls harden."[62] Oftentimes, smugglers can become traffickers, who continue to exploit individuals even after bringing them across the border.[63] Should the Proposed Rule be implemented, these deaths will occur more frequently, and the risk of human trafficking will increase.

ii. Asylum Seekers Will be Pushed into the Shadows

Legal status facilitates the provision of services and allows individuals to integrate confidently into the community, rather than feeling consigned to the shadows. *See* 84 Fed. Reg. at 33,832 (listing benefits of asylee status); S. Rep. No. 96-256, at 9 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 149 (noting that asylees' clear legal status was meant to remedy the fact that previous "practice ha[d] often left the refugee in uncertainty as to his own situation and ha[d] sometimes made it more difficult for him to secure employment and enjoy . . . other rights"). For future asylum seekers who do make it across the border without inspection, and for those already living, working, and contributing to the prosperity of each State, many will be forced to live in the shadows when they would otherwise have legal status. As a result, asylum seekers will be less likely to seek the protections of state and federal laws designed to protect all individuals, regardless of immigration status; particularly the protection of labor and civil rights laws. This puts asylum seekers at risk of labor code and civil rights violations, and will leave the perpetrators of such violations unscathed.

Furthermore, in creating numerous hurdles to seeking asylum, the Proposed Rule perpetuates uncertainty for asylum seekers and exacerbates asylum seekers' trauma and mental anguish. Asylum seekers often face multiple layers of traumatic experiences before seeking asylum in the United States. Indeed, to be eligible for asylum, an individual must have suffered extreme harm that rises to the level of persecution in their home country or live under the threat of such persecution in the future. *See* 8 U.S.C. § 1158. The Center for Victims of Torture estimates that 44 percent of asylum seekers, asylees, and refugees in the United States are survivors of torture.[64] Studies show that "asylum seekers are at particular risk of developing mental illness, including post-traumatic stress disorder (PTSD), depression, and anxiety."[65] The fallout of the Proposed Rule's impact are vast and unquantifiable. Rather than offering asylum seekers a lawful

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[62] Jasper Gilardi, *Ally or Exploiter? The Smuggler-Migrant Relationship Is a Complex One*, MIGRATION POL'Y INST. (Feb. 5, 2020), https://tinyurl.com/MPIAlly.
[63] *See id*.
[64] Craig Higson-Smith, *Updating the Estimate of Refugees Resettled in the United States Who Have Suffered Torture*, CTR. FOR VICTIMS OF TORTURE, (Sept. 2015), https://tinyurl.com/y358lp3k; Dep't of Health & Human Servs., Office of Refugee Resettlement, *Services for Survivors of Torture*, https://tinyurl.com/yyjvt4u3.
[65] Piyal Sen, *The mental health needs of asylum seekers and refugees – challenges and solutions*, BJ PSYCH INTL. (May 1, 2016), https://tinyurl.com/yyqd79xt.

pathway to relief from persecution, as Congress intended, the Proposed Rule will result in compounding the trauma and vulnerabilities asylum seekers already face.

In all, under the Proposed Rule, asylum seekers' only options will be either trauma-inducing or dangerous: go through a severely limited asylum process that could very well result in deportation to the very country they fled, or try to enter the United States undetected through a dangerous trek and remain undocumented, but live in a constant state of fear and uncertainty.

II. THE RULE HARMS THE STATES

The States welcome thousands of potential asylees into their communities every year. All immigrants, including asylum seekers, have become integral to the fabric and success of each of the States. The Proposed Rule will make the asylum process more arduous for all asylum seekers. These increased hurdles to obtaining relief, and likely consequences of many asylum seekers being denied relief or foregoing the process altogether, will negatively impact the States in profound ways. Specifically, the Proposed Rule harms the States for the following reasons: (1) asylees and asylum seekers, like other immigrants, are vital to the success of the States' economies and the prosperity and health of the States' communities; (2) the Proposed Rule undermines the States' programs designed to support immigrants, including asylum-seekers; (3) the Rule burdens state programs designed to assist immigrants; (4) it undermines the States' interest in family unity; and (5) the Rule hinders the States' ability to enforce their own laws.

A. The Proposed Rule Will Deprive the States of Important Economic and Societal Contributions

The Proposed Rule will harm the States' economies. Immigrants, including asylum seekers, are the backbone of States' workforce and economy. In 2016, immigrants were majority owners of 33 percent of businesses in the accommodation and food services industry across the United States.[66] Currently, undocumented immigrants residing in the States pay approximately $7.6 billion in state and local taxes annually.[67] Notably, a draft 2017 report by the U.S. Department of Health and Human Services found that over the past decade, refugees, including asylees, have contributed $63 billion

[66] Rakesh Kochhar, *The financial risk to U.S. business owners posed by COVID-19 outbreak varies by demographic group* (April 23, 2020), https://tinyurl.com/KochharPEW.
[67] Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* 3 (Mar. 2017), https://tinyurl.com/ITEP-UndocTaxes.

more in tax revenue than they cost in public benefits.[68] The following are examples of how immigrants have contributed to the States' economies:

- **California:** In California, there are 6.6 million immigrants in the State's workforce.[69] Immigrants fill over two-thirds of the jobs in California's agricultural and related sectors and almost half of those in manufacturing, just as 43% of construction workers and 41% of workers in computer and sciences are immigrants.[70] In 2018, immigrant business owners accounted for over 38% of all Californian entrepreneurs and generated almost $24.5 billion in business income.[71] And also in 2018, immigrant-led households in California paid over $38.9 billion in state and local taxes and exercised almost $290.9 billion in spending power.[72]

- **Connecticut:** In Connecticut, immigrants pay $7.4 billion in taxes and have a spending power of $16.1 billion.[73] There are over 41,000 immigrant entrepreneurs in Connecticut, employing over 95,000 people in the state.[74]

- **Hawaii:** The contributions of immigrants make up a significant portion of Hawaii's economy. Over 20,000 of Hawaii's business owners are foreign-born,[75] and in 2018, immigrants contributed $960.7 million in state and local taxes.[76]

- **Illinois:** Immigrants also play a big role in the economy of Illinois. According to a report by New American Economy and the Chicago Mayor's Office of New Americans, immigrants in Chicago alone contributed $1.6 billion to the state's economy through taxes and helped

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[68] Rejected Report Shows Revenue Brought In by Refugees, N.Y. TIMES (Sept. 19, 2017), https://tinyurl.com/2017DraftReport.
[69] Am. Immigration Council, *Immigrants in California* 2 (June 2020), https://tinyurl.com/AIC-ImmCA.
[70] *Id*. at 3-4.
[71] *Id.* at 5.
[72] *Id.* at 4-5.
[73] New Am. Econ., *Immigrants and the Economy in Connecticut*, (2018) https://tinyurl.com/CT-Immigration-Economy.
[74] *Id.*
[75] The Fiscal Pol'y Inst., *Immigrant Small Business Owners* 24 (June 2012), https://tinyurl.com/Imm-Business-Owners.
[76] New Am. Econ., *The Contributions of New Americans in Hawaii* (2018), https://tinyurl.com/2018Hawaii.

create or preserve 25,664 local manufacturing jobs.[77] Also, immigrant-owned businesses generated $63.9 billion in sales in Illinois in 2018.[78]

- **Massachusetts:** In Massachusetts, immigrants make up 20% of the state's workforce and immigrant-led households paid $4.5 billion in state and local taxes in 2018.[79]

- **Maryland:** In Maryland, immigrants make up 20% of the state labor force, and immigrant-led households paid $4.1 billion in state and local taxes in 2018.[80] Immigrant entrepreneurs make up almost 20% of Maryland's business owners, generating $1.7 billion in combined annual revenue.[81]

- **Michigan:** In Michigan, immigrants make up just under 10% of the state's workforce, pay approximately $7.1 billion in state and local taxes, have a spending power of $18.4 billion, and comprise over 33,000 of the state's entrepreneurs.[82]

- **Minnesota:** In Minnesota, immigrant workers comprised 11% of the labor force in 2018, and over 15% of all Minnesota healthcare support employees and over 20% of those working in the computer and math sciences are immigrants.[83] In 2018, immigrant-led households in Minnesota paid $1.5 billion in state and local taxes, and in 2018 immigrant business owners generated $576.2 million in business income.[84]

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[77] New. Am. Econ., *New Americans in Chicago* 1, 4 (Nov. 2018), https://tinyurl.com/Immigrants-Chicago.
[78] New Am. Econ., *The Contributions of New Americans in Illinois* (2018), https://tinyurl.com/2018Illinois.
[79] Am. Immigration Council, *Immigrants in Massachusetts* 2, 4 (June 2020), https://tinyurl.com/Imm-in-Mass.
[80] Am. Immigration Council, *Immigrants in Maryland* 2, 4 (June 2020), https://tinyurl.com/MarylandEcon.
[81] *Id*.
[82] *State Demographics Data: Michigan*, MIGRATION POL'Y INST., https://tinyurl.com/MI-Immigrant-Workforce (last visited June 25, 2020); New Am. Econ., *Immigrants and the Economy in Michigan*, (2018), https://tinyurl.com/MI-Immigration-Economy.
[83] Am. Immigration Council, *Immigrants in Minnesota* 2 (June 2020), https://tinyurl.com/AIC-Minn.
[84] *Id.* at 4.

- **Nevada:** In Nevada, the state's foreign-born households contributed more than one in every five dollars paid by Nevada residents in state and local tax revenues in 2014, and earned $13.2 billion dollars—or 19.3% of all income earned by Nevadans.[85]

- **New Jersey:** In New Jersey, immigrants comprise nearly 30% of the State's workforce and in 2018 they paid state and local taxes amounting to $9.5 billion.[86]

- **New York**: In New York, 2.8 million immigrant workers comprised 28 percent of the labor force in 2018. Immigrant-led households in New York paid $35.4 billion in federal taxes and $21.8 billion in state and local taxes in 2018.[87]

Asylum seekers also contribute to the States through increased tax revenue and increased purchasing power. Although unauthorized workers pay taxes, tax revenue increases when immigrants can legally work, and the States could stand to lose substantial revenue if the Proposed Rule is implemented. For example, in Massachusetts, undocumented immigrants pay an average of $184.6 million in state and local taxes every year, an amount that would increase to $240.8 if they had legal status and work authorization.[88] Similarly, according to a study by the Institute of Taxation and Economic Policy, undocumented immigrants in New Mexico would have paid in excess of $8 million more in taxes in 2017 if they had been granted full legal status.[89]

The vital role that immigrants, including asylum seekers, play in the States' economies and communities is particularly pronounced in the context of COVID-19. Immigrants, including refugees and asylum seekers, comprise 18 percent of the labor force deemed "essential," including 16 percent of health care workers, 31 percent of agricultural and farm workers, 26 percent of wholesale grocery workers, 18 percent of essential retail workers (restaurants, grocery stores, gas stations, pharmacies, etc.), 24 percent of construction workers, and 19 percent of workers providing service to maintain

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[85] New Am. Econ., *The Contributions of New Americans in Nevada* 6 (Aug. 2016), https://tinyurl.com/EconNevadaImmigrants.
[86] Am. Immigration Council, *Immigrants in New Jersey* 2, 4 (June 2020), https://tinyurl.com/Immigrants-in-NewJ.
[87] Am. Immigration Council, *Immigrants in New York* 2, 4 (June 2020), https://tinyurl.com/Immigrants-in-NY.
[88] Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* 3 (Mar. 2017), https://tinyurl.com/ITEP-UndocTaxes.
[89] *Id.*

safety, sanitation, and operations of essential businesses.[90] In California, immigrants comprise almost 36 percent of essential workers. Notably, of the approximate 3 million immigrant-owned businesses that were active in February 2020 across the country, about 80 percent were in "essential" industries, the majority of which have been able to continue operation.[91] Even during a global health pandemic, immigrants continue to provide essential services, such as health care, as well as create employment opportunities to the States and their residents.

By adding hurdles to obtaining asylum, the Proposed Rule impedes asylum seekers from obtaining legal status, thereby significantly lowering the tax revenue, economic contributions, and essential services that the States receive from asylum seekers participating in the economy.

B. The Proposed Rule Undermines the States' Investments in Programs Designed to Assist Immigrants

In recognizing the contributions that asylum seekers and asylees add to the States, the States invest significant resources to provide them education, legal, health care, and other services, enabling them to transition into and thrive in the States' communities. For example, the California Department of Social Services (CDSS) allocated almost $43 million for FY 2019-20 to administer the Immigration Services Funding program, established in 2015.[92] Under the program, CDSS contracts with nonprofit legal service providers to offer legal services, such as (1) providing legal education and outreach to immigrants, (2) providing assistance with completing immigration forms and applications (such as for DACA renewals and naturalization), and (3) representing undocumented immigrants in deportation proceedings. Similarly, the State of Washington allocated one million dollars from its general fund for FY 2019 to legal services organizations serving asylum seekers and other migrant populations in the state.[93] Among other programs, New York funds the Liberty Defense Project, a State-led, public-private legal defense fund designed to ensure that immigrants have access to legal counsel.[94] The District of Columbia allocated $2.5 million for FY 2020 to programs that provide services and

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[90] Donald Kerwin, et al., *US Foreign-Born Essential Workers by Status and State, and the Global Pandemic* 8-12 (May 2020), https://tinyurl.com/SMCPandemic.
[91] Robert Fairlie, *The Impact of Covid-19 on Small Business Owners: Evidence of Early-Stage Losses from the April 2020 Current Population Survey* 8 (May 2020), https://tinyurl.com/SIEPRCovid.
[92] Cal. Dep't of Soc. Serv. (CDSS), *Immigration Services Funding*, https://tinyurl.com/CDSSImm.
[93] *See* Wash. Laws of 2018, ch. 299, § 127(65) (amending Laws of 2017, 3d Spec. Sess., ch. 1, § 128) (Mar. 27, 2018), available at https://tinyurl.com/yy3rduov.
[94] *See* N.Y. St., Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2019 State Budget* (Mar. 30, 2018), https://tinyurl.com/y6qv2jev.

resources to its immigrant population, including asylum seekers.[95] New Jersey also allocated $2.1 million in state funds in FY 2019 and 2020 for legal assistance to individuals in removal proceedings.[96] Under Oregon House Bill 5050, passed in 2019, Innovation Law Lab, a non-profit that serves asylum seekers and other immigrants, would receive $2 million in state funding for a two-year project for immigration defense.[97] Delaware provides funding to legal and public service organizations such as Community Legal Aid Society, Inc. (CLASI), Catholic Charities Immigration Project (CCIP), and La Esperanza to provide services to the community.[98]

In addition to investing in legal services, the States also fund services to meet the healthcare needs of immigrants, including asylum seekers. California, New York, the District of Columbia, Illinois, Oregon, Massachusetts, and Washington all provide full scope health benefits to low-income children regardless of immigration status.[99] Starting January 1, 2020, California expanded these benefits to those who are 25 and younger.[100] In Illinois, asylum seekers can access state medical coverage and services by state-funded community agencies.[101] In Minnesota, immigrants residing there can access health care through Minnesota's Emergency Medical Assistance program, regardless of legal status.[102]

The States have also ensured that mental health services are available to immigrants, including asylum seekers. For example, every year, the Highland Human Rights Clinic in Oakland, California (operated by Alameda County) conducts approximately 80 to 120 health assessments of asylees, the vast majority needing mental

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[95] *Mayor Bowser Announces $2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program*, DC.gov (July 12, 2019), https://tinyurl.com/DC-Grant.
[96] *See* N.J. Office of Mgmt. & Budget*, The Governor's FY2020 Budget- Detailed Budget* 419 (Mar. 2019), https://tinyurl.com/NJ2020Budget.
[97] H.B. 5050, 80th Or. Legis. Assemb., 2019 Reg. Sess. (Or. 2019), available at https://tinyurl.com/Or-HB5050.
[98] Fiscal Year 2020 Appropriations Act, H.B. 260, 150 Gen. Assemb. (Del. 2019) (effective July 1, 2019), available at https://tinyurl.com/Grantsinaid.
[99] *Immigrant Eligibility for Health Care Programs in the United States*, Nat'l Conf. St. Legis. (Oct. 19, 2017), http://www.ncsl.org/research/immigration/immigrant-eligibility-for-health-care-programs-in-the-united-states.aspx.
[100] Bobby Allyn, *California is 1st State to Offer Health Benefits to Adult Undocumented Immigrants*, NPR (July 10, 2019), https://tinyurl.com/Allyn-NPR.
[101] *See PM 06-21-00: Medical Benefits for Asylum Applicants and Torture Victims*, Ill. Dep't of Hum. Servs., https://tinyurl.com/Ill-Med. The list of organizations can be found here: http://www.dhs.state.il.us/page.aspx?item=117419.
[102] Minn. Dep't Hum. Servs., *Health care coverage for people who are noncitizens*, (last updated March 19, 2016), https://tinyurl.com/MinnHealth.

health referrals, due to abuse and trauma. New York also provides inpatient psychiatric services to immigrant youth.[103]

The States have prioritized providing education for immigrants, including asylum seekers. For example, in 2011, the California State legislature passed the California DREAM Act, a set of two bills that allows certain undocumented students access to financial aid and tuition exemptions for California public higher education institutions.[104] [Other State education initiatives].

The States have also allocated funds for specialized programs to integrate asylees. In California, for example, the Immigration and Refugee Programs Branch of CDSS provides assistance for immigrants, through programs like the California Newcomer Education and Well-Being program (CalNEW), the Cash Assistance Program for Immigrants (CAPI), and the Trafficking and Crime Victims Assistance Program (TCVAP). CAPI provides cash assistance to certain aged, blind, and disabled noncitizens including asylees; TCVAP provides cash assistance, food benefits, employment and social services to victims of human trafficking, domestic violence and other serious crimes; and CalNEW provides funding to certain school districts to improve the well-being, English-language proficiency, and academic performance of their students.[105] The New York Office for New Americans has established neighborhood-based Opportunity Centers throughout the state to provide, among other things, English language courses and business development skills for immigrants.[106] One of Washington State's social service programs partners with local governments, community and technical colleges, ethnic community-based organizations, and other service provider agencies to deliver educational services, job training skills, assistance establishing housing and transportation, language classes, and other comprehensive support services.[107]

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[103] *See generally* Decl. of Donna M. Bradbury at 362-68 (Exhibit 60), *Washington v. Trump*, No. 2:18-cv-00939-MJP (W.D. Wash. July 17, 2018), ECF No. 31.
[104] Cal. Ed. Code, §§ 68130.7, 68130.5, 66021.6, 66021.7, 76300.5.
[105] Cal. Dep't of Soc. Servs., *Cash Assistance Program for Immigrants (CAPI)*, http://www.cdss.ca.gov/CAPI; Cal. Dep't of Soc. Servs., *Trafficking and Crime Victims Assistance Program*, https://www.cdss.ca.gov/inforesources/TCVAP; Cal. Dep't of Soc. Servs., *California Newcomer Education and Well-Being*, https://tinyurl.com/CalNewcomer.
[106] *See* N.Y. St. Office New Ams., *Our Mission*, https://tinyurl.com/y5wb8dws; *see also* N.Y. St. Office New Ams., *Request for Applications, RFA #18-ONA-32*, https://tinyurl.com/y3oqjul6; N.Y. St., Pressroom, *Governor Cuomo Announces Expansion of Services for Immigrant Community Through Office for New Americans*, https://tinyurl.com/y3yd54sb.
[107] *See* Office of Refugee & Immigration. Assistance, Econ. Servs. Admin., Wash. Dep't of Soc. & Health Servs., *Briefing Book for State Fiscal Year 2018*, (Jan. 2020) https://tinyurl.com/y528prka.

The States have a strong interest in supporting immigrants, including asylum seekers, residing in their geographical boundaries. In furtherance of this statewide policy, the States have carefully crafted systems that function to welcome and deliver essential services to immigrants residing within their borders. The States have made significant financial investments in these programs and services, and have created state departments responsible for administering them. These systems, in turn, have resulted in thriving immigrant communities that strengthen the social fabric and economies of communities throughout the States. The Proposed Rule stands to upend these systems. Because the Proposed Rule severely narrows the grounds upon which asylum seekers may seek humanitarian relief and deprives asylum seekers of significant due process protections, fewer asylum seekers will enter the States, fewer will be granted legal status and authorization to work, and fewer will be able to lawfully contribute to State economies. Thus, the immigrant-centered policies and fiscal decisions that States have made in reliance on the ongoing contributions of immigrants, including asylum seekers, are undermined by the Proposed Rule.

C. The Proposed Rule Will Burden State Programs

Not only does the Proposed Rule undermine State priorities, but it will also burden the very programs in which the States have invested. Because of the Proposed Rule, state-funded programs will need to shift resources to respond to new and complicated requirements.

First, the Proposed Rule will burden legal services designed to serve immigrant communities. The Proposed Rule imposes barriers to asylum and other protection, as well as creates a new complex screening mechanism with a very high burden asylum seekers must meet. The Proposed Rule will also reduce the number of immigrants who are eligible for asylum, forcing them to pursue more difficult forms of relief. *See supra*, Section I. Further, the Proposed Rule puts applicants at risk of being deemed to have filed a frivolous application—a finding that has severe and lasting consequences—for merely filing unsuccessful claims. These changes will frustrate the missions of legal services organizations in the States and require the allocation of additional time and resources for each case. Organizations will need to divert considerable resources to re-strategizing their approaches to representing clients and eligibility issues, revising their training, and re-allocating staff time. As a result, the number of cases these organizations can undertake will decrease. Because their funding is based, in part, on the number of cases handled per year, and the number of clients they anticipate serving,[108] the Proposed Rule will imperil their sustainability unless the States increase funding accordingly. Thus, by making it more expensive for the States to support the current level of services

[108] *See* Compl. ¶¶ 114, 132, *E. Bay Sanctuary Covenant v. Barr*, No. 3:19-CV-04073-JST (N.D. Cal.).

to immigrant communities, the Proposed Rule directly harms the States' financial interests. Harms to these organizations redound to their funders, including the States, whose priorities and funding decisions will also bear the impact of the Proposed Rule.

Second, the Proposed Rule will place a heavy burden on the States' medical and mental health programs and resources. The added trauma that asylum seekers will suffer, due to the uncertainty surrounding their legal status given the numerous changes and obstacles to obtaining asylum that the Proposed Rule presents, will likely cause long-term negative health impacts. Studies have shown that long-term stress can contribute to serious physical health problems including heart disease, diabetes, and severe viral infections.[109] The States and local jurisdictions will need to allocate additional resources to identify, assess, and treat asylees and asylum seekers.[110] Additionally, because asylum seekers will be less likely to apply for asylum, or may be ordered removed and residing in the States with an order of removal, fewer people will have legal status. This means that they will be more fearful to obtain routine healthcare because they are afraid of potential immigration consequences for seeking care. This harms the States' initiatives expanding healthcare to as many people as possible, particularly during COVID-19, because the States recognize healthcare for all residents is better for the overall health of our communities. However, when individuals are too afraid to get routine healthcare, state healthcare systems are tasked with the burden of addressing more acute medical conditions, and scarce emergency room resources are burdened with the aftermath of preventable conditions or injuries.[111]

D. The Proposed Rule Will Harm States' Interest in Family Unity

The Proposed Rule will cause unnecessary family separation. Many immigrants fleeing from persecution choose to seek refuge in the States—often to reunite with relatives who already reside within our borders. These applicants will face a greater risk of being ordered removed at the credible fear stage because of the heightened screening standards imposed by the Rule. Additionally, the Proposed Rule will result in the denial of protection, and subsequent deportation, for many of those with pending applications already residing in the States. Further, with asylum out of reach for many, and withholding of removal and CAT as the only forms of relief available, many individuals that are granted protection will not be able to petition for family members to join them in the United States. The separation of asylum seekers from their family members will

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[109] *See Stress Fact Sheet*, Nat'l Inst. Mental Health (Dec. 2016), https://tinyurl.com/NIMH-Stress.
[110] Anna Gorman, *Medical Clinics that Treat Refugees Help Determine the Case for Asylum*, NPR (July 10, 2018), https://tinyurl.com/Gorman-NPR.
[111] Shamsher Samra, *et al.*, *Undocumented Patients in the Emergency Department: Challenges and Opportunities*, 20 West J. Emergency Med. 791, 792 (Sept. 2019), available at https://tinyurl.com/UndocPatients.

harm the States, which benefit from family units that provide stability and support for their members as well as irreplaceable care and nurturing of children. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). The Select Commission on Immigration and Refugee Policy, a congressionally appointed commission tasked with studying immigration policy, expounded upon the necessity of family reunification in 1981:

> "[R]eunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and wellbeing of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States."[112]

Indeed, Congress recognized the importance of family unity when it adopted the modern immigration system. *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The Immigration and Nationality Act ('INA') was intended to keep families together."). Separating asylum seeking families undermines these core principles, and irreparably harms the neighborhoods and communities within the States.

Because family units provide stability and support for their members as well as irreplaceable care and nurturing of children, separating families could further traumatize and endanger asylum seekers. Family separation can also result in negative health outcomes including irregular sleep patterns, which can lower academic achievement among children; toxic stress, which can delay brain development and cause cognitive impairment; and symptoms of post-traumatic stress disorder.[113] Separation can be particularly traumatizing to children, resulting in a greater risk of developing mental health disorders such as depression and anxiety. Trauma can also have negative physical effects on children, such as loss of appetite, stomachaches, and headaches, which can

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[112] Human Rights Watch, *US: Statement to the House Judiciary Committee on "The Separation of Nuclear Families under US Immigration Law"* (March 14, 2013), https://tinyurl.com/HRWFamilySeparation (quoting US Select Committee on Immigration and Refugee Policy, "U.S. Immigration Policy and the National Interest," 1981).

[113] Colleen K. Vesely, Ph.D., et al, *Immigrant Families Across the Life Course: Policy Impacts on Physical and Mental Health*, NAT'L COUNCIL ON FAMILY RELATIONS (2019) https://tinyurl.com/NCFRpolicybrief.

become chronic if left untreated.[114] Similarly, spousal separation can cause fear, anxiety, and depression.[115]

The States, their residents, and their healthcare programs, will be forced to bear the burden of the effect of the separation of families under the Proposed Rule. *See supra*, Section II.C.

E. The Proposed Rule Will Make It More Difficult for States to Enforce Their Own Laws

The Proposed Rule interferes with the States' ability to enforce their labor, civil rights, and penal laws. The States have a fundamental interest in being able to enforce their own laws. *State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989). When rulemaking impinges on that ability, the States suffer an injury. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

As a result of the Proposed Rule, more applicants will be without status because of the likely chilling effect on asylum applications. Undocumented immigrants are increasingly likely to enter into the underground economy, and increasingly less likely to report ongoing labor and civil rights violations. Through labor and civil rights laws, the States protect their residents from wage theft, exploitation, and discrimination at work. *See generally*, N.J. Stat. Ann. § 34:11-56a to -56a38; N.J. Stat. Ann. § 10:5-1 *et seq.*; *Serrano v. Underground Utilities Corp.*, 970 A.2d 1054, 1064 (presuming that undocumented aliens may pursue relief under workers' compensation laws and obtain retrospective compensation under New Jersey prevailing wage laws); Cal. Gov. Code §§ 12900-12996; Cal. Bus. & Prof. Code § 17200 *et seq.*; Cal. Lab. Code § 200-1200; D.C. Code §§ 32-1301, *et seq.* (Wage Payment and Collection Law); D.C. Code §§ 32-1001, *et seq.* (Minimum Wage Revision Act); D.C. Code §§ 32-531.01, *et seq.* (Sick and Safe Leave Act); D.C. Code §§ 32-1331.01, *et seq.* (Workplace Fraud Act), and D.C. Code §§ 2-220.01, *et seq.* (Living Wage Act); N.Y. Labor Law Articles 5 (hours of labor), 6 (payment of wages), 19 (minimum wage standards), and 19-A (minimum wage standards for farm workers); N.Y. Workers' Comp. Law § 17 (McKinney). These laws are enforced without respect to immigration status, but effective enforcement relies on employees' ability and willingness to report violations.

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[114] Allison Abrams, *LCSW-R, Damage of Separating Families*, PSYCH. TODAY (June 22, 2018), https://tinyurl.com/AbramsSeparation.

[115] Yeganeh Torbati, *U.S. denied tens of thousands more visas in 2018 due to travel ban: data*, REUTERS (Feb. 29, 2019), https://tinyurl.com/TorbatiReuters (describing a U.S. citizen's plight to obtain a visa for his wife, and that their separation was causing them both to "break down psychologically").

Despite the significant labor and civil rights abuses that befall unauthorized workers, fear of reprisal and deportation often inhibits unauthorized workers from reporting such violations.[116] States are harmed when individuals do not come forward when their employers violate employment or civil rights law. Asylum seekers in particular have fail to report labor violations—including working weeks without pay and physical abuse at work—because they fear immigration consequences.[117] A study in Chicago found that, of the immigrant workers who have suffered a workplace injury and report it to their employer, 23 percent reported being either immediately fired or threatened with deportation.[118]

State law enforcement agencies will also be disadvantaged because asylum seekers, who under the Rule would likely be undocumented, will be less inclined to cooperate with law enforcement or provide helpful information when they are a victim of a crime, for fear of engaging with state actors and becoming subject to deportation. This disincentive to assist law enforcement will make it more difficult for States to enforce their penal laws, and puts immigrants at risk of being victims of crime themselves. This would also decrease the ability of State residents to apply for humanitarian relief, such as U-Visas or T-Visas. 8 U.S.C. § 1101(a)(15)(U) and (T).

The States' law enforcement interest in reducing "notario fraud" under consumer protection and criminal laws is likewise undermined by the Rule.[119] Notario fraud refers to immigration scams promulgated by individuals who represent themselves as immigration attorneys, but are not licensed as an attorney or as an authorized non-attorney for immigration purposes.[120] For example, because asylum seekers at risk of having their application deemed frivolous may opt to withdraw their application with prejudice and be deported, 85 Fed. Reg. 36,277, fewer asylum seekers will have an opportunity to file an ineffective assistance of counsel claim or otherwise alert authorities of a fraudulent scheme being conducted by the unscrupulous preparer and the States may never find out.

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[116] Human Rights Watch, *"At Least Let Them Work" The Denial of Work Authorization and Assistance for Asylum Seekers in the United States* (Nov. 12, 2013), https://tinyurl.com/yx9vp5wf; Daniel Costa, *California leads the way*, Economic Policy Institute (March 22, 2018), https://tinyurl.com/CostaEPI.
[117] Human Rights Watch, *"At Least Let Them Work" supra* note 115.
[118] Douglas D. Heckathorn, et al., *Unregulated work in Chicago: The Breakdown of Workplace Protections In the Low-Wage Labor Market* 18, CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHICAGO (2010), available at https://tinyurl.com/UChicagoHeckathorn.
[119] *See e.g. People v. Guerrero et al.*, No. BA464427 (Cal. Sup. Ct. 2018); *People v. Cabrera et al.*, BA443944 (Cal. Sup. Ct. 2016).
[120] CA Office of the Attorney Gen., *Immigration Services Fraud, Know Your Rights!* (2015), https://tinyurl.com/CANotarioFraud.

Similarly, the Proposed Rule forbids motions to reopen that raise new particular social groups, for any reason, including ineffective assistance of counsel. *Id*. at 36,291. 85 Fed. Reg. 36,279. This provision will discourage motions to reopen based on ineffective assistance of counsel. Ordinarily, to succeed on such motions, the filer must have filed a complaint with the appropriate disciplinary body, such as the state bar. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). It is often through motions to reopen that State consumer protection agencies and attorney regulatory bodies learn of attorney or preparer misconduct. Together, the frivolous provisions and limitation on motions to reopen penalize applicants, while obstructing the States' ability to discipline fraudulent preparers.

In placing significant barriers within the asylum process, the Proposed Rule has a chilling effect on asylum seekers reporting violations of the law or engaging with law enforcement. The Proposed Rule directly harms States' interest and authority to enforce its laws.

III. THE PROPOSED RULE VIOLATES THE LAW

The Proposed Rule is unlawful for a number of reasons, including that it violates the Due Process Clause of the Fifth Amendment of the Constitution and the Administrative Procedure Act (APA).

A. The Proposed Rule Violates the Due Process Clause

The Proposed Rule deprives asylum seekers access to due process under the law, and therefore violates the Fifth Amendment of the Constitution. To meet due process requirements, among other things, noncitizens facing removal must have a hearing with the right to counsel, a neutral arbiter, the ability to examine evidence against them, and the opportunity to present their own evidence, including their own testimony. *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926–27 (9th Cir. 2007) ("Where [a noncitizen] is given a full and fair opportunity to be represented by counsel, to prepare an application for . . . relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process."); *Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004) (due process requires that hearing notices be reasonably calculated to reach the noncitizen); *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (Immigration Judge's denial of a continuance to allow the respondent to inspect evidence against him was a denial of due process). Courts have also recognized that "competent counsel is particularly important in removal proceedings because "[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate." *See, e.g.*, *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008) (internal quotations omitted).

As it currently stands, asylum law is composed of complex rules and regulations. Pro se asylum seekers are particularly disadvantaged by the current system because of these complexities. Indeed, asylum seekers who are not detained and have legal representation in immigration court proceedings prevail in 74 percent of their cases; those without representation prevail only 13 percent of the time.[121] For asylum seekers who are detained, 18 percent prevail when represented, while only three percent prevail when not represented.[122] The Proposed Rule's changes to asylum law will exacerbate these preexisting discrepancies. Moreover, as referenced above, *supra* Section I.A.i., children will be more likely to be forced to present their claims in immigration court. Beyond the trauma that this is sure to produce, it also raises due process concerns as children are not guaranteed legal counsel and may not have a proper grasp of the consequences of these legal proceedings.

Should the Proposed Rule become final, thousands of current and future residents of the States will be deprived of humanitarian protection, and in many cases, will be deported without having the opportunity to be heard or present evidence. The following is a non-exhaustive discussion of particular provisions of the Proposed Rule that violate due process.

Pretermission of claims. The Proposed Rule would allow immigration judges to pretermit cases and order deportation of an application that does not illustrate prima facie eligibility for humanitarian relief. 85 Fed. Reg. 36,277. Even if an asylum seeker were to pass the credible fear interview with a positive outcome for asylum, or the heightened reasonable fear standard for withholding of removal or protection under CAT, the pretermission provision allows judges to terminate cases and order deportation without allowing the asylum seeker to testify or present all relevant evidence.

Empowering immigration judges to pretermit asylum claims on the basis of an application alone is especially detrimental to pro se asylum seekers. For individuals who are fleeing violence and traveling on foot for thousands of miles, meeting the exact legal requirements of asylum at the initial application stage can be impossible. To do so, asylum seekers would be required to have a high level of sophistication, an understanding of the United States' immigration laws, and a working knowledge of the conditions of countries from which they are fleeing. This difficulty is particularly pronounced for asylum seekers who are detained and have even less access to obtaining legal counsel, legal documents, or other evidence they may need to support their asylum claim within the required timeframes. Likewise, unaccompanied children, who are even more at a

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[121] Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM L. REV. 485, 486 (2018).
[122] *Id*.

disadvantage due to their age, do not appear exempted from the Proposed Rule's pretermission provision.[123]

The pretermission provision unnecessarily bars asylum seekers from obtaining alternative forms of relief. Applicants who are also victims of trafficking or other crimes may have concurrently pending applications for U-Visas and T-Visas at USCIS. 8 U.S.C. § 1101(a)(15)(U) and (T). By cutting their asylum cases short, these applicants may be ordered removed before USCIS has had an opportunity to adjudicate their visas. Without guaranteeing asylum seekers a fair day in court, the Proposed Rule leaves thousands without protection for which they could qualify.

Additionally, the ten-day notice that the Proposed Rule would require immigration judges or DHS to provide to an asylum seeker before effectuating pretermission of their application is an insufficient amount of time for the individual to respond. 85 Fed. Reg. 36,277. Pro se asylum seekers may not fully grasp the kind of evidence or legal arguments that would be sufficient to respond to a pretermission determination, and may not have the ability to provide that response within the ten-day timeframe. Indeed, the Proposed Rule does not offer any explanation or examples as to the kind of evidence asylum seekers could put forth in order to overturn a pretermission determination, thus making this provision unlawfully vague. *See generally Hill v. Colorado*, 530 U.S. 703, 732 (2000). Detained applicants, with or without representation, are particularly disadvantaged because of procedural delays in receiving and sending legal mail while in immigration detention facilities. Furthermore, even if an applicant does respond within the allotted timeframe, they still are not given an opportunity to present evidence through testimony, and are therefore denied their fair day in court. *Vargas-Hernandez*, 497 F.3d at 926–27.

The Proposed Rule unlawfully allows immigration judges to pretermit bona fide claims for protection without due process of the law, thereby subjecting an unknown number of people to deportation to countries where they will face almost certain persecution or torture, in contravention of federal and international law.

Frivolous claims. Under 8 U.S.C. § 1158(d)(6), ''[i]f the Attorney General determines that [a noncitizen] has knowingly made a frivolous application for asylum and the [noncitizen] has received [the notice of privilege of counsel and the consequences of knowingly filing a frivolous application]," the asylum seeker will be permanently ineligible for any benefit under the INA. Currently, only an immigration judge can make a "frivolous" finding. And an application can only be deemed frivolous when it is found that the asylum seeker *deliberately* fabricated a material element of their claim.

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[123] The Proposed Rule only explicitly states that unaccompanied minors are exempt from the expedited removal process. 85 Fed. Reg. 36,265, n.5 (citing 8 U.S.C. § 1232(a)(5)(D)(i)).

The Proposed Rule expands upon when the Federal Government can label an application frivolous. Current regulations provide that an application is frivolous if "any of its material elements is deliberately fabricated." *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,344 (Mar. 6, 1997). Under the Proposed Rule, an application may be found frivolous under three new grounds. *First*, an application may be found frivolous if the asylum seeker "knowingly" includes a "fabricated material element." 85 Fed. Reg. 36,275. The Proposed Rule defines "knowingly" as actual knowledge or willful blindness, thereby expanding the circumstances under which an asylum seeker acts "knowingly" beyond "deliberate[]." *Id*. at 36,273. This definition does not adequately account for inadvertent mistakes, or for the complexity of asylum law that may be beyond the grasp of a pro se asylum seeker. It also does not account for situations in which an asylum seeker may have reasonably relied on an unscrupulous preparer or notario. The Ninth Circuit, for example, has recognized that asylum applications are frequently filled out by "poor, illiterate people who do not speak English and are unable to retain counsel," and who may seek the assistance of preparers. *Alvarez-Santos v. I.N.S.*, 332 F.3d 1245, 1254 (9th Cir. 2003) (citing *Aguilera-Cota v. I.N.S.,* 914 F.2d 1375, 1382 (9th Cir.1990)). But, "[a]ll too often, vulnerable immigrants are preyed upon by [these] unlicensed *notarios* and unscrupulous appearance attorneys" who provide "false promises and shoddy, ineffective representation." *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (emphasis in original). In *Alvarez-Santos*, the court found that inconsistences due to an unscrupulous preparer do not provide an adequate basis for an adverse credibility finding. 332 F.3d at 1254. There is no reason this reasoning should not apply to applications when assessing frivolousness, particularly when accounting for the significant disadvantages asylum seekers face when applying for asylum, and the severe consequences of a frivolous finding.

Second, an application may be found frivolous if it contains claims foreclosed by applicable law. 85 Fed. Reg. 36,276. This is troubling because different circuit courts, which have jurisdiction to review determinations made by the BIA, may reach different outcomes when considering similar sets of facts. *See generally Lopez v. Gonzales*, 549 U.S. 47, 52 (2006) (Court granted certiorari to resolve circuit split on whether a state law constituted an aggravated felony in immigration context, as this classification bears on deportability of a noncitizen). What may be "applicable law" in one circuit may not be in another, and here, this inconsistency alone – which is no fault of the asylum seeker – has the absurd result of rendering the asylum seeker permanently ineligible for protection merely based on where they file their application.

Third, if an application is found to have been made without "regard to the merits of the claim," it may be deemed frivolous. 85 Fed. Reg. 36,276. The Proposed Rule does not offer a reasoned, or any, explanation of what "without regard to the merits" entails, and is thereby vague, in violation of due process protections. *See Hill v.*

Colorado, 530 U.S. at 732 (statute is impermissibly vague when it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement"). An asylum seeker could "knowingly" file a claim that is in fact not meritorious in the eyes of an immigration judge, but they may not know why or how the claim is unmeritorious when it was filed, because of the level of sophistication required to prevail on asylum claims. Such an application could not reasonably be found abusive of the asylum process. 85 Fed. Reg. 36,276 (citing *Cooter & Gell v. Hartmax, Corp.*, 496 U.S. 384, 398 (1990)). Notably, this provision would severely disadvantage pro se asylum seekers, who are not in the best position to meaningfully decipher what does and does not constitute a meritorious asylum claim. This is particularly troubling given how much the Proposed Rule stands to change asylum law and narrow the grounds upon which asylum seekers can seek relief. Allowing an asylum seeker to be permanently ineligible from applying for any benefit under the INA based on this vague ground of frivolousness, without an opportunity to present their testimony or evidence, or to correct their application, is disproportionately punitive and violates due process protections.

In addition to the expansion of what constitutes "frivolous," the Proposed Rule eliminates the requirement that immigration judges provide certain warnings before issuing a frivolous finding, thereby allowing the federal government to rely upon the notice provided on the application form alone. 85 Fed. Reg. 36,276. This disadvantages pro se asylum seekers who may be unfamiliar with asylum law or otherwise unable to understand the severity of consequences for filing a frivolous claim based on a written notice, asylum seekers who may face language barriers to filling out the asylum application, and asylum seekers who are unable to read. In denying asylum seekers a second, verbal, and meaningful opportunity to be notified about the consequences of filing a frivolous application, the Proposed Rule violates due process rights of asylum seekers to have their cases heard in front of an immigration judge.

In an equally unlawful attempt to mitigate the severe consequences of a finding of frivolousness, the Proposed Rule offers that as an alternative to having one's application dismissed on frivolous grounds, the asylum seeker may opt to withdraw their application with prejudice, to "ameliorate the consequences of knowingly filing a frivolous application." 85 Fed. Reg. 36,277. Far from avoiding the penalties of frivolousness, this "ameliorat[ive]" mechanism effectively subjects asylum seekers to the same result – inability to pursue benefits under the INA. This alternative disparately disadvantages pro se asylum seekers for the reasons discussed above, including their lack of sophisticated understanding of the law, and potential inability to grasp the weight of the consequence of withdrawing their application with prejudice.

Waiver of motions to reopen and reconsideration. The Proposed Rule would preclude asylum seekers from raising a claim for asylum on the basis of a particular social group if that particular social group is not specifically articulated in their

application form or otherwise in the record. 85 Fed. Reg. 36,279. Thus, the Proposed Rule would prevent asylum seekers from filing motions to reopen or for reconsideration based on grounds for asylum that are not listed on the application form, even when such motions are based on ineffective assistance of counsel. *Id*. at 36,291. Some courts have found that appealing an immigration decision based on a claim for ineffective assistance of counsel is a constitutional due process guarantee that extends to removal proceedings. *See Nehad*, 535 F.3d at 967. The Proposed Rule, however, would bar an asylum seeker from reopening their case even if the court were to determine that the asylum seeker's due process rights were not effectuated due to ineffective assistance of counsel. This is an unconstitutional result that deprives asylum seekers their right to effective assistance of counsel during their immigration court proceedings.

This waiver also disproportionately disadvantages pro se asylum seekers who may not be as familiar with the "labyrinth" that is asylum law and all the grounds for claiming asylum, or the specific requirements under each. *Nehad*, 535 F.3d at 967. This disadvantage is further pronounced given the vast amount of changes to asylum law that this Proposed Rule would enact. Moreover, given the absurd and severe consequences for filing a potentially unmeritorious claim (permanent ineligibility), the Proposed Rule will have a chilling effect on asylum seekers because the changes completely eliminate critical procedural due process protections for asylum seekers. As discussed *supra*, Section I.D., more individuals are eligible for relief may forgo seeking asylum altogether and be forced to live in the shadows, without documentation.

Waiver of appeal of credible fear interview. The Proposed Rule changes the means for asylum seekers to appeal negative determinations made after their credible fear interview. Current regulations provide that when an asylum seeker receives a negative determination from a credible fear interview, the asylum officer inquires as to whether the asylum seeker would like to appeal the decision. If the asylum seeker does not respond, the assumption is that they do opt for review. 8 C.F.R. §§ 208.30(g) and 1208.30(g)(2). These regulations comport with a common sense understanding that any number of barriers – language access, trauma, misunderstanding, lack of knowledge – could impede an asylum seeker from understanding the specific immigrations procedures in the United States. The Proposed Rule inexplicably removes any semblance of due process from this portion of the process. Should the Proposed Rule go into effect, when an asylum seeker receives a negative determination from a credible fear interview, and the asylum seeker does not indicate whether they want to appeal the decision, the asylum officer will automatically consider the lack of indication as a refusal and thus, a waiver of review of their credible fear interview. 85 Fed. Reg. 36,273. These changes flout basic notions of due process and fairness, and they introduce the type of procedural hurdles that are likely to disproportionately affect individuals who cannot afford or otherwise obtain legal representation, individuals for whom English is not their first language, and individuals who are experiencing trauma, among others.

Consideration of internal relocation during credible fear interview and presumption of reasonableness of internal relocation when persecution involves non-governmental actors. The Proposed Rule would allow asylum officers to consider internal relocation as a factor during credible fear interviews. 85 Fed. Reg. 36,272. Whether internal relocation is a reasonable option for a particular asylum seeker is a fact-specific inquiry that should be reserved for immigration proceedings, where asylum seekers would have the opportunity to be heard by an immigration judge and present evidence regarding this specific element. Moreover, requiring consideration of internal relocation at the credible fear interview stage disadvantages asylum seekers who may not yet have access to legal representation or evidentiary documents to demonstrate that internal relocation is not reasonable.

Furthermore, for asylum seekers who claim persecution from non-governmental actors, the Proposed Rule shifts the burden of internal relocation from the federal government proving that internal relocation is reasonable—as current regulations provide—to the asylum seeker, who must disprove that internal relocation is reasonable by a preponderance of the evidence. 85 Fed. Reg. 36,282. In doing so, the Proposed Rule establishes a presumption that internal relocation would be reasonable, unless the asylum seeker demonstrates that it is not. *Id*. The Proposed Rule does not make clear whether this burden shift would apply at the credible fear interview stage, whereby an asylum seekers would have to disprove that internal relocation is reasonable by a preponderance of the evidence. Thus, this provision is unlawfully vague as to its applicability to the credible fear interview, and in violation of the right to due process under the law. *See Hill v. Colorado*, 530 U.S. at 732.

B. The Proposed Rule Violates the APA

Should the Proposed Rule be enacted, it would violate the APA because it is (1) arbitrary and capricious; and (2) contrary to the INA.

i. The Proposed Rule is Arbitrary and Capricious

Under the APA, federal agencies must consider "the advantages *and* the disadvantages of agency decisions" before taking action. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasis in the original). As the Supreme Court has held, "agency action is lawful only if it rests on a consideration of the relevant factors," and an agency may not "entirely fail to consider an important aspect of the problem" when deciding whether a regulation is appropriate. *Id.* at 2706-07 (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co*. (*State Farm*), 463 U.S. 29, 43 (1983) (brackets and quotation marks omitted)). If an agency action is not "based on a consideration of the relevant factors," that action is arbitrary and capricious under the APA. *State Farm*, 463 U.S. at 41–43 (citing 5 U.S.C. § 706(2)(A)). An agency action is also arbitrary and capricious if the agency "offered an explanation for its decision that

runs counter to the evidence before the agency," or if it considered "factors that Congress has not intended it to consider." *Id.* at 43.

Should the Proposed Rule be finalized, it would be arbitrary and capricious because the Departments have not fully considered its harmful effects. *Michigan*, 135 S. Ct. at 2707. Additionally, the Departments' justifications for the Proposed Rule are unreasonable. *State Farm*, 463 U.S. at 52 (agency explanations must show that the rulemaking is the result "of reasoned decision making").

1. The Departments Must Consider the Disadvantages of the Proposed Rule

In the Notice of Proposed Rulemaking, the Departments failed to adequately analyze, and in some instances failed to even mention, several negative consequences, including: (1) the injuries it will inflict on asylum seekers; and (2) the harms to the States, their economies, their programs, and their ability to enforce the law. The Departments must address these concerns.

First, the Departments do not recognize any of the harms that will befall asylum seekers, such as those discussed in Section I, should the Proposed Rule be adopted. In focusing on deterring and penalizing what they perceive as frivolous asylum claims, the Departments do not adequately reconcile that objective with the likelihood that the Proposed Rule will result in the deportation of many bona fide asylum seekers. The Departments do not address the chilling effect that the Rule will have on eligible applicants, who will now fear applying for asylum because of the increased likelihood of denial, or worse yet, a frivolous finding. To be sure, as discussed above, in discouraging asylum seekers from coming forward, the Departments are keeping these applicants in the shadows—where they are more likely to attempt dangerous crossings, more likely to suffer civil rights and labor abuses, and more likely to avoid using critical services like healthcare. And finally, in enacting numerous procedural hurdles to a fair day in court, the Departments fail to grapple with the disastrous impact that the Proposed Rule would have on pro se asylum seekers. The Departments must consider, and appropriately weigh, these humanitarian considerations.

Second, the Departments do not adequately address harms to the States, their workforces, their programs, their fiscal health, or their law enforcement agencies. As set forth above, the States benefit greatly from immigration, and by deporting the States' residents and encouraging others to stay in the shadows, the Rule inflicts great harm on the States' communities. There are substantial economic and fiscal benefits to an operating asylum system, in which eligible applicants can lawfully work and eventually obtain status. The Proposed Rule would deprive the States of these benefits. The harm to States is even more pronounced during the COVID-19 crisis, in which immigrants have courageously served their communities as essential workers. Relatedly, the Departments

do not appear to have considered the Rule's potential impact on crucial State initiatives, such as those that expand healthcare. These initiatives are even more imperative during COVID-19. Indeed, if putative asylees forego healthcare because they fear deportation, the health consequences will be felt community wide. The Departments must grapple with the very likely prospect that the Proposed Rule will have a chilling effect not just on asylum applications, but also on programs and benefits in which the States have invested that protect the health and prosperity of their communities.

The Departments also must consider the full range of consequences of the Rule's provisions prohibiting certain motions to reopen based on ineffective assistance of counsel and expanding frivolous findings. As discussed above, these provisions infringe on the States' ability to investigate and discipline bad actors, like notarios or unethical attorneys who take advantage of immigrants, because the States will not be made aware of fraudulent schemes. Thus, under the Rule, such fraudulent schemes will proceed without interruption, while asylum seekers face steep consequences for falling victim to them. Likewise, the Departments have not considered that by driving asylum seekers into the shadows the Proposed Rule undermines the States' enforcement of their own labor, civil rights, and criminal laws. The Departments must consider these undesirable consequences.

2. The Departments' Justifications for the Proposed Rule are Unreasonable

The Departments argue that various aspects of the Proposed Rule are necessary to deter what they perceive as frivolous, non-urgent, or generally unmeritorious asylum claims, reduce the "strain" on the definition of refugee, and to mitigate the administrative burden of the asylum system. Below, the States provide a non-exhaustive list of examples of the Proposed Rule's flawed and unreasonable justifications.

The Departments' reasoning regarding deterrence and "strain" on the INA's definition of refugee. The Departments' goal of "avoid[ing] further strain on the INA's definition of refugee" and deterring, what they perceive as, meritless claims is unreasonable and improper for several reasons. 85 Fed. Reg. 36,279-80, 36,283, 36,274-5. To begin, these two goals seemingly conflict with each other. The Departments' decry that the "strain" on the INA's definition of refugee—which apparently is caused by applicants having cognizable claims for asylum—makes it necessary for them to stringently construe eligibility requirements. While the Departments address this "strain" by making it so fewer applicants can meet eligibility requirements, the Departments also lament that too many applicants have unmeritorious claims. It is because of these purportedly meritless claims that the Departments propose the punitive expansion of the frivolous grounds, among other things, in the Proposed Rule. Essentially, the Departments take away asylum seekers' grounds for eligibility, and then punish those same asylum seekers for now being ineligible. From these actions, it is not hard to

deduce the true goal of the Rule: to lower the number of people applying for and receiving asylum.

But, the Departments' simple desire for fewer people to seek and be eligible for asylum is not a valid reason for the Departments to decimate the asylum system. In enacting 8 U.S.C. § 1158(a), Congress expressly provided noncitizens the right to apply for, and if they make the requisite showing, receive asylum. While the Departments have the power to reasonably interpret the asylum requirements, the Departments cannot restrict eligibility simply because, in the Departments' view, too many people are receiving protection. *See* id. Neither can the Departments punish asylum seekers through punitive measures, as they seek to do via the massively expanded frivolous grounds, in order to deter them from filing claims for relief. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188–90 (D.D.C. 2015) (granting preliminary injunction against policy of detaining asylum seekers to send "a message of deterrence to other Central American individuals who may be considering immigration" and finding deterrence is not a valid reason to force someone to be civilly committed); *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1166–67 (S.D. Cal. 2018) (denying motion to dismiss substantive due process claim, holding that alleged "government practice. . . to separate parents from their minor children in an effort to deter others from coming to the United States . . . is emblematic of the exercise of power without any reasonable justification . . . .").

Indeed, the Proposed Rule does not even weed out weak claims. In fact, it does the opposite—it prevents applicants with strong claims from obtaining relief. The Proposed Rule will preclude applicants who fear persecution on account of their gender characteristics and/or political opinion against non-governmental groups. *See supra* Section I.A.ii. These common grounds for asylum have been recognized by the courts as cognizable, and yet, with no explanation or analysis, the Rule attempts to invalidate them. The Proposed Rule will also block bona fide asylum seekers for insignificant "discretionary" reasons, like having a layover in a third country, that are wholly unrelated to the merits of their claim. Further, the Proposed Rule's punitive use of the frivolous label will have a chilling effect on individuals with valid claims for relief. Indeed, the many procedural hurdles that the Rule introduces into the process will only serve to block applicants, including those with meritorious claims, from exercising their right to claim asylum in a meaningful way.

The discretionary factors. The Proposed Rule's discretionary factors are unreasonable and unjustified. The discretionary determination is meant to "balance the adverse factors evidencing [a noncitizen's] undesirability as a permanent resident of the United States with the social and humane considerations presented." *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). But many of the Proposed Rule's discretionary factors have no bearing on an applicant's desirability as a resident nor any reasonable connection to the applicant's worthiness for the relief.

- *Unlawful Entry*

To begin, the Proposed Rule makes unlawful entry a "significantly" adverse factor, because of the "resources required to apprehend, process, and adjudicate the cases of the growing number of [noncitizens] who illegally enter the United States putatively in order to seek asylum." 85 Fed. Reg. 36,283. At the outset, it is unclear how an applicant can overcome this "significantly adverse" factor; presumably, since it is deemed significant by the Departments, the mere presence of this factor alone will result in a denial. Simply that the Departments do not wish to expend resources to process these asylum seekers' claims does not make these asylum seekers any less worthy of relief. The statute, the courts, and even the US DOJ's own administrative appellate body, the BIA, have recognized that unlawful entry is almost never a valid reason to deny asylum. *Id.* at 36,282-83. Indeed, the INA is clear that *all* noncitizens within the United States have the right to claim asylum, regardless of "whether or not [they arrived] at a designated port of arrival." 8 U.S.C. § 1158(a). Based on this fundamental principle, the courts preliminarily struck down the Departments' prior attempt to block applicants who entered without inspection from asylum, finding it was arbitrary and capricious. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 772 (9th Cir. 2018), *stay denied* 139 S. Ct. 782 (Dec. 21, 2018). The Ninth Circuit explained that an applicant's manner of entry "has nothing to do with asylum itself." 932 F.3d at 772. In fact, the court found that entering without inspection could be "wholly consistent with [a] claim to be fleeing persecution." *Id.* at 773 (quoting *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)). The Ninth Circuit's ruling is consistent with the BIA's decision in *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), which states that unlawful entry alone "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." Interestingly, the Departments cite to *Matter of Pula* in the Proposed Rule, but contradict it by deeming unlawful entry as a strong basis for discretionary denials. It must also be noted that the Departments label unlawful entry as a "significantly" adverse factor, yet the Rule itself discourages applicants from coming forward to affirmatively seek protection at ports of entry thereby increasing the unlawful entries the Departments condemn. *See supra* Section I.D.

- *Use of Fraudulent Documents*

The Departments also make the use of fraudulent documents a "significantly" adverse factor. Putting such weight on this factor is unreasonable because "there may be reasons, fully consistent with the claim of asylum that will cause a person to possess false documents ... to escape persecution by facilitating travel." *Nreka v. U.S. Attorney Gen.*, 408 F.3d 1361, 1368 (11th Cir. 2005) (quoting *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998)).

- *Factors Related to Third Country Transit*

Likewise, the Departments' three discretionary factors related to third country transit are not reasonably justified. According to the Departments, "the failure to seek asylum or refugee protection in at least one country through which an [applicant] transited while en route to the United States may reflect an increased likelihood that the [applicant] is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection." 85 Fed. Reg. 36,283. However, courts have found that this premise is unreasonable and inconsistent with asylum protections. "[A] refugee need not seek asylum in the first place where he arrives" and that denying a claim based on an applicant's failure to apply in a third country is erroneous as a matter of law. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003). Failing to apply for protection in a third country has no bearing on the credibility or reasonableness of an applicant's fear of persecution. *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374-75 (9th Cir. 1985) ("We do not find it inconsistent with a claimed fear of persecution that a refugee, after he flees his homeland, goes to the country where he believes his opportunities will be best. Nor need fear of persecution be [a refugee's] only motivation for fleeing."). Particularly pertinent with respect to applicants at the southern border, who may be especially harmed by the Proposed Rule, in *Damaize-Job*, the Ninth Circuit explained that it is "quite reasonable" for an applicant who experienced persecution in Nicaragua to "to seek a new homeland that is insulated from the instability of Central America." 787 F.2d at 1337.

It was for these reasons, among others, that on July 6, 2020, the Ninth Circuit found that the Departments' third country transit interim final rule was likely arbitrary and capricious in *E. Bay Sanctuary Covenant v. Barr* (EBSC III), No. 19-16487, 2020 WL 3637585, at *13 (9th Cir. July 6, 2020); *E. Bay Sanctuary Covenant v. Barr* (EBSC IV), 385 F. Supp. 3d 922, 956 (N.D. Cal. 2019), order reinstated, 391 F. Supp. 3d 974 (N.D. Cal. 2019); see also *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*, No. 19-2117 (D.D.C. June 30, 2020) (granting Plaintiffs' motion for summary judgment regarding the third country transit interim final rule because the Federal Government did not demonstrate good cause or the foreign affairs exception to notice and comment); *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019), RIN: 1125-AA91 (Aug. 15, 2019).

The expansion of the firm resettlement mandatory bar. The firm resettlement bar makes ineligible any asylum applicant who "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). For the bar to apply, DHS must provide prima facie evidence that an applicant was offered "permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15; *Maharaj v. Gonzales*, 450 F.3d 961, 964 (9th Cir. 2006); *Matter of A-G-G-*, 25 I&N Dec. 486, 501-502 (BIA 2011). If there is no direct evidence of an offer of

permanent residence in a third country, such as a visa or other immigration document, DHS can provide evidence that the applicant was entitled to permanent residence in that country. *A-G-G-,* 25 I&N Dec. at 502 (citing *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004)). Under the current implementing regulations, the firm resettlement bar does not apply if the applicant establishes that their entry "into that country was a necessary consequence of [their] flight from persecution"; they "remained in that country only as long as was necessary to arrange onward travel;" and they did not have "significant ties" to the third country. 8 C.F.R. § 208.15(a). An applicant is also not subject to the bar if they prove that the "conditions of [their] residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled." *Id.* § 208.15(b).

Under the Proposed Rule, an applicant is considered to have firmly resettled if they were present in a country where they could have resided indefinitely as an asylee or refugee, regardless of the length of time they were there. 85 Fed. Reg. 36,286. In essence, this means that an applicant could be barred if they transited through any country with a functioning refugee processing system, because theoretically, they might have been offered asylee or refugee status there. This reading of the firm resettlement bar is a major departure from the current understanding of the bar and an unreasonable one at that. Indeed, as discussed above in reference to the Proposed Rule's third country-related discretionary factors, an applicant's decision to forgo applying for protection in a third country is very rarely relevant to the asylum determination.

The administrative burden. The Departments argue that several aspects of the Proposed Rule are necessary to mitigate the administrative burden of the asylum process; and yet, at the same time, it adds several additional burdens for adjudicators. For example, the Departments claim that raising the standard of proof for withholding of removal and CAT screenings will save resources. *See* 85 Fed. Reg. 36,271. This is illogical. There is no reason why imposing a higher burden of proof would mitigate the resources expended during this screening. If anything, it will make the screening more time consuming, as asylum officers will now be forced to switch between two different standards of proof during the same initial screening interview. Likewise, credible fear screenings will now have to encompass consideration of mandatory bars. If a bar is raised, then again, the standard of proof switches mid-interview to the higher "reasonable possibility" standard. These changes obscure what is supposed to be a quick screening process and make it more onerous on all of the parties involved.

Lack of clarity about key aspects of the Proposed Rule. The States finally note that the Departments fail to sufficiently explain how many of the Proposed Rule's changes will operate, leaving serious ambiguity and confusion about potential impacts of the Rule. For example, the Proposed Rule requires adjudicators to consider internal relocation at the credible fear stage, where applicants need only show a significant possibility of eligibility for asylum. At the same time, the Rule also shifts the burden of

proof to the applicant to prove by a preponderance of the evidence that internal relocation is unreasonable. The States assume that this preponderance standard would only apply at the merits stage of a claim (i.e., at an individual immigration hearing), rather than at the credible fear stage. But the Departments provide no such explanation and fail to clarify how these two different burdens of proof may interact during the credible fear screening. Similarly, the Departments enumerate three "significantly adverse" factors that must be considered. The Departments fail to discuss how one can rebut these factors and whether the presence of one or more factor will result in a denial. As some of these factors will be present in many, if not most cases, it is vital that the Departments clarify their consequences.

In light of the Departments' failure to adequately assess the disadvantages of the Proposed Rule and the Departments' dubious or altogether nonexistent reasoning in promulgating it, the Proposed Rule, if adopted, would be arbitrary and capricious.

ii. The Rule is Contrary to Law

Under the APA, agency action may be set aside where it is "not in accordance with law." 5 U.S.C. § 706(2)(A). Where a statute is unambiguous and the "intent of Congress" is clear in foreclosing agency action, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is ambiguous, a court will defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Applying these well settled principles, the Proposed Rule is contrary to the INA, and the treaties it implements, in a variety of respects. The States only address a few of these inconsistencies, and note that there are many other ways in which the Proposed Rule likely conflicts with the INA.[124]

[124] For example, the States take significant issue with the Proposed Rule's several discretionary provisions and newly expanded firm resettlement bar that make mere transit through a third country a reason for denial of asylum. The States discussed similar concerns in the comment letter opposing *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) at AR1205, and believe that the arguments raised in that letter are also relevant here and, in fact, the Ninth Circuit recently agreed that the Departments' other third country related asylum rule was contrary to law. *EBSC* III, No. 19-16487, 2020 WL 3637585, at *10. The States also take issue with the Departments' interpretation of the terms political opinion and particular social group, which would foreclose upon grounds for asylum that are court recognized. Additionally, the States believe that the Departments' contention that the CAT requires applicants to prove their torturer was acting under "color of law" is dubious at best. The Proposed Rule is simply so omnibus and makes so many changes, that it likely there are even more legally questionable provisions.

The Proposed Rule frustrates the right to apply for asylum under 8 U.S.C. § 1158. Congress enumerated three classes of immigrants ineligible to apply for asylum, *see* 8 U.S.C. § 1158(a)(2), and six categories of immigrants who cannot be granted asylum, *see id.* § 1158(b)(2). Yet, the Proposed Rule codifies a vast array of restrictions on eligibility such that the meaningful right to asylum has been frustrated to the point of having been effectively denied to several classes of immigrants whom Congress never intended to exclude. To provide just a few examples, the Proposed Rule will effectively exclude applicants who failed to file taxes or worked under the table, applicants with two layovers en route to the United States, and pro se asylum seekers who are not prepared to articulate the complex legal elements of asylum on their applications. Congress did not intend to reserve asylum protection to just the very few refugees who can overcome the Proposed Rule's numerous hurdles—Congress created the right to apply for asylum to provide protection to those in need. Accordingly, the Rule is contrary to the INA.

The Proposed Rule does not employ an appropriate discretionary standard. The term "discretion" is not defined in the INA, but traditionally, discretion has meant a flexible test involving the weighing of equities. *Zuh v. Mukasey*, 547 F.3d 504, 511 (4th Cir. 2008) ("we explicitly reject such an 'inflexible test' and recognize the 'undesirability and 'difficulty, if not impossibility, of defining any standard in discretionary matters of this character") (citing *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978)). Understanding that "each case must be judged on its own merits," the BIA previously set forth a number of positive and negative discretionary factors to be weighed, but stressed the importance of considering "the totality of the circumstances." *Matter of Pula*, 19 I&N. Dec. at 473. Even in weighing all of the circumstances, however, the BIA provided that the danger of persecution will generally outweigh "all but the most egregious of adverse factors." *Id*. at 474.

The Proposed Rule lists nine "discretionary" factors that if present, must result in denial unless an applicant can establish "extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the [applicant] demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the [applicant]." 85 Fed. Reg. 36,283-84. Thus, despite calling these factors "discretionary," the Proposed Rule requires an adjudicator to deny several categories of cases unless the applicant cannot meet an unreasonably high burden of establishing a narrow set of "extraordinary circumstances." This is an inflexible test that does not weigh all of the equities or consider the totality of the circumstances of a particular case. As such, the Rule presents an unreasonable, if not contradictory, interpretation of the discretionary showing required for asylum.

The Proposed Rule's discretionary factor involving unlawful presence conflicts with 8 U.S.C. § 1158(b)'s one-year filing deadline. The Proposed Rule is inconsistent with the INA's statutory exemptions to the one-year filing deadline and the TVPRA. Under the INA, an applicant is only eligible to apply for asylum if they applied within

one year of their entry into the United States, unless they can establish that a statutory exception to the deadline applies. 8 U.S.C. § 1158(b). The exceptions include changed circumstances materially effecting the asylum claim (i.e., a change in law or conditions) or an exceptional circumstance (i.e., physical or mental illness, injury, being a minor, or maintaining lawful status) relating to the delay of the application. Additionally, per the TVPRA, the one-year filing deadline does not apply to unaccompanied children. 8 U.S.C. § 1158(a)(2)(E). In essence, Congress has determined that under certain specific circumstances, applicants are excused from filing their applications within one-year of entry into the United States.

Under the Rule, even if an applicant falls within the statutory exceptions to the one-year filing deadline or is protected under the TVPRA, that applicant will still be denied asylum based on discretion unless they meet the "extraordinary circumstances" standard set forth in the Proposed Rule. The Proposed Rule thus makes the INA and TVPRA's exceptions to the filing deadline irrelevant. Even when applicants meet these exceptions, they are still denied asylum unless they can meet the heightened standard delineated by the Departments. Congress could not have intended for the applicants it expressly excluded from the filing deadline to be denied on that same basis under the guise of "discretion."

The Proposed Rule's unlawful entry discretionary factor conflicts with the law. The Proposed Rule makes entry without inspection a "significantly" adverse discretionary factor that will likely result in denial. However, 8 U.S.C. § 1158(a) specifically provides that an applicant may apply for asylum regardless of whether they entered unlawfully. The Departments contend that this discretionary factor does not conflict with § 1158(a), because applicants are still eligible to *apply* for asylum. This argument is unavailing. By making this factor "significantly" adverse, the Departments are effectively nullifying the right to apply for impacted applicants. In the *East Bay Sanctuary Covenant* cases, the Ninth Circuit held that the Departments cannot summarily deny asylum applicants to applicants who entered between ports of entry. As the Ninth Circuit explained, "[e]xplicitly authorizing a refugee to file an asylum application because he arrived between ports of entry and then summarily denying the application for the same reason borders on absurdity." *E. Bay Sanctuary Covenant v. Trump* (EBSC II), 950 F.3d 1242, 1272 (9th Cir. 2020)(upholding the preliminary injunction on the Departments' rule: "*Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims"*). The Ninth Circuit's ruling comported with the BIA's interpretation in *Matter of Pula*, which recognized that manner of entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Matter of Pula*, 19 I&N Dec. at 473.

Furthermore, as the Ninth Circuit explained, § 1158's provisions on unlawful entry "reflect[] our understanding of our treaty obligation to not 'impose penalties [on refugees] on account of their illegal entry or presence.'" *EBSC* I, 932 F.3d at 772

(quoting Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 174 art 31); *see also* 8 U.S.C. § 1158(a)(1). Creating a blanket-rule that results in the denial of applicants based on their manner of entry is precisely such an impermissible "penalty."

The Proposed Rule effectively heightens the credible fear standard. Because the consequence of an applicant failing at the credible fear interview stage—removal without a hearing—is so high, the standard for passing the credible fear screening is deliberately low. An individual can proceed to a full court hearing if there is only a "significant possibility" that they would be eligible for asylum. *See* 8 U.S.C. § 1225(b)(1)(B)(v).

The Proposed Rule imposes several changes to the credible fear process that upset this deliberately low standard. Most obviously, the Proposed Rule restricts immigration judges who are reviewing negative credible fear findings from considering case law from circuits outside of their jurisdictions. 85 Fed. Reg. 36,267. However, the Departments were preliminarily enjoined from placing a similar circuit law restriction on asylum officers in *Grace v. Whitaker*, 344 F. Supp. 3d 96, 139–40 (D.D.C. 2018). In that case, the court considered a policy memorandum that required asylum officers to apply the circuit law from where the applicant was located during the credible fear screening. In finding this provision was contrary to law, the court explained, "if there is a disagreement among the circuits on an issue, the [applicant] should get the benefit of that disagreement since, if the removal proceedings are heard in the circuit favorable to the [the applicant's] claim, there would be a significant possibility the [applicant] would prevail on that claim." *Id*. Thus, the court held, that the Departments' policy was contrary to the low credible fear standard that Congress intended. The Proposed Rule raises these same issues. To be sure, reviewing immigration judges do not always sit in the jurisdiction where the applicant's claim will ultimately be heard, and it is possible that an applicant's case will be heard in a more favorable circuit. Further, given the rapidness with which asylum law develops, even if a circuit does not yet recognize certain grounds for asylum, it is possible that through the course of an applicant's proceedings it will. As such, this provision is contrary to law.

* * *

The States strongly urge the Departments to withdraw the Proposed Rule. For the reasons set forth above, the Proposed Rule violates the law and will have damaging and irreparable impact on individuals escaping some of the most dangerous, persecutory conditions in the world. Moreover, the Proposed Rule will undoubtedly harm the States' current and prospective residents and their families, as well as the States' economic and social interests.

Sincerely,

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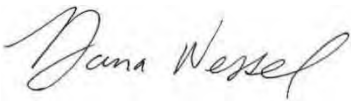

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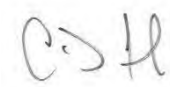

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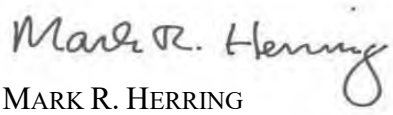

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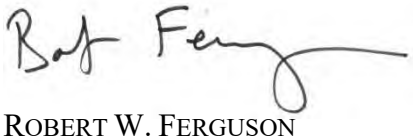

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EXHIBIT 10

DECLARATION OF NAOMI A. IGRA

JARED POLIS
GOVERNOR

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July 14, 2020

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041

Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW, Washington, DC 20503
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rule on Asylum, and Collection of Information, OMB Control Number 1615-0067

Dear Assistant Director Reid and Office of Information and Regulatory Affairs:

This comment is in opposition to the proposed rulemaking published on June 15, 2020, in the Federal Register at 85 F.R. 36264, on the Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94 / EOIR Dkt. No. 18-0002; A.G. Order No. 4714-2020. The Proposed Rule unacceptably dismantles the U.S. asylum system, under which many Coloradans have sought refuge.

As the Governor of Colorado, I have made it clear that asylum seekers with legitimate claims are welcome in Colorado. I am proud that Colorado is open to people fleeing oppression and persecution, reflecting the American values of humanitarianism, freedom, and opportunity. Thousands of asylum seekers have found a new home in Colorado, and our state is better because they are here.

The proposed rulemaking threatens these American values. The current immigration system, which I have long said needs reform, is flawed. Yet, instead of addressing these flaws, the Proposed Rule makes the system much worse. Across 160 pages, the Proposed Rule fundamentally changes our immigration system and asylum law, notably and disturbingly without authorization from Congress. Instead of streamlining and improving the asylum process, these changes essentially prevent valid asylum claims from being heard. The effect of this will force people who seek lawful shelter in Colorado and the United States to return to the places where they have faced persecution and violence. This does not reflect not who we are as a nation.

I am particularly disturbed by the changes to the definitions of "particular social group" and "political opinion". The narrowing of these definitions gravely limits the ability of LGBTQI

individuals to seek asylum. As the first openly gay Governor in the country, LGTBQI persecution hits particularly close to home. Thirty-one (31) countries impose sentences of ten years or more in prison for same-sex relations, and 12 countries allow the death penalty as a sentence.[1] These are realities that LGBTQI individuals face the world over. For people fleeing violence in their home countries, persecuted simply for who they are or for who they love, our country has long been a refuge and a place where all human lives have value. It is unacceptable, and un-American, that the government of the United States would turn them away without the due process that our asylum system has long provided.

Under these new rules, our asylum system will no longer be fair, balanced, or just. Threats of violence will no longer be deemed sufficient evidence of persecution. A person must wait for violence to be inflicted upon them before they are able to seek asylum, even if they reside in a county where being gay is officially a death sentence. This is absurd; Colorado statute (§ 18-3-206 (2016)) itself recognizes threats as criminal, even when they do not rise to the level of a hate crime, because we know that threats in and of themselves should be defined as persecution. As an American and a Coloradan, I am able to be myself and have a loving and supportive husband and family. I cannot imagine being forced to return to a place that would meet my family with threats and violence.

As a country, we have always held ourselves out as a place of hope and opportunity, welcoming people who seek safety and sanctuary. By limiting who can access our asylum system, we close off our country from people seeking safe harbor and fail to uphold our American values. In Colorado, a state I am proud to lead, we believe in hard work and self-determination, and my Administration is proud to celebrate and support values such as freedom and opportunity. As such, I am opposed to these proposed changes.

In addition, we submit that a 30-day timeframe in which to respond to a complete overhaul of our asylum system is woefully insufficient. The Proposed Rule seeks to rewrite decades of legal precedent in the middle of a global pandemic without adequate fidelity to the Administrative Procedures Act, which allows for diverse comment and input. As such, my comments cannot address every problematic provision. My silence on other issues should not be received as consent.

I urge the immediate withdrawal of the Proposed Rule.

Sincerely,

Jared Polis
Governor

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[1] *See* International Lesbian Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia: Global Legislation Overview*, at 48–52 (Dec. 2019), https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf

cc: The Honorable Michael Bennet
United States Senator

The Honorable Cory Gardner
United State Senator

The Honorable Scott Tipton
Member of Congress

The Honorable Joe Neguse
Member of Congress

The Honorable Diana DeGette
Member of Congress

The Honorable Doug Lamborn
Member of Congress

The Honorable Ken Buck
Member of Congress

The Honorable Jason Crowe
Member of Congress

The Honorable Ed Perlmutter
Member of Congress

EXHIBIT 11

DECLARATION OF NAOMI A. IGRA

July 15, 2020

Department of Justice, Department of Homeland Security
Regulatory Coordination Division, Office of Policy and Strategy,
Via electronic submission

Re: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review
EOIR Docket No.18-0002; A.G Order No.4714-2020

The City of New York ("the City") submits this comment to oppose the Department of Homeland Security ("DHS") and Department of Justice's ("DOJ") Proposed Rule entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," which was published in the Federal Register on June 15, 2020 ("Proposed Rule").[1] The Mayor's Office of Immigrant Affairs ("MOIA"), the Mayor's Office to End Domestic and Gender-Based Violence ("ENDGBV"), the Department of Social Services ("DSS"), and the New York City Commission on Human Rights ("CCHR") contributed to this comment.

The Proposed Rule, if implemented, will alter beyond recognition the U.S. asylum system, which has been in place for four decades. The Proposed Rule is the culmination of this Administration's sustained attacks on the asylum system over the past three years with new policies such as the Migrant Protection Protocol ("MPP"), the Third Country Transit Bar,[2] and several other recent Proposed and Interim Final Rules.[3] Despite the stated purpose of clarifying

[1] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (Jun. 15, 2020).
[2] This interim final rule was recently vacated in its entirety for the federal administration's failure to follow the notice-and-comment requirements of the APA. *See Capitol Area Immigrants' Rights Coalition, et al v. Trump*, No. 19-cv-02117-TJK, (D.D.C. Jun. 30, 2020).
[3] *See, e.g.*, comment in opposition to Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640 (Dec 19, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/NYC-Comment-Procedures-for-Asylum-and-Bars-to-Asylum-Eligibility.pdf; comment in opposition to Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (Nov. 14, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/DHS-Docket-No-USCIS-2019-0011-NYC-Comment.pdf; comment in opposition to U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 67243 (Dec. 9, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/us-citizenship-and-immigration-services-fee-schedule-comment-20191230.pdf; comment in opposition to Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765, 84 FR 47248 (Sep. 9, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/Comment-re-EAD-Asylees-11-8-19-CSB-Signed.pdf; comment in opposition to Asylum Eligibility and Procedural Modifications, 84 FR 33829 (Jul. 16, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/IFR-asylum-ban-comment-NYC-2019-08-15.pdf; comment in opposition to Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018) at

adjudicative factors and streamlining the asylum process, the litany of changes contained in this rule are designed to achieve one goal—the drastic reduction of individuals who can find shelter from persecution and violence in this country. The Proposed Rule touches on almost all aspects of asylum law, both substantive and procedural. It seeks to redefine key elements of asylum eligibility including but not limited to the notion of persecution itself and the protected grounds for demonstrating persecution (political opinion as well as "particular social group"), with the end result of shutting out survivors of particular forms of persecution such as gender and LGBTQ+ based violence.[4] These changes seek to restrict access to this critical humanitarian relief. Further, it robs asylum seekers of due process by giving executive officers unilateral power to deny hearings, creating a slew of discretionary factors designed to deny the vast majority of applications, and broadening the definition of frivolous applications to take away the applicants' ability to apply for other forms of relief.

The provisions of the Proposed Rule will serve to deny asylum to most applicants, sending them back into harm's way. New York City's comments focus on the ways in which the changes in regulation will negatively impact the City's communities as well as our core values. The Proposed Rule would harm immigrant New Yorkers who are seeking asylum as well as their families—including U.S. citizens—and their local communities. In turn, the Proposed Rule would harm the societal well-being of New York City, including significantly reducing the efficacy of investments made in immigration legal services. Further, these regulatory changes fly in the face of values long-championed by New York City, and historically the United States.

Additionally, the City objects to the woefully inadequate response deadline, which hinders the ability of stakeholders to meaningfully engage in the comment process. New York City strongly opposes the Proposed Rule and calls upon DHS and DOJ to withdraw it in its entirety. Nothing in these comments constitutes a waiver of any arguments that the City may assert in any other forum.

I. The Proposed Rule Would Create Unprecedented Barriers to Safety and Stability for the City's Most Vulnerable Residents.

New York City is the quintessential city of immigrants, with immigrants making up almost 40% of its population, or around 3.1 million people. This immigrant population is deeply tied to the City as a whole, with nearly 60% of New Yorkers living in households that have at

https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/nyc_mayors_office_immigrant_affairs_comment_on_asylum_ban_2019_01_08.pdf.

[4] While gender-based violence is not explicitly mentioned in the 1951 Refugee Convention, survivors have historically been considered refugees that are members of a "particular social group" by Congress, immigration courts, humanitarian guidance, and prior administrations. See: Tahirih Justice Center, *Tahirih Explains: Gender-Based Asylum, available at:* https://www.tahirih.org/wp-content/uploads/2020/06/Tahirih-Explains-Gender-Based-Asylum.pdf; United Nations High Commissioner For Refugees, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response, available at* https://www.unhcr.org/en-us/3f696bcc4.html.

least one immigrant.[5] Asylum seekers are a particularly vulnerable population in the City, having often made the perilous journey to the United States to flee persecution in their home countries. The Proposed Rule creates unprecedented barriers to asylum eligibility, preventing applicants from achieving more stable lives in the U.S., and harming cities like New York that are home to many asylum seekers and their families. [6]

The City has long recognized that policies that welcome and integrate immigrants lead to a stronger and more prosperous community for all of our residents. That is why the City has taken great strides to support those fleeing persecution as they establish safe, stable homes in the City.[7] The process of applying for asylum is already incredibly complex and difficult to navigate, especially for applicants who do not have adequate counsel. Far from providing clarity on asylum law, the Proposed Rule compounds the difficulties of the process by drastically changing the existing definitions and legal standards for determining asylum eligibility—definitions and standards that form the bedrock of the U.S.'s international obligations under the Refugee Convention and on which applicants and legal service providers have relied for decades.[8] The Proposed Rule would make the standards for what constitutes a meritorious claim of asylum much harder to achieve by narrowly defining the elements of asylum, eliminating entire categories of claims that have been deemed meritorious for years.[9] This would leave individuals fearing horrible persecution with no options, despite their having a credible fear of being persecuted or even killed in their home country. It would also join the significant limitations that

[5] New York City Mayor's Office of Immigrant Affairs, *State of Our Immigrant City: MOIA Annual Report for Calendar Year 2019*, 12, *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/MOIA-Annual-Report-for-2019.pdf.

[6] A significant proportion of those individuals granted asylum in any given year reside in the City and New York State ("the State"). In FY17, 1,510 individuals granted affirmative asylum reside in the State. Nadwa Mossad, *Refugees and Asylees: 2017*, DHS Off. of Immig. Statistics (Mar. 2019), *available at* https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf. In addition, the State and City are major destinations for children asylum seekers. In FY18, 2,837 unaccompanied immigrant children were released from federal custody to adult sponsors in the State, more than the vast majority of other states. Off. of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors by State* (last updated Nov. 29, 2018), *available at* https://tinyurl.com/UAC-state.

[7] *See, e.g.*, NBC New York, *Mayor De Blasio Says NYC Will Welcome Refugees*, Nov. 17, 2015, *available at* https://www.nbcnewyork.com/news/local/syria-refugee-new-york-mayor-bill-de-blasio-immigrant/1274304/; Bill de Blasio, Anne Hidalgo & Sadiq Khan, The New York Times, *Our Immigrants, Our Strength*, Sep. 20, 2016, *available at* https://www.nytimes.com/2016/09/20/opinion/our-immigrants-our-strength.html.

[8] Although there are many examples of provisions in the Proposed Rule that are contrary to the U.S.'s international obligations as well as domestic statutes adopting those obligations, we highlight only a few in this comment for the sake of brevity and due to the inadequate comment period. One of these examples is the firm resettlement bar. For two decades, an applicant was considered to have firmly resettled in another country prior to arrival in the U.S. if she was offered "permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15, 65 FR 76135, Dec. 5, 2000; *see also Abdille v. Ashcroft*, 242 F.3d 477, 484 (3d Cir. 2001). Now, through the Proposed Rule, the agencies would change this longstanding rule to create three completely new definitions of firm resettlement to bar asylum eligibility, including if an applicant resided for one year in another country, regardless of whether she was ever offered or given permanent or even nonpermanent status. And, there is no exception based on the asylum seeker's inability to leave the other country due to financial distress or being trafficked, or based on fear of remaining in the other country.

[9] For examples, *see infra* Section III, which identifies the many redefinitions of the elements of asylum that will work together to deny the majority of gender-based and LGBTQ+ related cases.

have already been enacted by this federal administration, that threaten to rend apart our communities.[10]

In addition to redefining the substantive requirements of asylum, the Proposed Rule also seeks to curtail applications by penalizing asylum seekers in a variety of new ways. First, the rule makes it much easier for asylum officers and immigration judges to deem applications "frivolous," a finding which carries the enormous penalty of barring any other future immigration relief. The vast majority of asylum seekers are fleeing violent persecution in their home countries and arrive in the U.S. with little to no assets let alone a sophisticated knowledge of the U.S. asylum laws. Yet, the Proposed Rule would find that an asylum seeker has made a "frivolous application" if such application is "filed without regard to the merits of the claim" or prohibited by "applicable law."[11] Asylum law and regulations change often—as recent changes driven by this administration demonstrate. How can a recent arrival, who may not even speak fluent English, be expected to determine the merits of her legal claim, especially without competent counsel? Further, existing regulation, 8 C.F.R. § 1003.102(j)(1), specifically states that an application is not frivolous if the applicant has "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." Determination of whether an application was "filed without regard to the merits of the claim" would therefore seem to be nearly impossible to prove and even harder to refute. Under the Proposed Rule, an asylum seeker who intends to challenge wrongly decided BIA or AG-certified precedent in federal court must risk a finding that would forever bar any future immigration relief if that appeal is unsuccessful. If this Proposed Rule were adopted, individuals fleeing persecution who would otherwise have valid claims would be relegated to far less stable living conditions either because of inappropriate denials or due to a fear of applying for asylum.

The Proposed Rule would severely hamstring asylum seekers' ability to effectively present their cases in fair proceedings, which in turn would dramatically lower the percentage of the City's most vulnerable population that will be able to win relief for which they are eligible. In New York City, we have seen that the stability of a person's immigration status positively correlates to better socio-economic outcomes across many indices.[12] Because the Proposed Rule places so many new limits on asylum eligibility, a higher percentage of those fleeing persecution will be left only with the ability to pursue related fear-based reliefs with higher standards than asylum—withholding of removal or deferral of removal under the Convention Against Torture ("CAT").[13] These forms of relief are harder to obtain, and even if granted, these forms of relief

[10] Asylum grant rates in immigration court for 1st quarter FY 2020 has fallen by almost 37% since FY 2016 (40% lower than average in Obama & Bush administrations). *See* Eleanor Acer & Kennji Kizuka, Human Rights First, *Fact Sheet: Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees*, Jun. 11, 2020, *available at* https://www.humanrightsfirst.org/resource/grant-rates-plummet-trump-administration-dismantles-us-asylum-system-blocks-and-deports.

[11] 85 Fed. Reg. at 36295.

[12] Data shows that stable immigration status, especially lawful permanent resident or naturalized citizen status, is indicative of lower rates of poverty, higher health insurance coverage, and educational attainment, among others. *See supra* note 5 at 22-23, 30.

[13] However, even the possibility of being able to pursue these fear-based reliefs with higher standards of proof is now uncertain. Just three weeks after the publication of this Proposed Rule, the Agencies unveiled a new proposed rule seeking to further limit eligibility for asylum as well as withholding of removal and to make it permissible to send individuals who meet the threshold to apply for deferral under CAT to a third country instead of allowing them

leave people in a far less stable position, with no pathway to lawful permanent residence and citizenship. This results in poorer socio-economic outcomes for applicants and their families. The federal administration's continuous attacks on asylum seekers and the asylum system, of which this Proposed Rule is the culmination, will deny the City's most vulnerable residents the safety and stability they desperately need.

II. The Proposed Rule Severely Undermines the City's Investments in Ensuring Due Process for Immigrants and Public Safety.

In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees ("Protocol"), which largely incorporated the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").[14] Article 33(1) of the Refugee Convention enshrines the principle of nonrefoulement: "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[15] In acceding to the Protocol, the United States sent a message to the world that brave leadership included providing refugees with a safe and welcoming home. This led to the codification of the United States asylum system through the Refugee Act in 1980, which sought to ensure that the United States legal code would comply with the 1967 Protocol Relating to the Status of Refugees,[16] which binds parties to the United Nations Convention Relating to the Status of Refugees.[17] New York City is proud to be embrace that position, and the City remains committed to upholding those values today.

Due process protections, which ensure that asylum seekers have a meaningful opportunity to present their cases, are critical, as the stakes are often life and death.[18] As it is, the

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to pursue their claims in the U.S. *See* Security Bars and Processing, 85 FR 41201 (Jul. 9, 2020). In this new proposed rule, the Agencies "acknowledge" that the procedures for processing individuals seeking humanitarian relief in these two rule conflict with one another but merely state that they will "reconcile" this conflict at the final rule stage. *Id*. at 41211.

[14] *See* Convention Relating to the Statute of Refugees art. 33(1), July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "Refugee Convention"); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (1968) (hereinafter "Protocol"); *see also INS v. Stevic*, 467 U.S. 407, 416 (1984) ("The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . with respect to "refugees" as defined in Article 1.2 of the Protocol."). The Convention and Protocol have been ratified by 145 and 146 countries, respectively. *See* U.N. Treaty Collection, Convention relating to the Status of Refugees (last updated Mar. 19, 2018); U.N. Treaty Collection, Protocol relating to the Status of Refugees (last updated Mar. 19, 2018), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V5&chapter=5&clang=_ en.

[15] Refugee Convention, *supra* note 14, art. 33(1).

[16] Protocol, *supra* note 14.

[17] Refugee Convention, *supra* note 14.

[18] *See* Elizabeth G. Kennedy & Alison Parker, *Deported to Danger United States Deportation Policies Expose Salvadorans to Death and Abuse*, Human Rights Watch (Feb. 5, 2020), *available at* https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and (finding that at least 138 Salvadorans were killed and over 70 were severely abused after being deported from the U.S. from 2013 to 2019).

process of seeking asylum is challenging because the evidentiary burden rests on the asylum seeker who is navigating a complex, unfamiliar system. In addition, applicants for asylum, like all immigrants in removal proceedings or pursuing affirmative applications for relief, have no right to counsel. Moreover, the U.S. asylum system already applies bars to asylum in a manner that is overly broad in the context of our obligations under the Refugee Convention.[19] The Proposed Rule would further rob individuals of due process protections by depriving them of a full day in court as well as creating a slew of new discretionary bars to asylum never contemplated under our existing U.S. and international law.

Recognizing that New York is a city that thrives because of our immigrant communities, this mayoral administration has increased and enhanced access to legal assistance for immigrants—especially for those most vulnerable like asylum seekers—by investing over $30 million dollars in a continuum of free legal service programs for immigrant New Yorkers for fiscal year 2020.[20] Together with the New York City Council, the City of New York has invested over $50 million in immigration legal services.[21] These investments are diminished by the federal administration's dismantling of the asylum system. The Proposed Rule would require legal service providers to expend extensive time and resources to retrain attorneys on the arbitrary changes to the asylum law[22] and to upend their case management systems.

The Proposed Rule would remove the existing procedural safeguards afforded to asylum seekers in service of "efficiency." It would relegate asylum seekers to a "streamlined" process in which individuals found to have credible fear of persecution will have their claims adjudicated by an Immigration Judge in a truncated asylum-only proceeding rather than in a regular immigration court proceeding.[23] Thus, even if an individual were eligible for a different form of immigration relief, she would not be able to apply for it, forcing a difficult choice between paths to relief. This arbitrarily denies applicants the opportunity to present a full case. In a further erosion of due process, the Proposed Rule would give immigration judges the power to summarily deny applications without so much as a hearing, if the judges decide, without the applicant's testimony, that the application form does not sufficiently make out a claim.[24]

The opportunity to a full and fair hearing remains a fundamental American value of justice. Yet, this rule seeks to take this most basic of guarantees away from those fleeing

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[19] *See* Philip L. Torrey, Clarissa Lehne, Collin Poirot, Manuel D. Vargas, Jared Friedberg, *United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened*, (2018) available at https://www.immigrantdefenseproject.org/wpcontent/uploads/IDP_Harvard_Report_FINAL.pdf.

[20] New York City Office of Civil Justice, *2019 Annual Report*, *available at* https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf.

[21] *Id*.

[22] Among many changes to longstanding regulations and legal precedent, the Proposed Rule seeks to arbitrarily redefine "persecution" as well as the protected grounds of "political opinion" and "particular social group." *See* 85 Fed. Reg. at 36278-80. It would also change the proof required for establishing a nexus between the persecution and protected ground, bar certain types of commonly-used evidence regarding cultural stereotypes to support a claim that a persecutor conformed to that stereotype (i.e., machismo, family violence), and it would shift the burden to the applicant in cases where an applicant has suffered past persecution and argues that internal relocation is not possible. *See id.* at 36281-2.

[23] *See* 85 Fed. Reg. at 36264, 36266-67.

[24] *See id.* at 36277.

persecution. Such drastic changes to the proceedings afforded asylum seekers, far from clarifying and streamlining the process, will result in widespread confusion. First, asylum-only proceedings mean that legal service providers will be unable to pursue every avenue of relief available to their clients. Further, these same providers will be burdened by the myriad appeals and challenges to these truncated proceeding they must pursue to fully vindicate their clients' rights. Second, allowing the immigration judge to pretermit cases without a hearing ignores the practical obstacles many asylum seekers face in completing the lengthy and complex asylum application. Most asylum seekers find it challenging to navigate a complex, foreign court system and face hurdles in finding trusted and free or low-cost counsel. In New York City, we recognize this reality and have accordingly made historic investments in legal services. As these applicants become more settled in their new city, they are often able to find quality legal representation through these services. As a result, applicants often end up filing their initial application *pro se* (on their own), and later work with legal service providers to gather evidence to supplement initial filings. These applications will now run the risk of being pretermitted without any opportunity for the applicant and her attorney to present such additional evidence.

The U.S. already applies bars to asylum that are far broader than was contemplated by international law, and the Proposed Rule, which adds a slew of new discretionary bars,[25] comes on the heels of a prior rule that sought to do the same, to which the City of New York commented on January 21, 2020.[26] As expressed in the City's previously submitted comment, the most egregious proposed bars clearly conflict with existing statutes and regulations, evincing the administration's primary goal of denying as many applications as possible. For one particularly salient example, the Proposed Rule would ban from asylum many individuals who submit their applications more than a year after arriving in the U.S. with no exceptions. This directly contradicts provisions of the Immigration and Nationality Act, passed by Congress.[27]

The numerous and arbitrary revisions contained in the Proposed Rule limiting due process and creating barriers to relief will significantly weaken the impact of New York City's historic investment in legal services and place an undue strain on the City's legal service partners by requiring retraining of legal service providers and upending their case load and management.

III. The Proposed Rule Contravenes the Values and Purpose of Asylum.

The City is proud to offer itself as a home to those who have escaped conflict, persecution, and violence.[28] This Proposed Rule is an egregious attempt to destroy the asylum system in the U.S. and joins an overwhelming number of proposals and policies offered by this administration that seek to deprive immigrants of safe harbor and critical resources.[29] It is impossible to comment on this Proposed Rule and ignore the obvious attacks on immigration as a whole. The Proposed Rule does not provide any justification for how it serves our country's

[25] *See id.* at 36282-85.
[26] *See* comment in opposition to Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640 (Dec 19, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/NYC-Comment-Procedures-for-Asylum-and-Bars-to-Asylum-Eligibility.pdf.
[27] *See* INA § 208(a)(2)(d).
[28] *See supra* note 7.
[29] *See supra* note 3.

economy, national security, or legal system and instead seeks, without justification, to overhaul the four-decades-old asylum system through unilateral executive action.[30] Such action, which attempts to circumvent the will of the legislature as well as precedential rulings in the Courts, is of deep concern to the City of New York.

Asylum was created as a path to safety for people harmed because of immutable characteristics: gender, sexual orientation, and gender identity, like race, religion, nationality, and political opinion, are fundamental aspects of one's personhood as recognized broadly in international human rights law.[31] Yet, the Proposed Rule would directly contradict the United States' treaty obligations by seeking to exclude gender and sexual orientation based violence claims, going so far as to virtually eliminate gender as a ground for asylum, and reading those fleeing gang-related violence entirely out of the refugee definition.

The Proposed Rule would make it practically impossible for asylum claims based on gender-based violence and LGBTQ+ related persecution to succeed by redefining the "particular social group" ("PSG")[32] and "political opinion"[33] grounds of asylum, redefining persecution to undercut these claims,[34] redefining nexus to explicitly exclude gender,[35] and prohibiting the submission of the most common and critical forms of evidence used to support these claims.[36]

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[30] *See e.g.*, *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/.

[31] In 1985, U.S. Board of Immigration Appeals ("BIA") ruled that the PSG ground for asylum protects individuals persecuted on account of a fundamental characteristic, including sex in *Matter of Acosta*, 19 U&N Dec. 211(BIA 1985). In 1996, in *Matter of Kasinga*, the BIA granted asylum to a young woman fleeing female genital mutilation/cutting and forced marriage, recognizing that her persecution was partly motivated by her gender. 21 I&N Dec. 357 (BIA 1996). The precedent set by *Kasinga* paved the way for those fleeing other types of gender-based violence.

[32] Among other restrictions, the Proposed Rule states that a PSG ground cannot be based on "interpersonal disputes" or "private criminal acts." 85 Fed. Reg. at 36279. As explained further in this section, such a change would effectively exclude most claims stemming from intimate partner violence—such as domestic violence or spousal rape—or intra-family violence—such as female genital cutting, honor crimes, or forced marriage.

[33] The Proposed Rule would limit the definition of "political opinion" to those held in "furtherance of a discrete cause related to political control of a state or a unit thereof." 85 Fed. Reg. at 36280. Under this definition, claims based on feminist beliefs that women should not be treated as objects of control and harm by husbands or other male family members or LGBTQ+ advocacy and speech would likely not be considered "political opinion."

[34] The Proposed Rule drastically raises the level of severity of harm to qualify as "persecution," changing the standard from threat to life or freedom to a harm so severe that it constitutes an exigent threat. The rule also lists harms that the Agencies claim do not constitute persecution under this new definition. This list includes harms that are dangerous due to their cumulative nature like repeated threats and harassment, which are often involved in gender-based violence. The rule would also deny asylum claims of LGBTQ+ individuals who fear persecution in a country with laws criminalizing gender identities or sexual orientation unless the individual can prove that they were going to be persecuted using that policy. *See* 85 Fed. Reg. at 36280-81.

[35] The Proposed Rule does not explain why gender is listed under nexus rather than a ground for asylum under PSG—perhaps, because it is clear that gender, like race or nationality, is an immutable and socially distinct characteristic. In any event, the rule would prohibit claims which argue that gender was or will be one of the central reasons why the applicant was persecuted. *See* 85 FR 36264, 64-65.

[36] Without any rationale, the rule seeks to prohibit evidence about "pernicious cultural stereotypes," even though these are often reflective of country conditions. 85 Fed. Reg. at 36282. The vast majority of gender or LGBTQ+ based asylum claims rely on evidence of widely held cultural attitudes toward women and LGBTQ+ individuals,

These changes will lead to almost categorical denial of cases where gender, gender-identity, or sexual orientation is a crucial reason for the persecution, and such outcomes are antithetical to the case-by-case analysis required under asylum law. [37]

Of particular concern in these myriad changes is the Proposed Rule's codification of the requirement that a PSG be defined "independently" of the alleged persecutory act or harm, and its attendant list of bases that "would be insufficient to establish a particular social group," including "interpersonal disputes" and "private criminal acts." 85 Fed. Reg. at 36279. Codifying such a blanket requirement and list of bases without nuance is particularly damaging to gender and LGBTQ+ related claims because so many are rooted in intimate partner or family violence that government actors choose to ignore as private or family matters. For example, in *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), the BIA held that a Guatemalan woman should be granted asylum on the basis that her former spouse had repeatedly abused her "emotionally, physically and sexually," establishing a precedent that has allowed many asylum seekers, especially women from Central America, to win cases.

LGBTQ+ individuals, who have been considered members of a PSG, face even heightened risk of experiencing gender-based violence. In many countries, LGBTQ+ people are subject to "corrective rape."[38] Likewise, in many countries rape and torture is countenanced under the guise of pseudoscientific "therapy."[39] Such gender-based violence, particularly for LGBTQ+ individuals, is often perpetrated by private actors, such as family and community members and is routinely underreported.[40]

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and such evidence has been accepted as probative and reliable by adjudicators for years, especially to establish that these individuals are set apart particularly and distinctly in their culture to establish the PSG ground.

[37] While the rule purports to allow gender-based claims in "rare circumstances," in practice, this exception will have no effect. 85 Fed. Reg. at 36282. As expressed in *supra* section II, the rule allows judges to pretermit any "legally insufficient" claims—e.g., those based on gender—at the outset. Such claims will then be deemed "frivolous" under another provision in the rule, forever barring an applicant from any immigration status or benefits of any kind. Survivors will be deterred or prevented from applying at all, and the parameters of the exception will go untested.

[38] For example, in Jamaica, lesbians are raped under the belief that intercourse with a man will "cure" them of their sexual orientation. *See Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report*, submitted at 118th Session of Human Rights Committee in Geneva, at 5, Sept. 2016, *available at* https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JAM/INT_CCPR_CSS_JAM_25269_E.pdf.

[39] In Ecuador, LGBTQ+ individuals are involuntarily admitted to "corrective therapy" clinics by their family members, where they are beaten, locked in solitary confinement, and force-fed psychoactive drugs. *See* Anastasia Moloney, *Gays in Ecuador raped and beaten in rehab clinics to "cure" them*, Reuters, Feb. 8, 2018, *available at* https://www.reuters.com/article/ecuador-lgbt-rights/feature-gays-in-ecuador-raped-and-beaten-in-rehab-clinics-to-cure-them-idUSL8N1P03QO.

[40] As the State Department has noted, "[r]eluctance to report abuse—by women, children, lesbian, gay, bisexual, transgender, or intersex persons (LGBTI), and members of other groups—is, of course, often a factor in the underreporting of abuses." *See* U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *2019 Country Reports on Human Rights Practices*, Appendix A, Mar. 11, 2020, *available at* https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/.

The Proposed Rule would summarily deny claims based on such atrocities by defining them as "interpersonal disputes" or "private criminal acts."[41] Violence is sometimes outside the reach of the state, and sometimes takes place where weak governments depend on allied armed groups to provide security.[42] However, the very indifference of governmental authorities to the plight of survivors of gender-based violence in fact *proves* that persecution exists. There is no good reason for denying survivors who can show their government's failure to protect them. Social norms can also hide gender-based violence from public view, and governments often allow those norms to go unchecked and unchallenged.

Asylum cases are inherently fact-specific and perhaps no part of an asylum claim is more individualized than the specific way in which one person has been or may be harmed by another. By establishing such per se rules around an individualized determination, the Proposed Rule significantly undercuts the necessary flexibility of the current framework and will ultimately result in the erroneous denial of protection to bona fide asylum seekers. The Proposed Rule provides no rationale for this significant departure from the current manner of interpreting this term.

This approach ignores the reality that discrimination, harassment, and violence toward people based on their gender, gender identity, and sexual orientation remain persistent social problems.[43] Locally, the City remains committed to combatting such discrimination through the protections of the New York City Human Rights Law and by welcoming asylum seekers and refugees who face persecution and are unable to enjoy comparable protections in their home countries.[44] All survivors of persecution based on their gender, gender identity, and sexual orientation deserve a chance to seek protection through the asylum process.

Indeed, the United Nations High Commissioner for Refugees ("UNHCR"), which oversees the Refugee Convention, has confirmed that people fleeing persecution based on gender, gender-identity and sexual orientation do qualify for asylum under the Convention's definition of a refugee. In recent years, the UNHCR has issued several interpretive instruments recognizing the specific protection needs of women and LGBTQ+ individuals.[45] A recent such instrument specifically recognized the need to address escalating levels of gender-based violence faced by women fleeing Central America.[46]

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[41] While the rule alludes to "rare circumstances" in which such cases might be considered, this is ultimately an empty assurance and will serve to deny survivors of gender-based violence any protection.

[42] *See* Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa*, Apr. 2018, *available at* https://www.hrw.org/sites/default/files/report_pdf/lgbt_mena0418_web_0.pdf.

[43] *See* N.Y.C. Comm'n on Human Rights, *Fiscal Year 2019 Annual Report*, 44, https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/AnnualReport2019.pdf.

[44] *See generally* N.Y.C. Admin. Code §§ 8-101, *available at* https://www1.nyc.gov/site/cchr/law/chapter-1.page#8-102.

[45] United Nations High Commissioner For Refugees, *UNHCR's Views on Asylum Claims based on Sexual Orientation and/or Gender Identity Using international law to support claims from LGBTI individuals seeking protection in the U.S.*, *available at* https://www.unhcr.org/en-us/5829e36f4.pdf.

[46] United Nations High Commissioner For Refugees, *UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender Using international law to support claims from women seeking protection in the U.S.*, *available at* https://www.unhcr.org/en-us/5822266c4.pdf.

Domestically, for more than two decades, the BIA has held that survivors of gender-based violence, just like those fleeing religious or political persecution, are eligible for asylum if they meet the statutory criteria that establish them as refugees. This legal precedent considers the social, economic, and legal reality that these survivors face by recognizing that this violence is brought about by a public code of conduct that allows them to be victimized simply because of their gender. The proposed rule is a continued attack[47] on refugees and asylum seekers, particularly those experiencing gender-based and LGBTQ+ related violence.

In addition to redefining asylum law to shut survivors of gender-based and LGBTQ+ related violence out of asylum, the Proposed Rule would also prohibit asylum-seeking survivors in "expedited removal" procedures from applying for protection under the Violence Against Women Act or Trafficking Victims Protection Act. It would also allow for disclosure of information in an asylum application under new circumstances, which may provide abusive partners to obtain survivor information and inflict further violence and abuse. As a result of the unnecessary abuse stemming from this Proposed Rule, the legal system may see an increase in gender-based violence cases, spreading already sparse resources even thinner.[48]

IV. This Notice of Proposed Rulemaking Warrants a Longer Comment Period.

As discussed above, the Proposed Rule, if implemented, would systematically erode asylum protections and would be the most sweeping changes to asylum since the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996. The Proposed Rule seeks to rewrite statutes passed by Congress forty years ago, without any legislative action.

The Notice of Proposed Rulemaking ("NPRM") is over 160 pages long, and more than 60 of those pages are the proposed regulations themselves. Written in dense, technical language, these sweeping new restrictions have the power to send the most vulnerable back to their countries where they may face persecution, torture, and death.[49] Any one of the sections of the Proposed Rule, standing alone, would merit 60 days for the public to fully contemplate the potential reach of the proposed changes, perform research on the existing rules and interpretations, and respond in a complete, thoughtful manner. Instead, the agencies have allowed a mere 30 days to respond to multiple, unrelated changes that, taken together, work to eviscerate the asylum system of the last forty years.

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this far-reaching and potentially life-threatening, but the challenges in responding to the NPRM now are magnified by the ongoing COVID-19 pandemic, which has impacted New York City particularly hard.

We urge the administration to grant the public at least 60 days to have adequate time to provide comprehensive comments.

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[47] *Matter* of *A-B-*, 27 I&N Dec. 227 (A.G. 2018).
[48] Contracted immigration legal services providers at the NYC Family Justice Centers explore all options with immigrant survivors and the proposed rule would make it much harder for survivors seeking safety in the U.S. to obtain legal immigration status.
[49] *See supra* note 18.

V. Conclusion

In creating more barriers for asylum seekers, the Proposed Rule continues this federal administration's march towards making the United States a hostile place for immigrants to the detriment of everyone in our communities. It is well documented that hostile climates for immigrants make the City less safe[50] and less prosperous.[51] As the City's Comptroller stated, "when immigrants are threatened, when their ability to live, work, and raise their families is compromised—our entire City pays a costly price."[52] The Proposed Rule, is particularly egregious, even in the context of this Administration's steady attack on the immigration system precisely because it targets the most vulnerable individuals fleeing for safety, those of whom our country has a long, proud history of protecting. The Proposed Rule imposes new hurdles and challenges at every stage of the asylum process, blocking the vast majority of applications, rendering our obligations under U.S. and international law and our basic humanitarian values, mere empty promises. For these reasons, and those articulated above, the Proposed Rule should be withdrawn.

[50] Mike Males, *White Residents of Urban Sanctuary Counties are Safer From Deadly Violence Than White Residents in Non-Sanctuary Counties*, Dec. 2017, *available at* http://www.cjcj.org/uploads/cjcj/documents/white_residents_of_urban_sanctuary_counties.pdf?utm_content=%7BURIENCODE%5bFIRST_NAME%5d%7D&utm_source=VerticalResponse&utm_medium=Email&utm_term=CJCJ%27s%20report&utm_campaign=New%20Report%3A%20Sanctuary%20Counties%20Safer%20for%20White%20Residents; *see* TCR Staff, *You're Safer in a 'Sanctuary City,' says New Study*, Dec. 13, 2017, *available at* https://thecrimereport.org/2017/12/13/youre-safer-in-a-sanctuary-city-says-new-study/; Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Jan. 26, 2017, *available at* https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/.

[51] *See* Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, Sep. 6, 2018, *available at* https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/; New American Economy Research Fund, *From Struggle to Resilience: The Economic Impact of Refugees in America*, Jun. 19, 2017, *available at* https://research.newamericaneconomy.org/report/from-struggle-to-resilience-the-economic-impact-of-refugees-in-america/.

[52] Scott Stringer, *Immigrant Population Helps Power NYC Economy*, Jan. 11, 2017, *available at* https://comptroller.nyc.gov/newsroom/press-releases/comptroller-stringer-analysis-immigrant-population-helps-power-nyc-economy/.

EXHIBIT 12

DECLARATION OF NAOMI A. IGRA

Department of Homeland Security
U.S. Citizenship and Immigration Services
U.S. Department of Justice
Executive Office for Immigration Review

OMB No. 1615-0067; Expires 07/31/2022

I-589, Application for Asylum and for Withholding of Removal

START HERE - Type or print in black ink. See the instructions for information about eligibility and how to complete and file this application. There is no filing fee for this application.

NOTE: ☐ Check this box if you also want to apply for withholding of removal under the Convention Against Torture (CAT) regulations. Refer to Instructions, **Part 1: Filing Instructions**, **Section II**, **Basis of Eligibility**, **Part B** for more information.

Part A.I. Information About You

1. Alien Registration Number(s) (A-Number) *(if any)*	**2.** U.S. Social Security Number *(if any)*	**3.** USCIS Online Account Number *(if any)*
4. Complete Last Name	**5.** First Name	**6.** Middle Name

7. What other names have you used *(include maiden name and aliases)?*

8. Residence in the U.S. *(where you physically reside)*

Street Number and Name			Apt. Number
City	State	Zip Code	Telephone Number ( )

9. Mailing Address in the U.S. *(if different than the address in Item Number 8)*

In Care Of *(if applicable):*		Telephone Number ( )
Street Number and Name		Apt. Number
City	State	Zip Code

10. Gender: ☐ Male ☐ Female	**11.** Marital Status: ☐ Single ☐ Married ☐ Divorced ☐ Widowed		
12. Date of Birth *(mm/dd/yyyy)*	**13.** City and Country of Birth		
14. Present Nationality *(Citizenship)*	**15.** Nationality at Birth	**16.** Race, Ethnic, or Tribal Group	**17.** Religion

18. *Check the box, a through c, that applies:* **a.** ☐ I have never been in Immigration Court proceedings.

b. ☐ I am now in Immigration Court proceedings. **c.** ☐ I am **not** now in Immigration Court proceedings, but I have been in the past.

19. *Complete 19 a through c.*

a. When did you last leave your country? *(mm/dd/yyyy)* _____ **b.** What is your current I-94 Number, if any? _____

c. List each entry into the U.S. beginning with your most recent entry. *List date (mm/dd/yyyy), place, and your status for each entry. (Attach additional sheets as needed.)*

Date _____ Place _____ Status _____ Date Status Expires _____

Date _____ Place _____ Status _____

Date _____ Place _____ Status _____

20. What country issued your last passport or travel document?	**21.** Passport Number Travel Document Number	**22.** Expiration Date *(mm/dd/yyyy)*

23. What is your native language *(include dialect, if applicable)?*	**24.** Are you fluent in English? ☐ Yes ☐ No	**25.** What other languages do you speak fluently?

For EOIR use only.	**For USCIS use only.**	**Action:** Interview Date: _____ Asylum Officer ID No.: _____ **Decision:** Approval Date: _____ Denial Date: _____ Referral Date: _____

Part A.II. Information About Your Spouse and Children

Your spouse ☐ I am not married. (Skip to **Your Children** below.)

1. Alien Registration Number (A-Number) *(if any)*	**2.** Passport/ID Card Number *(if any)*	**3.** Date of Birth *(mm/dd/yyyy)*	**4.** U.S. Social Security Number *(if any)*
5. Complete Last Name	**6.** First Name	**7.** Middle Name	**8.** Other names used *(include maiden name and aliases)*
9. Date of Marriage *(mm/dd/yyyy)*	**10.** Place of Marriage	**11.** City and Country of Birth	
12. Nationality *(Citizenship)*	**13.** Race, Ethnic, or Tribal Group	**14.** Gender ☐ Male ☐ Female	

15. Is this person in the U.S.?

☐ Yes ***(Complete Blocks 16 to 24.)*** ☐ No *(Specify location):* _____

16. Place of last entry into the U.S.	**17.** Date of last entry into the U.S. *(mm/dd/yyyy)*	**18.** I-94 Number *(if any)*	**19.** Status when last admitted *(Visa type, if any)*
20. What is your spouse's current status?	**21.** What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	**22.** Is your spouse in Immigration Court proceedings? ☐ Yes ☐ No	**23.** If previously in the U.S., date of previous arrival *(mm/dd/yyyy)*

24. If in the U.S., is your spouse to be included in this application? *(Check the appropriate box.)*

☐ Yes*(Attach one photograph of your spouse in the upper right corner of Page 14 on the extra copy of the application submitted for this person)*

☐ No

Your Children. List **all** of your children, regardless of age, location, or marital status.

☐ I do not have any children. *(Skip to **Part. A.III., Information about your background.)***

☐ I have children. Total number of children: _____.

(**NOTE:** *Use Form I-589 Supplement A or attach additional sheets of paper and documentation if you have more than four children.)*

1. Alien Registration Number (A-Number) *(if any)*	**2.** Passport/ID Card Number *(if any)*	**3.** Marital Status *(Married, Single, Divorced, Widowed)*	**4.** U.S. Social Security Number *(if any)*
5. Complete Last Name	**6.** First Name	**7.** Middle Name	**8.** Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	**10.** Nationality *(Citizenship)*	**11.** Race, Ethnic, or Tribal Group	**12.** Gender ☐ Male ☐ Female

13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):* _____

14. Place of last entry into the U.S.	**15.** Date of last entry into the U.S. *(mm/dd/yyyy)*	**16.** I-94 Number *(If any)*	**17.** Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	**19.** What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	**20.** Is your child in Immigration Court proceedings? ☐ Yes ☐ No	

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one photograph of your child in the upper right corner of Page 14 on the extra copy of the application submitted for this person.)*

☐ No

Part A.II. Information About Your Spouse and Children (Continued)

1. Alien Registration Number (A-Number) *(if any)*	2. Passport/ID Card Number *(if any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security Number *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic, or Tribal Group	12. Gender ☐ Male ☐ Female

13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):* _____

14. Place of last entry into the U.S.	15. Date of last entry into the U.S. *(mm/dd/yyyy)*	16. I-94 Number *(If any)*	17. Status when last admitted *(Visa type, if any)*

18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings? ☐ Yes ☐ No

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 14 on the extra copy of the application submitted for this person.)*

☐ No

1. Alien Registration Number (A-Number) *(if any)*	2. Passport/ID Card Number *(if any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security Number *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic, or Tribal Group	12. Gender ☐ Male ☐ Female

13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):* _____

14. Place of last entry into the U.S.	15. Date of last entry into the U.S. *(mm/dd/yyyy)*	16. I-94 Number *(If any)*	17. Status when last admitted *(Visa type, if any)*

18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings? ☐ Yes ☐ No

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 14 on the extra copy of the application submitted for this person.)*

☐ No

1. Alien Registration Number (A-Number) *(if any)*	2. Passport/ID Card Number *(if any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security Number *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic, or Tribal Group	12. Gender ☐ Male ☐ Female

13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):* _____

14. Place of last entry into the U.S.	15. Date of last entry into the U.S. *(mm/dd/yyyy)*	16. I-94 Number *(If any)*	17. Status when last admitted *(Visa type, if any)*

Part A.II. Information About Your Spouse and Children (continued)

18. What is your child's current status?	**19.** What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	**20.** Is your child in Immigration Court proceedings? ☐ Yes ☐ No

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 14 on the extra copy of the application submitted for this person.)*

☐ No

Part A.III. Information About Your Background

1. List your last address where you lived before coming to the United States. If this is not the country where you fear persecution, also list the last address in the country where you fear persecution. *(List Address, City/Town, Department, Province, or State and Country.)* *(**NOTE:** Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Number and Street *(Provide if available)*	City/Town	Department, Province, or State	Country	Dates From *(Mo/Yr)*	To *(Mo/Yr)*

2. Provide the following information about your residences during the past 5 years. List your present address first. *(**NOTE:** Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Number and Street	City/Town	Department, Province, or State	Country	Dates From *(Mo/Yr)*	To *(Mo/Yr)*

3. Provide the following information about your education, beginning with the most recent school that you attended. *(**NOTE:** Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Name of School	Type of School	Location *(Address)*	Attended From *(Mo/Yr)*	To *(Mo/Yr)*

4. Provide the following information about your employment during the past 5 years. List your present employment first. *(**NOTE:** Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Name and Address of Employer	Your Occupation	Dates From *(Mo/Yr)*	To *(Mo/Yr)*

Part A.III. Information About Your Background (continued)

5. Provide the following information about your parents and siblings (brothers and sisters). Check the box if the person is deceased. (**NOTE**: *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Full Name	City/Town and Country of Birth	Current Location
Mother		☐ Deceased
Father		☐ Deceased
Sibling		☐ Deceased
Sibling		☐ Deceased
Sibling		☐ Deceased
Sibling		☐ Deceased

Part B. Information About Your Application

(**NOTE:** *Use Form I-589 Supplement B, or attach additional sheets of paper as needed to complete your responses to the questions contained in Part B.)*

When answering the following questions about your asylum or other protection claim (withholding of removal under 241(b)(3) of the INA (statutory withholding of removal) or withholding of removal under the CAT regulations), you must provide a detailed and specific account of the basis of your claim to asylum or other protection. To the best of your ability, provide specific dates, places, and descriptions about each event or action described. You must attach documents evidencing the general conditions in the country from which you are seeking asylum or other protection and the specific facts on which you are relying to support your claim. If this documentation is unavailable or you are not providing this documentation with your application, explain why in your responses to the following questions.

Refer to Instructions, **Part 1. Filing Instructions**, **Section II. Basis of Eligibility**, **Parts A. - D.**; **Section V.**, **Completing the Form, Part B.**; **and Section VII. Additional Evidence That You Should Submit**, for more information on completing this section of the form.

1. Why are you applying for asylum and for statutory withholding of removal, or for withholding of removal under the CAT regulations? Check the appropriate box(es) below and then provide detailed answers to the questions below.

I am seeking asylum or withholding of removal based on:

☐ Race
☐ Religion
☐ Nationality
☐ Political opinion
☐ Membership in a particular social group
☐ Torture Convention

If you are claiming membership in a particular social group(s), identify or describe the particular social group(s), or provide any information that shows your membership in a particular social group(s):

A. Have you, your family, friends, colleagues ever experienced harm, mistreatment, or threats in the past by anyone?

☐ No ☐ Yes

If "Yes," explain in detail:

1. What happened.

2. When the harm, mistreatment, or threats occurred.

Part B. Information About Your Application (continued)

3. Who caused the harm, mistreatment, or threats.

4. Why you believe the harm, mistreatment, or threats occurred. If you are seeking asylum or statutory withholding of removal based on one or more of the protected grounds listed above (race, religion, nationality, political opinion, or membership in a particular social group), you must explain why you believe the harm, mistreatment, or threats you experienced were on account of one or more of the protected grounds.

B. Do you fear harm or mistreatment if you return to your home country?

☐ No ☐ Yes

If "Yes," explain in detail:

1. What harm or mistreatment you fear.

2. Who you believe would harm or mistreat you.

3. Why you believe you would or could be harmed or mistreated. If you are seeking asylum or statutory withholding of removal based on one or more of the protected grounds listed above (race, religion, nationality, political opinion, or membership in a particular social group), you must explain why you believe the harm or mistreatment you fear are on account of one or more of the protected grounds.

C. Have you, your family, friends, or colleagues ever been subjected to torture in the past?

☐ No ☐ Yes

If "Yes," explain in detail:

1. What happened.

2. When the torture occurred.

3. Who caused the harm, which, along with other factors, amounted to torture.

4. Why you believe the torture occurred.

Part B. Information About Your Application (continued)

D. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

☐ No ☐ Yes

If "Yes," explain in detail:

1. The nature of the harm you fear.

2. Who would harm you.

3. Why you believe you would be tortured.

2. Have you or your family members ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in any country other than the United States (including for an immigration law violation)?

☐ No ☐ Yes

If "Yes," explain the circumstances and reasons for the action.

3.A. Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group, or the press or media?

☐ No ☐ Yes

If "Yes," describe for each person the level of participation, any leadership or other positions held, and the length of time you or your family members were involved in each organization or activity.

3.B. Do you or your family members continue to participate in any way in these organizations or groups?

☐ No ☐ Yes

If "Yes," describe for each person your or your family members' current level of participation, any leadership or other positions currently held, and the length of time you or your family members have been involved in each organization or group.

Part C. Additional Information About Your Application

(**NOTE:** *Use Form I-589 Supplement B, or attach additional sheets of paper as needed to complete your responses to the questions contained in Part C.*)

1. Have you ever applied to the U.S. Government for refugee status or for asylum and withholding of removal?

☐ No ☐ Yes

2. Have your spouse, your child(ren), your parent(s), or your sibling(s) ever applied to the U.S. Government for refugee status or for asylum and withholding of removal?

☐ No ☐ Yes

3. Have you ever been included as a dependent in a spouse's or parent's application to the U.S. Government for refugee status or for asylum and withholding of removal?

☐ No ☐ Yes

If you answered "Yes" to **Item Number 1.**, **Item Number 2.** and/or **Item Number 3.**, explain the decision and what happened to any status you, your spouse, your child(ren), your parent(s), or your sibling(s) received as a result of that decision.

If you answered "Yes" to **Item Number 2.** and/or **Item Number 3.**, also provide the name, date of birth, and A-Number, if available, of your spouse, child(ren), parent(s), or sibling(s) referenced in **Item Number 2.** and/or **Item Number 3**.

Family Name (Last Name) | Given Name (First Name) | Middle Name

Date of Birth (mm/dd/yyyy) | Alien Registration Number (A-Number) ▶ A-

If you were previously denied asylum by USCIS, an immigration judge, or the Board of Immigration Appeals, you must describe in this application any change(s) in conditions in your country or your own personal circumstances since the date of the denial that may affect your eligibility for asylum. For guidance in answering this question, *see* Instructions, **Part 1: Filing Instructions**, **Section I. Who May Apply and Filing Deadlines** and **Part 1: Filing Instructions**, **Section V. Completing the Form**, **Part C.**

4.A. After leaving the country from which you are claiming asylum, did you, your spouse, or child(ren) included in the application, or your parents (if applicable) who are now in the United States travel through or reside in any other country before entering the United States?

☐ No ☐ Yes

If you answered "Yes" to **Item Number 4.A.**, provide the following: the name of every country you, your spouse, your child(ren), or parents traveled through or resided in before entering the United States, the dates you, he or she traveled through or resided in those countries, the length of stay, the person's status while there, and the reasons for leaving.

If you answered "Yes" to **Item Number 4.A.**, indicate whether you, your spouse, your child(ren), or your parents ever applied for protection from persecution or torture, including refugee status or asylum, while in any country that you, your spouse, your child(ren), or your parents traveled through or resided in before entering the United States, and if not, why you, he, or she did not do so.

Part C. Additional Information About Your Application (continued)

If you answered "Yes" to **Item Number 4.A.**, indicate whether you, your spouse, your child(ren), or your parents applied to, were offered the opportunity to apply to, or had the opportunity available to reside in any permanent legal immigration status or any non-permanent, indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding status such as of a tourist), in any country through which you, your spouse, your child(ren), or your parents traveled before entering the United States.

4.B. Have you, your spouse, your child(ren), or other family members, such as your parents or siblings, ever applied for, received, or could have applied for, but did not, any lawful status in any country other than the one from which you are now claiming asylum?

☐ No ☐ Yes

If you answered "Yes" to **Item Number 4.B.**, explain the circumstances, outcome of the application, and whether or not the person is entitled to return for lawful residence purposes.

5. After you left the country where you were harmed or fear harm, did you return to that country?

☐ No ☐ Yes

If "Yes," describe in detail the circumstances of your visit(s) (for example, the date(s) of the trip(s), the purpose(s) of the trip(s), and the length of time you remained in that country for the visit(s).)

6. Are you filing this application more than 1 year after your last arrival in the United States?

☐ No ☐ Yes

If "Yes," explain why you did not file within the first year after you arrived. You must be prepared to explain at your interview or hearing why you did not file your asylum application within the first year after you arrived. For guidance in answering this question, see **Instructions, Part 1: Filing Instructions, Section V. "Completing the Form," Part C.**

7. Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted, or sentenced for any crime (including for an immigration law violation)?

☐ No ☐ Yes

If "Yes," for each instance, specify in your response: what occurred and the circumstances, dates, length of sentence received, location, the duration of the detention or imprisonment, reason(s) for the detention or conviction, any formal charges that were lodged against you or your relatives included in your application, and the reason(s) for release.

Part C. Additional Information About Your Application (continued)

If you have been arrested in the United States, you must submit a certified copy of all arrest reports, court dispositions, sentencing documents, and any other relevant documents.

8. Have you, your spouse or your child(ren) ever ordered, incited, assisted or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

☐ No ☐ Yes

If "Yes," describe in detail each such incident and your own, your spouse's, or your child(ren)'s involvement.

9. Have you or any member of your family included in the application **EVER** ordered, incited, called for, committed, assisted, helped with, or otherwise participated in any of the following:

A. Acts involving torture or genocide?

☐ No ☐ Yes

B. Killing any person?

☐ No ☐ Yes

C. Intentionally and severely injuring any person?

☐ No ☐ Yes

D. Any kind of sexual contact or activity (by you, your family member, or another person) with any person who did not consent, was unable to consent, or was being forced or threatened by you, your family member, or by someone else?

☐ No ☐ Yes

E. Limiting or denying any person's ability to exercise religious beliefs?

☐ No ☐ Yes

If you answered "Yes" to any part of **Item Number 9.**, explain what occurred and describe the circumstances, including the dates and location of the circumstances.

10. Have you or any member of your family included in the application **EVER**:

A. Served in, been a member of, assisted, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, militia, or insurgent organization, or any other armed group?

☐ No ☐ Yes

B. Worked, volunteered, or otherwise served in any prison, jail, prison camp, detention facility, labor camp, or any other situation that involved detaining persons?

☐ No ☐ Yes

If you answered "Yes" to any part of **Item Number 10.**, explain what occurred and describe the circumstances, including the dates and location of the circumstances.

Part C. Additional Information About Your Application (continued)

11. Have you or any member of your family included in the application **EVER** been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you, your family member, or other persons used any type of weapon against any person or threatened to do so?

☐ No ☐ Yes

If "Yes," explain what occurred and describe the circumstances, including the dates and location of the circumstances.

12. Have you or any member of your family included in the application **EVER** sold, provided, or transported weapons, or assisted any person in selling, providing, or transporting weapons, which you or your family member knew or believed would be used against another person?

☐ No ☐ Yes

If "Yes," explain what occurred and describe the circumstances, including the dates and location of the circumstances.

13. Have you or any member of your family included in the application **EVER** received any weapons training, paramilitary training, or other military-type training?

☐ No ☐ Yes

If "Yes," explain what occurred and describe the circumstances, including the dates and location of the circumstances.

14. Have you **EVER** recruited, enlisted, or conscripted any person under 15 years of age to serve in or help an armed force or group, or attempted or worked with others to do so?

☐ No ☐ Yes

15. Have you **EVER** used any person under age 15 to take part in hostilities, for instance, participating in combat or providing services related to combat (such as sabotage or serving as a courier) or providing support services (such as transporting supplies), or attempted or worked with others to do so?

☐ No ☐ Yes

16. Has any member of your family included on this application **EVER** recruited, enlisted, or conscripted any person under 15 years of age to serve in or help an armed force or group, or attempted or worked with others to do so?

☐ No ☐ Yes

17. Has any member of your family included on this application **EVER** used any person under age 15 to take part in hostilities, such as participating in combat or providing services related to combat (such as sabotage or serving as a courier) or providing support services (such as transporting supplies), or attempted or worked with others to do so?

☐ No ☐ Yes

If you answered "Yes" to **Item Numbers 14.**, **15.**, **16.**, **and/or 17.**, specify in your response: what occurred and the circumstances, dates, locations, level of involvement, any leadership or other positions held, reason(s) for the involvement, and details about your involvement in any group(s) and/or conflict(s) referenced above in **Item Numbers 14.**, **15.**, **16.**, **and/or 17**.

Part C. Additional Information About Your Application (continued)

The following questions focus on adverse discretionary factors related to asylum eligibility. You must answer **Item Numbers 18.A. - 19.J.** as it relates to you and any member of your family included in the application. For guidance in answering these questions, *see* Instructions, **Part 1: Filing Instructions**, **Section V. Completing the Form**, Part **C. Additional Information about your Application**.

18.A. Have you or any member of your family included in the application ever unlawfully entered or unlawfully attempted to enter into the United States?

☐ No ☐ Yes

If you answered "Yes" to **Item Number 18.A.**, please specify in your response: what occurred, the circumstances, dates, and the reason(s) for the circumstances.

18.B. Did you or any member of your family included in the application transit through any country before entering the United States?

☐ No ☐ Yes

If you answered "Yes" to **Item Number 18.B.**, indicate whether you or any member of your family included in the application sought protection from persecution or torture, including refugee status or asylum, in any country through which you, he, or she transited before entering the United States, and if not, why you, he, or she did not do so. Please specify in your response: what occurred, the circumstances, dates, and the reason(s) for the circumstances.

18.C. Have you or any member of your family included in the application used fraudulent documents to enter the United States?

☐ No ☐ Yes

If you answered "Yes" to **Item Number 18.C.**, please specify in your response: what occurred, the circumstances, dates, and the reason(s) for the circumstances.

If you answered "Yes" to **Item Numbers 18.A.**, **18.B.**, and/or **18.C.**, do any of the corresponding exceptions or situations described in the exceptions (for example, entry or attempted entry was made in immediate flight from persecution or satisfying the definition of victim of a severe form of trafficking in persons) apply to you or any member of your family included in the application? If so, please specify in your response: why you believe you or any member of your family included in the application meet one of the exceptions, what occurred, the circumstances, dates, and the reason(s) for the circumstances.

19.A. Did you or any member of your family included in the application, immediately prior to arriving in the United States or en route to the United States from your or their country of citizenship, nationality, or last lawful habitual residence, spend more than 14 days in any one country?

☐ No ☐ Yes

19.B. Did you or any member of your family included in the application transit through more than one country between your or their country of citizenship, nationality, or last habitual residence and the United States?

☐ No ☐ Yes

19.C. Do you or any member of your family included in the application have a conviction or sentence that was reversed, vacated, expunged, or modified?

☐ No ☐ Yes

19.D. Did you or any member of your family included in the application accrue more than one year of unlawful presence in the United States prior to filing an asylum application?

☐ No ☐ Yes

Part C. Additional Information About Your Application (continued)

19.E. At the time this application is filed, have you failed to timely file any required federal, state, or local income taxes, or timely file a request for an extension of time to file?

☐ No ☐ Yes

19.F. At the time this application is filed, have you failed to satisfy any outstanding federal, state, or local income tax obligations?

☐ No ☐ Yes

19.G. At the time this application is filed, do you have income that would result in tax liability that has not been reported to the Internal Revenue Service?

☐ No ☐ Yes

19.H. Have you or any member of your family included in the application had two or more prior asylum applications denied for any reason?

☐ No ☐ Yes

19.I. Have you or any member of your family included in the application withdrawn a prior asylum application, been found to have abandoned a prior asylum application, or failed to attend an interview regarding an asylum application?

☐ No ☐ Yes

19.J. Have you or any member of your family included in the application been subject to a final order of removal, deportation, or exclusion, and did not file a motion to reopen to seek asylum?

☐ No ☐ Yes

If you answered "Yes" to any of the questions in **Item Numbers 19.A. - 19.J.**, please specify in your response: what occurred, the circumstances, dates, and reason(s) for the circumstances.

If you answered "Yes" to any of the questions in **Item Numbers 19.A. - 19.J.**, do any of the corresponding exceptions or situations described in the exceptions (for example, applying for protection from persecution or torture in another country or satisfying the definition of victim of a severe form of trafficking in persons) apply to you or any member of your family included in the application? If so, please specify in your response: why you believe you or any member of your family included in the application meet one of the exceptions, what occurred, the circumstances, dates, and the reason(s) for the circumstances.

If you answered "Yes" to any of the questions in **Item Numbers 19.A. - 19.J.**, if applicable, provide any information related to extraordinary circumstances that would warrant a favorable decision, and explain any exceptional or extremely unusual hardship that would result from a referral or denial of your asylum application.

Part D. Applicant's Statement, Contact Information, Certification, and Signature

WARNING: **Applicants who are in the United States unlawfully are subject to removal if their asylum or withholding claims are not granted by an asylum officer or an immigration judge. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn.**

If an asylum officer determines that you have knowingly made a frivolous application for asylum, that determination may be used as a basis for the institution of, or as evidence in, removal proceedings. If an immigration judge or the Board of Immigration Appeals determines that you have knowingly made a frivolous application for asylum, you will be permanently ineligible for any benefits under the Immigration and Nationality Act. You may not avoid a frivolous finding simply because someone advised you to provide false information in your asylum application.

Staple your photograph here or the photograph of the family member to be included on the extra copy of the application submitted for that person.

If filing with USCIS, unexcused failure to appear for an appointment to provide biometrics (such as fingerprints) and your biographical information within the time allowed or unexcused failure to appear for an asylum interview may result in an asylum officer dismissing your asylum application or referring it to an immigration judge. Failure without good cause to provide DHS with biometrics or other biographical information while in removal proceedings may result in your application being found abandoned by the immigration judge. See sections 208(d)(5)(A) and 208(d)(6) of the INA and 8 CFR sections 208.10, 1208.10, 208.20, 1003.47(d) and 1208.20.

NOTE: Read the **Penalty for Perjury** section of the Form I-589 Instructions before completing this section. You must file Form I-589 while in the United States.

Applicant's Statement

NOTE: Select the box for either **Item A.** or **B.** in **Item Number 1.** If applicable, select the box for **Item Number 2.**

1. Applicant's Statement Regarding the Interpreter

A. ☐ I can read and understand English, and I have read and understand every question and instruction on this application and my answer to every question.

B. ☐ The interpreter named in **Part E.** read to me every question and instruction on this application and my answer to every question in _____, a language in which I am fluent, and I understood everything.

2. Applicant's Statement Regarding the Preparer

☐ At my request, the preparer named in **Part F.**, _____, prepared this application for me based only upon information I provided or authorized.

Applicant's Contact Information

3. Applicant's Daytime Telephone Number

4. Applicant's Mobile Telephone Number (if any)

5. Applicant's Email Address (if any)

Applicant's Certification

Copies of any documents I have submitted are exact photocopies of unaltered, original documents, and I understand that USCIS may require that I submit original documents to USCIS at a later date. Furthermore, I authorize the release of any information from any and all of my records that USCIS may need to determine my eligibility for the immigration benefit I seek.

I furthermore authorize release of information contained in this application, in supporting documents, and in my USCIS records, to other entities and persons where necessary for the administration and enforcement of U.S. immigration laws.

I understand that USCIS will require me to appear for an appointment to take my biometrics (fingerprints, photograph, and/or signature) and, at that time, I will be required to sign an oath reaffirming that:

1) I reviewed and provided or authorized all of the information in my application;

2) I understood all of the information contained in, and submitted with, my application; and

3) All of this information was complete, true, and correct at the time of filing.

Part D. Applicant's Statement, Contact Information, Certification, and Signature (continued)

I certify, under penalty of perjury, that I provided or authorized all of the information in my application, I understand all of the information contained in, and submitted with, my application, and that all of this information is complete, true, and correct.

Applicant's Signature

6. Applicant's Signature

Date of Signature (mm/dd/yyyy)

NOTE TO ALL APPLICANTS: If you do not completely fill out this application or fail to submit required documents listed in the Instructions, USCIS may deny your application.

Part E. Interpreter's Contact Information, Certification, and Signature

Provide the following information concerning the interpreter.

Interpreter's Full Name

1. Interpreter's Family Name (Last Name)

Interpreter's Given Name (First Name)

2. Interpreter's Business or Organization Name (if any)

Interpreter's Mailing Address

3. Street Number and Name

Apt. Ste. Flr. Number

City or Town

State

ZIP Code

Province

Postal Code

Country

Interpreter's Contact Information

4. Interpreter's Daytime Telephone Number

5. Interpreter's Mobile Telephone Number (if any)

6. Interpreter's Email Address (if any)

Interpreter's Certification

I certify, under penalty of perjury, that:

I am fluent in English and , which is the same language specified in **Part D.**, **Item B.** in **Item Number 1.**, and I have read to this applicant in the identified language every question and instruction on this application and his or her answer to every question. The applicant informed me that he or she understands every instruction, question, and answer on the application, including the **Applicant's Certification**, and has verified the accuracy of every answer.

Interpreter's Signature

7. Interpreter's Signature

Date of Signature (mm/dd/yyyy)

Part F. Contact Information, Declaration, and Signature of the Person Preparing this Application, If Other Than the Applicant

1. Asylum applicants may be represented by counsel. Have you been provided with a list of persons who may be available to assist you, at little or no cost, with your asylum claim?

☐ No ☐ Yes

Provide the following information about the preparer.

Preparer's Full Name

2. Preparer's Family Name (Last Name)

Preparer's Given Name (First Name)

3. Preparer's Business or Organization Name (if any)

Preparer's Mailing Address

4. Street Number and Name

Apt. Ste. Flr. Number

City or Town

State

ZIP Code

Province

Postal Code

Country

Preparer's Contact Information

5. Preparer's Daytime Telephone Number

6. Preparer's Mobile Telephone Number (if any)

7. Preparer's Email Address (if any)

Preparer's Statement

8. **A.** ☐ I am not an attorney or accredited representative but have prepared this application on behalf of the applicant and with the applicant's consent.

B. ☐ I am an attorney or accredited representative and my representation of the applicant in this case ☐ extends ☐ does not extend beyond the preparation of this application.

NOTE: If you are an attorney or accredited representative, you may need to submit a completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, with this application.

Preparer's Certification

By my signature, I certify, under penalty of perjury, that I prepared this application at the request of the applicant. The applicant then reviewed this completed application and informed me that he or she understands all of the information contained in, and submitted with, his or her application, including the **Applicant's Certification**, and that all of this information is complete, true, and correct. I completed this application based only on information that the applicant provided to me or authorized me to obtain or use.

Part F. Contact Information, Declaration, and Signature of the Person Preparing this Application, If Other Than the Applicant (continued)

Preparer's Signature

9. Preparer's Signature

Date of Signature (mm/dd/yyyy)

Part G. To Be Completed at Asylum Interview, if Applicable

NOTE: *You will be asked to complete this part when you appear for examination before an asylum officer of the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS).*

I swear (affirm) and certify, under penalty of perjury under the laws of the United States of America, that I know the contents of this Application for Asylum and for Withholding of Removal, subscribed by me, including correction(s) numbered _____ to _____ and that they are complete, true, and correct. All documentary and other evidence I have submitted is complete, true, and correct.

I am aware that if an asylum officer determines that I knowingly made a frivolous application for asylum, such determination may be used as a basis for the institution of, or as evidence in, removal proceedings. Furthermore, I am aware that if an immigration judge or the Board of Immigration Appeals determines that I have knowingly made a frivolous application for asylum, I will be permanently ineligible for any benefits under the Immigration and Nationality Act, and that I may not avoid a frivolous finding simply because someone advised me to provide false information in my asylum application.

Signed and sworn to before me by the above named applicant on:

Signature of Applicant

Date (mm/dd/yyyy)

Write Your Name in Your Native Alphabet

Signature of Asylum Officer

Part H. To Be Completed at Removal Hearing, if Applicable

NOTE: *You will be asked to complete this Part when you appear before an immigration judge of the U.S. Department of Justice, Executive Office for Immigration Review (EOIR), for a hearing*

I swear (affirm) and certify, under penalty of perjury under the laws of the United States of America, that I know the contents of this Application for Asylum and for Withholding of Removal, subscribed by me, including correction(s) numbered _____ to _____, and that they are complete, true, and correct. All documentary and other evidence I have submitted is complete, true, and correct.

Furthermore, I am aware that if an immigration judge or the Board of Immigration Appeals determines that I have knowingly made a frivolous application for asylum, I will be permanently ineligible for any benefits under the Immigration and Nationality Act, and that I may not avoid a frivolous finding simply because someone advised me to provide false information in my asylum application.

Signed and sworn to before me by the above named applicant on:

Signature of Applicant

Date (mm/dd/yyyy)

Write Your Name in Your Native Alphabet

Signature of Immigration Judge

A-Number *(If available)*	Date
Applicant's Name	Applicant's Signature

List All of Your Children, Regardless of Age or Marital Status

(**NOTE:** *Use this form and attach additional pages and documentation as needed, if you have more than four children)*

1. Alien Registration Number (A-Number) *(if any)*	**2.** Passport/ID Card Number *(if any)*	**3.** Marital Status *(Married, Single, Divorced, Widowed)*	**4.** U.S. Social Security Number *(if any)*
5. Complete Last Name	**6.** First Name	**7.** Middle Name	**8.** Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	**10.** Nationality *(Citizenship)*	**11.** Race, Ethnic, or Tribal Group	**12.** Gender ☐ Male ☐ Female
13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):*			
14. Place of last entry into the U.S.	**15.** Date of last entry into the U.S. *(mm/dd/yyyy)*	**16.** I-94 Number *(If any)*	**17.** Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	**19.** What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	**20.** Is your child in Immigration Court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one photograph of your child in the upper right corner of Page 14 on the extra copy of the application submitted for this person.)* ☐ No			

1. Alien Registration Number (A-Number) *(if any)*	**2.** Passport/ID Card Number *(if any)*	**3.** Marital Status *(Married, Single, Divorced, Widowed)*	**4.** U.S. Social Security Number *(if any)*
5. Complete Last Name	**6.** First Name	**7.** Middle Name	**8.** Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	**10.** Nationality *(Citizenship)*	**11.** Race, Ethnic, or Tribal Group	**12.** Gender ☐ Male ☐ Female
13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):*			
14. Place of last entry into the U.S.	**15.** Date of last entry into the U.S. *(mm/dd/yyyy)*	**16.** I-94 Number *(If any)*	**17.** Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	**19.** What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	**20.** Is your child in Immigration Court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one photograph of your child in the upper right corner of Page 14 on the extra copy of the application submitted for this person.)* ☐ No			

Additional Information About Your Claim to Asylum

A-Number *(if available)*	Date
Applicant's Name	Applicant's Signature

NOTE: *Use this as a continuation page for any additional information requested. Copy and complete as needed.*

Part _____

Question _____

EXHIBIT 13

DECLARATION OF NAOMI A. IGRA

July 13, 2020

Lauren Alder Reid, Assistant Director
Office of Policy, Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Maureen Dunn, Chief, Division of Humanitarian Affairs
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
20 Massachusetts Ave. NW
Washington, DC 20529

Re: Comments in Opposition to Proposed Rulemaking: 85 FR 36264
RIN 1125-AA94; 1615-AC42
EOIR Docket No. 18-0002; A.G. Order No. 4714-2020

Dear Ms. Alder Reid and Ms. Dunn,

The Round Table of Former Immigration Judges is composed of 46 former Immigration Judges and Appellate Immigration Judges of the Board of Immigration Appeals. We were appointed by and served under both Republican and Democratic administrations. We have centuries of combined experience adjudicating asylum applications and appeals. Our members include nationally-respected experts on asylum law; many regularly lecture at law schools and conferences and author articles on the topic.

Our members issued decisions encompassing wide-ranging interpretations of our asylum laws during our service on the bench. Whether or not we ultimately reached the correct result, those decisions were always exercised according to our "own understanding and conscience,"[1] and not in acquiescence to the political agenda of the party or administration under which we served.

We as judges understood that whether or not we agreed with the intent of Congress, we were still bound to follow it. The same is true of the Attorney General, Secretary of Homeland Security, and for that matter, the President.

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[1] *See Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

INTRODUCTION

In their introduction, the proposed regulations misstate the Congressional intent behind our asylum laws.[2] Since 1980, our nation's asylum laws are neither an expression of foreign policy nor an assertion of the right to protect resources or citizens. It is for this reason that the notice of proposed rulemaking must cite a case from 1972 that did not address asylum at all in order to find support for its claim.

The intent of Congress in enacting the 1980 Refugee Act was to bring our country's asylum laws into accordance with our international treaty obligations, specifically by eliminating the above-stated biases from such determinations. For the past 40 years, our laws require us to grant asylum to all who qualify regardless of foreign policy or other concerns. Furthermore, the international treaties were intentionally left broad enough in their language to allow adjudicators flexibility to provide protection in response to whatever types of harm creative persecutors might devise. In choosing to adopt the precise language of those treaties, Congress adopted the same flexibility. *See e.g. Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804), pursuant to which national statutes should be interpreted in such a way as to not conflict with international laws.

The proposed rules are impermissibly arbitrary and capricious. They attempt to overcome, as opposed to interpret, the clear meaning of our asylum statutes. Rather than interpret the views of Congress, the proposed rules seek to replace them in furtherance of the strongly anti-immigrant views of the administration they serve.[3] And that they seek to do so in an election year, for political gain, is clear.

In attempting to stifle clear Congressional intent in service of its own political motives, the administration has proposed rules that are *ultra vires* to the statute.

THE USE OF BRAND X TO SIDESTEP DECADES OF FEDERAL CASELAW

The proposed regulations acknowledge outright in Footnote One,[4] the proponents' intention to rely upon these new regulations to overrule many outstanding asylum-related decisions of the federal circuit courts of appeal. Looking to the Supreme Court's decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* ("*Brand X*"), 545 U.S. 967, 982 (2005), the proponents assert: "the Departments note that portions of this rule, in accordance with well-established administrative law principles, would supersede certain [existing] interpretations of the immigration laws by federal courts of appeals."[5] This statement ignores the actual requirements that have

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[2] 85 FR 36264, 36265.

[3] Examples of these anti-immigrant views include Donald J. Trump's June 16, 2015 speech announcing his candidacy for President ("When Mexico sends its people, they're not sending their best...They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people"); Trump's March 9, 2016 statement to CNN ("I think Islam hates us ... We can't allow people coming into this country who have this hatred of the United States and of people that are not Muslim"); Trump's suggestion as President to have DHS agents "shoot migrants in the legs to slow them down;" and his January 2018 remarks to Congressional leaders ("Why do we want all these people from 'shithole countries' coming here?").

[4] 85 FR 36265, n. 1.

[5] *Id.*

been articulated in the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), discussed *infra*, which follows the recent trend towards limiting deference to an agency's interpretation of its own rules.

In *Brand X*, the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982 (internal quotations omitted) (emphasis added).[6] *See also Holder v. Martinez-Gutierrez*, 132 S. Ct. 2011 (2012). *See also Matter of M-H-*, 26 I. & N. Dec. 46 (BIA 2012). What this means in practice, is that where statutory or regulatory terms being construed are genuinely ambiguous and the agency has not ruled on the particular issue, the existing law of the circuit court which has addressed the issue in question governs only until the agency has issued a dispositive interpretation concerning the meaning of a genuinely ambiguous statute or regulation.

Brand X, for its part, relies upon the analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which holds that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to fill the statutory gap and involve difficult policy choices that agencies are better equipped to make than courts. 467 U. S., at 865-866. Accordingly, *Chevron* deference requires a federal court to accept the agency's reasonable construction of an ambiguous statute. *Id.* at 843-844, and n. 11. The question of genuinely ambiguous language versus plain language thus is a critical distinction.

The Departments' reliance on *Brand X*, however, to entirely eviscerate federal court caselaw is misplaced and contrary to controlling law. First, the proponents have failed to demonstrate that each and every instance of the statutory language found in the decades of federal court case law that they seek to overwrite is "genuinely ambiguous." *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)(ruling that deference under *Auer v. Robbins*, 519 U.S. 452 (1997) (*Auer* deference) to agency regulations should not be afforded automatically). *Kisor v. Wilkie*, the product of an increasing judicial preference not to give deference to agency interpretations that can be easily construed by courts, limits the propriety of affording deference unless (1) a regulation is genuinely ambiguous, requiring a court to employ all the tools of construction, (2) the agency's reading is reasonable as to text, structure, and history, (3) the interpretation must be the agency's official, authoritative position, (4) the regulation must implicate the agency's expertise, (5) the regulation must reflect the agency's fair and considered judgment.

Second, the departments' authority is not to rewrite the statute that Congress has written, but to faithfully interpret it. Rulemaking is not an opportunity for an agency to engage in an unauthorized writing exercise that duplicates the legislative role assigned to Congress.

The proponents have failed to demonstrate that the rules they wish to promulgate to supplant years of established asylum regulation address genuine ambiguities that cannot be filled by a court using tools of construction, that these proposed rules are reasonable, that the proposed rules

[6] The term "Chevron deference" refers to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

reflect agency expertise, that the drastic degree of change proposed is warranted, or that they reflects the agency's fair and considered judgment. *Cf. Kisor v. WIlkie, supra.* The Departments cannot satisfy the requirements recently imposed by the Supreme Court for limiting *Auer* deference to *genuinely ambiguous* agency regulations, or any of the other factors that warrant deference to agency interpretation. *Cf. Kisor v. Wilkie, supra*.[7] In publishing these proposed regulations, and asserting without specifically identifying either the provisions that they are intended to interpret, or the existing federal decisions that they are intended to supersede, the Departments improperly seek to re-write asylum law rather than interpret the statute.

AMENDMENTS TO THE CREDIBLE FEAR AND REASONABLE FEAR INTERVIEW PROCESS

Expedited removal was first proposed in 1992 in response to an increasing number of noncitizens arriving at U.S. airports without proper entry documents.[8] The proposal gained momentum following a March 14, 1993 *60 Minutes* report titled "How Did He Get Here?" focusing on asylum claimants gaining admission at New York's JFK International Airport.

In its early years, expedited removal involved a very small percentage of asylum seekers. In Fiscal Year 2001, 215,398 arriving noncitizens were designated for expedited removal. Only 5.7 percent were referred to USCIS for a credible fear determination. That number dropped to 3 percent in FY 2003.[9] Over the four and a half year period from April 1, 1997 through September 30, 2001, a total of 34,736 noncitizens subject to expedited removal claimed to have a credible fear of persecution, an average of less than 8,000 such claims per year.

By comparison, CBP reported 92,959 credible fear claims in FY 2018 alone.[10] Obviously, the present administration realizes that raising the credible fear standard would have a significant impact on overall immigration based on the present numbers, something that would not have been true in years past. Acting USCIS Director Ken Cuccinelli said as much in his June 2019 email to USCIS Asylum Officers, stating that asylum officers must apply a higher legal standard in credible fear determinations so that USCIS can do its "part to stem the crisis and better secure the homeland."[11]

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[7] Justice Kagan, writing for the majority emphasized that while *Auer* deference is "rooted in a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities" because agencies are best equipped to interpret the often-technical regulations, knee-jerk deference in response to the interpretation of agency regulations is not appropriate.

[8] *See* U.S. Committee on Refugees, *World Refugee Survey 1993* https://refugees.org/wp-content/uploads/2019/02/1993-World-Refugee-Survey.pdf at 43.

[9] Congressional Research Service, "Immigration Policy on Expedited Removal of Aliens," Updated May 15, 2006, https://www.everycrsreport.com/files/20060515_RL33109_dd7be03f25386d3a11a6461ec642c8cc9177b139.pdf at CS-9.

[10] U.S. Customs and Border Protection, Claims of Fear (FY 2017-2018), https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear.

[11] Hamed Aleaziz, "A Top Immigration Official Appears to Be Warning Asylum Officers About Border Screenings," *BuzzFeed News*, June 18, 2019, https://www.buzzfeednews.com/article/hamedaleaziz/uscis-director-asylum-officers-email.

As former judges who carefully applied such standards on a daily basis at the trial and appellate levels, we attest that there is no sliding scale for legal standards based on the volume of cases. It goes without saying that the need for USCIS to do its part to stem the crisis and better secure the country has no bearing on the proper legal standard for determining credible fear. The determination as to whether there is a significant possibility that an applicant could establish eligibility for asylum is the same whether one person or one million people per year are making such claims. To suggest that the standard should be raised in response to the number of applicants to "better secure the homeland" contradicts the clear meaning of the statute, and is thus ultra vires. It would constitute the equivalent of lowering the "beyond a reasonable doubt" standard required for criminal convictions in response to rising crime rates.

Nevertheless, the proposed rules seek to (1) create a higher evidentiary standard for arriving refugees to establish credible fear and avoid expedited removal; and (2) for some reason, create a new, more narrow scope of proceedings for those who do satisfy the new standard, under which the asylum applicants' rights and eligibility for alternate forms of relief would be limited.

The proposed rules would deprive those establishing a credible fear from being placed into full removal proceedings under section 240 of the Act. The proposal attempts to justify this by arguing that section 235(b)(1)(B)(ii) of the Act does not specifically require a hearing under section 240 of the Act, citing the observation of INS in 1997 that "the statute was silent as to procedures for those who demonstrated such a fear." The drafters therefore wish to place asylum-seekers who establish a credible fear into "asylum only" proceedings, of the type used for entrants under the Visa Waiver Program ("VWP").

However, the proposal overlooks critical facts. The Immigration and Nationality Act would not need to designate the type of removal proceeding because under the Act, there are only removal proceedings under section 240. "Asylum only" proceedings do not exist by statute, and are not mentioned anywhere in the Act. Such proceedings were created out of necessity due to the fact that those who enter under the VWP surrender their rights to removal proceedings by statute under section 217(b) of the Act, with the exception of claims for asylum and withholding of removal. As VWP entrants are entitled to review of their asylum claims before an immigration judge, but cannot by statute be placed in section 240 removal proceedings, there was no choice but to create something known as an "asylum only" proceeding.

As no such statutory prohibition exists on placing arriving asylum seekers into full section 240 proceedings, Congress had no need to specifically designate what is clear and obvious. The regulatory proposal is therefore contrary to Congressional intent. Had Congress intended to create an entirely new type of proceeding for those who established a credible fear of persecution, it would have explicitly said so.

The proposed rules reference DHS's ability to exercise "prosecutorial discretion" in removal proceedings as justification for the change. However, prosecutorial discretion does not include the inherent power to create entirely new types of proceedings, but rather, is limited to decisions involving whether or not to pursue charges. To again draw an analogy to criminal law, the fact that a criminal prosecutor may exercise prosecutorial discretion doesn't allow the prosecutor to

choose to prosecute, but only in a new, streamlined "murder only" trial of the U.S. Attorney's own invention, designed to create a greater likelihood of conviction.

The proposed regulations also argue that DHS has already determined removability for all those placed into expedited removal, and thus seems to believe that revisiting the issue before an Immigration Judge would be inefficient and redundant.

For all practical purposes, DHS has concluded that *everyone* placed into removal proceedings is removable; otherwise, it would not have issued a Notice to Appear and initiated removal proceedings. It bears noting that in the expedited removal context, these decisions are made by CBP officers who are not lawyers, and certainly aren't judges. There is obviously a risk of error or abuse in allowing an enforcement officer to also act as prosecutor and judge, and then not have the decision subject to appellate review.

Congress only authorized such procedure because it was deemed necessary to its goal of immediately removing noncitizens upon arrival, by foregoing the lengthier process of placing them into removal proceedings. In other words, Congress was willing to sacrifice quality in return for speed and deterrence for a specific category of noncitizens. It should be emphasized that in making such determination, the class of noncitizens involved was limited to those arriving at ports of entry, and did not include anyone located anywhere within the U.S. who could not demonstrate that they had been in the U.S. for a minimum of two years.

Once the noncitizen is already in immigration court proceedings, the purpose of allowing a non-attorney CBP officer's removal order to stand makes no sense. Someone who has cleared the hurdle of establishing a credible fear of persecution is not who Congress intended to deter, and is not who Congress was willing to risk wrongfully deporting.

Furthermore, based on our extensive knowledge and experience with immigration court proceedings, there is little efficiency in foregoing removability determinations in removal proceedings. In the overwhelming majority of cases, the pleadings required to establish removability take 30 seconds. That is all the time that relying on the removal determination of the CBP officer will save in close to all such cases. It is inconceivable that Congress would have chosen to sacrifice so much in terms of competency and accuracy to save 30 seconds.

The proposal makes no mention at all of the rare case in which there might be an issue regarding admissibility or removability which the non-attorney CBP officer got wrong. Once the asylum-seeker is in proceedings before a judge, with an actual attorney representing DHS, it makes absolute sense to have the determination made by a judge, with input from lawyers.

The proposal additionally seeks to limit asylum seekers from pursuing other forms of relief from removal in immigration court proceedings. We ask the question: Why?

We can attest from our extensive experience on the bench that the availability of a wide range of reliefs is a great aid to administrative efficiency. Hearings involving asylum, withholding of removal, or CAT applications are laborious, involving an extreme level of fact-finding, and the application and interpretation of increasingly complicated laws that are constantly evolving (as

these 161 pages of proposed regulations both acknowledge and demonstrate). Hearings generally take hours, and sometimes days, to complete, and usually involve at least one level of appeal. The proposed changes involving the meaning of key issues such as persecution, political opinion, particular social group, and the standards for exercising discretion will complicate those determinations even more, resulting in an increase in continuances for preparation and lengthier hearings. More evidence, expert testimony, and briefing involving legal theories will be necessary. Immigration Judges will have to issue more written decisions to address all of the new and complex issues created by the new rules. Hearing such cases in "asylum only" proceedings provides no shortcuts as to any of the above.

But should a respondent in full removal proceedings become eligible for a simpler form of relief, courts may forego the above. Some non-asylum forms of relief can be disposed of in hearings in a matter of minutes, and result in decisions more likely to be accepted by DHS as final, saving further time and resources by foregoing the need for appeal to the BIA and the circuit courts. It is clear that the motive behind this is purely punitive (which obviously has no place in the regulatory process).

The proposed regulations also seek to require applicants for withholding of removal to prove a "reasonable fear" of persecution, a higher evidentiary standard than the "credible fear" required for asylum. It is assumed that this proposal is meant to apply to those deemed ineligible for asylum, and who are thus applying only for withholding relief. It is imagined that the drafters assume that a significant number of refugees might fall into this category due to the administration's unsuccessful attempts to impose regulatory bans on asylum against those not entering at ports of entry and those arriving at the southern border who did not apply for asylum, and have such applications rejected, in third countries through which they were forced to travel en route to the U.S. The "third country" asylum ban regulations were vacated by a U.S. District Court on June 30, 2020.[12] And on July 6, 2020, the U.S. Court of Appeals for the Ninth Circuit upheld an earlier injunction against the same rule.[13]

Another rule the administration issued attempting to ban those entering the U.S. without inspection from asylum has been blocked by two separate district courts.[14] It is thus not clear who the drafters envision as falling into the category of being only eligible for withholding of removal or CAT.

Regardless, the rule is wrong. Having heard many, many such claims in court over many, many years, we can attest that claims for asylum, withholding, and CAT protection often develop slowly, and usually require the assistance of competent counsel.[15] Whether the relief involved is

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[12] *Capital Area Immigrants' Rights Coalition v. Trump*, No. 19-2117 (D.D.C. June 30, 2020).

[13] *East Bay Sanctuary Covenant v. Barr*, No. 19-16487 (9th Cir. July 6, 2020).

[14] *East Bay Sanctuary Convenant v. Trump*, No. 18-06810 (D. N. CA, 2018); *O.A. v. Trump*, No. 18-02718 (D. D.C. 2018).

[15] One study concluded that noncitizens are up to eight times more likely to obtain relief when represented by counsel in removal proceedings. Eagly & Shafer, *A National Study of Access to Counsel*, 164 U. Pa. L. Rev. at 57. Among asylum seekers, applicants represented by legal counsel were granted asylum at a rate 3.1 (affirmative) and 1.8 (defensive) times higher than unrepresented applicants. U.S. Gov't Accountability Off., GAO-17-72, Asylum Variation Exists in Outcomes of Applications Across Immigration Courts and Judges at 31, 33 (Nov. 2016).

asylum, withholding of removal, or CAT protection, our domestic law and international treaty obligations forbid the return of someone to suffer persecution on account of a statutorily-protected ground, or to suffer torture for any reason. A newly arrived refugee must overcome numerous obstacles to establishing the claim for relief. The refugee might be traumatized; often has not had the chance to consult an attorney, and lacks a sufficient knowledge of asylum and CAT law. A newly-arrived and detained refugee is not in a good position to gather evidence, present witnesses, or research the applicable case law. Furthermore, the applicable case law is in a state of extreme flux (a factor that would only be exacerbated by the proposed regulations).

Many of us can attest to claims that we granted on the bench that did not seem likely at the outset to qualify for relief. We can attest to cases becoming grantable well into the merits hearing. And Article III courts are presently issuing precedent decisions changing the applicable standards on a regular basis. Given the life or death nature of asylum, withholding, and CAT claims, and the recognition of such risk by Congress in creating the lower credible fear standard as a safeguard against removing one who might ultimately prove eligible for relief, the proposed raising of the applicable standard can only be described as cruelly irresponsible.

Regarding the proposal to consider applicable case law precedent in making credible fear determinations, it should be noted that those found to have a credible fear may have their ultimate immigration court proceedings held in an indeterminate jurisdiction. For example, an asylum applicant apprehended in Brownsville, Texas may have their asylum claim heard in an immigration court located within the jurisdiction of another circuit. Asylum Officers and Immigration Judges should therefore consider whether the asylum-seeker has established a credible fear under the case law of *any* U.S. jurisdiction. For example, the U.S. Court of Appeals for the Sixth Circuit has recently found the Attorney General's decision in *Matter of A-B-* to have been abrogated, and held out the possibility that therefore, the BIA's holding in *Matter of A-R-C-G-* might continue to be binding precedent. *Juan Antonio v. Barr*, No. 18-3500, ___ F.3d ___ (6th Cir. May 19, 2020). The First Circuit, in *De Pena Paniagua v. Barr*, No. 18-2100, ___ F. 3d ___ (1st Cir. April 24, 2020) held that *Matter of A-B-* did not categorically preclude the granting of domestic violence based asylum claims; further held that particular social groups may be properly defined by the feared harm without being deemed impermissibly circular; and further suggested the likelihood that gender per se may constitute a cognizable particular social group for asylum purposes. And all circuits that have ruled on the issue have found family to constitute a particular social group for asylum purposes. Regardless of the location of the credible fear determination, all such case law should be considered in determining the ultimate possibility of succeeding on the claim. For all the above mentioned reasons, we strongly oppose the amendments to the credible and reasonable fear processes.

AMENDMENTS TO THE CONFIDENTIALITY PROVISIONS FOR ASYLUM

The regulations at 8 CFR §§ 208.6 and 1208.6 protect the confidentiality of asylum applications as well as information disclosed in credible and reasonable fear proceedings. These regulations are vital to the protection of asylum seekers, as they may face additional harm if such information is disclosed. Moreover, the confidential process is central to many applicants' ability to

trust the United States asylum system such that they are able and willing to disclose highly sensitive and traumatic information. Many asylum seekers are afraid to disclose the intimate details of the persecution they suffered, as they worry about the information being disclosed to their government and other third parties.

While the proposed amendment suggests the information disclosure will remain limited, the proposed language is expansive and highly concerning.[16] The Departments propose to amend and limit confidentiality protections in "situations in which there is suspected fraud or improper duplication of applications or claims."[17] The Departments further justify the removal of confidentiality protections suggesting that such protections may shield investigations of fraud and other criminal behavior.[18] In addition, the Departments seek to disclose information about an individual's asylum claim in the context of federal litigation unrelated to the asylum application, where litigation is public record and can be accessed by anyone.[19] However, the actual proposed language, if finalized, will give the United States Government broad authority to disclose and share information from an asylum applicant's file:

> to the extent not already specifically permitted, and without the necessity of seeking the exercise of the Attorney General's or Secretary's discretion under paragraphs 208.6(a) and 1208.6(a), respectively, the Government may disclose **all relevant and applicable information** in or pertaining to the application for asylum, statutory withholding of removal, and protection under the CAT regulations as part of a federal or state investigation, proceeding, or prosecution; **as a defense to any legal action relating to the alien's immigration or custody status**; an adjudication of the application itself or **an adjudication of any other application or proceeding arising under the immigration laws**; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.[20]

The proposed rule would allow United States Government officials to disclose any piece of information in an applicant's file in a broad range of proceedings, including in other asylum applicants' cases, without seeking permission from anyone. In practice, this means that a DHS trial attorney would be permitted to file information from one asylum applicant's file in another applicant's case without seeking permission from the applicant. This also means that the information from one applicant's case would be accessible to another applicant, potentially putting asylum applicants in harm's way within the United States. This defeats the purpose of asylum, which is meant to protect those fleeing harm. Moreover, this is only one example of the way this rule could be implemented to disclose highly sensitive information under the guise of fighting fraud and criminal activity. In addition, the rule would allow the government to file information about an individual's asylum application in public proceedings in federal court, where evidence is accessible to anyone. This information could be easily accessed by individuals in the country of persecution.

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[16] 85 FR at 36288.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* (emphasis added).

As former Immigration Judges and Board of Immigration Appeals Members, we assured asylum applicants that their testimony in court was confidential, which encouraged applicants to disclose the most intimate and traumatic details of their lives, as they understood the information would not be shared with those whose could do them additional harm. If Immigration Judges are unable to provide such assurances to the applicants appearing before them, applicants will be less likely to disclose the details required for a grant of protection. In addition, by giving Immigration Judges the authority to receive information in this way, the Departments are allowing and encouraging Immigration Judges to further harm the most vulnerable individuals who are appearing before them. This provision is extremely concerning to us and we strongly object to its implementation.

AMENDMENTS ALLOWING PRETERMISSION OF LEGALLY INSUFFICIENT APPLICATIONS

The proposed rule, for the first time, would allow Immigration Judges to pretermit and deny applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT) without holding a hearing.[21] A decision to pretermit would be based on the Form I-589 and any supporting evidence, if an Immigration judge found the applicant did not establish a prima facie claim to relief.[22] While this rule would streamline the asylum process and allow the Immigration Courts to rapidly reduce the backlog, the rule flies in the face of due process and contrary to the purpose of asylum. It is particularly problematic for pro se and non-English speaking asylum seekers.

This proposed rule, in conjunction with the Immigration Court Performance Metrics, creates an incentive for Immigration Judges to pretermit asylum applications in order to meet case completion requirements and hear cases more quickly, without regard for the purpose of asylum, which is to protect the most vulnerable people in the world.[23] The proposed rule also ignores the realities of the Immigration Court and asylum systems, where asylum applicants have the "privilege of being represented, at no expense to the Government…"[24] In practice, this means that many indigent asylum seekers, including those who are detained and speak no English, must navigate the immigration court and asylum system with no assistance. Such individuals, many of whom are legitimate refugees, will never have their day in court under the proposed rule.

As former Immigration Judges and Board of Immigration Appeals Members, we understand the reality of the asylum process in Immigration Court. Countless times, we heard meritorious cases that, on their face originally, appeared to be lacking. In many cases, it was not until testimony was taken in open court and further inquiries made into the facts of the case that it became clear that the applicant qualified for asylum. By allowing and even encouraging Immigration Judges

[21] 85 FR at 36277.
[22] *Id.*
[23] Case Priorities and Immigration Court Performance Measures, January 17, 2018, https://www.justice.gov/eoir/page/file/1026721/download; Tracking and Expedition of "Family Unit" Cases, November 16, 2018, https://www.justice.gov/eoir/page/file/1112036/download; EOIR Performance Plan: https://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf
[24] INA § 240(b)(4).

to pretermit asylum applications, legitimate refugees will be returned to harm without any due process. We strongly oppose this amendment.

AMENDMENTS TO THE DEFINITION OF PERSECUTION

The most fundamental aspect underlying the UN Convention And Protocol Regarding The Status Of Refugees is the concept of *surrogate* protection. That is, by signing the Convention/Protocol, the United States agreed to provide protection for those individuals meeting the terms of the refugee definition.[25] By enacting domestic asylum laws we have accepted the obligation of protecting individuals who have suffered past persecution or have well-founded fears of future persecution when their home countries cannot or will not protect them.

United States asylum law, as enacted by Congress, includes detailed statutory provisions concerning the reasons for persecution, the characteristics that may trigger persecution, the degree or type of harm faced, and the severity of persecution that is risked together with extensive eligibility and procedural provisions. Regulations are intended only to fill any gap left by Congress when the language used by Congress is ambiguous or silent with respect to an element of the refugee definition.

Nevertheless, the proposed rule essentially seeks to "overrule" the statute, as well as the case law, which has developed over the past 40 years with a dramatically restrictive regulation that, *inter alia*, drastically limits the types of harm that can "rise to the level of " or qualify as "persecution." The proposed rule narrowly redefines persecution and impermissibly alters the accepted statutory interpretation used to determine eligibility and afford protection.[26]

The proposed change excludes degrees of harm, and types of mistreatment.
In particular, under the proposed rule, acceptable evidence of persecution <u>does not</u> include:

- every instance of harm that arises generally out of civil, criminal, or military strife in a country;
- any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional;
- intermittent harassment, including brief detentions;
- repeated threats with no actions taken to carry out the threats;
- non-severe economic harm or property damage; or
- government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.[27]

The proposed rule emphasizes that the harm must be "extreme" and that threats must be "exigent."[28] Defining persecution in this way, by excluding less serious forms of abuse, necessarily

[25] 8 U.S.C. 1101(a)(42)(A).
[26] 85 FR at 36280.
[27] 85 FR at 36280-81.
[28] 85 FR at 36280.

limits the facts, circumstances, and combinations thereof, that may be deemed sufficient to qualify for asylum in a given case.

For example, the proposed regulations fail to consider or take into account the factor of age of the asylum applicant. This is blatant disregard of the US Department of Justice Guidelines for Assessing Children's Asylum Claims which states that "the harm that a child fears or has suffered may be relatively less than that of an adult and still qualify as persecution."[29] The Guidelines state, "in addition to the many forms of persecution an adult may suffer, children may be particularly vulnerable" to a number of other forms of persecution, including "the deprivation of food and medical treatment."[30]

Furthermore, the proposed rule explicitly directs adjudicators to not consider laws on the books that are "unenforced or infrequently enforced" unless applicants can demonstrate the laws will specifically be enforced against them.[31] This encourages overlooking the impact of LGBTQ persecution that could result from reporting a hate crime to the police where in a country in which LGBTQ activity is prohibited. Likewise, a woman who suffered sexual assault may not have reported it because she knows that laws against rape are not adequately enforced and she may fear retribution from her persecutor(s).

The proposed rule also does not require adjudicators to analyze harm cumulatively. Thus, adjudicators would likely deny claims by asylum seekers who have been repeatedly detained for their political or religious views if those detentions are considered "brief." The Board of Immigration Appeals, along with the Circuit Courts, have long held that even if individual acts of harm might not rise to the level of persecution, adjudicators must consider them in the aggregate.[32] This unquestionably compromises the ability of those who face multiple less serious harms that are brief in duration to obtain protection, notwithstanding the fact that cumulatively, they amount to severe persecution warranting protection.

Until these regulations were proposed, persecution has always been a flexible statutory concept that includes a subjective and circumstantial element. *See Matter of Acosta* which defines persecution as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." 19 I&N Dec. at 222. This definition has been further refined by case law and requires a fact-specific inquiry. Shockingly, the approach of the proposed regulation seeks to obviate one of the most universal precepts in asylum adjudication, which is that eligibility for protection is to be demonstrated through a case by case evaluation.[33] We therefore strongly oppose the proposed amendments to the definition of persecution.

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[29] *See* USCIS, *Guidelines for Children's Asylum Claims*, Asylum Office Basic Training Course, March 21, 2009, p. 19.
[30] *Id*.
[31] 85 FR36281.
[32] *See, Matter of O-Z- &I-Z-*, 22 I&N Dec. 23 (BIA 1998); *Herrera-Reyes v. Attorney Gen. of United States*, 952 F.3d 101, 109 (3d Cir. 2020) ("Even if the IJ was correct that no single incident in isolation rose to the level of past persecution, he was still required to analyze whether the cumulative effect of these incidents constituted a severe 'threat to life or freedom.'"); *Baharon v. Holder,* 588 F.3d 228, 232 (4th Cir. 2009).
[33] *See Cardoza-Fonseca v. INS*, 480 U.S. 421 (1987).

AMENDMENTS TO THE DEFINITION OF PARTICULAR SOCIAL GROUP

As former Immigration Judges and Board Members, we are acutely aware of the complexity of analyzing asylum claims involving membership in a particular social group. The inclusion of membership in a particular social group in the statute was meant to allow for flexibility in the refugee definition, and to ensure that the United States offers broad protection in accordance with our treaty obligations. These types of claims are among the most complicated faced by an adjudicator and cannot be made simpler at the expense of eviscerating the Immigration and Nationality Act, years of carefully developed case law, and the due process rights of asylum applicants. At their core, the proposed regulatory changes seek to exclude the most vulnerable applicants, long protected by our asylum laws.

Based on our collective experience, many of the social groups slated for dismissal in the proposed social group regulations encompass a wide cross-section of potentially successful asylum claims. Few commenters to this proposed regulation could state this with more certainty than the undersigned. Collectively, we have adjudicated tens of thousands of asylum cases over many decades throughout this nation, in both our home courts and while on detail in other jurisdictions. Some of us have served as Board members, reviewing the social group analysis of the Immigration Judge. Included on the list of generally excluded social groups are "presence in a country with generalized violence or a high crime rate," "interpersonal disputes of which government authorities were unaware or uninvolved," and "the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups."[34] The broad wording of these groups is extremely concerning, and encompasses many thousands of credible asylum cases granted by this group based on longstanding Board and circuit caselaw: survivors of domestic violence; families; individuals that refused gang recruitment and authority; women; landowners; survivors of female genital mutilation; and members of the LGBTQI community.[35]

The changes suggested in the proposed regulation are at odds with the well-established and critically important legal requirement of case-by-case adjudication of asylum claims. While problematic in many respects, the Attorney General's own decision in *Matter of A-B-* is premised on the need for a detailed, case-specific analysis of asylum claims, and repeatedly emphasizes the Board's prior errors in assessing the cognizability of a social group without proper legal analysis.[36] The proposed regulations short-circuit legal analysis of an asylum applicant's claim in particularly dangerous ways, by providing a checklist of groups that would be "generally" insufficient to establish a particular social group under the refugee definition in order to provide uniformity and save Court time.

The wording of the proposed regulation creates a rebuttable presumption that claims based on any of the broadly enumerated particular social groups are insufficient to state an asylum claim,

[34] 85 FR at 36279.
[35] *See*, *e.g.*, *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) ("family remains the quintessential particular social group"); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (risk of female genital mutilation based on gender and clan membership); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (same) *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) (sexual orientation); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1081 (9th Cir. 2014) (suggesting "individuals taking concrete steps against gang authority and gang recruitment" would meet the Court's requirements for a cognizable social group).
[36] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

unless "more" is provided, without defining what would be sufficient to meet the exception.[37] Nowhere else in the regulations is such a negative presumption created—an applicant is left in the position of proving that they do not belong in, or are distinct from, one of social groups in the proposed regulations in order for their claim to either proceed to a full hearing, or to be granted by the adjudicator. This new rebuttable presumption harms the applicant, attempts to usurp independence from the Immigration Judge, and does nothing to increase Immigration Court efficiency.

The proposed social group regulations are particularly dangerous for pro se asylum seekers—an increasingly large part of many Immigration Court dockets. The statutory burden of proof in Immigration Court rests squarely on the applicant for asylum, whether represented or pro se.[38] The pro se asylum seeker is already at a profound disadvantage in making their case—completing a 12-page application in English, submitting English translations of all supporting documents, and recounting the past while suffering profound personal and family trauma, all in the increasingly limited timeframe allowed by the Court. Since January 2019, the majority of asylum seekers have been forced to prepare their cases entirely from Mexico, while living in refugee camps or on the street, because of the Migrant Protection Protocols ("MPP").

The proposed regulations render a successful pro se application even more difficult. An applicant who states in her asylum application, as translated through a non-professional translator, that she fears returning to her home country because of domestic violence has immediately placed herself in a category to be presumptively rejected, as she has broadly described fear based on "Interpersonal disputes of which government authorities were unaware or uninvolved," as listed in the proposed regulations. Unless she produces what the proposed regulations only generally describe as "more"—to, presumably, take her outside of the broad contours of the unacceptable social groups—her application will be denied, despite her lack of legal training to describe or obtain the additional information required. As a pro se applicant, this hurdle is nearly insurmountable, given the complexity of social group case law, including marshalling more complicated evidence of social distinction, obtaining more detailed supporting documents, and articulating a social group that places her outside of the proposed regulation.

The Immigration Judge's job is not made easier with a checklist of presumptively invalid social groups in the pro se context. Presented with a pro se applicant, an Immigration Judge has an enhanced duty under the regulations and the Constitution to assist the applicant in developing their claim.[39] Presented with an skeletal pro se asylum claim, an Immigration Judge has a clear duty to ask questions, explain the evidentiary requirements for relief, and provide the applicant with a full and fair hearing on their application. The proposed regulation's checklist of presumptively excluded social groups presents a potential pitfall for the busy Immigration Judge in a pro se case seemingly premised on gang violence, as she is compelled by her Constitutional duty to hold a

[37] 85 FR at 36279.
[38] INA § 208(b)(1)(B)(i).
[39] 8 U.S.C. § 1229a(b)(1) (Immigration Judges have a statutory duty to "administer oaths, receive evidence, interrogate, examine, and cross-examine the alien and any witnesses."); *Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000) (an Immigration Judge has the duty to fully develop the record where a respondent appears pro se); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (an Immigration Judge must adequately explain the procedures to the respondent, including what he must prove to prevail at the hearing).

full and fair hearing, but the regulations appear on the surface to compel one result for the applicant. Combined with performance goals and an unending docket, these proposed regulations will lead to the demise of due process in Immigration Court for pro se litigants.

Motions to Reopen and Reconsider

Motions to reopen and reconsider are critical tools for ensuring due process in removal proceedings. The standards for a motion to reopen and reconsider are spelled out in the regulations, well-developed in case law, and are not easy to meet.[40] Motions to reopen allow an applicant to reopen a case either before the Immigration Judge or the Board based on newly-discovered evidence that was unavailable at the original hearing, changed country conditions, or constitutionally deficient counsel. A person seeking reconsideration of a final agency decision must demonstrate an error of fact or law in that decision. A person seeking reopening or reconsideration must file a motion within a strict timeline, can only file one motion, and must provide objective evidence to support their motion.

We are deeply concerned that the motivation behind this proposed regulation is a false one: that asylum seekers are engaging in "gamesmanship" within our legal system.[41] We reject this attempt to amend federal regulations based on the nakedly biased position that asylum applicants have fraudulent or malevolent intent towards our honorable legal system. It is contrary to our experiences as adjudicators, and unbefitting of this process and our immigration system. The alternative stated motivation for this proposed regulation, encouraging "efficient litigation" is false rationale for this proposed change as well, as the motions practice is an essential accountability tool in a fallible legal system committed to due process.

Most disturbing in this portion of the proposed regulations is the limitation on motions to reopen even where the failure to raise a specific particular social group before the Court is the product of ineffective assistance of legal counsel.[42] Unfortunately, in our experience, it is not uncommon for respondents' counsel to fail to thoroughly research and prepare an asylum seeker's claim, which leads to a failure to present a properly articulated particular social group. An asylum seeker in this situation who was provided with constitutionally deficient counsel, including failure to raise a claim before the Immigration Judge, may currently raise that claim in a motion to reopen, and there long-recognized process established by the Board for the applicant to do so.[43] The circuit case law regarding ineffective assistance of counsel is well-developed, almost entirely through litigation of motions to reopen. To be clear, where an asylum applicant was provided with constitutionally deficient counsel, his counsel did not make "strategic choices" as suggested by the proposed regulation, as counsel is not permitted the strategic choice of violating their client's due process rights.[44] For all the above reasons, we strongly oppose the amendments to the definition and analysis of particular social group.

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[40] 8 CFR § 1003.2(c)(1); 8 CFR § 1003.23(b).
[41] 85 FR at 36279.
[42] *Id.*
[43] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
[44] *See*, *e.g., Nehad v. Mukasey*, 535 F.3d 962, 967-71 (9th Cir. 2008).

AMENDMENTS TO THE POLITICAL OPINION DEFINITION[45]

The proposed rule in pertinent part provides that "a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or unit thereof."[46] The rule proceeds to provide that in general, asylum claims regarding political persecution will not be granted where the applicants "claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."[47] The run-on, tortuous, and restrictive language of the proposed rule is inconsistent with the relatively straightforward language of the statute, the embracing, humanitarian intent of Congress in enacting it, the international law on which it is predicated, and the holdings of Article III Courts.

Section 101(a)(42) of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. 1101(a)(42), provides that an individual is a refugee, and therefore eligible for asylum, if she that she "is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or *political opinion*" (italics added).[48] According to the Supreme Court, the meaning of the terms in the definition of refugee should be subject to "case-by-case adjudication," and not by executive proscriptions ahead of the relevant proceedings.[49]

The legislative history of the Refugee Act of 1980 clearly indicated that the provisions of Section 101(a) (42) of the INA were intended be interpreted in a liberal fashion.[50] At the time of pas-

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[45] Note from Former Immigration Judge Bruce J. Einhorn: As a Justice Department lawyer, I was privileged to participate in the drafting of the modern American law of asylum, the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in 8 U.S.C. 1101(a)(4) and 1158). From 1990 through 2007, I served as a United States Immigration Judge in Los Angeles, and in that capacity applied and interpreted the asylum law. Since my retirement from the immigration bench, I have taught Immigration, Asylum, and Refugee Law as an Adjunct Professor at Pepperdine and Oxford Universities. I have also written law review articles and co-authored books on asylum law and adjudication. Based on my decades of work and study in the area of asylum and refugee law, I am convinced that the proposed rule is not consistent with the Refugee Relief Act and its Congressional intentions, the treaty on which the law is based, or its interpretation by Article III Courts. I further maintain that the proposed rule ignores the realities of human rights violations in the world, and is particularly and unfairly restrictive of gender-based claims of political persecution. For all those reasons, the proposed rule should not be implemented.

[46] 85 FR at 36280.

[47] *Id.*

[48] Pursuant to 8 CFR 208.13(a), the burden of proving asylum eligibility rests with the asylum applicant. That burden has not been modified by the proposed rule 8 CFR 208.1(d). Thus, without the proposed rule, the regulatory system for adjudicating claims of political persecution already ensures against the unsubstantiated and overly broad assertions of asylum eligibility.

[49] *INS v. Abudu*, 485 U.S. 94, 104 n.9 (1988), *quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

[50] In this regard, a liberal construction of Section 101(a) (42) comports with the principle that "in the immigration context…doubts are to be resolved in favor of the alien…" *Alvarez-Santos v. INS*, 332 F.3d 1245, 1250 (9th Cir. 2003) (*citing INS v. Cardoza-Fonseca*, 480 U.S. at 448 (emphasizing that there is a "long standing principle construing any lingering ambiguities in deportation statutes in favor of the alien"). *See Matter of Vizcaino*, 19 I. &

sage of the asylum statute. Representative Peter Rodino, then Chair of the House Judiciary Committee, characterized it as "one of the most important pieces of *humanitarian* legislation ever enacted by a United States Congress…[I]t confirm[ed] what this Government and the American people are all about…By their deep dedication and untiring efforts, the United States once again…demonstrated its concern for the homeless, the defenseless, and the persecuted peoples…"[51] The legislative intention to have the asylum statute construed liberally included the reference to those "persecuted on account of…political opinion."[52]

The federal courts have held that Congress has "plenary power" to determine "what noncitizens shall be permitted to remain within our borders."[53] In its proposed rule change to 8 CFR 208.1(d), the current Administration is attempting to do an end run around the legislative intent behind Section 101(a) (42) of the INA. The proposed rule is therefore unlawful, including with regard to the phrase "persecution on account of…political opinion."

The proposed rule also runs afoul of the international agreements to which the United States is a party. As the Supreme Court has held, a primary purpose of Congress in passing the Refugee Act of 1980 "was to bring United States refugee law into conformance with the 1967 United Nations Protocol" and Convention on the Status of Refugees. *INS v. Cardoza-Fonseca*, 480 U.S. 426.[54] The Supreme Court has also stated that in construing the terms of the asylum statute, it was guided by the analysis set forth in the Office of the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979, as amended 2019). The Handbook cautions that "the [asylum] applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons set forth in the definition [including "on account of political opinion]." *Id.,* at Ch. II B (2) (a) Sec. 42. *See also id.,* Sections 37-41. In sum, the Handbook is completely consistent with the legislative intent behind the Refugee Act of 1980, that the concept of "political opinion" should be construed in a broad sense, encompassing any point of view regarding matters on which the machinery of the state, government, *or society* is engaged. The phrase "political opinion" therefore goes beyond identification with a specific political party or recognized ideology, and may, for example, include opinion on gender roles.

The Handbook's guidance contrasts sharply with the proposed rule at 8 CFR 208.1 (d), which prohibits a grant of asylum on grounds of political opinion '"defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."[55] Much

N. Dec. 644, 648 (BIA 1988) (noting that the expansion of relief "clearly was intended as a generous provision, and it should therefore be generously interpreted").

[51] 126 CONG. REC. 1519 (1980).

[52] INA § 101(a)(42).

[53] *Carlson v. Landon*, 342 U.S. 524, 534 (1952) (footnote omitted); *See Arizona v. United States*, 567 U.S. 387 (2012).

[54] *See also* 19 U.S.T. 6223, T.I.A.S. 6577; S. REP. 90 n.264 at 19 (1980); H.R. CONF. REP. NO. 96-781 (1980).

[55] 85 FR at 36280.

more in conformity with the Handbook is the legislative intent behind the Refugee Act of 1980, that the concept of "political opinion" as grounds for asylum eligibility should be construed in a broad sense, encompassing any opinion on matters on which the machinery of the state, government, *or society* is engaged. Therefore, the phrase "political opinion" goes beyond identification with a specific political party or recognized ideology, including an opinion on gender roles.[56]

The current regulation on asylum eligibility, found at 8 CFR 208.13 is consistent with the language and legislative intent of the Refugee Act of 1980, and also consistent with the United Nations Protocol to the U.N. Convention on the Status of Refugees and UNHCR guidelines. For example, at 8 CFR 208.13(b)(2)(iii), the regulation states that an "asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility that he or she would be singled out individually for persecution [on account of political opinion, etc.] if:

(A) The applicant establishes that there is a pattern or practice in his or her country…of persecution of a group of persons similarly situated to the applicant account of race, religion, nationality, membership in a particular social group, or political opinion; and
(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable."

By contrast, the proposed rule, 8 CFR (1)(d), limits eligibility for asylum based on political opinion to "absent expressive behavior in furtherance of a cause" specifically delineated by the language of that provision.[57] The new rule thus is not in accord with the broad and humanitarian interpretation of the phrase "political opinion" as stated by Congress, the Supreme Court, and UNHCR.

Finally, the emphasis on "expressive behavior in furtherance of a cause" flies in the face of case law, which provides for political asylum eligibility based on neutrality and imputed opinions.[58] The proposed rule undercuts the principle that neutrality rather than "expressive behavior in furtherance of a cause" is sufficient to establish "political opinion" – *e.g.*, the refusal to hold or voice a partisan position between guerillas or gangs on the one hand and the government on the other, owing to the very real fear that overt action or statements will cause violent reprisals from the non-state actors on the one hand and the military or law enforcement on the other. Likewise, the proposed rule is inconsistent with the doctrine of imputed political opinion – *e.g.*, that the foreign government may impute to an asylum applicant a political opinion in favor of the guerillas or gangs on account of the individual's decision not to expressly act for or against the non-state actors.

In short, the proposed 8 CFR 208.1(d) is an overt attempt to subvert the language and legislative intent of Section 101(a) (42) of the INA regarding, *inter alia*, "persecution on account of political opinion." The proposed rule is also not in line with case law and the UNHCR Handbook and

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[56] *See* UNHCR Protection Training Manual, Session 3, Annex 2.

[57] 85 FR at 36280.

[58] *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Maldonado-Cruz v. INS*, 883 F.2d 788. 791 (9th Cir. 1989) (regarding neutrality); *Chun Gao v. Gonzales*, 424 F.3d 122, 129 (2d Cir. 2005 (regarding imputed political opinion).

Guidelines that have long been used as a guide to the adjudication of cases of politically based persecution. We therefore oppose the amendments.

Gender And Feminism As Forms Of Political Opinion

In the *Guidelines on International protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (May 2002), the United Nations Refugee Agency states that it "is an established principle that the refugee definition *as a whole* should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status" (emphasis added).

American case law has applied this principle in regard to women who claim asylum eligibility based on gender-related political persecution. For example, in *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (1994), the asylum applicant was repeatedly raped and beaten by her employer, a sergeant in the Salvadoran Armed Forces. In connection with her rapes, she was threatened by the sergeant with guns, bombs, and hand grenades. The sergeant labelled her a "subversive." *Lazo-Majano v. INS*, 813 F. 2d 1433. The Court of Appeals held that the sergeant's "generalized animosity" toward women and his belief that they should be subordinate to men, sexually and otherwise, constituted persecution based on political opinion. *Id.* Furthermore, the Court found that the asylum applicant's attempts to escape her tormentor and the further rapes and beatings that ensued were acts of persecution on account of an imputed political opinion. *Id.*

As the world has evolved – or perhaps more accurately, devolved – the denial of women's rights has taken many forms, from bride burning to gender-specific violence in the home and in the public sphere. When women object to these forms of persecution, and when they resist or protest them, and when these forms of persecution are committed either by government officials or non-state actors that the government is unable or unwilling to stop, then the dissenting views and/or actions of the women should be considered expressions of political opinion for purposes of asylum eligibility.

Furthermore, the types of gender-based political opinion that have occasioned acts of persecution have evolved. Feminism now qualifies as a form of political opinion.[59] Put another way, the advocacy or belief in women's rights, should and does constitute actual or imputed political opinion. For example, in some Muslim societies, persecution on account of political opinion exists where violence occurs or is threatened against those women who refuse to wear the traditional "hijab" or "chador." This view of political opinion, expressed in the *Fatin* case, is consistent with the holdings in other Western democracies, such as the Immigration and Refugee Board in Canada in *Namitabar v. Canada (*Minister of Emp't & Immigration), [1994] 2 F.C. 42 (Can.).[60] As immigration judges, we have granted asylum cases based on feminist political opinion. In many situations, these cases were not appealed by the legacy INS or DHS.

[59] *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993)

[60] *See also* U.K. VISAS & IMMIGRATION, GENDER ISSUE IN THE ASYLUM CLAIM: PROCESS (2010) (U.K.); New Zealand Refugee Status Authority 76044 (2008).

A sensitivity to the gender-based nature of women's actual or imputed political opinions is critical in adjudicating asylum cases. "Women are less likely than their male counterparts to engage in high profile political activity and are more involved in 'low level' political activities that reject dominant gender roles."[61]

The Administration's proposed rule would narrow and redefine "political opinion" in such a way that gender-based claims, including but not limited to feminism, would have little if any chance of success. Claims that women may protest and resist rape and strict codes of dress, and that they may demand the right to land ownership and birth control[62], appear to be closed out of consideration as political opinions for asylum purposes. If women's rights are human rights, then their expression in repressive and sexist societies should be regarded as political opinions. To do otherwise would be a decision by our own government to relegate women to second-class status in asylum cases based on claims of political persecution.

The proposed rule, 8 CFR 208.1(d), should be rejected. It is not consistent with the asylum statute's language and legislative history, the Protocol and Convention on the Status of Refugees, UNHCR Guidelines, Article III case law, and the decent opinions of humankind.

AMENDMENTS TO NEXUS REQUIREMENTS

We have particular concerns that the purpose of the proposed regulation with regard to nexus is not national uniformity, but rather two things: attempting to accelerate complicated asylum hearings at the expense of due process, and the final codification of the Attorney General's flawed decision in *Matter of A-B-*, which has been widely criticized by federal courts, and was a sharp departure from decades of Board and circuit case law.[63]

The proposed regulation purports to "further the expeditious consideration" of asylum claims by listing eight non-exhaustive grounds that cannot form nexus in a successful asylum claim.[64] As with the enumeration of particular social groups, in our experience as adjudicators, creating a checklist to expedite the nexus analysis for asylum claims does not simplify the process. Due process requires a careful consideration of whether an applicant is properly included in one of the eight categories, a time-consuming factual inquiry. This attempt to short-circuit or simplify the factfinding and legal analysis by Immigration Judge is shortsighted.

Similar to the particular social group proposed regulations, the proposed regulation creates nine broad nexus grounds that presumptively cannot establish an asylum claim, except in "rare circumstances."[65] Many of the categories slated for exclusion are supported by established case law supporting nexus.[66] They propose eliminating asylum and statutory withholding of removal for

[61] U.N. Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 33.

[62] Interestingly, the proposed rule recognizes that objections to involuntary abortions and sterilization are forms of political opinion, but not demands for birth control or access to family planning programs.

[63] 27 I. & N. Dec. 227 (A.G. 2018).

[64] 85 FR at 36281.

[65] *Id.*

[66] *See*, *e.g.*, *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (family); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (gender); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (gender) *Bringas-Rodriguez v. Sessions*,

all private-actor violence, and specifically target claims related to gang members or criminal enterprises.[67] Of particular concern, the proposed regulations target harm and feared harm based on gender as a protected characteristic, which has formed the basis of asylum claims for decades, contrary to the citation provided in the proposed regulations. *Matter of Acosta* stands as the seminal case where gender was held to be an immutable characteristic; since *Acosta*, the Board and the federal circuit courts have repeatedly acknowledged gender as a protected ground.[68],[69] Effectively excluding gender as a protected ground, as well as "interpersonal animus" and "personal animus" is a clear attempt to bar women from obtaining asylum based on domestic violence, an uncontroversial basis for asylum in many of our courtrooms until the Attorney General issued *Matter of A-B*. Changing the law by regulation in such a drastic manner is deeply concerning, as collectively we have granted thousands of credible asylum claims based on domestic violence and gender, and we are acutely aware of the importance of this basis of asylum protection.

Prohibiting Evidence of "Cultural Stereotypes"[70]

As former Immigration Judges and Board of Immigration Appeals members, neutrality and lack of bias are values at the core of our chosen profession. "Pernicious cultural stereotypes," as referenced in the proposed regulations,[71] have no place in any reasoned decision issued by the Immigration Court or the Board of Immigration Appeals. Based on our decades of experience in the courtroom, we are confident that Immigration Judges have the training to fairly assess evidence submitted by the parties in removal proceedings under clearly established standards. If an applicant believes that the Department has introduced evidence that is improper or prejudicial, he or she may object to the admission of that evidence, or request that it be given reduced weight by the Court. Similarly, if the Department believes that the applicant has submitted evidence that is improper, it may make similar objections. Either side may appeal an Immigration Judge's ruling regarding the admission of evidence, or the weight given to evidence, to the Board of Immigration Appeals.

We oppose the new proposed regulation which bars Immigration Judges from "consideration of evidence promoting cultural stereotypes of countries or individuals" because it is vague, unnecessary, and seeks to exclude the admission of necessary evidence that supports credible asylum claims. Detailed country conditions evidence is critical to establishing eligibility for asylum, and especially to establishing eligibility based on membership in a particular social group. To show cognizability of a proposed social group, an applicant needs to demonstrate social distinction of that group, and the existence of stereotypes about the group are directly at issue. The proposed regulation introduces a new evidentiary bar with vague standards, requiring Immigration Judges to uniformly understand an impossibly vague standard with no guidelines. The evidence this bar

850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) (sexual orientation); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1081 (9th Cir. 2014) ("individuals taking concrete steps against gang authority and gang recruitment").

[67] 85 FR at 36281-82.

[68] *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

[69] *See, e.g.,Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (BIA erred in rejecting the particular social group of "women in Guatemala" as not cognizable solely on the breadth of the group); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

[70] 85 FR at 36282.

[71] *Id.*

will potentially apply to is broad, and includes critical evidence under the REAL ID Act, presenting judges with difficult and time consuming factual and legal issues to resolve. For all the reasons discussed above, we strongly oppose the amendment to the nexus standard.

AMENDMENTS TO THE INTERNAL RELOCATION STANDARD

The proposed regulation purports to eliminate "unhelpful" caveats with regard to determining whether internal relocation is reasonable, but in doing so also eliminates a non-exhaustive list of relevant factors which currently must be considered in such determinations in the totality of the circumstances.[72] The proposed rule also purports to realign the focus of this inquiry by replacing those factors with another list of factors which must be considered, and it fails to even advise that the new list is non-exhaustive, even though it purports to require a "totality of the circumstances" analysis.[73] The factors in the current regulation call for a broad consideration of the totality of an individual's circumstances and country conditions in determining whether it is reasonable to require internal relocation.[74] The current regulation's replacement with a new list of factors, focused entirely on the reach of the persecutor and the applicant's ability to flee to the U.S, implies that the only reason not to require internal relocation would be continued persecution in the new location and that personal circumstances and country conditions are irrelevant. This essentially and inappropriately equates whether *internal relocation* is reasonable with a reasonable possibility or well-founded fear of *persecution* in the new location where the current regulation recognizes that whether internal relocation is reasonable is a *separate* inquiry than whether it is reasonable to expect the applicant to relocate.[75] It also implies that in no case in which the applicant has relocated to the U.S. could an adjudicator find it to be unreasonable to have relocated within his or her own country.[76] These propositions are patently inconsistent with the well-developed "totality of circumstances" analysis currently in effect and claimed to be required in the proposed regulation. The proposal fails to recognize that whether internal relocation is "reasonable" depends on more than just the ability to pick up and move and/or whether persecution would continue in the new locale. Critically, the current regulation recognizes that the reasonableness of relocation is a complex analysis which depends on a variety of factors, names some examples, and makes it clear that there may be even more.[77] In our experience as adjudicators and appellate judges, the likelihood that persecution may follow the applicant to the new internal location is relevant, but it is certainly not the only relevant factor in a relocation analysis.[78]

The efficiency-based justification given for the changes in the proposed regulation is also patently false. Judges and other adjudicators are accustomed to utilizing such lists as non-exhaustive examples of the types of considerations that are relevant to a particular inquiry. The clear intent of the proposed change is to limit the relocation analysis, and center it on the persecutor and likelihood of persecution, rather than the entirely relevant circumstances of the individual applicant. the proposed rule ignores the fact that the possibility of persecution upon relocation

[72] 8 CFR § 208.13(b)(3); 8 CFR § 1208.13(b)(3).
[73] 85 FR at 36282.
[74] *Id.*
[75] 8 CFR § 208.13(b)(1)(i)(B).
[76] *Id.*
[77] *Id.*
[78] *See*, *e.g.*, *Eduard v. Ashcroft*, 379 F.3d 182, 193-94 (5th Cir. 2004) (requiring consideration of more than likelihood of countrywide persecution).

and whether relocation would be reasonable are two *separate* inquiries.[79] Currently adjudicators must consider a number of factors, including, "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." [80] The proposed rule replaces these factors with a "totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum."[81]

The proposed list of factors eliminates personal factors that, in our collective experience, profoundly and accurately impact the ultimate decision of whether it is reasonable for an asylum applicant to relocate within the country of origin or last residence. It is contrary to decades of carefully developed case law, including the agency's own long-standing precedent.[82] In doing so, the proposed regulation implies that consideration of such personal factors such as lack of employment, lack of housing, lack of family support, age, sufficient economic resources, are *categorically impermissible* factors.[83] Each example given in the proposed regulation is related to the alleged persecution or persecutor, except the demonstrated ability to come to the U.S. Since *every* asylum applicant has made it to the U.S. somehow, overemphasizing this factor is also inappropriate and clearly intended to exclude legitimate refugees from eligibility. Eliminating the current non-exhaustive list of factors from the regulation and emphasizing the ability to make it to the U.S. makes it appear as though *none* of these personal factors may be considered to support an applicant's

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[79] *See*, *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28 (BIA 2012) (The regulations promulgated in 2000, *specifically to comply with international obligations*, created a two-step process consisting of a first inquiry as to whether persecution can be avoided through internal relocation and a *second* inquiry whether to expect the applicant to relocate would be reasonable *under all the circumstances*.) In explaining the necessity of the two-step process, the Board quoted the Department's explanation for creating the regulatory process:

> "The Department does agree . . . that some changes to the proposed language are appropriate in order to ensure that those provisions are applied in a manner that complies with our international obligations under the 1951 Convention relating to the Status of Refugees ("1951 Convention"), as modified by the 1967 Protocol relating to the Status of Refugees. In determining how to revise these provisions, the Department referred to the relevant provisions of the United Nations High Commissioner for Refugee's Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook"). . . .
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> ....
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> [T]he provisions have been revised to require a showing by the Service that "under all the circumstances, it would be reasonable to expect the applicant to (relocate)." That language is nearly identical to the language used in the relevant section of the UNHCR Handbook, paragraph 91. 65 Fed. Reg. at 76,133 (codified at 8 C.F.R. § 1208.13(b)(1)(i)(B))."

[80] 8 CFR § 208.13(b)(3); 8 CFR § 1208.13(b)(3).

[81] 85 FR at 36282.

[82] *Matter of M-Z-M-R*, 26 I. & N. Dec. 28 (BIA 2012).

[83] *See Knezevich v.Ashcroft*, 367 F.3d 1206, 1214-1216 (9th Cir. 2004) (relocation not reasonable under all circumstances were respondents were elderly, had no way to support themselves, had no home, and quality of life was unsustainable in home country); *see also Mashiri v. Ashcroft*, 383 F.3d 1112, 1122-23 (9th Cir. 2004) (giving weight to family presence in determination that relocation was not reasonable); *Matter of Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996) (considering gender in relocation analysis).

contention that internal relocation is unreasonable, and that their ability to make it to the U.S. is conclusive of the unreasonableness of internal relocation. This is not only contrary to law, but it is also contrary to the reality faced by many of the legitimate refugees whose cases members of the Round Table have considered in centuries of combined experience on the Immigration bench. Often legitimate refugees have family support and opportunities in the U.S. that don't exist in their home countries, particularly outside of their hometowns where they suffered persecution. The summary included in the proposed regulation indicates that the "caveats" at the end of the current regulation are "unhelpful". However, in our collective experience, these caveats serve to emphasize the discretionary nature of this inquiry and that the "totality of the circumstances" is case-specific and all-inclusive. The listed factors may cut differently in different cases, depending on the *totality* of the circumstances. If the Departments believe too much guidance is confusing to adjudicators, they should simply remove *any* reference to specific factors to be considered and tell adjudicators to consider the totality of *all* circumstances in each case, rather than favoring certain types of circumstances and factors over others that are even more relevant and important.

The proposed regulation would also modify the current presumptions and burdens of proof as to internal relocation, placing new and onerous burdens on both applicants for asylum and adjudicators where the persecutor is a non-government entity. The proposal creates a rebuttable presumption, where the persecutor is not a government actor, that internal relocation would be presumptively reasonable.[84] A rebuttable presumption is antithetical to consideration of the totality of the circumstances as an individualized inquiry in each case. The law allows for protection from non-government persecutors, just as it does from government persecutors.[85] It is unfair to treat those who fear persecution from non-government actors differently than those who fear their governments, and will lead, in our collective experience, to meritorious cases deserving of protection being denied. As stated above, the identity and reach of a persecutor should be considered as one factor in determining whether relocation is reasonable, but it should not be a factor that alone creates a burdensome presumption and puts an entire category of legitimate refugees at a disadvantage. This proposed regulation creates a new and heavy burden for applicants who, in our experience, have few resources, often are unrepresented and have difficulty obtaining evidence from afar, merely on account of the identity of their persecutor. There is simply no justification for elevating the identity of the persecutor so substantially as to create such a heavy burden against the party with the fewest resources.

The proposed change in presumption also decreases judicial efficiency by creating a heavy burden on adjudicators who must apply differing standards and burdens, depending on the identity of the persecutor or persecutors in each case. In our collective experience adjudicating thousands of asylum cases over many decades, it is not uncommon for an adjudicator to encounter a case in which the applicant has established a well-founded fear of persecution by both the government and one or more non-governmental entities.[86] Such a situation would require the adjudicator to

[84] 85 FR at 36282; compare to *Afriyie v. Holder*, 613 F.3d 924, 927-929 (9th Cir. 2010) (Immigration Judge incorrectly placed burden on asylum applicant in a private actor violence case, leading to improper denial of application).
[85] *Afriyie*, 613 F.3d. at 927-929.
[86] *See*, *e.g.*, *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1054-55 (9th Cir. 2006) (addressing both private actor and government-sanctioned harm); *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000) (addressing private actor violence combined with state-sponsored violence).

analyze the "totality of the circumstances" surrounding internal relocation multiple times with different presumptions and burdens applied to each persecutor, increasing the time required for taking of evidence and for issuing a far more complex decision. If the true goal of the proposed change is judicial efficiency, this proposed change will do nothing to further that goal, at the expense of credible claims for asylum protection. We therefore object to the amendment.

AMENDMENTS TO THE FIRM RESETTLEMENT ANALYSIS

For over 30 years, firm resettlement has been clearly defined by regulation and that definition is reasonable, comports with the reality of true refugees' situations, and has remained a clear and concrete standard for adjudicators to apply.[87] With certain exceptions, it requires that there have been an offer of permanent resident status, citizenship, or some other type of permanent resettlement in a third country for an asylum application to be denied on the basis of firm resettlement.[88] The proposed regulation would amend this one clear definition of firm resettlement by replacing it with three separate definitions, all of which put unreasonable burdens both on applicants and on adjudicators.[89] The first proposed definition requires denial of an asylum application where the applicant "either resided or could have resided in any permanent legal immigration status or any non-permanent, potentially indefinitely renewable legal immigration status" in a transit country.[90] The second proposed definition unfairly equates time in a transit country with firm resettlement there, requiring a denial of asylum whenever an applicant has remained in a transit country for one year or more.[91] The third proposed definition relates to having citizenship in a third country and its requirements are vague and difficult and time-consuming for the adjudicator to apply.[92]

Proposed § 208.15(a)(1)

The first arm of the new proposed definition is virtually impossible to implement as it calls entirely on improper speculation about what "could" have happened in a third country through which the applicant transited. [93] On what facts does an Immigration Judge or Asylum Officer rely in determining whether the applicant "could have resided in any permanent legal immigration status or any non-permanent, potentially indefinitely renewable legal immigration status" in a country of transit? Is the fact that that country has an asylum law, no matter how flawed or ineffectively implemented, enough? Is it sufficient that some non-immigrant visa categories in that country are renewable? How would an Immigration Judge or an asylum officer determine, under the laws of another country, whether the applicant "could have" obtained such status? How could an applicant possibly prove otherwise, particularly since any attempt to do so would require the ability to research potentially complex laws and practices of other countries? Does it mean that s/he/they might have, or that they definitely would have been granted status if they had only applied? This definition creates a standard which excessively complicates the firm resettlement determination, putting additional burdens on applicants and adjudicators alike. It will cause endless litigation,

[87] 8 U.S.C. § 1158(b)(2)(A)(vi); 8 C.F.R. § 1208.15.
[88] *See Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006) (en banc); *Matter of A-G-G-*, 25 I. & N. Dec. 486 (BIA 2011).
[89] 85 FR at 36286.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *See*, *e.g., Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) ("we have repeatedly held that it is error to rest a decision denying asylum on speculation and conjecture.").

further reducing certainty and efficiency in adjudication of applications. Legal standards must be clear and concrete, capable of being evaluated through the presentation of objective evidence. This standard is subjective and incapable of concrete evaluation, reliant on the laws of potentially hundreds of different countries through which applicants may transit. Applicants, who are often indigent, unrepresented and/or uneducated, but who have the burden of proof on this issue under the proposed regulation, are ill-equipped to present evidence of what might have happened under the laws of another country. By contrast, the current provision has been successfully applied for more than 30 years, has a uniform agency standard, and is easily implemented because it calls for an actual offer, rather than for speculation as to whether an offer of status might be granted by a third country.[94]

Proposed § 208.15(a)(2)

Under the second arm of the proposed definition, if the applicant voluntarily and without persecution remained for a year in a third country, that is sufficient to meet the definition of firm resettlement, *even if there is no possibility of ever obtaining any permanent or renewable status in that country*.[95] In our collective experience as adjudicators, this definition ignores the realities of what it is to escape persecution. Legitimate refugees don't always have choices about how they leave their countries, where they go, who they rely on, and how they travel. They frequently have severe restraints, economic or otherwise, which require moving along at a pace they would not choose under normal circumstances. Sometimes they must wait for documents to arrive, or money from relatives, or assistance from organizations. Refugees are sometimes stuck in unofficial refugee camps in appalling conditions of living, health, and crime, with no hope of receiving any status, for years before being able to leave and come to the U.S. where they can apply for asylum. Others similarly become "trapped" by economic circumstances and other factors in countries with no possibility of status.[96] Moreover, this subsection makes no exception for trafficked persons, who may be trapped for months or years by human traffickers before being able to escape to the U.S. Based on our collective experience as adjudicators, this proposed definition is unfair, unworkable, and does not reflect a truly resettled state as is contemplated by the statute. If Congress had intended to create a bar to asylum for those who spent a specified amount of time in a third country, it could and would have done so. Instead, it barred one who has been firmly resettled in a third country. This regulation is *ultra vires* and usurps Congressional power to make our immigration laws.

Proposed § 208.15(a)(3)

The third arm of the proposed definition relates to applicants who have citizenship in countries other than those from which they claim persecution. In our experience, this situation is exceedingly rare. Moreover, the definition also requires presence in the country of citizenship, but it is unclear when that presence is to have occurred. Does it mean that the applicant must have been present there *sometime* before coming to the United States, anytime in their whole lives? Or does it mean that they were present in the country of citizenship *after* leaving the country of persecution? If the latter, the current definition of firm resettlement would be sufficient to cover

[94] *Matter of A-G-G-*, 25 I. & N. Dec. 486 (BIA 2011).
[95] 85 FR at 36286.
[96] *See*, *e.g*. *Arrey v. Barr*, 916 F.3d 1149, 1153-58 (9th Cir. 2019) (no firm resettlement where petitioner, a victim of decades of sexual assault from Cameroon, remained in South Africa for years, because no possibility of remaining permanently).

their situation. If the former, considering them firmly resettled in the country of citizenship, without more, is unreasonable and unfair. This definition makes no accommodation for whether s/he/they has a right to reside in that country and/or whether s/he/they could be reasonably expected to do so.

Proposed § 208.15(b):
This subsection applies the burden-shifting provision at 8 C.F.R. §1240.8(d) to firm resettlement. Where generally under section 1240.8(d), DHS must raise evidence sufficient to establish that a bar "may" apply before the burden shifts to the applicant, this subsection indicates that either the Immigration Judge *or* DHS counsel may raise the bar based on evidence in the record.[97] It is unclear from the way this subsection is written whether it intends to authorize DHS counsel to make a conclusive *finding* that firm resettlement may apply, even if the Immigration Judge disagrees. If so, the subsection inappropriately usurps Immigration Judge decisional authority. At any rate, considering the subjective and nearly impossible to prove nature of the standard contained in the proposed definition, particularly at subsection (a)(1), shifting the burden to the Respondent or applicant is unfair and unworkable.

For all the reasons discussed above, we strongly object to the amendments of the firm resettlement bar in their entirety.

AMENDMENTS LIMITING THE EXERCISE OF DISCRETION

This section of the proposed rule represents a naked attempt through Executive action to rewrite asylum law and create at least nine new absolute bars to asylum which are not contained in the statute enacted by Congress, under the guise of discretion.[98] Thus, it is a severe overreach of the Departments' authority. Asylum is a discretionary form of relief.[99] Immigration Judges and Asylum Officers are the most qualified to exercise discretion in each case, based on all of the evidence before them and all factors both favorable and unfavorable. This rule severely limits the discretion of adjudicators, mandating that extreme weight be given to numerous negative factors, many of which are likely to be present in nearly all asylum cases. The rule is clearly intended to withdraw the protection of asylum, and its attendant benefits, from the vast majority of those applicants who qualify for such protection. This wholesale withdrawal is absolutely contrary to the obligations of the United States under international instruments,[100] under our asylum statute,[101] and under our moral obligations to provide refuge to those who flee persecution.

For decades, in keeping with those international obligations, the Courts have recognized the unique situation of asylum seekers and found that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."[102] This proposed regulation represents an about-face on this principle by identifying 13 very common negative factors and rigidly elevating their weight in the discretionary analysis in *every single case*, no matter the surrounding

[97] 85 FR at 36286.
[98] 85 FR at 36282-85.
[99] INA § 208; *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423, (1987).
[100] CONVENTION RELATING TO THE STATUS OF REFUGEES, *Geneva, 28 July 1951.*
[101] INA §§ 101(a)(42); 208.
[102] *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987); *Matter of D-X- and Y-Z-*, 25 I. & N. Dec. 664 (BIA 2012).

circumstances.[103] With regard to nine of these factors, the weight given them is so heavy as to preclude favorable discretion except in the very most exceptional of circumstances, or where a denial of asylum would cause exceptional and extremely unusual hardship to the applicant.[104] This not only would result in a discretionary denial of the vast majority of *those who have already met the statutory qualifications for asylum*, it would also burden Immigration Judges and Asylum Officers with an additional inquiry never before required in asylum proceedings, that of determining whether the hardship engendered by return to the country of persecution meets a hardship standard previously reserved for Cancellation of Removal cases.

The introductory portion of this section of the proposed rule merely states the obvious: that (impliedly negative) factors not amounting to an asylum bar under the statute may nevertheless be taken into account in exercising discretion.[105] Nevertheless, the manner in which this is stated implies that the only discretionary factors to be considered are *negative* equities that simply fall short of requiring mandatory denial. Discretion, if it means anything, means that the adjudicator weighs *all relevant factors* in each individual case, giving each factor the weight deemed to be appropriate under the totality of the circumstances of that case.[106] While the BIA, the courts and some regulations have occasionally mandated that certain factors be given more or less weight under certain circumstances, by nature of the definition of discretion, the agency cannot categorically limit discretion, since the discretionary determination in each case is dependent on the unique mix of factors present in that case, and on the interactions of all those factors.[107] The analysis of all relevant discretionary factors in each case, and how to weigh each of these factors is best left to the trier of fact. The purported justification for the proposed rule is to "ensure that immigration judges and asylum officers properly consider, in all cases, whether every applicant merits a grant of asylum as a matter of discretion, even if the applicant has otherwise demonstrated asylum eligibility."[108] However, this is in fact what asylum adjudicators have been doing in every case for decades. The subsections regarding discretion make a mockery of any discretionary consideration, which by nature must take into account both favorable and unfavorable factors, take into account the context in which those factors exist and determine the appropriate weight to be given each factor *in light of all the circumstances* of each particular case.

The subsections reveal the true purpose of this proposed section, which is to create new bars to asylum and severely limit the discretion afforded to Immigration Judges and Asylum Officers to grant asylum to qualified applicants by mandating that numerous factors present in the majority of all asylum cases be considered so devastatingly negative as to preclude eligibility except in the most exceptional of cases. That this is exclusively a discretion *limiting* provision is clear from the fact that not a single nod is given to the consideration of positive discretionary factors except to those of the most extraordinary, and impersonal, nature.

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[103] 85 FR at 36283-85.
[104] 85 FR at 36285.
[105] 85 FR at 36282.
[106] *See Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978); *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998); *Matter of Mendez-Morales*, 21 I. & N. Dec. 296 (BIA 1996).
[107] *See e.g. Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002); 8 C.F.R. §§ 212.7(d); 1212.7(d).
[108] 85 FR at 36285.

Proposed section 208.13(d)(1)/1208.13(d)(1) purports to identify "significant adverse discretionary factors" and to assign them significant weight *in every case*, without regard to the contextual circumstances under which those factors exist, a part of every legitimate discretionary determination.[109]

Subsections (1)(i) and (iii) together cover the vast majority of all asylum applications made in the United States,[110] particularly now that the DHS has virtually shut down the processing of asylum applications at many U.S. ports of entry.[111] Many legitimate refugees come from countries where U.S. visas are next to impossible to obtain. Therefore, through no fault of their own, refugees who are unable to escape persecution by obtaining a visa will be strapped with the additional burden to overcome a significant negative discretionary factor. Similarly, subsection (1)(iii) penalizes the use of fraudulent documents by making it a "significant negative discretionary factor", if not necessitated by the need to escape persecution.[112] The use of fraudulent documents is a factor that asylum adjudicators have always taken into account and assigned appropriate weight under the individual circumstances of each case.[113] But the subsection inexplicably draws a distinction, penalizing those who travel on fraudulent documents through multiple countries, and excusing those who come directly to the U.S. on such documents.[114]

Subsection (1)(ii) penalizes applicants who have not applied for protection elsewhere.[115] As justification, the Departments offer that the failure to do so: "may reflect an increased likelihood that the alien is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection."[116] While it may indeed reflect such misuse in rare cases, more frequently, refugees do not seek protection in third countries because of the lack of knowledge of of protection in other countries, how to seek protection, a lack of familial or social support in a transit country, a lack of sophistication, a lack of language skills, mistrust of officials, or fear of being returned to the country of persecution. On the off-chance that a failure to apply in countries of transit "may reflect" misuse of the system, the regulation guarantees that many legitimate refugees who in the totality of the circumstances are deserving of relief will have an uphill battle receiving asylum *even after they have established eligibility.* Discretionary considerations are meant to determine whether an applicant is *deserving* of relief by considering all relevant equities, not to cast such a wide net as to deny virtually all cases in order to catch the rare few who "may" be misusing the system. The system has other tools for doing that which do not result in demonizing legitimate refugees for doing what is necessary to flee persecution.

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[109] 85 FR at 36293.
[110] *Id.*
[111] Time, Mexican Asylum Seekers Are Facing Long Waits at the U.S. Border. Advocates Say That's Illegal, Oct. 16, 2019, https://time.com/5701989/mexico-asylum-seekersborder/; Vox, The abandoned asylum seekers on the US-Mexico border, Dec. 20, 2019, https://www.vox.com/policy-and-politics/2019/12/20/20997299/asylum-border-mexico-us-iom-unhcr-usaid-migration-international-humanitarian-aid-matamoros-juarez; https://www.humanrightsfirst.org/campaign/remain-mexico; https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program; https://www.aclu.org/news/immigrants-rights/asylum-seekers-stranded-in-mexico-face-a-new-danger-covid-19/.
[112] 85 FR 36293.
[113] *Matter of Pula,* 19 I. & N. Dec. 467, 474 (BIA 1987); *Matter of D-X- and Y-Z-*, 25 I. & N. Dec. 664 (BIA 2012).
[114] 85 FR at 36293.
[115] *Id.*
[116] *Id.*

Subsection (2)(i) mandates "discretionary" denial of asylum in each of 9 categories, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or where the applicant is able to establish by clear and convincing evidence that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the applicant.[117] As previously indicated, this subsection makes a mockery of the very idea of exercising discretion and withdraws the discretion that Immigration Judges and Asylum Officers now exercise to grant or deny asylum to qualifying applicants. The Round Table of Former Immigration Judges states from centuries of combined experience that at least one of these nine categories of negative factors will be present in nearly 100 percent of asylum cases, and that the cases in which counter-veiling positive factors involving national security or foreign policy considerations will be extremely few. Moreover, from our experience, virtually *every* qualifying asylum applicant faced with a mandatory discretionary denial will argue that they would suffer exceptional and extremely unusual hardship if asylum is denied. This will necessitate an additional complex inquiry and analysis on the part of asylum adjudicators and generate additional issues on appeal for the BIA and courts. This entire subsection is an attack on the discretionary nature of asylum relief and should be struck in its entirety. The Round Table will therefore not comment specifically on each of the nine categories, all of which suffer from this same infirmity. To the extent that certain of the categorical subsections merit additional criticism, our comments on those appear below.

Subsection 2(i)(A) essentially duplicates the Departments' concerns about applicants having traveled through other countries without applying for asylum in those countries and imposes an adverse discretionary finding in such cases.[118] In our experience, the poorest and least sophisticated of refugees must sometimes travel by foot, bus, or train, hiding from authorities and dangerous government and non-government actors, to avoid being sent back to the country of persecution.[119] Frequently they are robbed, kidnapped, or raped along the way. Navigating such perils can take refugees longer than 14 days, even though they remain in transit the entire time. To make a virtually conclusive determination that such a refugee is undeserving of asylum defies both reason and reality, and it is cruel and unfair to do so.

Subsection 2(i)(B) likewise increases the penalty against refugees with a more arduous journey, this time for those who have traveled through more than one country before arriving in the U.S.[120] This distinction is arbitrary and capricious and is proposed with the sole intent of reducing grants of asylum to legitimate refugees.

Subsection 2(i)(c) bars from a favorable exercise of discretion anyone who once had a conviction that would have barred asylum, *even if that conviction has been reversed, vacated, expunged or modified* in a way that eliminates the bar.[121] In other words, the subsection turns settled law on the sufficiency of post-conviction relief for immigration purposes on its head. That settled law

[117] *Id.*
[118] *Id.*
[119] The Guardian, Rapes, murders ... and coronavirus: the dangers US asylum seekers in Mexico must face, March 23, 2020, https://www.theguardian.com/us-news/2020/mar/23/us-mexico-immigration-coronavirus-asylum.
[120] 85 FR at 36293.
[121] *Id.*

focuses on whether the reversal, vacatur, expungement, or modification was entered merely to relieve immigration consequences for equitable purposes or was based on a substantive or procedural infirmity of the underlying conviction, calling into question its legal basis.[122] The current approach is an appropriate one, which has been developed through painstaking analysis over many decades. It is inappropriate, unfair, and violates due process to penalize *bona fide* refugees for a conviction which has been reversed, vacated, or modified in a way that undermines its immigration effects based on a substantive or procedural infirmity.

Subsection 2(i)(D) penalizes applicants who have accrued more than one year of unlawful presence in the United States prior to filing an application for asylum.[123] The filing of an asylum application more than one year after entry into the U.S. already forms the basis of a bar to asylum eligibility, unless certain exceptions are met.[124] If an asylum applicant reaches the discretionary stage of the proceedings, she must already overcome the one year filing deadline through evidence of either exceptional circumstances or changed circumstances.[125] Therefore, this subsection is contrary to the statute by attempting to subvert the statutory exceptions to the one-year bar by guaranteeing a discretionary denial in the majority of cases in which the bar has been overcome. The protection of asylum, which is mandated by the international obligations of the United States and codified into U.S. law is not offered differently under the statute to undocumented immigrants versus those who have legal status in the U.S. To make unlawful presence (regardless of the length of such presence) a negative factor so severe as to bar a discretionary grant of asylum except under the most exceptional of circumstances disregards our international obligations and is antithetical to the letter, purpose and intent of our asylum laws.

Subsection 2(i)(F) penalizes anyone who has had two or more prior asylum applications denied for *any* reason.[126] Again, this penalty is so severe as to guarantee denial of a ***bona fide*** application for asylum. In our experience, it would be very rare for an asylum applicant whose application has been found to qualify under the law to have twice before been denied asylum. However, in the rare case, if the applicant qualifies under the statute, prior denials cannot justify a denial on a new application on the basis that the applicant is not *deserving* of relief. Particularly where life and limb are at stake, this is an entirely inappropriate calculus, and it points out in stark terms why limiting discretion in this brutally rigid manner violates the letter and spirit of our asylum laws and is simply wrong. A true discretionary determination would take into account the fact of prior denials in *context*, considering all factors, including the reasons for prior denials and the applicant's reasons for making the prior applications.

Subsection 2(i)(G) penalizes anyone who has previously withdrawn an asylum application and suffers from the same infirmities as subsection 2(i)(F).[127] Rather than making a legally conclusive assumption that the prior withdrawal indicated a misuse of the asylum system (while it may

[122] *See Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).
[123] 85 FR at 36293.
[124] INA § 208(a)(2)(D).
[125] *Id.*
[126] 85 FR at 36293.
[127] *Id.*

in reality have been just the opposite), this too should be considered in a truly discretionary manner, considering the totality of the circumstances while making a contextual analysis; not under a strict liability standard such as that proposed here.

Likewise, subsections 2(i)(H) and (I) penalize actions on the part of applicants (failing to appear at an asylum interview, and not filing within one year of a change in country conditions where subject to a final order of removal)[128] that can have a variety of causes, meanings, and motivations, many of which do not indicate any fault, mal-intent, or system abuse on the part of the applicant. Thus, while they are factors to be considered in a full, thorough, and contextual discretionary analysis, they are entirely inappropriate as bars to asylum, which would be their effect in nearly 100% of cases.

Accordingly, for all the reasons discussed above, we oppose all amendments to the discretionary analysis in the proposed rules.

AMENDMENTS REDEFINING THE DEFINITION OF FRIVOLOUS

The proposed rule would redefine the meaning of a "frivolous" asylum application, which has severe consequences.[129] The statute at INA § 208(d)(6) sets forth the consequences for "knowingly" filing a frivolous application for asylum, and requires that an asylum applicant receive notice of such consequences before a frivolous finding can be made. These safeguards are in place in the statue because a frivolous finding leads to permanent ineligibility for immigration benefits.[130]

However, the Departments seek to amend the current regulation, asserting that "frivolous" has been defined too narrowly and does not "capture the full spectrum of claims that would ordinarily be deemed 'frivolous'..."[131] Therefore, the Departments propose to broaden the definition to purportedly "bring it more in line with prior understandings of frivolous applications, including applications that are clearly unfounded, abusive, or involve fraud, and better effectuate the intent of section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), to discourage applications that make patently meritless or false claims."[132] The proposed rule goes well beyond Congressional intent and includes applications where the adjudicator[133] determines that the application lacks "merit" or is "foreclosed by existing law."[134] The proposed rule also includes the filing of an asylum application solely for the purpose of being placed in removal proceedings. These provisions are exceptionally unfair, particularly to pro se applicants and those who are the victims of unscrupulous practitioners.

First, asylum law is in a state of constant flux, and immigration law is extremely complicated. The federal courts have held that immigration law is one of the most complicated areas of law,

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[128] *Id.*
[129] 85 FR at 36273.
[130] INA §§ 208(d)(6), 208(d)(4).
[131] 85 FR at 36274.
[132] *Id.*
[133] Immigration Judge, BIA, or asylum officer per 85 FR at 36275.
[134] *Id.*

only second to tax law.[135] Accordingly, requiring asylum seekers, many of whom are unrepresented and most of whom are non-English speakers, to understand the intricacies of the ever-evolving law, is contrary to the purpose of asylum and unfair to the most vulnerable. Second, notary fraud and other fraudulent schemes are rampant in the immigration law space. Often, noncitizens are the victims of unscrupulous notaries, immigration consultants, and attorneys who file asylum applications in order to place them into removal proceedings to apply for cancellation of removal under INA § 240A(b). While we, as former Immigration Judges and Board of Immigration Appeals Members recognize the inherent problems in filing asylum applications in order to apply for cancellation of removal, it is wholly unfair to penalize the asylum applicants who rely on a "professional" to attempt to legalize their status.

The Departments also seek to amend the regulation to allow frivolous findings to be made by asylum officers and for cases to be denied or referred to immigration judges on that basis.[136] Yet, the proposal declines to extend necessary procedural protections to the asylum applicant, but rather indicates that USCIS would not be required to provide asylum applicants the opportunity to address discrepancies in the claim.[137] In practice, this means that asylum applicants appearing in non-adversary proceedings before a DHS officer will not be afforded important procedural protections before receiving a frivolous finding that will impact their ability to remain in the United States for an indefinite period of time. While the proposed rule indicates that immigration judges would have de novo review of an asylum officer's finding, any adverse finding from an asylum officer is always part of the DHS toolbox in immigration court and is always considered by the immigration judge. In addition, for asylum applicants in legal status, it means they have no means to challenge a determination by a DHS employee that impacts their entire future.

In addition to being unfair to asylum applicants, the proposed rule would increase the workload of already burdened Immigration Judges. In addition to evaluating the merits of a claim, including the credibility of the applicant, Immigration Judges would be tasked with determining whether legal arguments were presented in a way that is seeking to "extend, modify, or reverse the law" or whether the arguments were simply foreclosed by existing law.[138] This is an impossible task under the best of circumstances. However, Immigration Judges are expected to hear upwards of four asylum cases in a day. It is unrealistic to expect them to be able to make determinations in every case where asylum applicants are pro se and/or presenting creative legal arguments. Similarly, requiring Immigration Judges to consider frivolous findings made by asylum officers adds another layer to the litigation of referred asylum cases in immigration court. For all the above reasons, we strongly oppose this amendment to the rule.

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[135] *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 809 (9th Cir. 2007) ("immigration laws have been termed second only to the Internal Revenue Code in complexity"); *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).
[136] 85 FR at 36275.
[137] *Id.*
[138] 85 FR at 36276.

AMENDMENTS TO PROTECTIONS UNDER THE CONVENTION AGAINST TORTURE

Protection from torture is one of the most fundamental of human rights. It was for the purpose of providing such protection that the U.S. became a signatory to the U.N. Convention Against Torture. The interpretation of the Convention's requirements are meant to be flexible in order to allow courts the ability to provide protection where it is due. Yet the drafters of the proposed regulations seem to view our nation's obligations under the Convention as a game which is won by excluding the most victims from protection.

Following the lead of the BIA in its recent precedent decision in *Matter of O-F-A-S-*, the proposed rules intend to restrict eligibility for CAT protection by narrowing the definition of "government acquiescence," a requirement for protection under the Convention.

The courts have defined the meaning of when a public official acts "under color of law" in cases arising both in the CAT and the Civil Rights contexts. The applicable case law demonstrates that the "under color of law" determination is a far more nuanced one covering a far broader scope of actions than either the language of the proposed regulation or the BIA's decision in *O-F-A-S-*, would indicate.

The Supreme Court has held "[i]t is clear that under 'color' of law means under 'pretense' of law…. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea." *Screws v. U.S.*, 325 U.S. 91, 111 (1945).

It is extremely important for any rule to emphasize that acting "under color of law" does not require the government official in question to be on duty, to be following orders, or to be acting on a matter of official government business. In *U.S. v. Tarpley*, 945 F.3d 806 (5th Cir. 1991), a case favorably cited by the BIA in its decision in *Matter of O-F-A-S-*, the Fifth Circuit concluded that a police officer acted under color of law when he lured his wife's lover to his home and beat him, put his service revolver in the lover's mouth, and said "I'll kill you. I'm a cop. I can." He also involved a fellow police officer in his plan, who was present as an ally. The court found that the "presence of police and the air of official authority pervaded the entire incident." The court's finding that an officer acting on a purely personal matter in his own home, who was not in uniform, did not threaten to arrest his victim, and threatened his victim not to report the incident, was acting under color of law should provide instructive guidance.

It is also not clear why the proposed regulations would exempt from the concept of acquiescence instances in which a public official "recklessly disregarded the truth, or negligently failed to inquire."[139] These terms seem indistinguishable from "willful blindness," which has been recognized as sufficient to constitute "acquiescence" by the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits in the CAT context.[140] The regulations should obviously

[139] 85 FR at 36286.
[140] *See Zheng v. Ashcroft*, 332 F.3d 1186, 1188-89 (9th Cir. 2003); *Khouzam v. Ashcroft*, 361 F.3d 161, 170 (2d Cir. 2004); *Myrie v. Att'y Gen. of U.S.*, *Romero-Donado v. Sessions*, 720 Fed. Appx. 693, 698 (4th Cir. 2018); *Iruegas-Valdez v. Yates*, 846 F.3d 806, 812 (5th Cir. 2017); *Torres v. Sessions*, 728 Fed. Appx. 584, 588 (6th Cir. 2018);

codify this near-universal standard. The proposed rules should also reflect that courts have also taken a broad view of what entities constitute "state actors" for CAT purposes, and have further held that government acquiescence may be found even where parts of the government have undertaken preventative measures.[141]

The administration should look to these decisions for guidance, and seek to codify their holdings in the proposed rules. Instead, the proposed rules aim to erase or overcome the law as it has developed over decades in violation of law.

CONCLUSION

For all the reasons set forth above, we strongly urge the Departments to withdraw all sections of the proposed rule.

Very truly yours,
The Round Table of Former Immigration Judges
/s/
Steven Abrams
Sarah Burr
Esmeralda Cabrera
Teofilo Chapa
Jeffrey Chase
George Chew
Bruce J. Einhorn
Cecelia M Espenoza
Noel Anne Ferris
James Fujimoto
Jennie Giambastiani
John Gossart
Miriam Hayward
Charles Honeyman
Rebecca Bowen Jamil
Carol King
Charles Pazar
Laura Ramirez
Lory Rosenberg
Susan Roy
Paul Schmidt

Lozano-Zuniga v. Lynch, 832 F.3d 822, 831 (7th Cir. 2016); *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017); *Medina-Velasquez v. Sessions*, 680 F.3d 744, 750 (10th Cir. 2017).

[141] *See e.g. Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015) (noting it is not required to find the entire Mexican government complicit); *De La Rosa v. Holder*, 598 F.3d 103, 110 (2d Cir. 2010).

Ilyce Shugall
Denise Slavin
Andrea Sloan
Polly Webber
William Van Wyke
Robert D Vinikoor

EXHIBIT 14

DECLARATION OF NAOMI A. IGRA

Order Designating the Order of Succession
for the Secretary of Homeland Security

(a) By any authority vested in me as Acting Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), and notwithstanding any Department of Homeland Security (DHS) prior delegation, directive, instruction, policy, or other document of any kind, including without limitation DHS Delegation No. 00106, I hereby designate the order of succession for the Secretary of Homeland Security as follows:

Order of Succession for the Secretary of Homeland Security
Pursuant to Title 6, United States Code, Section 113(g)(2)

1. Deputy Secretary of Homeland Security;

2. Under Secretary for Management;

3. Commissioner of the U.S. Customs and Border Protection

4. Under Secretary for Strategy, Policy, and Plans;

5. Administrator and Assistant Secretary of the Transportation Security Administration; and

6. Administrator of the Federal Emergency Management Agency.

(b) No individual who is serving in an office listed in paragraph (a) in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this order.

(c) I am issuing this Order out of an abundance of caution and to minimize any disruption occasioned by a recent Government Accountability Office (GAO) opinion (B-331650 (Comp. Gen., Aug. 14, 2020)) and recent challenges filed in Federal court alleging that the November 8, 2019, order of succession issued by then-Acting Secretary Kevin McAleenan was not valid. I believe that the GAO's opinion and the plaintiff's arguments in those court cases are incorrect and present an unnecessary distraction to the mission of the Department of Homeland Security. Nevertheless, under GAO's view, no Secretary has ever properly invoked 6 U.S.C. § 113(g)(2) "[to] designate such other officers of the Department in further order of succession to serve as Acting Secretary." In that case, the Federal Vacancies Reform Act (FVRA) would provide an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. As the most senior successor listed in Executive Order 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016), in accordance with the President's advance exercise of his authority to name an Acting Secretary under the FVRA, and without casting doubt on the continued validity of the Amendment to the Order of Succession for the Secretary of Homeland Security issued by Acting Secretary McAleenan on November 8, 2019, I am relying on any authority I may have been granted by the FVRA to designate the order of succession for the Secretary of Homeland Security pursuant to 6 U.S.C. § 113(g)(2), as specified and directed in paragraph (a) of this Order. Upon my signature, any authority that I may have been granted by the FVRA will terminate because 6 U.S.C. § 113(g)(2) applies "[n]otwithstanding chapter 33 of title 5."

(d) This Order Designating the Order of Succession for the Secretary of Homeland Security shall be effective immediately upon the affixing of the signature of the undersigned.

Dated: 10 SEPT 2020

Peter T. Gaynor
Department of Homeland Security

EXHIBIT 15

DECLARATION OF NAOMI A. IGRA

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

RATIFICATION OF ACTIONS TAKEN BY THE ACTING SECRETARY OF HOMELAND SECURITY

I am affirming and ratifying each of my delegable prior actions as Acting Secretary, *see* 5 U.S.C. § 3348(a)(2), (d)(2), out of an abundance of caution because of a recent Government Accountability Office (GAO) opinion, *see* B-331650 (Comp. Gen., Aug. 14, 2020), and recent actions filed in federal court alleging that the November 8, 2019, order of succession issued by former Acting Secretary Kevin McAleenan was not valid. *See, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 920 F.3d 1, (D.C. Cir. 2019) ("We have repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action . . . resolves the claim on the merits by remedy[ing] the defect (if any) from the initial appointment" (quote marks omitted) (second alteration in original)).

When former Acting Secretary McAleenan resigned on November 13, 2019, I began serving as Acting Secretary in accordance with the order of succession former Acting Secretary McAleenan designated on November 8, 2019, under the Homeland Security Act (HSA), 6 U.S.C. § 113(g)(2) (enacted on Dec. 23, 2016, Pub. L. 114–328, div. A, title XIX, § 1903(a), 130 Stat. 2672). That designation of the order of succession followed former Secretary Kirstjen Nielsen's April 9, 2019, designation of the order of succession, also pursuant to section 113(g)(2), which resulted in Mr. McAleenan serving as Acting Secretary when former Secretary Nielsen resigned.

The Secretary of Homeland Security's authority to designate the order of succession under section 113(g)(2) is an alternative means to the authority of the Federal Vacancies Reform Act (FVRA) to designate an Acting Secretary of Homeland Security. Section 113(g)(2) provides that it applies "notwithstanding" the FVRA; thus, when there is an operative section 113(g)(2) order of succession, it alone governs which official shall serve as Acting Secretary. Accordingly, I properly began serving as Acting Secretary on November 13, 2019. Because section 113(g)(2) authorizes the designation of an Acting Secretary "notwithstanding chapter 33 of title 5" in its entirety, section 113(g)(2) orders addressing the line of succession for the Secretary of Homeland Security are subject to neither the FVRA provisions governing which officials may serve in an acting position, *see* 5 U.S.C. § 3345, nor FVRA time constraints, *see id.* § 3346.

On September 10, 2020, President Donald J. Trump nominated me to serve as Secretary of Homeland Security. Because I have been serving as the Acting Secretary pursuant to a section 113(g)(2) order of succession, the FVRA's prohibition on a nominee's acting service while his or her nomination is pending does not apply, and I remain the Acting Secretary notwithstanding my nomination. *Compare* 6 U.S.C. § 113(a)(1)(A) (cross-referencing the FVRA without the "notwithstanding" caveat), *with id.* § 113(g)(1)–(2) (noting the FVRA

provisions and specifying, in contrast, that section 113(g) provides for acting secretary service "notwithstanding" those provisions); *see also* 5 U.S.C. § 3345(b)(1)(B) (restricting acting officer service under section 3345(a) by an official whose nomination has been submitted to the Senate for permanent service in that position).

That said, there have been recent challenges to whether my service is invalid, which rest on the erroneous contentions that the orders of succession issued by former Secretary Nielsen and former Acting Secretary McAleenan were invalid. If those contentions were legally correct—meaning that neither former Secretary Nielsen nor former Acting Secretary McAleenan would have issued a valid section 113(g)(2) order of succession—then the FVRA would apply and Executive Order 13753 (published on December 14, 2016, under the FVRA) would continue to govern the order of succession for the Secretary of Homeland Security.

The FVRA provides an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. In that alternate scenario, under the authority of the FVRA, 5 U.S.C. § 3345(a)(2), when the President submitted my nomination, Peter Gaynor, the Administrator of the Federal Emergency Management Agency (FEMA), would have become eligible to exercise the authority of the Secretary temporarily in an acting capacity. This is because Executive Order 13753 pre-established the President's succession order for the Department when the FVRA applies,[1] Mr. Gaynor would be the most senior official eligible to serve as the Acting Secretary under that succession order, and my nomination restarted the FVRA's time limits, 5 U.S.C. § 3346(a)(2).

Out of an abundance of caution and to minimize any disruption to the Department of Homeland Security and to the Administration's Homeland Security mission, on September 10, 2020, Mr. Gaynor exercised any authority of the position of Acting Secretary that he had to designate an order of succession under 6 U.S.C. § 113(g)(2) (the "Gaynor Order"). Mr. Gaynor re-issued the order of succession established by former Acting Secretary McAleenan on November 8, 2019, and placed the Under Secretary for Strategy, Policy, and Plans above the FEMA Administrator in the order of succession. Once the Gaynor Order was executed, it superseded any authority Mr. Gaynor may have had under the FVRA and confirmed my authority to continue to serve as the Acting Secretary. Thus, in addition to the authority I possess pursuant to the November 8, 2019, order of succession effectuated by former Acting Secretary McAleenan, the Gaynor Order alternatively removes any doubt that I am currently serving as the Acting Secretary.

I have full and complete knowledge of the contents and purpose of any and all actions taken by me since November 13, 2019. Among my prior actions that I am ratifying is a Final Rule I approved and issued in the Federal Register at 85 Fed. Reg. 46,788 (Aug. 3, 2020). Former Acting Secretary McAleenan issued a Notice of Proposed Rulemaking (NPRM) for that Final Rule at 84 Fed. Reg. 62,280 (Nov. 14, 2019), and I am familiar with that NPRM having previously approved the Final Rule. I believe that all of the aforementioned actions as Acting

[1] Executive Order 13753, Amending the Order of Succession in the Department of Homeland Security, 81 Fed. Reg. 90667 (Dec. 14, 2016).

Secretary since November 13, 2019, were legally authorized and entirely proper. However, to avoid any possible uncertainty and out of an abundance of caution, pursuant to the Secretary of Homeland Security's authorities under, *inter alia*, the Homeland Security Act of 2002, Pub. L. No 207-296, as amended, and 5 U.S.C. §§ 301-302, I hereby affirm and ratify any and all actions involving delegable duties that I have taken from November 13, 2019, through September 10, 2020, the date of the execution of the Gaynor Order, and I hereby affirm and ratify the above noted November 14, 2019 NPRM originally approved by former Acting Secretary McAleenan.

Chad F. Wolf
Acting Secretary

September 17, 2020
Date

EXHIBIT 16

DECLARATION OF NAOMI A. IGRA

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
BRIGHAM J. BOWEN
Assistant Branch Director
JULIE STRAUS HARRIS (DC Bar No. 1021928)
Senior Trial Counsel
CHARLES E.T. ROBERTS (PA Bar No. 326539)
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Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IMMIGRANT LEGAL RESOURCE CENTER, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, *et al.*,

Defendants.

Case No. 4:20-cv-5883-JSW

NOTICE OF CORRECTION

Defendants respectfully notify Plaintiffs and the Court of an apparent inadvertent factual inaccuracy regarding the ratification of the Proposed Rule, USCIS Fee Schedule & Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,282 (Nov. 14, 2019), and the Final Rule, USCIS Fee Schedule & Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788, 46,790-792 (Aug. 3, 2020) ("Final Rule" or "Rule"), made in their Memorandum of Points and Authorities in Response to Briefs of *Amici Curiae* in Support of Plaintiffs' Motion for Preliminary Injunction ("Defs.' Amici Br."), ECF No. 75, and Supplemental Brief Regarding Notice of Ratification, ECF No. 80 ("Defs.' Suppl. Br."), ECF No. 86.

As the basis for Defendants' ratification argument, *see* Defs.' Suppl. Br. 1-2, Defendants explained that, in the event that Chad F. Wolf had not been properly designated Acting Secretary of Homeland Secretary in the first instance, then under Plaintiffs' theory, "when Mr. Wolf's nomination" to serve as Secretary of Homeland Security was submitted to the Senate on September 10, 2020, Federal Emergency Management Agency (FEMA) Administrator Peter Gaynor "became the President's designated Acting Secretary under the FVRA as the senior-most successor under [Executive Order] 13753," *id.* at 1; *see also* Defs.' Amici Br. 2 n.2. Defendants further explained that on that same day, "'out of an abundance of caution,' Mr. Gaynor exercised 'any authority' he might possess as Acting Secretary" under the FVRA and Executive Order 13753 and "designated an order of succession for the office under [6 U.S.C.] § 113(g)(2)." Defs.' Suppl. Br. 1; *see also* ECF No. 80-1.

Late on the evening of Thursday, November 12, 2020, however, the Department of Homeland Security ("DHS") conveyed to the Department of Justice that it had learned that FEMA records indicate that Mr. Gaynor's September 10, 2020 succession order may have been signed approximately one hour before Mr. Wolf's nomination was formally submitted to the Senate. Department of Justice counsel immediately sought to verify the facts regarding the precise timing of events. After reviewing records from FEMA and the United States Senate, it appears that the September 10, 2020 succession order signed by FEMA Administrator Peter Gaynor was likely signed approximately one hour before the Senate received the formal submission of Mr. Wolf's nomination that same day. At a minimum, counsel for Defendants cannot confirm that the September 10, 2020 succession order was signed *after* the submission of Mr. Wolf's nomination.

The precise timing of events on September 10, 2020, however, has no legal effect on the merits of Defendants' ratification arguments because, out of an abundance of caution, on November 14, 2020, Mr. Gaynor once more exercised any authority he may have as Acting Secretary under Executive Order 13753 and designated an order of succession under 6 U.S.C. § 113(g)(2). *See* Order Designating the Order of Succession for the Secretary of Homeland Security (Nov. 14, 2020), *available at* https://www.dhs.gov/sites/default/files/publications/20_1114_gaynor-order.pdf. Under the November 14, 2020 succession order, Mr. Wolf, as the Senate-confirmed Under Secretary for Strategy, Policy, and Plans, is the senior-most official in the line of succession and would have begun serving as Acting Secretary upon the issuance of the order. Thus, even if Plaintiffs are correct that the order of succession for the office of the Secretary continued to be governed by the Federal Vacancies Reform Act and Executive Order 13753 after the issuance of Secretary Nielsen's April 9, 2019 order and even if Mr. Gaynor's September 10, 2020 succession order was invalid due its timing, Mr. Wolf would be the valid Acting Secretary pursuant to Mr. Gaynor's November 14, 2020 succession order. And on November 16, 2020, Mr. Wolf ratified all of his prior delegable actions from November 13, 2019 to November 14, 2020 and certain actions taken by former Acting Secretary Kevin McAleenan, thereby ratifying the Proposed Rule and Final Rule once more. *See* Ratification of Actions Taken by the Acting Secretary of Homeland Security (Nov. 16, 2020), *available at* https://www.dhs.gov/sites/default/files/publications/20_1116_as1-global-ratification.pdf; Ratification of Certain Actions Taken by Former Acting Secretary Kevin McAleenan and One Action Taken by Joseph Edlow (Nov. 16, 2020), *available at* https://www.dhs.gov/sites/default/files/publications/20_1116_ratification-of-mcaleenan-edlow-actions.pdf. Accordingly, regardless of the validity of the September 10, 2020 succession order, the Proposed Rule and Final Rule have been validly ratified.[1]

[1] In any event, under the plain language of the FVRA, Mr. Gaynor's September 10, 2020 succession order was validly issued, even if signed an hour before, because it was still signed on the same day as the submission of Mr. Wolf's nomination. The statutory provision that allows for acting service during the pendency of a nomination, 5 U.S.C. § 3346(a)(2), provides that an acting official may serve "once a first or second nomination for the office is submitted to the Senate, *from the date* of such nomination for the period that the nomination is pending in the Senate." In other words, once Mr. Wolf's nomination was submitted on September 10, 2020, Mr. Gaynor would have been permitted to serve as Acting Secretary "from th[at] date,"—*i.e.*, from September 10, 2020—while Mr. Wolf's nomination is pending before the Senate. And consistent with the long-established rule that unless required by "substantial justice," a governmental action is deemed effective from the first moment of the day in which it was enacted regardless of the precise time it was actually enacted, under § 3346(a)(2), Mr. Gaynor had the authority to issue the succession order from the first moment

Dated: November 18, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Branch Director
Federal Programs Branch

JULIE STRAUS HARRIS
DC Bar No. 1021298
Senior Trial Counsel

/s/ Bradley Craigmyle
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Bradley Craigmyle
BRADLEY CRAIGMYLE

of September 10, 2020. *See, e.g.*, *Taylor v. Brown*, 147 U.S. 640, 645 (1893); *see also United States v. Norton*, 97 U.S. 164, 170 (1877) (proclamation "covers all the transactions" of date it was enacted); *Lapeyre v. United States*, 84 U.S. 191, 198 (1872) (statute "becomes effectual upon the day of its [enactment] date. In such cases it is operative from the first moment of that day").

EXHIBIT 17

DECLARATION OF NAOMI A. IGRA

Order Designating the Order of Succession
for the Secretary of Homeland Security

(a) By any authority vested in me as Acting Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), and notwithstanding any Department of Homeland Security (DHS) prior delegation, directive, instruction, policy, or other document of any kind, including without limitation DHS Delegation No. 00106, I hereby designate the order of succession for the Secretary of Homeland Security as follows:

Order of Succession for the Secretary of Homeland Security
Pursuant to Title 6, United States Code, Section 113(g)(2)

1. Deputy Secretary of Homeland Security;

2. Under Secretary for Management;

3. Commissioner of the U.S. Customs and Border Protection

4. Under Secretary for Strategy, Policy, and Plans;

5. Administrator and Assistant Secretary of the Transportation Security Administration; and

6. Administrator of the Federal Emergency Management Agency.

(b) No individual who is serving in an office listed in paragraph (a) in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this order.

(c) I am issuing this Order out of an abundance of caution and to minimize any disruption occasioned by a recent Government Accountability Office (GAO) opinion (B-331650 (Comp. Gen., Aug. 14, 2020)) and recent challenges filed in Federal court alleging that the November 8, 2019, order of succession issued by then-Acting Secretary Kevin McAleenan was not valid. I believe that the GAO's opinion and the plaintiff's arguments in those court cases are incorrect and present an unnecessary distraction to the mission of the Department of Homeland Security. Nevertheless, under GAO's view, no Secretary has ever properly invoked 6 U.S.C. § 113(g)(2) "[to] designate such other officers of the Department in further order of succession to serve as Acting Secretary." In that case, the Federal Vacancies Reform Act (FVRA) would provide an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. As the most senior successor listed in Executive Order 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016), in accordance with the President's advance exercise of his authority to name an Acting Secretary under the FVRA, and without casting doubt on the continued validity of the Amendment to the Order of Succession for the Secretary of Homeland Security issued by Acting Secretary McAleenan on November 8, 2019, I am relying on any authority I may have been granted by the FVRA to designate the order of succession for the Secretary of Homeland Security pursuant to 6 U.S.C. § 113(g)(2), as specified and directed in paragraph (a) of this Order. Upon my signature, any authority that I may have been granted by the FVRA will terminate because 6 U.S.C. § 113(g)(2) applies "[n]otwithstanding chapter 33 of title 5."

(d) This Order Designating the Order of Succession for the Secretary of Homeland Security shall be effective immediately upon the affixing of the signature of the undersigned.

Dated:

Peter T. Gaynor
Department of Homeland Security

14 NOV 2020
1745

EXHIBIT 18

DECLARATION OF NAOMI A. IGRA

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

RATIFICATION OF ACTIONS TAKEN BY THE ACTING SECRETARY OF HOMELAND SECURITY

I am affirming and ratifying each of my delegable prior actions as Acting Secretary, *see* 5 U.S.C. § 3348(a)(2), (d)(2), out of an abundance of caution because of a recent Government Accountability Office (GAO) opinion, *see* B-331650 (Comp. Gen., Aug. 14, 2020), and recent actions filed in federal court alleging that the November 8, 2019, order of succession issued by former Acting Secretary Kevin McAleenan was not valid. *See, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 920 F.3d 1, (D.C. Cir. 2019) ("We have repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action . . . resolves the claim on the merits by remedy[ing] the defect (if any) from the initial appointment" (quote marks omitted) (second alteration in original)).

When former Acting Secretary McAleenan resigned on November 13, 2019, I began serving as Acting Secretary in accordance with the order of succession former Acting Secretary McAleenan designated on November 8, 2019, under the Homeland Security Act (HSA), 6 U.S.C. § 113(g)(2) (enacted on Dec. 23, 2016, Pub. L. 114–328, div. A, title XIX, § 1903(a), 130 Stat. 2672). That designation of the order of succession followed former Secretary Kirstjen Nielsen's April 9, 2019, designation of the order of succession, also pursuant to section 113(g)(2), which resulted in Mr. McAleenan serving as Acting Secretary when former Secretary Nielsen resigned.

The Secretary of Homeland Security's authority to designate the order of succession under section 113(g)(2) is an alternative means to the authority of the Federal Vacancies Reform Act (FVRA) to designate an Acting Secretary of Homeland Security. Section 113(g)(2) provides that it applies "notwithstanding" the FVRA; thus, when there is an operative section 113(g)(2) order of succession, it alone governs which official shall serve as Acting Secretary. Accordingly, I properly began serving as Acting Secretary on November 13, 2019. Because section 113(g)(2) authorizes the designation of an Acting Secretary "notwithstanding chapter 33 of title 5" in its entirety, section 113(g)(2) orders addressing the line of succession for the Secretary of Homeland Security are subject to neither the FVRA provisions governing which officials may serve in an acting position, *see* 5 U.S.C. § 3345, nor FVRA time constraints, *see id.* § 3346.

On September 10, 2020, President Donald J. Trump nominated me to serve as Secretary of Homeland Security. Because I have been serving as the Acting Secretary pursuant to a section 113(g)(2) order of succession, the FVRA's prohibition on a nominee's acting service while his or her nomination is pending does not apply, and I remain the Acting Secretary notwithstanding my nomination. *Compare* 6 U.S.C. § 113(a)(1)(A) (cross-referencing the FVRA without the "notwithstanding" caveat), *with id.* § 113(g)(1)–(2) (noting the FVRA

provisions and specifying, in contrast, that section 113(g) provides for acting secretary service "notwithstanding" those provisions); *see also* 5 U.S.C. § 3345(b)(1)(B) (restricting acting officer service under section 3345(a) by an official whose nomination has been submitted to the Senate for permanent service in that position).

That said, there have been recent challenges contending that my service is invalid, resting on the erroneous contentions that the orders of succession issued by former Secretary Nielsen and former Acting Secretary McAleenan were invalid. If those contentions were legally correct—meaning that neither former Secretary Nielsen nor former Acting Secretary McAleenan would have issued a valid section 113(g)(2) order of succession—then the FVRA would apply and Executive Order 13753 (published on December 14, 2016, under the FVRA) would continue to govern the order of succession for the Secretary of Homeland Security.

The FVRA provides an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. In that alternate scenario, under the authority of the FVRA, 5 U.S.C. § 3345(a)(2), when the President submitted my nomination, Peter Gaynor, the Administrator of the Federal Emergency Management Agency (FEMA), would have become eligible to exercise the authority of the Secretary temporarily in an acting capacity. This is because Executive Order 13753 pre-established the President's succession order for the Department when the FVRA applies,[1] Mr. Gaynor would be the most senior official eligible to serve as the Acting Secretary under that succession order, and my nomination restarted the FVRA's time limits, 5 U.S.C. § 3346(a)(2).

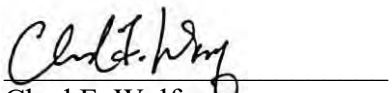
Out of an abundance of caution and to minimize any disruption to the Department of Homeland Security and to the Administration's Homeland Security mission, on November 14, 2020, after the President submitted my nomination to the Senate on September 10, 2020, Mr. Gaynor exercised any authority of the position of Acting Secretary that he had to designate an order of succession under 6 U.S.C. § 113(g)(2) (the "Gaynor Order").[2] Mr. Gaynor re-issued the order of succession established by former Acting Secretary McAleenan on November 8, 2019, and placed the Under Secretary for Strategy, Policy, and Plans above the FEMA Administrator in the order of succession. Once the Gaynor Order was executed, it superseded any authority Mr. Gaynor may have had under the FVRA and confirmed my authority to continue to serve as the Acting Secretary. Thus, in addition to the authority I possess pursuant to the November 8, 2019, order

[1] Executive Order 13753, Amending the Order of Succession in the Department of Homeland Security, 81 Fed. Reg. 90667 (Dec. 14, 2016).

[2] Mr. Gaynor signed an initial succession order to this effect on September 10, 2020. Out of caution, due to uncertainties related to the timing of the signing of that order on the date of my nomination to the U.S. Senate, Administrator Gaynor has issued the November 14, 2020, order. Further, I previously issued a ratification order on September 17, 2020, similar to this present order, *see* Ratification, 85 Fed. Reg. 59651 (Sept. 23, 2020), but I am issuing this order today to eliminate any potential question about whether, assuming that the orders issued by Secretary Nielsen and Acting Secretary McAleenan were insufficient to make me Acting Secretary under section 113(g)(2), my ratification has occurred subsequent to the proper signing and issuance of a succession order that has the effect of making me Acting Secretary.

of succession effectuated by former Acting Secretary McAleenan, the Gaynor Order alternatively removes any doubt that I am currently serving as the Acting Secretary.

I have full and complete knowledge of the contents and purpose of any and all actions taken by me since November 13, 2019. Among my prior actions that I am ratifying is a Final Rule I approved and issued in the Federal Register at 85 Fed. Reg. 46,788 (Aug. 3, 2020). Former Acting Secretary McAleenan issued a Notice of Proposed Rulemaking (NPRM) for that Final Rule at 84 Fed. Reg. 62,280 (Nov. 14, 2019), and I am familiar with that NPRM having previously approved the Final Rule. I believe that all of the aforementioned actions as Acting Secretary since November 13, 2019, were legally authorized and entirely proper. However, to avoid any possible uncertainty and out of an abundance of caution, pursuant to the Secretary of Homeland Security's authorities under, *inter alia*, the Homeland Security Act of 2002, Pub. L. No 207-296, as amended, and 5 U.S.C. §§ 301-302, I hereby affirm and ratify any and all actions involving delegable duties that I have taken from November 13, 2019, through November 14, 2020, the date of the execution of the Gaynor Order, and I hereby affirm and ratify the above noted November 14, 2019 NPRM originally approved by former Acting Secretary McAleenan.



Chad F. Wolf
Acting Secretary

11/16/2020
Date

EXHIBIT 19

DECLARATION OF NAOMI A. IGRA

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: **Department of Homeland Security**—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security

File: B-331650

Date: August 14, 2020

DIGEST

The Federal Vacancies Reform Act of 1998 (Vacancies Reform Act) provides for temporarily filling vacant executive agency positions that require presidential appointment with Senate confirmation. 5 U.S.C. § 3345. GAO's role under the Vacancies Reform Act is to collect information agencies are required to report to GAO, and GAO uses this information to report to Congress any violations of the time limitations on acting service imposed by the Vacancies Reform Act. 5 U.S.C. § 3349. As part of this role, we issue decisions on agency compliance with the Vacancies Reform Act when requested by Congress. The Vacancies Reform Act is generally the exclusive means for filling a vacancy in a presidentially appointed, Senate confirmed position unless another statute provides an exception. 5 U.S.C. § 3347. The Homeland Security Act of 2002 provides an order of succession outside of the Vacancies Reform Act when a vacancy arises in the position of Secretary of the Department of Homeland Security (DHS). 6 U.S.C. § 113(g).

Upon Secretary Kirstjen Nielsen's resignation on April 10, 2019, the official who assumed the title of Acting Secretary had not been designated in the order of succession to serve upon the Secretary's resignation. Because the incorrect official assumed the title of Acting Secretary at that time, subsequent amendments to the order of succession made by that official were invalid and officials who assumed their positions under such amendments, including Chad Wolf and Kenneth Cuccinelli, were named by reference to an invalid order of succession. We have not reviewed the legality of other actions taken by these officials; we are referring the matter to the Inspector General of DHS for review.

DECISION

This responds to a request from the Chairman of the Committee on Homeland Security and the Acting Chairwoman of the Committee of Oversight and Reform regarding the legality of the appointment of Chad Wolf as Acting Secretary of the Department of Homeland Security (DHS) and Ken Cuccinelli as Senior Official Performing the Duties of Deputy Secretary. Letter from Chairman, Committee on Homeland Security, U.S. House of Representatives and Acting Chairwoman, Committee on Oversight and Reform, U.S. House of Representatives to Comptroller General (Nov. 15, 2019). Specifically, we consider whether the appointments were authorized pursuant to the Secretary's designation of an order of succession under the Homeland Security Act of 2002 (HSA). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002), *as amended by* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1903, 130 Stat. 2000, 2672 (Dec. 23, 2016), *codified at* 6 U.S.C. § 113(g)(2).

As explained below, we conclude that in the case of vacancies in the positions of Secretary, Deputy Secretary, and Undersecretary for Management, HSA provides a means for an official to assume the title of Acting Secretary pursuant to a designation of further order of succession by the Secretary. However, upon the resignation of Secretary Kirstjen Nielsen, the express terms of the then existing designation required the Director of the Cybersecurity and Infrastructure Security Agency (CISA) to assume that title instead of the Commissioner of Customs and Border Protection (CBP), Kevin McAleenan. As such, the subsequent appointments of Under Secretary for Strategy, Policy, and Plans, Chad Wolf and Principal Deputy Director of U.S. Citizenship and Immigration Services (USCIS) Ken Cuccinelli were also improper because they relied on an amended designation made by Mr. McAleenan.[1]

Under the Federal Vacancies Reform Act of 1998 (Vacancies Reform Act), GAO collects information agencies are required to report to GAO, and GAO uses this information to report to Congress any violations of the time limitations on acting service imposed by the Vacancies Reform Act. 5 U.S.C. § 3349. As part of this

[1] We have only been asked to address the designation of Messers. Wolf and Cuccinelli, so we do not otherwise address the consequences of any official's improper service. We are referring that question to the DHS Inspector General for his review. In that regard, we are aware that certain actions taken by Acting Secretary Wolf and his authority to take them are currently the subject of litigation. *See, e.g. A.B-B v. Morgan*, Docket No. 1:20-cv-0846 (D.D.C. 2020); *Casa De Maryland v. Wolf*, Docket No. 8:20-cv-02118 (D. Md. 2020); *Don't Shoot Portland v. Wolf*, Docket No. 1:20-cv-02040 (D.D.C. 2020). We are also aware that in March, 2020, the U.S. District Court for the District of Columbia ruled that Mr. Cuccinnelli's separate appointment as acting director of USCIS was illegal. *See L.M.-M v. Cuccinelli*, 442 F. Supp. 3d 1, 29 (D.D.C. 2020). That question was not before us.

role, we issue decisions on agency compliance with the Vacancies Reform Act when requested by Congress. Our practice when rendering decisions is to contact the relevant agencies and obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 5, 2006), *available at* www.gao.gov/products/GAO-06-1064SP. We contacted DHS to obtain the agency's views. Letter from Managing Associate General Counsel, GAO, to General Counsel, DHS (Dec. 6, 2019). We received DHS's response on December 20, 2019. Letter from Associate General Counsel for General Law, DHS, to Managing Associate General Counsel, GAO (Dec. 20, 2019) (Response Letter).

BACKGROUND

The Vacancies Reform Act permits certain individuals to serve as acting officials in vacant presidentially appointed, Senate confirmed positions (PAS) for limited periods of time. 5 U.S.C. §§ 3345, 3346. The Vacancies Reform Act is generally the exclusive means for filling a vacancy in a PAS position unless another statute provides an exception.[2] Pursuant to the Vacancies Reform Act, the first assistant to a PAS position automatically becomes the acting official in case of a vacancy unless the President designates another individual who meets the Vacancies Reform Act's eligibility requirements. 5 U.S.C. § 3345.

HSA created DHS to prevent terrorist attacks within the United States and reduce the nation's vulnerabilities to such attacks, among other critical missions. Pub. L. No. 107-297, title I, § 101. At the head of the department, HSA created the position of Secretary of Homeland Security who is vested with all the functions of all officers, employees, and organizational units of DHS. HSA, Pub. L. No. 107-296, title I, § 102. HSA also created the position of Deputy Secretary and made the Deputy Secretary the first assistant for purposes of the Vacancies Reform Act. Pub. L. No. 107-297, title I, § 103.

On December 23, 2016, HSA was amended to establish an order of succession outside the Vacancies Reform Act for the position of Secretary. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, div. A, title XIX, § 1903, 130 Stat. 2000, 2672 (2016). Under the amendment, the Under Secretary for Management is next in line to be Acting Secretary in the case of absence, disability, or vacancy in the positions of Secretary and Deputy Secretary. 6 U.S.C. § 113(g)(1). Beyond this mandated order, "the Secretary may designate such other officers of the Department in further order of succession to serve as Acting

[2] A statute only qualifies as an exception if the statutory provision expressly authorizes the President or the head of an executive department to designate an official to perform the functions and duties of a specified office temporarily in an acting capacity or it designates an acting official. 5 U.S.C. § 3347(a)(1).

Secretary."[3] 6 U.S.C. § 113(g)(2). These succession provisions take effect "[n]otwithstanding" the provisions of the Vacancies Reform Act.[4] 6 U.S.C. § 113(g).

On December 5, 2017, Kirstjen Nielsen was confirmed as Secretary of DHS. On April 10, 2019, Secretary Nielsen resigned from her position. At this time, the Deputy Secretary position had been vacant since April 14, 2018, and the Under Secretary for Management resigned on April 10, 2019, as well, leaving that position vacant. GAO, *Federal Executive Vacancy System Database*, *available at* https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act.[5] Upon the Secretary's resignation, the Commissioner of Customs and Border Protection, Kevin McAleenan, assumed the title of Acting Secretary.

On November 13, 2019, Acting Secretary McAleenan resigned, and the Under Secretary for Strategy, Policy, and Plans, Chad Wolf assumed the title of Acting Secretary. The same day, Mr. Wolf designated the Principal Deputy Director of USCIS, Kenneth Cuccinelli, as the Senior Official Performing the Duties of Deputy Secretary of Homeland Security (Deputy Secretary).[6]

DISCUSSION

Article II of the U.S. Constitution provides that "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2. As noted previously, when there is a vacancy in these presidentially appointed, Senate confirmed (PAS) positions, the Vacancies Reform Act is generally the exclusive means for filling them temporarily with an acting official, unless another statute provides an exception.

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[3] The amendment did not impose time limitations on an individual serving as Acting Secretary under HSA.

[4] HSA does not establish an order of succession outside the Vacancies Reform Act for the position of Deputy Secretary. However, HSA establishes the Under Secretary for Management as the first assistant to the Deputy Secretary for purposes of the Vacancies Reform Act. 6 U.S.C. § 113(a)(1)(F).

[5] Under the Vacancies Reform Act, agencies are required to report to GAO certain information regarding vacancies in PAS positions. 5 U.S.C. § 3349(a). GAO compiles the information from these reports and makes them available to the public through its Executive Vacancy System.

[6] Regarding Mr. Cuccinelli, this decision only addresses his service as the Senior Official Performing the Duties of Deputy Secretary and does not address any other positions which he may also hold.

Here, HSA provides such an exception. HSA requires the Under Secretary for Management to serve as Acting Secretary if there is a vacancy in the offices of Secretary and Deputy Secretary. 6 U.S.C. § 113. By providing an initial order of succession for the Secretary and allowing the Secretary to make further designations, HSA qualifies as an exception to the Vacancies Reform Act's exclusivity provision.

At the time the Secretary resigned, the positions specified in HSA were vacant as well, permitting DHS to turn to the Secretary's designation of further officials to serve as Acting Secretary when Secretary Nielsen resigned and the position of Secretary became vacant. 6 U.S.C. § 113(g)(1), (2). Hence, to determine whether Chad Wolf and Ken Cuccinelli are properly serving, we must examine whether DHS adhered to the order of succession in the Secretary's delegation in force at the time Mr. McAleenan and Mr. Wolf each assumed the title of Acting Secretary. As explained further below, we conclude DHS did not.

HSA Delegation 00106

In its response to us, DHS stated that Secretary Nielsen had exercised the HSA power to designate an order of succession through Delegation 00106. *See* Response Letter. Secretary Nielsen issued this delegation on February 15, 2019 (February Delegation).[7] In this February Delegation, there were two grounds for assuming the position of Acting Secretary. The first ground was in the case of the Secretary's death, resignation, or inability to perform the functions of the office. February Delegation § II.A. The second ground was if the Secretary was unavailable to act during a disaster or catastrophic emergency. *Id.* § II.B.

Each ground had its own order of succession. In cases of the Secretary's death, resignation, or inability to perform the functions of the office, the February Delegation stated the order of succession was governed by Executive Order 13753 (E.O. 13753). *Id.* § II.A. E.O. 13753 included an order of succession for officers who would act and perform the duties of the Secretary during any period in which the Secretary has died, resigned, or otherwise become unable to perform the functions and duties of the Office of Secretary. In cases where the Secretary is unavailable to act during a disaster or catastrophic emergency, Annex A to the February Delegation governed the order of succession. *Id.* § II.B. At that time, the orders of succession found in E.O. 13753 and Annex A were the same. The figure in appendix 1 attached to this decision illustrates the legal framework that could be used to designate an Acting Secretary at the time of the February Delegation.

[7] DHS, *DHS Orders of Succession and Delegations of Authorities for Named Positions*, DHS Delegation No. 00106, Revision No. 08.4 (Feb. 15, 2019).

Under E.O. 13753 and Annex A, the first four positions in the order of succession were as follows: (1) Deputy Secretary, (2) Under Secretary for Management, (3) Administrator of the Federal Emergency Management Agency (FEMA), and (4) Director of CISA.[8]

The February Delegation also listed positions in an order of succession for Deputy Secretary in Annex B. The first four positions were as follows: (1) Under Secretary for Management, (2) Administrator of FEMA, (3) Director of CISA, and (4) Under Secretary of Science and Technology. [9]

The February Delegation further stated acting officials in the listed positions are ineligible to serve and, therefore, the order of succession would fall to the next designated official in the approved order of succession. *Id.* § II.G.

Nielsen's Resignation

According to DHS, on April 9, 2019, the day before her resignation, Secretary Nielsen established a new order of succession. Delegation 00106 was updated the following day, reflecting the changes (April Delegation).[10] The April Delegation on its face maintained the two separate grounds for designation. Vacancies due to the Secretary's death, resignation, or inability to perform the functions of the office were still governed by the order of succession under E.O. 13753, and vacancies due to the Secretary's unavailability to act during a disaster or catastrophic emergency were still governed by Annex A to the Delegation. April Delegation §§ II.A, II.B. Secretary Nielsen did however amend the orders of succession for the Secretary and Deputy Secretary in Annexes A and B, respectively. The figure in appendix 1 attached to this decision illustrates the legal framework that could be used to designate an Acting Secretary at the time of the April Delegation.

[8] Both E.O 13753 and Annex A list more positions than those indicated here. However, they are not relevant for purposes of this decision. Public Law 115-278 renamed the position of Under Secretary for National Protection and Programs to be Director of the Cybersecurity and Infrastructure Security Agency. Cybersecurity and Infrastructure Security Agency Act of 2018, Pub. L. No. 115-278, § 2(a), 132 Stat. 4168, 4169 (Nov. 16, 2018), *codified at* 6 U.S.C. § 652(a), (b).

[9] The Secretary may provide for an order of succession for the Deputy position under general management authorities granted the Secretary in HSA. 6 U.S.C. § 112. However, any order of succession for the Deputy position must reflect that the Under Secretary for Management is the first assistant for purposes of the Vacancies Act, in accordance with HSA. 6 U.S.C. § 113(a)(1)(F).

[10] DHS, *Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106, Revision No. 08.5 (Apr. 10, 2019).

The first four positions in the order of succession for Acting Secretary in revised Annex A (disaster or catastrophic emergency) were as follows: (1) Deputy Secretary, (2) Under Secretary for Management, (3) Commissioner of CBP, and (4) Administrator of FEMA. April Delegation Annex A. The April Delegation removed the CISA director from for the order of succession. The April Delegation added the Commissioner to be third in the order, making the Administrator fourth in the order.

In amending Annex A, the Secretary effectively established two different orders of succession. Annex A only applies to the Secretary's unavailability as a result of a disaster or catastrophic emergency. Because the Secretary did not amend the order of succession established in E.O. 13753 otherwise, the Delegation maintained the order set out therein whenever the position became vacant as a result of the Secretary's death, resignation, or inability to perform the functions of the office: (1) Deputy Secretary, (2) Under Secretary for Management, (3) Administrator of FEMA, and (4) Director of CISA.

Secretary Nielsen also changed the order of succession for Deputy Secretary in Annex B. The first four positions in the order of succession were changed to be: (1) Under Secretary for Management, (2) Administrator of the Transportation Security Administration (TSA), (3) Administrator of FEMA, and (4) the Director of CISA. *Id.* Annex B.

On April 10, Secretary Nielsen and the Under Secretary for Management resigned. The Deputy Secretary had resigned a year earlier. In its response to us, DHS stated that it referred to the April Delegation to fill the Acting Secretary position. *See* Response Letter. Apparently, DHS mistakenly referred to Annex A, rather than E.O. 13753. Mr. McAleenan served as the previously confirmed Commissioner of U.S. Customs and Border Protection at the time. Mr. McAleenan would have been the appropriate official had Secretary Nielsen been unavailable to act during a disaster or catastrophic emergency. That was not the case here. Secretary Nielsen resigned. A Secretary's resignation is addressed in E.O. 13753, not Annex A.

Applying the plain language of the April Delegation, the governing order of succession therefore, should have been that provided under E.O. 13753 and not Annex A. The April Delegation explicitly stated, "In case of the Secretary's death, *resignation*, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016." April Delegation § II.A (emphasis added). Annex A only applied to when the Secretary was unavailable to act during a disaster or catastrophic emergency. *Id.* § II.B.

The first previously confirmed official in the order of succession in E.O. 13753 was the Director of CISA.[11] However, instead of following the order of succession in E.O. 13753, DHS applied the one in Annex A. If DHS had invoked the April Delegation due to the Secretary's unavailability to act during a disaster or catastrophic emergency, then Mr. McAleenan would have been the designated official. However, here the vacancy was due to Secretary Nielsen's resignation. Accordingly, under the express terms of Delegation 00106, the incorrect individual assumed the position of Acting Secretary.

In its response to us, DHS stated that Secretary Nielsen used the authority provided by HSA to establish an order of succession with Mr. McAleenan's position—the Commissioner of Customs and Border Protection—as next in the order of succession, after the positions of Deputy Secretary and Under Secretary for Management. Response Letter. DHS further stated that the order of succession was not governed by E.O. 13753 because the executive order was superseded when the Secretary established an order of succession pursuant to HSA. *Id.*

DHS asserted that the direction from the Secretary to change the order of succession applied to any vacancy in the position of the Secretary. In support, DHS provided a memorandum from the DHS General Counsel to Secretary Nielsen. Memorandum from General Counsel, DHS, to Secretary of Homeland Security (Apr. 9, 2019) (Memorandum).

The Memorandum included the revised order of succession for Annex A which provides:

> "By the authority vested in me as Secretary of Homeland Security, including [HSA], 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security as follows: Annex A of . . . Delegation No. 00106, is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof."

Id. This Memorandum includes additional text from the then-General Counsel summarizing Secretary Nielsen's desire to "designate certain officers of [DHS] in order of succession to serve as Acting Secretary," and that "[b]y approving the attached document, you will designate your desired order of succession for the Secretary . . . in accordance with your authority pursuant to [HSA]." *Id.* A discussion section in this memorandum was redacted before DHS provided it to us.

[11] The confirmed Director of CISA at the time of Secretary Nielsen's resignation was Christopher Krebs. GAO, *Federal Executive Vacancy System Database*, *available at* https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act. The Administrator of FEMA was listed third in the order of succession, but the Administrator resigned on March 3, 2019, before Secretary Nielsen resigned. *Id.*

Notwithstanding the General Counsel's statement in the Memorandum asserting the Secretary's intentions in amending the April Delegation, the plain language of the delegation controls, and it speaks for itself. When Secretary Nielsen issued the April Delegation, she only amended Annex A, placing the Commissioner of U.S. Customs and Border Protection as the next position in the order of succession in cases of the Secretary's unavailability to act during a disaster or catastrophic emergency. April Delegation Annex A. She did not change the ground for which Annex A would apply. DHS did not provide evidence of Secretary Nielsen's designation under HSA in the case of her death, resignation, or inability to perform the functions of the office.

We are mindful that the timing of Secretary Nielsen's resignation the next day and the subsequent actions and statements of officials—such as Secretary Nielsen's farewell message to DHS[12]—may suggest that she intended for Mr. McAleenan to become the Acting Secretary upon her resignation. However, it would be inappropriate, in light of the clear express directive of the April Delegation, to interpret the order of succession based on post-hoc actions. *See N.L.R.B. v. SW General, Inc*., 137 S. Ct. 929, 941–42 (2017) (providing that when the text is clear, the court need not consider post-enactment practice); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.") (internal citations omitted); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) ("Such *post hoc* statements of a congressional Committee are not entitled to much weight.") (internal citations omitted). The April Delegation was the only existing exercise of the Secretary's authority to designate a successor pursuant to HSA. As such, Mr. McAleenan was not the designated Acting Secretary because, at the time, the Director of CISA was designated the Acting Secretary under the April Delegation.

McAleenan's Resignation

On November 8, 2019, shortly before he resigned, Mr. McAleenan revised the Delegation (November Delegation).[13] The November Delegation maintained the two grounds for serving, but substituted Annex A for E.O. 13753 as governing the order of succession in cases of the Secretary's death, resignation, or inability to perform the functions of the office. November Delegation §§ II.A, II.B. This change meant Annex A governed both grounds for assuming the title of Acting Secretary, including the Secretary's inability to act during a disaster or catastrophic emergency. The figure in the appendix illustrates the legal framework that could be used to designate an Acting Secretary at the time of the November Delegation.

[12] Press Release, DHS, *Farewell Message from Secretary Kirstjen M. Nielsen* (Apr. 10, 2019), *available at* https://www.dhs.gov/news/2019/04/10/farewell-message-secretary-kirstjen-m-nielsen.

[13] DHS, *Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106, Revision No. 08.6 (Nov. 8, 2019).

Mr. McAleenan also changed the officials listed in the order of succession found in Annex A as follows: (1) Deputy Secretary, (2) Under Secretary for Management, (3) Commissioner of CBP; and (4) Under Secretary for Strategy, Policy, and Plans. *Id.* Annex A. As a consequence, the revision removed the FEMA Administrator and CISA Director from the order of succession, replacing them with the CBP Commissioner and the Under Secretary for Strategy, Policy, and Plans respectively.

On November 13, Mr. McAleenan resigned as both Acting Secretary and Commissioner of U.S. Customs and Border Protection. In its response to us, DHS stated Mr. Wolf became the Acting Secretary pursuant to the November Delegation. Response Letter. At this time, the positions of Secretary, Deputy Secretary, Under Secretary for Management, and Commissioner of CBP were all vacant. Mr. Wolf was serving as the previously confirmed Under Secretary for Strategy, Policy, and Plans at the time he assumed the title of Acting Secretary. DHS told us this was the first position that was filled with a previously confirmed official in the order of succession. *Id.* Mr. Wolf currently serves as the Acting Secretary.

On November 13, 2019, Mr. Wolf amended the order of succession for Deputy Secretary in Annex B, as follows: (1) Under Secretary for Management, (2) Principal Deputy Director of USCIS, (3) Administrator of TSA, and (4) Administrator of FEMA. *Id.*; November Delegation Annex B. The revision removed the CISA Director from the order of succession, installed the Principal Deputy Director of USCIS next in the order, and shifted TSA and FEMA to third and fourth. Subsequently, Mr. Cuccinelli assumed the title of the Senior Official Performing the Duties of Deputy Secretary, as he was the Principal Deputy Director of USCIS. Mr. Cuccinelli currently serves as the Senior Official Performing the Duties of Deputy Secretary.

Under HSA, the Secretary, or properly serving Acting Secretary, has the authority to designate the order of succession for Acting Secretary. 6 U.S.C. § 113(g)(2). Based on the analysis above, Mr. McAleenan was not the proper Acting Secretary which means he did not have the authority to amend the April Delegation. When Mr. McAleenan issued the November Delegation, he did so without the proper authority. *See generally Utility Air Regulatory Group v. EPA,* 573 U.S. 302 (2014) (holding agency actions exceeding statutory authority are invalid). Because Mr. Wolf draws his authority to serve as Acting Secretary from the November Delegation, Mr. Wolf cannot, therefore, rely upon it to serve as the Acting Secretary.

Mr. Wolf altered the order of succession for Deputy Secretary in the November Delegation to permit Mr. Cuccinelli to serve as the Senior Official Performing the Duties of Deputy Secretary.[14] According to DHS, Mr. Wolf did this under his

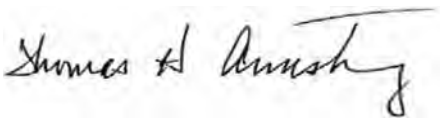
[14] Because the Vacancies Reform Act governs the Deputy Secretary, the 210-day limitation on acting service had already passed. This means the position had to remain vacant and no one could serve as Acting Deputy Secretary. However, under the Vacancies Reform Act, the department could designate an official to perform the

authority as Acting Secretary. Response Letter. As discussed previously, Mr. McAleenan did not have the authority to alter the order of succession; therefore, Mr. Wolf also does not have the authority to alter it as well. The last valid order of succession to serve in that capacity was Annex B to the April Delegation, which did not include Mr. Cuccinelli's position.

CONCLUSION

In the case of vacancy in the positions of Secretary, Deputy Secretary, and Under Secretary for Management, the HSA provides a means for an official to assume the title of Acting Secretary pursuant to a designation of further order of succession by the Secretary. Mr. McAleenan assumed the title of Acting Secretary upon the resignation of Secretary Nielsen, but the express terms of the existing designation required another official to assume that title. As such, Mr. McAleenan did not have the authority to amend the Secretary's existing designation. Accordingly, Messrs. Wolf and Cuccinelli were named to their respective positions of Acting Secretary and Senior Official Performing the Duties of Deputy Secretary by reference to an invalid order of succession.

In this decision we do not review the consequences of Mr. McAleenan's service as Acting Secretary, other than the consequences of the November delegation, nor do we review the consequences of Messers. Wolf and Cuccinelli service as Acting Secretary and Senior Official Performing the Duties of Deputy Secretary respectively. We are referring the question as to who should be serving as the Acting Secretary and the Senior Official Performing the Duties of Deputy Secretary to the DHS Office of Inspector General for its review. We also refer to the Inspector General the question of consequences of actions taken by these officials, including consideration of whether actions taken by these officials may be ratified by the Acting Secretary and Senior Official Performing the Duties of Deputy Secretary as designated in the April Delegation.



Thomas H. Armstrong
General Counsel

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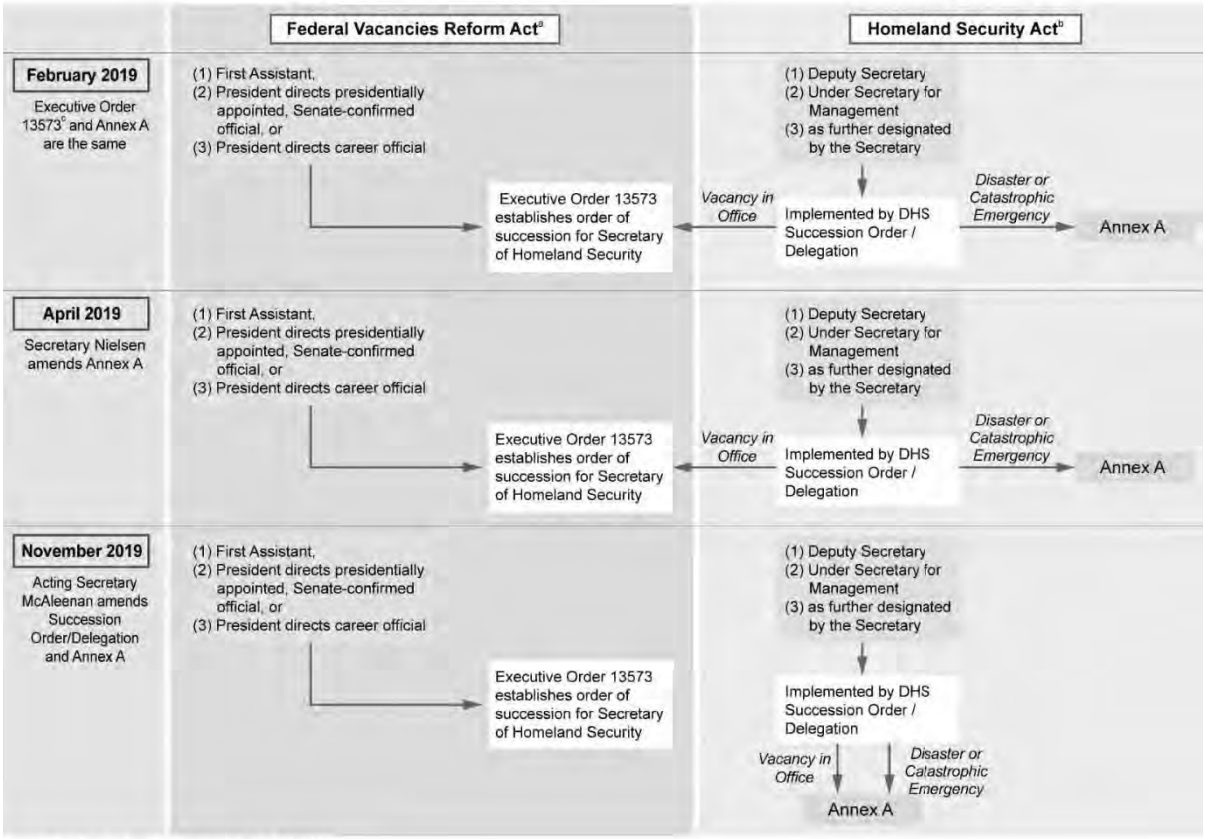
duties of the Deputy Secretary so long as the official does not perform any non-delegable duties of the position. DHS indicated to us that, to the department's knowledge, no one performed any of the position's non-delegable duties. Response Letter.

Appendix 1: Figure Illustrating the Legal Framework for Designating an Acting Secretary of Homeland Security, Calendar Year 2019



Source: GAO analysis of DHS documents. | B-331650.

[a] The Federal Vacancies Reform Act of 1998 (Vacancies Reform Act) is the default framework to designate acting officials for presidentially appointed, Senate confirmed positions. 5 U.S.C. §§ 3345–3349d.

[b] The Homeland Security Act of 2002, as amended, (HSA) provides an order of succession outside of the Vacancies Reform Act when a vacancy arises in the position of Secretary of Homeland Security (Secretary). 6 U.S.C. § 113(g). This includes authority for the Secretary to designate officers to serve as Acting Secretary, which the Secretary implemented through DHS Delegation 00106 and its various revisions.

[c] The President issued Executive Order 13753 providing an order of succession to serve as Acting Secretary under the Vacancies Reform Act. Exec. Order 13753, *Amending the Order of Succession in the Department of Homeland Security*, 81 Fed. Reg. 90,667 (Dec. 9, 2016).

EXHIBIT 20

DECLARATION OF NAOMI A. IGRA

Michael B. Hancock
Mayor

City and County of Denver
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CITY AND COUNTY BUILDING
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July 15, 2020

Submitted via www.regulations.gov

Lauren Alder Reid
Assistant Director
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5107 Leesburg Pike, Suite 2600
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Office of Information and Regulatory Affairs,
Office of Management and Budget,
725 17th Street NW, Washington, DC 20503;
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

Dear Assistant Director Reid:

The City and County of Denver respectfully submits this comment opposing the aforementioned proposed rules on asylum. We urge the Department of Justice (DOJ) and the Department of Homeland Security (DHS) to withdraw these rules which we believe to be both immoral and illegal. Asylum provides a lifeline to tens of thousands of vulnerable refugees. If published, these rules would eliminate the possibility of protection for the vast majority of those seeking protection. Further, these proposed regulations violate the United States' responsibilities under domestic and international law and set a dangerous precedent for the United States to turn its back on the most vulnerable populations.

The City and County of Denver and the Denver Office of Immigrant and Refugee Affairs (DOIRA) works with local non-profits, community-based organizations, government agencies and immigrant and non-immigrant residents alike to support immigrant and refugee integration and wellbeing. As a result, Denver is exceedingly aware of the disruptive effects these policies will have on our residents, particularly the many Denver residents that have fled extraordinary political and economic chaos in their home countries. These men, women, and children have left their homes, extended family, friends and communities with the hope of building a new life safe from violence and persecution and Denver has proudly welcomed them into the fabric of our diverse city.

While we can't know exactly how many Denver residents are seeking asylum, we are certain they make up a significant portion of our 115,000-member immigrant community.[1] Nationwide, there are 340,810 affirmative asylum applications pending before USCIS and a backlog of more than 476,000 asylum cases pending before the Executive Office for Immigration Review as of October 11, 2019.[2] The statewide

[1] https://www.newamericaneconomy.org/locations/colorado/colorado-district-1/
[2] https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-25137.pdf

refugee service providers reported 112 new asylees between October 2017 and September 2018[3] and in Colorado, the state welcomed a total of 821 refugees during this same time period.[4] However, with severe adjudication backlogs with both USCIS or in immigration courts, the majority of immigrants seeking protection in Denver are waiting for their cases to be adjudicated. Furthermore, these proposed changes will have severe implications for refugees processing overseas, as their adjudications are also governed by US asylum laws and rules.[5] This significantly expands the impact of these proposed rules.

We Object to the Agencies Only Allowing 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)

The proposed changes seek to rewrite the laws adopted by Congress and would be the most sweeping changes to asylum in nearly 25 years. The changes would unequivocally obliterate the asylum system. The Notice of Proposed Rulemaking (NPRM) is over 160 pages long. Usually, just one section of these regulations would merit 60 days for the public to fully absorb the extent of the proposed changes, research and interpret the existing rule, and respond thoughtfully. Instead, the agencies have allowed only 30 days to respond to multiple, unrelated, and complex changes to the asylum rules.

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this extensive, but the challenges to respond to the NPRM now are magnified by the ongoing COVID-19 pandemic. On March 13, 2020, President Trump declared a national emergency in response to the COVID-19 pandemic[6]. Since then, varying levels of shelter-in-place orders have been implemented across the country in an effort to slow the spread of the novel coronavirus. The pandemic has upended normal life, limiting the ability of stakeholders to carefully review and provide comprehensive feedback to the agency. Many residents within the ity and county of are still unable to work from their offices and are navigating the challenges of work-at-home environment, including providing care for young children, as well as high-risk family members. During these challenging and chaotic times, it is unreasonable to expect the public to submit comments to these sweeping changes as the Administrative Procedures Act requires for a rulemaking of this significance.

Also of significance, asylum seekers with work authorization are among those on the frontline of the national response - working in restaurants, grocery stores and in the medical field. Making such drastic changes to the asylum system during this time of uncertainty and chaos would be irresponsible and harmful to asylum seekers working essential jobs and the entire country.

For these reasons alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comments.

We Strongly Object to the Substance of the Proposed Rule and Urge the Administration to Rescind it in its Entirety

The City of Denver has been, and continues to be, exceedingly concerned with the severe due process violations associated with being unrepresented in immigration proceedings. According to the first national study on access to counsel in immigration court, published by the University of Pennsylvania Law Review, only 37 percent of all immigrants (and just 14 percent of detained immigrants) obtained representation.[7] While representation rates vary widely by court jurisdiction, in Colorado, immigrants

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[3] Colorado Department of Human Services, 2018. "Denver Metro Quarterly Community Consultation 4th QTR 2018" https://drive.google.com/file/d/1_umX574m6ViQKRSExqFGoMwhPGLj5Dv7/view

[4] Colorado Department of Human Services, 2018. "Denver Metro Quarterly Community Consultation 4th QTR 2018" https://drive.google.com/file/d/1_umX574m6ViQKRSExqFGoMwhPGLj5Dv7/view

[5] https://www.law.cornell.edu/cfr/text/8/1208.13

[6] White House, Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Conference, Mar. 13, 2020, https://www.whitehouse.gov/briefings-statements/remarks-presidenttrump-vice-president-pence-members-coronavirus-task-force-press-conference-3/

[7] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review

have roughly a 51% chance of obtaining counsel in immigration court.[8] Furthermore, this Administration's policy of choice is to detain asylum seekers, including family units containing children, further limiting their opportunities to obtain counsel and ultimately prevail in their asylum cases. At the Aurora Contract Detention Facility, just 15 miles from Denver, approximately 71 percent of detained immigrants appear before immigration judges without a lawyer.[9] In May of 2019, that percentage rose to 83.9 percent.[10]

Many asylum seekers, especially those who are unrepresented and those who are detained, struggle to complete the 12-page asylum application form at all. They may have to use unofficial translators with whom they fear sharing intimate details of their past or their present fears. Asylum seekers who are detained and do not speak English fluently are likely unable to secure any assistance in filling out the application. Further, asylum seekers are often not well-versed in the complexities of the U.S. asylum system and cannot be expected to lay out every element of their asylum claims in the application before applying in court.

To address this injustice, the City and County of Denver established the Denver Immigrant Legal Services Fund (DILSF) in 2018, in partnership with The Denver Foundation. The DILSF provides grants to nonprofit organizations that offer direct legal representation to low-income Denver residents in immigration proceedings and in affirmative forms of relief.[11] The Rocky Mountain Immigrant Advocacy Network (RMIAN), one of the grantees of the DILSF, provides representation to children, families, and adults detained at the Aurora Contract Detention Facility. According to RMIAN, since January 2019, 2000 unduplicated immigrants who were screened were found to have a non-frivolous asylum claim.

While we object to the agencies' unfair 30-day timeframe allotted for comments, we submit this comment to object to the proposed regulations that would make it nearly impossible for our grant recipients to serve their asylum-seeking clients, and our asylum-seeking Denver residents. Specifically, the following affronts are of grave concern to our legal service defense grantees:

- 8 CFR § 1208.13 (e) – Denying asylum seekers due process
- 8 CFR § 208.1(c); 8 CFR § 1208.1(c) – Eliminating the possibilities of prevailing on a particular social group claim
- 8 CFR § 208.1(d); 8 CFR § 1208.1(d) – Redefining political opinion contravening long-established principles
- 8 CFR § 208.1(e); 8 CFR § 1208.1(e) – Narrows and impermissibly alters the accepted definition of persecution
- 8 CFR § 208.1(f); 8 CFR § 1208.1(f) – Imposes a comprehensive list of anti-asylum measures under the guise of "Nexus"
- 8 CFR § 208.13(b)(3); 1208.16; 8 CFR § 208.13(b)(3); 1208.16 – Redefines the internal relocation standard by greatly increasing the burden on those seeking protection
- 8 CFR § 208.13; 8 CFR § 1208.13 – Imposes a comprehensive list of anti-asylum measures under the guise of "discretion"
- 8 CFR § 208.15; 8 CFR § 1208.15 – Erroneously redefines "Firm Resettlement" to include those who have not firmly resettled
- 8 CFR § 208.18; 8 CFR § 1208.18 – Imposes a nearly impossible evidentiary burden on those seeking CAT protection
- 8 CFR § 208.20; 8 CFR § 1208.20 – Radically redefines frivolous and may prevent asylum seekers from pursuing meritorious claims
- 8 CFR § 208.20; 8 CFR § 1208.20 – Impermissibly heightens the legal standards for credible and reasonable fear interviews and will turn away erfugees without providing them a full hearing

[8] https://trac.syr.edu/immigration/reports/477/
[9] Ibid.
[10] https://trac.syr.edu/phptools/immigration/asylum/
[11] http://www.denverfoundation.org/Nonprofits/Grants-What-We-Fund/Other-Grant-Programs/Denver-Immigrant-Legal-Services-Fundhttp://www.denverfoundation.org/Portals/0/Denver%20Immigrant%20Legal%20Defense%20Fund%20Overview%205.11.2020%20FINAL.pdf?timestamp=1589384445134

Omission of any proposed change from this comment should not be interpreted as tacit approval. Because of the magnitude of the proposed changes and the constricted timeframe in which to respond, we are unable to include every proposed change, but we oppose all aspects of the proposed rule and call upon the agencies to withdraw them.

Conclusion

These proposed rules represent a radical rewriting of the U.S. asylum system. These regulations attempt to dismantle most of our asylum laws and seek to eliminate critical pathways to humanitarian relief that our laws were designed to protect. Each section of these monumental proposed changes deserves a full 60-day comment period for the public to adequately prepare comments. Together, these proposed rules would eviscerate asylum protections that have been in place in the United States for decades. The vast majority of asylum seekers will not have a chance at asylum even if they have well-founded fears of persecution. Further, these stringent proposals target asylum seekers who arrive from the southern border and would place evidentiary burdens on asylum seekers in both preliminary border fear screenings and in asylum interviews and proceedings before immigration judges.

Since World War II, the United States has been a beacon of hope for those fleeing danger and harm. These rules would require immigration officials to slam the door on those seeking safety. For the reasons provided above, the City of Denver urges the administration to withdraw these proposed rules in their entirety.

Michael B. Hancock
Mayor
City and County of Denver

EXHIBIT 21

DECLARATION OF NAOMI A. IGRA

COMMITTEE ON
IMMIGRATION & NATIONALITY LAW

VICTORIA F. NEILSON
CHAIR
vickie.neilson@gmail.com

July 14, 2020

Submitted via https://www.regulations.gov

Lauren Alder Reid, Assistant Director,
Office of Policy,
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Desk Officer, U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
725 17th Street NW, Washington, DC 20503

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

Dear Ms. Alder Reid:

On behalf of the Immigration and Nationality Law Committee of the New York City Bar Association[1] ("City Bar") we submit this comment, asking the Department of Justice ("DOJ") and Department of Homeland Security ("DHS") to withdraw the above-referenced Proposed Rule, posted in the Federal Register on June 15, 2020 (85 Fed. Reg. 36264) (the "Proposed Rule") and, if the agencies wish to reissue it, that they provide—at bare minimum—the 60-day period for public comment contemplated by Executive Order 12866. The 30 day timeline is both inadequate and arguably seems calculated to minimize public participation in commenting, given the expansive complexity of the Proposed Rule, the especially vulnerable population who would be affected by the Proposed Rule, and the unprecedented burdens imposed by the ongoing national health emergency.

[1] With 24,000 members, the City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society.

The Proposed Rule would radically alter the substantive and procedural rules governing all adjudications of applications for asylum, withholding of removal, and protection under the Convention Against Torture. The Proposed Rule redefines, or codifies for the first time, substantive definitions of concepts refined through decades of case law and analysis, including *particular social group, political opinion, persecution*, and *nexus*; and sweepingly extends grounds for discretionary denials. At the same time, the Proposed Rule would radically alter existing procedures and would compromise due process: allowing immigration judges to pretermit asylum claims without full and fair hearings, raising the standards for credible and reasonable fear interviews for asylum seekers presenting at the border, and decreeing that those who are permitted to present their claims before the immigration court be placed in asylum- or withholding-only proceedings thereby preventing them from raising certain defenses or pursuing other forms of relief.

Any one of these substantial changes alone would call for the use of a 60-day comment period. By Executive Order:

> [e]ach agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. . . . In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Executive Order 12866 at 6, 58 Fed. Reg. No. 190 (Oct. 4, 1993).

Indeed, the complexity of the Notice of Proposed Rule Making ("NPRM") warrants a comment period longer than 60 days. The inadequacy of the current shortened comment period is further underscored by the high stakes facing the persons to be affected by the Proposed Rule - applicants for protection who have fled a significant risk of torture, trafficking, persecution, or other harm. Guidance on rulemaking prepared by the Office of the Federal Register explains:

> In general, agencies will specify a comment period ranging from 30 days to 60 days in the "Dates" section of the *Federal Register* document, but the time period can vary. For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more. Agencies may also use shorter comment periods *when that can be justified*.[2]

The net effect of contracting instead of expanding the comment period for an NPRM embodying radical departures from prior policy, combined with an ongoing pandemic the effects of which also fall heavily on the regulated community, is to severely impair the capacity for public comment, depriving the agencies of the benefit of significant subject-matter expertise and depriving the public of its right to comment on an extraordinarily significant rulemaking.

[2] Office of the Federal Register, "A Guide to the Rulemaking Process Prepared by the Office of the Federal Register," https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf. (emphasis added) (all websites last visited July 14, 2020).

There has not been a proposed change to asylum law that is as extensive as this Proposed Rule since Congress rewrote the Immigration and Nationality Act through the Illegal Immigration Reform and Immigration Responsibility Act of 1996. Under any circumstances, allowing only 30 days to respond to a NPRM of this scope and complexity would be unreasonable, but allotting this very short timeframe in the middle of a pandemic that is unprecedented in our lifetime[3] has made it impossible for us to submit additional comments on substantive provisions of the Proposed Rule.

Until recently, New York City has been the epicenter of the COVID-19 pandemic. With over 400,000 coronavirus cases, New York state has a higher incidence of the disease than any other state in the country.[4] While the New York City government is no longer prohibiting offices from reopening, the New York City Health Department continues to recommend that the "best way to protect your employees and prevent the spread of COVID-19 is to continue remote work policies as long as possible."[5] The City Bar's building remains closed until, at the earliest, Labor Day. Many members of our Committee are struggling to prioritize their client caseloads and advocacy work as the Executive Office for Immigration Review makes decisions on a day-to-day basis whether the courts will be open or closed.[6] At the same time, those who are directly affected by COVID-19, are caring for relatives affected by the virus, or caring for children in the home[7] are challenged by those unprecedented changes wrought by the virus.

The Immigration and Nationality Committee takes its role within the City Bar very seriously and has, over the past two years, submitted detailed, comprehensive comments on more than a dozen regulatory changes proposed during this administration. Specifically, the Immigration and Nationality Committee has submitted the following comments:

- Comment Letter Urging EOIR to Withdraw Rule That Would Dramatically Increase Fees for Immigration Court Filings and Appeals, March 30, 2020.[8]

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[3] For example, the United States Citizenship and Immigration Services recognized the extraordinary challenges posed by the pandemic in the context of adjudicating applications by, inter alia, automatically extending by 60 days, the due date for Requests for Evidence issued between March 1, 2020 and September 11, 2020. *See* United States Citizenship and Immigration Services, USCIS Response to COVID-19, https://www.uscis.gov/about-us/uscis-response-covid-19.

[4] *See* Worldometer, Coronarvirus, https://www.worldometers.info/coronavirus/country/us/.

[5] NYC Health, Reopening New York City: Frequently Asked Questions What Offices Need to Know (June 28, 2020), https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-reopening-offices-guidance.pdf.

[6] *See* Executive Office for Immigration Review, EOIR OPERATIONAL STATUS DURING CORONAVIRUS PANDEMIC, https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic.

[7] *See* Deb Perelman, In the Covid-19 Economy, You Can Have a Kid or a Job. You Can't Have Both, THE NEW YORK TIMES, Jul. 2, 2020, https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html?searchResultPosition=1; Patricia Cohen and Tiffany Hsu, Pandemic Could Scar a Generation of Working Mothers, THE NEW YORK TIMES, June 3, 2020, https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women.html.

[8] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-drastic-eoir-fee-increases-comments.

- Opposition to Proposed Procedures for Asylum and Bars to Asylum Eligibility: Comments, Jan. 21, 2020.[9]

- Opposition to Proposed Rule Governing Employment Authorizations for Asylum Seekers, Jan. 13, 2020.[10]

- Opposition to Proposed Third-Country Asylum Agreements: Comments, Dec. 19, 2019.[11]

- Opposition to Fee Increases for USCIS Applications: Comments, Dec. 19, 2019.[12]

- Opposition to DHS Proposed Rule Regarding Special Immigrant Juvenile Petitions: Comments, Nov. 15, 2019.[13]

- Opposition to Proposed Expansion of DNA Collection from Immigration Detainees, Nov. 12, 2019.[14]

- Opposition to Removal of the 30-Day Processing Provision for EAD Cards: Comments, Nov. 06, 2019.[15]

- Opposition to Interim Rule and Subsequent Organizational Changes to EOIR, Oct. 23, 2019.[16]

- Comments Opposing DHS/DOJ Interim Final Rule Limiting Asylum Eligibility, Jan. 08, 2019.[17]

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[9] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-procedures-for-asylum-and-bars-to-asylum-eligibility-comments.

[10] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-rule-governing-employment-authorizations-for-asylum-seekers.

[11] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-third-country-asylum-agreements-comments.

[12] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-fee-increases-for-uscis-applications-comments.

[13] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-dhs-proposed-rule-regarding-special-immigrant-juvenile-petitions-comments.

[14] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-expansion-of-dna-collection-from-immigration-detainees.

[15] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-removal-of-the-30-day-processing-provision-for-ead-cards-comments.

[16] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-interim-rule-and-subsequent-organizational-changes-to-eoir-letter.

[17] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comments-opposing-dhsdoj-interim-final-rule-limiting-asylum-eligibility.

- DHS Comment: Inadmissibility on Public Charge Grounds, Dec. 11, 2018.[18]
- Comment on DHS Proposed Change to Fee Waiver Rule, Nov. 27, 2018.[19]
- Comments on Proposed DHS Rulemaking regarding the Flores Settlement, Nov. 06, 2018.[20]

The Proposed Rule includes potentially the most significant changes that have been initiated by this administration. Our Committee does not lightly make the decision to not submit additional substantive comments—yet there is simply not time for the Committee to do an adequate job responding to the provisions and statements in the NPRM that we have identified as problematic and potentially unlawful within the 30-day framework.

Within three days of the publication of the proposed rule, more than 500 organizations signed on to a letter requesting that the Departments of Justice and Homeland Security extend the comment period to a minimum of 60 days.[21] That letter cited to Executive Order 13563 which directs agencies to "...afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[22] It is our understanding that neither agency has responded to the letter.

In contrast, other agencies have recognized the unique challenges posed by the COVID-19 pandemic and adopted a flexible approach to rulemaking. For example, the Bureau of Consumer Financial Protection (the "Bureau") recently extended a comment period from an initial 60 days to add an additional 90 days after receiving comments from the public that the COVID-19 pandemic affected the public's ability to timely comment. It issued a new NPRM in the Federal Register stating:

> The SNPRM provided a 60-day public comment period that was set to close on May 4, 2020. In light of the challenges posed by the COVID-19 pandemic, and in response to requests from stakeholders to give interested parties more time to conduct outreach to relevant constituencies and to properly address the many questions presented in the SNPRM, the Bureau extended the comment period until June 5, 2020. Since extending the

[18] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/dhs-comment-inadmissibility-on-public-charge-grounds.

[19] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comment-on-dhs-proposed-change-to-fee-waiver-rule.

[20] *See* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comments-on-proposed-dhs-rulemaking-re-flores-settlement.

[21] *See* AILA and Partners Send Letter Requesting Asylum Rule Comment Period Extension (June 18, 2020), No. 20070105 at https://www.aila.org/advo-media/aila-correspondence/2020/request-asylum-rule-comment-period-extension. As a matter of ordinary practice, the City Bar does not sign on to coalition letters and did not sign on to this letter. However, we agree with the points it makes and wish to ensure that the letter becomes a part of the administrative record.

[22] *Id.*

> comment period, the Bureau has received requests from a consumer advocacy group, a debt collection trade association, and three State Attorneys General to extend the comment period for an additional 60 day period. These stakeholders state that the COVID-19 pandemic continues to make it difficult to respond to the SNPRM thoroughly. **The Bureau agrees that the pandemic makes it difficult to respond to the SNPRM thoroughly** and to determine when stakeholders will be able to do so. To ensure that stakeholders have the time they need to provide such responses, the Bureau concludes that an extension of the SNPRM comment period to August 4, 2020, is appropriate. This extension should allow interested parties more time to prepare responses to the SNPRM without delaying the rulemaking on this topic. The SNPRM comment period will now close on August 4, 2020.[23] [Emphasis added].

There the Bureau more than doubled the comment period from an initial 60 days to 150 days based on requests from three commenters. Yet the Departments of Justice and Homeland Security has yet to respond to a request by more than 500 organizations to extend the comment period from 30 days to 60 days.

Similarly, the Commodity Futures Trading Commission ("CFTC") also extended comment periods based on the pandemic, stating, "These extensions reflect my commitment to providing market participants with additional flexibility during this pandemic. Commenters on recently proposed rules will now have at least 90 days, and in many cases more, to provide feedback that we value tremendously as we seek to finalize rules," said CFTC Chairman Heath P. Tarbert.[24] The Federal Deposit Insurance Corporation ("FDIC") likewise extended a rulemaking by 60-days "[i]n light of the challenges associated with COVID-19."[25] And the FDIC and Federal Reserve System, again, extended by 30 days a comment period regarding resolution plans for foreign banks, "in light of the challenges arising from the COVID-19 emergency."[26]

In short, when the public stakeholders are part of the financial industry, the government has been responsive to concerns raised regarding the pandemic and the difficulties for stakeholders to comply with ordinary deadlines. We request the same consideration and courtesy here.

The City Bar would very much like to have the opportunity to submit further comments on many aspects of this proposed rule, as it has on more than a dozen proposed immigration rules over the past two years. However, given the current challenges posed by COVID-19 and the unexplained comment period of only 30 days, it is not possible for us to do so at this time.

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[23] 85 Fed. Reg. (May 21, 2020).

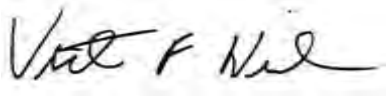
[24] CFTC Extends Certain Comment Periods in Response to COVID-19, (Apr. 10, 2020), https://www.cftc.gov/PressRoom/PressReleases/8146-20.

[25] FDIC Extends Comment Period on Modernizing Brokered Deposit Restrictions (Apr. 3, 2020), https://www.fdic.gov/news/press-releases/2020/pr20045.html.

[26] Agencies extend comment period on updates to resolution plan guidance for large foreign banks (Apr. 27, 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200427a.htm.

For these reasons, we urge the agencies to withdraw this rulemaking and provide a meaningful opportunity for stakeholders to submit comments. The asylum system should not be rewritten via regulation in this manner, especially without giving the public adequate time to comment in the midst of a pandemic. This departure from the normal procedures of rulemaking is deeply troubling; the likely effects of the proposed rule, eradicating most asylum protections, is more troubling still.

Respectfully,



Victoria F. Neilson, Chair
Immigration & Nationality Law Committee

EXHIBIT 22

DECLARATION OF NAOMI A. IGRA

Federal Vacancies Reform Act

OVERVIEW | REPORT A VACANCY | SEARCH VACANCIES | VIOLATION LETTERS

Overview

This page has information about the temporary filling of vacant executive positions that require presidential appointment with Senate confirmation.

The Federal Vacancies Reform Act of 1998 (Vacancies Reform Act) was enacted on October 21, 1998. (Pub. L. No. 105 -277, Div. C, tit. 1, §151, 112 Stat. 2681-611-16, codified at 5 U.S.C.§§3345-3349d.) The act replaces the prior Vacancies Act, and provides new rules for the temporary filling of vacant executive agency positions that require presidential appointment with Senate confirmation. Under the act, an acting officer may serve in a vacant position for no longer than 210 days, with adjustments to be made if the President submits a nomination to fill the position and under other specified circumstances.

The act requires executive departments and agencies to report to the Congress and to the Comptroller General certain information about a vacancy immediately upon the occurrence of events specified in the act. The act also provides that the Comptroller General is to report to specified congressional committees, the President, and the Office of Personnel Management if the Comptroller General determines that an acting officer is serving longer than permitted by the act.

GAO's Role

GAO receives and records the information agencies report to the Comptroller General under the act. Note: The search functions on this website access only the vacancy information that federal departments and agencies have actually submitted to GAO. For this reason, the results may not be complete or the most up-to-date information regarding those vacancies.

Report a Vacancy

Use this form (PDF, 1 page) to report to Congress and GAO information about the temporary filling of vacant executive agency positions that require presidential appointment with Senate confirmation.

Please do not complete the form by hand. (Form updated April 24, 2001)

Send form to GAO

- By e-mail to FederalVacancies@gao.gov
- By fax to Janet Dolen, (202) 512-7703
- By mail to Janet Dolen, Office of General Counsel, Room 7182, 441 G Street N.W. DC 20548

Search Vacancies

Search Federal Vacancies for Current Administration

This search function is only for vacancy information that federal departments and agencies have actually submitted to GAO. For this reason, the results may not be complete or the most up-to-date information regarding those vacancies.

Search results include:

- Position Title
- Date vacancy reported to GAO
- Vacancy Identification Number

- Quick View for more detailed vacancy information

Position Title:

Acting Official:

Nominee:

Agency: Department of Homeland Security

Subagency:
All

Vacancy Status: All

Results Per Page: 50

Start over Search

Under Secretary for Intelligence and Analysis (I and A)
Vacancy Identification Number: Trump Administration 20850, **Date reported to GAO**: May 15, 2020
Quick View

Deputy Administrator, Resilience, FEMA
Vacancy Identification Number: Trump Administration 20752, **Date reported to GAO**: February 4, 2020
Quick View

Deputy Administrator
Vacancy Identification Number: Trump Administration 20751, **Date reported to GAO**: January 20, 2020
Quick View

Under Secretary for Strategy, Policy, and Plans
Vacancy Identification Number: Trump Administration 20631, **Date reported to GAO**: November 18, 2019
Quick View

Commissioner
Vacancy Identification Number: Trump Administration 20630, **Date reported to GAO**: November 18, 2019
Quick View

General Counsel
Vacancy Identification Number: Trump Administration 20470, **Date reported to GAO**: September 23, 2019
Quick View

Director, United States Citizenship and Immigration Services
Vacancy Identification Number: Trump Administration 20090, **Date reported to GAO**: June 12, 2019
Quick View

Under Secretary for Management
Vacancy Identification Number: Trump Administration 19851, **Date reported to GAO**: April 19, 2019
Quick View

Secretary
Vacancy Identification Number: Trump Administration 19850, **Date reported to GAO**: April 19, 2019
Quick View

Administrator
Vacancy Identification Number: Trump Administration 19774, **Date reported to GAO**: March 12, 2019
Quick View

Deputy Secretary

Vacancy Identification Number: Trump Administration 19290, **Date reported to GAO**: April 16, 2018
Quick View

Inspector General
Vacancy Identification Number: Trump Administration 19158, **Date reported to GAO**: December 4, 2017
Quick View

Secretary
Vacancy Identification Number: Trump Administration 18789, **Date reported to GAO**: August 14, 2017
Quick View

Deputy Secretary
Vacancy Identification Number: Trump Administration 18329, **Date reported to GAO**: February 15, 2017
Quick View

Assistant Secretary/Director
Vacancy Identification Number: Trump Administration 18290, **Date reported to GAO**: February 8, 2017
Quick View

Deputy Administrator, FEMA
Vacancy Identification Number: Trump Administration 18343, **Date reported to GAO**: January 23, 2017
Quick View

Administrator
Vacancy Identification Number: Trump Administration 18342, **Date reported to GAO**: January 23, 2017
Quick View

Under Secretary, National Protection and Program Directorate
Vacancy Identification Number: Trump Administration 18341, **Date reported to GAO**: January 23, 2017
Quick View

Director, United States Citizenship and Immigration Services
Vacancy Identification Number: Trump Administration 18340, **Date reported to GAO**: January 23, 2017
Quick View

Assistant Secretary/Administrator
Vacancy Identification Number: Trump Administration 18339, **Date reported to GAO**: January 23, 2017
Quick View

Under Secretary
Vacancy Identification Number: Trump Administration 18338, **Date reported to GAO**: January 23, 2017
Quick View

Deputy Administrator for National Preparedness (FEMA)
Vacancy Identification Number: Trump Administration 18337, **Date reported to GAO**: January 23, 2017
Quick View

Under Secretary for Intelligence and Analysis (I&A)
Vacancy Identification Number: Trump Administration 18335, **Date reported to GAO**: January 23, 2017
Quick View

General Counsel
Vacancy Identification Number: Trump Administration 18334, **Date reported to GAO**: January 23, 2017
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Chief Financial Officer
Vacancy Identification Number: Trump Administration 18333, **Date reported to GAO**: January 23, 2017
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Commissioner
Vacancy Identification Number: Trump Administration 18332, **Date reported to GAO**: January 23, 2017
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Under Secretary for Management
Vacancy Identification Number: Trump Administration 18331, **Date reported to GAO**: January 23, 2017
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Secretary
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Violation Letters

Below is a listing of violation letters GAO has issued after determining that a violation of the act has occurred.

Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Chief Financial Officer, U.S. Environmental Protection Agency

B-332619: Dec 15, 2020

Pursuant to section 3349(b) of title 5 of the United States Code, we are reporting a violation of the Federal Vacancies Reform Act of 1998 (Vacancies Act) at the U.S. Environmental Protection Agency (EPA) with respect to the Chief Financial Officer position. Pub. L. No. 105-277, div. C, title I, 112 Stat. 2681-611 (Oct. 21, 1998), as amended, 5 U.S.C. §§ 3345–3349d. Specifically, we are report...

View Decision (PDF, 2 pages)

Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: President of the Government National Mortgage Association

B-331539: Sep 18, 2020

Pursuant to section 3349(b) of title 5 of the United States Code, we are reporting a violation of the Federal Vacancies Reform Act of 1998 (herein "the Vacancies Reform Act" or "Act") at the Department of Housing and Urban Development (HUD), Government National Mortgage Association (GNMA) with respect to the GNMA President position. Pub. L. No. 105-277, div. C, title I, 112 Stat. 2681-611 (Oct. 21...

EXHIBIT 23

DECLARATION OF NAOMI A. IGRA

UNHCR
The UN Refugee Agency

Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services)

"Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review"

Submitted 15 July 2020

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I. UNHCR's Role and Supervisory Authority

The Office of the United Nations High Commissioner for Refugees (UNHCR) submits for your consideration the comments below on the new Proposed Rule on Procedures for Asylum and Withholding of Removal as well as Credible and Reasonable Fear Review from the U.S. Department of Justice and U.S. Department of Homeland Security (*hereinafter* "the Proposed

Rule"). These comments focus on those aspects of the Proposed Rule which if adopted will have a significant impact on the international legal protections to which persons seeking international protection (including asylum-seekers, asylees, and refugees[1]) are entitled.

This submission is offered consistent with UNHCR's supervisory responsibility under its Statute and reiterated in the 1967 United Nations Protocol Relating to the Status of Refugees (the "1967 Protocol")[2] and the 1951 United Nations Convention Relating to the Status of Refugees (the "1951 Convention").[3] The United States is a signatory and State Party to the 1967 Protocol, and is therefore bound to comply with the 1967 Protocol as well as, by incorporation, articles 2-34 of the 1951 Convention.[4] Furthermore, as a State Party, the United States has agreed to cooperate with UNHCR to facilitate the Office's duty of supervising the application of the provisions of the Protocol, and, as incorporated therein, the 1951 Convention.[5]

One of the means by which UNHCR exercises its supervisory responsibility is by communicating with States Party its guidance on the 1951 Convention, the 1967 Protocol, and other international and regional refugee instruments. This guidance is informed by UNHCR's nearly seven decades of experience assisting refugees and supervising the treaty-based system of refugee protection.

UNHCR presents these comments today out of concern that the Proposed Rule creates new procedural barriers to a fair and efficient review of a claim for protection; makes fundamental changes to the refugee definition[6] in the United States; and establishes new bars to asylum, in a

[1] UNHCR notes at the outset that the term 'refugee' is used slightly differently in international law as compared to U.S. domestic law, while the term "asylee" is only used in the U.S. domestic law framework. Under international refugee law, a refugee is a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." Convention Relating to the Status of Refugees, art. 35, 19 U.S.T. 6259, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter Refugee Convention], art. 1A(2). Those who meet the refugee definition set forth in the Convention have the right to enjoy asylum. *See* UN General Assembly, Universal Declaration of Human Rights, art. 14(1), 217 A (III) (Dec. 10, 1948); Executive Committee of the High Commissioner's Programme, *Safeguarding Asylum No. 82 (XLVIII)*, U.N. Doc. 12A (A/52/12/Add.1) (Oct. 17, 1997), ¶¶ (b), (d) (referencing "the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights," and describing key aspects of the institution of asylum). Under U.S. statute, the refugee definition itself is very similar: "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). In the United States, however, someone who meets the refugee definition may hold one of two statuses. A person who has their refugee status recognized outside of the United States prior to their admission (usually through resettlement) is considered to have the status of "refugee." *See* 8 U.S.C. § 1157(c)(1). A person who has their refugee status recognized while physically present in the United States is considered to have the status of "asylee." *See id*. §§ 1158(a)(1), (b)(1)(A) (describing the authority to apply for and the conditions for granting asylum). The term "asylee" is not used in international refugee law, since someone who qualifies for asylum is referred to as a "refugee." Where necessary, this Comment will clarify whether these terms are used in the international law context or according to their specific meaning under U.S. law.

[2] Protocol Relating to the Status of Refugees, art. II, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967) [hereinafter Protocol].

[3] Refugee Convention. UNHCR has a mandate to "[p]romot[e] the conclusion and ratification of international conventions for the protection of refugees" and to "supervis[e] their application and propos[e] amendments thereto." Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(b), ¶ 8(a) (Dec. 14, 1950) [hereinafter UNHCR Statute].

[4] *See* Protocol.

[5] "The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions." Protocol, art. II; *see also* UNHCR, *Note on the Mandate of the High Commissioner for Refugees and His Office* (2013), at 4-7 (describing the High Commissioner's supervisory responsibility in relation to states' compliance with their international obligations towards refugees, asylum-seekers, and others of concern).

[6] UNHCR observes that this Proposed Rule modifies the definition of a refugee as codified at Section 101(a)(42) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(42)): "The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]" This definition is based on provisions of the 1951 Convention; specifically, the U.S. definition tracks the language in Article 1A(2) of the 1951 Convention, and the Refugee Act of 1980 was enaged in order to confirm provisions of U.S. law to U.S.

way that diverges sharply from the United States' international legal obligations related to refugee protection. UNHCR has a strong interest in ensuring that U.S. asylum law and policy aligns with the international treaty obligations that the United States helped to create, and respectfully offers its guidance on those obligations.

UNHCR notes that these technical comments are submitted as follow-up to our letter of June 26, 2020 to the Attorney General and the Acting Secretary of Homeland Security, in which our initial concerns over this Proposed Rule were raised. Our fundamental observations regarding deviations from basic tenets of international refugee law—including the obligation to protect against refoulement, the right to seek and enjoy asylum, and the principles of due process and fair treatment during the asylum process—are further expounded on below. UNHCR considers that the comment period of only 30 days is insufficient for such extensive changes of enormous consequence for those in need of international protection, and we remain ready to engage in further conversation regarding the wide-ranging changes introduced in the Proposed Rule and covered in UNHCR's comments below.

II. Overall Comments on the Proposed Rule's Incompatibility with the 1951 Convention and 1967 Protocol on the Status of Refugees

UNHCR appreciates that there have been decades of engagement between our agency and the U.S. government, including on technical aspects of international refugee law and its domestic realization. In this context, UNHCR has deep concerns about the Proposed Rule which is incompatable with fundamental tenets of international refugee law and would dramatically diminish the United States' capacity to guarantee protection of refugees from return to situations of serious harm.

As a preliminary matter, UNHCR observes that the Proposed Rule puts forward a vast number of procedural and substantive (definitional) changes that affect almost every aspect of adjudication of protection claims in the United States (affecting asylum seekers and others), while many of the substantive changes will also impact overseas adjudications of refugee status (impacting candidates for refugee admissions). UNHCR is concerned that the extensive changes made in the Proposed Rule move away from the humanitarian, non-discriminatory spirit of the 1980 Refugee Act, which implemented the U.S.'s commitments made through ratifying the 1967 Protocol.[7]

The Proposed Rule, if enacted, would be at variance with at least four basic principles and well-established standards of international refugee law. First, the Proposed Rule makes a great number of substantive changes to the definition of a refugee. For instance, the Proposed Rule takes an overly restrictive approach to core terms such as "political opinion" and "persecution," and further compounds an interpretation of "particular social group" that was already out of step with international law.

Second, the Proposed Rule establishes new and vastly over-reaching exclusionary grounds, including through expanded use of the discretionary clause on asylum in U.S. law, a concept

obligations under the 1951 Convention and its protocol. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol], to which the United States acceded in 1968."). *See also* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES (2017), pp. 4-26 (providing a detailed discussion of the links between international law and the definition of 'refugee' in U.S. domestic statute).

[7] Refugee Act of 1980, Pub. L. No. 96-212, § 101(b), 94 Stat. 102 (1980) ("The objectives of this Act . . . are to provide a permanent and systematic procedure for the admission to this country of refugees . . . and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.").

which is already at odds with international standards. UNHCR notes that there is an exhaustive exclusionary framework established in international law. Going beyond that framework raises the specter of erroneous exclusion, which may threaten the life or freedom of concerned refugees and place them at risk of irreparable harm.

Third, the Proposed Rule establishes a series of procedural rules that fall short of due process standards required for a fair and efficient asylum process. For instance, the Proposed Rule alters the preliminary screening that occurs during accelerated removal procedures such that many with valid claims for international protection will be denied. Additionally, the Proposed Rule establishes an asylum-and-withholding-only procedure that precludes access to complementary forms of international protection. The Proposed Rule also puts forward new and punitive standards for frivolous claims and pretermission of incomplete applications, and puts burdens of proof on individuals who are ill-equipped and cannot reasonably be expected to meet them. Taken individually, each of these changes would be divergent from international standards; as a group they serve to create a series of barriers that all but deny outright the right to seek asylum.

Fourth, the Proposed Rule will have particularly harsh impact on vulnerable groups in need of international protection, including unaccompanied children; and those appearing *pro se* in immigration proceedings. This is out of step with international standards that provide for non-adversarial adjudication of claims and favorable treatment for the most vulnerable.

Overall, the Proposed Rule re-orients the U.S. asylum process away from a principled, humanitarian approach focused on identifying individuals with international protection needs towards one that establishes a set of obstacles which must be overcome by individuals seeking international protection. This approach will make it very difficult for many categories of people seeking protection to find refuge in the United States. International human rights and refugee law—in keeping with the spirit of humanitarianism present in the U.S. at least since the 1980 Refugee Act—is premised on protecting those in need. UNHCR is troubled that many of the proposed changes will have a negative impact on refugees who have committed minor infractions (in the case of discretionary denials), made simple mistakes in applications (in the case of frivolous dismissals or pretermission), and in some cases, seemingly for simply seeking protection in the first place.

UNHCR observes with concern that the Proposed Rule purports to remain in compliance with international obligations because of the continued availability of statutory withholding of removal, a procedure the U.S. has maintained fulfils its international obligations.[8] UNHCR wishes to address this premise at the outset. First, UNHCR notes that compliance with the 1951 Convention and 1967 Protocol is not brought about merely by complying with one article therein (that is, non-refoulement obligations under Article 33). Instead, the U.S. should provide for a determination of eligibility for refugee status pursuant to the criteria in Article 1 (inclusion as well as exclusion).[9] Those in need of international protection are entitled to the rights enumerated in the 1951 Convention, including but not limited to protection under Article 33.[10] Second, UNHCR notes that

[8] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,289-90 (proposed Jun. 15, 2020) [hereinafter Proposed Rule on Asylum and Withholding] ("[A]n alien who is ineligible for asylum may still be eligible to apply for the protection of withholding of removal."). *See also, e.g.*, *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1081 (9th Cir. 2020) (examining and ultimately rejecting the government's argument that withholding of removal meets the U.S.'s non-refoulement obligations).

[9] *See* UNHCR's views on discretionary denials for Article 1 analysis, *infra*.

[10] The U.S. status of "withholding of removal" under the INA does not meet the required provision of rights under the Refugee Convention because it has a higher bar than an asylum determination and is not available to all refugees. As a result, those rightfully considered "refugees" still do not have access to the protection of withholding of removal. *Compare Huang v. Holder*, 744 F.3d 1149,

many of the changes in the Proposed Rule, including, for instance, substantive changes to the refugee definition, also affect the adjudication of withholding of removal; the flaws therein impact the withholding procedure too. UNHCR observes that the protection in its weakened form as introduced by the Proposed Rule is not sufficient to protect against violations of the non-refoulement provisions of Article 33.

Ultimately, UNHCR is concerned that the Proposed Rule will lead to the refoulement of large numbers of asylum-seekers of many different nationalities, ethnic backgrounds or religions, and of a very wide range of risk profiles. Non-refoulement, a norm of customary international law, is the cornerstone of the 1951 Convention and its 1967 Protocol. The Proposed Rule, by impeding access to asylum through the introduction of a great number of changes to procedural due process; narrowing the substantive definition of those entitled to protection as an asylee (or qualifying for admissions as a refugee); and vastly expanding the criteria for denying individuals protection, puts forward a regulatory framework at variance with international and U.S. law standards. If enacted, this framework will lead to the refoulement of individuals with international protection needs. This undermines the very fabric of refugee protection, and UNHCR is deeply concerned that the Proposed Rule would lead to a serious deterioration of the protection historically offered by this country.

In light of the Proposed Rule's incompatibility with foundational principles of international refugee law, **UNHCR recommends that the government refrain from adopting the Proposed Rule in its entirety**. Should the government proceed with the Proposed Rule, UNHCR recommends that the rule be carefully reconsidered in order that it might be brought in compliance with international refugee law, including fundamental aspects of the international framework such as non-refoulement, the right to seek and enjoy asylum, and the principles of due process and fair treatment during the asylum process. UNHCR has endeavored to provide specific guidance and recommendations on these principles and others in the ensuing commentary.

UNHCR has long acknowledged the U.S. is facing unprecedented challenges associated with new and increased flows of asylum-seekers within the subregion. We recognize that the U.S. asylum system is under significant strain and is in need of reform, and we appreciate the ongoing engagement with the Departments of Homeland Security and Justice on ways to improve the quality and efficiency of the system and reduce the current backlog. UNHCR stands ready to support the U.S. government to grapple with these complex challenges, with a view to building a more resilient, fair, and efficient domestic asylum system that upholds international standards.

III. Observations on Specific Provisions of the Proposed Rule

In this section, UNHCR offers observations and comments on the Proposed Rule on Asylum and Withholding and Credible and Reasonable Fear Review. The below analysis mirrors the structure of the discussion in the Proposed Rule for ease of reference, providing in each case an overview of how the proposed change will affect persons seeking international protection, followed by a comparison to the relevant international legal standards. UNHCR has endeavored to propose

1152 (9th Cir. 2014) ("[T]he bar for withholding of removal is higher; an applicant 'must demonstrate that it is more likely than not that he would be subject to persecution'" in his country of origin (quoting *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001))), *with Cardoza-Fonseca*, 480 U.S., 439–40 (stating that an asylum determination requires an applicant to show "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." (quoting UNHCR Handbook, ¶ 42)). Additionally, withholding of removal fails to guarantee many central Convention rights available to those recognized through Article 1, including rights to family reunification; freedom from arbitrary detention, and pathways to naturalization.

recommendations for modifying the Proposed Rule in line with those standards, and would welcome an opportunity to engage further with the Departments of Homeland Security and Justice on the below areas of concern, in line with UNHCR's mandate to provide technical advice on implementing obligations under the 1951 Convention and its 1967 Protocol.[11]

A. Expedited Removal and Screenings in the Credible Fear Process[12]

1. Asylum-and-Withholding-Only Proceedings for Non-citizens who have Established Credible Fear

The Proposed Rule introduces an asylum-and-withholding-only proceeding, a new, stand-alone process within the expedited removal framework for full consideration of an asylum applicant's eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). UNHCR is concerned that this proceeding will narrow the procedural protections available to asylum applicants in a way that is at variance with international standards on fair and efficient asylum procedures.

Under the Proposed Rule, non-citizens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture during screening will now appear before an immigration judge for "asylum-and-withholding-only" proceedings.[13] The Proposed Rule places this proceeding for full determination of a claim for protection under INA § 235, the part of the domestic law that provides for expedited removal, and which allows for prolonged detention.[14] An immigration judge will hold "exclusive jurisdiction" over the merits claim and may only consider the non-citizen's eligibility for asylum, statutory withholding of removal, and withholding or deferral of removal under the CAT regulations.[15]

UNHCR is concerned that this new form of proceeding may curtail options currently available to those seeking international protection. First, this proceeding will preclude non-citizens' opportunities to access some options for complementary forms of protection.[16] (For example,

[11] Refugee Convention, art. 35. UNHCR has a mandate to "[p]romot[e] the conclusion and ratification of international conventions for the protection of refugees" and to "supervis[e] their application and propos[e] amendments thereto." UNHCR Statute ¶ 8(a).

[12] UNHCR is concerned that the provisions in this part of the Proposed Rule will have a particularly harmful impact on persons with international protection needs in light of two operational realities with respect to expedited removal in the United States. First, the administration has expanded the use of expedited removal to the full extent permitted by U.S. domestic law (for those apprehended anywhere throughout the contiguous United States within two years of arriving in the country); this expansion was recently upheld by the U.S. Court of Appeals for the D.C. Circuit. *Make the Road New York v. Wolf*, No. 19-5298, 2020 WL 3421904, at *3 (D.C. Cir. 2020). Second, individuals who receive negative credible fear determinations under INA § 235 are not entitled to challenge those findings in federal court; this has long been the practice and was recently upheld by the Supreme Court in *Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161, 2020 WL 3454809 (Jun. 25, 2020). Consequently, UNHCR is concerned that the reach of the asylum-only provision could be exceptionally wide, applying to almost all asylum-seekers making claims in the U.S. Further, in light of the *Thuraissigiam* ruling, there seems a very real possibility that even full asylum hearings in an asylum-and-withholding-only proceeding, placed as the Proposed Rule envisions under INA § 235, would not lead to review in federal appeals courts.

[13] Proposed Rule on Asylum and Withholding, p. 36,267. This new category of proceedings is akin to that applied to stowaways and Visa Waiver Program nationalities. *Id.*

[14] *See* Proposed Rule on Asylum and Withholding, p. 36,266; *see also* 8 U.S.C. § 1225(b)(B)(IV) ("[A]ny alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.").

[15] *Id.*

[16] "Complementary protection" refers to protection mechanisms outside of the Refugee Convention. These forms of protection are typically "intended to provide protection for persons who cannot benefit from [the 1951 Convention and its 1967 Protocol] even though they, like Convention refugees, may have sound reasons for not wishing to return to their home country. *See* Ruma Mandal, UNHCR, Dep't of Int'l Prot., *Legal and Protection Policy Research Series: Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, ¶¶ 4-5, U.N. Doc. PPLA/2005/02 (Jun. 2005). UNHCR acknowledges that the proposed asylum-and-withholding-only proceedings do allow for withholding of removal (CAT), which is one form of complementary protection. However, UNHCR is concerned that other forms of complementary protection, discussed *infra*, would not be included in the new proceedings, thus narrowing the forms of protection available.

under U.S. law, victims of crime, human trafficking, and other violence and abuses may be entitled to protections and forms of relief under other sections of U.S. law, such as VAWA, U visas, T visas, and SIJS.[17]) Second, while the Proposed Rule does allow for appeal to the Board of Immigration Appeals (BIA),[18] the rule does not specify whether there remains a pathway to appeal to the independent federal courts.[19] Additionally, that appeal does not open pathways to complementary forms of protection such as those mentioned above. Finally, UNHCR is concerned that, given the strict new approach to frivolous applications proposed elsewhere in this regulation,[20] and discussed *infra* at Section III.B.1, p. 14, asylum-seekers may feel pressure to waive this appeal.

In UNHCR's opinion, this new procedure may conflict with international standards in three ways.

First, under international law, procedures to adjudicate individuals' claims for protection must uphold key due process safeguards.[21] It is generally recognized that fair and efficient asylum procedures are an essential element in the full and inclusive application of the 1951 Convention. This allows states to identify those who qualify (and those who do not) under the refugee definition fairly and efficiently in order to protect against refoulement.[22] While States have considerable leeway to design procedures for adjudicating refugee status, States must include essential due process guarantees.[23] In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure.

The need to provide fair and efficient refugee status determination procedures in the context of individual asylum systems stems from the right to seek and enjoy asylum, as guaranteed under Article 14 of the Universal Declaration of Human Rights, and the responsibilities derived from the 1951 Convention, international and regional human rights instruments, as well as relevant Executive Committee conclusions.[24] An applicant for protection is typically in a particularly vulnerable situation, and may experience technical, psychological, and linguistic difficulties in submitting their case to authorities.[25] UNHCR's Executive Committee, of which the U.S. has been

[17] *See, e.g.*, Trafficking Victims Protection Act, 22 U.S.C. § 7105 (2018); Battered Immigrant Woman Act, 8 U.S.C. § 1105a (2018). Individuals in asylum-and-withholding-only proceedings would also presumably be ineligible to apply to adjust status or to seek voluntary departure.

[18] Proposed Rule on Asylum and Withholding, p. 36,267 ("If the immigration judge does not grant the alien asylum . . . the alien will be removed, although the alien may submit an appeal of a denied application . . . ."). In the event that a non-citizen appeals a denial of his or her application to the BIA, the immigration judge's order of removal should be automatically stayed during the adjudication of the appeal. Executive Office for Immigration Review, Dep't of Justice, *Board of Immigration Appeals Practice Manual*, ch. 6.2(b) (Jun. 10, 2020).

[19] *See Thuraissigiam*, No. 19-161, 2020 WL 3454809, *18 (holding that a non-citizen cannot challenge a negative fear determination in federal court).

[20] Proposed Rule on Asylum and Withholding, p. 36,295 (proposing to revise § 208.20 so that a withdrawn application could still be found frivolous unless the applicant wholly disclaims it, withdraws with prejudice and waives their right to appeal).

[21] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶¶ 189-204, U.N. Doc. HCR/1P/4/ENG/REV.4 (April 2019) [hereinafter UNHCR Handbook].

[22] Article 33(1) of the 1951 Convention codifies the fundamental principle of non-refoulement, which refers to the obligation of States not to expel or return (refouler) a person to territories where his or her life or liberty would be threatened. *See* Black's Law Dictionary 1157 (9th ed. 2009). *See also* UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, (Jan. 26, 2007), http://www.unhcr.org/refworld/docid/45f17a1a4.html.

[23] UNHCR Handbook, ¶¶ 189-192.

[24] *See* UN General Assembly, Universal Declaration of Human Rights, art. 14(1), 217 A (III) (Dec. 10, 1948); Refugee Convention, Introductory Note (explaining that the Convention is grounded in Article 14 of the Universal Declaration of Human Rights and is the centerpiece of international refugee protection); Executive Committee of the High Commissioner's Programme, *Safeguarding Asylum No. 82 (XLVIII)*, U.N. Doc. 12A (A/52/12/Add.1) (Oct. 17, 1997), ¶¶ (b), (d) (referencing "the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights," and describing key aspects of the institution of asylum).

[25] UNHCR Handbook, ¶ 190.

a member since its establishment in 1955, has recommended that procedures satisfy certain basic requirements, including: the applicant be given guidance on the procedure itself; the applicant be given the necessary facilities, including a competent interpreter, for submitting his case; and the applicant should have ability to appeal.[26] UNHCR is concerned that this asylum-and-withholding-only proceeding, placed as it is under INA § 235 (expedited removal), may not include the basic procedural requirements described above.

Second, denying access to complementary forms of protection would be in conflict with international standards. While it is UNHCR's position that individuals who fulfill the criteria enumerated in Article 1A(2) of the 1951 Convention (or its Protocol) are entitled to be recognized as such and protected under that instrument rather than under complementary protection schemes,[27] UNHCR acknowledges the varying interpretations of the inclusion criteria have created significant differences in recognition rates for persons in similar circumstances across and even within States.[28] Therefore, UNHCR has recognized the value of asylum countries offering complementary forms of protection to individuals not formally recognized as refugees but who nonetheless require international protection.[29] Such forms of protection are only effective in strengthening the global protection regime if individuals have the chance to apply for them,[30] and those applications are best conducted in the same proceeding as that used for assessing refugee protection needs [31] UNHCR is concerned that the narrowing of the U.S. refugee definition in these regulations, which diverges significantly from international law, discussed *infra* at Section III.C.1, p. 23, will lead to larger numbers of persons seeking international protection without relief. In light of that likelihood, UNHCR observes that access to complementary forms of protection, precluded by this proposed adjudicatory process, takes on an additional degree of importance.

Third, UNHCR is concerned that individuals in asylum-and-withholding-only proceedings may be subject to arbitrary detention as a result of this procedure.[32] Non-citizens placed into asylum-and-

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[26] UNHCR Handbook, ¶ 192; UNHCR, *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, No. 8: Determination of Refugee Status (1977), https://www.unhcr.org/en-us/578371524.pdf (enumerating basic procedural requirements). *See generally* UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12 (May 31, 2001), https://www.refworld.org/docid/3b36f2fca.html; UNHCR, *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'immigration pending before the Court of Justice of the European Union* (May 21, 2010), https://www.refworld.org/docid/4bf67fa12.html. *See also* International Covenant on Civil and Political Rights 999 UNTS 171, Art. 2(3) (Dec. 19, 1966, entered into force Mar. 23, 1976) (providing for, *inter alia*, the right to an effective remedy).

[27] Mandal, s*upra* note 16; *see also* Exec. Comm. Of the High Comm'r's Programme, Standing Comm., *Providing International Protection Including Through Complementary Forms of Protection*, ¶ 26, U.N. Doc. EC/55/SC/CRP.16 (June 2, 2005) (stating that "complementary protection . . . should be granted to persons in need of international protection who fall outside the scope of the 1951 Convention"); UNHCR, *Complementary Forms of Protection*, ¶31 (Apr. 2001), https://www.refworld.org/docid/3b20a7014.html ("[States] should implement complementary protection in such a way as to ensure the highest degree of stability and certainty possible in the circumstances . . . ."); Nicole Dicker & Joanna Mansfield, UNHCR, *Filling the Protections Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia*, 3, U.N. Doc. Research Paper No. 238 (May 31, 2012) (explaining that complementary protections are based on "international refugee, human rights and humanitarian law" and that its "central feature" is the "international legal obligation of non-refoulement").

[28] Exec. Comm. Of the High Commissioner's Programme, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, ¶¶ 7, 25(b), U.N.Doc. EC/50/SC/CRP.18 (9 Jun. 2000); *see also* UNHCR, Dep't of International Protection, *UNHCR Legal and Protection Policy Research Series: Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, ¶ 19, U.N.Doc. PPLA/2005/02 (Jun. 2005).

[29] *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, ¶ 1; *see also* UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, U.N. Doc. EC/GC/01/12 (May 2001).

[30] *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, ¶ 25.

[31] UNHCR, *Global Consultations on International Protection/Third Track*, ¶ 50 ("A single procedure to assess the claims of all those seeking refugee status or other complementary protection may, in many cases, represent the clearest and swiftest means of identifying those in need of international protection.").

[32] Compare *infra* Section III.A.2, p. 7, *and infra* Section III.A.3, p. 8. UNHCR is concerned that other changes in the Proposed Rules will limit independent review of DHS custody decisions, driving its detention policies further away from international standards.

withholding-only proceedings will not have access to custody redeterminations before an immigration judge, as these new proceedings fall under INA § 235 instead of INA § 240.[33]

Under international law, detention of asylum-seekers should be treated as an option of last resort.[34] When detention is used, it must not be arbitrary. In order to avoid arbitrariness, the decision to detain must be based on an individual's particular circumstances, and more specifically, detention must be determined to be necessary in the individual's case, reasonable in all the circumstances, proportionate to a legitimate purpose, and prescribed by law.[35] Mandatory detention is always arbitrary because it is not based on an individualized examination of the necessity of detention.[36] Any decision to detain must be subject to independent, periodic review.[37] Furthermore, detention must not be discriminatory.[38] Among other things, this requires that a state has an objective and reasonable basis for distinguishing between non-nationals in this regard, and an individual must always have an opportunity to challenge their detention on these grounds.[39] The Proposed Rule violates international standards on the detention of asylum-seekers by allowing those seeking international protection to be detained without adequate review during the pendency of "asylum-and-withholding-only" proceedings.[40]

UNHCR recommends that the government refrain from instituting "asylum-and-withholding-only" proceedings and instead continue to use full removal proceedings. (UNHCR stands ready to engage in further conversation about backlog reduction and improving efficiencies in full removal proceedings, in keeping with international standards.) Nonetheless, if the Government wishes to instate "asylum-and-withholding-only" proceedings, it should ensure that such proceedings align with international standards, including by: preserving critical due process protections such as the right to an independent appeal; providing access to complementary forms of protection; and refraining from arbitrary detention, including mandatory detention.

2. Consideration of Precedent When Making Credible Fear Determinations in the "Credible Fear" Process

[33] Proposed Rule on Asylum and Withholding, 36,266 ("[T]he Departments believe . . . that it is better policy to place aliens with a positive credible fear determination in asylum-and-withholding-only proceedings rather than section 240 proceedings."). Although these individuals would retain the possibility of release by DHS on parole on humanitarian or "significant public benefit" grounds, UNHCR is concerned that individuals will then not be considered as entitled to a custody hearing before an immigration judge to seek release, resulting in their prolonged and arbitrary detention.

[34] UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, ¶ 2 (2012), https://www.refworld.org/docid/503489533b8.html [hereinafter Detention Guidelines].

[35] Detention Guidelines, ¶ 18.

[36] Detention Guidelines, ¶ 20.

[37] Detention Guidelines, ¶¶ 47(iii) and 47(iv).

[38] Detention Guidelines, ¶ 43.

[39] Detention Guidelines, ¶ 43.

[40] UNHCR notes that it has previously engaged the U.S. government with respect to its detention practices in expedited removal and their (lack of) compatibility with international law. More specifically, UNHCR submitted a comment in February 1997 in response to Proposed Rules intended to implement the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), which included provisions on expedited removal. In its comments, UNHCR recommended that (1) the credible fear standard be modified; (2) asylum-seekers not be subject to mandatory detention; (3) at-risk groups not be placed in expedited procedures; (4) meaningful review procedures for expedited removal orders be established; (5) immigration officials receive appropriate training; (6) asylum-seekers be provided information about the expedited removal process; and, (7) asylum-seekers have meaningful access to counsel and interpreters. In addition, UNHCR has previously stated its concern about the use of detention to deter asylum-seekers. *See, e.g.*, Letter from Guenet Guebre-Christos, Regional Representative, UNHCR Regional Office for the United States and the Caribbean, to Becky Sharpless, Florida Immigrant Advocacy Center (Apr. 12, 2002) (submitted by FIAC in legal challenge to mandatory detention of Haitian asylum-seekers, Moise v. Bulgur); Letter from Guenet Guebre-Christos, Regional Representative, UNHCR Regional Office for the United States and the Caribbean, to John Ashcroft, Attorney General, U.S. Dep't of Justice (Mar. 28, 2003).

The next section of the Proposed Rule requires immigration judges to consider applicable legal precedent when reviewing a negative determination of credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. This includes administrative precedent from the BIA, decisions issued by the Attorney General, decisions of the circuit courts binding where the reviewing immigration judge sits, and decisions of the Supreme Court of the United States.[41] Currently, where there is no law in point in their circuit, adjudicators may to apply the most favorable law from all circuit courts, which has taken disparate positions on key legal issues involved in evaluating an asylum-seeker's eligibility for protection. [42] Consequently, this provision may result in further precluding persons seeking international protection from accessing full asylum procedures.[43]

UNHCR acknowledges that states may wish to include special provisions for dealing expeditiously with those applications which are "so obviously without foundation as not to merit full examination."[44] However, the standard for such procedures must be set cautiously in order to remove the possibility of the "grave consequences" of erroneously excluding those in need of protection.[45] This permits a state to screen out "clearly abusive" or "manifestly unfounded" claims—that is, those that are clearly fraudulent or not related to the criteria for granting refugee status.[46] As discussed below, UNHCR observes that, even prior to this Proposed Rule, the U.S. threshold for credible fear screenings—requiring a "significant possibility" that the applicant can establish eligibility for protection in a full proceeding—was inconsistent with this standard.[47] Now, UNHCR is concerned that relying on less favorable precedent will have the practical effect in some cases of further shifting that threshold away from the international standard. Consequently, this provision may lead to refugees being denied access to fair and efficient status determination procedures, refused protection, and returned to places where their lives and safety are in danger, in violation of Article 33(1) of the 1951 Convention.

UNHCR recommends that the Government continue to permit immigration judges to assess all relevant authorities and give them their due weight when reviewing negative fear determinations. This partially mitigates the risk that such determinations are inconsistent with international law, which requires that adjudicators use cautious thresholds during screening processes.

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[41] Proposed Rule on Asylum and Withholding, p. 36,367.

[42] Case law governing the definition of who qualifies as a "refugee" is not consistent across U.S. circuit courts. For instance, varying definitions of what constitutes a particular social group can result in inconsistent decisions among Circuit Courts. *See, e.g.*, B. Robert Owens, *What is a Social Group in the Eyes of the Law? Knowledge Work in Refugee-Status Determination*, 43 L. AND SOC. INQUIRY 1257 (2018) (summarizing the changing interpretations of a "particular social group" in U.S. Courts).

[43] For instance, immigration judges sitting in border regions may be bound by circuit case law that differs from immigration judges who sit in other areas of the country. After asylum-seekers pass screening and if they are released, many relocate to places all across the country to join their sponsors and pursue their claims in full. Thus, requiring immigration judges to apply the law of the circuit where they sit in reviewing in a negative fear determination may not be representative of the asylum-seeker's likelihood of establishing their eligibility in full proceedings. For a complete analysis on the inconsistencies in asylum and refugee determinations across the United States, see Owens, *What is a Social Group?* (summarizing the changing interpretations of a "particular social group" in U.S. Courts); *and* Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (analyzing the significant disparities in asylum and refugee determinations among U.S. courts).

[44] UNHCR Executive Committee 34th session, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, ¶ 97(2)(e), U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (1983), https://www.refworld.org/docid/3ae68c630.html [hereinafter ExCom (1983)].

[45] *Id*.

[46] *Id*.

[47] UNHCR notes that it has previously engaged the U.S. government with respect to its fear screening practices in expedited removal and their (lack of) compatibility with international law. More specifically, UNHCR submitted a comment in February 1997 in response to Proposed Rules intended to implement IIRIRA and the AEDPA, which included provisions on credible fear screenings. In those comments, UNHCR recommended that the credible fear standard be modified to conform with international law on asylum screening. *See supra*, note 37.

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3. DHS-Specific Procedures in Expedited Removal and Credible Fear and Their Potential Impact on Detention

The Proposed Rule removes from DOJ regulations provisions related to expedited removal and credible fear that were transferred from the legacy Immigration and Naturalization Service (INS) in 2003. All of the provisions under 8 C.F.R. § 1235 were originally transferred in whole to DOJ on the basis that "nearly all of the provisions of this part affect bond hearings before immigration judges."[48] Now, however, the Proposed Rule seeks to remove certain sections that it suggests do not have relevance to DOJ, while leaving intact other provisions.[49]

UNHCR observes that as originally noted in the 2003 transfer justification, at least one of the sections removed includes reference to custody determination authority, specifically as it relates to parole.[50] As expressed above[51], international human and refugee rights law prohibit the arbitrary detention of asylum-seekers.[52] To the extent that the removal of any of these provisions would eliminate an independent review of DHS custody decisions or subject an asylum-seeker to mandatory detention, elimination of those provisions would run counter to that prohibition.

UNHCR recommends that the Government strike the removal of any provision that would negatively impact access to custody determinations for those who meet the credible fear standard or the reasonable possibility standard for screening.

4. Reasonable Possibility as the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations for Non-citizens in Expedited Removal Proceedings and Stowaways

The Proposed Rule raises the standard of proof for statutory withholding and torture-related fear determinations from a "significant possibility" of being able to establish eligibility for protection in full proceedings to a "reasonable possibility" that the applicant would be persecuted or tortured.[53] This heightened standard, especially in combination with the changes to the refugee definition contained in other provisions of the Proposed Rule,[54] will reduce access to asylum procedures for people in need of international protection, elevating the risk of refoulement.

Raising the threshold that individuals must meet to have their claims fully considered fails to advance the fundamental protections of the 1951 Convention and its 1967 Protocol. Given the very preliminary nature of screening of asylum and withholding claims, international law requires that the standards applied therein must guard against the risk that refugees are returned to places

[48] Proposed Rule on Asylum and Withholding, p. 36,267; *see also* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9826 (Feb. 28, 2003).
[49] Proposed Rule on Asylum and Withholding, p. 36,267.
[50] *See* 8 C.F.R. § 1235.3(b)(4)(ii)
[51] *See* Detention Guidelines, *supra*, note 34.
[52] *See* Detention Guidelines ¶ 2.
[53] Proposed Rule on Asylum and Withholding, 36,268. The "significant possibility" standard requires that an individual demonstrate a "substantial and realistic possibility of success" on the merits of an application for asylum, withholding of removal, or CAT protection; the individual does not have to "show that he or she is more likely than not going to succeed when before an immigration judge." *See* U.S. Citizenship & Immigration Services, *Asylum Division Officer Training Course: Credible Fear of Persecution and Torture Determinations* 14-16 (Feb. 13, 2017). Thus, in the credible fear of torture context, "the applicant must show there is a significant possibility that he or she could establish in a full hearing that it is more likely than not he or she would be tortured in that country." *Id*. at 36. The "reasonable possibility" standard, which sets a higher threshold than "significant possibility," is the same as a well-founded fear of persecution in an asylum case. U.S. Citizenship & Immigration Services, *Reasonable Fear of Persecution and Torture Determinations* 11 (Feb. 13, 2017). It requires that an applicant establish a reasonable possibility that he or she would be persecuted or tortured in the country of removal. *Id*. at 10.
[54] Proposed Rule on Asylum and Withholding, p. 36,280.

where they face persecution (direct refoulement) or onward removal to an unsafe country (indirect refoulement) which would violate the core principle of non-refoulement that is enshrined in Article 33(1) of the 1951 Convention. As explained above, cases that may be screened out in this context can only be manifestly unfounded or clearly abusive claims (that is, those claims that are clearly fraudulent or not related to the criteria for granting refugee status[55]). All other claims should proceed for a full determination on the merits. The significant possibility standard adopted by the United States was already out of step with the international standard, and further elevating the threshold to a reasonable possibility will widen that gap.[56]

UNHCR recommends that these heightened standards of proof not be implemented. Further, the existing standard of proof should be revisited and brought in line with international standards.

5. Proposed Amendments to the Credible Fear Screening Process

The Proposed Rule introduces changes related to the criteria for adjudicating fear determinations, as well as to an asylum-seeker's ability to obtain immigration judge review ("IJ review") of a negative fear determination. Asylum Pre-Screening Officers (APSOs) must specifically consider whether an applicant could internally relocate to avoid persecution or torture in their country of origin and must enter negative fear determinations in cases where an applicant appears subject to a mandatory bar to asylum or to statutory withholding, unless the applicant can establish a reasonable possibility of torture.[57] In cases where an APSO makes a negative fear determination, an asylum-seeker must affirmatively elect to undergo IJ review; an asylum-seeker's failure to indicate that they wish to proceed with an IJ review will be treated as declining a request for such review.[58] UNHCR has two primary concerns: first, that persons who merit international protection will be inappropriately screened out by APSOs, and second, there will not be adequate review of those decisions.

International standards on screening indicate that only those claims that are manifestly unfounded or clearly abusive (that is, clearly fraudulent or unrelated to the criteria for granting refugee status) should be screened out.[59] UNHCR's position is that it is contrary to international law to deprive asylum-seekers of access to full procedures based on the possibility of an internal relocation alternative or when the individual may be subject to exclusion; these are, after all, questions intrinsically related to the criteria for granting refugee status.

Looking first at exclusion,[60] UNHCR notes that this inquiry involves complex factual and legal questions involving not only international refugee law, but in many cases international humanitarian law and international criminal law. This cannot be completed adequately in a

[55] UNHCR Executive Committee 34th session, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, ¶ 97(2)(e), U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (1983), https://www.refworld.org/docid/3ae68c630.html [hereinafter ExCom (1983)].
[56] When the U.S. Congress created the credible fear screening, it recognized that the "substantial possibility" standard exceeded the internationally-recognized "manifestly unfounded" standard, but nonetheless specified that the former was "intended to be a low screening standard for admission into the usual full asylum process." *See* 142 Cong. Rec. S11491-02 (Sep. 27, 1996) (statement of Sen. Hatch); *see also* Brief for UNHCR as Amicus Curiae, at 21-22; *East Bay Sanctuary Covenant v. Barr*, Nos. 19-16487, 19-16773, 2018 WL 5396739 (C.A.9.) (Oct. 15, 2019) (stating that the higher bar required to demonstrate persecution for withholding of removal will result in refoulement of legitimate refugees under the Convention).
[57] Proposed Rule on Asylum and Withholding, p. 36,282.
[58] Proposed Rule on Asylum and Withholding, p. 36,298.
[59] UNHCR Executive Committee 34th session, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, ¶ 97(2)(e), U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (1983), https://www.refworld.org/docid/3ae68c630.html [hereinafter ExCom (1983)].
[60] UNHCR notes that the mandatory bars to asylum in US law both overlap with grounds for exclusion in the 1951 Convention to some extent and go beyond that framework. For further discussion, *see* Factors for Consideration in Discretionary Determinations, *infra*.

screening interview, particularly given the procedural shortcomings (such as lack of legal assistance, information about the procedure, translation and interpretation, and time to recover from recent trauma) that often occur in these contexts. Especially in light of the possible serious consequences for the individual—an asylum-seeker who wrongfully receives a negative fear determination could be returned to a place where they will suffer persecution and even death—UNHCR considers it inappropriate in principle to consider bars to asylum in screening.[61]

Turning next to internal relocation, UNHCR notes that this concept also should be addressed only in a full merits hearing, and not during screening. "A consideration of internal flight or relocation necessitates regard for the personal circumstances of the individual claimant and the conditions in the country for which the internal flight or relocation alternative is proposed." [62] Accordingly, because an asylum-seeker has a limited opportunity to present the facts of his or her case, much less gather and present country conditions or other evidence responsive to the possibility and reasonableness of internal relocation, this factor should not affect the outcome of a screening interview.

Even prior to this proposed regulation, UNHCR observed that the U.S. system was already at variance with international law with respect to certain exclusion categories.[63] The 1951 Convention and 1967 Protocol lay out a clear framework for determining who is a refugee and is therefore entitled to the rights enumerated in the Convention itself.[64] The Convention establishes an exhaustive framework for identifying persons who should be excluded from refugee protection, yet U.S. law has evolved in a way that has expanded bars to protection beyond those provided for in the Convention's exhaustive exclusion framework.[65] Accordingly, when the Proposed Rule suggests incorporating those bars into screening procedures, it moves the U.S. regime further away from the framework contemplated under the 1951 Convention and its 1967 Protocol.

Accelerated procedures must uphold key safeguards to minimize the risk of refoulement, including the rights of an asylum-seeker to receive adequate information and to appeal a negative fear determination. UNHCR has acknowledged that accelerated procedures can benefit both States and applicants by allowing for the efficient identification of individuals with possible international protection needs.[66] However, international standards require certain due process considerations in accelerated procedures to minimize the risk of a flawed decision.[67] The Proposed Rule does not make clear whether asylum-seekers will be informed of the exact actions they need to take to obtain IJ review of a negative fear determination. In UNHCR's experience, it is often challenging

[61] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶ 31, U.N. Doc. HCR/GIP/03/05 (Sep. 2003) ("Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures . . . .").
[62] UNHCR, *Guidelines on International Protection No. 4: Internal Flight or Relocation Alternative*, ¶ 4, U.N. Doc. HCR/GIP/03/04 (Jul. 23, 2003).
[63] UNHCR observes that it has offered observations on this topic to the U.S. government in previous comments on regulatory proposals (*see, e.g.* 1997 comments related to regulatory proposals following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)). *See* note 47, *supra*.
[64] This framework is discussed more extensively *infra* at Section III.C.6, p. 46 of this Comment. In addition, UNHCR previously submitted comments on Proposed Rules issued by U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) in February 2020 that extensively address the exclusion framework under the 1951 Convention and 1967 Protocol (submitted Mar. 3, 2020). This framework includes criteria for identifying persons who, while they would otherwise have the characteristics of refugees, should nonetheless be excluded from refugee status, which appear under Articles 1D-F. 1951 Convention, Article 1D-F. Additionally, refugees who pose security risks are denied the benefit of non-refoulement under Article 33(2). Refugee Convention, art. 33(2).
[65] *See* Refugee Convention, art. 1E, 1F (detailing when persons may be excluded from refugee status).
[66] *See, e.g.*, UNHCR, *Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union*, 5-6 (July 25, 2018) https://www.refworld.org/docid/5b589eef4.html.
[67] *Id.* at 13; *see also* UNHCR, *UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures (in the European Context)*, ¶¶ 11-12 (Jan. 1992), https://www.unhcr.org/en-us/protection/operations/4deccc639/unhcr-statement-right-effective-remedy-relation-accelerated-asylum-procedures.html.

for asylum-seekers to obtain representation during screening, and those without counsel may have received limited or no legal information or might not have a full understanding of their rights or the consequences of failing to exercise them. Moreover, even with legal representation, it will often be difficult if not impossible to prove the negative (that internal relocation is not possible), in the limited setting and under the time pressures of a pre-screening interview.

As a result, UNHCR is concerned that a greater number of asylum-seekers will be prevented from accessing IJ review of a negative fear determination if the Proposed Rule's new requirement that they affirmatively elect to appeal is adopted. Coupled with the heightened standards of proof for screening interviews and rules around how adjudicators must decide cases at the screening stage, it is especially important that individuals have access to IJ reviews.

UNHCR recommends that the government not implement this provision. Specifically, UNHCR recommends that: the possibility of internal relocation not be included as a factor leading to a negative fear determination; asylum-seekers who appear potentially subject to a bar be provided with access to full asylum procedures for careful consideration of that bar; and that asylum-seekers have access to IJ review of negative fear determinations unless they affirmatively decline that opportunity, having been informed in a language they understand of the consequences of doing so.

B. I-589: Application for Asylum, Withholding of Removal, and CAT Protection

1. Frivolous Applications

i) The Proposed Rule's suggested changes

The Proposed Rule introduces several amendments to the identification and processing of "frivolous" asylum applications. Applicants whose claims are found to be frivolous are precluded from filing any other asylum claim in the future or receiving any form of complementary protection articulated under the Immigration and Nationality Act (they may still file a claim for withholding of removal,[68] but that status, as discussed elsewhere,[69] fails to measure up to the standards in the 1951 Convention). UNHCR notes with concern that this Proposed Rule will have a negative impact on the ability of applicants to obtain a fair and efficient evaluation of their asylum claim and will deter those in need of protection from coming forward now and in the future.

The Proposed Rule broadens the definition of what constitutes a "frivolous" application for asylum. While the current regulatory definition of "frivolous" requires a finding of deliberate fabrication of material elements,[70] the new provision would broaden the definition to apply to asylum applications where the application:

[68] INA § 208(d)(6) ("If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter"); 8 CFR § 1208.20. This statutory provision has been interpreted to mean ineligibility for all immigration benefits listed under the Immigration and Nationality Act (INA). *See* EOIR IJ Benchbook, "Frivolous Finding Standard Language" at 1 ("A finding of submission of a frivolous application shall render the respondent permanently ineligible for any benefit under the Act, aside from withholding of removal…Relief under Article III of the Convention Against Torture is not barred by a frivolous finding because it is not a benefit under the Act). *See also* Proposed Rule on Asylum and Withholding, 85 Fed. Reg. at 36,304 ("1208.20(g): For the purposes of this section, a finding that an alien filed a knowingly frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issue pursued to [CAT]'s implementing legislation"]

[69] *See* Section II, *supra* p. 2.

[70] 8 CFR § 1208.20

- contains a fabricated essential element;
- is premised upon false or fabricated evidence, unless the application would have been granted without the false or fabricated evidence;
- is filed without regard to the merits of the claim; or
- is clearly foreclosed by applicable law.[71]

In addition to modifying the definitional terms used to identify "frivolous" applications, the Proposed Rule also alters the process by which frivolous applications may be identified. Current regulations provide that only immigration judges or the Board of Immigration Appeals (BIA) may issue a finding of a frivolous asylum application.[72] The Proposed Rule, however, will extend this authority to asylum officers adjudicating affirmative asylum applications.[73]

Further, the Proposed Rule seeks to eliminate the existing regulations that require an adjudicator to provide sufficient opportunity to an applicant to account for any discrepancies or implausible aspects before issuing a frivolousness finding,[74] thereby allowing all adjudicators (including asylum officers, immigration judges, and the BIA) to reach a frivolousness finding without providing additional opportunities for the applicant to account for such issues. The proposed regulations suggest that the written warning against frivolous asylum applications found in the Form I-589 should be sufficient notice.[75]

The Proposed Rule makes two further changes. First, the Proposed Rule introduces a definition of "knowingly" filing a frivolous application for asylum, as it pertains to penalization for such an application.[76] Under current law, the term "knowingly" is not defined by current statute or regulations.[77] The Proposed Rule recommends defining "knowingly" as requiring "actual knowledge of the frivolousness or willful blindness" toward it.[78] The new rule further clarifies that "willful blindness" means that the non-citizen "was aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise."[79]

Those whose claims are found to be frivolous—both under the expanded definition and according to the current definition—are rendered permanently ineligible for any future immigration benefits, except for statutory withholding of removal or protection under CAT.[80] This includes asylum claims: the individual will not be able to re-file the dismissed claim, or file any future claim

[71] Proposed Rule on Asylum and Withholding, pp. 36,274-75.
[72] INA § 208(d)(6).
[73] Under the new regulations, if an asylum officer refers an asylum application to an immigration judge because of alleged frivolousness, an applicant will not be rendered permanently ineligible for future immigration benefits including asylum, unless the immigration judge or BIA makes a specific finding of frivolousness. Proposed Rule on Asylum and Withholding, p. 36304 (8 C.F.R. 1208.20(b))
[74] These regulations can be found in the existing regulations of 8 CFR § 208.20 or 8 CFR § 1208.20
[75] Proposed Rule on Asylum and Withholding, p. 36,276.
[76] Proposed Rule on Asylum and Withholding, p. 36,273.
[77] INA § 208(d)(6) (providing that a non-citizen "shall be permanently ineligible for any benefits" under immigration law if the Attorney General determines that the non-citizen "knowingly made a frivolous application for asylum and the alien has received notice…of the consequences of knowingly filing a frivolous application.")
[78] Proposed Rule on Asylum and Withholding, p. 36,304.
[79] Proposed Rule on Asylum and Withholding, pp. 36,273-74.
[80] Proposed Rule on Asylum and Withholding, p. 36,277*; see also* Proposed Rule on Asylum and Withholding, p. 36,273 ("Under section 208(d)(6) of the INA, 8 U.S.C. § 1158(d)(6), "[i]f the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received […notice], the alien shall be permanently ineligible for any benefits under this chapter.") This statutory provision has been interpreted to mean ineligibility for all immigration benefits listed under the Immigration and Nationality Act (INA) or the "Act." *See* EOIR IJ Benchbook, "Frivolous Finding Standard Language" at 1 ("A finding of submission of a frivolous application shall render the respondent permanently ineligible for any benefit under the Act, aside from withholding of removal…Relief under Article III of the Convention Against Torture is not barred by a frivolous finding because it is not a benefit under the Act.").

(including those on new or different grounds).[81] That individual will also be rendered ineligible for most forms of complementary protection, such as protection under trafficking laws.[82] While the individual will still be eligible for withholding of removal or CAT claims, those are insufficient to meet international standards [see discussion on asylum-and-withholding-only proceedings at p. 6, *supra*].

Finally, the Proposed Rule creates a new mechanism by which applicants could avoid being subject to a frivolousness finding and its associated penalties. An applicant could take the following actions to avoid a frivolousness finding: withdrawing his or her application with prejudice; accepting voluntary departure; withdrawing any other applications for relief; and waiving any rights to file an appeal, motion to reopen, or motion to reconsider.[83]

ii) Impact on Asylum-Seekers and Others Seeking International Protection

UNHCR is concerned that persons seeking international protection will be penalized and denied access to international protection by both the substantive and procedural changes (including the ability for asylum officers to determine "frivolousness" in affirmative claims). This may lead to numerous legitimate claims being prematurely dismissed as frivolous (and therefore more applicants blocked from consideration of their claim now and in the future).

First, UNHCR is concerned that the new and amended definitions of "knowingly" and "frivolous" under the Proposed Rule will block even more people from a meaningful evaluation of their asylum claim than under prior definitions. Under the Proposed Rule, to file a frivolous application "knowingly" requires actual knowledge or "willful blindness toward it." UNHCR anticipates that the "willful blindness" element of this definition could be unfairly applied to asylum-seekers, especially those proceeding *pro se*, who do not necessarily grasp the complexities of the asylum and immigration system in the United States.

In addition, UNHCR is troubled that more claims will be found frivolous under the changed definition that includes applications "clearly foreclosed by applicable law." It is very difficult to ascertain what is "clearly foreclosed by applicable law," particularly in light of the constant evolution of asylum law and its interpretation. This is a serious undertaking for even seasoned lawyers, who have access to legal training, legal research tools, and expertise in the area. Indeed, often government and non-government lawyers—and appellate judges interpreting the INA—do not agree on what is "clearly foreclosed by applicable law." Applicants will almost certainly not be able to understand—prior to adjudication—whether their claim is foreclosed by applicable law (and again, if they fail to grasp this concept, they will be penalized by being prohibited from refiling).

Second, the Proposed Rule's procedural changes will have further adverse impacts on persons seeking international protection. Immigration judges are no longer obliged to provide applicants with notice and opportunity to account for issues of frivolousness; this will also likely result in increased numbers of erroneous findings of frivolousness. This change will have an especially acute impact on *pro se* and child asylum applicants who may not be proficient in English, may be illiterate, may be subject to detention with even more limited resources, or may not understand

[81] Asylum is a benefit listed in INA § 208, and Motions to Reopen and Reconsider are benefits provided in INA §§ 240(c)(6)-(7). Therefore, as benefits under the Act, they will be unavailable to a person subject to the frivolousness bar of INA § 208(d)(6).
[82] The various forms of complementary protection, such as T visas (victims of trafficking), U visas (victims of crime), Temporary Protection Status, and other forms of lawful status are generally established by the INA; therefore, as benefits under the Act, they will be unavailable to a person subject to the INA § 208(d)(6) frivolousness bar.
[83] Proposed Rule on Asylum and Withholding, p. 36,277.

the contours of, for example, applicable law that will influence whether their applications would be considered frivolous.

Third, the new rule disadvantages applicants by limiting forms of protection available to them. UNHCR is concerned that those whose claims are dismissed as frivolous are barred not only from refiling their current asylum claim, but also from any future asylum claims (including those on new grounds). UNHCR notes that withholding of removal will still be available to these individuals, but reiterates its concern that withholding of removal falls short of international standards for protection.[84]

The rule also limits individuals' ability to have access to complementary forms of protection, given that applicants may be strongly incentivized to avoid a threatened frivolousness finding by withdrawing their applications for asylum and any other forms of relief, even though international protection needs may exist.[85] Individuals may be eligible for multiple forms of relief and protection that are complementary to asylum, withholding of removal, and protection under CAT. For example, victims of crime, human trafficking, and other violence and abuses may be entitled to protections and relief such as VAWA, U visas, T visas, and SIJS. Individuals should not be penalized for pursuing those possibilities when relevant to their situation, especially in light of the challenges that many may face obtaining asylum due to the narrowing of the refugee definition in the Proposed Rule.[86]

Finally, UNHCR is concerned that the provision on withdrawing frivolous applications may push individuals seeking international protection to abandon their claims in order to avoid the strict penalties that would correspond to those applications judged frivolous. Individuals may be intimidated when they receive a warning that their application may be found to be frivolous and inclined to take action to avoid the consequences of a frivolousness finding, even if one would not be warranted under the circumstances. As discussed above, a frivolousness finding triggers permanent ineligibility for benefits under immigration law, including future applications for asylum, with the exception of withholding of removal and protection under CAT; therefore, the incentive to avoid such consequences will likely be high. *Pro se* and child applicants may be disproportionately impacted in this regard.

iii) International standards

International law utilizes a standard of "clearly abusive" or "manifestly unfounded" when it comes to screening out applications that do not merit full adjudication – these concepts were introduced by the Executive Committee in 1983.[87] UNHCR is concerned that the Proposed Rule deviates significantly from this standard. UNHCR notes that the concept of "frivolousness" in U.S. law was

[84] UNHCR recognizes that an applicant who previously filed a "frivolous" application could still apply for withholding of removal or CAT protection. However, UNHCR notes that these are not sufficient forms of protection to fulfill the U.S.'s obligations under the 1951 Convention and 1967 Protocol. *See* Refugee Convention, art. 1 (articulating criteria for those to be recognized under the Convention and Protocol, and guaranteed the rights therein); *cf id.* art. 33 (providing protection from non-refoulement only, as opposed to guaranteeing the rights in other articles of the Convention). To be in compliance with the 1951 Convention / 1967 Protocol, the state must use an adjudicatory standard in line with Article 1, not Article 33.

[85] *See* Chapter 1 of these comments (addressing the availability and provision of complementary protection to persons of UNHCR's concern); *Providing International Protection Including Through Complementary Forms of Protection*, ¶ 26 (stating that "complementary protection . . . should be granted to persons in need of international protection who fall outside the scope of the 1951 Convention"); *Complementary Forms of Protection*, ¶ 31 (Apr. 2001), https://www.refworld.org/docid/3b20a7014.html ("[States] should implement complementary protection in such a way as to ensure the highest degree of stability and certainty possible in the circumstances. . . .").

[86] UNHCR Handbook, ¶ 192

[87] ExCom (1983). These standards are in use in many jurisdictions.

already not in line with the international framework. It is worrying, then, to see the concept further expanded, with very limited safeguards, and UNHCR is concerned that many more people will be erroneously blocked from full consideration of their claims.

The Executive Committee of UNHCR,[88] during its 34th Session, recognized that it may be useful to derive consensus among States on how to address applications that are considered "clearly abusive" or "manifestly unfounded."[89] These concepts are somewhat distinct from the "frivolous" standard articulated in U.S. law, having been generally understood to encompass claims that are "clearly fraudulent" or "not related to the criteria for granting refugee status under the 1951 Convention...nor to any other criteria justifying the granting of asylum."[90] It has been clarified that these terms generally apply to cases involving individuals who *clearly* do not need international protection,[91] and the standard for evaluating whether a claim is clearly abusive or manifestly unfounded should not be too broad.[92] Moreover, UNHCR has explained that false statements, or more broadly, false or falsified 'evidence,' do not in and of themselves make a claim clearly fraudulent or manifestly unfounded, though that is what the Proposed Rule contemplates.[93]

With these substantive definitions in mind, UNHCR urges that procedures for manifestly unfounded or clearly abusive applications include at minimum certain procedural safeguards.[94] While the Executive Committee has recognized "that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure," it has also articulated particular safeguards that should be implemented when assessing whether an application for refugee status is manifestly unfounded or clearly abusive because of "the grave consequences of an erroneous determination."[95] The safeguards include:

> i) "a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority to determine refugee status;"
>
> ii) that "the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;" and

[88] The Executive Committee of the UNHCR Programme is a group of 51 countries that advises UNHCR in the exercise of its protection mandate. The Executive Committee, among other things, issues Executive Committee Conclusions, which are arrived at by consensus among the 51 Member States, including the United States, and which serve under international law as evidence of evolving State practice with respect to refugee protection. ExCom Conclusion No. 30 refers to manifestly unfounded and / or clearly abusive asylum claims. *See* "Executive Committee" at https://www.unhcr.org/executive-committee.html (last accessed Jul. 15, 2020).
[89] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes*, ¶¶ 27-28; UNHCR, *Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union* at 4-5.
[90] ExCom (1983).
[91] *See* ExCom (1983) (recommending that the "manifestly unfounded or abusive character of the application" be established by a competent authority), *and* UNHCR, *The 10-Point Plan in Action, 2016 Update*; *Chapter 6 Differentiated Processes and Procedures*, 175 (Dec. 2016), https://www.refworld.org/docid/584183c74.html (stating that accelerated procedures can be used when there are a large number of claimants "who manifestly have no international protection needs").
[92] *See* ExCom (1983), ¶ d (stating that "clearly abusive" or "manifestly unfounded" claims "are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status" in the Refugee Convention). *See also* UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems*, 177 Handbook for Parliamentarians No. 27 (2017) https://www.refworld.org/docid/5a9d57554.html (outlining situations in which accelerated procedures are not appropriate).
[93] UNHCR, *UNHCR Comments on the European Commission Proposal for an Asylum Procedures Regulations – Com (2016) 467*, at 30 (Apr. 2019), https://www.refworld.org/docid/5cb597a27.html; UNHCR, *Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to Refugee Status Determination [RSD] Under UNHCR's Mandate*, at 20 (2020), https://www.refworld.org/docid/5a2657e44.html.
[94] UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 3 European Series 2, p. 397 (Dec. 1992); ExCom (1983).
[95] ExCom (1983).

iii) "an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory."[96]

In such an assessment, should any issue arise that may warrant a full examination of the application, the procedure must accommodate that.

Additionally, UNHCR emphasizes that applicants should receive the benefit of the doubt when presenting their claims notwithstanding that they are unable to substantiate all elements of their case, if they are generally credible, their statements are coherent and plausible, and they are not counter to generally known facts.[97] Applying the notions of abusive, fraudulent, or manifestly unfounded claims to asylum-seekers can be problematic because "not all asylum-seekers have the capacity without assistance to articulate clearly and comprehensively why they left, and certainly not where there is an element of fear or distrust involved, or where other factors are at play."[98] These elements may be particularly present in claims of *pro se* applicants, children, and other vulnerable asylum-seekers, as well as in claims filed by individuals who have consulted certain 'notarios' who make misrepresentations as to their qualifications or other false statements that victimize the immigrant community, or those who retain ineffective counsel.[99]

UNHCR emphasizes that applicants should in any event not be penalized for merely filing applications deemed "frivolous" under a heightened standard. Individuals should certainly not be automatically precluded from filing future asylum applications, nor barred from seeking complementary forms of protection, unless the new asylum application contains no new elements other than those already examined fully in previous proceedings.[100]

In sum, UNHCR is deeply concerned that the expanded definition of "frivolousness" articulated in the new rule takes U.S. law even further away from international standards than what is currently in place. Further, the procedural restrictions imposed by the Proposed Rule will negatively affect asylum-seekers, leading to a far broader application of the concept than would be seen as appropriate under international law.

UNHCR recommends that the Government adopt the "manifestly unfounded / clearly abusive" framework envisioned under international law if it wishes to address "frivolous" applications. Regardless of the definition used, necessary procedural safeguards, as detailed above, should be incorporated into the process. Finally, UNHCR urges that any current or future immigration penalties for filing frivolous applications not be implemented.

2. Pretermission of Legally Insufficient Applications

i) The Proposed Rule's suggested changes

The Proposed Rule creates a new provision that allows immigration judges to pretermit and deny applications for asylum, withholding of removal, or protection under CAT where the applicant has

[96] ExCom (1983).
[97] UNHCR Handbook, ¶¶ 203-204.
[98] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes*, ¶ 28.
[99] *See, e.g.*, *About Notario Fraud*, Amer. Bar Ass'n (Jul. 19, 2018), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/.
[100] UNHCR, *Global Consultations on International Protection/Third Track*, ¶ 50 (stating that a single procedure for adjudicating both refugee protection and complementary forms of protection is the "clearest and swiftest" means for identifying those in need or protection); *see also* discussion at *supra* Section III.B.1.iii, p. 14.

not established a *prima facie* claim for relief or protection under applicable law, without a hearing.[101] Such a provision does not exist under current regulations. Much like the provision on frivolous claims, UNHCR is concerned that this new provision would run afoul of due process requirements and standards for fair and efficient adjudication of asylum claims, including the concepts of "manifestly unfounded" or "clearly abusive," discussed above.[102]

Under the Proposed Rule, the immigration judge's decision to pretermit would be based on the Form I-589 and any supporting evidence (and would not require an interview).[103] The rule further proposes that the Department of Homeland Security (DHS) can move for pretermission of an application through an oral or written motion.[104] In cases where DHS moves for pretermission, the immigration judge must consider any response from the non-citizen to the motion before making a decision.[105] In cases where the immigration judge elects on his or her own authority to pretermit, the immigration judge must provide DHS and the non-citizen with 10 days' notice prior to entering an order and must consider any filings received in response to that notice before making a decision.[106] Whether pretermission is initiated by DHS or an immigration judge, the regulation appears to limit challenges by applicants to written responses;[107] in neither situation would the immigration judge be required to conduct a hearing prior to pretermitting and denying an application.[108]

ii) Impact on Asylum-Seekers and Others of Concern to UNHCR

UNHCR is concerned that this provision will result in the summary dismissal of large numbers of asylum applications, leading to a significant number of asylum-seekers who will never receive a hearing to present their claim. Further, UNHCR is concerned by the short time period that applicants have to respond, in writing, to a motion or notice of pretermission. UNHCR is aware, for example, that it can sometimes take nearly the entire response period of ten days for the mail from DHS or the immigration court to reach detained asylum-seekers. As a result, even if an applicant had the technical resources to challenge such motion or notice, the time to do so may have already passed by the time the applicant is notified.[109] Moreover, UNHCR is concerned that the new regulation does not specify whether or how an applicant can challenge the denial of an application that is pretermitted. For instance, the Proposed Rule does not address whether asylum-seekers can appeal the denial of a pretermitted application or refile the application for re-consideration. Under all scenarios, the lack of due process protections implicated in the proposed pretermission regulatory framework is concerning.

Pretermission of applications, while worrying for all asylum-seekers, will likely have a heavy adverse impact on *pro se* applicants who have to prepare their applications without assistance;

[101] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[102] *See* discussion on international standards regarding frivolous asylum applications, *supra*, p. 18.
[103] Proposed Rule on Asylum and Withholding, p. 36,277.
[104] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[105] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[106] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[107] Proposed Rule on Asylum and Withholding, p. 36,302.
[108] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.
[109] UNHCR's concern is based on an understanding that the time to reply to a motion or notice of pretermission would begin to run either at the time that DHS effects service of its motion or when the immigration court mails a notice. Under the Immigration Court Practice Manual, a non-detained individual has 10 days to submit a response to a response to a written motion filed by the opposing party at least 15 days before a hearing (filing deadlines for detained individuals are as specified by the immigration court). Executive Office for Immigration Review, *Immigration Court Practice Manual*, ch. 3.1(b)(i) (July 2, 2020). In addition, UNHCR observes that the 10-day period allowed to respond to an immigration judge's notice of pretermission may begin to run when notice is mailed if the same general principles apply as to other aspects of immigration court practice. *See id*. at ch. 6.2(b) (explaining that, to appeal an immigration judge's decision, the Notice of Appeal must be received by the Board of Immigration Appeals no later than 30 calendar days after the immigration judge renders an oral decision or *mails a written decision*) (emphasis added).

may not speak English; may not be familiar with legal standards and requirements related to these forms of protection; and/or may not understand how to challenge a motion for pretermission by a seasoned government attorney. Similarly, many *pro se* applicants would be ill-equipped to respond were they to receive notice that the immigration judge planned to pretermit and deny their applications. As a result, the Proposed Rule may discriminate against *pro se* applicants who cannot articulate in writing an initial summary of the basis of their claim that an immigration judge finds sufficient, possibly due to their trauma history, age, English proficiency, level of education, lack of familiarity with U.S. law, and/or other factors.

UNHCR further observes that, as with other provisions of the Proposed Rule, there does not appear to be an exception to pretermission for children, and it considers that the application of this rule to such a vulnerable group would be especially damaging to addressing their possible international protection needs.

iii) International Standards

Under international law, States are given leeway to establish appropriate procedures for determining who is or is not entitled to asylum.[110] However, States should always take note that an asylum applicant is "in a particularly vulnerable situation . . . in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own."[111] The framework for examining asylum applications should have "an understanding of an applicant's particular difficulties and needs,"[112] and—despite variance in that framework from state to state—should include essential guarantees and basic requirements.[113] Those requirements include, among others:

- The applicant should receive the necessary guidance as to the procedures to be followed;
- The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his or her case to the authorities;
- If not recognized, the applicant should be given a reasonable time to appeal for a formal reconsideration of the decision.

UNHCR has deep concerns that the provision on pretermission of applications in the Proposed Rule not only fails to comport with these basic requirements but also imposes harsh and disproportionate penalties in a context where applicants themselves are simply not provided with the assistance or opportunity to present their asylum cases effectively. International law suggests that, in appropriate circumstances, incomplete applications may be considered implicitly withdrawn and result in the provisional discontinuation of the application.[114] In some cases, it may be appropriate to consider an application implicitly withdrawn, for example, where the applicant without good cause "failed to respond to requests to provide information essential to his

[110] UNHCR Handbook, ¶ 189.
[111] UNHCR Handbook, ¶ 190.
[112] UNHCR Handbook, ¶ 190.
[113] UNHCR Handbook, ¶ 192.
[114] *See* UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, Council Document 14203/04, Asile 64, of 9 November 2004 (Feb. 10, 2005), at 25-26; European Union: Council of the European Union, Council Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 2013 O.J. (L. 180/60 -180/95), arts. 27, 28(1)(a). Alternatively, incomplete applications could be rejected if the authorities determine that the application is unfounded. *See id*.

or her application."[115] However, this conclusion should be drawn only where the applicant had the necessary facilities to do so. UNHCR has recommend that any such withdrawal should result in a discontinuation of the proceedings, and not in a rejection of the application, such that reopening the application is possible without any time limits.[116] Otherwise, by rejecting an application and not allowing it to be reopened, international protection needs may not be examined.

UNHCR observes that the U.S. system is already at variance with international standards regarding essential guarantees and basic requirements, as it does not provide applicants with access to interpreters, much less a qualified legal representative who could explain the law and asylum process to them. Without access to interpreters or qualified legal representatives, UNHCR considers an interview or hearing on the merits of the claim to be a necessary facility for asylum-seekers to submit their cases. UNHCR does not consider rejection of an application appropriate unless on the one hand, the applicant has received all relevant information to respond to requests for information, including information about the consequences of failing to do so, in a language that they understand, and on the other, the authorities have fully and fairly examined the applicant's claim on its merits.[117] While it is already problematic that asylum-seekers lack access to interpreters and qualified representatives, the Proposed Rule does not address whether applicants would be given information about the possible pretermission of their application in a language they can understand nor does it provide clear authorities to nonetheless review an application for possible international protection needs. Furthermore, UNHCR is concerned about the lack of a pathway for appeal against pretermission decisions.

UNHCR also notes with concern that the failure to require an interview with an asylum-seeker before pretermitting an asylum application is at variance with international standards. It is acknowledged that, under international law, the relevant facts of an individual case are to be furnished in the first place by an individual themselves.[118] However, asylum applicants, in most cases, "will have arrived with the barest necessities and very frequently even without personal documents."[119] Given that the asylum applicant "who can provide evidence of all his statements will be the exception rather than the rule . . . the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner."[120] The examiner should work with the applicant to draw out the full story, noting that "very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained."[121] Relying merely on a form, and not progressing to an interview (or multiple interviews) with the asylum applicant, will "normally not be sufficient to enable the examiner to reach a decision."[122] Consequently, the provision on pretermission—which examines the application on paper and precludes, in many cases, an interview—falls far short of the relevant international standards.

[115] *See* European Union: Council of the European Union, Council Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 2013, OJ (L. 180/60 -180/95), art. 28(1).
[116] *See* UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards*, pp. 25-26.
[117] UNHCR, *UNHCR Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast) COM (2011) 319 Final*, 12, 13, 21 (Jan. 2012), https://www.refworld.org/docid/4f3281762.html.
[118] UNHCR Handbook, ¶ 195.
[119] UNHCR Handbook, ¶ 196.
[120] UNHCR Handbook, ¶ 196.
[121] UNHCR Handbook, ¶ 201.
[122] UNHCR Handbook, ¶ 200.

UNHCR observes that the Proposed Rule refers to the use of pretermission where the individual fails to establish a *prima facie* case.[123] Under international standards, the *prima facie* approach[124] to refugee status determination should only be used in an inclusive, protectionary manner. Any decision to deny an asylum application requires an individual assessment of the claim,[125] and that assessment should follow the basic procedural requirements described above. Denying applications summarily that appear insufficient without providing applicants with an opportunity to have a personal interview or the chance to challenge the decision could impinge on their rights to be heard and to appeal, which, as discussed, are regarded as minimum procedural guarantees in asylum adjudication.[126]

UNHCR recommends that the Government strike the provision permitting pretermission of applications for asylum, withholding of removal, and protection under CAT. Instead, as a minimum, the Government should implement a framework for asylum adjudication in keeping with international standards, in which an adjudicator (whether at USCIS or in immigration court) can interview the asylum-seeker, preferably in a non-adversarial manner, to ascertain the full set of facts relevant to the case in question.

C. Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal[127]

1. Membership in a Particular Social Group

The Proposed Rule makes significant changes to "particular social group" (PSG) in U.S. adjudication. The Proposed Rule does so by: codification of a heightened standard to define a legally cognizable PSG; the prohibition of 'circularly-defined' PSGs; a non-exhaustive list of PSGs that the government, "in general, will not favorably adjudicate;"; and a procedural requirement that increases the burden of proof on asylum-seekers. UNHCR is concerned that this takes the definition of PSG further away from international standards, while also imposing procedural obstacles that will be hard for many asylum-seekers to overcome.

First, the Proposed Rule codifies case law requiring "that a particular social group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, *and* (3) socially distinct in the society in question"[128] (emphasis added). The Proposed Rule goes on to say that "the particular social group must have existed independently

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[123] Proposed Rule on Asylum and Withholding, pp. 36,277, 36,302.

[124] In international refugee law, "[t]he *prima facie* approach consists of the recognition of refugee status on the basis of readily apparent, objective circumstances in the country of origin . . . indicating that individuals fleeing these circumstances are at risk of harm which brings them within the applicable refugee definition, rather than through an individual assessment." *See* UNHCR, *Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union* at 8, fn. 26 (citing to UNHCR, *Guidelines on International Protection No. 11*).

[125] *See* UNHCR, *Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union* p. 8, fn. 26 (indicating that "decisions to reject [under a *prima facie* approach] require an individual assessment").

[126] UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems* at 156; UNHCR Handbook, ¶192(vi); *see also* UNHCR, *Procedural Standards for RSD Under UNHCR's Mandate*, § 7.1 (Nov. 2003), https://www.refworld.org/docid/42d66dd84.html (outlining the right to appeal, including in situations where there was a breach of procedural fairness that would have limited the applicant's ability to present his or her claim); Committee Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶18(e); *see also* UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes*, ¶¶ 41, 43.

[127] While the analysis in this section is framed in relation to impact on standards applied in domestic asylum adjudications, UNHCR observes with concern that many of the changes articulated in Section C may also impact USCIS overseas adjudications for the purposes of refugee admissions.

[128] Proposed Rule on Asylum and Withholding, p. 36,278 (emphasis added).

of the alleged persecutory acts and cannot be defined exclusively by the alleged harm."[129] Such a requirement takes two distinct approaches to formulating membership of a PSG recognized by international refugee law and requires that an asylum-seeker fulfill both when defining his or her PSG.

Second, the Proposed Rule prohibits purportedly circularly-defined PSGs, noting that a PSG "cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim."[130]

Third, the Proposed Rule narrows the scope of potential PSGs by laying out the following non-exhaustive list of nine circumstances that would generally not be considered sufficient to form the basis of a PSG claim:[131]

1) past or present criminal activity or associations;

2) past or present terrorist activity or association;

3) past or present persecutory activity or association;

4) presence in a country with generalized violence or a high crime rate;

5) the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups;

6) the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence;

7) interpersonal disputes of which governmental authorities were unaware or uninvolved;

8) private criminal acts of which governmental authorities were unaware or uninvolved;

9) status as an alien returning from the United States.[132]

Finally, the Proposed Rule introduces a procedural requirement that places a higher burden on the asylum-seeker at the risk of forfeiting her claim if it is not met. "While in proceedings before an immigration judge, the alien must first define the proposed particular social group as part of the asylum application or otherwise in the record. If the alien fails to do so while before an immigration judge, the alien will waive any claim based on a particular social group formulation that was not advanced."[133]

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[129] Proposed Rule on Asylum and Withholding, p. 36,278.
[130] Proposed Rule on Asylum and Withholding, p. 36,290.
[131] "The proposed rule would further build on the BIA's standards and provide clearer guidance to adjudicators regarding whether an alleged group exists and, if so, whether it is cognizable as a particular social group." Proposed Rule on Asylum and Withholding, 85 Fed. Reg. at 36,278.
[132] Proposed Rule on Asylum and Withholding, p. 36,279; *see also id.* p. 36,300.
[133] Proposed Rule on Asylum and Withholding, p. 36,279.

As one of the five enumerated grounds in the 1951 Convention, membership in a particular social group is integral to a complete understanding of the refugee definition. UNHCR observes that when the United States incorporated the international law definition of a 'refugee' into domestic law through the 1980 Refugee Act, it explicitly included the concept of "particular social group."[134] The Proposed Rule correctly notes that the term "particular social group" is itself not defined in the 1951 Convention.[135] However, the UNHCR Handbook, which the U.S. Supreme Court regards as authoritative on interpreting the 1951 Convention and 1967 Protocol,[136] expounds on this ground. In addition, UNHCR has developed extensive guidance on its interpretation in accordance with its supervisory responsibility and through UNHCR's adjudicatory experience and observation of state practice as this ground has been invoked with increasing frequency in refugee status determinations.[137] Fundamental to the PSG ground is the instruction that "the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[138] While the PSG Guidelines make clear that PSG is not to serve as a "catch all" category,[139] it also states that there is no "closed list" of PSGs.[140]

i) Requirements for Legally Cognizable Particular Social Groups

The Proposed Rule codifies an approach to evaluating the legal cognizability of "particular social groups" that would further cement U.S. practice around this ground outside of international standards.[141] Although "particular social group" is on its face an open-ended term, international jurisprudence and commentary have helped clarify its meaning over time.[142] Based on international legal norms and State practice, UNHCR's PSG Guidelines identify two common approaches to defining a particular social group, and adopt a standard allowing for either approach:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted [the "protected characteristics" approach], **or** who are perceived as a group by society [the "social perception" approach]. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights[143] (emphasis added).

[134] INA § 101(a)(42) ("The term 'refugee' means (A) any person who is outside any country of such person's nationality. . . and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion" (emphasis added)). *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) (discussing the legislative history of the 1980 Refugee Act); DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 452-76 (2017), (giving a comprehensive overview of U.S. caselaw on particular social group and providing comparisons to UNHCR standards, including through discussion of the Handbook and the PSG Guidelines).
[135] Proposed Rule on Asylum and Withholding, p. 36,278.
[136] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987) (following guidelines set forth in the UNHCR Handbook to determine the definition of a "refugee").
[137] *See generally* UNHCR Handbook; UNHCR, *Guidelines on International Protection No. 2: Membership of a Particular Social Group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2020), ¶ 1.
[138] UNHCR, *Guidelines on International Protection No. 2* [hereinafter PSG Guidelines], ¶ 3.
[139] UNHCR, *Guidelines on International Protection No. 2*, ¶ 2.
[140] UNHCR, *Guidelines on International Protection No. 2*, ¶ 3.
[141] Brief for UNHCR as Amicus Curiae, at 23-24; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).
[142] Brief for UNHCR as Amicus Curiae, at 23-24; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).
[143] UNHCR, *Guidelines on International Protection No. 2*, ¶ 11.

A particular social group must be identifiable through one of the approaches but need not satisfy both.[144] UNHCR observes that this either-or approach to identifying a particular social group was first delineated in *Matter of Acosta*, which guided U.S. practice on this element for more than twenty years.[145] Eventually, U.S. case law evolved to require that asylum-seekers establish that a particular social group be defined with particularity and be socially distinct, in addition to being comprised of members who share a common, immutable characteristic.[146] As UNHCR has repeatedly noted in amicus briefs, imposing the additional, heightened requirements of particularity and social distinction is contrary to the object and purpose of the 1951 Convention, 1967 Protocol, and PSG Guidelines.[147]

Analyses under these two approaches frequently converge, as groups whose members are targeted based on a common immutable or fundamental characteristic are often perceived as a social group in their societies. However, at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity, such as an occupation or social class. Therefore, it is critical that these approaches be applied distinctly.

UNHCR recommends that the Government strike the codification of these requirements around defining particular social groups from the Proposed Rule and in its place propose adoption of the either-or approach to analyzing particular social groups that conforms with UNHCR guidance.[148] Specifically, UNHCR suggests that the Government reconcile the approaches to minimize gaps in protection: a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted *or* who are perceived as a group by society.[149]

ii) Circularly-Defined Particular Social Groups

The Proposed Rule endeavors to restrict PSGs by requiring that they "must have existed independently of the alleged persecutory acts", citing to *Matter of A-B* for justification.[150] As UNHCR has emphasized, particular social groups must be evaluated on a case-by-case basis,[151] and this provision is at variance with international legal standards on PSGs to the extent that it artificially forecloses a full analysis of a PSG's legal cognizability.

International standards assert that "a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted."[152] However, "persecutory action toward a group may be a relevant factor in determining the visibility

[144] Gang Guidance, ¶ 35.
[145] 19 I&N Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).
[146] *Matter of S-E-G-*, 24 I&N Dec. 579, 582, 589 (BIA 2008); DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 452-76 (2017).
[147] *See, e.g.*, Brief for UNHCR as Amicus Curiae, at 25; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).
[148] UNHCR has explained in detail how U.S. law on the interpretation of "particular social group" could be aligned with international standards in some of its recent amicus briefs. *See*, *e.g.*, Brief for UNHCR as Amicus Curiae, at 24-34, *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019); Brief for UNHCR as Amicus Curiae in support for Plaintiffs' Cross-Motion for Summary Judgment, at 13-19, *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Sep. 28, 2018); Brief for UNHCR as Amicus Curiae in Support of Petitioner, at 15-23, *O.L.B.D. v. Barr*, Case No. 18-1816 (1st Cir.) (Mar. 11, 2019).
[149] Under the "protected characteristics" approach, the characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights. *Id.* at ¶ 11.
[150] Proposed Rule on Asylum and Withholding, p. 36,278.
[151] UNHCR, *Guidelines on International Protection No. 2*, ¶ 14. UNHCR, *Guidelines on International Protection No. 2*, ¶ 3.
[152] UNHCR, *Guidelines on International Protection No. 2*, ¶ 14 (emphasis added).

of a group."[153] UNHCR guidance, drawing on a widely cited decision from Australia, explains, "[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group."[154]

For instance,[155] persecutory action against victims of trafficking "may be relevant in heightening the visibility of the group without being its defining characteristic."[156] Depending on the context, a society may "view persons who have been trafficked as a cognizable group within that society."[157] In some countries, for example, authorities have targeted individuals who fell victim to trafficking to penalize them for prostitution or "moral crimes."[158] The past trafficking experience would constitute one of the elements defining the group in such cases, rather than the future persecution feared in the form of re-trafficking or other harm, meaning that the group would therefore not be defined solely by its fear of future persecution.[159]

Further, there may be groups in which the persecutory conduct is one factor but not the sole factor in defining the visibility of the group. In cases based on domestic abuse, for example, the inability to leave a relationship may be caused by cultural or religious reasons, rather than solely by the threat of harm from a domestic partner.[160] Women in domestic relationships in Guatemala and El Salvador "endure the twin punishments of violence from male partners who feel 'entitled to physical and emotional power,' and 'widespread impunity for [such] acts of violence' by their cultures."[161] Therefore, it would be improper to conclude, as is done in *Matter of A-B-* and referenced in the Proposed Rule,[162] that fear of persecution is the sole reason that women are unable to leave their relationship.

UNHCR recommends that the Proposed Rule's restrictions around purportedly-circular particular social groups not be enacted. Should these restrictions remain in some form, UNHCR urges that the language be revised to acknowledge the fact that persecution can play a role in determining the visibility of a PSG. Additionally, UNHCR urges that explicit language be strengthened in the rule preserving the ability of adjudicators and courts to continue to evaluate PSG claims on a case-by-case basis beyond the "rare circumstances" envisioned in the current language of the Proposed Rule.

iii) Particular Social Groups That Will Generally Fail in U.S. Adjudicatory Fora

[153] Summary Conclusions of the Expert Roundtable on Gender-Related Persecution, San Remo, *Membership of a Particular Social Group, no. 6* (Sep. 6-8, 2001).
[154] UNHCR, *Guidelines on International Protection No. 2*, ¶ 14 (citing McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 264, 142 ALR 331).
[155] UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) f the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07 (Apr. 7, 2006), ¶ 37; *see also* UNHCR, UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, HCR/EG/AFG/18/02 (Aug. 30, 2018), at 86-88 [hereinafter Afghanistan Eligibility Guidelines] (discussing why UNHCR considers that people, such as women, children, or those whose socio-economic circumstances create vulnerabilities to trafficking, may be in need of international refugee protection on the basis of a well-founded fear of persecution for reasons of their membership in a particular social group or other Convention grounds).
[156] UNHCR, *Guidelines on International Protection: Trafficking*, ¶ 37.
[157] UNHCR, *Guidelines on International Protection: Trafficking*, ¶ 39.
[158] *See* Afghanistan Eligibility Guidelines, p. 88.
[159] UNHCR, *Guidelines on International Protection: Trafficking*, ¶ 39.
[160] Brief for UNHCR as Amicus Curiae, at 30; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).
[161] Brief for UNHCR as Amicus Curiae, at 30; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019) (citing UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, 17 (Oct. 2015)).
[162] Proposed Rule on Asylum and Withholding, p. 36,281. *See also* Brief for UNHCR as Amicus Curiae, p. 30; *Grace v. Barr*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C.) (Jul. 31, 2019).

The Proposed Rule puts forward a list of "generally insufficient" PSGs that will, by themselves, not lead to favorable adjudication of a claim for protection. This approach may lead to decisions on protection claims which are inconsistent with international standards, whose concept of a PSG remains open to evolving norms and circumstances. There is no "closed list" of what may constitute a PSG within the meaning of Article 1A(2) of the 1951 Convention.[163] UNHCR guidance on defining PSG indicates that the concept should be read in an evolutionary manner, "open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[164] Therefore, the new regulation's attempt to circumscribe the realm of legally cognizable PSGs is at odds with international law. Instead, the U.S. should adopt standards that can be appropriately responsive to current and future refugee protection needs and international human rights.

The Proposed Rule effectively narrows the range of potential PSGs at the same time it heightens the procedural burden on the asylum-seeker. By providing a non-exhaustive list of "generally insufficient" PSGs, the Proposed Rule limits an adjudicator's ability to evaluate an asylum-seeker's PSGs on a case-by-case basis. Coupled with the rule on pretermission,[165] this list may ultimately preclude many asylum-seekers from having their case heard in a full hearing, as a PSG based on one of the scenarios on this list will be seen as failing to state a *prima facie* case. UNHCR is concerned that this provision not only forecloses PSGs that would likely be recognized under international standards, but also, due to the interplay between it and the proposed changes to pretermission, will impinge on asylum-seekers' right to consideration of their claim.

While these proposed changes will have an impact on many claimants from around the world, they will have particular impact on those in need of protection from Central America and Mexico, especially women. UNHCR's extensive assessments of international protection needs of individuals from Central America and Mexico highlight the nature of persecution commonly experienced by asylum-seekers from those countries, underscoring that these cases often involve claims based on membership of a particular social group.[166] As detailed in recent UNHCR guidelines from 2010, 2016, and 2018, limiting the scope of this ground such that situations involving extortion, attempted recruitment, gang violence, domestic abuse, and other harms no longer form the basis of a PSG claim will leave large numbers of individuals who would otherwise qualify for asylum under international standards without a path to protection.[167]

While the mere notion of a list of "generally insufficient" PSGs is problematic, the exclusion of the PSGs below are particularly out of step with international standards, and therefore merit closer scrutiny:

a. Past or present criminal activity or associations

The Proposed Rule provides that claims based on PSGs defined by past or present criminal activity or associations will generally fail. This provision is in direct conflict with international law and guidance. In UNHCR's view, claims concerning persons with present or past criminal activity

[163] *Id*.
[164] *Id*.
[165] *See supra* Section III.B.2, p. 16.
[166] *See generally* UNHCR Eligibility Guidelines for El Salvador, Guatemala, and Honduras; UNHCR Guatemala Background Paper; UNHCR Gang Guidance; Children on the Run; Women on the Run.
[167] *See* UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, ¶¶ 36-40 (Mar. 2010), https://www.refworld.org/docid/4bb21fa02.html [hereinafter Gang Guidance]; Eligibility Guidelines for Guatemala, pp. 40-49, 54-55; Eligibility Guidelines for Honduras, pp. 48, 51, 56, 63-64.

or associations, whether voluntary or involuntary, require a careful assessment as to whether the applicant is indeed a member of a particular social group.[168] Voluntary membership in organized gangs normally does not constitute membership of a PSG within the meaning of the 1951 Convention; because of the criminal nature of such groups, it would be inconsistent with human rights and other underlying humanitarian principles of the 1951 Convention to consider such affiliation a protected characteristic.[169]

Nevertheless, in cases involving claims based on past or present criminal activity or associations, it is important to take into account the circumstances under which the applicant became involved in criminal activity.[170] For instance, a person who has been forcibly recruited into a gang would primarily be considered a victim of gang practices rather than a person associated with crime.[171] This applies in particular to young people who may have less capacity or means to resist gang pressures.[172] However, even if the association occurred voluntarily, former gang members, including those who have engaged in or been convicted of criminal activity, may constitute a valid PSG under certain circumstances provided they have denounced affiliation and credibly deserted from it.[173]

UNHCR has explained that gang 'traitors' and former members of gangs may be in need of international protection on account of membership in a particular social group, as well as other grounds.[174] The same guidance provides that family members, dependents, and other members of household of gang members or organized criminal group members, as well as women and girls forced to become gang "wives" or "girlfriends" may also be in need of protection on account of membership in a PSG.[175] For asylum-seekers fleeing these types of circumstances, denial of protection can be a death sentence.[176]

b. Presence in a country with generalized violence or a high crime rate

The Proposed Rule would generally prohibit PSGs defined by presence in a country with generalized violence or a high crime rate.[177] 'Generalized violence' does not have a strict or closed meaning nor is it used in international humanitarian law, and encompasses situations characterized by violence that is indiscriminate and/or sufficiently widespread to affect large groups of persons or entire populations.[178] The concept is understood to include violence perpetrated by both state and non-state actors, including gangs.[179] People fleeing gang violence

[168] Gang Guidance, ¶ 44.
[169] Gang Guidance, ¶ 43.
[170] Gang Guidance, ¶ 44.
[171] Gang Guidance, ¶ 44.
[172] Gang Guidance, ¶ 44.
[173] Gang Guidance, ¶ 44. UNHCR observes that there is a distinction between inclusion and exclusion, and a former gang member could be found to have a well-founded fear based on membership in a PSG but that prior egregious criminal conduct could lead to exclusion.
[174] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, 34, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 2016) [hereinafter El Salvador Eligibility Guidelines]; UNHCR, *Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Guatemala*, 44, U.N. Doc. HCR/EG/GTM/18/01 (Jan. 2018) [hereinafter Guatemala Eligibility Guidelines]; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, 50, U.N. Doc. HCR/EG/HND/16/03 (Jul. 2016) [hereinafter Honduras Eligibility Guidelines].
[175] El Salvador Eligibility Guidelines, p. 33-36; Guatemala Eligibility Guidelines p. 43; Honduras Eligibility Guidelines, p. 50.
[176] *See, e.g.*, Kevin Sieff, *When death awaits deported asylum seekers*, WASH. POST (Dec. 26, 2018).
[177] UNHCR notes that, in the absence of a legal definition for "high crime rate," any crime rate could be asserted to be "high" in the context of a particular asylum claim.
[178] UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and / or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, at ¶¶ 71-72, U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016).
[179] UNHCR, *Guidelines on International Protection No. 12*, ¶¶ 71-73.

or violence by organized criminal groups may meet the refugee definition under the 1951 Convention.[180] "Gang violence may affect large segments of society, especially where the rule of law is weak. Evidently, however, certain individuals are particularly at risk of being victims of gangs. . .Young people, in particular, who live in communities with a pervasive and powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention."[181]

Gangs in Central America are reported to exercise considerable levels of societal control over the population of their territories.[182] In gang-controlled zones, residents are compelled to stay silent and may face a myriad of gang-imposed restrictions.[183] Many gangs also reportedly forbid inhabitants from showing 'disrespect' for the gang, which is subjectively evaluated by gang members and encompasses a multitude of perceived slights and offences, including arguing with a gang member or refusing an extortion demand, resisting a child's recruitment into the gang, or rejecting amorous attention from a gang member.[184] Against this background, and taking into account the limitations on the ability or willingness of State agents to provide protection to civilians, UNHCR considers that some persons perceived by a gang or other organized criminal group as contravening its rules or resisting its authority may be in need of international protection on the grounds of their membership in a particular social group.[185]

c. Recruitment by criminal, terrorist, or persecutory groups

The Proposed Rule generally forecloses PSGs consisting of individuals forcibly recruited by criminal, terrorist, or persecutory groups. This provision is at variance with international law. In UNHCR's view, "[i]ndividuals who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender or social status. Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty, and lack of parental guidance."[186] Resisting recruitment or otherwise opposing gang or terroristic practices may be considered a characteristic that is fundamental to both a person's conscience and exercise of human rights—that is, at the core of gang or terrorism resistance, is respect for the rule of law.

UNHCR has emphasized that children and youth are at especially high risk of forced recruitment and clearly stated that they may be entitled to international protection on account of membership in a PSG.[187] UNHCR has reported on the serious consequences for children of resisting

[180] UNHCR, *Guidelines on International Protection No. 12*, ¶ 84.
[181] Gang Guidance, ¶¶ 63, 65.
[182] *See* El Salvador Eligibility Guidelines at 9-10; Guatemala Eligibility Guidelines at 17; Honduras Eligibility Guidelines at 16.
[183] *See* El Salvador Eligibility Guidelines at 12; Guatemala Eligibility Guidelines at 17; Honduras Eligibility Guidelines at 18.
[184] *See* El Salvador Eligibility Guidelines at 12; Guatemala Eligibility Guidelines at 17; Honduras Eligibility Guidelines at 18.
[185] UNHCR observes that such a scenario also may merit consideration under the political opinion ground. *See* Political Opinion, *infra*.
[186] Gang Guidance, ¶¶ 36, 37-41 (elaborating on recruitment claims); *see also* UNHCR, Afghanistan Eligibility Guidelines, p. 55 (explaining how and why men and children who suffer forced recruitment by pro-government forces or anti-government elements may be in need of international refugee protection on the basis of a well-founded fear of persecution for reasons of their membership in a particular social group or other Convention grounds); UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia*, HCR/EG/SOM/10/1 (May 5, 2010), p. 16 (describing young Somali males forcibly recruited by Islamist armed opposition groups as a group at risk on the basis of article 1(A) of the 1951 Convention). (UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, HCR/EG/LKA.12/04 (Dec. 21, 2012), p. 35 (explaining that former child soldiers, depending on the details of their claims, may be in need of international refugee protection on account of belonging to a particular social group or other Convention grounds to include careful examination of exclusion considerations in accordance with UNHCR guidance).
[187] *See* Afghanistan Eligibility Guidelines p. 52-55; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia*, HCR/EG/COL/15/01 (Sep. 2015), p. 14 [hereinafter Colombia Eligibility Guidelines]; El Salvador

recruitment, including being punished or killed, making it critical to grant them refugee protection when they meet the criteria under Article 1A(2), which they may on the ground of membership in a particular social group.[188] In particular, separated and displaced children are even more vulnerable to recruitment by armed forces and non-State actors, such as gangs, guerilla forces militias, and terrorist groups.[189] Thus, as international guidance recognizes the cognizability of PSGs involving children so situated, U.S. law should uphold PSGs that are based on recruitment activities.

d. Criminal activity targeting the applicant for financial gain based on perceptions of wealth or affluence

The Proposed Rule generally precludes PSGs defined by circumstances related to criminal activity perpetrated against an applicant for financial gain based on perceptions of wealth or affluence. Such prohibition conflicts with international guidance. UNHCR has addressed extortion by criminal organizations, such as drug trafficking operations and other armed actors, "in areas where they have territorial and social control, as a strategy to ensure control over the population."[190] Similarly, UNHCR has recognized that in the course of exercising exclusive control over their home territories, Central American gangs target "[b]usinesses, (public) transport routes, and even homes in other nearby (and often wealthier) neighbourhoods" for extortion as their main source of revenue.[191] UNHCR has observed that an individual targeted in this manner may be in need of international protection due to their membership in a particular social group "based on the applicant's occupation," where, for example, "disassociation from the profession is not possible or would entail a renunciation of basic human rights."[192] That the persecutor may reap financial gain from the harm inflicted does not undercut the applicant's claim, including the cognizability of their posited PSG.

e. Interpersonal disputes or private criminality

The Proposed Rule would all but foreclose PSGs based on "interpersonal disputes" or "private criminality." This would adversely impact a wide variety of claims advanced by asylum-seekers who arrive from a diverse set of countries and circumstances. For instance, UNHCR has recognized that individuals targeted as part of tribal conflict resolution, including blood feuds, may have international protection needs based on membership in a particular social group.[193] Further,

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Eligibility Guidelines, p. 36; Guatemala Eligibility Guidelines, p. 45; Honduras Eligibility Guidelines, p. 52; UNHCR, International Protection Considerations with Regard to People Fleeing the Republic of Iraq, HCR/PC/IRQ/2019/05_Rev.2 (May 2019), pp. 7, 99-100 [hereinafter Iraq Protection Considerations] (highlighting that children who are survivors of or at risk of forced and underage recruitment may be in need of international refugee protection, depending on the individual circumstances of the case).

[188] *See* Afghanistan Eligibility Guidelines pp. 52-55 (describing forced recruitment of children, as well as men of fighting age, the risks associated with forced recruitment, and the ways in which individuals so targeted may be entitled to refugee protection).

[189] *See, e.g.*, USA for UNHCR, *UNHCR Helps Refugee Children at High Risk of Forced Recruitment* (Mar. 1, 2012), https://www.unrefugees.org/news/refugee-children-at-highest-risk-of-forced-recruitment/; *see also* UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶¶ 19-23, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009).

[190] Colombia Eligibility Guidelines pp. 31-33.

[191] El Salvador Eligibility Guidelines p. 11; Guatemala Eligibility Guidelines p. 15; Honduras Eligibility Guidelines p. 16.

[192] Colombia Eligibility Guidelines p. 33; *see also* El Salvador Eligibility Guidelines, p. 31-32 (providing that, "[d]epending on the particular circumstances of the case, UNHCR considers that persons in professions or positions susceptible to extortion, including but not limited to those involved in informal and formal commerce as business owners, their employees and workers, or as street vendors; public transport workers; taxi and *mototaxi* drivers; public sector employees; and certain returnees from abroad may be in need of international protection" on account of their membership in a PSG, among other grounds); Guatemala Eligibility Guidelines p. 41; Honduras Eligibility Guidelines p. 47.

[193] Iraq Protection Considerations pp. 106-08; *see also* Afghanistan Eligibility Guidelines pp. 74-76 (recognizing that individuals who suffer harmful traditional practices, like forced or child marriage, "honour killings," and other forms of sexual and gender-based

events related to domestic abuse or gang violence could also be characterized as involving interpersonal disputes or private criminality.

International legal standards do not require that the persecutor be a State actor. The UNHCR Handbook provides that persecution, while normally related to action by the authorities of a State, "may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned."[194] While asylum claims involving non-State actor persecutors tend to be regarded as involving a more nuanced analysis, the complexity of these types of claims should not render them any less relevant nor deserving of international protection.[195]

f. Persons returning from the United States

The Proposed Rule would generally foreclose PSGs consisting of individuals returning from the United States. UNHCR has recognized that persons fitting this profile may be in need of international protection. For example, in some countries, "[t]here are reports of individuals who returned from Western countries having been threatened, tortured or killed . . . on the grounds that they were perceived to have adopted values associated with these countries, or they had become 'foreigners' or that they were spies for or supported a Western country."[196] UNHCR considers that such individuals, potentially including deportees from the United States, may in certain instances be in need of international protection on any number of the Convention grounds, including membership in a particular social group.[197] In addition, returnees to some regions are reported to be "easily identifiable" by actors who may have previously threatened or harmed them or may be targeted for extortion based on the perception of having financial resources.[198] UNHCR guidance also explains how returnees in such circumstances may be in need of international protection due to their membership in a particular social group.[199]

UNHCR recommends that the Government strike this provision entirely in the final version of the Rule. In the alternative, the government should provide explicit authority to adjudicators to evaluate PSG claims on a case-by-case basis. If the government wishes to list particular social groups in order to aid adjudicators in individualized assessments of each claim, it should do so in an inclusionary manner, rather than by making a list of non-cognizable PSGs.

iv) Requiring Applicants to Identify Their Own Particular Social Groups

In addition to generally foreclosing a variety of particular social group formulations, the Proposed Rule creates a new procedural requirement for asylum-seekers pursuing claims based on membership in a particular social group.[200] Under this new provision, applicants presenting their claims before an immigration judge must articulate (or provide a basis for) their own particular

violence—harms that are typically perpetrated by non-State actors—may be entitled to refugee protection on the ground of their membership in a particular social group). Blood feuds are generally understood to involve "members of one family threatening to kill members of another family in retaliatory acts of vengeance carried out according to an ancient code of honour and behaviour." Iraq Protection Considerations at 106.

[194] UNHCR Handbook, ¶ 65; *see also* UNHCR, *Guidelines on International Protection No. 2*, ¶¶ 20-23; Afghanistan Eligibility Guidelines, p. 76.

[195] Brief for UNHCR as Amicus Curiae, at 16-17; *Gonzales v. Thomas*, 547 U.S. 183 (2007).

[196] Afghanistan Eligibility Guidelines, pp. 46-47.

[197] Afghanistan Eligibility Guidelines, pp. 48-49.

[198] El Salvador Eligibility Guidelines, pp. 28, 30-32.

[199] El Salvador Eligibility Guidelines, pp. 32.

[200] Proposed Rule on Asylum and Withholding, pp. 36,279, 36,300.

social groups without assistance from the adjudicator.[201] Any particular social groups that the applicant does not advance (or provide a basis for) before the immigration judge will be waived, including on appeal, and those particular social groups could not serve as the basis for potential subsequent motions to reopen or reconsider.[202]

UNHCR is concerned that the Proposed Rule will prevent asylum-seekers from pursuing their claims and lead to the denial of applications made by persons seeking international protection. Under this Proposed Rule, the mere inability of an asylum-seeker to articulate a legally cognizable PSG, even if the individual is a member of such a PSG and has a well-founded fear of being persecuted on such an account, will foreclose pathways to international protection to which he or she is entitled. As with other proposals in the new rule, UNHCR anticipates that this new requirement will adversely affect large numbers of refugees, especially those appearing *pro se* as well as child asylum applicants.[203] UNHCR considers it unlikely that many *pro se* and child applicants are in positions to articulate particular social groups, much less be familiar with this legal concept and its intricate contours.[204]

UNHCR is further concerned that these proposed changes limit opportunities for asylum-seekers to raise new particular social groups on appeal that they may not have had the means or opportunity to present in the first instance before an immigration judge. Appellate review serves as a fundamental safeguard in accessing fair and transparent asylum procedures.[205] That appeal, which must be conducted by an independent body, "must examine both facts and law based on up-to-date information."[206] As at the first instance, the appellate examination of the claim should be non-adversarial, with the adjudicator and the applicant working together to ascertain the facts. Without such a safeguard, the adjudicatory system may fail to identify those in need of international protection.

Requiring applicants to define their own particular social groups, or provide a basis for defining particular social groups, is at variance with basic standards of procedural fairness required under international law. Stated most simply, asylum-seekers are "not required to identify accurately the reason why he or she has a well-founded fear of being persecuted."[207] The Proposed Rule sets forth a framework in which applicants would need to understand the complex concept of a particular social group and define how it applies to them – a difficult task for anyone, let alone an asylum-seeker who might lack understanding of the legal process, might not be fluent in English, and might very well still be traumatized from persecution and flight. The Proposed Rule then would punish them, with serious procedural consequences, for failure. This puts forward a framework that most will simply not be able to meet.

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[201] Proposed Rule on Asylum and Withholding, pp. 36,279, 36,300.
[202] Proposed Rule on Asylum and Withholding, pp. 36,279, 36,300.
[203] *See, e.g.*, UNHCR Handbook, ¶46 (discussing the reasons why a refugee may not be able to describe elements of the asylum analysis using legal terminology); UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*, ¶36 (providing that adjudicators "should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education).
[204] The proposed procedural changes to PSG are striking in light of the high rate of *pro se* asylum applicants. It is objectively unreasonable to expect a *pro se* applicant to be able to define a PSG within the narrow frame that the Proposed Rule still allows and no form of notice of the asylum-seeker's burden to do so is sufficient to rectify such a violation of due process. Even more striking is the stark absence of an exception to this requirement for child asylum applicants, many of whom must also represent themselves in immigration court in the absence of qualified or affordable legal representation. *See* discussion, *infra* Section IV.1 and IV.1, p. 65.
[205] *See, e.g.* UNHCR, *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union*, (May 2010) https://www.refworld.org/docid/4bf67fa12.html.
[206] *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail*.
[207] UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and / or its 1967 Protocol Relating to the Status of Refugees*, ¶ 23, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

In order to be considered a refugee, a person must show well-founded fear of persecution on account of one of the five enumerated Convention grounds; it is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them.[208] UNHCR considers adjudicators and asylum-seekers to have a shared duty to produce and evaluate facts relevant to refugee status determination,[209] and the burden cannot fall to the claimant alone to identify the grounds of the claim or understand which facts are critical to convey to form the basis of a particular social group.[210] Instead, it is up to the adjudicator in particular to ascertain the reason or reasons for persecution and to decide whether the definition in the 1951 Convention is met with in this respect.[211]

Indeed, in some cases, an adjudicator may need to use "all the means at his [or her] disposal" to develop the evidence most critical to this assessment.[212] International standards recognize the diverse set of technical and psychological reasons that an asylum-seeker may not be able to describe the harm they have suffered, the reasons why, and other elements of the asylum analysis using legal terminology or concepts.[213] For instance, trauma, English proficiency, age, level of education, religious or cultural background, and other factors may limit an individual's ability to articulate their own particular social groups, among other things.

Additionally, many individuals are not able to secure legal assistance until after an immigration judge has decided their applications. For example, detained asylum-seekers are often held in remote locations with few, if any, opportunities to access counsel. Individuals who obtain legal assistance during the appellate stage may be better positioned to present legally cognizable particular social group formulations. In effect, because applicants are often in particularly vulnerable situations, their applications "should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs."[214]

International standards address the need to provide child asylum applicants with special consideration, and it would be particularly egregious to require this highly vulnerable group to define their own particular social groups.[215] UNHCR has published extensive guidance on assessing the international protection needs of children in which it underscores that children may require special assistance in articulating their claims to refugee status.[216] Children may have difficulty articulating their claims due to a range of reasons, including trauma, age, and maturity level, all of which can influence their capacity to even "interpret what they have witnessed or experienced in a manner that is easily understandable to an adult."[217] Therefore, it is highly improbable that many children, especially those without legal representation,[218] can

[208] UNHCR Handbook, ¶ 66.
[209] UNHCR Handbook, ¶ 196.
[210] Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 693 (Can.) ("A claimant is not required to identify the reasons for the persecution. The examiner must decide whether the Convention definition is met; usually there will be more than one applicable ground.").
[211] UNHCR Handbook, ¶ 67.
[212] UNHCR Handbook, ¶ 196.
[213] UNHCR Handbook, ¶¶ 46, 190; UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*, ¶¶ 35-36.
[214] UNHCR Handbook, ¶ 190.
[215] As noted above, the new regulations do not explicitly exempt children from this provision (note that the regs do, for example, explicitly exempt unaccompanied children from asylum-and-withholding-only proceedings, which may suggest that if children were intended to be exempt from this provision the regulation would so state). Thus, it appears likely to apply to them.
[216] UNHCR, *Guidelines on International Protection No. 8*, ¶ 2.
[217] UNHCR, *Guidelines on International Protection No. 8*, ¶ 72.
[218] Approximately half of unaccompanied children do not have representation in removal proceedings. Kids in Need of Defense, Improving the Protection and Fair Treatment of Unaccompanied Children 7 (Sep. 2016). The many children who lack attorneys will especially suffer as a result of this provision.

independently identify any or all of the reasons for which they were targeted and identify legally cognizable particular social groups to advance their asylum applications. Whereas the burden of proof is typically shared between adjudicators and applicants in adult claims, adjudicators may need "to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied."[219] In cases where a child cannot fully articulate his or her claim, the adjudicator should make a decision based on all known circumstances, meaning that the adjudicator might have to define the particular social group to which the child belongs if the child suffered persecution on that ground.[220]

UNHCR recommends that the Government strike this provision requiring asylum-seekers to articulate their own particular social groups without the assistance of an adjudicator. UNHCR encourages the Government to rewrite any rule concerning asylum application processing to affirm the adjudicator's duty to explore and identify the reason(s) why an individual has a well-founded fear of persecution, up to and including exploring the elements of particular social groups. UNHCR also encourages the Government to preserve pathways to raise newly articulated PSGs on appeal.

2. Political Opinion

The Proposed Rule sets out to re-define political opinion as "one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control or a state or unit thereof."[221] The Rule would further limit the definition of political opinion by asserting that adjudicators will decline to recognize political opinion "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."[222] The Proposed Rule also provides two exceedingly narrow but valid circumstances under which applicants will generally be found to establish a valid asylum claim on account of political opinion: forced abortion and involuntary sterilization.[223]

The Proposed Rule would impermissibly narrow the concept of political opinion by crafting a definition that strictly recognizes only those ideas and convictions related to political control of a state. The proposed definition is overly restrictive, limiting current interpretations and future evolution of the concept. It explicitly excludes political opinions defined by "generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior."[224]

As a preliminary matter, UNHCR observes that the Proposed Rule's background section cites to the UNHCR Handbook to support an overly-restrictive reading of 'political opinion'. The Proposed Rule asserts that political opinion should be analyzed in terms of "holding an opinion different from the Government or not tolerated by the relevant government authorities."[225] UNHCR agrees, as does the United States Supreme Court, that its Handbook is a valuable resource in

[219] UNHCR, *Guidelines on International Protection No. 8*, ¶ 73.
[220] UNHCR, *Guidelines on International Protection No. 8*, ¶ 73.
[221] Proposed Rule on Asylum and Withholding, pp. 36,280, 36,291-92.
[222] Proposed Rule on Asylum and Withholding, pp. 36,280; 36291-92.
[223] Proposed Rule on Asylum and Withholding, pp. 36280; 36,291-92.
[224] Proposed Rule on Asylum and Withholding, pp. 36,280; 36,291-92.
[225] Proposed Rule on Asylum and Withholding, p. 36,279.

understanding international refugee law obligations.[226] UNHCR notes, however, that this single quote, without context, fails to present our full position. A more complete reading of the Handbook and its Guidelines on International Protection, which complement the Handbook, reveals UNHCR's view that political opinion is an expansive concept encompassing a wide range of beliefs and convictions.[227] In subsequent Guidelines on International Protection, UNHCR has clarified that this ground has much broader scope: "[p]olitical opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, policy may be engaged."[228] The UNHCR Handbook further clarifies that "[i]n determining whether a political offender can be considering a refugee, regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; final, also, the nature of the law on which the persecution is based."[229] The Proposed Rule's limiting of the definition of political opinion precludes adjudicators from taking the sum of these factors into account in weighing the validity of an asylum applicant's political opinion claim.

The narrowing of the concept of political opinion forecloses otherwise valid claims based on this ground for a diverse set of asylum-seekers. Limiting implementation of political opinion in this way will, for example, adversely affect asylum-seekers fleeing situations of armed conflict or other violence. International law and UNHCR guidance has clearly recognized that individuals coming from these circumstances may have a well-founded fear of persecution for reasons of political opinion.. "Expressing objections or taking a neutral or indifferent stance to the strategies, tactics or conduct of parties in situations of armed conflict and violence, or refusing to join, support, financially contribute to, take sides or otherwise conform to the norms and customs of the parties involved may—in the eyes of the persecutor—be considered critical of the political goals of the persecutor.[230] The context and features of the conflict as well as the characteristics of the actor inform whether an opinion is political.[231] For example, "[i]n Colombia, the highly polarized situation and the powerful guerilla groups . . . which at times carry out State-like functions have been relevant factors in finding that an opinion attributed to a victim by a non-State actor is a political one."[232] It is critical to interpret this ground for international protection more broadly than envisioned by the Proposed Rule and to evaluate whether an asylum-seeker is entitled to refugee protection on this ground on a case-by-case basis.[233]

UNHCR guidance recommends that gang-related refugee claims to be analyzed on the basis of the applicant's actual or imputed political opinion vis-à-vis gangs, or the State's policies toward gangs or other segments of society that target gangs.[234] Central American gangs are in some

[226] *INS v. Cardoza Fonseca*, 480 U.S. 421, 439, fn. 22 (1987) ("It has been widely considered useful in giving content to the obligations that the Protocol establishes.").
[227] *See generally* UNHCR Handbook, at ¶¶ 80-86 (providing overview of political opinion claims). *See also Guidelines on International Protection No. 1*, ¶¶ 32-34; *Guidelines on International Protection No. 8*, ¶¶ 45-47; *Guidelines on International Protection No. 11*, ¶¶ 51-54; Guidelines *on International Protection No. 12*, ¶¶ 37-38.
[228] *Guidelines on International Protection No. 1*, ¶¶ 32. *See also Guidelines on International Protection No. 8*, ¶ 45; *Guidelines on International Protection No. 9*, ¶ 50; Guidelines *on International Protection No. 10*, ¶¶ 10, 51; Gang Guidance, ¶ 45.
[229] UNHCR Handbook, ¶ 86.
[230] UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, HCR/GIP/16/12/ (Dec. 2, 2016), ¶ 37.
[231] Vanessa Holzer, *UNHCR Legal and Protection Policy Research Series: The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, PPLA/2012/05 (Sep. 2012), at 35-36; *see also* UNHCR, *Guidelines on International Protection No. 12*, ¶ 37.
[232] Holzer, *The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, p. 36.
[233] *See* Holzer, *The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, pp. 34-36.
[234] Gang Guidance, ¶¶ 45-51.

areas functionally similar to State actors, and political opinion may manifest in various expressions of anti-gang beliefs and values.[235] Examples include: refusing forced affiliation or taxes-via-extortion; testifying or informing against the gangs; reporting incidents of gang violence to authorities, participating in community-based gang prevention and intervention activities; maintaining neutrality (especially in "hazardous" conditions);[236] or associating with persons or social or religious groups that promote anti-gang values. An individual may also oppose gang activity due to their beliefs in basic human rights, such as the right to security of person, or the rule of law. Such individuals may be viewed as a threat by gangs or as not conforming to their practices, thus becoming targets of intimidation tactics and violence by gangs.[237]

Further, international standards recognize that the concept of political opinion can include non-conformity to gender norms. UNHCR guidance explains that political opinion "may include an opinion as to gender roles," as well as "non-conformist behaviour which leads the persecutor to impute a political opinion to him or her."[238] In some societies, "women continue to face pervasive social, political and economic discrimination due to persistent stereotypes and customary practices that marginalize them," and they often risk threats to their lives and safety where they transgress those norms.[239] "Where non-conformity to traditional roles is perceived as opposing traditional power structures, the risk of persecution may be linked to the ground of . . . political opinion."[240] Thus, "there is not as such an inherently political or inherently non-political activity, but the context of the case should determine its nature."[241] Accordingly, it would be contrary to well-established guidance interpreting this ground to exclude this type of political opinion claim.

The Proposed Rule does make one exception to its otherwise restrictive approach to political opinion, giving favorable treatment to forced abortion and involuntary sterilization claims,.[242] UNHCR acknowledges that these claims are explicitly provided for in the Immigration and Nationality Act.[243] Further, UNHCR notes that forced abortions and sterilizations breach human rights, and despite that these practices may be implemented under a legitimate domestic law, they amount to persecution.[244] Resisting or rejecting these practices may be seen as transgression of religious, social or political norms and as such related to the Convention ground of religion, membership of a particular social group or political opinion, or a combination thereof.[245]

While UNHCR agrees with the notion that forced abortions and forced sterilizations can amount to persecution within the meaning of the 1951 Convention, UNHCR is somewhat concerned with the singling out of these concepts, should other forms of persecution then be dismissed. Persecution was deliberately left undefined by the drafters of the 1951 Convention, to ensure a flexible and evolutionary approach to the term.[246] What amounts to persecution and how the fear of persecution is linked to a Convention grounds depends on the circumstances of each case.[247]

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[235] Gang Guidance, ¶ 12.
[236] See, e.g., *Sangha v. I.N.S.,* 103 F.3d 1482, 1488 (9th Cir. 1997) (finding that an applicant can establish a "political opinion" by showing "political neutrality in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces" and defining "political neutrality" to include "the absence of any political opinion").
[237] Gang Guidance, ¶ 12.
[238] UNHCR, *Guidelines on International Protection No. 1*, ¶ 32.
[239] Afghanistan Eligibility Guidelines, pp. 76-80.
[240] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea* (Apr. 2009), p. 28.
[241] UNHCR, *Guidelines on International Protection No. 1*, ¶ 32.
[242] Proposed Rule on Asylum and Withholding, pp. 36,280; 36,291-92.
[243] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(B) (2018).
[244] UNHCR, *Guidelines on International Protection No. 1*, ¶ 13.
[245] UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 23, 26, 28, 32.
[246] *See* UNHCR Handbook, ¶ 51.
[247] UNHCR Handbook, ¶¶ 52, 66-67.

Consequently, specific references to certain forms of persecution should never result in the dismissal of others. Political opinion is a broad Convention ground and people may be subjected to many forms of persecution for reasons of this ground (or other grounds), including many gender-related forms of persecution.[248] This "carve-out" for forced abortion and forced sterilization must not function in a discriminatory way that unfairly privileges certain types of claims over others; this concern is relevant regardless of the type of "carve-out" established.

UNHCR recommends that the definition of political opinion be reviewed and broadened to conform with international legal standards. Political opinion is a broad ground; domestic law should not be written in such a way to limit its current use or future evolution, nor should to prioritize one type of claim above others.

3. Persecution

The Proposed Rule radically redefines "persecution" in exceptionally narrow terms that will not be in line with international law. Currently, "persecution" is not defined in U.S. law by statute or regulation, but it is generally considered to include "a threat to life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[249] However, the new regulations envision a much higher threshold for harm to rise to the level of persecution:

> For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage, though this list is nonexhaustive.[250]

In effect, the Proposed Rule constricts the element of persecution by requiring that it be understood as an "extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat." [251] Furthermore, this definition includes a list of harms that will virtually always no longer be considered persecution. More specifically, the Proposed Rule dismisses virtually all harm arising out of civil, criminal, or military strife in a country; treatment that may be regarded as unfair, offensive, unjust, unlawful or unconstitutional; "intermittent harassment"; 'empty' threats; and "non-severe economic harm."[252]

UNHCR is concerned that the Proposed Rule defines "persecution" so narrowly that it all but forecloses the vast majority of claims, including those that would be recognized under the refugee

[248] See UNHCR, *Guidelines on International Protection No. 12*, ¶¶ 37-39 (enumerating several forms of persecution capable of forming the basis for a valid political opinion claim).
[249] *Matter of Acosta*, 19 I&N Dec. at 222.
[250] Proposed Rule on Asylum and Withholding, pp. 36,291-92, 36,300.
[251] Proposed Rule on Asylum and Withholding, pp. 36,291-92, 36,300.
[252] The Proposed Rule notes this list is not exhaustive (allowing room for additional factors to be added later).

definition articulated in Article 1A(2) of the 1951 Convention. UNHCR anticipates that this provision, if enacted, would result in the denial of many applications submitted by refugees and their forced return to territories where their lives or freedom will be in danger, in violation of Article 33(1) of the Convention.

Further, UNHCR is troubled that the Proposed Rule fails to account for the sensitivity needed to address children's claims. In cases of child applicants, international law requires consideration of their claims through a child-sensitive lens, as children may experience forms of persecution distinct from adult applicants.[253] "Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child."[254] Factors including age, stage of development, knowledge and memory of conditions in country of origin, and vulnerability must be considered to ensure an appropriate application of the eligibility criteria for refugee status.[255]

i) Harm Constituting "Persecution," Generally

Under the 1951 Convention, refugees have a well-founded fear of persecution on account of one or more of the five enumerated protected grounds.[256] The phrase "well-founded fear of being persecuted" is "the key phrase of the [refugee] definition" under Article 1A(2) of the Convention.[257] Neither the Convention nor its 1967 Protocol define the term "persecution." UNHCR has observed that there is no universally accepted definition of "persecution" and that various attempts to formulate such a definition have been met with little success.[258] Nevertheless, from Article 33 of the Convention, "it may be inferred that a threat to life or freedom" on account of a protected ground "is *always* persecution."[259] Further, UNHCR has recognized that "[o]ther serious violations of human rights—for the same reasons—would also constitute persecution."[260] International law recognizes a variety of harms involving physical, psychological, and sexual violence, such as rape, to generally meet the threshold for persecution.[261] In its Handbook, which, as noted above, has been recognized by the U.S. Supreme Court as offering "significant guidance in construing the Protocol,"[262] UNHCR underscores the need to evaluate whether past or feared harm rises to the level persecution on a case-by-case basis.[263] Accordingly, the Convention and Protocol mandate a broad interpretation of this element that is central to refugee status determination.

The exclusion of a diverse set of harms from the persecution analysis, as contemplated by the Proposed Rule, is not consistent with protection obligations under international refugee law.

[253] UNHCR, *Guidelines on International Protection No. 8,* ¶¶ 3-4, 10-12, 15-36 ("[C]hildren may experience child-specific forms and manifestations of persecution."); *see also* ExCom, Conclusion on Children at Risk, 5 Oct. 2007, No. 107 (LVIII) – 2007, ¶ (b)(x)(viii).
[254] UNHCR, *Guidelines on International Protection No. 8*, ¶ 10 (citing to USCIS Guidelines for Children's Asylum Claims, 10 Dec. 1998).
[255] UNHCR, *Guidelines on International Protection No. 8*, ¶ 4; see also UNHCR, Guidelines on Unaccompanied Children Seeking Asylum, op cit., p. 10.
[256] Refugee Convention, art. 1A(2).
[257] UNHCR Handbook, ¶ 37.
[258] UNHCR Handbook, ¶ 51.
[259] UNHCR Handbook, ¶ 51 (emphasis added).
[260] UNHCR Handbook, ¶ 51.
[261] UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity*, ¶¶ 20-25, U.N. Doc. HCR/GIP/12/01 (Oct. 23, 2012); *see also* UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 9-18 (describing various forms of gender-related violence that may rise to the level of persecution); UNHCR Guidelines on International Protection No. 7: Application of Article 1A(2) to Victims of Trafficking and Persons at Risk of Being Trafficked, ¶¶ 15, 17 (explaining that severe exploitation including abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labor, removal of organs, physical beatings, starvation, and the deprivation of medical treatment constitute serious human rights violations that will generally amount to persecution).
[262] *INS v. Cardoza Fonseca*, 480 U.S. 421, 439, fn. 22 (1987) ("It has been widely considered useful in giving content to the obligations that the Protocol establishes.").
[263] *See* UNHCR Handbook, ¶¶ 52-53.

Whether past or feared harm rises to the level of persecution depends on the circumstances of each case, thus making it necessary to assess this element on a case-by-case basis.[264] Such determination may require consideration of an asylum applicant's psychological state, the sociopolitical circumstances in which the harm suffered or feared occurs (such as a prevailing context of insecurity), and the cumulative impact of events or factors which, taken together, may give rise to a well-founded fear of persecution notwithstanding that any one of them may not have sufficed alone. Fear of persecution includes a subjective element that "requires an evaluation of the opinions and feelings of the person concerned."[265] Those opinions and feelings are a lens through which any actual or anticipated measures against the particular asylum-seeker must be viewed.[266] "Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary."[267] In addition, harms that may not independently rise to the level of persecution may if considered cumulatively.[268] UNHCR has explained:

> Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above others, sometimes a small incident may be "the last straw"; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear "well-founded."[269]

As a result, "it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical, and ethnological context."[270]

In contrast to this framework, the Proposed Rule states that "[p]ersecution *does not encompass*…" a non-exhaustive list of harms that according to its provisions will not be sufficient to satisfy this element.[271] While some of the types of harm referenced in the Proposed Rule as insufficient to constitute persecution independently would in fact be persecution under international law, or may be so in particular instances when considered on a case-by-case basis as mandated under UNHCR guidelines, the regulations do not clarify whether adjudicators are to consider the cumulative effect of the harms that it deems not to be persecution. If that were how this provision is applied—excluding from consideration certain harms and leading adjudicators to neglect consideration of their cumulative effect—such policy would represent a double affront to the concept of "persecution," as well as the humanitarian, protectionary spirit of the 1951 Convention.

ii) Harm Arising Out of Civil, Criminal, or Military Strife

International law recognizes that persecution may occur in situations of civil, criminal, or military strife.[272] UNHCR has emphasized, "In accordance with the ordinary meaning to be given to the

[264] UNHCR Handbook, ¶ 52.
[265] UNHCR Handbook, ¶ 52.
[266] UNHCR Handbook, ¶ 52.
[267] UNHCR Handbook, ¶ 52.
[268] UNHCR Handbook, ¶ 52.
[269] UNHCR Handbook, ¶ 201.
[270] UNHCR Handbook, ¶ 53.
[271] Proposed Rule on Asylum and Withholding, pp. 36,291-92, 36,300 (emphasis added).
[272] *See* UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 20 (Apr. 2001), https://www.refworld.org/docid/3b20a3914.html (providing that even in conflict situations, persons may be forced to flee persecution on account of a protected ground, and strife and violence are themselves often used as instruments of persecution); *see also* UNHCR, *Legal Considerations on Refugee Protection*

terms and in light of the context as well as the object and purpose of the 1951 Convention, Article 1A(2) applies to persons fleeing situations of armed conflict and violence. In fact, the 1951 Convention definition makes no distinction between refugees fleeing peacetime or 'wartime' persecution. The analysis required under Article 1A(2) focuses on a well-founded fear of being persecuted for one or more of the Convention grounds."[273] In other words, the standard that threats to life or freedom and other serious human rights violations, and that lesser forms of harm cumulatively (or in light of particular individual circumstances), can constitute persecution "should be applied no differently in the context of persons fleeing situations of armed conflict and violence. No higher level of severity or seriousness of the harm is required for the harm to amount to persecution."[274] Moreover, the risk of persecution may exist for individuals as well as entire groups or populations, and "[t]he fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim."[275]

These types of circumstances often generate or advance conditions that put specific or vulnerable individuals at increased risk for persecution. UNHCR guidance has noted, "At times, the impact of a situation of armed conflict and violence on an entire community, or on civilians more generally, strengthens, rather than weakens the well-founded nature of the fear of being persecuted of a particular individual."[276] UNHCR has further observed, "States where there has been significant social upheaval and/or economic transition or which have been involved in armed conflict resulting in a breakdown in law and order are prone to increased poverty, deprivation and dislocation of the civilian population. Opportunities arise for organized crime to exploit the instability, or lack of will, of law enforcement agencies to maintain law and order, in particular the failure to ensure adequate security for specific or vulnerable groups."[277] So, for instance, persecution can occur in countries where there exists widespread violence by gangs or other organized criminal groups. "Gang violence may affect large segments of society, especially where the rule of law is weak. Evidently, however, certain individuals are particularly at risk of becoming victims of gangs."[278] In such context, those individuals who have a well-founded fear of persecution on account of a protected ground would be entitled to protection under the 1951 Convention.[279]

The Proposed Rule stands in conflict with international legal standards governing persecution as they specifically pertain to persecution in the context of civil, criminal, or military strife. The new regulations would exclude "the generalized harm that arises out of civil, criminal, or military strife in a country."[280] While not all individuals who live in countries experiencing civil, criminal, or military strife would meet the refugee definition under Article 1A(2) of the Convention, those who have a well-founded fear of a threat to their lives or freedom on account of a protected ground may be entitled to international protection under that instrument and its 1967 Protocol. As discussed above, it is exceptionally important that each application for protection be assessed on a case-by-case basis. It would never be appropriate to deny an application as failing to establish a well-founded fear of persecution simply because the asylum-seeker came from a country experiencing civil, criminal, or military strife; as underscored in the preceding paragraph, such an asylum-

for People Fleeing Conflict and Famine Affected Countries, ¶ 2 (Apr. 2017) https://www.refworld.org/docid/5906e0824.html ("Situations of armed conflict and violence may be rooted in, motivated or driven by, and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides, or may impact people based on these factors").

[273] UNHCR, *Guidelines on International Protection No. 12*, ¶ 10.

[274] UNHCR, *Guidelines on International Protection No. 12*, ¶ 11.

[275] UNHCR, *Guidelines on International Protection No. 12*, ¶ 17.

[276] UNHCR, *Guidelines on International Protection No. 12*, ¶ 17.

[277] UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and / or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, ¶ 31, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006).

[278] Gang Guidance, ¶ 63.

[279] Gang Guidance, ¶ 65.

[280] Proposed Rule on Asylum and Withholding, pp. 36,291-92, 36,300.

seeker may be even more vulnerable and at risk of harm constituting persecution. The Proposed Rule, therefore, undermines the protection regime under the Convention and Protocol by excluding a potentially significant category of refugees from relief.

UNHCR recommends that that any definition of persecution included in the rules be brought in line with international standards, as outlined above. At a minimum, the Government should remove the language suggesting that persecution is an "extreme concept" and strike the non-exhaustive list of harms that it does not consider to constitute persecution.

4. Nexus

The Proposed Rule purports to "provide clearer guidance on situations in which alleged acts of persecution would not be on account of one of the five grounds," and relies on both the REAL ID Act of 2005 and *Matter of A-B-* to enumerate a non-exhaustive list of situations in which an asylum application will generally not result in a favorable outcome.[281] UNHCR is concerned that this will render the U.S. regime even further from international standards.

Under the Proposed Rule, adjudicators, "in general, will not favorably adjudicate" claims based on the following: (1) "personal animus or retribution," (2) "interpersonal animus" involving persecutors who have not targeted or manifested animus against other members of the applicant's asserted PSG, (3) "generalized disapproval of, disagreement with, or opposition to" non-state actors without expressive behavior on the part of the applicant "that is antithetical to the state or a legal unit of the state," (4) "resistance to recruitment or coercion" by a non-state actor, (5) "targeting the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence," (6) "criminal activity," (7) "perceived, past or present, gang affiliation," or (8) "gender."[282] The rationale behind this new provision suggests that, "[w]ithout additional evidence, these circumstances will generally be insufficient to demonstrate persecution on account of a protected ground" and that this new "guidance" will "further the expeditious consideration" of claims for protection.[283] Despite the expansive set of claims captured by this provision, the Proposed Rule "does not foreclose that, at least in rare circumstances, such facts could be the basis for finding nexus, given the fact-specific nature of this determination."[284]

This new proposal is wide-ranging and will affect asylum-seekers who have fled countries around the world, though UNHCR notes that it appears many of these provisions disproportionately target the types of asylum claims frequently brought by individuals who were forced to flee the northern Central America countries of El Salvador, Guatemala, and Honduras, which in recent history have produced large numbers of asylum-seekers. Many women and LGBTI claimants will also be disadvantaged, as the Proposed Rule all but directs adjudicators to deny gender-based claims, even though well-established international standards recognize that gender can form the basis of a claim for refugee status.

UNHCR observes that, even before the publication of the Proposed Rule, U.S. law and policy was at variance with international legal standards regarding the interpretation of the refugee definition under Article 1A(2) of the 1951 Convention. The current U.S. legal standard for assessing whether persecution feared is 'for reasons of' a protected ground (often referred to as the 'nexus' in U.S.

[281] Proposed Rule on Asylum and Withholding, pp. 36,381, 36,292.
[282] Proposed Rule on Asylum and Withholding, p. 36,281.
[283] Proposed Rule on Asylum and Withholding, pp. 36,281-82.
[284] Proposed Rule on Asylum and Withholding, p. 36,282.

practice) requires an applicant to establish that the ground upon which his or her asylum claim is based "was or will be at least one central reason" for the persecution suffered.[285] U.S. federal courts are split as to the standard upon which to evaluate nexus,[286] meaning that the likelihood of an asylum seeker to be granted protection currently varies based on jurisdiction. That regional variation notwithstanding, the way that the concept is applied in U.S. practice establishes a higher threshold that an applicant must meet than the standard articulated in international law. While the Proposed Rule purports to standardize the review of nexus, it does so in way that both risks denying protection to potential meritorious, genuine asylum claims and disregards international legal standards, moving the United States further out away from compliance with its international obligations.

Under Article 1A(2) of the 1951 Convention, a refugee is a person outside their country of origin who has a "well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership in a particular social group or political opinion" and is unwilling or unable to avail himself or herself of the protection of that country.[287] UNHCR guidance states that a Convention ground must be *a relevant contributing factor* to the feared persecution but that it need not be shown to be the sole, or dominant cause.[288] Whether there exists a causal link between the harm and a Convention ground "must be assessed in light of the text context, objects, and purposes of the Refugee Convention and Protocol."[289] Accordingly, establishing whether a claim involves a causal link between the persecution feared and a protected ground requires a highly fact-specific inquiry that demands case-by-case adjudication, which is incompatible with the summary rejection of certain types of claims.

The Proposed Rule, as described below, puts forward a set of criteria that will further tighten the concept of "nexus," moving the U.S. further away from the position at international refugee law, according which a person is a refugee so long as the persecution they fear is 'for reasons of' a protected ground, in the sense that ground is a "relevant contributing factor."

i) Nexus in cases involving personal or interpersonal animus

The Proposed Rule attempts to foreclose claims based on personal animus or retribution and interpersonal animus in which the persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group beyond the member who has raised the claim at issue. These exceptionally broad categories will most likely foreclose many claims to refugee status that would be recognized under the 1951 Convention and 1967 Protocol. UNHCR observes that these provisions appear intended to target claims where the persecutor is a "non-State actor," or what the Government has referred to as a "private actor."[290] In particular, the rationale behind the prong concerning "interpersonal animus" appears to focus on claims based on domestic violence, citing *Matter of A-B-*.[291] Such an interpretation of the refugee definition is sharply at odds with international law.

[285] 8 U.S.C. § 1158(b)(1)(B)(i).
[286] *See, e.g.*, Christian Cameron, *Why Do You Persecute Me? Proving the Nexus Requirement for Asylum*, 18 U. MIAMI INT'L & COMP. L. REV. 233, 234; 247 (2014).
[287] Refugee Convention, art. 1A(2) (emphasis added).
[288] UNHCR, *Guidelines on International Protection No. 1*, ¶ 20; *see also* UNHCR, *Guidelines on International Protection No. 7*, ¶ 29 ("It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause."); UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 23.
[289] James C. Hathaway, *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. OF INT'L Law 207, ¶ 6 (2002).
[290] *See Matter of A-B-*, 27 I. & N. Dec. 316, 337 (2018).
[291] Proposed Rule on Asylum and Withholding, p. 36, 281.

Under the UNHCR Handbook, which, as previously mentioned, the U.S. Supreme Court regards as authoritative guidance on interpreting the 1951 Convention and 1967 Protocol, persecution can be perpetrated by State and non-State actors.[292] Although persecution frequently relates to action by the authorities of a State, it "may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned."[293] While asylum claims involving non-State actor persecutors tend to be regarded as involving a more nuanced analysis, the complexity of these types of claims does not render them any less relevant nor deserving of international protection:[294]

> "In UNHCR's view, the source of the feared harm is of little, if any, relevance to the finding whether persecution has occurred, or is likely to occur. It is axiomatic that the purpose and objective of the 1951 Convention is to ensure the protection of refugees. There certainly is nothing in the text of the Article that suggests the source of the feared harm is in any way determinative of that issue. UNHCR has consistently argued, therefore, that the concerns of well-foundedness of fear, of an actual or potential harm which is serious enough to amount to persecution, for a reason enumerated in the Convention are the most relevant considerations."[295]

Thus, it would be contrary to international law to dismiss claims involving non-State actors without evaluating whether those actors harmed the applicant for reasons of a protected ground.

In addition, international law does not require that all members of a particular social group risk persecution.[296] An applicant for asylum need not demonstrate that all individuals who share the same protected characteristic that they possess are at risk of persecution in order to establish a causal link between the persecution feared by the applicant and an enumerated Convention ground. Certain members of the group may not be at risk if, for example, they hide their shared characteristic, are not known to the persecutors, or cooperate with the persecutor.[297] For instance, "in cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner, or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established.[298] The fact that other individuals who belong to the same particular social group are not targeted for harm does not disqualify from refugee status the person who fears persecution for reason of belonging to that group.

Moreover, the existence of personal or interpersonal animus does not necessarily lead a claim to fail for lack of nexus. As explained above, one or more Convention grounds must be a relevant, contributing factor for the persecution, "though it need not be shown to be the sole, or dominant cause."[299] Persecution could, therefore, be perpetrated due to personal or interpersonal animus in combination with one or more Convention grounds, and this would satisfy the causal link so

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[292] UNHCR Handbook, ¶ 65.
[293] UNHCR Handbook, ¶ 65.
[294] Brief for UNHCR as Amicus Curiae, at 16-17; *Gonzales v. Thomas*, 547 U.S. 183 (Jan. 25, 2007).
[295] UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 19. *See also* Brief for UNHCR as Amicus Curiae, at 16; *Gonzales v. Thomas*, 547 U.S. 183 (Jan. 25, 2007).
[296] *See* UNHCR, *Guidelines on International Protection No. 2*, ¶17 ("An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group. As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution").
[297] UNHCR, *Guidelines on International Protection No. 1*, ¶ 21.
[298] UNHCR, *Guidelines on International Protection No. 2*, ¶ 14.
[299] UNHCR, *Guidelines on International Protection No. 1*, ¶ 20; *see also* UNHCR, *Guidelines on International Protection No. 7*, ¶ 29 ("It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause."); UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 23.

long as the Convention ground(s) were a "relevant, contributing factor." "Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established."[300] Accordingly, personal or interpersonal animus does not necessarily preclude a grant of refugee status.

ii) Nexus in cases involving gang violence and criminal activity

The Proposed Rule names several categories of claims related to violence by gangs and other organized criminal groups as not in general to be favorably adjudicated for lack of nexus. Specifically, these provisions would largely preclude claims based on generalized disapproval of or disagreement with gangs or other criminal groups, resistance to recruitment, targeting of an applicant based on wealth or affluence, criminal activity, and gang affiliation. As explained above, international law does not permit entire classes of claims to be *prima facie* dismissed without performing an individualized assessment to determine whether an asylum-seeker meets the refugee definition. Instead of categorizing claims in such manner as to reject asylum-seekers, the starting point of the analysis should be whether an individual has suffered or fears persecution on account of a protected ground.

Applicants with gang-related claims may meet the refugee definition when they have suffered or fear persecution for reasons of a Convention ground. UNHCR has explained in detailed guidance how applicants with gang-related asylum claims may have suffered or fear persecution that is linked to any of the Convention grounds.[301] UNHCR has observed, "Gang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak. . . . Certain social groups may, however, be specifically targeted."[302] In extensive analysis, UNHCR has explained that there are a variety of distinct categories of applicants in gang-related asylum claims who will likely be in need of international protection. In neglecting to take into account this guidance, the Proposed Rule is likely to result in failure to identify many claimants with international protection needs.

UNHCR's guidance has recognized that those who disapprove of or disagree with gangs and other organized criminal groups may be in need of international protection.[303] For instance, gangs often target individuals they perceive as contravening their rules or resisting their authority for reasons of race, religion, political opinion, or membership in a particular social group.[304] In addition, UNHCR has explained that those who resist gang activity may have claims for refugee status on account of various Convention grounds.[305] For example, applicants may have claims based on religion where the applicants' religious beliefs are incompatible with gang lifestyles,[306] based on political opinion if they refused the advances of a gang because they were "politically

[300] UNHCR, *Guidelines on International Protection No. 1*, ¶ 21.
[301] Gang Guidance, ¶¶ 31-42; *see also* El Salvador Eligibility Guidelines, p. 28; Guatemala Eligibility Guidelines, p. 39; Honduras Eligibility Guidelines, p. 44.
[302] Gang Guidance, ¶¶ 10-11.
[303] Gang Guidance, ¶¶ 45-47; *see also* El Salvador Eligibility Guidelines, p. 28; Guatemala Eligibility Guidelines p. 39; Honduras Eligibility Guidelines, p. 44.
[304] *See* El Salvador Eligibility Guidelines, p. 30; Guatemala Eligibility Guidelines, p. 39; Honduras Eligibility Guidelines p. 45.
[305] Gang Guidance ¶¶ 12, 32, 36-41, 48.
[306] Gang Guidance, ¶ 32 ("It could, for example, be the case where the applicant refuses to join a gang because of his/her religious belief or conscience").

or ideologically opposed to the practices of gangs";[307] or claims based on membership in a particular social group where, for example, those "[i]ndividuals who resist forced recruitment into gangs or oppose gang practices . . . share innate or immutable characteristics."[308] Finally, gang deserters and former gang members may fear retaliation for leaving the gang based on a Convention ground.[309] This is not to say, of course, that every individual who opposes gangs is automatically entitled to asylum. The non-citizen has to meet the other parts of the refugee definition. That is one reason why international law requires a case-by-case approach to adjudication of asylum claims.

Beyond the above profiles, international law has recognized that individuals may have international protection needs for reasons of their wealth or affluence (or imputations of the same) as well as being victim of criminal activity. As to the first category related to wealth and affluence, UNHCR guidance provides, "Depending on the particular circumstances of the case, UNHCR considers that persons in professions or positions susceptible to extortion, including but not limited to those involved in informal and formal commerce as business owners, their employees and workers, or as street vendors; public transport workers; taxi and *mototaxi* drivers; public sector employees; and certain returnees from abroad" may have claims to refugee status on account of their membership in a particular social group, among other Convention grounds.[310] That the persecutor may reap financial gain from the harm inflicted does not undercut the applicant's claim, as a Convention ground must be a relevant contributing factor to the harm suffered but that it need not be shown to be the sole, or dominant cause.[311]

Turning to the second category related to criminal activity, as previously discussed, the fact that an asylum-seeker suffered or fears persecution by a non-State actor in no way means that they may for that reason be denied international protection. Rather, the inquiry must center on whether the the applicant fears persecution for reasons of a Convention ground. UNHCR has observed that victims of criminal activity can establish a nexus notably where the criminal actors targeted the applicant because of the applicant's political opinion, some immutable characteristic shared with others in their social group, or another ground. Where, for instance, gang or other criminal violence affects large segments of a society, it is possible for a person to be targeted for reasons of an enumerated ground. UNHCR guidance has underscored that in such circumstances "[y]oung people, in particular, who live in communities with pervasive and powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention."[312] This is merely one example of many different profiles of victims of criminal activity who may meet the refugee definition.

iii) Nexus in cases involving gender-based claims

[307] Gang Guidance, ¶ 48 ("Where an applicant has refused the advances of a gang because s/he is politically or ideologically opposed to the practices of gangs and the gang is aware of his/her opposition, s/he may be considered to have been targeted because of his/her political opinion").
[308] Gang Guidance, ¶¶ 36-41("Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty and lack of parental guidance").
[309] Gang Guidance, ¶¶ 13-14.
[310] El Salvador Eligibility Guidelines, pp. 31-32; Guatemala Eligibility Guidelines, pp. 40-41; Honduras Eligibility Guidelines, pp. 46-47.
[311] UNHCR, *Guidelines on International Protection No. 1*, ¶ 20; *see also* UNHCR, *Guidelines on International Protection No. 7*, ¶ 29 ("It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause."); UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 23.
[312] Gang Guidance, ¶¶ 63, 65.

The Proposed Rule provides that gender-based claims will, for the most part, no longer be favorably adjudicated. The rationale behind this specific prong of the new provision on nexus cites to a Tenth Circuit case that had noted, "There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there."[313] UNHCR is deeply concerned with the Proposed Rule's general rejection of gender as a basis for asylum claims, as it will foreclose international protection to many individuals who meet the refugee definition in the 1951 Convention. The change in law envisioned by the Proposed Rule will lead the United States to diverge sharply from well-established guidance according to which claims involving persecution linked to the applicant's gender are fully capable of falling within the refugee definition.

Under UNHCR standards, "[i]t is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR's Programme."[314] Although gender is not specifically referenced in the refugee definition set forth under Article 1A(2) of the 1951 Convention, it is widely accepted that gender can influence the type of persecution suffered as well as be a reason for that harm.[315] Accordingly, the UNHCR Handbook emphasizes that "[e]nsuring that a gender-sensitive interpretation is given to each of the Convention grounds is important in determining whether a particular claimant has fulfilled the criteria of the refugee definition," and UNHCR has provided extensive guidance detailing how gender can form the basis of claims on each of the five enumerated grounds in the Convention.[316]

International guidance identifies numerous ways in which an individual may suffer persecution for reasons of their gender.[317] For instance, gender may be a relevant contributing factor to persecution that takes the forms of discrimination,[318] sexual violence,[319] domestic violence,[320] coerced family planning,[321] female genital mutilation,[322] punishment for transgression of social mores,[323] and trafficking,[324] among others. If the well-founded fear of being persecuted in these or other ways is for reasons of a Convention ground—race, religion, nationality, membership of a particular social group, or political opinion—then there exists the connection required by the refugee definition.[325] In cases where a female applicant suffered domestic abuse, for example, nexus would be satisfied if the persecutor harmed the applicant for reasons related to her relationship with the persecutor or status in the relationship, in addition to any other reasons or motives that may exist.[326] Alternatively, in that same profile of case, nexus would be established

[313] Proposed Rule on Asylum and Withholding, p. 36,281 (citing *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005)).
[314] UNHCR, *Guidelines on International Protection No. 1*, ¶ 2
[315] UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 1-2.
[316] UNHCR Handbook, ¶ 22; *see generally* UNHCR, *Guidelines on International Protection No. 1*.
[317] UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 1-2. *See also* El Salvador Eligibility Guidelines, pp. 38-39; Guatemala Eligibility Guidelines, p. 49; Honduras Eligibility Guidelines, p. 56.
[318] UNHCR, *Guidelines on International Protection No. 1*, ¶¶ 14-15.
[319] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3.
[320] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3.
[321] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3. The Proposed Rule recognizes that individuals who have suffered or fear forced abortion or involuntary sterilization "shall be deemed to have been persecuted on account of political opinion" or "shall be deemed to have a well-founded fear of persecution on account of political opinion." Proposed Rule on Asylum and Withholding, p. 36,291. UNHCR observes that, given the gender element that is often present in claims involving forced abortion, the provision redefining "political opinion" is inconsistent with this provision on nexus that will purportedly preclude all gender-based claims.
[322] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3.
[323] UNHCR, *Guidelines on International Protection No. 1*, ¶ 3.
[324] UNHCR, *Guidelines on International Protection No. 1*, ¶ 18.
[325] UNHCR, *Guidelines on International Protection No. 1*, ¶ 20. UNHCR stresses once again that "[t]he claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted." *Id*. ¶ 23.
[326] Brief for UNHCR as Amicus Curiae, at 17; *Gonzales v. Thomas*, 547 U.S. 183 (Jan. 25, 2007).

if the State's failure to protect the applicant was connected to State biases and discrimination against women, for example, for religious or cultural reasons, engaging the Convention ground of religion and/or political opinion.[327]

The size of a group of people who share a protected characteristic has no bearing on whether it may form the basis of a claim for international protection. In other words, "[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds."[328] "The size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument is misconceived, as the other grounds are not bound by this question of size."[329] UNHCR has explained, "Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[330]

UNHCR recommends that the Government strike this provision that all but precludes asylum in cases involving eight different types of claims, as international law requires that applications for international protection not be rejected in the absence of a case-by-case adjudication of their merits. Further, UNHCR recommends that the Government implement a standard for nexus in U.S. law which requires only that a Convention ground be a relevant, contributing factor, not necessarily one central reason, for an applicant's persecution, which will bring the United States into conformity with international legal standards on this issue.

5. Evidence

The Proposed Rule introduces a new provision barring the consideration of evidence related to cultural stereotypes in the adjudication of claims for protection. It dictates, "For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender, and offered to support the basis of an alleged fear of harm from the individual or country shall not be admissible in adjudicating that application." The rationale behind this provision is indicated to be that "pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim," citing to the former Attorney General's decision in *Matter of A-B-* as support.[331] The parenthetical accompanying the cite to *Matter of A-B-* suggests that, for example, evidence about topics like *machismo* and family violence are not appropriate.[332]

UNHCR is concerned that this provision of the Proposed Rule will severely limit asylum-seekers' ability to submit and have adjudicators consider critical country conditions evidence that bears on

[327] Brief for UNHCR as Amicus Curiae, at 17; *Gonzales v. Thomas*, 547 U.S. 183 (Jan. 25, 2007).
[328] UNHCR, *Guidelines on International Protection No. 2*, ¶¶ 18-19.
[329] UNHCR, *Guidelines on International Protection No. 1*, ¶ 31.
[330] UNHCR, *Guidelines on International Protection No. 1*, ¶ 4; *see also* UNHCR, *Guidelines on International Protection No. 2*, ¶¶ 18-19 ("Cases in a number of jurisdictions have recognized 'women' as a particular social group. This does not mean that all women in the society qualify for refugee status. A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria").
[331] Proposed Rule on Asylum and Withholding, p. 36,282.
[332] Proposed Rule on Asylum and Withholding, p. 36,282.

determining whether they are eligible for international protection. While UNHCR observes that no documentary proof is required for states to recognize a refugee claim, information on certain social norms, attitudes, practices, and beliefs may support an applicant's case.[333] For example, information about specific social norms related to masculinity, the expectations of women and girls, and the types of treatment that are tolerated by communities and authorities in a given society may provide key context for evaluating whether a Convention ground is applicable, including whether a posited particular social group is legally cognizable (especially whether it satisfies the social distinction and particularity prongs of that analysis) and connected to the fear of persecution, whether the government in the applicant's country of origin is unwilling or unable to protect them, as well as whether the applicant is eligible for CAT protection.[334] In addition, this type of evidence may corroborate other aspects of applicants' claims, such as the persecution that they suffered or fear. By foreclosing the submission of a potentially wide body of country evidence, the provision will make it exceptionally challenging for asylum-seekers to meet the evidentiary burden required under U.S. law.[335] Moreover, UNHCR is particularly concerned that restricting the submission of evidence related to 'cultural stereotypes' will in fact encourage adjudicators to improperly rely, even if inadvertently, on personal assumptions or speculation about the context and circumstances that an asylum-seeker fled.[336] UNHCR is troubled that this rule will have an heavy negative impact on applicants with gender-based claims, child asylum applicants, and others.

Under international law, states are given leeway to establish appropriate procedures for determining who is or is not entitled to asylum.[337] Despite variance in the specific frameworks for examining asylum applications that exist from State to State, every framework should include essential guarantees and basic requirements.[338] UNHCR considers denying asylum applicants the opportunity to present relevant evidence to be a breach of procedural fairness, as it constricts applicants' abilities to establish that they meet the refugee definition set forth under Article 1A(2) of the 1951 Convention.[339] Whether claimed cultural or societal norms or patterns which may be understood as stereotypes, specifically, are relevant in refugee status determination depends on the nature and reliability of the information. When such information is reliable, it may be pertinent as evidence in an individual asylum case. In other cases, 'stereotype' evidence may indeed be of limited or no probative value, or simply irrelevant. Accordingly, international standards do not permit the categorical exclusion of certain types of evidence that may be critical to conducting refugee status determination.

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[333] UNHCR Handbook, ¶ 37 ("No documentary proof . . . is required in order for the authorities to recognize a refugee claim, however, information on practices in the country of origin may support a particular case.").

[334] *See, e.g.*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, Report to the Human Rights Council, A/HRC/31/57 ¶ 10 (Jan. 5, 2016) ("States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity.").

[335] The standard for corroboration in asylum cases under U.S. law has become increasingly difficult for applicants to meet, making their ability to submit country conditions evidence that supports their claim even more critical. Since the passage of the REAL ID Act in 2005, an immigration judge can require an applicant to provide corroborating evidence to sustain his or her burden of proof, even if the immigration judge finds the applicant's testimony credible, persuasive, and specific. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(ii), 119 Stat. 302 (codified at 8 U.S.C. § 1158(b)(1)(ii) (2014)); 8 U.S.C. § 1158(b)(1)(B)(ii) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

[336] *See* UNHCR & European Refugee Fund of the European Comm'n, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, 41 (May 2013), https://www.refworld.org/docid/519b1fb54.html.

[337] UNHCR Handbook, ¶ 189.

[338] UNHCR Handbook, ¶ 192.

[339] UNHCR, *Procedural Standards for RSD Under UNHCR's Mandate*, § 7.4.1.

UNHCR recommends that the Government strike this provision from the Proposed Rule, as it is clearly at variance with international standards on procedural fairness in asylum adjudication and will have a significant impact on applicants who submit certain types of claims. Instead, the Government should permit applicants to continue to support their claims with country conditions evidence that provides adjudicators with information that can help them determine whether the applicant is entitled to refugee protection.

6. Internal Relocation

The Proposed Rule creates a presumption that internal relocation would be reasonable in cases involving non-state actors, which it refers to as "private actors," unless the applicant can establish by a preponderance of the evidence that it would be unreasonable to relocate.[340] In addition, the rule identifies individuals or entities that constitute "private actors," including gang members, rogue officials, and family members or neighbors who are not themselves government officials.[341]

UNHCR is concerned that the new presumption that internal relocation is reasonable in non-state actor cases establishes an unfairly high threshold for establishing a protection claim, will ultimately preclude refugees from receiving international protection and could result in *non*-refoulement in violation of Article 33(1) of the 1951 Convention. Further, UNHCR is particularly troubled that this provision appears to apply to child applicants, whose capacity to relocate internally is particularly limited and who have less capacity to meet the burden of proof proposed by these changes.

It is acknowledged that the concept of internal flight or relocation is certainly considered in some countries, in appropriate cases, in the implementation of their refugee protection obligations. It should however not be seen as an independent test in the determination of refugee status, and should not be used as a presumptive bar.[342] UNHCR acknowledges that the question of whether an asylum applicant could internally relocate very well may arise in determining asylum eligibility[343] - and indeed has arisen in U.S. jurisprudence for decades[344] - yet urges that this must be considered as part of the holistic assessment of refugee status.[345]

As a baseline principle, UNHCR notes that the criteria for refugee status are to be interpreted in a liberal and humanitarian spirit, in keeping with the object and purpose of the Convention. [346] International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum.[347] Because asylum is not a last resort, therefore, internal relocation cannot be invoked "in a manner that would undermine important human rights tenets

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[340] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing to revise 8 C.F.R. § 208.13(b)(3)(iii) so that internal relocation is presumed reasonable in instances where the persecutor is not the government), *and id.* at 36,294 (proposing to revise 8 C.F.R. § 208.16(b)(3)(iii) so that internal relocation is presumed reasonable where the persecutor is a private actor); *see also id.* at 36,272 (proposing to consider the reasonableness of internal relocation in credible fear screenings), *and id.* p. 36,282 (claiming that "there is no apparent reason" why internal relocation would not be reasonable where the persecutor is a non-government actor).

[341] *See* Proposed Rule on Asylum and Withholding, 85 Fed. Reg. at 36,293 (proposing to revise 8 C.F.R. 208.13(b)(3)(iv) so that "private actors" for the purposes of section iii includes "gang members, rogue officials, family members who are not government officials, or neighbors who are not government officials), *and id.* at 36,294 (proposing to narrow the definition of "private actor" in 8 C.F.R. § 208.16).

[342] UNHCR, *Guidelines on International Protection No. 4*, ¶ 2.

[343] UNHCR, *Guidelines on International Protection No. 4*, ¶ 2.

[344] *See* Proposed Rule on Asylum and Withholding, p. 36,282 (explaining that the current regulations provide a "nonexhaustive list of factors for adjudicators to consider in making internal relocation determinations"), *and id.* at 36,272 (citing *Maldonado v. Lynch*, 786 F.3d 1155, 1163 (9th Cir. 2015)); *see also, e.g.*, 8 C.F.R. §§ 208.13(b)(1)(i)(B), 1208.13(b)(1)(i)(B), 208.16(b)(1)(i)(B), 1208.16(b)(1)(i)(B).

[345] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 6-30.

[346] UNHCR, *Guidelines on International Protection No. 4*, ¶ 2.

[347] UNHCR, *Guidelines on International Protection No. 4,* ¶ 4.

underlying the international protection regime, namely the right to leave one's country, the right to seek asylum and protection against refoulement."[348]

Internal relocation should be considered as part of the holistic assessment of the asylum claim (as opposed to creating a presumption of denial, as the Proposed Rule sets out to do). In this holistic assessment, the adjudicator should look to both relevance and reasonableness: that is, is relocation practical, safe, and legally accessible (if not, this inquiry is not relevant), and can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship (if not, this inquiry is not reasonable).[349] Where the persecutor is a non-state actor, the adjudicator should look to the capacity for the persecutor to pursue the claimant in other parts of the country, as well as the capacity and willingness of the state to provide effective protection.[350]

UNHCR observes that asylum-seekers may not be able to flee or relocate within their countries of origin when persecuted by non-state actors,[351] and imposing a presumption of such fails to account for the reality of many asylum-seekers. In cases involving non-state agents of persecution, adjudicators must perform a nuanced analysis of whether the persecutor is likely to pursue the claimant to the proposed area of relocation and whether effective, durable State protection from the harm feared exists in that place.[352] With respect to the availability of State protection in the proposed area of relocation, a variety of factors must be considered, including the ability and willingness of the State to provide protection in both the original area of persecution and the proposed area of relocation.[353] Because assessing reasonableness of internal relocation involves a highly fact- and location-specific inquiry, it is not possible to establish a presumption that internal relocation is reasonable in this type of case.

The use of the concept of internal relocation should not create additional burdens for asylum-seekers, as the Proposed Rule would do.[354] Instead, the burden of proving that internal relocation is reasonable should rest on the one who asserts the allegation.[355] Where internal relocation is considered, international law required that a particular area of the applicant's country of origin be identified, and that the applicant then have an opportunity to respond.[356] The Proposed Rule sets the burden with the asylum-seeker, creating a presumption of internal relocation alternatives for non-state actor persecution. Instead, the burden to demonstrate that internal relocation is reasonable should lie with the adjudicator, and to meet that burden, the adjudicator would need to specify a location in the country of origin where the applicant could lead a relatively normal life without facing undue hardship.[357]

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[348] UNHCR, *Guidelines on International Protection No. 4*, ¶ 4.
[349] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 6-31.
[350] UNHCR, *Guidelines on International Protection No. 4,* ¶¶ 15-17.
[351] "UNHCR has long maintained that the 1951 Convention does not confer protection exclusively against persecution by state agents. Rather, persecutory conduct can also be committed by non-state agents." UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466*, 13 (Feb. 2018) https://www.refworld.org/docid/5a7835f24.html.
[352] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 7(I)(c), 17.
[353] UNHCR, *Guidelines on International Protection No. 4*, ¶ 15; *see also* Gang Guidance, ¶ 53 (outlining the analysis for internal flight in gang-based cases). UNHCR guidance on this issue provides, "As with questions involving State persecution generally, the latter involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection. Evidence of the State's inability or unwillingness to protect the claimant in the original persecution area will be relevant. It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas." UNHCR, *Guidelines on International Protection No. 4*, ¶ 15.
[354] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 33-34.
[355] UNHCR, *Guidelines on International Protection No. 4*, ¶¶ 33-34; *see also* UNHCR Handbook, ¶196 (discussing burden of proof).
[356] UNHCR, *Guidelines on International Protection No. 4*, ¶ 6.
[357] *See* UNHCR, *Guidelines on International Protection No. 4*, ¶ 7(II)(a) (addressing considerations concerning the "reasonableness" prong of the internal relocation analysis); *see also id.* ¶¶ 18-30 (elaborating on these considerations).

There are special considerations in any analysis of an internal flight or relocation alternative for child applicants, especially unaccompanied children.[358] Given that child asylum applicants are frequently targeted by non-state agents of, such as militarized groups, criminal gangs, and caregivers, this vulnerable group stands to be particularly impacted by the Proposed Rule's provision creating a presumption that internal relocation is reasonable in cases involving non-state actors.[359] Internal relocation may not be practically realistic for children, and poses potentially severe consequences, including violations of fundamental human rights like the right to life, survival, and development.[360] The child's best interests should inform the determination of whether internal relocation is reasonable, as well as whether it is relevant.[361] What is or is not in a child's best interest is a highly fact-specific analysis that often requires an adjudicator to elicit critical information from the child applicant or other witnesses. Due to their trauma history, age, and maturity level, children may have a difficult time articulating their claims, and they are not likely to be able to rebut a presumption of reasonable internal relocation, even where it is not actually reasonable.

In sum, UNHCR is concerned that the Proposed Rule's creation of a presumption of internal relocation for non-state actor persecution is out of step with the object and purpose of the Convention. Substantively, internal relocation should be considered on a case-by-case basis, as part of the holistic analysis of the refugee claim, and should weigh the reasonableness and relevance of the possibility of relocation. The realities of non-state actor persecution make it imperative that such claims be included in such holistic, case-by-case analysis. Procedurally, the burden of proof should not fall to the asylum-seeker, but rather to the adjudicator, who should identify an area of the country that would be reasonable and relevant for relocation, and who should offer the individual the opportunity to rebut that assertion. Finally, the special considerations owed child asylum applicants, particularly unaccompanied children, further confirm that a presumption of internal relocation as applied to this population would be inappropriate.

UNHCR recommends that the Government not implement the new provision creating a presumption of internal relocation in cases involving asylum-seekers who have suffered persecution by non-state actors. Instead, UNHCR recommends that the Government bring its adjudication of internal relocation in line with the international legal principles described above. At the very least, children's claims should be exempted from this section of the Proposed Rule.

7. Factors for Consideration in Discretionary Determinations

i) Changes put forward in the Proposed Rule

UNHCR is concerned that the Proposed Rule mandates that adjudicators consider additional negative factors in determining whether ultimately to grant asylum. This stems from the "discretionary" provision in U.S. law; that the attorney general or homeland security secretary "may" grant asylum if the applicant meets the definition.[362] The Proposed Rule instructs adjudicators working for the attorney general or homeland security secretary to use these

[358] For example, "What is merely inconvenient for an adult might well constitute undue hardship for a child, particularly in the absence of any friend or relation." UNHCR, *Guidelines on International Protection No. 4*, ¶ 15.
[359] *See* UNHCR, *Guidelines on International Protection No. 8*, ¶ 37.
[360] *See* UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 53-57 ("Such relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment.").
[361] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 53-57.
[362] Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A) (2018).

additional discretionary factors in a wide-reaching and, given the very limited circumstances in which an applicant may overcome them, all but mandatory fashion. By doing so, the Proposed Rule effectively creates new bars to asylum that are beyond the exclusionary grounds proposed in the Convention and Protocol.

The Proposed Rule introduces a series of twelve negative discretionary factors that adjudicators must consider in any asylum application, and which will forcefully influence whether an application for asylum will be granted.[363] First, the provision identifies three "specific but non-exhaustive factors that adjudicators *must* consider" in determining whether to grant asylum.[364] These factors are "significantly adverse" for the purpose of granting asylum (though the Proposed Rule notes that that the adjudicator "should also consider any other relevant facts and circumstances"). They include:

(i) Unlawful entry into the United States unless "made in immediate flight from persecution in a contiguous country";
(ii) Failure to apply for protection in at least one country through which he or she transited before arriving in the United States; and
(iii) Use of fraudulent documents to enter the United States unless the individual arrives directly from his or her country of origin without transiting through any other country.[365]

Next, the provision proposes nine additional adverse factors, "the applicability of which would ordinarily result in the denial of asylum as a matter of discretion." (Adjudicators may "nevertheless favorably exercise discretion in extraordinary circumstances" or extreme and unusual hardships.[366]) These nine factors apply to any applicants who:[367]

(A) Spend more than 14 days in any transit country immediately before arriving in the United States;
(B) Transit through more than one country between their country of origin and the United States;
(C) Have certain criminal histories that will now remain relevant for immigration purposes, despite any reversal, vacatur, expungement, or modification of their conviction or sentence, unless they were found not guilty;
(D) Accrue more than one year of unlawful presence in the United States prior to filing their asylum application;
(E) Fail to timely file required federal, state, and local income tax returns or otherwise fail to satisfy any federal, state, or local tax obligations;
(F) Have had two or more prior asylum applications denied for any reason;
(G) Have withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;
(H) Fail to attend their asylum interviews with DHS; or

[363] Proposed Rule on Asylum and Withholding, p. 36,283 (proposing three mandatory discretionary factors and nine additional "adverse factors").
[364] Proposed Rule on Asylum and Withholding, p. 36,283 (emphasis added).
[365] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing additions at 8 CFR §§ 208.13(d)(1) and 1208.13(d)(1)).
[366] Proposed Rule on Asylum and Withholding, p. 36,283 (giving examples of extraordinary circumstances "such as those involving national security or foreign policy considerations", and stating that if any of the nine adverse factors are present, the adjudicator can grant asylum if the applicant shows "by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship"). The Proposed Rule cites to previous prior case law on exceptions to discretionary denials.
[367] Proposed Rule on Asylum and Withholding, p. 36,283 (stating that if any of the nine adverse factors are present, the adjudicator can grant asylum if the applicant shows "by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship").

(I) Were subject to a final order of removal and did not file a motion to reopen to seek asylum based on changed country conditions within a year of those changes in country conditions.[368]

The Proposed Rule only permits an applicant to overcome any of the above nine adverse discretionary factors where there exist "extraordinary circumstances" or when the applicant can demonstrate by clear and convincing evidence that denial "would result in exceptional and extremely unusual hardship."[369] The regulation specifically contemplates "extraordinary circumstances" as encompassing "national security or foreign policy considerations." It does not elaborate on what may qualify as "exceptional and extremely unusual hardship" in the asylum context, but rather refers to previous case law.[370] Regardless, this provision of the Proposed Rule concludes by noting that even when an applicant can establish "extraordinary circumstances," those may nevertheless "still be insufficient to warrant a favorable exercise of discretion."[371]

It is UNHCR's understanding that a discretionary denial of asylum has typically been entered *after* the adjudicator has considered other aspects of the asylum claim,[372] and our comments below reflect this understanding. However, UNHCR notes with concern that this panoply of discretionary factors could, in practice, interplay with other aspects of the Proposed Rule such that they deny access to consideration of the substance of the asylum claim altogether. For instance, the Proposed Rule's provisions on frivolous claims[373] indicates that an asylum claim can be dismissed as frivolous (and the applicant rendered unable to reapply) if the application is "clearly foreclosed by applicable law."[374] UNHCR is concerned, in light of other changes suggested in the Proposed Rule, that an applicant who falls into one of these (exceptionally broad) categories for discretionary denial could see their application "foreclosed by applicable law." Likewise, the Proposed Rule contains provisions permitting pretermission of applications that do not establish a *prima facie* claim on paper and / or are "legally deficient,"[375] and UNHCR is concerned that this could be construed to permit the pretermission of claims which trigger one or more of these discretionary factors. Consequently, it seems eminently possible that these provisions could, in combination, preclude consideration of the substance of the asylum claim.

ii) UNHCR's views on discretionary denials

UNHCR is concerned that the expansive new set of negative discretionary factors will effectively function as additional bars to asylum, in a manner far beyond the grounds for exclusion prescribed by Article 1E and Article 1F of the Convention and Protocol. In line with international standards, provisions for the exclusion of those who would otherwise qualify for protection must always be applied with "great caution" and interpreted in a "restrictive manner" in light of the possible serious

[368] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing additions to 8 CFR §§ 208.13(d)(2)(i); 1208.13(d)(2)(i)).
[369] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing to revise 8 CFR §§ 208.13(d)(2)(ii), 1208.13(d)(2)(ii)).
[370] 8 CFR §§ 208.13(d)(2)(ii), 1208.13(d)(2)(ii). "Exceptional and extremely unusual hardship" is a concept in U.S. immigration that historically was relevant to determining eligibility for other relief, including cancellation of removal, but never had a place in the asylum eligibility analysis.
[371] 8 CFR §§ 208.13(d)(2)(ii), 1208.13(d)(2)(ii). The provision does not comment on whether exceptional and extremely unusual hardship may sometimes be insufficient to warrant a favorable exercise of discretion.
[372] *See* Proposed Rule on Asylum and Withholding, p. 36,282 ("[A]fter demonstrating statutory and regulatory eligibility" applicants must then demonstrate that the Attorney General or Secretary should "exercise his discretion to grant asylum."); *see also, e.g.*, U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (2018) ("[O]nce an officer has determined that an applicant is eligible for asylum, he or she must then decide whether to favorably exercise discretion . . . .").
[373] *See supra* Section III.B.1, p. 11.
[374] Proposed Rule on Asylum and Withholding, p. 36,295 (proposing to revise 8 C.F.R. § 208.20(c)(4)); *see also id.* p. 36,304 (proposing to revise 8 C.F.R. § 1208.20(c)(4)).
[375] Proposed Rule on Asylum and Withholding, p. 36,277. *See* discussion at *supra* Section III.B.2, p. 16.

consequences of denying protection to an asylum-seeker.[376] Though the Proposed Rule asserts that these adverse discretionary factors "fall short of grounds of mandatory denial," it seems to institute a new set of bars to asylum, as the presence of any one of those factors will lead to denial of protection in all but the rarest of circumstances. The twelve articulated factors, if applied, will contravene fundamental principles guaranteed under the 1951 Convention, including non-discrimination, non-penalization for irregular entry or presence, and non-refoulement. Because the Proposed Rule makes no exception for child asylum-seekers, UNHCR anticipates that many members of this exceptionally vulnerable group will be refouled due to these new provisions that all but bar them from relief and protection.

UNHCR observes that, even prior to the Proposed Rule, the U.S. practice of discretionary denial of asylum was at variance with international law, which does not recognize discretion as a factor in providing refugee protection. Under international law, someone who meets the definition articulated in Article 1 of the Convention and Protocol "shall" be considered a refugee.[377] This definition has a declaratory character, that is, "a person does not become a refugee because of recognition, but is recognised because s/he is a refugee."[378] It follows that failure to meet certain technical requirements "does not negate the refugee character of the person."[379]

Fundamentally, the right to seek and enjoy asylum, included inter alia in Article 14 of the Universal Declaration on Human Rights, is implemented in part by States' obligations to provide international protection to refugees in accordance with the 1951 Convention and its 1967 Protocol. The United States delivers on this responsibility in part through the status of "asylee" – the outcome of a successful asylum claim. This cannot depend on the discretion of the adjudicator; protection under the 1951 Convention and its 1967 Protocol is not contingent on the discretion of refugee authorities.[380]

When an individual is determined to meet the 'inclusion criteria' of the refugee definition contained in Article 1A(2) of the 1951 Convention or the 1967 Protocol, that person should have their refugee status formally recognized through the domestic legal framework of the host country and be provided with a secure and stable status to stay and reside in the country.[381] In other words, once it is established that a person is a refugee, the person "lawfully stays" in the host country within the meaning of the 1951 Convention and should be accorded access to a range of rights allowing

[376] UNHCR, *Guidelines on International Protection No. 5*, ¶ 2.
[377] *See* Refugee Convention, art. 1A(2) (providing that "the term 'refugee' *shall* apply to" anyone who meets the definition under Article 1A(2)) (emphasis added).
[378] UNHCR Handbook, ¶ 28.
[379] UNHCR, *Interpreting Article 1 of the 1951 Convention.*
[380] *See* UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶16, U.N. Doc. EC/SCP/54 (Jul. 1989) ("The legislative approach adopted by States to regulate refugee rights can, in itself, negatively influence their realization. In some countries, for example, the issue of refugee protection is approached as one of defining not the rights themselves but rather the powers vested in refugee officials. This means that the protection of refugee rights becomes an exercise of powers and discretions by those officials rather than enforcement of specific rights identified and guaranteed by law. In other cases the realization of refugee rights is left to depend ultimately on an exercise of ministerial discretion.").
[381] The U.S. status of "withholding of removal" under the INA does not meet the required provision of rights under the Convention because it has a higher bar than an asylum determination and is not available to all refugees. As a result, those rightfully considered "refugees" still do not have access to the protection of withholding of removal. *Compare Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014) ("[T]he bar for withholding of removal is higher; an applicant 'must demonstrate that it is more likely than not that he would be subject to persecution'" in his country of origin (quoting *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001))), *with Cardoza-Fonseca*, 480 U.S. at 439–40 (stating that an asylum determination requires an applicant to show "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." (quoting Handbook, ¶ 42)). Additionally, withholding of removal fails to guarantee many central Convention rights available to those recognized through Article 1, including rights to family reunification; freedom from arbitrary detention, and pathways to naturalization.

the person to integrate.[382] The U.S. discretionary provision, which effectively says that a person may meet the definition of a refugee but nonetheless not be granted asylum in the United States, goes against the object and purpose of the 1951 Convention and its 1967 Protocol by failing to ensure the effective implementation of the right to seek and enjoy asylum.

The international legal regime does acknowledge that there are individuals who may meet the positive ('inclusion') criteria for refugee status, but who nonetheless are excluded from international protection. The relevant provisions in the 1951 Convention and 1967 Protocol lay out a clear framework for determining who is a refugee (and is therefore entitled to the rights enumerated in the Convention itself) – and who, while otherwise having the characteristics of a refugee, should nonetheless be excluded from refugee status.[383] Such exclusionary considerations should generally be considered only after an assessment of the 'inclusion' aspects of the person's claim for refugee status, and should be balanced against the need for protection itself.[384]

There are three categories of criteria for exclusion, which are commonly referred to as "the exclusion clauses."[385] The first category—exclusion of persons already receiving United Nations protection or assistance[386]—is not relevant to the issues raised by this Proposed Rule. However, the second and third categories—exclusion of persons not considered to be in need of international protection[387] and of persons considered not to be deserving of international protection[388]—provides valuable guidance for the particular provisions at hand.

The Convention sets a high threshold for the exclusion of persons not considered in need of international protection under Article 1E. Individuals "recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country" are excluded from protection in another country.[389] Because of the potential serious consequences of excluding an individual with international protection needs, "a strict test" with two core requirements controls whether an asylum-seeker is excludable under Article 1E.[390] For Article 1E to apply, a person must have both (a) taken residence in the country with respect to which the application of Article 1E is being examined *and* (b) be recognized by the competent authorities of that country as having the rights and obligations attached to possession of the nationality of that country.[391] In other words, the firm resettlement bar does not apply to individuals who could take up residence in a third country but have not done so. It also does not apply to individuals who merely visited, transited through, or were present in a country for a temporary or short-term stay, as well as those whose rights and obligations in a country diverge significantly from those enjoyed by nationals.[392] The object and

[382] The object and purpose of the 1951 Convention and its 1967 Protocol is to ensure refugees can effectively gain access to international protection and the rights stipulated in the Convention (the importance of which is emphasized in the Protocol via art I(1)).
[383] Refugee Convention, arts. 1D - 1F.
[384] *See* UNHCR, *Guidelines on International Protection*, ¶ 31 ("The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion . . . ."), *and* UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1051 Convention Relating to the Status of Refugees*, ¶ 99 (Sep. 4, 2003), https://www.refworld.org/docid/3f5857d24.html (explaining that application of the exclusion clauses require both an evaluation of the crime, the applicant's role, and the nature of the persecution feared).
[385] UNHCR Handbook, ¶¶ 140-41 *et seq.*
[386] Refugee Convention, art. 1D; *see also* UNHCR Handbook, ¶ 142.
[387] Refugee Convention, art. 1E.
[388] Refugee Convention, art. 1F.
[389] Refugee Convention, art. 1E.
[390] UNHCR, *Note on the Interpretation of Article 1E of the 1951 Convention*, ¶ 2 (Mar. 2009), https://www.refworld.org/docid/49c3a3d12.html.
[391] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 6.
[392] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 9-10, 13.

purpose of this Article is to exclude from refugee status those persons who do not require refugee protection because they already enjoy a status which, possibly with limited exceptions, corresponds to that of nationals.[393]

The Convention also sets a high threshold for the Article 1F exclusion clause to apply. Under this article, a person may only be excluded from refugee status when there are "serious reasons for considering" that (a) he or she has committed a crime against peace, a war crime, or a crime against humanity; (b) he or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee; or (c) he or she is guilty of acts contrary to the purposes and principles of the United Nations.[394] The rationale behind Article 1F "is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts."[395]

The grounds for exclusion – that is, denial of refugee status to a person who would otherwise meet the eligibility criteria for international refugee protection – are enumerated exhaustively in Article 1 of the 1951 Convention. While these grounds are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect.[396] The exclusion clauses in Article 1F of the 1951 Convention, in particular, should not be confused with Article 33(2) of the 1951 Convention, which denies the benefit of non-refoulement protection under Article 33(1) to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted of a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[397] Article 1F and Article 33(2) are distinct provisions that serve different purposes: Article 1F excludes individuals from the refugee definition, whereas Article 33(2) provides for exceptions to the principle of non-refoulement. Whereas Article 1F aims to preserve the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country and permits, under exceptional circumstances, the withdrawal of protection from refoulement of refugees who pose a serious actual or future danger to the host country or its community.

Accordingly, the Proposed Rule's new set of adverse discretionary factors undermine fundamental principles of the 1951 Convention and 1967 Protocol. The Proposed Rule effectively suggests that they function as additional bars to asylum (that is, grounds for exclusion). UNHCR is concerned they will be nearly impossible for many asylum-seekers to overcome, creating an onerous exclusion framework deeply at variance with international law. Further analysis of these adverse discretionary factors is provided, below.

a. Unlawful entry[398]

[393] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 2.
[394] Refugee Convention, art. 1F
[395] UNHCR, *Guidelines on International Protection No. 5*, ¶ 2.
[396] UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1051 Convention Relating to the Status of Refugees*, ¶ 7.
[397] Refugee Convention, art. 33(2).
[398] UNHCR notes that a separate policy directing that asylum-seekers who cross irregularly be denied asylum is being challenged in federal court. UNHCR filed amicus briefs addressing the asylum proclamation in *O.A. v. Trump*, D.D.C., 1:18-cv-02718 (Dec. 2018); *S.M.S.R. v. Trump*, D.D.C., 1:18-cv-02838 (Dec. 2018); *East Bay Sanctuary Covenant v. Barr*, Ninth Cir., Nos. 19-16487, 19-16773 (Oct. 2019). In addition, UNHCR has previously made public statements regarding the U.S. government's attempts to restrict asylum based on manner of entry. *See* UNHCR Press Release, UNHCR Deeply Concerned About New U.S. Asylum Restrictions, (15 July 2019), https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html (noting that such a rule "will endanger vulnerable people in need of international protection from violence or persecution"). UNHCR is concerned

The Proposed Rule directs that those who enter irregularly be denied asylum under the discretionary clause.[399] UNHCR is troubled that this element of the Proposed Rule appears to all but mandate the denial of asylum for applicants who enter the United States irregularly unless the individual fled persecution or torture in a contiguous country. This bar is at variance with three fundamental principles of international law underlying the 1951 Convention and 1967 Protocol, including non-discrimination, non-penalization for irregular entry or presence, and *non-*refoulement.[400] The Proposed Rule discriminates against asylum-seekers from particular countries of origin and penalizes them for their manner of entry into the United States,[401] and increases the risk that those individuals will be returned to a place where their lives or freedom are at risk; all these results contravene international legal standards.

The Convention "recognizes that the seeking of asylum can require refugees to breach immigration rules" and stipulates that refugees should not suffer penalties, or discrimination, for this reason.[402] Article 31(1) of the 1951 Convention effectively prohibits discrimination between groups of refugees based on their manner of entry. Specifically, Article 31(1) prohibits states from imposing penalties on asylum-seekers "on account of their illegal entry or presence . . . provided they have come directly, present themselves without delay to the authorities and show good cause for their illegal entry or presence."[403] The reference to "penalties" in Article 31 is not intended to be limited to criminal penalties and encompasses "any administrative sanction or procedural detriment imposed on a person seeking international protection."[404] Disparate treatment of two groups of refugees—those who arrive at ports of entry and those who enter irregularly—is exactly this type of detriment, as is denying the latter group access to rights enumerated in the 1951 Convention. Making unlawful entry a negative discretionary factor in the determination of refugee status, which should not be a discretionary analysis in the first place, is a penalty that carries potentially serious consequences for someone seeking international protection, undermines the right to asylum and risk violations of the principle of non-refoulement.

UNHCR recommends that this element of the Proposed Rule not be enacted.

b. Transit factors[405]

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that this type of measure "excessively curtails the right to apply for asylum, jeopardizes the right to protection from refoulement, significantly raises the burden of proof on asylum seekers beyond the international legal standard, sharply curtails basic rights and freedoms of those who manage to meet it, and is not in line with international obligations." *Id.*

[399] *See* Proposed Rule on Asylum and Withholding, p. 36,293 (proposing that 8 C.F.R. § 208.13(d)(1)(i) list unlawful entry or attempted unlawful entry into the United States as a "significant adverse discretionary factor"), *and id.* at 36,283 (explaining that irregular entry should be considered "significantly adverse for purposes of the discretionary determination").

[400] *See* Refugee Convention, Introductory Note.

[401] The rationale behind this adverse discretionary factor is a fairly clear expression of the U.S. government's intent to penalize asylum-seekers who enter irregularly. It highlights that it is a federal crime to enter the United States outside of a port of entry and discusses the "significant strain" on resources to respond to individuals who enter irregularly to seek asylum. Proposed Rule on Asylum and Withholding, p. 36,283. UNHCR observes that, if this provision is intended to exclude based on such criminal conduct, it would be at variance with the exclusion clause in Article 1F, which describes persons not deserving of international protection as those who have committed certain serious crimes or heinous acts.

[402] Refugee Convention, Introductory Note.

[403] UNHCR notes that the requirement in Article 31(1) for asylum-seekers to have "come directly" – while not the precise topic of this proposed change – may nonetheless be relevant for consideration when crafting a framework in line with international law. For a detailed discussion of the "come directly" term in Article 31(1), *see* Cathryn Costello, UNHCR Legal and Protection Policy Research series, PPLA/2017/01, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, § 4.2 (Jul. 2017) https://www.refworld.org/docid/59ad55c24.html (noting "there is strong support for the view that all refugees are to be regarded as 'coming directly' except those who have found secure asylum elsewhere").

[404] UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas of 'International' Zones at Airports*, ¶8 (Jan. 2019) https://www.refworld.org/docid/5c4730a44.html.

[405] UNHCR filed an amicus brief addressing the transit ban in *O.A. v. Trump*, D.D.C., 1:18-cv-02718 (Dec. 2018); *S.M.S.R. v. Trump*, D.D.C., 1:18-cv-02838 (Dec. 2018); *East Bay Sanctuary Covenant v. Barr*, Ninth Cir., Nos. 19-16487, 19-16773 (Oct. 2019). In

UNHCR is concerned that the three new transit-related adverse discretionary factors—failing to apply for protection in at least one transit country, spending more than 14 days in a transit country, and transiting through more than one country en route to the United States[406]—impinge on the right to seek asylum and the core principle of non-refoulement, and go beyond the exhaustive exclusion framework previsioned in international law. While ensuring refugee protection is the responsibility of the state where the refugees are, UNHCR acknowledges that at the same time, refugees do not have an unfettered right to choose their 'asylum country.'[407] Refugees' intentions ought to be taken into account when considering onward movement, as should connections to the country in which the refugee applies for asylum.[408] Blanket rules requiring refugees to apply in the first country they reach are inappropriate and fail to recognize the need for responsibility-sharing in refugee protection globally.[409]

As discussed above, the Convention does acknowledge that persons who enjoy a secure residency status and rights akin to those of nationals on one country do not need, and may therefore be excluded from, refugee status in another country. Article 1E provides a precise test and sets a high threshold for determining whether exclusion is applicable on such ground: individuals "recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country" are excluded from protection.[410] For Article 1E to apply, a person must have both (a) taken residence in the country with respect to which the application of Article 1E is being examined *and* (b) be recognized by the competent authorities of that country as having the rights and obligations attached to possession of the nationality of that country.[411]

None of the transit-related adverse discretionary factors align with international legal standards:

- **Failure to apply for protection in a transit country:** International law does not require asylum-seekers to apply for protection in the first, or any subsequent, country through which they transit before arriving in the country where they intend to seek asylum.[412] UNHCR emphasizes that the primary responsibility for international protection remains with the state where an asylum claim is lodged.[413] In many cases, asylum-seekers move

addition, UNHCR has previously made public statements regarding the U.S. government's attempts to restrict asylum based on manner of entry. *See* UNHCR Press Release, UNHCR Deeply Concerned About New U.S. Asylum Restrictions, (Jul. 15, 2019), https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html (noting that such a rule "will endanger vulnerable people in need of international protection from violence or persecution"). UNHCR is concerned that this type of measure "excessively curtails the right to apply for asylum, jeopardizes the right to protection from refoulement, significantly raises the burden of proof on asylum seekers beyond the international legal standard, sharply curtails basic rights and freedoms of those who manage to meet it, and is not in line with international obligations." *Id*.

[406] *See* Proposed Rule on Asylum and Withholding, p. 36,284, *and id.* p. 36,293 (proposing to include the transit factors at 8 C.F.R. § 208.13(d)(1)(ii), 8 C.F.R. § 208.13(d)(2)(i)(A) and 8 C.F.R. § 208.13(d)(2)(i)(B)).

[407] UNHCR, *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 (Apr. 2018) [hereinafter Safe Third Country Paper]; *see also* UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, ¶ 14 (Sep. 2019); UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, ¶ 1 (May 2013).

[408] Safe Third Country Paper, ¶ 2.

[409] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, ¶ 14 (Sep. 2019).

[410] Refugee Convention, art. 1E.

[411] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 6.

[412] *See* UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, ¶ 14 (Sep. 2019) (explaining that while the 1951 Convention does not include the right of refugees to decide in which State they will receive international protection, asylum should not be refused solely because it could have been sought in another country); Exec. Comm., No. 15 (XXX) Refugees Without an Asylum Country (1979), ¶¶ (h)(iii-iv) (noting that "[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account" and that "[r]egard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State").

[413] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees & Asylum-Seekers*, 6 ¶ 16 (Sep. 2019), https://www.refworld.org/docid/5d8a255d4.html.

onward to seek international protection that is not in fact available in the place to which they have initially fled.[414] The fact that an asylum-seeker has moved onward does not affect his or her right to apply for asylum and be treated in conformity with international refugee and human rights law, including protection from refoulement.[415] Thus, "asylum should not be refused solely on the ground that it could be sought elsewhere."[416]

In addition, this adverse discretionary factor goes far beyond the exclusion clause in Article 1E, which does not apply to individuals who could take residence in a third country but have not done so or merely visited, transited through, or were present in a country for a temporary or short-term stay, as well as those whose rights and obligations in a country diverge significantly from those enjoyed by nationals.[417]

- **Spending more than 14 days in a transit country:** This adverse discretionary factor falls outside of the exclusion clause in Article 1E. It requires no inquiry into whether the asylum-seeker took residence in the transit country in question, nor does it require that the asylum-seeker have the rights and obligations equivalent to those of nationals in that country. Therefore, it is clearly at variance with international law.

- **Transiting through more than one country:** As with the other transit-related provisions, this adverse discretionary factor is at odds with international legal standards on exclusion. It does not contemplate whether an asylum-seeker took residence and had certain rights and responsibilities in any transit country, as required under Article 1E to determine whether a person is not considered in need of international protection.

Therefore, directing adjudicators to deny applications where the asylum-seeker did not apply for asylum in a transit country, stayed for a short time in a transit country, or transited through one or more countries will excessively curtail the protection for refugees to which they are entitled under the 1951 Convention and 1967 Protocol.

UNHCR recommends that these elements of the Proposed Rule not be enacted.

c. Fraudulent documents

The Proposed Rule states that an applicant who uses "fraudulent documents" to enter the United States is "inadmissible."[418] UNHCR is concerned that this adverse discretionary factor fails to recognize that some asylum-seekers may be forced to rely on fraudulent documents to escape violence or persecution that they face in a territory, including a territory that may not be the asylum-seeker's country of origin.[419] Similar to the adverse discretionary factor on unlawful entry, this provision contravenes fundamental principles of refugee protection by penalizing asylum-seekers who were forced to breach immigration rules during their flight to seek safety.[420]

[414] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees & Asylum-Seekers*, 2 ¶ 4.
[415] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees & Asylum*-Seekers, 2 ¶ 11.
[416] Exec. Comm., No. 15 (XXX) Refugees Without an Asylum Country (1979), ¶¶ (h)(iv).
[417] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 9-10, 13.
[418] Proposed Rule on Asylum and Withholding, p. 36,283; *see also id.* at 36,293 (proposing to revise 8 C.F.R. § 208.13(d)(1)(iii) so that the use of fraudulent documents is a "significant adverse discretionary factor" for adjudicators).
[419] *See ExCom Conclusion No. 58* (XL) – 1989 UNHCR, ¶ (i).
[420] *See* Refugee Convention, Introductory Note (discussing non-penalization and non-refoulement).

Under Article 31(1) of the Convention, states are prohibited from imposing penalties on asylum-seekers "on account of their illegal entry or presence . . . provided they have come directly, present themselves without delay to the authorities and show good cause for their illegal entry or presence." "Illegal entry" is understood to "include arriving or securing entry through the use of false or falsified documents."[421] This reflects international law's recognition "that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered."[422] Penalties imposed beyond the scope of Article 31(1) risk undermining the object and purpose of the Convention, which as discussed above, gives meaning to the right to seek and enjoy asylum. Enacting this provision is likely to lead to the forced return of refugees to territories where they fear threats to their lives and freedom, in violation of Article 33(1) and in a manner that undermines the object and purpose of the Convention.

UNHCR recommends that this element of the Proposed Rule not be enacted.

d. Criminal convictions

The Proposed Rule states that adjudicators must consider any criminal conviction that remains relevant for immigration purposes under U.S. law as a significant adverse factor (including those that have been reversed, vacated, expunged, or modified).[423] More specifically, it directs adjudicators to deny applications filed by individuals who were previously convicted of a "particularly serious crime" but whose convictions or sentences were subsequently reversed, vacated, expunged, or modified, unless the individual was found not guilty.[424] This proposal is inconsistent with the grounds for exclusion based on an applicant's involvement in certain crimes or heinous acts established by Article 1F of the Convention, setting up the possibility of denials of asylum without sufficient levels of case-by-case analysis and rigorous procedural safeguards. This change compounds the pre-existing incompatibilities between the acts listed in Section 208.13(c) and the exhaustive framework for exclusion as well as exceptions to the principle of non-refoulement, as articulated in Articles 1F and 33(2) of the Convention, respectively. [425]

UNHCR is concerned that the Proposed Rule gives adjudicators authority to rely on reversed, vacated, expunged, or modified convictions, unless the individual was found not guilty, to deny

[421] Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection* (Oct. 2001), ¶ 34, https://www.unhcr.org/3bcfdf164.pdf.
[422] *ExCom Conclusion No. 58* (XL) – 1989 UNHCR, ¶ (i); *see also* UNHCR, UNHCR's Position on Manifestly Unfounded Applications for Asylum (Dec. 1, 1992) ("As to the use of forged or counterfeit documents, it is not the use of such documents which raises the presumption of an abusive application, but the applicant's insistence that the documents are genuine. It should be borne in mind in this regard that asylum-seekers who have been compelled to use forged travel documents will often insist on their genuineness until the time they are admitted into the country and their application examined").
[423] Proposed Rule on Asylum and Withholding, p. 36,284 (proposing that criminal convictions are significant adverse factors and that a conviction remains valid "despite a reversal, vacatur, expungement, or modification" if the change was not based on procedural or substantive defect in the proceedings); *see also id.* p. 36,293 (proposing to revise 8 C.F.R. § 208.13(d)(2)(i)(C) so that convictions that would otherwise be valid "but for the reversal, vacatur, expungement, or modification" indicate a significant adverse factor).
[424] *See* 8 USC § 1158(b)(2)(A)(ii); 8 CFR §§ 208.13(c), 1208.13(c). *Cf.* Off. of Staff Attorneys, Ninth Circuit Court of Appeals, Criminal Issues in Immigration Law D-9-12 (Jan. 2020), http://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/D.pdf. A conviction overturned for substantive, non-immigration reasons may not be used as the basis for removability. See, e.g., Nath v. Gonzales, 467 F.3d 1185, 1187-89 (9th Cir. 2006); Poblete Mendoza v. Holder, 606 F.3d 1137, 1141 (9th Cir. 2020). The government bears the burden of proving whether a state court reversed or vacated a prior conviction for reasons other than the merits. Reyes-Torres v. Holder, 645 F.3d 1073, 1077 (9th Cir. 2011). Expunged claims usually still count as convictions for immigration purposes.
[425] UNHCR acknowledges that there is potential overlap between the criminial acts that serve as bars in domestic law (*see*, *e.g.*, INA § 208.13(c)) and the acts that fall within the scope of Article 1F of the Convention. This would need to be determined based on the facts of the case and in light of relevant international standards that inform understanding of the international crimes covered by Article 1F(a), serious non-political crimes (plus geographic and temporal criteria) for Art 1F(b), and the specific criteria of Art 1F(c) (which can encompass acts of terrorism, for instance).

protection, and that exclusion may be applied in such cases without an individualized assessment of whether the individual concerned has committed a crime, or acts, which justify exclusion from refugee status. Under international standards, the exclusion analysis must be performed on a case-by-case basis, and "rigorous procedural safeguards" are essential to the procedure, as the consequences of exclusion can be grave.[426] In order to satisfy the standard of proof for exclusion, for which the state has the burden, "clear and credible evidence is required."[427] This does not necessarily require that the applicant have been convicted of the criminal offense.[428] However, the reversal, vacatur, expungement, or modification of a conviction or sentence raises serious questions as to whether excluding the applicant from refugee protection would be consistent with international standards. These events could signify that an individual has not incurred individual responsibility for crimes within the scope of an exclusion clause, or that there are circumstances which would mean that applying exclusion to him/her would no longer be consistent with the object and purpose of Article 1F of the Convention.[429] In either case, the possibility that the criteria for exclusion may not be met should be carefully probed in light of all relevant circumstances, and not immediately accepted as sufficient basis for excluding the applicant, as this provision would have adjudicators do. Although the Proposed Rule creates a narrow exception for those found not guilty, UNHCR is troubled that this expansive provision does not reflect the exacting standard for exclusion required under international law and may ultimately result in the exclusion of refugees who were not involved in criminal conduct that would render them undeserving of refugee protection.

The Proposed Rule compounds UNHCR's pre-existing concerns about the discrepancies between Section 208.13(c) and the exclusion framework articulated in the Convention. As has been extensively discussed by legal academics, the U.S. bars to asylum bear some resemblance to Article 1F(b), while also drawing from language in Article 33(2), and also resting on domestic concerns.[430] International law, on the other hand, exhaustively enumerates the grounds for exclusion related to a person's criminal conduct in Article 1F of the Convention. Yet this is not the direct error of the Proposed Rule; the Proposed Rule did not create Section 208.13(c). UNHCR's primary concern with the Proposed Rule itself is that it compounds the problems of Section 208.13(c) by allowing adjudicators to rely on less firm grounds when determining the relevance of the purported conduct that triggers the bar.

In sum, this provision would lead the United States further away from complying with its obligations under the 1951 Convention and 1967 Protocol.

UNHCR recommends that this element of the Proposed Rule not be enacted.

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[426] *See* UNHCR, *Guidelines on International Protection No. 5*, ¶ 31.
[427] UNHCR, *Guidelines on International Protection No. 5*, ¶¶ 34-35.
[428] UNHCR, *Guidelines on International Protection No. 5*, ¶ 35.
[429] *See* UNHCR, *Guidelines on International Protection No. 5*, ¶ 23.
[430] For detailed discussions of the legislative history and origins of the bars to asylum in § 208.13(c), *see, e.g.*, James Sloan, *Application of Article 1F of the 1951 Convention in Canada and the United States*, 12 INT'L J. REF. L. 222, 224 (2000) (LCHR Supplementary Volume) (noting that the United States has not incorporated the exclusion regime established in the 1951 Cconvention, but rather has created its "own exclusion regime based in part on the Convention and in part on its own domestic concerns"); James C. Hathaway and Anne K. Cusick, *Refugee Rights are Not Negotiable*, 14 GEO. IMMIGR. L. J. 481, 487 (2000) (arguing that the Immigration and Nationality Act of 1996 established bars to asylum which are only partially compatible with international law articulated in the 1951 Convention) and 535-536 (discussing the reliance on Article 33(2) of the Convention); ANKER, *supra* note 6, at §§ 6.4 (comparing U.S. bars to Convention provisions) and 6.16-6.20 (providing a detailed discussion of the origin and use of the 'particularly serious crime' bar to asylum and withholding).

e. Unlawful presence of more than one year before filing

The Proposed Rule states that an applicant's unlawful residence in the United States for one year will act as an adverse factor in the adjudicator's discretionary decision.[431] UNHCR is concerned that this adverse discretionary factor will unduly impact vulnerable asylum-seekers who may not be able to file their applications within a year of arriving in the United States.[432] In addition, UNHCR observes with concern that exercise of this adverse discretionary factor will effectively undermine the exceptions to the "one year bar" that exist under current law.[433]

Under international law, states are given leeway to establish appropriate procedures for determining who is or is not entitled to asylum.[434] However, procedures for determining refugee status should account for the vulnerabilities that applicants may experience. In some cases, for instance, individuals might have significant challenges submitting an application for asylum to the authorities if they have suffered profound trauma, have limited English proficiency, or do not have access to counsel.[435] Therefore, the framework for examining asylum applications should reflect "an understanding of an applicant's particular difficulties and needs,"[436] and – despite variance in that framework from state to state – should include essential guarantees and basic requirements.[437]

While recognizing the desire of states to promptly receive claims to maintain a fair and efficient asylum system, UNHCR considers the protection of applications from rejection based solely on timing or other procedural grounds to be "a fundamental safeguard."[438] Under Article 1 of the 1951 Convention, "failure to meet formal, technical requirements such as time limitations [as to the submission of claims] does not negate the refugee character of [a] person."[439] Therefore, an asylum-seeker's failure to submit an application within a certain period of time, as well as failure to fulfill other formal requirements, "should not in itself lead to an asylum request being excluded from consideration."[440] Under international standards, regard must be given to concept of refugees *sur place* – that is, people whose refugee claim developed while out of the country – for instance, due to changes of circumstances at home.[441]

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[431] *See* Proposed Rule on Asylum and Withholding, p. 36,284; *see also id.* p. 36,293 (proposing to amend the regulation at 8 C.F.R. § 208.13(d)(2)(i)(D) so that adjudicators should not "favorably exercise discretion" for applicants who "accrued more than one year of unlawful presence").

[432] Under the Immigration and Nationality Act (INA), individuals do not accrue unlawful presence during the period of time in which they have a bona fide asylum application pending. 8 USC § 1182(a)(9)(B)(iii)(II). Accordingly, it appears that this adverse discretionary factor will negatively impact asylum-seekers who do not file their applications within one year of arriving in the United States.

[433] The existing requirement to apply for asylum within one year is subject to exception for "changed circumstances" or "extraordinary circumstances." 8 U.S.C. § 1158(a)(2)(D) ("An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates . . . changed circumstances . . . or extraordinary circumstances.").

[434] UNHCR Handbook ¶ 189.

[435] *See* UNHCR Handbook, ¶ 190 ("It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within . . . an understanding of an applicant's particular difficulties and needs."); UNHCR, Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466 at 9-10 ("Due consideration should be given to any circumstances of the case that may lead to delays in applying for international protection or appropriately substantiating the claim, including trauma due to past experience, feelings of insecurity, or language problems. UNHCR recalls that a late application or substantiation does not preclude the credibility of the applicant's statements").

[436] UNHCR Handbook ¶ 190.

[437] UNHCR Handbook ¶ 192.

[438] UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12 (31 May 2002), ¶ 20 (citing *Jabari v. Turkey*, ECHR, ¶40 (Jul. 10, 2000); Conclusion No. 15 (XXX), 1979, on refugees without an asylum country, ¶ (i) (A/AC.96/572, ¶ 72.2). *See also* discussion on unlawful entry, *supra*, p. 58.

[439] UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 9.

[440] UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12 (May 31, 2002), ¶ 20.

[441] UNHCR Handbook ¶¶ 94-96.

The Proposed Rule appears to overwrite the existing rules on what is considered a timely filing. UNHCR observes that under current U.S. law individuals are not eligible for asylum if they did not file within a year of their arrival into the United States unless they can establish that they qualify for an exception to that deadline, including changed circumstances materially affecting their eligibility or extraordinary circumstances that prevented a delay in submitting the application.[442] Whereas an existing regulation providing examples of what may constitute "extraordinary circumstances" for the purposes of the one-year filing deadline touches upon issues related to the applicant's personal circumstances (e.g., health, legal disability, and counsel, among others), the Proposed Rule's description of "extraordinary circumstances" as they relate to discretion focuses on "national security or foreign policy considerations."[443] This disparity suggests that asylum-seekers who are unable to file their applications within a year face a high burden in demonstrating that they deserve a favorable exercise of discretion.

UNHCR recommends that this element of the Proposed Rule not be enacted.

f. Other adverse discretionary factors

In addition to the individual factors discussed in detail above, the Proposed Rule also considers the following to be adverse factors: failure to file taxes; having two or more previously denied asylum claims; having withdrawn with prejudice a previous claim; failure to attend an interview; and failure to file to reopen a claim within one year. [444] These remaining adverse discretionary factors are incompatible with international law, which, as explained above, does not recognize discretion as part of the refugee status determination.

The international legal framework is structured such that exclusion is an exceptional measure: provisions on the exclusion of those who would otherwise qualify for protection must always be applied with "great caution" and interpreted in a "restrictive manner."[445] This acknowledges the possible serious consequences of a denied claim for someone in need of protection. Many of the adverse discretionary factors such as those discussed in this section are typically not of a serious enough caliber to form part of an exclusionary analysis while others do not justify exclusion for other reasons (for instance, because they do not constitute crimes in the first place, let alone acts contrary to the purposes and principles of the United Nations).[446] Whether an applicant failed to file taxes, had two or more asylum applications denied (especially in light of the new provision on pretermission of 'legally insufficient' asylum applications), missed their asylum interview before the Asylum Office, or may have not filed a motion to reopen to seek asylum based on changed country conditions within a year of the changed circumstances has no meaningful bearing on whether the individual meets the refugee definition under Article 1A(2) of the Convention, nor do these circumstances fall within—or anywhere close to—any of the prudently circumscribed exclusion clauses.

UNHCR recommends that each of these elements be struck from the final rule.

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[442] 8 USC §§ 1158(a)(2)(B), (D); 8 CFR §§ 208.4(a), 1208.4(a).
[443] 8 CFR §§ 208.4(a)(5); 1208.4(a)(5).
[444] Proposed Rule on Asylum and Withholding, p. 36,293 (proposing to add adverse discretionary factors at 8 C.F.R. § 208.13(d)(2)(i)(E)-(I)).
[445] UNHCR, *Guidelines on International Protection No. 5*, ¶ 2.
[446] For further discussion, *see* UNHCR, *Guidelines on International Protection No. 5* ¶ 3; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶ 7 (Sep. 4, 2003), https://www.refworld.org/docid/3f5857d24.html.

With respect to discretionary factors overall, UNHCR recommends that the Government promulgate regulations directing adjudicators to grant asylum every time they encounter an individual who meets the criteria, effectively discontinuing the use of discretion. In the absence of such a change to the use of discretion, UNHCR recommends that the entire list of factors for discretionary denial in the Proposed Rule be struck from the final regulation, effectively removing the adjudicator's mandate to deny on these grounds.

8. Firm Resettlement

The Proposed Rule expands the definition of "firm resettlement" by specifying three circumstances under which an asylum-seeker would be considered firmly resettled.[447] According to the new regulation, an asylum-seeker will be considered firmly resettled (and therefore barred from a grant of asylum) if:

(1) the asylum-seeker "either resided or could have resided in any permanent or non-permanent legal immigration status in a country through which the individual transited prior to arriving in or entering the United States, regardless of whether the individual applied for or was offered such status;"[448]

(2) the asylum-seeker "physically resided voluntarily, and without continuing to suffer persecution or torture, in any one country for one year or more after departing his or her country of nationality or last habitual residence and prior to arrival in or entry into the United States;"[449] or,

(3) the asylum-seeker is a "citizen of a country other than one where he or she alleges a fear of persecution and the asylum-seeker was present in that country prior to arriving in the United States,"[450] or "was a citizen of a country other than the one where the alien alleges a fear of persecution, the asylum-seeker was present in that country prior to arriving in the United States, and the asylum-seeker renounced that citizenship after arriving in the United States."[451]

In addition to identifying the above three circumstances under which an asylum-seeker will be considered firmly resettled, the Proposed Rule creates several additional procedural rules regarding the application of the firm resettlement bar. The Proposed Rule directs that when the evidence of record indicates that the firm resettlement bar may apply, the asylum-seeker will have the burden of proving by a preponderance of the evidence that the bar does not apply.[452] Next, the Proposed Rule specifically allows either DHS or the immigration judge to raise the issue of the application of the firm resettlement bar based on the evidence of record.[453] Finally, the Proposed Rule requires that the firm resettlement bar be imputed from parent to child if the resettlement occurred before the child asylum-seeker turned 18 years old and the child asylum-

[447] *See* Proposed Rule on Asylum and Withholding, p. 36,286.
[448] *Id.*
[449] *Id.*
[450] *Id.*
[451] *Id.*
[452] *See* Proposed Rule on Asylum and Withholding, p. 36,286; *see also id.* p. 36,294 (proposing to revise 8 C.F.R. § 208.15(a)(3)(ii)(B) so that "the alien shall bear the burden of proving the bar does not apply").
[453] *See* Proposed Rule on Asylum and Withholding, p. 36,294 ("Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of the record").

seeker resided with his or her parent at the time of the firm resettlement, except where the child can establish that he or she could not have derived any status from his or her parent.[454]

UNHCR is concerned that these sweeping changes to the interpretation and application of the firm resettlement bar will undoubtedly lead to the exclusion from refugee protection and refoulement of large numbers of refugees. There are only a few, specific bases upon which a person can be excluded from refugee protection under the 1951 Convention.[455] Article 1E is the only one that is potentially relevant to "firm resettlement" and contemplates a specific situation of de facto nationality (which the Proposed Regulation falls far short of).[456] The Convention also provides for consideration of whether a person who is seeking international protection in fact does not require it, because he or she can look to at least one state of nationality for national protection (provided that nationality and protection remain effective in practice).[457] A firm resettlement bar should not apply to individuals who could take residence in a third country but have not done so or merely visited, transited through, or were present in a country for a temporary or short-term stay, as well as those whose rights and obligations in a country diverge significantly from those enjoyed by nationals.[458] See p. 54, *supra*, for discussion of the high threshold for the exclusion of persons not considered in need of international protection set by Article 1E of the Convention.

Each of the circumstances that the Proposed Rule identifies as triggering the firm resettlement bar conflicts with the 1951 Convention and its 1967 Protocol, as none of them require that an asylum-seeker both (a) have taken residence in a third country *and* (b) enjoy the same rights and obligations as nationals of that country:

(1) The first circumstance described by the Proposed Rule, which covers individuals who could have but did not take up residence in a third country, fails to align with international legal standards for exclusion, because it does not require that an individual to have actually taken up residence in another country having certain rights and obligations there. The text of Article 1E as well as UNHCR guidance on this issue is abundantly clear—Article 1E does not apply to individuals who could take up residence in a third country but have not done so.[459] Moreover, that piece of the Proposed Rule makes no mention of the rights and obligations that an individual must have in the third country for the bar to apply. Finally, even if a person had taken residence in a third country and enjoyed the rights and obligations equal to nationals of that country, he or she may have a well-founded fear of being persecuted if returned there, and this provision does not provide necessary non-refoulement protections, which would permit an evaluation of an asylum claim against that country.[460] Therefore, this part of the Proposed Rule does not meet the requirements of exclusion under Article 1E.[461]

(2) Next, the second circumstance described by the Proposed Rule, which targets individuals who voluntarily live in a third country for more than a year before arriving in the United States, is at variance with international law because it encompasses individuals who have neither "taken residence" as understood within Article 1E of the 1951 Convention nor have the rights and obligations equivalent to those held by nationals of the country. The phrase

[454] *See* Proposed Rule on Asylum and Withholding, p. 36,294.
[455] Refugee Convention, art. 1D-1F. *See also* UNHCR's views on discretionary denials for Article 1 analysis, *supra*.
[456] Refugee Convention, art. 1E.
[457] Refugee Convention, art. 1E; UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 2, 7.
[458] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 9-10, 13.
[459] UNHCR, Note on the Interpretation of Ar ticle 1E of the 1951 Convention, ¶ 9.
[460] *See* UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 4, 17.
[461] *See* discussion on transit factors, *supra*, p. 59.

"has taken residence" signifies that "[t]he person concerned must benefit from a residency status which is secure and hence include the rights accorded to nationals to return to, re-enter, and remain in the country concerned."[462] Further, to be excluded under Article 1E, a person must satisfy the "stringent test" of having the rights and obligations afforded to nationals of the third country in question.[463] This, in fact, means that "it is not enough that he or she merely enjoys better treatment than that provided for by the 1951 Convention."[464] The Proposed Rule does not appear to require that the individual have any rights or obligations in the country in which he or she lived voluntarily. Last, as mentioned in the preceding paragraph, even if the conditions of Article 1E were satisfied, the asylum analysis must provide for non-refoulement considerations where an individual has a well-founded fear of persecution in the third country.[465] Thus, similar to above, this part of the Proposed Rule does not meet the requirements of exclusion under Article 1E.[466]

(3) Last, the third circumstance covered by the Proposed Rule essentially captures two distinct situations—one in which an asylum-seeker holds citizenship in a third country where they have not suffered persecution and was present in that country before arriving in the United States, and another in which an asylum-seeker previously had citizenship in a third country, was present in that country before arriving in the United States, and renounced that citizenship after arriving in the United States.

The first situation would require an assessment of refugee status against both countries of nationality (irrespective of whether the asylum-seeker was present in that country before arriving in the asylum country).[467] Only if the individual can avail himself or herself of the protection of at least one of the countries of which he or she is a national would the individual not qualify for refugee status.[468]

The second situation is at variance with the 1951 Convention because an asylum-seeker may still be entitled to protection as a refugee, notwithstanding that the asylum-seeker has renounced nationality of a country in which they were present before arriving in the United States, if at the time of their application they meet the refugee definition, cannot avail themself of the protection of another country of nationality (in case of multiple nationalities), and do not fall within one of of the Convention exclusion grounds. If a person cannot in practice avail themself of the protection of a third country of which they are a national, or can no longer avail themself of the protection of a country of which the were previously a national, it is immaterial to assessment of refugee status under the Convention that the person has renounced a previously held nationality, whether prior to or after arrival in the United States.

Accordingly, an adjudicator would need to consider whether the applicant who renounced his or her former nationality now has a new nationality, whether he or she is still the

[462] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 10; *see also* ICCPR, art. 12(4) ("No one shall be arbitrarily deprived on the right to enter his own country").
[463] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 12.
[464] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶ 12.
[465] *See* UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 4, 17.
[466] *See* discussion on transit factors, *supra*, p. 59.
[467] Refugee Convention, art. 1A(2) ("[i]n the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without ay valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national").
[468] *See* UNHCR Handbook, ¶¶ 106-07.

national of yet another country having held multiple nationalities prior to renouncing, or whether the individual has become stateless.

Beyond the problems in the definition of "firm resettlement," the procedural provisions of the Proposed Rule on this topic are also at variance with international law. In particular, international law does not allow exclusion grounds to be imputed from one asylum-seeker to another, including in cases where parents and children file independent applications. UNHCR observes that it is possible, for example, for parents and children to have different statuses as well as rights and obligations in any transit country through which they pass before arriving in their destination country. To be barred under Article 1E, "[t]he person concerned must benefit from a residency status which is secure," and the person must essentially enjoy the same civil, political, economic, social and cultural rights and have generally the same obligations as nationals.[469] While it may be that [all or] none of the applicants involved require refugee protection, it is possible that one will while another will not. Accordingly, the applicability of this bar to asylum to any unique asylum applicant must be determined on a case-by-case basis, including for members of the same family who file their own claims. Excluding an asylum-seeker from protection under the 1951 Convention carries potential serious consequences for the individual, and it is, therefore, critical that Article 1E not be wrongfully applied to an individual who does not personally meet the stringent test it requires.

UNHCR recommends that the Government not implement the Proposed Rule expanding the firm resettlement bar and that it instead use this opportunity to establish a definition of this concept that is compatible with international law.

9. Rogue Officials

i) The Proposed Rule's suggested changes

The Proposed Rule amends the definition of "torture" by addressing the concepts of "public official" and "acquiescence."[470] UNHCR is concerned that this definition deviates from international law and will exclude people in need of protection.

Current regulations provide that, in an application for CAT protection, an applicant must demonstrate that it is more likely than not that he or she will be tortured in the country of removal, with torture being defined, *inter alia*, as harm intentionally inflicted "by a public official."[471] Current regulations do not provide guidance on what constitutes a "public official," though some courts have found that the "public official" definition can be met whether or not the official is acting within the scope of his or her official duties;[472] however, the Board of Immigration Appeals has recently held that an official who is not acting in an official capacity is not covered by the Convention.[473]

The new regulation seeks to codify the recent Board decision, proposing that pain or suffering inflicted by a public official who is *not* acting under color of law (a "rogue official") shall not constitute torture.[474] The guidance given with this proposed regulatory change indicates that the

[469] UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, ¶¶ 10, 16.
[470] Proposed Rule on Asylum and Withholding, p. 36,286.
[471] 8 CFR 1208.16(c)(2000).
[472] *See Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2017) (find that there is no "rogue official" exception to protection under the Convention Against Torture).
[473] *Matter of O-F-A-S*, 27 I & N Dec. 709; 718 (BIA 2019) (holding that an official who is not acting in official capacity, also known as a "rogue official," is not covered by the Convention).
[474] Proposed Rule on Asylum and Withholding, p. 36,294.

assessment of whether a person is acting in an official capacity or as a rogue official include, *inter alia,* whether the person could engage in conduct amounting to torture because of his or her government position or whether he or she could have done so without any connection to the government and whether the person's government connections provided him or her with access to the victim. Additionally, the proposed regulation narrows the definition of "acquiescence" from current regulations by requiring that the public official in question must have awareness of the activity amounting to torture before it occurs and thereafter breach his or her legal responsibility to intervene to prevent it.[475] Specifically, it provides that awareness requires actual knowledge or willful blindness and that, in evaluating "willful blindness," it is not enough for an official to be mistaken, to recklessly disregard the truth, or negligently fail to inquire.

ii) Impact on Asylum-Seekers and Others of Concern to UNHCR

UNHCR is concerned that the new definitions in the Proposed Rule circumscribing what constitutes "torture" will deprive qualifying individuals of international protection.[476] UNHCR observes that the U.S. position has been, even before these regulations, at variance with international law on providing protection against torture since its initial implementation of CAT, as its interpretation of "torture" is narrower than what the term is intended to encompass under Article 1 of the CAT. These rules further limiting the protection available to those facing torture as defined under CAT will drive the United States further out of compliance with its international obligations, and they may ultimately result in the refoulement of individuals to a place where there are substantial grounds for believing they would be subjected to torture in violation of Article 3 of CAT. These changes are especially troubling in light of the amendments to the refugee definition proposed in different sections of the Proposed Rule, which will restrict access to asylum and statutory withholding of removal and render these forms of international protection nearly impossible to obtain.

iii) International standards

Under CAT, "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for a specific purpose "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[477] Whether an individual is eligible for CAT protection requires an assessment of whether there are substantial grounds for believing that the applicant would be in danger of being subjected to torture in another territory to which he or she would be forced to return.[478] This involves an evaluation of whether the individual is at risk of torture at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[479] International law governing who constitutes a "public official" for purposes of the "torture" definition does not exempt conduct by individuals who the Proposed Rule refers to as "rogue officials." "It is well established that a state will be responsible for the torturous acts of its officials even if such conduct did not have the specific approval of the authorities."[480] The

[475] Proposed Rule on Asylum and Withholding, p. 36,294.
[476] *See* CAT, art. 1, ¶ 1 (defining "torture").
[477] Convention Against Torture, art. 1, ¶ 1.
[478] Committee Against Torture, General Comment No. 4, ¶ 5.
[479] Committee Against Torture, General Comment No. 1, ¶ 49(b).
[480] *See* DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 7:31 (2020) (citing U.N. Comm'n on Hum. Rts., Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), Rep. on Violence Against Women, ¶ 14, U.N. Doc. E/CN.4/1997/47 (1997) ("[A] strict interpretation of human rights law considered that the State is only responsible for its own actions or that of its agents . . . in recent times. . . States are expected to exercise due diligence in preventing, prosecuting and punishing those who perpetrate violence").

Committee Against Torture has emphasized that "the State's obligation to prevent torture also applies to all persons who act, *de jure* or *de facto*, in the name of, in conjunction with, or at the behest of the State party."[481]

The concept of "acquiescence" has been interpreted more broadly under international law than in the Proposed Rule. According to guidance published by the Committee Against Torture, acquiescence exists when public officials "know or *have reasonable grounds to believe* that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute, and punish such non-State officials or private actors consistently with the Convention."[482] Similarly, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has explained that "[i]ndifference or inaction by the State provides a form of encouragement and/or de facto permission" for the torturous acts.[483] In other words, international legal standards do not require that public officials be able to intervene or, if they do intervene, to prevent the activity. Rather, it is sufficient that the public officials did nothing. In contrast, the new regulation would find no acquiescence where a public official "was mistaken, recklessly disregarded the truth, or negligently failed to inquire," even though such indifference and inaction would clearly be sufficient under international law. Therefore, the Proposed Rule diverges from international legal standards because it sets a high threshold for applicants to establish acquiescence on the part of the state.

UNHCR recommends that, should the Government implement a new definition of "torture," it make it less restrictive such that it aligns with the definitions in international law.

D. Information Disclosure

The Proposed Rule identifies and broadens the circumstances under which individuals' information may be disclosed without their written consent. Current regulations prohibit the disclosure of protected information pertaining to asylum applications and credible or reasonable fear records to unauthorized third parties. Under the Proposed Rule, however, the Government may now release in certain cases information regarding asylum applications as well as credible or reasonable fear interviews to any U.S. government official or contractor with a need to examine it, including:

- information in an application for asylum, withholding of removal, or CAT protection;
- information supporting that application;
- information about individuals who have filed such an application; and
- information about individuals who have undergone the credible or reasonable fear screening process.[484]

The new regulation provides that this information could be disclosed during an adjudication of the application or any other application under the immigration laws; as part of any state or federal criminal investigation, proceeding, or prosecution; to prevent child abuse; as part of any proceeding arising under immigration laws; or as part of the Government's defense to any legal action related to an individual's immigration or custody status, including petitions for review. In

[481] Committee Against Torture, General Comment No. 2, CAT/C/GC/2, ¶ 7.
[482] Committee Against Torture, General Comment No. 2, CAT/C/GC/2, ¶ 18 (emphasis added).
[483] *See* Juan Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Report on Torture, ¶¶ 11, 55-56 U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).
[484] Proposed Rule on Asylum and Withholding, p. 36,288.

short, the Proposed Rule endeavors to vastly expand the types of information it can disclose and the circumstances under which it may do so.

Under international law, asylum applicants have a right to confidentiality, which must be respected throughout all stages of the adjudicatory process.[485] UNHCR observes that there are some circumstances under which it may be appropriate to disclose data about asylum-seekers, and it has developed thorough guidance governing conditions for such release of information about this vulnerable population. Data protection principles and obligations require that any disclosure be made only when certain conditions are met, including when the disclosure is necessary and proportionate to a specific and legitimate purpose.[486] For instance, disclosure of personal data may be justified to protect national security, combat fraud, and identify those individuals not entitled to international protection.[487] It is never acceptable to disclose information for retaliatory purposes.[488] Sharing in any justified situations must respect data protection principles and international human rights law obligations.[489] When information is released, consent of the concerned individual should typically be required.[490] It is essential that no information about the existence of or included in an asylum application be shared with an asylum-seeker's country of origin, either directly or indirectly, in light of the possible serious consequences to the individual, his or her family, and potentially others.[491]

Further, international standards on conducting refugee status determination caution against disclosure for its impact on evaluating claims. It is necessary for adjudicators to gain the confidence of applicants to facilitate fact gathering and development.[492] "In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed."[493] This principle is exceptionally important in cases involving applicants with gender-based claims, survivors of torture and trauma, and children.[494] Applicants fitting these profiles may be especially reluctant to identify the true extent of persecution suffered or feared for a variety of reasons, such as rejection or reprisals from their

[485] *See* UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, pp. 6-17 (May 2015), https://www.refworld.org/pdfid/55643c1d4.pdf. *See e.g.,* UNHCR Handbook, ¶ 200 (discussing the important of confidentiality in refugee status determination); UNHCR *Guidelines on International Protection No. 5*, ¶ 33; *see also* UNHCR, *Guidelines on International Protection No. 1*, ¶ 36(v) (particularly in cases involving gender-based violence, "[t]he claimant should be assured that his/her claim will be treated in the strictest confidence").

[486] *See* UNHCR, Procedural Standards for RSD Under UNHCR's Mandate, § 2.1 (providing that conditions for disclosure include requiring that it serve a legitimate purpose and not jeopardize the security of the individual, their family members or other associates, and observing that the consent of the individual should typically be required); UNHCR, Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information (Mar. 31, 2005), https://www.refworld.org/pdfid/42b9190e4.pdf.

[487] UNHCR, *Guidelines on International Protection No. 5*, ¶ 33; Inter-Parliamentary Union & UNHCR, A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27, p. 159; *see also* Executive Committee of the High Commissioner's Programme, *Conclusion on Registration of Refugees and Asylum-Seekers No. 91 (LII) – 2001*.

[488] *See* UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information, ¶ 14 ("[I]t would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin").

[489] Inter-Parliamentary Union & UNHCR, A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27 at 159; *see also* Executive Committee of the High Commissioner's Programme, *Conclusion on Registration of Refugees and Asylum-Seekers No. 91 (LII) – 2001*.

[490] UNHCR, Procedural Standards for RSD Under UNHCR's Mandate, § 2.1.

[491] UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12 (May 31, 2002), ¶ 50(m). UNHCR observes that, "[i]n exceptional circumstance, contact with the country of origin may be justified on national security grounds, but even then the existence of the asylum application should not be disclosed." UNHCR, *Guidelines on International Protection No. 5*, ¶ 33.

[492] UNHCR Handbook, ¶200; *see also* Inter-Parliamentary Union & UNHCR, A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No. 27 at 159 (discussing why confidentiality is critical to creating an environment of security and trust conducive to the gathering of information related to an asylum-seeker's claim and explaining that any disclosure of information requires informed consent of the individual concerned).

[493] UNHCR Handbook, ¶ 200.

[494] UNHCR, *Guidelines on International Protection No. 1*, ¶ 35; UNHCR, *Guidelines on International Protection No. 8*, ¶ 70.

family, communities, or persecutors, making it critically important to provide them with "a supportive environment where they can be reassured of the confidentiality of their claim[s]."[495] The failure to account for these realities risks undermining applicants' confidence in an asylum system, which may hinder their abilities to share their accounts.

While recognizing that data sharing may be warranted under some circumstances, such as in efforts to combat fraud, UNHCR is concerned that the expansive opportunities for disclosure under the Proposed Rule may jeopardize asylum-seekers' safety as well as make it more difficult to conduct refugee status determination and deter individuals from exercising their rights. The provision in the Proposed Rule does not reflect these types of limits on data disclosure, instead giving wide latitude to release asylum-seekers' information. For example, disclosure could be especially problematic should that information reach the authorities of asylum-seekers' countries of origin. Such authorities may have persecuted or tortured asylum-seekers and could target them, or their family members or other contacts, for further harm should they learn of the applicants' pending claims. And, disclosure of information could lead to an asylum-seeker becoming a refugee *sur place*.[496]

UNHCR recommends that the Government amend the Proposed Rule to limit the circumstances under which asylum-seekers' information can be disclosed, including by removing the prong of this provision on permitted disclosures that concerns legal actions related to the denial of an application for protection or challenges to custody status, and enhance provisions related to the protection of their personal data and asylum claims. UNHCR advises the Government to remove the prong on disclosures concerning legal actions so that applicants for refugee protection are not deterred from challenging a denial of their claim or their custody status.

IV. Observations on How the Proposed Rule Affects Particularly Vulnerable Groups

A. Children

The Proposed Rule introduces a great number of provisions that will have a severe impact if applied to children in need of protection (including both children in families and unaccompanied children[497]). UNHCR notes that children have specific rights and protection needs, and consequently international standards call for a child-sensitive approach to adjudicating their claims, both with respect to the substantive elements of the refugee definition and to the procedural protections due this vulnerable group.[498]

UNHCR is concerned that the following provisions in the Proposed Rule will – if implemented and applied to children – impede the capacity of those children to find protection in the United States:

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[495] UNHCR, *Guidelines on International Protection No. 1*, ¶ 35; *see also Sexual Violence Against Refugees: Guidelines on Prevention and Response* (UNHCR, Geneva, 1995) and *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* (Report of Inter-Agency Lessons Learned Conference Proceedings, Mar. 27-29, 2001, Geneva).

[496] *See* UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information, ¶ 15 ("In a situation where the initial elements of the claim presented by the asylum-seeker would not lead to inclusion, sharing of confidential information with the country of origin, could well lead to the asylum-seeker becoming a refugee *sur place*").

[497] UNHCR notes with concern that the Proposed rule does not provide conclusive analysis on how many of its provisions interact with existing pieces of U.S. domestic legislation that protect unaccompanied children, such as the TVPRA. *See* Trafficking Victims Protection Reauthorization Act of 2017, 22 U.S.C. § 7101 (2018). UNHCR urges the U.S. government to resolve any discrepancies between the Proposed rule and extant protections in favor of the unaccompanied child.

[498] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 1-5.

- The introduction of asylum-and-withholding proceedings (that may preclude access to complementary forms of protection for children in families);[499]
- The higher standard of proof for screening for statutory withholding and CAT protection (which may affect children in families);[500]
- The proposed changes on frivolous applications (which may disproportionally apply to children, who cannot be expected to understand whether their claims are "clearly foreclosed by applicable law," and who would then be foreclosed from refiling an asylum claim now or presenting another claim in the future);[501]
- The proposed changes on pretermission (which require a child to be able to state a full claim on paper, without an interview);[502]
- The requirement for the child to state their own particular social group(s) (if not done accurately, this be a ground for pretermission as discussed above, and even if the claim survives pretermission, additional formulations of particular social groups cannot be introduced later in the first instance proceeding or on appeal); [503]
- The substantive changes to the definition of "particular social group", as well as the list of "generally insufficient" particular social groups (including gang recruitment and presence in a country with high crime and/or violence), which will particularly impact children from Central America;[504]
- The narrowed definition of persecution (particularly, the exclusion of harm arising in the context of civil strife, and the lack of special consideration for child applicants);[505]
- The changed definition of "political opinion" as to refer to state opposition only (which will preclude many opinions held by children, such as opposition to FGM or pro-LGBTI rights positions, for example);[506]
- The new approach to internal relocation, which sets a presumption of the availability of internal relocation for non-state actor cases and which does not include an exception for children;[507]
- The applicability of bars triggering discretionary denial to child applicants, including the penalties for unlawful entry; transiting through other countries; using fraudulent documents to enter; and transiting through more than one country;[508]
- The imputation of an adult's firm resettlement status to children, leading to denial of children's claims.[509]

Although the definition of a refugee in the 1951 Convention and 1967 Protocol is not age-specific, it has traditionally been interpreted in light of adult experiences; consequently, child-specific forms of persecution are often overlooked.[510] Both UNHCR and the UN Committee on the Rights of the Child urge that it is imperative to interpret the refugee definition in an age- and gender-sensitive

[499] *See supra* Section III.A.1, p. 4.
[500] *See supra* Section III.A.4, p. 9; UNHCR notes that children accompanied by adults are able to receive independent fear screenings following a negative fear determination for their parent. *See* 8 C.F.R. 208.21(a); *see also Matter of A-K-*, 24 I. & N. Dec. 275 (2007). Under the Proposed Rule, children in this situation would have to meet the higher burden of proof.
[501] *See supra* Section III.B.1, p. 11.
[502] *See supra* Section III.B.2, p. 16.
[503] *See supra* Section III.C.1.iv, p. 28.
[504] *See supra* Section III.C.1, p. 19.
[505] *See supra* Section III.C.3, p. 32.
[506] *See supra* Section III.C.2, p. 30.
[507] *See supra* Section III.C.5, p. 44.
[508] *See supra* Section III.C.6, p. 47.
[509] *See supra* Section III.C.7, p. 59.
[510] UNHCR, *Guidelines on International Protection No. 8*, ¶ 1. "The specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not generally well understood. Children may be perceived as a part of a family unit rather than as individuals with their own rights and interests." *Id.* ¶ 2.

manner, taking into account the specific forms and manifestations of persecution experienced by children.[511] For instance: persecution may manifest differently for children than for adults[512]; children may be subjected to specific forms of persecution influenced by their age, maturity, and vulnerability (and indeed, the fact that the applicant is a child may be a part of the reason for the harm inflicted or feared);[513] and a persecutory act may encompass violations of child-specific rights.[514]

UNHCR notes that certain forms of child-specific persecution are particularly relevant in the context of current refugee flows to the United States.[515] International law recognizes a growing consensus on the ban on recruitment and use of children below the age of 18 in armed conflict;[516] this is a relevant factor in adjudicating some children's claims for protection, especially for children who may have been recruited into non-state armed groups including gangs.[517] Likewise, domestic violence against children – including physical, psychological and sexual violence, while in the care of parents or others – is a very relevant form of harm to consider when adjudicating some children's cases.[518] In child asylum claims, the agent of persecution is frequently a non-state actor; the assessment of whether a state is unable or unwilling to protect the victim should be assessed on a case-by-case basis and should take into account the degree to which state officials are able to respond appropriately to children's needs and complaints.[519]

When it comes to weighing factors that may deny the child protection, international law counsels that adjudicators proceed with deep caution, as the consequences of errors in judgment are particularly high.[520] With regard to internal relocation, for instance, both the relevance of internal relocation as an option and the reasonableness of requiring relocation will be measured differently for a child than for an adult ("what is merely inconvenient for an adult might well constitute undue hardship for a child") and internal relocation of an unaccompanied child to an area with no known relatives is clearly inappropriate.[521] As for the exclusion clauses in Article 1F (see Section III. C. 7. ii., *supra*, p. 54), they should be applied to children only "with great caution" and only if the child has reached the age of criminal responsibility at the time of the excludable act.[522]

In addition to considerations of the substantive elements of a child's claim, UNHCR observes that adjudicators should ensure that children enjoy specific procedural and evidentiary safeguards to ensure due process.[523] These include: children's claims should be processed on a priority

[511] UNHCR, *Guidelines on International Protection No. 8*, at ¶ 4; *see also* UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin,* ¶ 74, U.N. Doc. CRC/GC/2005/6 (Sep. 2005).
[512] *See, e.g.* UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 10-12 (noting, among other things, that ill treatment that does not rise to the level of persecution in an adult may nonetheless do so for a child); *id.* ¶¶ 15-17 (noting that children may experience harm differently than adults; that psychological harm may be particularly relevant to consider; and that children are likely to be sensitive to acts that target close relatives).
[513] UNHCR, *Guidelines on International Protection No. 8*, ¶ 18 (citing examples such as forced labor, forced or underage marriage, forced prostitution, and child pornography).
[514] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 13-15 (citing as examples the rights to family unity, protection from traditional practices prejudicial to the health of children, and protection from all forms of physical and mental violence, abuse, neglect, and exploitation).
[515] *See, e.g.*, Children on the Run (UNHCR report, 2015)
[516] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 19-23.
[517] *See generally* UNHCR Gang Guidance.
[518] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 32-33.
[519] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 37-39 (discussing, for example, the notion that police may easily dismiss children and / or may not have the necessary skills to interview and listen to children).
[520] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 53- 64.
[521] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 53-57.
[522] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 58-64.
[523] UNHCR, *Guidelines on International Protection No. 8*, ¶¶ 65-77.

basis;[524] unaccompanied and separated children should be appointed both an independent, qualified guardian and a legal representative;[525] children should be given the opportunity to express their views and participate meaningfully in the process;[526] the adjudicator should take on greater responsibility to explore the claim fully, not resting the burden of proof with the child;[527] and evidence should be gathered carefully, taking into account children's limited capacity to provide information on country of origin information or the reasons for their persecution.[528]

There appear to be serious incompatibilities between the international standards on children's claims and the elements of the Proposed Rule that may apply to children, which, if applied, will have severe consequences for children seeking protection. This is true both for the substantive elements and the procedural protections as they apply to children. For instance, the proposed changes to the definitions of "persecution," "particular social group," and "political opinion" will all make it harder for children to assert claims and do nothing to take into account the specific persecutory circumstances of children. The effective expansion of bars to asylum – such as discretionary denials and presumption on internal relocation – also do not show regard for the specific needs of children. Likewise, the procedural barriers – including pretermission, dismissal of frivolous claims, and requirement to demonstrate one's own particular social group – indicate a lack of procedural fairness toward children, who require more, not fewer, procedural safeguards in the asylum process.

UNHCR recommends that, should the Government implement the Proposed Rule, it should take great care to account for the special needs of children seeking protection. At a minimum, the government should revise the provisions discussed above with children's needs in mind. The Government should include specific exemptions for children which would address their unique vulnerabilities, such as their age, maturity level, and past trauma. Further, UNHCR urges the Government to enable child asylum-seekers with the facilities they need to have a realistic opportunity to have their claims developed, heard in full, and fairly adjudicated in a non-adversarial setting. This must include providing them with interpreters and access to legal assistance and representation.

B. Applicants without the means to navigate the complex legal system in the United States, including those appearing *pro se* before immigration courts

The Proposed Rule puts forward a great number of procedural changes that are punitive toward applicants, as discussed above, and UNHCR is concerned that these will be disproportionately felt by applicants less well-equipped to navigate complex legal systems. This includes applicants appearing *pro se* in U.S. immigration proceedings, as well as those who have suffered profound trauma, have a low level of literacy, and are not proficient in English. UNHCR observes with concern that representation rates are low for certain categories of asylum-seekers in the U.S., and that being represented correlates with a more than threefold chance of gaining protection.[529]

[524] UNHCR, *Guidelines on International Protection No. 8*, ¶ 66.
[525] UNHCR, *Guidelines on International Protection No. 8*, ¶ 69.
[526] UNHCR, *Guidelines on International Protection No. 8*, ¶ 70.
[527] UNHCR, *Guidelines on International Protection No. 8*, ¶ 73.
[528] UNHCR, *Guidelines on International Protection No. 8*, ¶ 74.
[529] UNHCR observes that, under the INA, individuals have a right to counsel in immigration court proceedings, but at no expense to the government. 8 U.S.C. § 1362. As a result, in the majority of cases, individuals must pursue their claims for protection or relief *pro se* due to a variety of barriers to representation, including financial and geographic obstacles. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 2 (Dec. 2015). A recent study found that "only 37% of all immigrants, and a mere 14% of detained immigrants, secured representation." Id at 2. Nevertheless, data has consistently shown that those with representation fare far better than those proceeding *pro se*. Individuals in removal proceedings with representation are five-and-a-half times more likely to succeed on their claims than those without counsel. *Id*. p. 2. While legal

Yet, despite international standards suggesting that particular care and assistance be given to applicants in vulnerable categories such as these, the Proposed Rule instead seems to establish virtually insurmountable barriers to protection for unrepresented applicants.

The Proposed Rule's provisions prejudice individuals without representation at nearly every stage of the process required to seek international protection—from expedited removal, to asylum application processing, and through adjudication:

- Beginning with expedited removal, the Proposed Rule raises the standards for certain fear screenings and makes it more challenging to obtain review of a negative fear determination. *Pro se* asylum-seekers may not understand which facts of their account they must share to meet the new fear screening thresholds, and those that receive a negative determination might not know that they are required to positively elect to have an immigration judge review their case.

- *Pro se* asylum-seekers who make it into the new asylum-and-withholding-only proceedings established under these regulations face a series of effectively insurmountable challenges to filing their applications and having their claims heard.

- The Proposed Rule allows for asylum-seekers' claims to be pretermitted before receiving a hearing if their application is 'legally insufficient' under applicable law; this standard is incredibly hard for an unrepresented asylum-seeker, especially a person who is not literate and does not speak English, to be able to follow.

- Asylum-seekers face a newly expanded definition of "frivolous" applications that, like pretermission, assumes knowledge of "applicable law." *Pro se* asylum-seekers may not be able to defend themselves if threatened with a finding of frivolousness and consequently suffer harsh penalties such as permanent ineligibility for immigration benefits, including asylum.

- If a *pro se* applicant manages to make it over all of those hurdles, they will face exceptional difficulties establishing their eligibility for international protection under the Proposed Rule's exceptionally narrow definition of a refugee. For instance, a *pro se* applicant may not be aware or understand the contours of particular social groups, and yet the Proposed Rule requires them to articulate their own if their claim is based on this ground or otherwise waive consideration of the particular social group formulations not advanced.[530]

The cumulative effect of the Proposed Rule's provisions on *pro se* asylum-seekers, and especially those with low levels of English proficiency or literacy, is clear: this highly vulnerable group stands virtually no chance at obtaining protection in the United States.

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assistance generally is highly beneficial to asylum-seekers, UNHCR also notes that individuals who do consult with or retain representation can face challenges due to fraudulent practices, which are often referred to as the "unauthorized practice of immigration law" (UPIL). A long-standing problem, UPIL "results in serious consequences including devastating financial loss and severe immigration ramifications such as deportation." *See Avoiding the Unauthorized Practice of Immigration Law*, AMER. BAR ASS'N (Aug. 1, 2018), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/avoiding-the-unauthorized-practice-of-immigration-law/; *About Notario Fraud*, AMER. BAR ASS'N (Jul. 19, 2018), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/.

[530] UNHCR observes that *pro se* asylum-seekers whose claims are exclusively based on membership in a particular social group are unlikely to make it this far in the process, as their applications will likely have been pretermitted at an earlier stage of adjudication.

Under international law, states have flexibility in establishing appropriate procedures for determining who is entitled to protection.[531] However, states must recognize that an asylum applicant is "in a particularly vulnerable situation . . . in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own."[532] The framework for examining asylum applications should have "an understanding of an applicant's particular difficulties and needs,"[533] and, despite variance in that framework from state to state, should include essential guarantees and basic requirements.[534] Among others, these basic requirements include that an applicant be provided with guidance as to procedures that will be followed; the necessary facilities, including the services of a competent interpreter, for submitting their case; and if not recognized as a refugee, a reasonable time to appeal.[535] Further, international legal standards provide that the applicant and adjudicator share the duty to ascertain and evaluate all the relevant facts.[536] In some cases, "it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application."[537] The UNHCR Handbook cautions, "[t]he requirement of evidence should . . . not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself," and it explains why an adjudicator may need to conduct multiple interviews or hearings to gather facts before making a determination as to the applicant's refugee status.[538] In sum, because an adjudicator's decision "affects human lives," he or she must act "in a spirit of justice."[539] And yet, in contrast to these standards, the Proposed Rule fails to put forward any safeguards for unrepresented applicants.

UNHCR recommends that the Government revisit the Proposed Rule to take into account the needs of unrepresented asylum-seekers, including those who have suffered profound trauma, those with low levels of literacy, and those who are not proficient in English. UNHCR recommends, as discussed elsewhere, that the Government reconsider punitive procedural provisions such as those on pretermission and frivolous claims. Should these provisions remain, UNHCR recommends that the Government take measures to mitigate their effects on vulnerable groups, including but not limited to those identified here.

Specifically, UNHCR suggests that the Government ensure that all asylum-seekers have access to guidance on the procedures involved in the U.S. system, including during screening procedures (e.g., the precise steps an applicant must take to obtain immigration judge review of a negative fear determinations) and adjudication of their applications. In addition, UNHCR advises the Government to enable asylum-seekers with the facilities they need to have a realistic opportunity to have their claims heard in full. This involves providing applicants with interpreters and access to legal assistance and representation. Further, as noted earlier in this Comment, UNHCR underscores that asylum-seekers should not be detained during the pendency of their proceedings, in part because this practice obstructs their ability to secure representation.[540]

[531] UNHCR Handbook ¶ 189.
[532] UNHCR Handbook ¶ 190.
[533] UNHCR Handbook ¶ 190.
[534] UNHCR Handbook ¶ 192.
[535] UNHCR Handbook ¶ 192.
[536] UNHCR Handbook ¶ 196.
[537] UNHCR Handbook ¶ 196.
[538] UNHCR Handbook ¶ 197.
[539] UNHCR Handbook ¶ 202.
[540] *See* Detention Guidelines, *supra*, note 34.

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V. Conclusion and List of Recommendations

UNHCR closes by reiterating our overarching concerns about the breadth of changes in the Proposed Rule and their fundamental incompatibility with international standards. We recognize the challenges associated with increased flows of asylum-seekers within the sub-region, and the corresponding strains on an asylum system in need of reform. Nonetheless, we are deeply concerned that the proposals in this rule breach fundamental tenets of international refugee law binding on the United States. These tenets include *non-refoulement*, the right to seek and enjoy asylum, and the principles of due process and fair treatment in the asylum process. UNHCR is deeply troubled that much of the Proposed Rule seems to run counter to these principles. The Proposed Rule, if enacted, would drastically diminish the United States' capacity to guarantee protection, and lead the United States to step away from a decades-long tradition of humanitarian welcome to asylees and refugees.

UNHCR recommends that the government refrain from implementing the Proposed Rule in its entirety. Should the government proceed, UNHCR recommends that virtually every aspect of the rule be carefully reconsidered in order that the rule might be brought in compliance with international refugee law. The analysis above provides guidance and recommendations on how to approach provisions of the Proposed Rule in line with international standards. In addition to specifying our recommendations at the point of the discussion of each specific provision above, we have provided a unified list of these recommendations below for ease of reference. We close by reiterating our commitment to the decades-long relationship between UNHCR and the U.S. government, and emphasizing that we stand ready to support the U.S. government in building a legal framework for protection that corresponds with international standards, while responding to contemporary challenges that have strained the current domestic asylum system.

List of Recommendations:

A. Expedited Removal and Screenings in the Credible Fear Process

1. Asylum-and-Withholding-Only Proceedings for Non-citizens with Credible Fear

UNHCR recommends that the government refrain from instituting "asylum-and-withholding-only" proceedings and instead continue to use full removal proceedings. (UNHCR stands ready to engage in further conversation about backlog reduction and improving efficiencies in full removal proceedings, in keeping with international standards.) Nonetheless, if the Government wishes to instate "asylum-and-withholding-only" proceedings, it should ensure that such proceedings align with international standards, including by: preserving critical due process protections such as the right to an independent appeal; providing access to complementary forms of protection; and refraining from arbitrary or mandatory detention.

2. Consideration of Precedent When Making Credible Fear Determinations in the "Credible Fear" Process

UNHCR recommends that the Government continue to permit immigration judges to assess all relevant authorities and give them their due weight when reviewing negative fear determinations. This partially mitigates the risk that such determinations are inconsistent with international law, which requires that adjudicators use cautious thresholds during screening processes.

3. DHS-Specific Procedures in Expedited Removal and Credible Fear and Their Potential Impact on Detention

UNHCR recommends that the Government strike the removal of any provision that would negatively impact access to custody determinations for those who meet the credible fear standard or the reasonable possibility standard for screening.

4. Reasonable Possibility as the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations for Non-Citizens in Expedited Removal Proceedings and Stowaways

UNHCR recommends that these heightened standards of proof not be implemented. Further, the existing standard of proof should be revisited and brought in line with international standards.

5. Proposed Amendments to the Credible Fear Screening Process

UNHCR recommends that the government not implement this provision. Specifically, UNHCR recommends that: the possibility of internal relocation not be included as a factor leading to a negative fear determination; asylum-seekers who appear potentially subject to a bar be provided with access to full asylum procedures for careful consideration of that bar; and that asylum-seekers have access to IJ review of negative fear determinations unless they affirmatively decline that opportunity, having been informed in a language they understand of the consequences of doing so.

B. I-589: Application for Asylum, Withholding of Removal, and CAT Protection

1. Frivolous Applications

UNHCR recommends that the Government adopt the "manifestly unfounded / clearly abusive" framework envisioned under international law if it wishes to address "frivolous" applications. Regardless of the definition used, necessary procedural safeguards, as detailed above, should be incorporated into the process. Finally, UNHCR urges that any current or future immigration penalties for filing frivolous applications not be implemented.

2. Pretermission of Legally Insufficient Applications

UNHCR recommends that the Government strike the provision permitting pretermission of applications for asylum, withholding of removal, and protection under CAT. Instead, as a minimum, the Government should implement a framework for asylum adjudication in keeping with international standards, in which an adjudicator (whether at USCIS or in immigration court) can interview the asylum-seeker, preferably in a non-adversarial manner, to ascertain the full set of facts relevant to the case in question.

C. Standards of Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal

1. Membership in a Particular Social Group

Regarding requirements for legally cognizable PSGs, UNHCR recommends that the Government strike the codification of these requirements around defining particular social groups from the Proposed Rule and in its place propose adoption of the either-or approach to analyzing particular social groups that conforms with UNHCR guidance. Specifically, UNHCR suggests that the Government reconcile the approaches to minimize gaps in protection: a

particular social group is a group of persons who share a common characteristic other than their risk of being persecuted *or* who are perceived as a group by society.

Regarding purportedly-circular PSGs, UNHCR recommends that the Proposed Rule's restrictions around purportedly-circular particular social groups not be enacted. Should these restrictions remain in some form, UNHCR urges that the language be revised to acknowledge the fact that persecution can play a role in determining the visibility of a PSG. Additionally, UNHCR urges that explicit language be strengthened in the rule preserving the ability of adjudicators and courts to continue to evaluate PSG claims on a case-by-case basis beyond the "rare circumstances" envisioned in the current language of the Proposed Rule.

Regarding the non-exhaustive list of PSGs that will generally fail, UNHCR recommends that the Government strike this provision entirely in the final version of the Rule. In the alternative, the government should provide explicit authority to adjudicators evaluate PSG claims on a case-by-case basis. If the government wishes to list particular social groups in order to aid adjudicators in individualized assessments of each claim, it should do so in an inclusionary manner, rather than by making a list of non-cognizable PSGs.

Regarding the requirement that applicants define their own PSGs, UNHCR recommends that the Government strike this provision requiring asylum-seekers to articulate their own particular social groups without the assistance of an adjudicator. UNHCR encourages the Government to rewrite any rule concerning asylum application processing to affirm the adjudicator's duty to explore and identify the reason(s) why an individual has a well-founded fear of persecution, up to and including exploring the elements of particular social groups. UNHCR also encourages the Government to preserve pathways to raise newly articulated PSGs on appeal.

2. Political Opinion

UNHCR recommends that the definition of political opinion be reviewed and broadened to conform with international legal standards. Political opinion is a broad ground; domestic law should not be written in such a way to preclude its current use or future evolution, nor should it prioritize one type of claim above others.

3. Persecution

UNHCR recommends that the definition of political opinion be reviewed and broadened to conform with international legal standards. Political opinion is a broad ground; domestic law should not be written in such a way to limit its current use or future evolution, nor should to prioritize one type of claim above others.

4. Nexus

UNHCR recommends that the Government strike this provision that all but precludes asylum in cases involving eight different types of claims, as international law requires that applications for international protection not be rejected in the absence of a case-by-case adjudication of their merits. Further, UNHCR recommends that the Government implement a standard for nexus in U.S. law which requires only that a Convention ground be a relevant, contributing factor, not necessarily one central reason, for an applicant's persecution, which will bring the United States into conformity with international legal standards on this issue.

5. Evidence

UNHCR recommends that the Government strike this provision from the Proposed Rule, as it is clearly at variance with international standards on procedural fairness in asylum adjudication and will have a significant impact on applicants who submit certain types of claims. Instead, the Government should permit applicants to continue to support their claims with country conditions evidence that provides adjudicators with information that can help them determine whether the applicant is entitled to refugee protection.

6. Internal Relocation

UNHCR recommends that the Government not implement the new provision creating a presumption of internal relocation in cases involving asylum-seekers who have suffered persecution by non-state actors. Instead, UNHCR recommends that the Government bring its adjudication of internal relocation in line with the international legal principles described above. At the very least, children's claims should be exempted from this section of the Proposed Rule.

7. Factors for Consideration in Discretionary Determinations

With respect to discretionary factors overall, UNHCR recommends that the Government promulgate regulations directing adjudicators to grant asylum every time they encounter an individual who meets the criteria, effectively discontinuing the use of discretion. In the absence of such a change to the use of discretion, UNHCR recommends that the entire list of factors for discretionary denial in the Proposed Rule be struck from the final regulation, effectively removing the adjudicator's mandate to deny on these grounds.

8. Firm Resettlement

UNHCR recommends that the Government not implement the Proposed Rule expanding the firm resettlement bar and that it instead use this opportunity to establish a definition of this concept that is compatible with international law.

9. Rogue Officials

UNHCR recommends that, should the Government implement a new definition of "torture," it make it less restrictive such that it aligns with the definitions in international law.

D. Information Disclosure

UNHCR recommends that the Government amend the Proposed Rule to limit the circumstances under which asylum-seekers' information can be disclosed, including by removing the prong of this provision on permitted disclosures that concerns legal actions related to the denial of an application for protection or challenges to custody status, and enhance provisions related to the protection of their personal data and asylum claims. UNHCR advises the Government to remove the prong on disclosures concerning legal actions so that applicants for refugee protection are not deterred from challenging a denial of their claim or their custody status.

IV. Particularly Vulnerable Groups

Regarding child asylum-seekers, UNHCR recommends that, should the Government implement the Proposed Rule, it should take great care to account for the special needs of

children seeking protection. At a minimum, the government should revise the provisions discussed above with children's needs in mind. The Government should include specific exemptions for children, which would address their unique vulnerabilities, such as their age, maturity level, and past trauma. Further, UNHCR urges the Government to enable child asylum-seekers with the facilities they need to have a realistic opportunity to have their claims developed, heard in full, and fairly adjudicated in a non-adversarial setting. This must include providing them with interpreters and access to legal assistance and representation.

Regarding *pro se* asylum-seekers, UNHCR recommends that the Government revisit the Proposed Rule to take into account the needs of unrepresented asylum-seekers, including those who have suffered profound trauma, those with low levels of literacy, and those who are not proficient in English. UNHCR recommends, as discussed elsewhere, that the Government reconsider punitive procedural provisions such as those on pretermission and frivolous claims. Should these provisions remain, UNHCR recommends that the Government take measures to mitigate their effects on vulnerable groups, including but not limited to those identified here.

Specifically, UNHCR suggests that the Government ensure that all asylum-seekers have access to guidance on the procedures involved in the U.S. system, including during pre-screening procedures (e.g., the precise steps an applicant must take to obtain immigration judge review of a negative fear determinations) and adjudication of their applications. In addition, UNHCR advises the Government to enable asylum-seekers with the facilities they need to have a realistic opportunity to have their claims heard in full. This involves providing applicants with interpreters and access to legal assistance and representation. Further, as noted elsewhere in this Comment, UNHCR underscores that asylum-seekers should not be detained during the pendency of their proceedings, in part because this practice obstructs their ability to secure representation.

EXHIBIT 24

DECLARATION OF NAOMI A. IGRA

July 15, 2020

Submitted via www.regulations.gov

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RE: EOIR Docket No. 18-0002, Human Rights First's Comment in Response to Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

Human Rights First submits these comments in response to the Department of Homeland Security's (DHS) and Executive Office for Immigration Review's (EOIR) Notice of Proposed Rulemaking published in the Federal Register on June 15, 2020, by which the agencies propose to rewrite decades of asylum law to create new restrictions on eligibility for protection in the United States. In violation of U.S. and international law and settled principles of refugee protection, the proposed rule seeks to profoundly rework U.S. asylum law in a way that will result in countless refugees being returned to danger. The proposed rule would render much of U.S. case law and the specific language used by Congress in the relevant statutes meaningless.

The proposed changes would, for instance, ban from asylum, or deny asylum to, refugees who suffered brief detentions or escaped their persecutors before threats could be carried out, transited through other countries on their way to the United States, crossed into the United States between ports of entry, or were unable to precisely articulate the legal parameters of their persecuted social group at their hearings. The proposed changes would certainly lead to denials of asylum to protestors from Hong Kong, people who risked their lives to oppose activities of terrorist, militant, criminal or other armed groups that control territories, victims of religious persecution forced to give up the practice of their faith, women targeted for honor killings, forced marriage or severe domestic abuse, and refugees persecuted due to their sexual orientation or gender identities. The rule would, moreover, separate many refugee families through its asylum denials; leave refugees without a route to integration and naturalization by improperly blocking refugees from asylum (evading both the route created by Congress and the Refugee Convention's direction to states to encourage such integration and naturalization); block asylum seekers from due process, removal hearings and other forms of immigration relief; allow adjudicators to deny asylum without ever hearing an asylum seeker's testimony; and illegally raise the credible fear screening standard set by Congress. The rule would also deport torture survivors back to torture.

In a rare public statement criticizing U.S. proposed regulatory changes, the UN High Commissioner for Refugees (UNHCR) has expressed serious concerns that the proposed rule is

"a departure from humanitarian policies and practices long championed by the United States."[1] We agree.

Human Rights First strongly opposes this proposed rule and urges the agencies to abandon it. Through our pro bono refugee representation program, Human Rights First and our volunteer lawyers see firsthand how difficult it already is for asylum seekers to be granted protection in the United States. If the provisions of this proposed rule had been in place, many of our refugee clients, who are now asylees, would have been denied asylum or permanently separated from their families. And the proposed rule, if codified, will result in the deportation of countless future asylum seekers who have faced grave violations of their human rights and qualify for asylum under the Immigration and Nationality Act (INA).

In the supplementary information to the proposed rule, the agencies mischaracterize asylum laws as "an expression of a nation's foreign policy" and "an assertion of a government's right and duty to protect its own resources and citizens." In fact, the Refugee Act of 1980 "was a clear statement of intention of the United States Congress to move away from a refugee and asylum policy which, for over forty years, discriminated on the basis of ideology, geography and even national origin, to one that was rooted in principles of humanitarians and objectivity."[2]

When it enacted the Refugee Act of 1980, Congress intended to eliminate such biases in U.S. refugee and asylum determinations and bring our country's asylum laws into accordance with U.S. treaty obligations. The 1951 Convention Relating to the Status of Refugees (Refugee Convention), drafted in the wake of World War II, protects refugees from return to persecution, encourages their integration and naturalization and prohibits states from penalizing them for illegal entry or presence. The United States helped lead efforts to draft the Convention and ratified its Protocol, legally binding itself to the Refugee Convention's provisions.

Human Rights First and its interest in this issue

For over 40 years, Human Rights First has provided pro bono legal representation to refugees seeking asylum in the United States and advocated for the protection of the human rights of refugees. Human Rights First grounds its work in the legal standards of the 1951 Refugee Convention, its Protocol, and other international human rights instruments, and we advocate adherence to these standards in U.S. law and policy. Human Rights First operates one of the largest and most successful pro bono asylum representation programs in the country. Working in partnership with volunteer attorneys at many of the nation's leading law firms, we provide legal representation, without charge, to hundreds of refugees each year through our offices in California, New York, and Washington D.C. This extensive experience dealing directly with refugees seeking protection in the United States is the foundation for our advocacy and informs the comments that follow.

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[1] UNHCR, "Statement by UN High Commissioner for Refugees Filippo Grandi on U.S. Asylum Changes" (July 9, 2020), https://www.unhcr.org/news/press/2020/7/5f0746bf4/statement-un-high-commissioner-refugees-filippo-grandi-asylum-changes.html.

[2] Deborah Anker, "The Refugee Act of 1980: A Historical Perspective" (1982), https://www.jstor.org/stable/23141008?read-now=1&seq=1#page_scan_tab_contents.

The agencies have only provided the public with 30 days to comment on the Notice of Proposed Rulemaking (NPRM), an insufficient period for a regulation that eviscerates asylum protections through multiple complex provisions.

The public has not been given adequate time to respond to this proposed rule, which would profoundly rewrite asylum law and render ineligible for protection countless refugees. It is comprised of numerous provisions and dense, technical language. Among other fundamental changes, it creates new and restricted immigration proceedings for asylum seekers, arbitrarily eliminates entire categories of asylum claims, creates multiple new bars to asylum that would block countless refugees, and reverses decades of settled law and principles. It violates U.S. and international law. These changes are so sweeping that any one provision would require longer than a 30-day comment period. To give the public only 30 days to respond meaningfully to this unprecedented rule, especially during a global pandemic, will essentially deprive the public of the right to comment on the NPRM. This alone is a critical reason for the agencies to withdraw the proposed rule and, should they choose to reissue it, grant the public significantly more time to respond.

Additionally, on July 9, 2020, DHS and the Department of Justice (DOJ) published a proposed regulation that set forth additional alterations to the procedures for expedited removal that create additional bars to asylum and withholding of removal and impermissibly elevate the standard set for these preliminary screenings by Congress. That notice of proposed rulemaking explicitly states that procedures set forth in the July 9 regulation conflict with the procedures set forth in this NPRM.[3] The agencies stated in the July 9, 2020 proposed regulation that they would request comment regarding how to best reconcile these procedures. It is critical that the public have an opportunity to comment on how the agencies propose to reconcile these procedures before either proposed rule goes into effect. Given the complexity and scope of both proposed rules and the extent to which they both unlawfully transform expedited removal procedures, this additional comment period must be substantially more than 30 days.

The proposed rule would make countless refugees ineligible for asylum by drastically narrowing key legal definitions including "persecution," "political opinion," and "particular social group."

Under the INA, applicants are eligible for asylum if they have a well-founded fear of future persecution and a central reason for this persecution is their nationality, race, religion, political opinion, or membership in a particular social group. 8 U.S.C. § 1158(b). Applicants are entitled to withholding of removal if they are more likely than not to suffer persecution because of one or more of these same five grounds. 8 U.S.C. § 1231(b)(3). The proposed rule fundamentally alters and narrows these elements of an asylum and withholding claim and provides, for the first time, a regulatory definition of "persecution."

[3] Dep't of Homeland Security & Dep't of Justice, "Security Bars and Processing," 85 FR 41201 (July 9, 2020), https://www.federalregister.gov/documents/2020/07/09/2020-14758/security-bars-and-processing.

I. *Persecution*

The agencies propose to amend 8 C.F.R. § 208.1 and 8 C.F.R. § 1208.1 by adding 8 C.F.R. § 208.1(e) and 8 C.F.R. § 1208.1(e), which creates a regulatory definition of persecution that is impermissibly narrow and at the same time unclear. The concept of persecution has resisted unitary definition, both internationally and in U.S. asylum law, due to the wild diversity of forms of harm to which persecutors subject their fellow humans and the varied circumstances in which that harm occurs, but also because a well-founded fear has both an objective and subjective component. The proposed rule defines persecution as "an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat." This heightened standard would result in adjudicators rejecting claims involving severe violence and threats on the basis that they are not "extreme" enough, not "severe" enough, and do not constitute an "exigent threat." It would reverse the long-accepted definition of persecution as a "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive[4] The proposed rule states that persecution "does not include intermittent harassment, including brief detentions." It is not clear what this means. Under well-established law, various forms of harm that may not rise to the level of persecution if considered individually, may constitute persecution in their cumulative effect, as noted above. In these cases, "intermittent harassment" may be part of a sequence of events that may indeed constitute persecution. Similarly, "brief detentions" may or may not constitute persecution in and of themselves, depending on factors such as the conditions of detention, how the asylum applicant is treated while detained, and the context surrounding these incidents; they are frequently "included" in a cumulative experience of harm that unquestionably constitutes persecution. Adjudicators can and should consider these scenarios in context and cumulatively. The proposed rule would discourage this.

Similarly, the proposed regulation states that persecution "does not include . . . threats with no actual effort to carry out the threats." This rule would produce bizarre and unjust results in situations where, for example, the asylum applicant deprived those threatening him of the opportunity to carry out their threats by fleeing the country. Asylum and withholding of removal were intended by Congress to protect and preserve the living, not the dead, and there exists in U.S. asylum law a body of precedent that considers when threats standing alone may constitute persecution, and does so much more coherently than this proposed rule.[5] Moreover, there should be no doubt that threats may be part of a cumulative course of conduct that rises to the level of persecution, but this rule injects murkiness even into that uncontroversial proposition.

In our experience, our clients—including many political activists—have suffered serious harm from short or recurring periods of detention by their country's government, which often operate as warnings that they will be harmed or tortured more severely if they do not cease their activities. Longer, more severe detentions could also be dismissed by adjudicators on the theory that each individual instance was not sufficiently extreme and severe and did not pose an exigent threat on its own.

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[4] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

[5] *Herrera-Reyes v. Att'y Gen.*, 952 F.3d. 101 (3d Cir. 2020); *Tamara-Gomez v. Gonzales*, 447 F.3d 343 (5th Cir. 2006); *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015); *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994); *Navas* v. INS, 217 F.3d 646 (9th Cir. 2000).

One Human Rights First client, for example, who was granted asylum years ago, fled Syria after he was taken in for interrogation by Syrian intelligence on two occasions. Both of these detentions lasted hours rather than days, but during that time, this man, a married father of young children, was left alone in windowless rooms for hours to listen to the screams of women being tortured, and his interrogators threatened the lives of his children and other family members; on the second occasion they also abused him physically. This proposed rule would encourage adjudicators to discount this man's past harm on the grounds that his detentions were "brief" and that there was no "actual effort" on the part of the intelligence agencies to carry out their threats against the lives of his children, despite the fact that he suffered grave psychological harm in custody and that both he and his interrogators were aware that they could do anything they wanted to him and his family at any time.

The proposed rule could likely trigger asylum denials to pro-democracy advocates protesting in Hong Kong if their detentions were "brief" and they escaped before threats of additional harm could be perpetrated. Many would also be denied asylum under various provisions in the proposed rule aimed at denying asylum to refugees who transit other countries on their way to safety in the United States.

The proposed rule's unclear reference to persecution requiring "a severe level of harm that includes actions so severe that they constitute an exigent threat" also threatens the protection of refugee claimants if the harm they are fleeing is the violation of their identities or consciences. Asylum seekers seeking the freedom to live according to their consciences and identities have on occasion faced wrongful denials of their cases even under current law based on adjudicators' failure to understand that being forced to suppress what they believe or who they are is itself persecution. This regulation, with the language just cited, would make such wrongful denials more frequent.

In 2005, for example, a panel of the Ninth Circuit affirmed the denial of asylum to a Chinese Christian, Xiaoguang Gu.[6] Mr. Gu had been arrested in China for attending an unofficial house church and distributing Christian religious materials. The record reflected that he had been detained for three days, interrogated, and struck about 10 times with a rod, leaving marks but no lasting injury. He was released after being forced to sign a statement admitting that he had done wrong, and was warned by his employer that if he engaged in any further "illegal activities" he would be fired from his job. As a result of this abuse and these threats, between his release from custody and his flight to the United States, Mr. Gu limited his religious activities to reading his Bible at home. He testified in immigration court that he had come to the United States in order to be able to practice his religion freely. After his arrival here, he learned that the authorities in China had come looking for him, he believed because he had sent religious materials to China from the United States. A majority of the panel upheld the immigration judge and Board of Immigration Appeals' (BIA) conclusions that Mr. Gu had not suffered persecution because he did not "experience further problems" after his release from police custody in China. Lost in all of this was any consideration of the suppression of his religious freedom.

[6] *Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006) (withdrawing earlier decision appearing at 429 F.3d 1209 (9th Cir. 2005).

The *Gu* decision created an uproar, which led DHS to join in a motion to reopen the case before the BIA, whose subsequent approval led the Ninth Circuit to withdraw its earlier decision. Under this proposed regulation, however, we could expect to see more denials of this kind and no willingness to fix them. The same danger would arise for claims based on sexual orientation—setting aside for a moment the fact that a separate provision of this proposed regulation would invalidate all gender-based claims on other grounds—as those claims as well have at times met with denials that operate on the theory that the asylum applicant could live safely in his home country if he would only remain in the closet.

The proposed regulation compounds the latter problem by dismissing a home country's own persecutory laws, mandating that government laws or policies that are infrequently enforced do not independently constitute persecution. This change would encourage adjudicators to ignore the impact of such laws—even if rarely enforced—on an LGBT asylum seeker's ability to live a free and dignified life in the home country. In a country with laws on the books that make homosexual acts punishable by death, for example, an LGBT person is highly unlikely to be able to live a normal life, or even to seek protection from the police when a victim of crimes, whether motivated by the victim's sexual orientation or otherwise. The problem in such cases may not be the direct enforcement of this particular persecutory law, but the fact that its existence contributes to the denial of core human rights.

II. *Political opinion*

The proposed rule would amend 8 C.F.R. § 208.1 and 8 C.F.R. § 1208.1 by adding 8 C.F.R. § 208.1(d) and 8 C.F.R. § 1208.1(d), which impermissibly narrow what constitutes a political opinion for purposes of asylum and withholding of removal, and would result in the deportation of individuals who were threatened and brutally harmed because of their political beliefs and actions. The proposed rule defines political opinion as "one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof." This restricted definition would eliminate all valid asylum claims where the applicant was persecuted for a political opinion that is not explicitly tied to a specific cause related to "political control of a state or a unit thereof," even in cases where the government itself persecuted the applicant. This definition is confusing and vaguely worded, contravenes long-established principles of asylum adjudication, and would return innumerable refugees to persecution. Indeed, in recognition of the fact that a person may be persecuted for a broad range of political opinions and expressions, U.S. courts have interpreted a political opinion to be significantly broader than a conviction related to political control of a state or unit thereof.[7] A political opinion can encompass feminism[8] and opposition to guerilla groups.[9] But the proposed rule narrows the definition of political opinion so drastically that it would seem that even individuals who are persecuted *by their governments* for actions that the government disapproves of would be denied protection unless their views and activities fit into the proposed rule's narrow box. This is particularly problematic given that

[7] *See, e.g., Espinosa-Cortez v. Att'y Gen.*, 607 F.3d 101, 110 (3d Cir. 2010); *Martinez-Buendia v. Holder*, 616 F.3d 711 (7th Cir. 2010); *Delgado v. Mukasey*, 508 F.3d 702, 708–09 (2d Cir. 2007); *Chavarria v. Gonzales*, 446 F.3d 508, 518 (3d Cir. 2006).
[8] *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993).
[9] *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007).

many refugees who flee to the United States to escape political persecution are reluctant to characterize their own activities as "political," either because that label was used to stigmatize them in their home countries, where "politics" is a loaded and dangerous term. This is frequently true of activists working in fields not involving partisan politics. While their persecutors in many cases do impute political opinions to such refugees, these often take the form of broad accusations of opposition, not "an ideal or conviction in support of the furtherance of a discrete cause related to political control" of the state or a unit thereof.

A Human Rights First client from Cameroon, for example, who had suffered atrocious persecution in his home country, was emphatic that the harm he feared was on account of his student activism seeking reasonable working and teaching conditions at the university campuses in his area, not political opposition party membership. Given that his activities were clearly a challenge to government policies and were understood as such by the Cameroonian government which targeted him for arrest, he was granted asylum years ago now without any conceptual difficulty. It is unclear what would happen to this classic refugee claim under the proposed rule.

Another former Human Rights First client, a woman from Burma, was targeted by the forces of the military junta then in power in that country for documenting rapes of women from her ethnic minority by Burmese military personnel. Even under the current regulations, an immigration judge failed to understand the political meaning of her human rights documentation work, and her application for asylum was initially denied based on lack of nexus. This clearly erroneous result was corrected following an appeal, but what would happen to this woman under the proposed rule?

The proposed rule's purposefully cramped understanding of political opinion, ironically, would appear to exclude much of the content of political opinion and disagreement in the present-day United States. In many of the countries whose citizens are forced to flee to the United States to escape political persecution, almost any activity independent of the government can be seen by an authoritarian or repressive government as a threat to its security, but the retribution that follows is not always articulated in the terms this proposed rule would require.

Asylum seekers may also flee because their governments are unable or unwilling to control non-state actors who seek to harm them due to their political opinion. Despite this reality, long recognized by U.S. asylum law, the proposed rule states that *in general, asylum claims will not be successful* where individuals fear persecution on account of a political opinion "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state." Again, the proposed rule is so poorly phrased as to be incomprehensible, but it would appear intended to wipe out the majority of asylum claims where an individual faces harm at the hands of non-state forces, even in regions where such forces act as de facto governments and kill anyone opposed to them. By limiting the definition of a political opinion in such situations to "expressive behavior" that directly relates to *efforts by the state to control* these organizations, or behavior that directly opposes the state, the rule makes it virtually impossible to win asylum where an applicant was persecuted by forces that the government is making no serious effort to

control, or where the applicant's opposition to such forces is not framed as support for state efforts to control them. Under this rule, many political opinion claims stemming from persecution by gangs, guerrilla forces, terrorist organizations, and other non-state actors would instantly fail.

Human Rights First has worked with several refugees, for example, who were themselves targeted by the Islamic State in Syria, or lost family members to murder or disappearance by that group, because they or their relatives were opposed to it. Their opposition, however, had nothing to do with "efforts by the [Syrian] state to control" the Islamic State—the regime of Bashar al-Assad was making no such efforts, and these refugees were *also* opposed to that regime. This cannot remove their opposition to the Islamic State from the scope of "political opinion."

While the proposed rule specifies that a woman who is forced to abort a pregnancy or undergo involuntary sterilization, or is persecuted for refusal to undergo such a procedure, will be deemed to have been persecuted on account of political opinion, it does not similarly protect a woman who resists state or non-state actors who claim that they have a right to rape her or subject her to an honor killing, for example.

III. *Particular social group*

The proposed rule would amend 8 C.F.R. § 208.1 and 8 C.F.R. § 1208.1 by adding 8 C.F.R. § 208.1(c) and 8 C.F.R. § 1208.1(c), which eviscerate "membership in a particular social group" as a basis for asylum. UNCHR has characterized the fluid definition of particular social group in the following way: "The term . . . should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[10] The cognizability of a particular social group is an issue that must be assessed on a case-by-case basis, with attention to the specific circumstances in a country. Nonetheless, DOJ has repeatedly sought to eliminate particular social groups previously recognized by the BIA, federal courts of appeals, and international law.[11] This proposed rule would result in the continued and arbitrary dismantling of protections for asylum seekers who face harm because of their membership in a particular social group.

The proposed rule rejects broad categories of particular social groups with no regard to the circumstances of individual cases. It would also impose on several types of claims, notably gender-based claims brought by women and girls, an astonishingly retrograde framing, treating much of their persecution as a personal or familial problem. This characterization is doubly disturbing since it underlies the failure of protection these refugees suffer from at home, and blasts U.S. asylum law back to a past from which other areas of American law moved on decades ago. This nearly categorical rule would provide that:

[10] UNHCR, Refugees Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (May 7, 2002), https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html.
[11] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

> The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by…past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or, status as an alien returning from the United States.

These exceptions bear no relation to whether an individual is a member of a particular social group as previously defined by agency and federal court decisions. Each of these exceptions is broad and vague. For example, prohibiting asylum grants based on particular social groups that relate to "presence in a country with generalized violence or a high crime rate" would arbitrarily undermine asylum claims from countries that suffer from high rates of violence, where the asylum applicant's citizenship in such a country was simply an element in the social group. The rule's peremptory rejection of claims based on fears of recruitment by a wide range of non-state armed groups, while a transparent attempt to bar many claims from Central America, where persecution by such groups, including in the form of punishment for refusing recruitment into them, is a widespread cause of flight from the country, will result in the wrongful denial of many types of refugee claims, including but certainly not limited to those brought by Central American youth.

The dismissal of particular social groups that are based on "interpersonal disputes of which governmental authorities were unaware or uninvolved" would have predictable negative consequences for asylum applicants fleeing gender-based harm within their families or communities, asylum applicants whose need for international refugee protection typically stems from this very insistence on characterizing their persecution as a matter of personal conflict. For them and for other asylum applicants whose harm adjudicators would now be encouraged to write off as "interpersonal disputes," this proposed rule creates an unnecessary conflict with decades of precedent—in both U.S. and international refugee law—recognizing that the standard for granting protection against persecution by non-state actors (however large- or small-scale) is not whether governmental authorities were aware of or involved in the abuse, but rather whether they were (or would be) willing and able to protect the refugee.

One former Human Rights First client, then a young teenager from Guinea, sought refuge with a family friend in the United States to avoid being forced into marriage by her father, who had promised her to one of his own friends, a man her father's age. The young girl wanted to complete her education and have some say in whom she later married; while government authorities in Guinea at the time were not aware of her particular situation, she had little reason to seek help from them, as an abundance of independent evidence and her own experience in her community made clear that such recourse would be futile and indeed likely to make her situation worse. This child's predicament also could not fairly be characterized as an "interpersonal dispute," but this regulation would encourage such portrayal in any case where the persecutor

and the victim are individual people, ignoring the social norms and structures that exist to protect the persecutor rather than the victim.

The proposed rule does not alter the "unable or unwilling" standard for showing a failure of state protection—indeed, the supplementary information to the rule cites to it, for example at page 36280—yet by misunderstanding the standard in the context of what it deems to be "interpersonal disputes," the proposed rule sets the stage for wrongful denials of valid asylum claims.

Also extremely troubling is the proposed requirement that an individual articulate a particular social group on the record in order to be granted asylum on that basis. According to the proposed rule, a failure to define a particular social group before an immigration judge will waive the claim for appeal or a motion to reopen or reconsider. In general, in any refugee status determination, it should not be the refugee's job to argue the intricacies of the law of a country not his own. Asylum adjudication systems, in order to function safely, must be geared to enable refugees, including those unrepresented by counsel, to present their claims as easily as possible. In such a system, it should be the refugee's job to present her facts; the adjudicator bears responsibility for evaluating the facts and considering whether they meet the requirements of the law.[12] While the current U.S. asylum system already confronts refugees with a host of technical, procedural, and evidentiary hurdles, the new burden of lawyering imposed by this proposed rule is one that does not apply to any of the other grounds in the refugee definition: an asylum seeker whose claim is based on political opinion, for example, will not be denied on appeal for failing to enunciate at trial the precise contours of the political opinion at issue (even though this proposed rule would create confusion around the concept of political opinion comparable to that currently characterizing the interpretation of "particular social group").

For asylum seekers represented by counsel whose cases were denied based on *their lawyers'* failure to define adequately the particular social group, the proposed rule would bar them from moving to reopen their cases based on the ineffective assistance they received from those lawyers. Again, this prohibition, which raises clear due process concerns, does not apply to any of the other grounds of the refugee definition.

In 1996, a teenage girl from Togo was granted asylum in the United States by the BIA based on her fear of being forced to undergo female genital cutting (FGC) in her home country.[13] This decision set the precedent that has protected many girls and women from FGC in the decades since, yet the particular social group the BIA settled on ("young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice") was distinct from those argued both by the applicant's counsel and by the then-INS even before the BIA. It serves

[12] UNHCR, "Note on Burden and Standard of Proof in Refugee Claims" (Dec. 16 1998), https://www.refworld.org/pdfid/3ae6b3338.pdf ("In view of the particularities of a refugee's situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts."); UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (Jan. 1972), https://www.unhcr.org/4d93528a9.pdf ("Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.").
[13] *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

neither the due process interests of refugees nor the thoughtful development of U.S. asylum law to preclude asylum applicants from arguing on appeal a different framing of their particular social group from that presented to the immigration judge.

The proposed rule fundamentally changes the requirements for establishing nexus, in contravention of the asylum statute

The INA requires that, for purposes of establishing past persecution or well-founded fear, "at least one central reason" for the persecution must be race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1158(b)(1)(B)(i). The proposed rule amends 8 C.F.R. § 208.1 and 8 C.F.R. § 1208.1 by adding 8 C.F.R. § 208.1(f) and 8 C.F.R. § 1208.1(f), which improperly jettison this statutory standard and create new principles regarding nexus that will make it nearly impossible for many refugees to be granted asylum.

It states that in general, asylum claims will not be successful where the persecution is based on: interpersonal animus or retribution; interpersonal animus where the persecutor has not targeted or manifested an animus against other members of the particular social group; generalized disapproval of, disagreement with, or opposition to criminal, terrorist, guerrilla, or other non-state organizations "absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state"; resistance to recruitment or coercion by guerilla, criminal gang, terrorist, or other non-state organizations; the targeting of the applicant based on wealth or affluence of perception of wealth or affluence; criminal activity; perceived, past or present, gang affiliation; or gender.

Providing for blanket denials of claims where persecution is based on "interpersonal animus or retribution" disregards the reality that persecutors often have mixed motives, and harm individuals both because of a protected characteristic *and* animus or retribution. The proposed rule encourages adjudicators to deny claims whenever interpersonal animus exists, regardless of any other motivation that the persecutors may have had. It would also encourage adjudicators to dismiss any harm by an individual persecutor as a matter of "interpersonal animus."

It then goes even further to mandate the general denial of claims where the persecutor has not targeted or shown an animus against other members of the particular social group. This requirement will result in the unjustified denial of claims, for example, in which victims of domestic violence cannot show that their partners attacked other women as well. As DHS noted in its brief filed in 2004 in *Matter of R-A-*, this is like saying that a slave is not suffering persecution on account of his status as a slave because his master is only oppressing his own slaves, not those of other slaveowners.[14] It profoundly undermines the statutory definition of refugee, which requires only that a protected characteristic be *at least one central reason f*or the

[14] *Matter of R-A-*, brief of the Dep't of Homeland Security (Feb. 19, 2004), https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf.

persecution—nowhere does it mandate that the persecutor must have harmed others for that same characteristic.[15]

The other aspects of the new nexus definition similarly invalidate many valid asylum claims. The proposed rule arbitrarily excludes cases involving resistance to gangs, guerillas, and other non-state organizations "absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state." As noted earlier in connection with its occurrence in the proposed regulation on political opinion, this phrase is incomprehensible and will be a recipe for unnecessary litigation and, from what we can understand of it, for the wrongful denial of valid claims.

The proposed rule also categorically excludes cases of resistance to recruitment by any type of non-state armed group, even, apparently, if the resulting persecution is based on a protected characteristic. There exists a body of law considering when claims based on resistance to recruitment by an armed group are cognizable as refugee claims, and there is no legal basis for excluding cognizable claims on the grounds that the recruiting armed force was not governmental.

Human Rights First worked with a human rights defender from the Democratic Republic of the Congo, for example, whose work in his home country involved advocacy against the recruitment and use of child soldiers by all the armed forces present in the eastern part of that country. With respect to the rebel armies there, his cause was certainly a "discrete cause against such organizations," but it was not "related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state." This human rights defender was not advocating for any of the sides engaged in the armed conflict; he was advocating for all of them to cease recruiting and using children as soldiers and to release the children already in their forces. This should be a clear asylum claim based on political opinion, yet both the "political opinion" and the "nexus" section of this proposed regulation would result in its denial.

Lastly, the proposed rule excludes persecution based on gender from the refugee definition. UNHCR has affirmed that women who fear persecution on the basis of gender should be considered members of a particular social group for the purpose of determining refugee status.[16] U.S. agency and court decisions have long recognized that sex is a prototypical immutable characteristic for purposes of a particular social group.[17] The proposed rule will have far-

[15] This novel requirement would also create unnecessary evidentiary burdens for asylum applicants, who may have no basis to know whether or not their particular persecutor targeted others similarly situated. Human Rights First has represented some women seeking asylum based on severe domestic violence, for example, who only learned by chance, after their own relationships had already become abusive, that their abuser had previously treated a former spouse or partner in the same way. This proposed regulatory requirement would deny protection to the first spouses or partners of such abusers, as well as to others suffering from informational deficits beyond their control.

[16] UNHCR, "Information Note on UNHCR's Guidelines on the Protection of Refugee Women" (July 22 1991), https://www.unhcr.org/en-us/excom/scip/3ae68cd08/information-note-unhcrs-guidelines-protection-refugee-women.html.

[17] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020); *Orellana v. AG*, 956 F.3d 171 (3d Cir. 2020); *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014); *NLA v. Holder*, 744 F.3d 425 (7th Cir. 2014); *Quinteros v. Holder*, 707 F.3d 1006 (8th Cir. 2013).

reaching harms in eliminating gender as a basis for asylum in contravention of the INA and international law.

The proposed rule prohibits asylum seekers from introducing crucial evidence in court

The proposed rule amends 8 C.F.R. § 208.1 and 8 C.F.R. § 1208.1 by adding 8 C.F.R. § 208.1(g) and 8 C.F.R. § 1208.1(g), which mandate that "evidence promoting cultural stereotypes about an individual or a country" will not be admissible in adjudicating the application. Human Rights First certainly encourages the agencies, and refugee advocates, to strive to rid themselves of implicit and explicit biases and stereotypes—whether based on race, religion, nationality, gender, or other protected characteristics—in refugee adjudication and immigration policy. That said, much of the persecution that takes place worldwide and falls within the scope of the asylum and withholding statutes is based on stereotypes about people and cultures, typically perpetrated by the persecutors. It is difficult to see how an asylum seeker whose claim stems from such dynamics can be expected to prove her claim without discussing and documenting them.

In August 1998, for example, with the outbreak of the second war in the Democratic Republic of the Congo, there was a wave of persecution of Tutsi and Banyamulenge in the country, fomented by the ruling authorities in Kinshasa. This persecution also extended to a number of people who "looked Tutsi" but were in fact members of other ethnic groups. A number of refugees affected by this persecution fled the country; the United States granted asylum to some and resettled others. Discussing these refugee claims necessarily involved discussing, and documenting, the stereotypes that were the basis for singling the victims out for persecution—that Tutsi were perceived as having oval faces and narrow noses, for example (however untrue this might be in individual instances), as well as how they were perceived culturally within Congolese society. While on some level such evidence could be seen to "promote" those same perceptions, at least by repetition, it is unclear how an asylum seeker in this situation could be expected to meet his burden of proof without offering it.

To give another example, the applicant in *Matter of Kasinga* provided evidence, including that of a cultural anthropologist, concerning the practice of FGC among her ethnic group, the expectations of husbands that their wives would have undergone the procedure before marriage, and so on. These were, at the time, novel facts to most asylum adjudicators in the United States. Certainly this evidence did not mean that every member of the Tchamba-Kusuntu ethnic group supported or furthered FGC—the applicant's own father had not, which is why she had been spared this harm until he died—but assessments of well-founded fear involve an assessment of likelihoods, which makes such evidence critical.

This proposed rule constitutes a marked departure from the relaxed evidentiary rules typically applicable in immigration proceedings, and is all the more harmful—and ironic—in light of the fact that the BIA's recent precedents in claims based on membership in a particular social group, by forcing applicants to prove that the group in question is perceived as a group by society at large and not only by the persecutor, have forced applicants to submit ever more evidence of social perceptions, cultural history, and dominant attitudes in their home countries. This rule could result in critical evidence being dismissed—for example, evidence of *machismo* in a culture, as well as documentation of abuse of women in a particular culture, including

widespread rape or femicide, could be excluded if the adjudicator deems that this evidence can also be conceived of as a cultural stereotype. This rule violates due process principles of fundamental fairness in proceedings and the INA's guarantee that individuals have the right to present evidence on their behalf. 8 U.S.C. § 1229a(b)(4)(B). Additionally, 8 C.F.R. § 1240.7(a) states that the immigration judge may receive any evidence that is "material and relevant to any issue in the case." The proposed rule rejects these fundamental principles and denies asylum seekers the right to present critical country conditions evidence.

The proposed rule invents a new definition of "firm resettlement" in order to block nearly all refugees who fled to the United States by way of another country

Under 8 U.S.C. § 1158(b)(2)(A)(vi), individuals are ineligible for asylum if they were "firmly resettled in another country prior to arriving in the United States." Current 8 C.F.R. § 208.15 explains that an individual is "firmly resettled if, prior to arrival in the United States, he or she entered the country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." This definition of firm resettlement has been interpreted and applied by the BIA and the federal courts of appeals for many years.[18]

The proposed rule amends 8 C.F.R. § 208.15 and 8 C.F.R. § 1208.15 to create an entirely new definition of firm resettlement that abandons this framework and makes it nearly impossible for refugees to be granted asylum if they traveled through another country. It is a third-country transit ban by another name.

The proposed rule considers refugees to be firmly resettled regardless of whether they were offered permanent residency status. First, it mandates that an individual is firmly resettled if she "could have resided" in a "permanent *or* non-permanent, *potentially* indefinitely renewable legal immigration status," and this "regardless of whether the individual applied for or was offered such status." This would be unworkable. Adjudicators would need to engage in speculation regarding a country's laws, whether an individual would have been granted status had she applied under that country's laws, and whether a temporary status could be indefinitely renewed. It forces judges and asylum officers to first act as third-country adjudicators—without any expertise in that country's law—and then as U.S. adjudicators. Not only is this unworkable, but it would return people to danger in violation of U.S. legal obligations.

This rule would result in the removal from the United States of refugees who are *not*, in fact, firmly resettled in a third country and might never be able to obtain status there. Once these individuals are removed from the United States and are unable to secure status in the third countries that the proposed rule speciously claims they are firmly resettled in, they may be deported to danger in the countries they fled from. This proposed rule will thus achieve a similar result to the Interim Final Rule published July 16, 2019 (the third-country transit ban), which has barred refugees from asylum merely for having passed through third countries en route to seek protection in the United States.

[18] *See, e.g.*, *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006); *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001); *Lara v. Lynch*, 833 F.3d 556 (5th Cir. 2016); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004); *Elzour v. Ashcroft*, 378 F.3d 1143 (10th Cir. 2004).

For instance, in the case of Mexico, some asylum seekers have been issued so-called humanitarian visas, which are typically issued for a one-year periods and are renewable under Mexican legislation. However, in practice, many of these humanitarian visas are not renewed, in particular, because many were issued in recent years for the purpose of permitting asylum seekers to safely transit through Mexico. Granting asylum seekers temporary status permits them to use public transportation and to avoid the need to pay traffickers and/or cartels who control transit routes for asylum seekers traveling through the country. Denying asylum protections to individuals who have received these temporary humanitarian visas would return individuals to danger when they were not offered, and did not have a possibility of, permanent resettlement in Mexico.

Moreover, considering refugees to be firmly resettled in a country where they *could have* obtained temporary, *potentially* renewable status permits adjudicators to deny asylum where an individual could—potentially—have applied for a work permit in a country where he/she had no guarantee of permanent residence. It should also be noted that a number of the countries where refugees often find themselves on temporary residence permits, typically tied to work contracts, are countries that are not signatories to the 1951 Refugee Convention or its 1967 Protocol and/or do not have functioning asylum systems—for example, Saudi Arabia—meaning that the loss of temporary residence leaves the asylum applicant no protection against forced return to his country of persecution. The proposed rule should be abandoned because it does not take into account these realities. It would deny asylum to individuals who are not firmly resettled and would be in danger of being deported from these third countries to the home country they fled.

Human Rights First, for example, represented a woman from Syria who, along with her husband, had spent much of her working life in Saudi Arabia, on temporary residence permits tied to the husband's work contracts. The two were saving up with the intention of retiring to Syria. All their plans were turned upside down when the husband died unexpectedly and her whole family back in Syria were forced to flee that country for political reasons that also threatened her. Their hometown was subsequently bombed to the ground. Left a widow in Saudi Arabia, this woman was initially able to acquire a temporary residence permit based on a work contract of her own, but an economic downturn in Saudi Arabia due to the declining price of oil was leading to a "saudization" of the workforce. When her work contract—and with it her residence permit—was terminated as a result while she was on a visit to the United States, she had nowhere to go. Unable to return to Saudi Arabia and fearing for her life in Syria, she applied for asylum here.

While it should be clear from this example how impermanent such "potentially indefinitely renewable" arrangements frequently are in fact, even if the finite nature of her status in Saudi Arabia were recognized, the widow just described would have been barred from asylum by another provision of this regulation. The proposed rule would also apply the firm resettlement bar to individuals who physically resided voluntarily, without continuing to suffer persecution or torture, in any one country for one year or more after departing their country of nationality or last habitual residence and prior to arrival or in the United States. This proposed change is a drastic departure from the existing regulation and would bar asylum for individuals who lived in countries where they would not even have been legally eligible to apply for status. For example, an asylum applicant from Syria who spent a year or more in Lebanon—a country that offers refugees no lasting security of any kind and has been actively returning Syrian refugees to

Syria—would find herself barred from asylum under this provision. So would a Uyghur refugee from China who spent a year without status in Malaysia.

Even more perversely, this proposed change would make thousands of refugees waiting for hearings under the Migrant Protection Protocols (MPP) ineligible for asylum merely because the U.S. government required them to wait in Mexico for over a year for their hearings—including months of delays resulting from postponements of hearings due to COVID-19.[19] It would be cruel to punish asylum seekers and eliminate their eligibility for asylum merely because the U.S. government placed them in MPP. This proposed change would operate as a third-country transit ban for anyone who lived in another country for a year or more, even if only by virtue of heeding the instructions of the U.S. government.

The proposed rule also eliminates the existing important exceptions to the firm resettlement bar. Under the proposed rule, an individual could not argue that he is exempt from the bar because entry into the country was a necessary consequence of his flight from persecution or that the conditions of residence in that country were substantially and consciously restricted. For example, refugees who are able to stay in another country for an indefinite period but are unable to work, receive medical care, send their children to public school, live anywhere but in limited parts of that country's territory, or obtain insurance would not be exempted from the firm resettlement bar. Human Rights First represented several activists from Bhutan, for example, who had spent years as refugees in camps in Nepal before arriving in the United States; they were not legally allowed to leave the camps and were not allowed to work. In other words, they had no future at all in Nepal, and in recognition of that fact, the United States and several other countries moved to resettle this population nearly in its entirety, with the result that a few Human Rights First asylum clients from Bhutan saw their family members resettled here through the Refugee Admissions Program. The current regulation, unlike the proposed rule, recognizes that individuals may have the ability to stay permanently in a country but be so oppressed in that country that they do not even have the right to basic necessities. It serves no legitimate public purpose and is both cruel and unproductive to include such individuals in the scope of the firm resettlement bar.

Through these provisions, the rule seeks essentially to implement the Interim Final Rule published on July 16, 2019, which was vacated in its entirety by a federal district court on June 30, 2020, after it had resulted in unlawful denials of asylum and ripped apart families for almost a year.[20] Like the Interim Final Rule, the proposed rule would harm asylum seekers in unimaginable ways, leaving asylum seekers' spouses and children permanently stranded in danger since family members of refugees determined to be ineligible for asylum due to the new resettlement rules do not qualify for automatic protection as "derivative asylees." As a result, refugees who manage to qualify under the elevated withholding of removal or CAT standards

[19] Human Rights First, "Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger" (May 2020), https://www.humanrightsfirst.org/sites/default/files/PandemicAsPretextFINAL.pdf (as of June 2020, more than 1,200 individuals in MPP had been waiting in Mexico for more than one year for MPP immigration court proceedings).

[20] Human Rights First, "Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban" (July 2020), https://www.humanrightsfirst.org/resource/asylum-denied-families-divided-trump-administration-s-illegal-third-country-transit-ban. The report in its entirety is appended to the end of this comment.

would be unable bring their families to safety in the United States. In addition, refugee families who sought asylum together would be divided where, for instance, a parent is granted withholding of removal but the rest of the family is ordered deported back to the country where that parent has been determined to face a very high likelihood of persecution. These lesser, inadequate forms of relief leave refugees unable to reunite with family, leaving them in permanent limbo. These refugees face obstacles to integration such as inability to bring their children and spouse to the United States, fear of living under a permanent removal order, lack of permanent legal status, lifelong check-ins with ICE officers, baseless threats of imminent deportation, and denial of access to benefits crucial for integration and self-sufficiency.

Human Rights First has documented the serious harms inflicted on asylum seekers by the third-country transit asylum ban in its report published in July 2020,[21] and these same harms would apply to this proposed rule as well. In fact, the proposed rule is even broader than the third-country transit ban, in that it applies to all asylum seekers rather than only to individuals seeking asylum at or after crossing the southern border. We urge the agencies to rescind this proposed rule in light of the extensively documented harms of the third-country transit ban.

The proposed rule would unfairly deny asylum based on purported ability to internally relocate where the relocation would not be safe or reasonable

Under current 8 C.F.R. § 208.13 and 8 C.F.R. § 1208.13, an asylum seeker is ineligible for asylum if he or she can avoid persecution by relocating within the country of persecution and it would be reasonable for him or her to do so. In determining the reasonableness of relocation, adjudicators are currently instructed to consider factors such as: whether the applicant would face other serious harm in the place of proposed relocation, ongoing civil strife in the country, the country's administrative, economic, or judicial infrastructure, geographical limitations, age, gender, health, and social and family ties. 8 C.F.R. § 208.13(b)(3); 8 C.F.R. § 1208.13(b)(3). The emphasis in the current regulation, which offers these factors as a non-exhaustive list of potentially relevant considerations, is on a case-by-case adjudication of the reasonableness and effectiveness of an internal flight alternative. There are many reasons that internal relocation could be dangerous or unreasonably burdensome to an applicant, especially in countries with high levels of violence and widespread human rights violations. We have worked with clients from Central American countries who would have been unable to internally relocate safely because of gang control of entire regions throughout the country.

The proposed rule amends 8 C.F.R. § 208.13 and 8 C.F.R. § 1208.13 to eliminate these factors and their accompanying holistic analysis and replaces them with mandatory factors for the adjudicator to consider, including: size of the country, geographic locus of the alleged persecution, size, reach, and numerosity of the alleged persecutor, and the applicant's *demonstrated ability to relocate to the United States in order to apply for asylum*. This proposed change disregards the realities of the countries that many asylum seekers flee from. First, it eliminates important considerations regarding the reasonableness of relocation and no longer directs adjudicators to consider widespread civil strife and geographic, social, or economic limitations on ability to relocate.

[21] *See id.*

Second, it disadvantages applicants who are persecuted in larger countries or by persecutors that operate in only a segment of the country, regardless of the individual circumstances of the case. It licenses adjudicators to issue blanket denials of asylum based on generalized conclusions that internal relocation is feasible because a country is large or a persecutor does not operate everywhere. Domestic violence victims could be denied asylum based on the "numerosity" of the alleged persecutor, even in the face of evidence that their abusive partners could and in fact did track them down anywhere in the country.

Most troubling is the requirement that adjudicators consider "demonstrated ability to relocate to the United States in order to apply for asylum," which incorrectly suggests that because an individual successfully fled their country to escape danger and harm she is more likely to be able to relocate internally. This misunderstands the obstacles to internal relocation in many valid refugee claims, which are not simply a matter of moving costs. Human Rights First for example represented a woman from Honduras who was targeted by the 18th Street gang in her neighborhood of Tegucigalpa. She was the mother of a very young child and the gang had already murdered one of her siblings. Every neighborhood she had lived in or where she had any contacts in Honduras was under the control of the same gang. Relocating to adjacent MS-13 territory posed a different risk, of being targeted based on an association with the 18th Street gang imputed to her simply by virtue of her home address. All of these areas were also places of extremely high levels of violence. The gang's monitoring of her movements also made it dangerous for her to go to her job. This woman had immediate family in the United States; relocating here gave her guarantees of protection against her persecutors and a safe future for her child. Internal relocation in Honduras offered neither of these things. Considering an asylum seeker's ability to reach the United States as a mandatorily relevant factor in assessing the reasonableness of his relocation *within* his country of origin is illogical and would tip the scales against *every* asylum seeker in the United States.

The proposed changes to the internal relocation analysis also require asylum seekers who have experienced past persecution to establish that they cannot reasonably relocate. Under current regulations, an asylum seeker who suffered past persecution benefits from a presumption that internal relocation is not reasonable. This presumption aligns with the reality that if someone has already suffered harm so severe that it rises to past persecution, it should be presumed that they would not be safe in their country. Yet the proposed rule flips this reality on its head and instead creates a presumption that internal relocation would be *reasonable*. This change adds to the numerous new and unreasonable obstacles that asylum seekers would face under this proposed rule.

The rule creates new discretionary factors to block large numbers of asylum seekers from a discretionary grant of asylum, in violation of the asylum statute and U.S. obligations under the 1967 Refugee Protocol

The rule proposes to amend 8 C.F.R. § 208.13 and § 1208.13 by adding 8 C.F.R. § 208.13(d) and 8 C.F.R. § 1208.13(d) to essentially ban additional large categories of asylum seekers—in ways that directly contravene the statute and its intent—under the guise of denials of asylum. In fact, U.S. courts have previously ruled that attempts to ban several of these categories of asylum

seekers —those who cross the border outside ports of entry and those who transit through other countries—are not consistent with U.S. refugee law.

Congress enacted U.S. asylum laws to protect refugees with well-founded fears of persecution. While a grant of asylum is discretionary, due to the risk of harm or death that asylum seekers face upon being deported to their home country, the BIA and federal courts of appeals have repeatedly recognized that only egregious adverse factors should outweigh a fear of persecution.[22] Despite this long-established principle, the proposed rule creates new "significant adverse discretionary factors" on the basis of which adjudicators are encouraged to exercise negative discretion and deny asylum.

The proposed rule's additional categories of discretionary asylum denials include:

> "(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country;"
> "(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States;" and
> "(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country."[23]

Fundamental to the asylum statute is its very first provision—that anyone who is physically present in the United States or who arrives in the United States, whether or not at a designated port of entry, and regardless of status, *may apply for asylum*. 8 U.S.C. § 1158(a)(1). To enable adjudicators to deny asylum solely because an asylum seeker did not pass through a port of entry is incompatible with this key statutory provision and inconsistent with Article 31 of the 1951 Refugee Convention, which generally prohibits the United States from imposing penalties on refugees on account of their illegal entry or presence. In August 2019, a federal district court vacated the administration's prior attempt to bar asylum for individuals who sought protection after crossing the southern border, finding the proclamation to be "inconsistent with 8 U.S.C. § 1158."[24]

Denying asylum to refugees because they crossed into the United States without proper authorization or used fraudulent documents to flee to safety violates the Refugee Convention and Protocol. Article 31 of the Refugee Convention addressed the reality that "[a] refugee whose departure from his country of origin is usually in flight, is rarely in a position to comply with the requirements for legal entry" and "that the seeking of asylum can require refugees to breach

[22] *Dankam v. Gonzales*, 495 F.3d 113 (4th Cir. 2007); *Huang v. INS, 436 F.3d 89* (2d Cir. 2006); *In re Kasinga*, 21 I&N Dec. 357 (BIA 1996).
[23] 85 FR 36293.
[24] *O.A. v. Trump*, 404 F.Supp.3d 109 (D.D.C. 2019).

immigration rules."[25] Article 31(1) of the Convention prohibits the United States from penalizing refugees for illegal entry or presence in most cases. The denial of asylum is certainly a penalty; it will lead a refugee to either be returned to his or her country of persecution or to be permanently separated from his or her spouse and children.

Moreover, none of these factors is so "egregious" that it can outweigh the risk of persecution. In fact, these factors reflect a profound misunderstanding of the reality that asylum seekers face. Refugees fleeing harm in their home countries may enter without inspection precisely because they are fleeing and hope to find safety in the United States; additionally, unlawful U.S. policies such as metering, MPP, Asylum Cooperative Agreements, and the Prompt Asylum Claim Review program have made it so difficult to seek protection as at an official port of entry that entering without inspection has become the safest path in many cases. Similarly, in our work, we have clients who had no choice but to use fraudulent documents to escape their home countries and reach the United States.

Asylum seekers often transit through other countries because they cannot reach the United States directly and are desperate to flee the danger in their home countries; to deny asylum on this basis is arbitrary, much like the third-country transit ban. This particular adverse factor cloaks the third-country transit ban in "discretion" but it will operate in a similar way—permitting denials of asylum to individuals who passed through countries with dysfunctional asylum systems where they would neither be safe nor receive refugee protection. Denying asylum on these bases would likely result in asylum-eligible individuals being deported en masse.

One Human Rights First client, for example, fleeing repeated detention and torture in his home country in Central Africa, realized by the time he reached Mexico that he was extremely sick with what was later diagnosed as cancer. He was vomiting blood but when he sought medical care in Mexico he was turned away. He had no community support in Mexico and did not speak Spanish but had a very close contact in the United States willing to receive him. He found that the metering system in place for those seeking to present themselves at the U.S. port of entry was dysfunctional and chaotic, with people selling the numbers that were supposed to mark asylum seekers' place in the backlog to approach U.S. Customs and Border Protection (CBP). His money was running out; fearing that he would die if he remained in this situation, he crossed the Rio Grande and waited for the Border Patrol. Under the regulations, an immigration judge would be authorized to deny asylum in his case.

The proposed rule creates virtually automatic bars to asylum not provided for in U.S. law

The rule proposes amend 8 C.F.R. §208.13 and §1208.13 by adding 8 C.F.R. § 208.13(d) and 8 C.F.R. § 1208.13(d). These provisions conflict with the INA because they create new bars to asylum eligibility that are not provided for in the INA, violating the statute's requirement that regulations be "consistent" with Congress's carefully crafted limitations. 8 U.S.C. § 1158

[25] Guy S. Goodwin-Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection, UNHCR (background paper commissioned by UNHCR for an expert roundtable held in Geneva, Switzerland, Nov. 8–9, 2001), p. 190 (quoting Draft Report of the Ad Hoc Committee on Statelessness and Related Problems, 'Proposed Draft Convention Relating to the Status of Refugees', UN doc. E/AC.32.L.38, 15 Feb. 1950, Annex I (draft Art. 26); Annex II (comments, p. 57)).

(b)(2)(C). Though the agencies characterize the new bars as discretionary factors, they are virtually automatic bars. The proposed rule requires that adjudicators *will not favorably exercise discretion to* grant asylum to anyone who, for example, spent more than fourteen days in a third country without applying for protection or transited through more than one country to the United States (subject to similar exceptions as the Interim Final Rule), accrued more than one year of unlawful presence in the United States prior to filing for asylum, at the time the asylum application was filed with DHS had failed to timely file taxes or satisfy tax obligations, or had income that would result in tax liability that was not reported to the Internal Revenue Service (IRS). These are only a few of the bars to asylum under the proposed rule. The agencies attempt to disguise these bars as discretionary factors by providing that in extraordinary circumstances—such as national security or foreign policy considerations—or where an applicant would face "exceptional and extremely unusual hardship," an adjudicator can *consider* not applying the bars. Because these standards are extremely difficult to meet and still would not guarantee an asylum grant, these factors operate as de facto bars.

Mandating discretionary denial of asylum to an asylum seeker based on the fact that he was out of status for a year or more contravenes the statutory exceptions to the one-year deadline to file for asylum, which recognize that changed circumstances or extraordinary circumstances may justify late filing for asylum. To deny asylum to refugees for filing taxes late is counterproductive—many asylum seekers in their first year in the United States are unfamiliar with our income tax system or face bureaucratic hurdles in trying to obtain from the IRS the Individual Taxpayer Identification Number needed to allow them to file a tax return before obtaining employment authorization from DHS.[26] Currently the focus of most adjudicators and refugee advocates is on making sure they sort out any outstanding tax issues prior to their applications for asylum being adjudicated, not filed. The other grounds for "discretionary" denial listed here, such as that applicable to an asylum seeker who has "been found to have abandoned a prior asylum application" or who did not attend an asylum interview with DHS but cannot show that the interview notice was not mailed to the address he provided to DHS, are similarly unnecessary and will also inflict severe harm on legitimate refugees.

Human Rights First has represented several asylum seekers, for example, who failed to attend an asylum interview with DHS because they never received notice of the interview. (Some of these asylum applicants found out about the interview notice when they themselves contacted the Asylum Office to find out why they had not been called to an interview.) As far as USCIS records showed, the interview notice had been mailed to their last address—the problem was that it had not been received, a circumstance this proposed regulation does not recognize.

We strongly oppose these news bars to asylum, which are incompatible with the narrow limitations on asylum eligibility set forth by Congress in the INA.

[26] This is a particular problem where the asylum seeker was detained by DHS upon arrival in the United States and DHS has retained her identity documents, and given the fact the DHS has almost recently extended the period of time asylum applicants must wait to apply for an initial work authorization document to one year.

The proposed rule will result in victims of torture being deported to their home countries

It is a violation of U.S. and international law to return a person to a country where he is more likely than not to be tortured at the instigation of or with the consent or acquiescence of a public official or person acting within an official capacity.[27] It is already extremely difficult to be granted protection on this basis because of the stringent more likely than not standard and the requirement that a public official or person acting in an official capacity instigate, consent, or acquiesce to the torture. Nonetheless, the proposed rule amends 8 C.F.R. § 208.18 and 8 C.F.R. § 1208.18 to impose new barriers to obtaining protection under the Convention against Torture that violate legal requirements and do not reflect the realities of how governments carry out torture against their citizens.

The proposed rule makes applicants ineligible for protection under CAT if they were tortured by a "rogue official"—a public official not acting under "color of law."[28] In the discussion of the proposed rule, the agencies cite factors such as whether the officer was on duty and in uniform at the time of his conduct and whether the officer threatened to retaliate through official channels if the victim reported his conduct to authorities. This change will severely limit the availability of CAT protection to persons at real risk of torture. We have represented clients who were tortured by government officials in plain clothes, and country conditions evidence reflects that this is all too common. We are concerned that an ill-informed analysis of whether the government official committing an act of torture was officially on duty, in uniform, or acting in an official capacity will block protection for persons who were tortured directly by their country's government. Such an interpretation violates the Convention against Torture and its implementing statute.

Dedicated primarily to the protection of refugees, Human Rights First mainly represents applicants for CAT protection who face torture for reasons protected under the Refugee Convention and Protocol. In a number of countries from which refugees regularly seek protection in the United States, the government agencies responsible for much torture operate in the shadows, and the legal basis for the very existence of these agencies is sometimes murky. In Syria, for example, the agents of the intelligence services responsible for hundreds of thousands of cases of torture do not wear uniforms when on duty, and with a couple of exceptions, these intelligence services themselves may not be officially attached to any government ministry authorized by publicly known law. These kinds of arrangements foster the total lack of accountability (to the public) that characterizes the operations of these services, and in no way reflect a lack of authorization for those operations on the part of those in governmental authority. Similarly, in a number of countries death squads and other such forces have operated, and inflicted harm amounting to torture on dissidents, on persons suspected of common crime, on persons seen as deviating from dominant social norms, and others, without their existence being officially acknowledged by the governments that either arm them or allow them to operate. It is critical that any consideration of the nature of these torturous operations be sensitive to context and local realities. We are deeply concerned that this regulation will instead encourage

[27] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 26, 1967), https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.

[28] It should be noted that on July 14, 2020, the Attorney General held that "under color of law" was the applicable standard and that "rogue official" was not. *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020). The proposed rule, however, equates these two standards.

adjudicators to reinforce the deniability that many countries whose officials commit or acquiesce to torture are eager to maintain.

Another new burden to protection under CAT created by the proposed rule is to narrow the definition of "acquiescence." Acquiescence has previously been defined as willful blindness.[29] The proposed rule purports to define willful blindness as awareness of a high probability of activity constituting torture and a deliberate effort to avoid learning the truth. It also states that a public official must have 1) awareness of the activity and 2) breach his or her legal responsibility to intervene. By requiring that the official have awareness, the definition does not encompass the meaning of willful blindness. The proposed rule specifies that it is insufficient to be mistaken, recklessly disregard the truth, or negligently fail to inquire—actions that often connote turning a blind eye. Indeed, federal courts of appeals have held that it is sufficient for purposes of protection under CAT that public officials "could have inferred" the torture was taking place.[30]

Adjudicators relying on this rule will deny claims for protection under CAT unless the applicant can demonstrate that the government official had actual awareness of the torture—an unfair burden given the difficulties of establishing the exact mental state of an official. Whereas an applicant can show through circumstantial evidence that a government official turned a blind eye to the torture, it is far more difficult to establish actual awareness. Under the proposed rule, countless victims of torture will be returned to their home countries in violation of U.S. and international law.

The proposed rule creates new asylum-and-withholding-only proceedings that further restrict access to relief for asylum seekers

Asylum seekers who have been placed into expedited removal proceedings and found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture will no longer have their claims adjudicated in full removal proceedings under INA § 240. Instead, the proposed rule amends 8 C.F.R. § 208.30, 8 C.F.R. § 1208.30, 8 C.F.R. § 1003.1, 8 C.F.R. § 1003.42, 8 C.F.R. § 1208.2, 8 C.F.R. § 208.2, 8 C.F.R. § 235.6, and 8 C.F.R. § 1235.6 to require that these individuals will be placed into "asylum-and-withholding-only" proceedings, where they can only apply for asylum, withholding of removal, or protection under CAT. The adjudicator would not be able to consider eligibility for other relief, even if an applicant clearly qualifies for it. The asylum seeker would also be unable to dispute his removability.

This change will harm asylum seekers who are placed in expedited removal proceedings because it will limit the relief they can seek. An asylum seeker who during the pendency of her case married a U.S. citizen and was otherwise eligible to apply for adjustment of status, for example, would be unable to do so under this rule; applying for permanent residence from outside the country based on an approved family-based visa petition is not an option for most asylum seekers who face danger in their home countries, so this would force the immigration system to conduct what is typically a more complex and time-consuming asylum adjudication rather than

[29] *Silva-Rengifo v. Att'y Gen*, 473 F.3d 58, 70 (3d Cir. 2007); *Matter of J-G-D-F-*, 27 I&N Dec. 82, 90 (BIA 2017).
[30] *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir 2006); *Silva-Rengifo v. Att'y Gen.* 473 F.3d 58 (3d Cir. 2007).

allowing the new family to establish itself through more routine means. Moreover, the legislative history of the statute establishes that Congress intended for asylum seekers to be referred to "normal non-expedited removal proceedings."[31]

Human Rights First has also represented the odd asylum seeker who was actually admissible to the United States, and had been placed in expedited removal proceedings based on a lack of familiarity on the part of CBP with the specific requirements of the person's visa category. One such client had served as an interpreter for U.S. forces in Iraq, was facing grave threats to his life as a result, and on this basis had been approved for a Special Immigrant Visa, based on which he was arriving in the United States, expecting to be admitted to this country as a lawful permanent resident. Instead, due to a previously-resolved confusion in his security and background check records, he was denied admission, and, when he made clear that he feared return to Iraq, he was placed in detention to await a credible fear interview. He passed the credible fear interview, but shortly after his case was referred to the immigration court, Human Rights First was able to establish that he was in fact admissible to the United States. Based on this, rather than enduring a long, humiliating, and difficult asylum process from a county jail in New Jersey, this man was finally able to receive the lawful permanent resident status for which he had been approved for having repeatedly risked his life for U.S. forces. This proposed rule would have risked prolonging this man's unbearable situation, with consequences cruel to him and embarrassing to the U.S. government.

The proposed rule heightens the standards for credible fear and reasonable fear interviews and will return asylum seekers to danger without a fair hearing

Asylum seekers placed into expedited removal must establish a credible fear of persecution or torture in order to be placed in removal proceedings and present their case before an immigration judge. This is already a difficult burden to place on asylum seekers, who often are detained, cannot access counsel before their fear interviews, and must present their story to an asylum officer after a traumatic journey to the United States and poor conditions in CBP or Immigration and Customs Enforcement custody.

To establish a credible fear of persecution, individuals must show a "significant possibility" that they could establish eligibility for asylum. 8 U.S.C. § 1225(a)(b)(1)(B)(v). The proposed rule amends 8 C.F.R. § 208.30(e)(1) to create a new standard that is far more difficult to meet: "a substantial and realistic possibility of succeeding." By its plain language, this standard is higher than a "significant possibility" and violates the statute. Not only does it contravene the INA, but it also increases the risk that asylum seekers with valid claims will be turned away at the threshold credible screening for not meeting an excessively high standard. A credible fear screening is conducted while the asylum seeker is in detention, often very recently arrived, and frequently still reeling from the shock of detention, the difficulties of the journey, the inability to establish communication with loved ones here in the United States or back home, and, for those who speak languages less common among the detained population, frequently unable to

[31] Dep't of Homeland Security & Executive Office for Immigration Review, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (June 15, 2020), https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review (quoting H.R. Rep. No. 104-828 (1996) (Conf. Rep.).

communicate with anyone around him, which compounds the effects of all the other phenomena just noted. The officers conducting these interviews, meanwhile, are often doing so over the phone, through interpreters also present by phone, and against substantial background noise. They are operating with little to no prior information about the claim and through interpreters of very variable quality.

In one credible fear interview Human Rights First attended, for example, the applicant, an older woman from Central America, was trying to testify about years of very serious spousal abuse, and the asylum officer, an older man, was genuinely trying to listen to her, but both were speaking through an interpreter who was present over a very poor speakerphone connection. There was an unbearable amount of noise right outside the room from guards speaking on walkie-talkies and electric doors sliding open and shut, as the applicant struggled to explain forms of sexual abuse she had suffered that she found particularly shameful. Every time she tried to talk about this, her voice would drop, and the interpreter would miss what she had said and not translate it. She had counsel present, who flagged this for the officer, and the applicant was ultimately able to get her testimony heard, but most asylum seekers are unrepresented at this stage. Another asylum seeker, who had experienced detention and torture in Syria, was physically shaking when he met with a lawyer immediately before his credible fear interview, asking for confirmation that in this detention center where he was now they did not torture people. Yet another, a Rwandan national who had also lived through horrors, was a perfectly clear witness in French but found upon receiving the write-up of his credible fear interview, which he had attended without counsel, that the asylum officer had understood his claim backwards, essentially inverting the persecutors and the persecutees.

The existing credible fear standard was intended to take into account these realities. The proposed rule does not, and Human Rights First is deeply concerned that it will result in increased numbers of refugees being returned to persecution.

We also oppose the proposed rule's provision that enables DHS officers to apply asylum bars to block individuals at the credible fear stage. This is a new and deeply concerning trend. In the past year, DHS has permitted asylum officers to apply these bars at the credible fear stage to block people on the basis of the third-country transit ban. This is the first time since Congress created the expedited removal process in 1996 that adjudicators have been authorized to apply asylum bars at the credible fear stage. Codifying this additional barrier in the regulations would cause countless asylum seekers to be turned back to danger without a full hearing on their asylum eligibility. Unsurprisingly, positive credible fear rates dropped precipitously by 45 percent from an average of 67.5 percent (May to September 2019) to 37 percent (October 2019 to June 2020) after the Supreme Court lifted the stay on the third-country transit asylum ban in September 2019 and as the administration began to use other fast-track deportation programs to limit access to counsel, according to government data.[32] We strongly urge the agencies not to implement these additional barriers for asylum seekers at the threshold fear screening.

[32] USCIS, "Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions", https://www.uscis.gov/tools/reports-studies/immigration-forms-data/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions.

The proposed rule requires that, once individuals are determined to be ineligible for asylum at the credible fear screening, they must then meet a higher burden to be able to present a case to an immigration judge. Whereas they previously would have only needed to establish a significant possibility of eligibility for relief, they would instead need to show a "reasonable possibility" of persecution or torture—a much higher standard. In the past year, DHS officials have carried out this process and required anyone barred from asylum by the third-country transit ban to meet the higher standard; Human Rights First has documented cases of refugees turned back to danger as a result of this policy.[33]

The proposed rule would permanently bar asylum seekers from any immigration relief for not knowing the technicalities of the law

Under 8 U.S.C. § 1158(d)(6), an individual who files a frivolous asylum application is permanently barred from ever receiving immigration benefits. The current regulation, 8 C.F.R. § 208.20 and § 1208.20, defines a frivolous application as one where "any of its material elements is deliberately fabricated." The proposed rule amends this definition at 8 C.F.R. § 208.20 and § 1208.20 to include asylum applications where the applicant knew or was willfully blind to the fact that the application contained a fabricated essential element, was premised upon false or fabricated evidence, was filed without regard to the merits of the claim, or was clearly foreclosed by applicable law. This standard could lead to a frivolousness finding for the vast majority of denied asylum claims. An adjudicator who concludes that an asylum claim does not meet the necessary legal standards for asylum eligibility could then conclude, under the proposed rule, that the application is frivolous for this very reason.

Asylum law is highly technical and confusing. It is in constant flux. Particularly for unrepresented individuals, understanding the requirements of asylum eligibility is often an impossible task, varies by federal circuit court, and is subject to new regulations, including this proposed rule that rewrites decades of asylum law. Punishing asylum seekers for seeking safety without legal expertise is not fair and not logical.

We also have concerns that the proposed rule would enable asylum officers to determine that an application is frivolous and refer the case to an immigration judge on that ground. Given the severity of the consequences for filing a frivolous application, we oppose permitting asylum officers who do not conduct full adversarial hearings to make such a finding.

The proposed rule would deprive asylum seekers of the right to present their cases in court

The rule proposes to amend § 1208.13 by adding 8 C.F.R. § 1208.13(e). Under the proposed addition, an immigration judge must pretermit or deny an application for protection if the applicant has not established a prima facie claim for relief or protection. This can be done solely on the basis of the I-589 application, and without affording the applicant an opportunity to testify or present additional evidence. While the proposed regulation provides that an applicant be given the opportunity to respond before the judge pretermits or denies, even for those lucky enough to

[33] Human Rights First, "Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban" (July 2020), https://www.humanrightsfirst.org/resource/asylum-denied-families-divided-trump-administration-s-illegal-third-country-transit-ban.

be represented by counsel at the time of filing the I-589 form, this is not a meaningful safeguard against erroneous denial and wrongful return of refugees to persecution. Even skilled and experienced refugee lawyers find that many asylum claims take time to develop. Lawyers need time to develop a relationship of trust with a new client, to interview the client in detail about her facts, to engage in country research to place those facts in context, to talk to witnesses (who sometimes offer facts of which even the asylum applicant was unaware), and to engage in legal research. The realities of immigration court practice are that often, the I-589 must be filed before all these efforts are perfected: asylum seekers often knock on many doors before finding legal representation, and by the time they do, deadlines for submission of the application, or one-year deadlines to file for asylum, may be looming. Adequately responding to an attempt to pretermit an asylum application on the grounds, for example, that the asylum seeker's particular social group is not legally cognizable, will often require the submission of the entire evidentiary submission. This will be exceedingly difficult for the lawyer to do in the time allotted, and in any case goes against whatever efficiency gains the agencies contemplate in this proposal.

As for unrepresented asylum seekers, succeeding in filing a technically complete I-589 form is a daunting obstacle to many, and one that proposed revisions to the I-589 form would make even worse. Many asylum seekers do not speak or write English, some have limited literacy even in their native languages, and some are detained. Many asylum seekers in detention or under MPP are unable to secure assistance, including translators, to complete the application; the U.S. government provides them with none. It is Human Rights First's experience, from decades of assisting lawyers at major U.S. law firms in completing this form as volunteer counsel to asylum-seeking clients, that some of the questions on the form are opaque even to many otherwise highly skilled attorneys, and that the way to use this form to effectively present an asylum seeker's case is also not obvious to all. Asylum seekers who lack such assistance frequently misunderstand key questions on the form, do not realize the level of detail expected from them in response, and are, in many cases, attempting to reduce some of the most painful experiences of their lives to writing in a foreign language. Human Rights First has seen I-589's completed by unrepresented people who, in response to a question about whether they feared return to their country and if so why, wrote simply: "Because in my country war." This, on its own, does not state an asylum claim, but it likewise does not mean the applicant does not have one. This is why the law requires an evidentiary hearing.

This change would violate due process principles of fundamental fairness in proceedings and the INA's guarantee that individuals have the right to present evidence on their behalf. 8 U.S.C. § 1229a(b)(4)(B). Furthermore, 8 C.F.R. § 1240.11(c)(3) requires an evidentiary hearing to resolve factual issues.

Conclusion

For the reasons outlined above, Human Rights First recommends that DHS and EOIR abandon this proposed rule in its entirety. This rule rewrites decades of asylum law without the requisite legal authority and arbitrarily changes existing regulations to eliminate refugee protection for the majority of people seeking safety in the United States. We strongly oppose this proposed rule and urge the agencies to withdraw it and protect refugees in accordance with U.S. and international law.I

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Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban

One year ago, on July 16, 2019, the Trump administration issued a rule barring asylum for virtually all refugees who travel through another country on their way to seek protection at the southern border of the United States. It has done immense harm. Under the transit ban, the Trump administration has prevented refugees from seeking and receiving asylum, returned them to persecution, kept them in detention, left them in limbo in the United States, and separated them from their children.

On June 30, 2020, a federal court in Washington DC vacated the ban, and in early July 2020, in a separate suit, the U.S. Court of Appeals for the Ninth Circuit upheld a preliminary injunction against the ban. But rather than abandon this illegal and inhumane policy, the Trump administration is doubling down. It is proposing additional changes to U.S. regulations that would deny asylum to refugees who travel through other countries and expand this ban to all asylum seekers, whether or not they initially sought protection at the southern border.

The third-country transit asylum ban, and its proposed extension, are blatant attempts to circumvent the law. Congress has enacted specific measures to protect refugees who travel through other countries. Refugees are barred from asylum based on their travel only if they have "firmly resettled" in another country or if the United States has a formal return agreement with a country where refugees are both safe from persecution and have access to fair asylum procedures. Yet under the Trump administration's transit ban and its proposed rules, refugees are ineligible for asylum due to their flight through other countries, unless they somehow manage to meet prohibitively restrictive exceptions.

The transit ban has inflicted enormous suffering on refugees and their families. Asylum seekers have been summarily deported in secretive border proceedings where officers used the ban to improperly raise the screening standard set by Congress. Torture-survivors and asylum seekers in immigration detention facilities from Cameroon, Ghana, Jamaica, and other countries, including many LGBTQ people, have been denied both asylum and the ability to bring their families to safety. Refugees from a range of countries such as Cuba, Honduras, Nicaragua, and Venezuela—already forced to wait many months in acute danger in Mexico under the "Migrant Protection Protocols" (MPP)—have been denied asylum and separated from their families. Immigration and Customs Enforcement (ICE) has used the ban to deny asylum seekers from release from detention regardless of their eligibility for parole.

Since March 2020, the administration has exploited the COVID-19 pandemic as a pretext to indefinitely block virtually all asylum seekers at the southern border, flouting U.S. refugee laws and treaty obligations. As a result, many asylum seekers who would have been subjected to the transit ban during expedited removal have been illegally expelled. While many immigration hearings have been postponed due to coronavirus-related court closures, some have gone forward, leading to additional transit ban denials. There is little doubt that the Trump administration will, if given the chance, continue to use the transit ban or similar proposed rules to deny refugees asylum and to prevent them from bringing their families to safety in the United States.

This report is based on interviews with dozens of asylum seekers and attorneys, asylum cases handled by Human Rights First's attorneys and pro bono partners, immigration court decisions, credible fear determinations, federal court filings, government data, observation of immigration court hearings for the Laredo and Brownsville MPP tent courts in late 2019, and media reports.

Our key findings:

- ☑ **The Trump administration has used the transit ban to deny asylum to hundreds of refugees and many more would be denied under similar proposed rules.** While neither the Department of Justice (DOJ) nor the Department of Homeland Security (DHS) track or disclosure figures, Human Rights First has identified more than 130 refugees denied asylum because of the ban. But falling asylum grant rates indicate that **more than 500 non-Central American refugees were likely denied asylum because of the transit ban** in just four months following its implementation. **Asylum grant rates have declined by 45 percent for Cameroonian asylum applicants, 32 percent for Cubans, nearly 30 percent for Venezuelans, 17 percent for Eritreans, and 12 percent for Congolese (DRC)** compared to the year before the ban took effect. Such denials will continue, if the administration's proposed rules move ahead or if the transit ban is reinstated.
- ☑ **The transit ban has caused the United States to deny asylum to persecuted pro-democracy advocates, torture survivors, and people targeted due to their sexual or gender identities including many determined by immigration judges to be refugees under U.S. law**. Some asylum seekers have been denied all relief and ordered deported due to the transit ban. They include a Venezuelan opposition journalist and her one-year-old child and a Cuban asylum seeker who was beaten and subjected to forced labor due to his political activity. Many others have been recognized as refugees but denied asylum including a Cameroonian man tortured by the military, an LGBTQ woman from Honduras who was beaten, repeatedly raped, and kidnapped by gangs because of her sexual orientation, a Cuban political activist detained, beaten, and threatened with death for supporting the *Damas de Blanco* (Ladies in White), a Cuban opposition movement founded by female relatives of jailed dissidents, and a Venezuelan opposition supporter kidnapped and tortured by pro-government forces. These refugees were afforded only the very limited and deficient form of protection known as withholding of removal.
- ☑ **The transit ban separates families and leaves spouses and children stranded in danger.** Under the ban, an asylum seeker who manages to receive withholding of removal or protection under the Convention against Torture (CAT) cannot bring family to safety in the United States. Families seeking asylum together may also be separated unless each family member, including children, meets the heightened requirements for withholding or CAT. Families facing likely permanent separation due to the transit ban include a Cameroonian man tortured by the military whose wife and child are in hiding in Cameroon and a Venezuelan opponent of the Maduro regime.
- ☑ **The administration has used the transit ban in conjunction with other policies, such as fast-track deportation programs, to improperly raise the credible fear standard set by Congress and rig preliminary fear screenings.** As a result, **positive credible fear rates dropped precipitously to just 37 percent** during FY 2020 (thru June 2020)—**50 percent lower than in the prior year. Because of the transit ban, asylum seekers found not to meet what Congress intended to be a low credible fear threshold include** an asylum seeker from the Democratic Republic of Congo beaten by police when she sought information about her jailed husband and a Central American woman whose partner abused her and killed one of her children.
- ☑ **DHS and some immigration judges are perversely applying the transit ban to deny asylum to asylum seekers who were blocked by DHS before the ban took effect.** Among the refugees denied asylum because of the transit ban are individuals who sought protection before the ban existed but who were subjected to the administration's policy of "metering" (reducing the number of asylum seekers accepted at ports of entry) and/or sent to Mexico under MPP.

- ☑ **The Trump administration is using the transit ban to override legal parole and release criteria and unnecessarily jail asylum seekers for prolonged periods**. DHS and DOJ have deployed the transit ban to keep detained asylum seekers who are eligible for release on parole or bond, claiming they pose a flight risk because the ban renders them ineligible for full humanitarian protections. Under this perverse logic, many asylum seekers, including those later recognized by immigration judges as refugees, have been jailed for many months. DHS continues to block releases even as COVID-19 surges in crowded ICE facilities. As of July 4, 2020, over 3,600 asylum seekers who passed fear of persecution screenings remain detained; most are likely subject to the transit ban. In addition, DHS is refusing to release some refugees even after they have been granted humanitarian protection while DHS appeals those decisions.
- ☑ **The ban prevents refugees who have won relief from integrating into the United States, leaving them in permanent limbo.** These refugees face obstacles to integration such as inability to bring their children and spouse to the United States, fear of living under a permanent removal order, lack of permanent legal status, lifelong check-ins with ICE officers, baseless threats of imminent deportation, and denial of access to benefits crucial for integration and self-sufficiency.

Human Rights First urges the Trump administration and/or a next administration to:

- ☑ **Rescind the interim final rule implementing the third-country transit asylum ban and other proposed regulations that include transit asylum bans.**
- ☑ **Cease all other policies and practices that violate U.S. asylum and immigration law and U.S. Refugee Protocol obligations**, including the March 20, 2020 Centers for Disease Control and Prevention (CDC) order and its extension, MPP, asylum turn-backs, "metering" at ports of entry, the proposed June 15, 2020 asylum regulation, the July 9, 2020 asylum regulation, and all attempts to send asylum seekers to other countries, including El Salvador, Honduras, Guatemala and Mexico, that do not meet the legal requirements for safe-third country agreements.

Human Rights First recommends that Congress:

- ☑ **Defund** implementation of all Trump administration policies that deny humanitarian protections to refugees in violation of U.S. law and treaty obligations, including the third-country transit asylum ban, "metering" at ports of entry, MPP, fast-track deportation programs, asylum-seeker transfer agreements, and expulsions under the CDC order.
- ☑ **Hold oversight hearings** on the third-country transit asylum ban and the administration's other illegal efforts to deny asylum to refugees seeking protection in the United States.
- ☑ **Direct DHS and DOJ to create tracking mechanisms** for all fear screenings and asylum applications affected by the third-country transit asylum ban and **publicly release data** on these cases disaggregated by country of origin, gender, age, family make-up, representation, detention status, and other factors.

Refugees Denied Asylum and Ordered Deported

The administration's July 16, 2019 third-country transit asylum bar bans refugees at the southern border from receiving asylum if they transited through a third country en route to the United States even if they have well-founded fears of persecution. The ban applies to *all* non-Mexican asylum seekers and has already been used by the administration to deny asylum likely to hundreds of refugees, including those from Cameroon, Cuba, El Salvador, Ghana, Guatemala, Honduras, Jamaica, Nicaragua, Venezuela, and elsewhere. Neither DHS nor DOJ

have released data on (nor appear to have any system to track) cases of asylum seekers whose applications are denied because of the third-country transit asylum bar.

As of July 15, 2020, Human Rights First has identified at least 134 individuals denied asylum because of the third-country transit asylum bar. Many have been recognized as refugees by immigration judges but were denied asylum under the transit ban. They may remain in the United States for the time being (in a kind of legal limbo termed "withholding of removal" where they live under continued threat of deportation) without the ability to reunite with family or receive lasting asylum and residency status in the United States. **Others denied asylum under the transit ban—including refugees with well-founded fears of persecution—have been ordered deported back to their countries of feared persecution after being found not to meet the heightened withholding standard.** As the figures discussed below indicate, this tally is surely a vast undercount of the number of refugees subject to the third-country transit asylum ban[1] and denied protection. These numbers would continue to rise were the transit ban reinstated and would increase significantly if the administration's proposed regulations to expand the transit ban were implemented.

Indeed, this asylum ban has likely resulted in the denial of asylum to hundreds of refugees over the past year. Government data analyzed by Syracuse University's Transaction Records Access Clearinghouse (TRAC)[3] shows:

- A sudden decline in overall asylum grant rates for non-Central Americans (from 45.1 percent in the year preceding its implementation to 41.5 percent between December 2019 and March 2020) indicates that an additional **500 non-Central American asylum seekers were denied asylum in just four months** (December 2019 to March 2020), **likely due to the transit asylum ban**.
- As Table 1 shows, **immigration court asylum grant rates declined by 45 percent for Cameroonian asylum applicants, 32 percent for Cubans, nearly 30 percent for Venezuelans, 17 percent for Eritreans, and 12 percent for Congolese (DRC)** since December 2019, compared to the year before the third-country transit asylum ban began to affect refugee claims. Some nationals of these countries seek asylum at the southern border, as visas that would enable them to travel directly to the United States are not issued for the purpose of seeking asylum.

Table 1: Select Immigration Court Grant Rates Pre and Post Third-Country Transit Asylum Ban (by nationality)

	Dec. 2018 – Nov. 2019	Dec. 2019[2] – Mar. 2020	Percent change
Cameroon	80.6%	44.0%	**- 45.4%**
Cuba	44.4%	30.0%	**- 32.4%**
DRC	52.6%	46.2%	**- 12.2%**
El Salvador	17.5%	16.6%	**- 4.9%**
Eritrea	68.1%	56.6%	**- 17.0%**
Guatemala	13.9%	12.8%	**- 7.7%**
Honduras	12.2%	10.6%	**-12.9%**
Venezuela	66.7%	46.8%	**- 29.9%**

Source: TRAC, Asylum Decisions

[1] For instance, thousands of non-Mexican inadmissible individuals were processed at ports of entry, many of whom are likely asylum seekers, in FY 2020. This includes at least 3,300 Cubans (as of February 2020, after which CBP removed information on inadmissible Cubans from its website), 1,000 Cameroonians, 340 Russians, and 171 Congolese (DRC) – the vast majority of whom are asylum seekers.

[2] Although the transit asylum ban went into effect in September 2019, Human Rights First assessed its impact from December 2019 due to a lag in adjudication of affected cases. Based on Human Rights First's representation of and research on detained asylum seekers and those under MPP, immigration courts hearing those cases began to issue decisions affected by the transit ban around November 2019 and in larger numbers by December 2019. Because cases in non-detained immigration courts took, for instance, 532 days on average to complete in FY 2019, few non-detained cases subject to the bar have been adjudicated.

[3] As of June 3, 2020, TRAC has stopped updating its Asylum Decisions tool following the release of April 2020 data by EOIR that was "too unreliable to be meaningful or to warrant publication" and has warned that "any statistics EOIR has recently published on this topic may be equally suspect." TRAC has issued repeated warnings to EOIR about the significant problems with the data it releases to the public.

The vast majority of asylum seekers subject to the transit ban can seek only withholding of removal under the Immigration and Nationality Act (INA) and protection under CAT, as explained in the box below. But these highly deficient forms of protection from deportation are not adequate substitutes for asylum, and the criteria to receive these forms of relief is far more onerous than for asylum. Thus, even if an immigration judge finds that a refugee subject to the transit ban has a well-founded fear of persecution (the standard for asylum), that individual will be deported unless they meet the much higher requirement of proving that they are more likely than not to suffer persecution or torture.

Asylum, Withholding of Removal, and U.N. Convention Against Torture Protection Explained

Under U.S. immigration law, refugees who fear harm in their home country can request asylum as well as two other lesser forms of protection from an immigration judge: withholding of removal or protection under CAT – an international treaty banning torture, which the U.S. ratified in 1994. These very limited measures provide only temporary protection from return to the country of feared harm. They do not provide essential protections such as bringing a spouse and children to safety in the United States, legal status of asylee, or the ability to later apply for permanent legal residence.

Asylum: To be granted asylum in the United States, an applicant must show that he or she meets the definition of a "refugee" under U.S. law and that none of the bars to asylum in U.S. law apply. A refugee is a person who has suffered past persecution or has a well-founded fear of future persecution because of his or her race, religion, nationality, political opinion, or membership in a particular social group and is outside of his or her country. This fear may be well-founded, as the U.S. Supreme Court has explained, if there is as little as a 10 percent chance of suffering persecution.

Withholding of Removal: This lesser form of protection requires a showing of an even higher risk of harm. Withholding of removal protects only those refugees who prove that they would face a more than 50 percent chance of persecution on account of one of the protected grounds. While some bars to asylum, such as the one-year-filing deadline, do not apply to withholding, the standard to qualify is much more difficult to meet.

Convention Against Torture: Protection under CAT, another lesser form of temporary relief from deportation, protects only people who fear torture. A person seeking CAT protection must establish a more than 50 percent chance that he or she would be tortured if returned to their home country. The applicant does not have to show the torture would be on account of a protected ground but must prove that government authorities would be responsible for or would know about the torture and allow others to carry it out.

Under a Transit Ban, Refugees with Well-Founded Fears of Persecution May be Deported

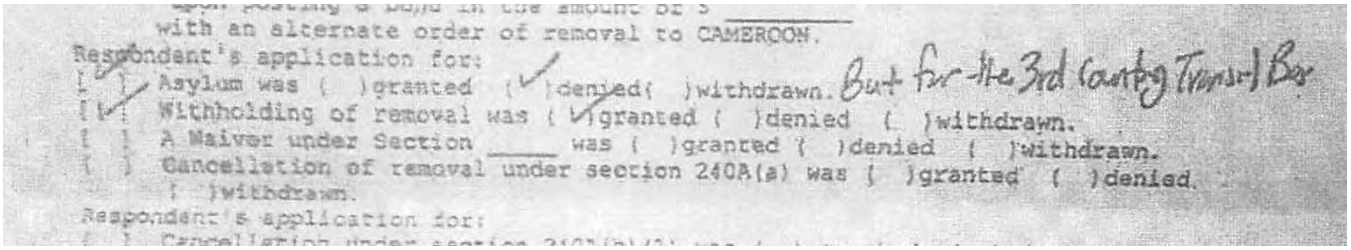
Barring refugees from asylum, as a transit ban does, places them at risk of deportation to persecution. For instance, where an immigration judge finds that a refugee subject to a transit ban faces a one-in-three chance of persecution, the refugee would not receive asylum (due to the transit ban) and would not qualify for withholding or CAT protection. Yet, the United States joined the Refugee Protocol, and Congress adopted the Refugee Act of 1980, to ensure that refugees with well-founded fears of persecution would not be deported. Further, refugees who have suffered severe past persecution, including torture, will not qualify for protection under a transit ban unless they show that they fear future harm that is more likely than not to occur – a high standard that not all will be able to meet. Indeed, refugees received withholding of removal and CAT protection in very limited circumstances. In FY 2018 (the latest year with available data) immigration judges granted only about six percent of withholding and less than five percent of CAT applications, according to government statistics.

Because of the third-country transit asylum bar, some asylum seekers with well-founded fears of persecution have already been **denied all relief and ordered deported**, including:

- A Venezuelan journalist and her one-year-old infant who were attacked by Venezuelan government officials were denied all relief and ordered deported at the Laredo MPP tent court in January 2020. An immigration judge at the Fort Worth Adjudication Center found the family ineligible for asylum due to the transit ban and concluded that they did not merit withholding or CAT. According to their attorney, Rolando Vazquez, the judge concluded that if the woman's persecutors intended to kill her and her child, they would have done so during the attack she had suffered before fleeing Venezuela.
- A Cuban asylum seeker politically opposed to the Cuban government was denied asylum in January 2020 as a result of the third-country transit asylum bar and was found to not have met the much higher withholding standard. He is awaiting deportation to Cuba, and is now detained in the Pine Prairie, Louisiana immigration detention center.
- In June 2020, on the same day the transit ban was vacated by a federal court, a Cuban man who had been detained in Cuba, beaten, and fired for his anti-regime political opinion was denied asylum at the Oakdale immigration court due to the transit ban. At his final hearing, the immigration judge explicitly refused to consider any arguments regarding asylum because of the transit ban. The man told Human Rights First, "**I felt in that moment that everything I had suffered, all my efforts to get out of Cuba, being detained in Mexico, everything that happened to me . . . w[as] just dismissed in less than an hour."** He remains detained at Pine Prairie detention center, where he has been held for over 10 months.
- In March 2020, a Nicaraguan student activist, who had been shot at during a protest against the Ortega government, had his home vandalized, and was pursued by the police, was denied asylum due to the transit ban during a hearing at the Brownsville MPP court. The immigration judge found the young man did not meet the heightened requirements for withholding of removal or CAT protection and ordered him deported to Nicaragua.
- An LGBTQ Honduran asylum seeker, who has been detained at Pine Prairie detention center for more than five months, was denied all relief and ordered deported under the transit ban in March 2020. He told Human Rights First: **"**In Honduras, I was threatened and assaulted because I was gay. I was attacked by both gangs and the police. After being threatened in June 2019, I decided to flee Honduras, to seek asylum to protect my life . . . **I cannot return to my country because I would be in danger, but I can't have liberty here either. I only want an opportunity to stay here and be free.**"
- A Cuban man, who was seeking asylum due to political persecution, including forced labor and physical assaults suffered in Cuba, was denied asylum under the transit ban and ordered deported in early February 2020 after an immigration judge for the Brownsville MPP tent court found that the man did not meet the heightened withholding/CAT standard. The man, who was detained pending appeal, had also been kidnapped in Reynosa after being returned to Mexico under MPP, according to Zaida Kovacsik, the attorney representing him on appeal.
- A gay, HIV-positive asylum seeker from Nicaragua who experienced severe abuse and death threats on account of his sexual orientation, HIV status, and political opinion was denied asylum due to the transit ban. The immigration judge found that the man, who was unable to find an attorney to represent him, had not met the higher burden for withholding/CAT and ordered him removed. The man has been detained since August 2019, according to the organization Immigration Equality, which is providing the man pro se assistance as he appeals the decision.

Because of the third-country transit asylum bar many people who otherwise meet the legal requirements for asylum are being **denied asylum** and are only given the totally inadequate withholding of removal relief, including:

- In May 2020, **asylum was denied to an Anglophone Cameroonian woman whose father, nephew, uncle, and son were killed in Cameroon**, where the government has jailed, tortured and murdered English-speaking Cameroonians in an attempt to suppress the Anglophone region's independence movement. An immigration judge at the Varick immigration court found that the woman, whose eight-year-old son had been shot and killed in front of her and whose home was burned down by a unit of the Cameroonian military, did not qualify for asylum under the transit ban.
- An Anglophone Cameroonian refugee who was brutally tortured by the military for his opposition politics was denied asylum because of the transit ban at the Adelanto immigration court in May 2020.
- In February 2020, an immigration judge at the Pearsall immigration court denied asylum, due to the transit ban, to a Cameroonian refugee who was detained and beaten during a government crackdown on Anglophone teachers and activists, according to his attorney, Sara Ramey, with the Migrant Center for Human Rights.
- A Cameroonian man who was detained and tortured in Cameroon for over a year without being brought before a court or charged with a crime was denied asylum in February 2020 because of the transit ban. The immigration judge presiding over the hearing for the man, who was detained in the LaSalle detention center, wrote on the withholding of removal order, included in part below, that she would have granted asylum "but for the 3rd country transit bar."


with an alternate order of removal to CAMEROON.
Respondent's application for:
[ ] Asylum was ( )granted (✓)denied( )withdrawn. But for the 3rd Country Transit Bar
[✓] Withholding of removal was (✓)granted ( )denied ( )withdrawn.
[ ] A Waiver under Section ____ was ( )granted ( )denied ( )withdrawn.
[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied.
( )withdrawn.
Respondent's application for:

- A prominent Venezuelan business owner and supporter of Juan Guaido's opposition party was denied asylum in January 2020 at the Boston immigration court because of the asylum transit bar. The man had been kidnapped and tortured by government-affiliated groups in Cuba for his pro-opposition activities.
- An LGBTQ man from Ghana seeking protection from persecution on account of his sexual orientation was denied asylum due to the transit ban in January 2020 in the Tacoma immigration court. The judge stated that asylum would have been granted but for the transit ban, according to the man's attorney, AnnaRae Goethe, with the Northwest Immigrant Rights Project.
- During a hearing in the El Paso MPP immigration court, a Nicaraguan student protester was denied asylum due to the transit ban in January 2020. The woman had been shot at and tear gassed by police in Nicaragua, had rocks thrown at her, and received death threats due to her political activism.
- A Honduran family with three children (ages 11, 8, and 3) was denied asylum in the Brownsville MPP court in January 2020 because of the transit ban. Their attorney reported that the family had been threatened and badly beaten after the mother participated in political protests in Honduras.
- A Cuban woman who had been attacked by government officials when she refused to participate in an annual government commemoration of the Cuban revolution was denied asylum in the Brownsville MPP court in January 2020 due to the transit ban, according to her attorney Kou Arie Sua.

- In December 2019, an immigration judge denied asylum, solely due to the transit ban, to a lesbian refugee from Honduras who was beaten, repeatedly raped, and kidnapped in Honduras by gangs because of her sexual orientation, according to her attorney. The U.S. State Department has reported that impunity for violence against LGBTQ persons remains a significant problem in Honduras with 92 percent of crimes going unpunished.
- An unrepresented Cuban political activist and her two sons (ages 18 and 20) were denied asylum due to the transit ban at the Laredo MPP court during a hearing in December 2019 observed by Human Rights First. The woman had been detained, beaten, and threatened with death for supporting the *Damas de Blanco* (Ladies in White), a Cuban opposition movement founded by female relatives of jailed dissidents, and for using her home to support women persecuted by the police.

Litigation Challenging the Transit Ban

On June 30, 2020, a federal court in Washington D.C. vacated the third-country transit asylum ban, finding that it was issued in violation of the Administrative Procedure Act (APA). On July 6, 2020, in a separate lawsuit, the U.S. Court of Appeals for the Ninth Circuit upheld a preliminary injunction issued by a district court that had been stayed by the U.S. Supreme Court in September 2019 pending appeal. The Ninth Circuit found that the transit ban violates the U.S. asylum statute because the rule "does virtually nothing to ensure that a third country is a 'safe option'" and concluded that rule was also arbitrary and capricious under the APA.

In another suit against the transit ban, a federal court in November 2019 separately enjoined the government from applying the transit asylum ban to individuals who attempted to seek asylum at a port of entry prior to July 16, 2019, but were subjected to the so-called practice of "metering" in which U.S. border officers turn away asylum seekers at ports of entry forcing them to wait often for months before being permitted to request asylum. A temporary stay of that order by the Ninth Circuit was lifted in early March 2020. Thus, at time the transit ban was vacated in late June 2020, it should not have applied to asylum seekers who were subjected to metering before the ban was announced.

Postponements of immigration court hearings due to COVID-19, including in detention centers, have left thousands of asylum seekers who would have been subject to the third-country transit asylum ban waiting for adjudication. When hearings resume in full, and if the unlawful transit bar is back in effect or the proposed asylum regulations are implemented, the vast majority of individuals seeking protection in the United States will be categorically denied asylum. Some of the asylum seekers still waiting on final adjudication of their cases but likely to be barred from asylum because of a transit ban include:

- An Eritrean asylum seeker who fled torture and forced military service is subject to the third-country transit asylum bar because he reached the United States to seek protection in December 2019 after the ban went into effect. If the current or proposed transit ban is in effect at the time his case is decided, he would be denied asylum and blocked from reuniting with his three children (ages nine, six, and three), who remain in Eritrea.
- In November 2019, a Somali asylum seeker, who had been tortured and his parents and siblings murdered in Somalia because of their clan status, was told during his credible fear interview that he was barred from asylum due to the transit ban. Although he met the higher screening standard used for withholding of removal, he has been detained for 8 months in the Pearsall detention center after being denied bond and due to his asylum hearing being repeatedly postponed because of COVID-19 court closures. He would be ineligible for asylum under a transit ban.

- A Russian asylum seeker who fled Russia in the spring of 2019 after being interrogated, brutally beaten, and threatened by Russian authorities is likely to be denied asylum, if the transit ban or the proposed asylum regulations are in effect at the time of his hearing. The man, who was targeted for his opposition political activity, sought protection in the United States at the southern border with his family, who would also be automatically ineligible for asylum under the transit ban rule.

Permanently Separating Families

The administration's third-country transit asylum ban is ripping apart families, leaving asylum seekers' spouses and children permanently stranded in danger. In fact, one of the primary and certainly intentional impacts of the transit ban is to prevent refugees—who have been determined by immigration judges to qualify for protection under U.S. law—from bringing their families to safety in the United States. In addition, the ban divides families who sought asylum together where, for instance, a parent is granted withholding of removal but the rest of the family is ordered deported back to the country where that parent has been determined to face a very high likelihood of persecution. In MPP cases, families can be separated at the border with some family members granted withholding while others are sent alone to Mexico. These separations occur because refugees subject to the transit ban are barred from asylum, which means that their families do not qualify for automatic protection as "derivative asylees." The deficient relief of withholding of removal and CAT protection do not provide a way for families to be reunified in the United States – a fact that the architects of the transit ban certainly know full well.

The transit ban ignores the long-standing recognition of the importance of family unity and the danger that family members of refugees often face. Under U.S. law, people who apply for asylum in the United States may include their spouse and children on their asylum applications. Family members who are in immigration court proceedings together automatically receive asylum status when a principal applicant is granted asylum. Refugees granted asylum may also petition to bring their spouse and children to the United States who are outside the country. However, because refugees subject to the transit ban are barred from asylum, their family members cannot receive derivative asylum status in immigration court nor are they eligible to be brought to the United States as derivative asylees.

Under the transit ban, asylum seekers recognized as refugees are being separated from family members who were with them in immigration court proceedings but not granted relief. Due to the transit ban, each family member, including children and infants, must independently qualify for protection under the heightened withholding of removal or CAT standard. Even when a parent is granted these lesser forms of humanitarian protection, their children must be found independently eligible for relief to stay in the United States. At the same time, the Attorney General has also sought to limit asylum and withholding of removal for people at risk of persecution because of their family relationships – making it even more difficult for children and infants of refugee families to receive humanitarian protection under the transit ban.

Recognized refugees whose spouse or children have been denied all relief and ordered deported due to the third-country transit asylum ban include:

In April 2020, a Cuban doctor seeking asylum based on political persecution in Cuba was denied asylum because of the transit ban and ordered deported while her husband, who is also a doctor, was granted withholding of removal. The couple were held at different detention centers after seeking asylum at the Nogales port of entry together, and their cases were heard by different immigration judges. The woman remains detained at the Eloy detention center pending an appeal, while her husband was released from detention.

- The 18-year old daughter of a Venezuelan refugee was denied all relief, separated from her father, and returned alone to Mexico in January 2020 even though her father was recognized as a refugee, but granted only withholding due to the transit ban, by an immigration judge during a Brownsville MPP

hearing. The father, who had fled Venezuela after being kidnapped and beaten for refusing to work for the Maduro regime, returned there to rescue his daughter who was threatened by the same people who had attacked him. The man told BuzzFeed News, "**She's a young girl and knowing she's alone in Matamoros is unbearable. The whole reason I went back to Venezuela was to get her because her life is worth more than mine and now she's alone in Mexico**." He added, "I already lived one nightmare in Venezuela and another here."

- In December 2019, three Venezuelan children (an eight-year-old and four-year-old twins) were denied all relief and ordered removed under the transit ban even though their mother was recognized as a refugee and granted withholding of removal at the Laredo MPP immigration court. The family suffered numerous attacks by pro-government groups including bullets fired at their home and written threats, including one that said the woman would bathe in the blood of her children. Nevertheless, the immigration judge concluded that the children had not independently established eligibility for refugee protection at the heightened withholding of removal or CAT standard.

Refugees granted the limited and inadequate relief of withholding of removal who are separated from family members stranded in the countries these refugees fled, include:

- An Anglophone Cameroonian refugee who was brutally tortured by the Cameroonian military, which has engaged in the wide-spread arrest, detention and torture of Cameroonians advocating for independence of the English-speaking region of the country, was denied asylum solely because of the transit ban. The man was granted withholding by the Adelanto immigration court in May 2020 but without asylum cannot reunify with his wife and child, who are in hiding in Cameroon because of the threats they face.
- Because of the transit ban, a Cuban musician and critic of the Cuban government, who was jailed and beaten in Cuba, was denied asylum in the El Paso immigration court in February 2020, preventing him from reuniting with his wife and two children who remain in Cuba, according to his immigration attorney Arvin Saenz.
- A Cameroonian refugee denied asylum at the Las Vegas immigration court in February 2020 due to the transit ban is permanently separated from his nine-year-old daughter who is in danger in Cameroon where she lives with his sister, who was herself recently attacked. Because he received the limited protection of withholding of removal, the man cannot petition to bring his daughter to safety in the United States. He told Human Rights First: **"It is something really disturbing. Every day I have to think about it . . . I never wished for my daughter to live like that."**
- Due to the transit ban, a Cameroonian refugee fleeing political persecution was denied asylum in January 2020 at the Tacoma immigration court, leaving him unable to reunite with his wife and seven children. Reflecting on the reality that he may never see his family again, he told Human Rights First: "**It's making me sick. It's traumatizing that I have to live my life without my family. They aren't safe in Cameroon and there's no way that I can help them**. Life is coming to an end for me and my family as a family, so I feel very much disturbed. I continue to pray to God that he performs one of his miracles and I can see my family again and feel the love that we had." Recently, one of the man's cousins was shot by the military in Cameroon, further terrifying him for the safety of his family.
- A Venezuelan refugee who was denied asylum due to the transit ban by an immigration judge in the Laredo MPP court in October 2019 is now likely permanently separated from his three children who remain in Venezuela. He was detained and tortured by former police colleagues because he refused an order to arrest people protesting the Maduro regime. Because the man was denied asylum due to the ban and received only withholding of removal, he cannot bring his children to the United States to join him and his mother and sister who also fled persecution in Venezuela.

Perversely Denying Asylum to Refugees Who Tried to Follow the Administration's Metering and MPP "Rules"

While for years President Trump and administration officials have exhorted asylum seekers to go to ports of entry and wait to request asylum, the administration is cynically using the third-country transit asylum ban to deny asylum to refugees who have attempted to follow the administration's ever-shifting dictates and illegal policies. Indeed, under the transit ban, asylum is being denied to refugees who attempted to seek protection in the United States *before* the rule went in to effect but were prevented from requesting asylum because of the administration's illegal policy of "metering" (*i.e.* reducing the processing of asylum seekers at ports of entry) and/or because they were returned to Mexico under MPP. Some immigration judges have read the broad language of the transit ban as requiring them to deny asylum to these individuals even though they originally attempted to request asylum prior to July 16, 2019 when the rule went into effect.

On November 19, 2019, a federal district court granted a preliminary injunction barring the administration from applying the transit asylum ban to individuals "unable to make a direct asylum claim at a U.S. POE [port of entry] before July 16, 2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process," which the court deemed **"quintessentially inequitable**." On December 4, 2019, the Ninth Circuit granted an emergency stay of the district court's order, which was subsequently lifted on March 5, 2020.

Yet even with the injunction in place, some immigration judges denied asylum based on the transit ban to refugees who initially sought or attempted to seek asylum in the United States before July 16, 2019. Refugees who arrived at U.S. ports of entry months before the transit ban was implemented but who were forced to wait on metering lists have been denied asylum as a result of the rule. In addition, some immigration judges have denied asylum to individuals placed in MPP and returned to Mexico *prior* to the transit ban, as these adjudicators consider these individuals subject to the transit asylum ban because they entered the United States for MPP hearings after July 16, 2019.

Many refugees have been denied asylum under the third-country transit asylum ban after Customs and Border Protection (CBP) blocked them from requesting asylum at ports of entry prior to July 16, 2019, including:

- An Anglophone Cameroonian teacher who had been arrested, beaten, and detained for months in Cameroon was denied asylum at the Pearsall immigration court in February 2020 due to the transit ban despite having been turned away by CBP after attempting to request asylum at the Del Rio port of entry in early July 2019, according to his attorney, Sara Ramey.
- A Jamaican LGBTQ refugee who fled persecution based on his sexual orientation was denied asylum in February 2020 at the Adelanto immigration court under the transit ban even though he presented documentary evidence and testified that he had been subjected to metering prior to July 16, 2019 at the San Ysidro port of entry. The immigration judge ruled that the evidence was insufficient and granted him only withholding of removal, stating that he would have received asylum but for the transit ban.
- In January 2020, an immigration judge at the Oakdale immigration court applied the transit ban to a Cuban asylum seeker who initially sought asylum at a port of entry in April 2019. The immigration judge ruled that only an official U.S government document would suffice to establish that the man had been subjected to metering even though CBP does not appear to record this information nor issue such documents.
- A Cameroonian refugee was denied asylum at the Tacoma immigration court in January 2020 due to the transit ban even though he had been blocked from requesting protection at a port of entry in early July 2019 due to CBP's illegal practice of metering. Despite presenting proof in court of his daily efforts to

determine whether CBP would permit him to seek asylum, the immigration judge told him that his hands were tied and denied asylum.

- An LGBTQ Honduran refugee who was beaten, raped, and kidnapped in Honduras due to her sexual orientation was denied asylum in December 2019 at the Adelanto immigration court due to the transit ban despite having been metered at the San Ysidro port of entry prior to July 16, 2019.
- In December 2019, while the injunction on applying the transit ban to asylum seekers subject to metering was in place, Human Rights First court observers witnessed an immigration judge presiding over Laredo MPP tent court hearings repeatedly deny asylum to Cuban refugees who had been turned away at ports of entry prior to July 16, 2019 due to metering. The judge erroneously stated that the transit ban applied to *applications* for asylum *filed* on or after July 16, 2019, rather than to the date of the asylum applicant's arrival or entry to the United States.

Asylum seekers returned by DHS to Mexico under MPP prior to July 16, 2019, who waited in Mexico for their U.S. asylum hearings as directed by the administration have also been denied asylum under the transit ban. Some immigration judges hearing MPP cases interpreted the ban to apply to any asylum seeker with an MPP hearing scheduled after July 16, 2019 – resulting in arbitrary denials of asylum based on the immigration judge assigned to the case. For instance, an El Paso judge denied asylum to an asylum seeker placed in MPP before July 16, 2019 due to the transit ban because the person's final asylum hearing took place in October 2019, reasoning, in a written decision shared with Human Rights First, that "the text of the rule does not distinguish between initial and subsequent dates of entry or arrival." Other examples of asylum seekers in MPP denied asylum due to the transit ban and its expansive reading include:

- Married Cuban doctors who entered the United States to seek asylum before July 16, 2019 but were returned to Mexico by DHS under MPP were denied asylum. An El Paso immigration judge granted withholding of removal in November 2019 after concluding that entering the United States to attend MPP hearings after July 16, 2019 subjected them to the transit ban, according to their attorney Nico Palazzo with Las Americas Immigrant Advocacy Center.
- An unrepresented Honduran refugee who was returned to Mexico under MPP was denied asylum in February 2020 at the Brownsville MPP tent court because of the transit ban even though he entered the United States in May 2019 to seek asylum. When the man asked why he was subject to the rule, the judge responded only that this was the law and granted him only withholding of removal – separating the man from his wife and one-year-old child in Honduras.
- A Nicaraguan activist who was beaten and received death threats after participating in protests in Nicaragua was denied asylum at the El Paso MPP immigration court in January 2020, although he had entered the United States to seek asylum prior to July 16, 2019 and was returned to Mexico by DHS under MPP. Recognizing that the man qualified as a refugee, the immigration judge granted him withholding of removal.

Prolonged Jailing

The administration has used the third-country transit asylum ban to override parole criteria applicable to asylum seekers and callously prolong the detention of asylum seekers even as the COVID-19 pandemic rapidly spreads in ICE detention facilities. In some cases, DHS has refused to release asylum seekers from detention even after they were granted asylum or withholding of removal – instead detaining them during appeals of these decisions and even attempting to deport individuals granted withholding to third countries where they had no permanent status. For example:

- In January 2020, DHS deported an unrepresented Cuban man to Mexico days after an immigration judge denied him asylum due to the transit ban but granted him withholding of removal – meaning that he was determined to be a "refugee" who qualified for U.S. protection. DHS returned this Cuban refugee to Mexico even though he feared harm in Mexico and had no permanent legal status there.[4] Attorneys with The Florence Immigrant and Refugee Rights Project in Arizona assisted the man to present himself again at a U.S. port of entry. He is currently detained in the La Palma correctional center six months after being determined by a U.S. court to be a refugee.
- DHS continues to detain a transgender Guatemalan woman at the Eloy detention center after she was denied asylum solely because of the transit ban but granted withholding of removal. Even though DHS did not appeal the decision, ICE still refuses to release the woman as she challenges the denial of her request for asylum, according to attorneys at The Florence Immigrant and Refugee Rights Project.
- ICE continued to jail a Cuban man at the Port Isabel detention center for seven months after he had been recognized as a refugee and granted withholding of removal by an immigration judge in Brownsville in November 2019. The man was denied asylum solely because of the transit ban. He was released in June 2020 only after his attorneys filed suit in federal court.
- DHS needlessly detained a Ugandan woman for a week after she was granted asylum while the agency decided whether to challenge the judge's decision. In February 2020, an immigration judge found the woman eligible for asylum despite her having requested asylum after July 16, 2019 because she had been subjected to metering, which prevented her from requesting asylum before the ban took effect. The woman, who suffered arbitrary arrest and imprisonment by the police in Uganda due to her political opinion, was further traumatized by her detention in the United States according to her attorneys at The Florence Immigrant and Refugee Rights Project.

DHS has also denied release based on the transit ban for asylum seekers held in detention while waiting for immigration court proceedings. The agency refused to parole arriving asylum seekers who sought protection at a port of entry and were subject to the transit ban on the basis that these asylum seekers were presumptively ineligible for asylum, which DHS speciously claimed made them a flight risk. DHS similarly asserted during immigration bond hearings that asylum seekers subject to the transit ban pose a risk of flight, and many judges denied bond or set bond at levels that are impossibly high for asylum seekers to pay. As a result, asylum seekers needlessly languish in immigration detention centers for many months, even though many have ultimately been recognized as refugees by immigration courts and could have instead been safely living with family, friends, or other sponsors in the community.

For years DHS has been denying parole to asylum seekers eligible for release in violation of ICE's 2009 parole directive. In fact, multiple federal courts have found blanket denials of parole by ICE to violate the law. The administration's latest attempt to punish and deter asylum seekers by holding them in detention during the entire course of asylum proceedings is all the more distressing given the rapid spread of COVID-19 in these facilities that further endangers the lives of asylum seekers. **As of July 4, 2020, ICE was holding over 3,600 asylum seekers who had passed fear of persecution screenings, the vast majority of whom are eligible for release on parole or bond.**

Asylum seekers denied parole because ICE labeled those subject to the transit ban a flight risk include:

- A Cameroonian woman whose father, nephew, uncle, and eight-year-old son were murdered in Cameroon was denied parole due to the transit ban and needlessly detained for more than five months before being recognized as a refugee and granted withholding of removal. The woman was among

[4] *See Ibarra-Perez v. Howard*, 2020 WL 3440298 (D. Ariz June 23, 2020).

dozens of detainees, many of them Cameroonian asylum seekers, transferred from the T. Don Hutto facility to a detention center in Mississippi, far from her attorney, after protests in March 2020 against inadequate medical care and the indefinite confinement of asylum seekers, many of whom were eligible for parole.

- ICE officers at the El Paso Service Processing Center denied parole to a Venezuelan LGBTQ asylum seeker who had been shot in Venezuela. ICE informed his attorney, Nico Palazzo, that an internal directive instructed ICE officers to consider individuals subject to the transit ban as a flight risk and deny them parole. Instead of being released from detention, this asylum seeker was detained for four months.
- A Cuban asylum seeker who was sexually assaulted in Cuba before fleeing the country was denied parole by ICE officers at the El Paso Service Processing Center due to the asylum transit ban. ICE officers told the man's attorney that the man was considered a flight risk, under an internal ICE directive, because he is subject to the transit ban. As a result, he was held in detention for six months.
- A Cuban asylum seeker who was beaten and imprisoned in Cuba for her political opinion was denied parole in November 2019 because, according to the parole denial form, the "exceptional, overriding factor[]" of her ineligibility for asylum under the transit ban "militate[s] against parole." The woman spent more than six months in the Karnes County and T. Don Hutto detention centers where she suffered mistreatment by guards and difficulty getting medical attention for a pre-existing condition as COVID-19 spread through ICE detention facilities. In March, she was denied asylum due to the transit ban and found not to meet the heightened withholding/CAT standard by the San Antonio immigration court. She did not appeal the decision, despite being terrified to be returned to Cuba, because she was too afraid to remain in detention as the coronavirus continued to spread.
- ICE repeatedly denied parole to a Cameroonian woman subject to the transit ban who was beaten, arrested, and tortured by the authorities for participating in a peaceful protest in Cameroon. After an immigration judge recognized her as a refugee and granted her withholding of removal, the woman was finally released after seven months of being needlessly jailed at the Adelanto detention center. ICE had previously refused to grant her parole, asserting that the woman was a flight risk under the transit ban. While the woman was also eventually given a bond hearing (pursuant to the Ninth Circuit's decision in *Rodriquez*), the immigration judge imposed a $12,000 bond, also labeling the woman a flight risk due to the transit ban; she could not pay this amount and thus remained detained throughout her asylum proceedings.

Asylum seekers denied bond or who had high bond amounts set because DHS and immigration judges considered them to be a "flight risk" due to the transit ban, include:

- An LGBTQ Honduran asylum seeker has been detained for more than five months in Pine Prairie detention center after being denied bond in January 2020 by an immigration judge who found the man presents a flight risk because he is ineligible for asylum due to the transit ban, according to his bond attorney, Rose Murray. The man told Human Rights First, "**The judge said that I could not receive bond because of the new law, without even reviewing the four letters of support I submitted.** The attorney for the government just looked at his computer and agreed."
- In December 2019, an immigration judge for the Pine Prairie detention center denied bond to a Cuban asylum seeker who had been arrested and detained, physically assaulted, and fired in Cuba because of his political opinion, finding the man to be a flight risk due to his presumptive ineligibility for asylum under the transit ban and in spite of multiple letters of support from U.S. citizen family members. He has been detained in Pine Prairie since September 2019 and was denied asylum due to the transit ban in June 2020.

- A Venezuelan asylum seeker beaten by the police in Venezuela was denied bond in January 2020, as an immigration judge found the man presented a flight risk since he is only potentially eligible for withholding of removal and CAT protection due to the transit ban. The man submitted multiple letters from family and friends in the United States willing to host and support him.

Further Rigging Fear Screenings

The Trump administration is using the asylum transit ban to evade the credible fear screening standard set by Congress, labeling essentially all asylum seekers (other than Mexicans) at the border as failing these screenings, and instead subjecting them to an improperly elevated screening. The Trump administration is applying the third-country transit bar in tandem with other policies that rig the preliminary fear screening process against asylum seekers. The predictable, and indeed certainly planned, result was to block asylum seekers subject to the transit ban at the credible fear stage and deport many back to the countries they have fled without letting them apply for asylum or have an asylum hearing.

Following the June 30, 2020 federal court decision overturning the July 2019 travel ban, DHS reportedly instructed officers conducting credible fear interviews to stop applying the transit ban. However, DOJ and DHS officials have not allowed asylum seekers subjected to the transit ban who were determined not to have met the transit ban's heightened screening standard an opportunity for a fear screening under the credible fear standard set by Congress. As a result, these asylum seekers remain detained and/or facing deportation without a chance to apply for asylum before an immigration judge.

During the year in which it was in effect, the transit ban and other policies intended to elevate the credible fear standard and manipulate the credible fear process significantly lowered the pass rate. **Positive credible fear rates plummeted by 45 percent from an average of 67.5 percent** (May to September 2019) **to 37 percent** (October 2019 to June 2020) **after the U.S. Supreme Court lifted a stay on the third-country transit asylum ban in September 2019** and as the administration began to use other fast-track deportation programs to limit access to counsel, according to U.S. Citizenship and Immigration Services (USCIS) data. The current 37 percent **positive credible fear determination rate is 50 percent lower than in fiscal year 2019** and a significant departure from credible fear rates during the Obama and George W. Bush administrations, when they averaged 78 percent.[5]

For decades potential bars to asylum were not assessed at the credible fear stage given that recently arrived asylum seekers, the vast majority of whom are unrepresented during these interviews, are not in a position to address the complex legal issues and factual questions these bars entail during a preliminary screening. However, under the transit ban, asylum seekers placed by DHS in expedited removal were blocked from passing credible fear interviews if the officer conducting the interview determined the transit ban applied. Remarkably, this determination was made during the interview itself. Officers conducting fear screenings first questioned asylum seekers on their travel route to apply for protection in the United States and then immediately decided whether the transit ban applies and if the individual qualified for one of the extremely limited exceptions. Officers often abruptly informed asylum seekers subject to the ban that they were ineligible for asylum and would be assessed under the much higher screening standard for reasonable fear interviews for individuals with prior deportation orders.

Below are examples from credible fear interview summaries provided to Human Rights First of statements read to asylum seekers after an officer conducting the interview determined the individual was subject to the transit ban. These materials make clear that the transit ban effectively turns what is supposed to be a credible fear screening

[5] *See* U.S. Commission on International Religious Freedom (2001–03); USCIS (2004–13, 2014, 2015, 2016, 2017, 2018, 2019, 2020).

into an interview in which the asylum seeker must meet a different—higher—burden in order to even be permitted to apply for U.S. protection:

If applicable read the following Orientation Memo

The purpose of the remainder of the interview is to determine if you have a reasonable fear of persecution or torture. If it is determined that you have a reasonable possibility of being persecuted or tortured in the country to which you will be ordered removed, you will receive a Notice to Appear for a hearing in immigration court for consideration of your claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture. If it is determined that you do not have a reasonable possibility of being persecuted or tortured, then you may ask to have an immigration judge review that decision. During that immigration judge review, you may also request review of the determination that you do not have a credible fear of persecution because you are barred from asylum under 8 CFR § 208.13(c)(4).

Q: Did you understand that information?
A: Yes i didn't ask because I didn't stay I just came here and asked for asylum here so im asking not to be deported to my country I want asylum here I cannot go back to my country

☒ Explanation of Bar for Asylum

There is a new regulation in the US stating that people who enter the US after July 16, 2019 do not qualify for asylum in the US if they did not previously apply for asylum in one of the countries they passed through to get to the US. Because you entered after this date and did not apply for asylum in any of the countries that you passed through, you are not eligible for asylum in the US. However, there is another process similar to asylum called withholding of removal, which you may be eligible for.	OK.
Read: The purpose of the remainder of the interview is to determine if you have a reasonable fear of persecution or torture. If it is determined that you have a reasonable possibility of being persecuted or tortured in the country to which you will be ordered removed, you will receive a Notice to Appear for a hearing in immigration court for consideration of your claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture. If it is determined that you do not have a reasonable possibility of being persecuted or tortured, then you may ask to have an immigration judge review that decision. During that immigration judge review, you may also request review of the determination that you do not have a credible fear of persecution because you are barred from asylum under 8 CFR § 208.13(c)(4).	

CREDIBLE FEAR INTERVIEW – CLAIM

Based on your testimony so far, you are barred from asylum under 8 CFR § 208.13(c)(4), and therefore you will be unable to establish a credible fear with respect to an application for asylum. The purpose of the remainder of the interview is to determine if you have a reasonable fear of persecution or torture. If it is determined that you have a reasonable possibility of being persecuted or tortured in the country to which you will be ordered removed, you will receive a Notice to Appear for a hearing in immigration court for consideration of your claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture. If it is determined that you do not have a reasonable possibility of being persecuted or tortured, then you may ask to have an immigration judge review that decision. During that immigration judge review, you may also request review of the determination that you do not have a credible fear of persecution because you are barred from asylum under 8 CFR § 208.13(c)(4). So we will now actually begin discussing your claim. It is in your best interest to keep

Announcing that an asylum seeker is ineligible for asylum during the middle of interview before even asking any questions regarding persecution in the individual's home country understandably creates confusion and anxiety for many asylum seekers, as the first example above indicates. A declaration from an attorney assisting asylum seekers at the Dilley family detention center also notes that these abrupt announcements create fear for asylum seekers. In one case, for instance, after an asylum seeker was informed that she was ineligible for asylum under the transit ban, the woman's daughter "proceed[ed] to cry, uncontrollably, out of fear that she would be deported to harm and her case was being denied." [6]

Indeed, the stakes of these interviews are incredibly high. Asylum seekers determined by DHS not to meet the artificially elevated screening standard are subject to deportation without an opportunity to have their request for asylum heard during a full asylum hearing. Some of these asylum seekers include:

- In November 2019, DHS decided that an asylum seeker from the Democratic Republic of Congo had failed to pass her screening interview and would not be allowed to even apply for asylum in the United States. The Congolese woman reported that she had been beaten by police in her country when she sought information about her husband, who had been jailed and tortured due to his political activity. Citing the transit ban, the DHS officer determined she was ineligible for asylum and subjected her instead to the artificially elevated screening standard. The officer concluded the Congolese woman did not meet that higher screening standard and as a result, she was ordered deported to Congo without an asylum hearing. Seven months later (as of late June 2020), she remains detained by ICE pending deportation.
- In late 2019, an Angolan asylum seeker and his 12-year-old daughter, who had been raped while transiting through Mexico, did not pass their fear screening. The DHS interviewing officer told the man that his daughter's rape was irrelevant, found the family to be subject to the asylum transit ban and determined that they did not meet the transit ban's higher preliminary screening standard.

In addition, in May 2019, the administration began deploying CBP border enforcement officers to conduct some fear interviews, including at family detention centers, instead of the USCIS officers trained to adjudicate asylum applications. Thus far in FY 2020 (through June 2020), **CBP officers have found asylum seekers established a credible fear in just 30 percent of cases – 20 percent lower than the already reduced positive credible fear rate for interviews conducted by USCIS officers**, according to USCIS data. Allowing CBP officers, who are not suited to carrying out sensitive, legally complex, non-adversarial screenings of often traumatized asylum seekers, undermines the safeguards intended to protect refugees.

[6] *M.M.V. v. Barr*, 19-cv-02773, (D.D.C. Jan. 13, 2020), Dkt. No. 67, Declaration of Shalyn Fluharty, para. 25.

In a further step to rig the fear screening process, in late 2019 the administration also placed some Central American asylum-seeking families and single adults who were subject to the third-country transit asylum ban in the Prompt Asylum Claim Review (PACR) program – effectively blocking them from legal representation while subjecting them to horrible conditions in CBP custody. This fast-track deportation program jails asylum seekers in CBP holding cells at the border during the credible fear process, where families and adults frequently report being provided insufficient or inedible food and water, lack of basic sanitation, and inability to sleep, because of overcrowding, lack of adequate bedding, notably cold conditions, and lights that are kept on all night. Attorneys are prohibited from visiting clients in person and legal services organizations are not permitted to give legal orientations in CBP facilities. Individuals in these programs are reportedly provided only 30 minutes to an hour to attempt to contact a lawyer or family members before their interview. As of late February 2020, some 2,500 families and adults had been placed in PACR, according to Congressional testimony by Acting CBP Commissioner Mark Morgan, and many of them have been rapidly deported after being found to not meet the heightened fear screening standard under the transit ban, including these women and children:

- In late March 2020, DHS applied the transit ban to a 16-year-old girl who fled attempts by a Salvadoran gang, which exercises control over large swaths of the country, to traffic and sexually exploit her. The DHS officer determined that she did not meet the unduly high fear screening standard applied by DHS under the transit ban. The girl and her mother were held in CBP custody under PACR and did not have access to legal counsel until after their case was already decided, according to their attorney, Max Brooks with Las Americas Immigrant Advocacy Center.
- An indigenous Guatemalan woman fleeing gender-based violence, who was also threatened by a narco-cartel in Mexico, was placed in PACR in March 2020 and found not to have met the heightened screening standard under the third-country transit asylum ban. She was deported without even being allowed to apply for asylum, according to attorney Linda Corchado of Las Americas, who spoke briefly to the woman by telephone while the woman was being held in a border patrol station in Texas.
- Nine Central American women and their children were summarily deported in February 2020 without being allowed to apply for asylum after they were subjected to the PACR fast-track deportation program and transit ban, which was used to artificially elevate their screening interview requirements. These cases, reported to Human Rights First, included an indigenous Guatemalan asylum seeker who was sexually assaulted because of her ethnicity and a Central American woman subjected to severe domestic violence by an abuser who killed of one of her children. DHS found that they had not met the improperly high screening standard imposed by the transit ban, according to Karla Vargas, an attorney with the Texas Civil Rights Project who spoke with the women by phone and provided support to their attorney Thelma Garcia. The attorney believed that these women would have met the credible fear standard.
- In early January 2020, an indigenous woman who fled Guatemala after repeated threats to kidnap her six-year-old daughter was forced to sleep on the floor of a CBP cell with her daughter for over two weeks under the PACR program. She was deported after DHS determined the family did not meet the transit ban's heightened fear screening standard, according to attorney Linda Corchado.

Empty Exceptions

The few exceptions to the asylum bar are essentially insurmountable and fail to take into consideration the danger asylum seekers face in the countries they transit to reach the southern U.S. border. The exceptions are narrowly limited to individuals who: (a) were denied asylum in a country of transit, (b) are victims of severe forms of trafficking, or (c) did not pass through a country that has signed the Refugee Convention, Refugee Protocol, or CAT. Because Mexico is a party to these treaties, the third exception is meaningless on its face.

The third-country transit ban does not include an **exception for unaccompanied children,** who Congress has exempted from other asylum bars, including safe-third country agreements and the one-year-filing deadline.

The exception for individuals who have been denied asylum in a transit country does not provide a meaningful exception, as it fails to capture the reality that few refugees apply for asylum in transit countries because their lives or safety would be at risk there and/or they are not protected in transit countries from forced return to their countries of persecution, as discussed below.

Further, the exception for victims of "severe forms of trafficking" is rarely used and narrowly applied. For instance:

- While an El Paso immigration judge in November 2019 noted that a family of Cuban asylum seekers subject to the transit ban had testified to being trafficked in Mexico, the judge did not seek to further develop the record on this point during their hearing and did not fully analyze their testimony in his written decision, finding merely that the family "did not provide the Court with evidence to demonstrate" they met the exception, in a written decision shared with Human Rights First.
- In late March 2020, DHS found that a 16-year-old girl who fled attempts by a Salvadoran gang to traffic and sexually exploit her was subject to the transit ban even though she had been a victim of trafficking, according to her attorney Max Brooks. Review of a summary from the credible fear interview indicates that the officer narrowly considered the exception as applying only to trafficking that occurs directly during an asylum seeker's flight – an element not required by the exception.

Permanent Limbo

Refugees denied asylum and granted only withholding of removal or CAT protection face major barriers to re-building their lives in the United States, are left without a pathway to citizenship, and are often separated from their families. Refugees who receive these deficient forms of protection have in fact been ordered deported and must indefinitely live in the United States under the threat that the U.S. government could seek to reopen their cases and remove them at any moment. Unlike asylum, withholding of removal and CAT protection do not entitle the individual to automatic work authorization. Individuals must apply for and renew work permits, a process that often requires the assistance of a lawyer and has become subject to increasingly significant processing delays.

Refugees who receive withholding or CAT protection due to the transit ban report numerous barriers to establishing a stable life in the United States, including inability to reunite with family, long delays in obtaining work authorization, barriers to accessing health care and other support while they search for work, difficulty obtaining an identification card, threats of deportation by ICE officers, and the uncertainty of remaining in limbo without a path to permanent legal status.

- In May 2020, ICE released an unrepresented Cameroonian refugee who had been held in detention for over six months but failed to release him with his important court documents, including the judge's order granting him withholding of removal. As a result, the man is unable to even apply for permission to work to be able to support himself until ICE returns his documents, which the attorney assisting him since his release, Kristy White from Solidarity, has repeatedly requested.
- A Cameroonian anti-government activist who was granted only withholding of removal in February 2020 because of the transit ban told Human Rights First, "**I'm really quite in limbo right now**." Ineligible for most government support to individuals with asylum and unable to find a job to support himself until his work authorization request is approved, he reported to Human Rights First, "Even though I was happy to leave the [detention] facility I really have a lot to think about. I'm thinking about my status of being here. The work permit—how long will I have it? The work permit procedure—how long?"

- ICE attempted to prevent a Cameroonian woman granted withholding of removal due to the transit ban in May 2020 from even receiving work authorization. After being recognized as a refugee by an immigration judge, ICE released the woman with a parole document that stated she was not permitted to work. The woman's attorney was able to correct this error, but refugees without legal counsel might well have been blocked from the ability to work to support themselves.
- A lesbian Honduran woman recognized as a refugee but denied asylum because of the transit ban in December 2019 has faced a host of difficulties in integrating into the United States. She has no identity documents because ICE refuses to return her passport, a common practice with individuals who receive withholding. As a result, she has been unable to obtain other identity documentation, making it even more difficult to apply for the extremely limited assistance available to refugees who have not received asylum.
- ICE officers have terrorized some recipients of withholding with unfounded threats to deport them. While withholding of removal is not a permanent legal status, an individual with withholding cannot be deported unless that status is revoked by an immigration judge. Nonetheless, multiple attorneys reported that ICE officers threaten to deport recognized refugees denied asylum merely because of the transit ban. ICE officers in New Jersey repeatedly told a woman granted withholding due to the transit ban that she would be deported, even going so far as visiting her home to repeat this threat, according to her attorney.
- A Cameroonian refugee denied asylum due to the transit ban in January 2020 and unable to petition for his wife and seven children suffers from the anxiety of potentially permanent separation from his family, who remain in danger. He told Human Rights First, "**Life is coming to an end for me and my family as a family . . . people are truly affected by these laws. If they can make some adjustments to the law, taking to heart that families are being separated, that would be good.**"

Violates U.S. Law and Treaty Obligations

The INA protects refugees with well-founded fears of persecution from return to their country of persecution and ensures that asylum seekers can apply for such protection regardless of their nationality, travel route, or place of entry or arrival to the United States (8 U.S.C. § 1158(a)(1)). Congress delineated specific and limited exceptions to this general rule in situations where an asylum seeker was "firmly resettled" (8 U.S.C. § 1158(b)(2)(A)(vi)) in a third country on the way to the United States, or where a "safe third country" (8 U.S.C. § 1158(a)(2)(A)) agreement is in place to allow for the person's return. Under federal law, safe third country agreements can only be entered into where refugees in the third country would be safe from persecution and have access to a full and fair procedure for adjudication of their protection claims. The third-country transit asylum bar is entirely inconsistent with those statutory provisions and beyond what Congress has authorized the administration to do.

Promulgating the asylum bar as an interim final rule also violates the APA. The administration claimed that issuing the transit ban without the standard notice and comment period was necessary to avoid a surge of migrants who might have learned of changes in immigration policy prior to implementation and would otherwise interfere with the foreign affairs of the United States. Yet, on July 18, 2019, the acting head of CBP publicly stated that the transit ban was being implemented as a pilot project at only two Border Patrol stations—severely undermining the administration's stated rationale for issuing the bar as an interim rule. Indeed, in vacating the transit ban, the district court in Washington, D.C. held that the administration's claimed exceptions to standard rulemaking lacked a valid justification and that the rule was issued in violation of the APA.

Further, the third-country transit asylum bar violates international refugee law by "significantly rais[ing] the burden of proof on asylum seekers beyond the international legal standard," as the UN Refugee Agency noted, subjecting refugees with well-founded fears of persecution to *refoulement* at both the screening stage and after the full adjudication of their protection claims.

Despite its clear illegality, the transit ban, like many of the administration's policies, was a blatant attempt to deny protection to as many refugees as possible before it could be blocked by a U.S. court.

Disregards Dangers in Transit Countries

As noted above, the transit ban violates the safe third country provision under U.S. law, which permits the return of asylum seekers to third countries only under formal agreements to countries where refugees are protected from persecution and would have access to a fair asylum adjudication systems. The transit ban also fails to include an exception for individuals who have passed through countries where their lives would have been in peril, even though many transit countries en route to the southern U.S. border—including Guatemala, El Salvador, Honduras, and Mexico—are among the most dangerous in the world. Applying the transit ban to asylum seekers who passed through unsafe third countries inhumanely punishes them for not seeking refugee status in countries where they could not find safety.

Overwhelming evidence shows, including U.S. Department of State reports and the 1,114 reports of kidnappings, rapes, and violent attacks on asylum seekers in MPP documented by Human Rights First, show that many asylum seekers face serious danger in Mexico.

- The U.S. Department of State reported in its 2019 assessment of human rights in Mexico that police, military, state officials, and criminal organizations engage in unlawful or arbitrary killings, forced disappearance, torture, and arbitrary detention. Armed groups carry out kidnappings and murders of migrants. The human rights report also indicated that migrants are victimized by police, immigration officers, and customs officials. Mexico includes five regions that are designated by the Department of State as a Level Four threat, the highest threat assessment and the same level assigned to Afghanistan, Iran, Libya, and Syria. Human Rights First found that there are now over 1,114 reports of kidnappings, rapes and other attacks against migrants trapped in Mexico under MPP, which is only the tip of the iceberg because most attacks are not reported to the media, attorneys, or human rights organizations. Requiring asylum seekers to apply for asylum in Mexico is inhumane given the dangers that migrants face in Mexico.
- Asylum seekers who do not speak Spanish, including indigenous language speakers, would be even more vulnerable to danger because they are easily identifiable as migrants. Human Rights First has identified numerous transit-ban affected cases where non-Spanish speakers are ineligible for asylum because they did not apply for protection in Mexico, including a Russian man who was persecuted by his government and arrived at the southern border with his family.

Nor would asylum seekers be safe in other common transit countries, such as Guatemala, El Salvador, or Honduras, which have among the highest murder rates in the world.

- **Guatemala** "remains among the most dangerous countries in the world" with an "alarmingly high murder rate," according to the U.S. State Department. It has the third highest femicide rate in the world.
- **Honduras** also has one of the highest murder rates in the world. There are an estimated 7,000-10,000 gang members operating in Honduras, and along with drug traffickers they commit killings, kidnappings, and human trafficking. The U.S. State Department reported that migrants, including refugees, are vulnerable to abuse by criminal groups.
- **El Salvador** also has one of the world's highest homicide rates. Violence in El Salvador is akin to those in the "deadliest war zones around the world." The country has *the highest* femicide rate in the world.

For particularly vulnerable asylum seekers, these countries pose an even greater risk to their lives.

Asylum seekers fleeing death and persecution in their home countries are likely to face serious danger in transit countries, particularly individuals who may be targeted because of their gender, sexuality, race and/or ethnicity.

- Rape, femicide, violence against women, trafficking in persons, violent attacks against LGBTQ persons, and gang recruitment of displaced children are all serious problems in **Guatemala**.
- Women, girls, and LGBTQ individuals face high levels of violence in **Honduras**. Between January and October 2017 alone, the Center for Women's Rights recorded 236 violent deaths of women in Honduras. The State Department's 2019 Trafficking in Persons Report for Honduras found that "Women, children, LGBTI Hondurans, migrants, and individuals with low education levels are particularly vulnerable to trafficking."
- According to the U.S. State Department, violence against women is a "widespread and serious problem" in **El Salvador** and laws against rape are not effectively enforced. Amnesty International reported that El Salvador is one of the most dangerous countries to be a woman. LGBTQ individuals are targeted for homophobic and transphobic violence in El Salvador, including at the hands of gangs and the police. Gangs forcibly recruit children and force women, girls, and LGBTQ individuals into sexual slavery. Human trafficking is a widespread problem in El Salvador, and LGBTQ individuals are at a particularly high risk of being victims of trafficking.
- African and Afro-descendent asylum seekers and migrants in Mexico frequently face xenophobia and racially-motivated violence and human rights violations, including by Mexican authorities. Violence against indigenous people is widespread in Mexico, where indigenous women are "among the most vulnerable groups in society." Indigenous people and members of Afro-descendent communities face violence and threats in Honduras, as do indigenous communities in El Salvador and Guatemala.
- Asylum seekers fleeing gang violence in the Northern Triangle are unlikely to be safe in any country in the Northern Triangle. According to UNHCR, gang activity crosses borders in the Northern Triangle, and asylum seekers fleeing from one Northern Triangle country to another increasingly report gang violence and threats.

ON HUMAN RIGHTS, the United States must be a beacon. Activists fighting for freedom around the globe continue to look to us for inspiration and count on us for support. Upholding human rights is not only a moral obligation; it's a vital national interest. America is strongest when our policies and actions match our values.

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability, and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 30 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

Human Rights First is a nonprofit, nonpartisan international human rights organization based in Los Angeles, New York, and Washington D.C.

This report is available online at humanrightsfirst.org

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EXHIBIT 25

DECLARATION OF NAOMI A. IGRA

ASYLUM SEEKER ADVOCACY PROJECT

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RIN 1125-AA94
EOIR Docket No. 18-0002
85 F.R. 36264

July 15, 2020

To Whom It May Concern:

The Asylum Seeker Advocacy Project (ASAP) respectfully submits the following comments to the Department of Justice and Department of Homeland Security's Notice of Proposed Rulemaking and Request for Comment on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94 or EOIR Docket No. 18-0002, 85 FR 36264, issued June 15, 2020 ("the Notice"). ASAP also submits this comment in response to the proposed collection of information, OMB Control Number 1615-0067.

Interest in the Proposed Rule:

ASAP provides community support and legal services to individuals who have arrived at the Mexico-U.S. border to seek asylum, regardless of where they are currently located. Since its establishment, ASAP has provided community support to over 4,000 members, and successfully resolved more than 1,650 legal emergencies for clients using its unique remote representation model. ASAP has provided assistance to individuals in

defensive asylum proceedings in over 40 states, with a focus on supporting individuals in areas with little to no pro bono legal services. ASAP has represented asylum seekers before the Board of Immigration Appeals (BIA), the Department of Homeland Security (DHS), federal courts, and in administrative filings with United States Citizenship and Immigration Services (USCIS). ASAP also conducts trainings, creates guides and resources, and provides technical assistance to other attorneys.

ASAP routinely assists asylum applicants with the filing of applications for asylum, withholding of removal, and protection under the Convention Against Torture ("asylum applications"). During 2019, ASAP assisted in the preparation and filing of asylum applications for over 80 individuals. In 2020, ASAP is on track to assist over 100 individuals with filing an asylum application.

Department of Homeland Security and Department of Justice Notice:

On June 15, 2020, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) published a Notice of Proposed Rulemaking and Request for Comment on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94or EOIR Docket No. 18-0002, 85 FR 36264, issued June 15, 2020 ("the Notice"), with a comments submissions due on July 15, 2020. The deadline for submission of comments on the proposed collection of information is August 14, 2020 and must include OMB Control Number 1615-0067.

The Notice makes myriad, sweeping changes to the legal standards and procedures for asylum, withholding of removal, the Convention Against Torture (CAT), and credible fear and reasonable fear interviews. ASAP describes and analyzes many of the changes in the below sections. However, ASAP was not able to address all of the proposed changes in detail given the sheer quantity and the minimal timeline the agencies allowed for submission of comments. Because of the multiple deficiencies explained below, ASAP objects to the Notice as a whole. ASAP further objects to the agency allowing only 30 days for the public to respond to the multitude of changes proposed in the 161 pages of the Notice.

Summary of Arguments

First, the agencies' failure to explain the reasons for the proposed changes fatally doom the Notice by denying the public a meaningful opportunity to comment. The public cannot fully assess whether the agency has addressed all meaningful aspects of the problem, because the agency has, indeed, failed to identify the specific problem to which the Notice responds. Commentators cannot adequately assess whether the

reasons for the proposed changes satisfy the Constitution and other statutory requirements, nor can they evaluate evidence to determine whether the rule is rationally related to any purpose.

Second, many of the specific provisions of the Notice violate the Immigration and Nationality Act (INA), the U.S. Constitution, and U.S. Treaty obligations. Its legal and constitutional deficiencies are sweeping, and in many instances, ultra vires. The proposed changes would also make it extraordinarily hard, if not impossible, for those seeking safety in the United States to be granted asylum, withholding of removal, or protection under CAT. DHS and DOJ should therefore withdraw the Notice in its entirety. If the agencies decide to move forward with any of the proposed changes in the Notice, they must make significant changes and abandon all unlawful provisions.

Third, the Notice is unlawful because Acting Secretary Wolf holds his office in violation of both the Homeland Security Act and the Federal Vacancies Reform Act. Because Mr. Wolf holds his office unlawfully, we cannot designate authority to Mr. Mizelle to sign the Notice, as all his actions taken as Acting Secretary must be set aside as unlawful under the Administrative Procedure Act.

Fourth, the Notice violates the Rehabilitation Act because it introduces barriers to the asylum process that will prevent individuals with disabilities from meaningfully participating, without setting forth a process for identifying disabilities and providing reasonable accommodations or modifications.

Fifth, the proposed I-589 included with the supporting documents to the Notice violates the Paperwork Reduction Act. The proposed I-589 is significantly longer and would unnecessarily increase the amount of information collected, creating an undue burden on asylum seekers and nonprofits like ASAP.

I. The Agencies Have Failed to Meet the Basic Requirements of Notice and Comment Rule-Making, Depriving the Public of a Meaningful Opportunity to Participate

The Notice fails to meet the basic requirement for notice and comment rule-making that an agency identify the reasons for its proposed regulatory changes. Nowhere does the Notice include a clearly identifiable section or subheading describing the "purpose" or "reasons" for the proposed changes. Two sections of the proposed rule indicate that DHS and DOJ have made the indicated changes "for the reasons set forth in the preamble," 85 FR 36291, 36298; but the word "preamble" does not

otherwise appear anywhere in the text of the Notice.[1] Nor does any subsection of the Notice or any of the discussion of changes to specific provisions of the Code of Federal Regulations explain the agencies' reasoning for implementing the proposed changes.

Because the agencies fail entirely to identify the reasons for the proposed regulatory changes, they have denied the public any meaningful opportunity to engage in a public comment. *See*, *e.g.*, *Connecticut Light & Power Co. v. Nuclear Regulatory*

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[1] The "Discussion" section of the Notice also utterly fails to make clear its purpose. (85 FR 36265). This two paragraph section states that "[a]s an expression of a nation's foreign policy, the laws and policies surrounding asylum are 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. *See*, *e.g.*, *Kleindienst v. Mande*l, 408 U.S. 753, 765 (1972)." *Id.* Notably, *Mandel* is not an asylum case and does not concern immigrants fleeing persecution. *Mandel* also predates the Refugee Act of 1980 by 8 years. *See* Pub. L. 96–212, 94 Stat. 102 (1980).

In any event, the general proposition that asylum laws are "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," does nothing to clarify the reasons for the specific changes the Notice makes to the regulations governing the CFI process and asylum, CAT, a withholding claims. At minimum the government is required to state how and why the specific changes it proposes further the United States asylum policy goals, and to provide sufficient evidence for the public to meaningfully assess whether the proposed changes were likely to achieve those goals. The present Notice utterly fails to do so.

Notably, the agencies stated account of asylum policy — for which it sites only an inapposite, anachronistic case — is also at odds with the purpose identified in the statutory text of the Refugee Act:

> The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.

Pub. L. 96–212 (S 643), 94 Stat. 102. The Refugee Act nowhere identifies the purpose of asylum law and policy as "protect[ion of the United States'] own resources and citizens." (85 FR 36265). To the contrary, the Act specifically notes that it is the "policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees *to the fullest extent possible*." Pub. L. 96–212 (S 643), 94 Stat 102 (emphasis added). In so far as the NOTICE is motivated by a desire to *limit* asylum and humanitarian assistance opportunities below "the fullest extent possible," it violates the statutory purpose of the Refugee Act.

Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982), ("If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals" and "[a]s a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making."). The agencies must provide sufficient detail on the reasons for the proposed rule in both law and evidence for the public to meaningfully evaluate their proposal. *See California v. Dep't of the Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019). Because commentators do not know, for instance, whether the proposed legal changes to the standards for asylum, CFIs, CAT and withholding are meant to achieve any particular outcome, commentators cannot provide countervailing evidence that indicates the agencies' changes will not achieve their goals.

Failing to sufficiently identify the reasons for the proposed changes also prevents commentators from adequately assessing whether the agencies' reasons may run afoul of the Constitution or other statutes. For instance, commentators cannot fully assess whether the proposed changes are motivated by impermissible racial animus, as has been the case with other of the Administration's immigration policy changes. *See e.g.*, *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018) (finding that plaintiffs provided sufficient evidence to raise a serious question that unconstitutional animus towards non-white, non-European immigrants motivated the Trump Administration's Acting DHS Secretary's decision to terminate Temporary Protected Status for certain groups, "even if the DHS Secretary or Acting Secretary did not 'personally harbor animus ..., their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated their decision-making process.' ") (citations omitted). The third-country transit bar,[2] Migrant Protection Protocols (MPP)[3] and expedited processing for "family unit" asylum cases[4] are evidence that this administration is

[2] *See* Human Rights First, *Trump Administration Third-Country Bar is An Asylum Ban that Will Return Refugees to Danger*, (Sept. 2019), https://www.humanrightsfirst.org/sites/default/files/Third-Country-Transit-Ban.pdf.

[3] *See* Human Rights Watch Report, *"We Can't Help You Here": U.S. Returns Asylum Seekers to Mexico* 1 (2019), https://www.hrw.org/sites/default/files/report_pdf/us_mexico0719_web2.pdf ("The Trump administration has pursued a series of policy initiatives aimed at making it harder for people fleeing their homes to seek asylum in the United States, separating families, limiting the number of people processed daily at ports of entry, prolonging detention, and narrowing the grounds of eligibility for asylum. In January 2019, the administration expanded its crackdown on asylum with a wholly new practice: returning primarily Central American asylum seekers to several border towns in Mexico where they are expected to wait until their US asylum court proceedings conclude, which could take months and even years.").

[4] *See* Jeffrey S. Chase, EOIR Creates More Obstacles for Families, (Dec. 13, 2018), https://www.jeffreyschase.com/blog/2018/12/13/eoirs-creates-more-obstacles-for-families (A former immigration judge stating that the FAMU docket is an effort at "gaming of the system to deny more asylum claims for [the administration's] own political motives").

attempting to make it harder for individuals who seek safe haven at the Mexico-U.S. border to win asylum and get on a path to citizenship.[5] These proposed changes build on those efforts, making it nearly impossible for many asylum seekers to win relief, especially those who cross the Mexico-U.S. border.

Multiple statements by administration officials,[6] including the President, have suggested a particular animus motivating immigration policies, directed at specific immigration populations on the basis of their racial and ethnic identities, and countries of origin.[7] Recent research by legal scholars has also tied the immigration policies of this administration to nativist ideologies seeking to secure the ethnic composition of the United States as a "white majority" country.[8]

Given the sweeping nature of these proposed rule, the intention to prevent as many people as possible from winning asylum is clear. The present rule is likely part of an insidious agenda of discrimination meant to undermine valid legal claims to asylum as part of the administration's ethno-nationalist political project.[9] Such a project would necessarily run afoul of the constitutional guarantees of equal protection and Due

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[5] *See* Nicole Narea, *The Demise of America's Asylum System Under Trump, Explained*, VOX (Nov. 5, 2019), https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp.

[6] Senior White House official and immigration policy architect Stephen Miller in particular has been accused of holding and promoting white supremacist views. *See, e.g.*, Joel Rose, *Leaked Emails Fuel Calls for Stephen Miller to Leave White House*, NPR (Nov. 26, 2019) https://www.npr.org/2019/11/26/783047584/leaked-emails-fuel-calls-for-stephen-miller-to-leave-white-house (detailing revelations from Miller's emails while working as reporter at Breitbart News in which he promoted a number sources associated with white nationalist and racism); Dennis Carter, *It's Time to be Honest about Stephen Miller, Whose Radical Vision for U.S. Immigration is Spreading*, REWIRE NEWS (May 14, 2018), https://rewire.news/article/2018/03/14/time-honest-stephen-miller-whose-radical-vision-u-s-immigration-spreading/.

[7] *See* Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STANFORD L. REV. 197, 198-204 (2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-Stan.-L.-Rev.-Srikantiah-Sinnar.pdf (cataloging the President and other administration officials' statements and explaining how they were justified as part of a white nationalist project); *see also* Max Greenwood, *Trump on Removing Confederate Statues: "They're Trying to Take Away Our Culture,"* THE HILL (Aug. 22, 2017), https://thehill.com/homenews/administration/347589-trump-on-removing-confederate-statues-theyre-trying-to-take-away-our.

[8] *See, e.g.*, Reva Siegel and Duncan Hosie, *Trump's Anti-Abortion and Anti-Immigration Policies May Share a Common Goal*, TIME (Dec. 13, 2019), https://time.com/5748503/trump-abortion-immigration-replacement-theory/ (detailing how Trump Administration officials lauded Hungary's efforts to ensure more white women are procreating in order to ensure the country remains a majority white country); *see also* Jonathan S. Blake, *How Ethno-Nationalism Explains Trump's Early Presidency*, VICE (Feb. 26, 2017), https://www.vice.com/en_us/article/53qnxx/how-etho-nationalism-explains-trumps-early-presidency; Jayashri Srikantiah & Shirin Sinnar, *supra, note* ***Error! Bookmark not defined.***.

[9] *See, e.g.*, Jayashri Srikantiah & Shirin Sinnar, *supra, note* ***Error! Bookmark not defined.*** at 200–203.

Process.[10] However, in the absence of stated reasons for this rule, commentators cannot fully raise these concerns, which likely obscures the animus that connects these proposed changes with this administration's other immigration policies.

Nor can commentators assess whether the Notice may be motivated by statutorily impermissible justification of trying to deter legitimate immigration claims. *See Aracely, R. v. Nielsen*, 319 F.Supp.3d 110 (D.D.C. 2018) (agency cannot consider deterrence in evaluating parole requests); *R.I.L-R v. Johnson*, 80 F.Supp.3d 164 (D.D.C. 2015) (agency cannot deny bond in order to deter others).

The agencies have denied the public the opportunity to meaningfully comment on the proposed rule, by failing to clearly identify its purpose. Commentators cannot adequately assess whether the reasons for the proposed changes satisfy the Constitution and other statutory requirements, nor can they evaluate evidence to determine whether the rule is rationally related to any purpose. The agencies therefore must retract the rule from the Federal Registry — if they wish to proceed, they must reissue the rules with a clearly identified purpose and rationale.

II. Analysis of the Proposed Rule's Divergence from Constitutional, Statutory and Treaty Obligations

In the following section, ASAP analyzes each sections of the Notice in detail, noting in particular where the proposed changes would violate the INA, Due Process guarantees required under the Fifth Amendment, and the United States' international treaty obligations. The Notice suffers from myriad deficiencies, and in many instances, its proposed changes so deviate from statutory and constitutional requirements as to be *ultra vires*. ASAP urges the agencies to remove all of the offending and unlawful provisions of the Notice. Notably, because the legal and constitutional deficiencies of the rule are so sweeping and comprehensive, ASAP does not believe any of its specific provisions can be salvaged in their current form.

Section A: Expedited Removal and Screenings in the Credible Fear Process

Credible fear (CF) and reasonable fear (RF) screenings are exactly that – merely screenings. Screenings are conducted by asylum officers from the United States Citizenship and Immigration Services (USCIS). Given the complexity of the law, these officers are not equipped to, and cannot, handle full adjudication of claims for asylum,

[10] *See, e.g.*, Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900-24 (2012) (describing unconstitutional animus in Supreme Court equal protection cases).

withholding of removal under INA 241(b)(3) (WH or "withholding"), or protection under the Convention Against Torture (CAT). Furthermore, adjudication of asylum, WH and CAT claims require a fact intensive inquiry to determine a person's eligibility for these forms of protection.

The fundamental problem with requiring consideration of specific precedents and regulations, mandatory bars, etc. at the CF and RF stage (as the proposed regulations in Part A require) is that it is difficult, if not impossible, to do this correctly in accordance with the INA, Due Process required under the Fifth Amendment of the United States Constitution, and international treaty obligations at screenings, rather than full interviews or court hearings.

In so far as the proposed regulations in Part A attempt to squeeze too much into CF and RF screenings, DHS and DOJ risk violating the INA, Due Process, and international treaty obligations, which will result in more impact and individual litigation, with some courts refusing to give DHS and DOJ deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, depending on the issues. As we have already seen with litigation on the 2018 and 2019 Interim Final Rules, the impact and individual litigation to challenge these proposed regulations cause chaos that benefits no one, as different courts issue conflicting orders and injunctions, with no certainty for the asylum seekers, DHS, and DOJ. This likely outcome will cause the already overburdened immigration system to grind to a halt.

DHS and DOJ must address practical concerns related to the ability of asylum officers to adjudicate complex cases during what have been preliminary screenings, and the likelihood that this new process could violate statutory and constitutional rights of asylum seekers. Furthermore, the government must address the cost of likely litigation to challenge these proposed regulations as unlawful.

No retroactivity of asylum- and withholding-only proceedings

DHS and DOJ must amend the proposed regulation to clarify that it will not be applied retroactively to place people with positive CF into asylum-only or withholding-only proceedings rather than full removal proceedings under INA § 240. Since 1997, DHS has already placed millions of people whom it or DOJ have found to have positive CF into full removal proceedings. Several hundred thousand of these individuals are still in proceedings, given the backlog of cases pending in DOJ.

Due to no fault of their own, many asylum seekers have been waiting for years to have DOJ adjudicate their cases. Some subset of these individuals have since developed

significant ties to the United States, such as U.S. citizen or lawful permanent resident (LPR) families or U.S. employers who may be able to file immigrant petitions for them. If they are moved from full removal proceedings to asylum- or WH-only proceedings, they may be unable to become LPRs through their family or employment ties without having to return to countries where they may be in danger, as evidenced by their positive CF findings.

As the Supreme Court observed in the seminal case of *Bowen v. Georgetown University Hospital*:

> [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *See Brimstone R. Co. v. United States*, 276 U.S. 104, 122, 48 S.Ct. 282, 287, 72 L.Ed. 487 (1928) ("The power to require readjustments for the past is drastic. It ... ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

488 U.S. 204, 208-09 (1988). Given that the proposed regulations in Part A will upend the credible fear process that has been in effect for over two decades, DHS and DOJ must clarify that these changes will not apply retroactively to individuals who have already been found to have credible fear and been placed in full removal proceedings.

Role of precedents in the credible fear process

Proposed 8 C.F.R. section 1003.42(f) would require immigration judges to "apply relevant precedent issued by the Board of Immigration Appeals, the Attorney General, the federal circuit courts of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court." Such a mandate will harm CF applicants in a number of ways.

First, where there are circuit splits on issues involving asylum, WH, or CAT, DHS will be able to game the system by filing the Requests for Review with immigration courts in the circuits with law least favorable to the CF applicants, thereby preventing legitimate asylum seekers from passing CF review. In addition to encouraging DHS to game the system in this manner, proposed section 1003.42(f) will overload the immigration courts in the circuit court jurisdictions where DHS will choose to file the Requests for Review, thereby slowing down not only the CF and RF process, but also further overloading the

already overburdened immigration courts in those jurisdictions. That will harm all respondents in those immigration courts – many of whom are ASAP members – who have already been waiting for years to get their day in court. DHS and EOIR must address these concerns as they relate to basic ideas of fairness as well as agency operations.

Second, even where the precedent to be applied may be relatively clear, the application of precedents to a particular case require fact intensive inquiry under the law.[11] One such common situation in asylum and WH is determining whether nexus to one or more protected ground exists. As the federal courts have repeatedly held, "more than one central reason may, and often does, motivate a persecutor's actions," and "the assessment of a persecutor's motivation presents a 'classical factual question.'" *Cantillano Cruz v. Sessions*, 853 F.3d 122, 128 (4th Cir. 2017).

In order to accurately apply such circuit court precedents correctly in determining nexus, the immigration judge may need to conduct a fact specific review not very different than a full individual hearing. However, the application of precedents in a CF or RF screening – rather than a full USCIS asylum interview or a full individual hearing in immigration court – is a challenge, given the limited amount of time in such screenings, coupled with the complexity of evolving case law governing asylum, WH, and CAT. The result may be that some individuals will have their claims unfairly and prematurely rejected at the CF or RF review stage based on a cursory application of precedents that stem from full 240 removal proceedings.

Finally, current 8 C.F.R. section 208.30(e)(4) directs asylum officers to "consider whether the [noncitizen]'s case presents novel or unique issues that merit consideration in a full hearing before an immigration judge." The proposed rule eliminates this provision without any explanation. DHS and DOJ should reinstate this provision to ensure that viable asylum claims are not excluded, but at the very least, they must provide an explanation and justification for eliminating this provision.

Confusing and possibly conflicting CF screening and review process

Proposed 8 C.F.R. sections 208.30(e)/1208.30(e) create a complicated roadmap of the various bars to asylum and withholding that must be considered in the CF process. The proposed rule appears to make what types of protection the applicants can apply for in immigration court dependent on what happened in the CF screening process.

[11] *See infra* comments to Part C, Sections 1 (Particular Social Group), 4 (Nexus), 5 (Internal Relocation), 7 (Firm Resettlement), and 8 (Rogue Officials).

This may violate the applicant's due process and statutory rights under INA 208 and INA 235(b)(1)(B)(iii)(III), if the asylum officer's decision to place the applicant in WH-only proceedings (versus asylum- and WH- proceedings) cannot be reversed by an IJ during the asylum- and/or WH-only proceedings. For example, proposed section 208.30(e)(5)(i)(B) appear to limit anyone whom the asylum officer found to be subject to an asylum bar in the CF process from applying for asylum in immigration court. If there is an IJ review of the asylum officer's CF determination (including whether the asylum officer correctly placed the applicant in asylum- and WH-proceedings, versus just WH-only proceedings) under the proposed section 1003.42, the IJ will have the last word on whether the applicant is eligible to apply for asylum in immigration court.

What is disturbingly unclear is what happens under the proposed section 208.30(e)(5)(i)(B) if there was no IJ review of the asylum officer's determination that the applicant was subject to a mandatory bar to asylum and should therefore be placed in WH-only, rather than asylum- and WH- proceedings. If the immigration judge discovers during the WH-only proceedings that the asylum officer erred during the CF process in determining that the applicant was subject to a mandatory bar to asylum, that IJ should be able to expand the WH-only proceedings to asylum- and WH- proceedings, so that the applicant can apply for asylum, as well as WH and CAT. To do otherwise would violate INA 235(b)(1)(B)(iii)(III), INA 208, and Due Process by unlawfully limiting the applicant's right to apply for asylum based on unreviewable error committed by an asylum officer during the CF process. DHS and DOJ must explain the reason for choosing such an inflexible procedure, must consider the negative impacts on asylum seekers, legal aid providers and local communities as a result.

DHS and DOJ's discussion on the scope and timing of IJ reviews on these types of proceedings also appear to contradict itself. DHS and DOJ first state that "[i]n those proceedings, the [noncitizen] would have the opportunity raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations." 85 FR 36272. Yet just a couple of paragraphs later, DHS and DOJ state that "it is pointless and inefficient to adjudicate claims for relief in section 240 proceedings when it is determined that an [noncitizen] is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage," 85 FR 36272.

Neither the proposed rules nor the discussion address what happens to individuals whom asylum officers determine should be placed into WH-only, rather than asylum- and WH- only proceedings, where the asylum officer's determination was not reviewed by an IJ during the CF process. If the IJ in WH-only proceeding is bound by

the asylum officer's determination at the CF screening stage, that would violate INA 235(b)(1)(B)(iii)(III).

Such hopelessly confusing and muddled interactions among proposed sections 208.30, 1003.42, and 1208.30 on fundamental issues such as the scope and timing of IJ review of the CF process helps no one – not the asylum seekers, the asylum officers, the IJs, or even the attorneys for the United States Immigration and Customs Enforcement (ICE) who represent DHS in immigration courts – and will lead to more litigation even as people who should have been allowed to apply for asylum are limited to WH and CAT or worse, removed before they can exercise their legal right to apply for these protections. As such, DHS and DOJ should not move forward with the proposed process as outlined, but to the extent the government moves forward, it must provide a mechanism for reviewing and remedying mistakes made during the CF process regarding asylum eligibility.

Eliminates the presumption for immigration judge review

As part of the proposed rule change, DHS flips the presumption for IJ review of negative fear determinations in proposed sections 208.30(g)(1) and 208.31. **"**If the [noncitizen] refuses to make an indication, DHS shall consider such a response as a decision to decline review." This reverses the presumption in the current regulation that a refusal to make an indication "shall be considered a request for review." 8 C.F.R. section 208.30(g)(1) (2020).

In support of this change, DHS and DOJ claim – without any data or evidence – that "[g]iven that the [noncitizen] has been informed of his or her right to seek further review and given an opportunity to exercise that right, referring an [noncitizen] to an immigration judge based on a refusal to indicate his or her desire places unnecessary and undue burdens on the immigration courts." 85 FR 36273. Such cursory and unsupported assertions are insufficient to justify a decades long presumption that IJ review does not merit agency deference under *Chevron*. DHS and DOJ must provide data or evidence supporting this assertion.

Deprives applicants of the right to be interviewed in the language of their choice

The changes made to the CF process in Part A are all the more problematic based on a change in the regulations not discussed at all by DHS and DOJ. Proposed 8 C.F.R. section 208.30(d)(5) changes the standard for what language an asylum seeker will be interviewed in from "language chosen by the [noncitizen]" to "language the [noncitizen] speaks and understands."

This unexplained change will disproportionately harm asylum seekers from countries such as Guatemala, from where many individuals speak languages such as Mam, Quiche, and others in addition to (or instead of) Spanish. If the CF applicant can no longer choose to be interviewed in a language that they speak and understand best, and may be forced to proceed in any language that they simply "speak[] and understand[],"as proposed 8 C.F.R. 208.30(d)(5) states, then errors that will send people who are legally eligible for protection back to danger will greatly increase, particularly when the lack of choice in language will be combined with the complex new legal requirements imposed by these proposed regulations.

DHS and DOJ must provide reasoning and justification for this proposed change, especially in light of the harm it would likely cause to indigenous language speakers.

Section B: Form I-589, Application for Asylum, Withholding of Removal, Filing Requirements

The proposed changes to the I-589 form, and the broad authority given to adjudicators to pretermit and even find applications frivolous before a full hearing on the merits, constitute a significant and unjustifiable departure from the current asylum process. In practice, these proposed changes will make the initial asylum application much more difficult for all asylum seekers and create insurmountable barriers to the asylum process for many. The proposed changes in Section B conflict with the INA and Due Process under the Fifth Amendment of the United States, and ASAP therefore urges DHS and DOJ to withdraw them in their entirety.

If DHS and DOJ decide to keep any portion of Section B – "Form I–589, Application for Asylum and for Withholding of Removal, Filing Requirements" – the agencies should amend the regulations to clarify that no part of Section B will not apply retroactively to individuals who file or will file their I-589 forms before this rule goes into effect. Applying Section B retroactively would raise additional due process concerns because it would likely lead to some asylum applications being rejected based on changed law without notice of the changes and without giving the applicant a meaningful opportunity to challenge them.

Frivolous Applications

DHS and DOJ do not take sufficient care when outlining changes as they relate to the finding of a frivolous asylum application. The current penalty for knowingly filing a frivolous asylum application is permanent ineligibility for any immigration benefits,

other than withholding of removal under INA § 241(b)(3) and CAT protection. INA § 208(d)(6); 8 CFR 208.20, 1208.20 (2019). Given the severity of this penalty, any finding of a frivolous asylum application must be made more carefully and with greater protections than are currently outlined in the Notice.

"Willful blindness" does not equal "knowingly"

Under INA § 208(d)(6), the penalty for filing a frivolous asylum application may be applied only after the Attorney General determines that the applicant "knowingly" made a frivolous asylum application. Notwithstanding the clear language of the statute, however, DHS and DOJ would expand "knowingly" to include "willful blindness" in the proposed 208.20(a)(2)/1208.20(a)(2).

DHS and DOJ do not define "willful blindness" in the proposed 208.20(a)(2)/ 1208.20(a)(2). In their discussion of the proposed regulation, they cite only one case – *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769-70 (2011) – a patent infringement case, in support of expanding the statutory requirement of "knowingly" to include "willful blindness." In doing so, DHS and DOJ twist the willful blindness requirement arising from a patent infringement case in order to apply it to the entirely different context of whether an asylum applicant filed a frivolous application.

The standard for willful blindness in *Global-Tech* is that "(1) the defendant must *subjectively believe* that there is a high probability that a fact exists, and (2) the defendant must take *deliberate actions* to avoid learning that fact." *Global-Tech* at 767 (emphasis added). DHS and DOJ misapply this standard to frivolous asylum as "*aware[ness]* of a high probability that his or her application was frivolous and *deliberately avoided* learning otherwise." 85 FR 36273 (emphasis added).

As the above comparison clearly show, DHS and DOJ leave out the subjective belief required in the first element of *Global-Tech*. Instead, the Departments' discussion only requires "awareness of a high probability that his or her application was frivolous." Likewise, DHS and DOJ alter "deliberate action" required in the second element of *Global-Tech* to "deliberate avoid[ance]."

Given the clear statutory mens rea requirement of "knowingly" in INA § 208(d)(6), coupled with the harsh penalty of permanent ineligibility for virtually all immigration relief, DHS and DOJ should not be allowed to expand "knowingly" to include "willful blindness" based on a cursory citation to a patent infringement case that sheds no light on how "knowingly" may be expanded to include "willful blindness" in filing a frivolous asylum application.

Unwarranted expansion of what constitutes "frivolous"

Proposed 8 CFR 208.20(c)(3), (4)/1208.20(c)(3), (4) expands the what constitutes a frivolous asylum application to include those "filed without regard to merits of the claim," or "clearly foreclosed by applicable law."

The federal courts have long observed that immigration laws are "second only to the Internal Revenue Code in complexity." *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal quotation omitted). Yet the proposed expansion would impermissibly penalize asylum applicants who cannot and would not know the complexities of immigration law, or risk being permanently barred from virtually all immigration relief.

Pro se asylum applicants

The injustice of applying such an expanded definition of what constitutes "frivolous" is self-evident when it comes to unpresented asylum applicants. DHS and DOJ cannot and do not explain how pro se asylum applicants would know the "merits of [their] claim" or whether their claim is "clearly foreclosed by applicable law." Asylum applicants who cannot afford a lawyer must prepare and file their application on their own, trying to do the best that they can by relying on families, friends, or even strangers who appear knowledgeable to them. This means that pro se asylum applicants sometimes consider claims that they heard were successful and sound similar to their own experiences, without knowing the legal merits of such claims, or whether they are clearly foreclosed by applicable law.

It is one thing to deny such asylum applications on substantive legal grounds. But it is entirely another to permanently bar unrepresented asylum applicants from virtually all immigration relief by finding their application to be frivolous if they happen to contain claims that lack merit or are clearly foreclosed by applicable law. This is a harsh and unfair provision that discriminates against asylum seekers who lack legal counsel, and therefore DHS and DOJ should withdraw these proposed changes.

Chilling effect on pro se assistance

ASAP currently helps unrepresented asylum seekers in removal proceedings file I-589s pro se,[12] as do other nonprofits around the country. Because work authorization

[12] Pro se assistance is permissible, and ASAP follows the contours of the settlement agreement in *NWIRP v. Sessions*, 2:17-cv-00716-RAJ (W.D. Wash. Apr. 17, 2019) to provide pro se assistance.

is tied to the filing of an I-589, many asylum seekers do not have the means to pay for private attorneys to prepare their I-589s. And nonprofits, like ASAP, do not have the capacity to provide full representation to all the asylum seekers in removal proceedings who need an attorney. As a result, the provision of pro se legal services is one of the only ways that many asylum seekers are able to access the defensive asylum process.

For nonprofits providing pro se assistance, this rule change will make it difficult to continue to meet this need. Currently, ASAP aims to provide basic information about the asylum process and then help the asylum seeker fill out the factual basis of their claim in response to the questions on the I-589 form. ASAP does not help the asylum seeker articulate specific particular social groups, nor does ASAP help the person include country conditions or expert evidence. This is because asylum seekers have been able to supplement their cases with a full body of evidence closer to their individual hearing date. The proposed I-589 has increased from 12 pages to 16 pages and includes questions that require legal analysis and an understanding of the complicated law on particular social groups. It will take substantial effort for ASAP to adapt its pro se program to help pro se individuals include the new required information, and the changes will substantially decrease the number of I-589s ASAP could do.

Even if ASAP could adapt our program to help asylum seekers understand the law enough to fill out the proposed complex I-589, ASAP would still have to help pro se asylum seekers explain why their claim isn't foreclosed by existing precedents to avoid a finding of frivolousness, which could lead them to be barred from immigration benefits. In that state of the world, ASAP would have to evaluate whether it would be feasible for us to continue to provide pro se assistance on I-589s at all. These proposed changes would cause a chilling effect on pro se assistance for I-589s, which would limit access to the asylum process for individuals in removal proceedings who lack counsel.

DHS and DOJ have also not made clear what purpose these changes serve in the defensive asylum context. Many unrepresented asylum seekers will still be in removal proceedings regardless of how difficult DHS and DOJ make it to submit the asylum application. Asylum seekers will therefore still need substantial assistance with the form, especially because it is only in English. If pro se assistance is not available, then unrepresented asylum seekers will have to turn to other sources for information and help. They will likely request more assistance and explanation from immigration judges and court staff, or their ICE officers. Or they may try to get assistance from *notarios*, or unlicensed individuals posing as attorneys, which will lead to misinformation. Either way, this will cause a substantial additional burden on DOJ and DHS, which the agencies have failed to address in the Notice.

DOJ itself has recognized the importance of the provision of basic legal information for the efficiency of the immigration court system. On EOIR's website offering self-help materials, EOIR has recognized that "respondents who have access to basic information require less assistance from court staff and are better prepared when they appear before an immigration judge. In addition, immigration judges can directly refer unrepresented respondents to the centers and the respondent can then obtain helpful information."[13] A more complicated form that forecloses pro se assistance will create inefficiency and confusion in immigration court.

However, DOJ and DHS made no attempt to address the importance of pro se assistance and the provision of basic legal information in the Notice. DOJ and DHS should provide an analysis of how the substantial changes to the I-589 form, coupled with the adjudicators' broadened authority to find applications frivolous or pretermit them, will affect the provision of pro se legal services for applicants in removal proceedings. DOJ and DHS should also evaluate the current benefit of such services, and the cost to the immigration system if they were no longer available.

Represented asylum applicants

Even for asylum applicants who are represented by counsel, DHS and DOJ fail to explain how these asylum applicants would know enough about the "merits of [their] claim" or whether their claim is "clearly foreclosed by applicable law" to control the actions of their attorneys. Proposed 8 CFR 208.20(c)(3-4)/1208.20(c)(3-4). Rather than grappling with this difficult issue, DHS and DOJ simply assert in footnote 20 of their discussion that "[i]f an [noncitizen] acts through an agent, the [noncitizen] will be deemed responsible for actions of the agent if the agent acts with apparent authority." 85 FR 36275, n. 20. The footnote then continues that "[i]f the [noncitizen] has signed the asylum application, he or she shall be presumed to have knowledge of its contents regardless of his or her failure to read and understand its contents." 85 FR 36276. For this proposition DHS and EOIR cites 8 CFR 208.3(c)(2)/1208.3(c)(2).

8 CFR 208.3(c)(2)/1208.3(c)(2) has been traditionally used to bind asylum applicants to the facts stated in asylum applications, regardless of who prepared the application. It is one thing to require asylum applicants to read their application and know what it says factually, although even that may be a challenge for applicants who have recently arrived in the United States and do not read English or even their own native language. However, it is entirely another thing to make asylum applicants

[13] U.S. Department of Justice, Executive Office for Immigration Review, Self-Help Materials, https://www.justice.gov/eoir/self-help-materials (last updated Aug. 1, 2019).

responsible for knowing U.S. immigration law, such as which asylum claims may have merit, or whether a claim is "clearly foreclosed by applicable law." Proposed 8 CFR 208.20(c)(4)/1208.20(c)(4)

As with anyone who hires lawyers, asylum applicants rely on their lawyers to know the law. It is one thing to deny asylum because the applicant, through their attorney, presented claims that lack merit. But it is entirely another thing to make asylum applicants permanently ineligible for any relief under our immigration laws because they have the misfortune of hiring an attorney or a *notario* who file asylum applications with USCIS so that they can be placed in removal proceedings, or raises claims that are foreclosed by applicable law. Moreover, even where the asylum applicants are represented by competent and knowledgeable counsel, the threat of a frivolous asylum finding may prevent both the applicants and the attorneys from raising cutting edge arguments that an adjudicator could potentially find to be without merit or clearly foreclosed by applicable law, and therefore frivolous.

Pressure for asylum applicants to withdraw I-589s under threat of frivolous finding

Proposed 208.20(f)/1208.20(f) allows asylum applicants to withdraw applications that may be found frivolous if they 1) withdraw it with prejudice; 2) accepts voluntary departure of 30 days or less if eligible under INA 240B(a); 3) withdraws any and all other applications for relief with prejudice; and 4) waives their right to appeal or a motion to reopen or reconsider. In the discussion, DHS and DOJ claim that these measures would "ameliorate the consequences of knowingly filing a frivolous asylum application." 85 FR. 36277.

One, it is unclear whether the broad bars of proposed 208.20(f)/1208.20(f) may run afoul of the applicants' due process rights, as well as their statutory rights under INA 208 and 240(b)(4), (c)(7), given the lack of exceptions for ineffective assistance of counsel or other changes circumstances.

Two, proposed 208.20(f)/1208.20(f) will likely be used by DHS, DOJ and even unscrupulous applicants' attorneys to pressure applicants to withdraw their asylum applications if DHS or DOJ threaten to find that the application is frivolous.

DHS and DOJ must address the potential for a chilling effect these proposed changes will have on legitimate asylum applications, especially in cases where an asylum seeker is raising novel legal claims or unique facts. DHS and DOJ should also provide statistics for the number of unrepresented asylum seekers, and consider the effects of

these changes on their ability to access the asylum process or defend themselves in removal proceedings.

Pretermission of Legally Insufficient Applications

Proposed 8 CFR 1208.13(e) would create a brand new regulation that would require ("shall") immigration judges to "pretermit and deny" any application for asylum, withholding of removal under INA § 241(b)(3), and CAT protection upon oral or written motion by DHS ((e)(1)) or on the judges' own authority ((e)(2)) if the applicant "has not established a prima facie claim for relief or protection under applicable law."

No guidance on what "a prima facie claim for relief or protection under applicable law" means

Proposed 1208.13(e) gives no guidance to immigration judges or the parties on what "a prima facie claim for relief or protection under applicable law" means. DOJ also fails to explain what this means in the discussion, but simply uses terms such as "purely legal issues," "legally sufficient," and "legally deficient asylum applications" (terms which may conflict with one another) interchangeably with "a prima facie claim for relief or protection under applicable law."

DOJ provides only two concrete, but cursory, examples of situations where it believes that pretermission would be required under the proposed regulation. The first example is a quote from the Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018). "Of course, if an [noncitizen]'s asylum application is fatally flawed in one respect – for example, for *failure to show membership in a proposed social group* … an immigration judge or the Board need not examine the remaining elements of the asylum claim." *A-B-* at 340, FR 36277. (emphasis added).

The second example is a citation to an unpublished decision from the U.S. Court of Appeals for the Second Circuit where, according to DOJ, the court found that "pretermission of an asylum application due to a *lack of a legal nexus to a protected ground* was not a due process violation".FR at 36277 (describing the holding of *Zhu v. Gonzales*, 218 F. App'x 21, 23 (2d Cir. 2007)) (emphasis added).

But even the examples used by DOJ itself in the discussion are not "purely legal issues." DOJ precedents require the applicants to provide significant oral and written evidence to establish these elements. For example, in the section entitled "Evidentiary Burdens," the BIA observed in *Matter of M-E-V-G-*, a seminal decision on establishing particular social group, that:

> [T]he applicant has the burden to establish a claim based on membership in a particular social group and will be *required to present evidence that the proposed group exists* in the society in question. The evidence available in any given case will certainly vary. However, a successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart from the society in some particular way. *Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists* and is perceived as "distinct" or "other" in a particular society. 26 I&N Dec. 227, 244 (BIA 2014) (emphasis added).

Yet DOJ (or DHS and DOJ, since it states "the Departments"[14]) observes in a footnote that "the Departments do not believe that requiring a sufficient level to determine whether or not an [noncitizen] has a prima facie case for asylum, statutory withholding of removal, or protection under CAT regulations would necessarily require a voluminous application." 85 FR 36277 n. 26. However, the "evidentiary burden" for establishing a particular social group described by the BIA in *M-E-V-G-* directly contradict "the Departments" assertion that a "voluminous application" will not be required to survive pretermission under the proposed regulation.

DOJ cannot lawfully pretermit I-589s without giving applicants the opportunity to present testimony in immigration court.

Furthermore, showing the existence of a particular social group is just one of many situations in which evidence, often testimony, is required to establish eligibility for asylum, withholding, and CAT. The other example that DOJ gives in the discussion is nexus. To establish nexus, asylum applicants must show that religion, nationality, race, political opinion, or membership in a particular social group is at least one central reason why the persecutor did harm or will attempt to harm them. INA 208(b)(1)(B)(i). As the U.S. Court of Appeals for the Fourth Circuit has observed, this "assessment of a persecutor's motivation presents a 'classic factual question.'" *Cantillano Cruz*, 853 F.3d at 128.

[14] It is worth noting that DOJ is speaking in one voice with DHS, who is one of the two parties in immigration courts, on the proposed regulation that would require pretermission of the opposing party's application. Under these circumstances, it is unclear how DOJ can possibly argue that it can impartially and fairly adjudicate issues involving this proposed regulation in immigration courts and before the BIA.

Because the evidence required to establish nexus is necessarily specific to the respondent and what happened between them and the persecutors, testimony from the respondent and witnesses, if any, is almost always necessary to answer this classic question of fact. Given the lack of guidance in the proposed 1208.13(e) or DOJ's discussion, it is unclear how any asylum application where nexus is an issue can be pretermitted on that ground without an evidentiary hearing, notwithstanding its cursory citation to an unpublished Second Circuit case.

If DOJ intends to use the proposed 1208.20 to pretermit and deny I-589 applications without giving applicants the full opportunity to present testimonies from themselves and witnesses, it will violate the applicants' due process rights under Fifth Amendment of the U.S. Constitution, as well as the applicants' statutory rights under INA 240(b)(4)(B). *See e.g. Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020) (IJ violated asylum seeker's due process rights by rejecting her claims without first providing her with an opportunity to testify again on remand); *Al Khouri v. Ashcroft*, 362 F.3d 461 (8th Cir. 2004) (IJ violated the respondent's due process rights by limiting his testimony and circumscribing his ability to elaborate on the details of his claim by instructing him only to answer the questions asked).

Pretermitting asylum applications before a full individual hearing will also unlawfully interfere with the applicants' ability to meet their burden of proof for asylum under INA § 208(b)(1)(B). INA § 208(b)(1)(B)(i) directs the applicant "to establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." Under INA § 208(b)(1)(B)(ii), the respondent must "satisf[y] the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." The respondent must also "provide evidence that corroborates otherwise credible testimony … unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

To ensure that the respondent has the opportunity to meet this burden of proof, INA 240(b)(4)(B) gives respondents "a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen]'s own behalf, and to cross-examine witnesses presented by the Government."

Given the plain language of the proposed 1208.20, coupled with the truncated discussion justifying the proposed regulation, it is unclear how asylum applications can be pretermitted without violating the respondents' rights in removal proceedings under

INA § 240(b)(4)(B) and without interfering with their ability to meet their burden of proof for asylum under INA § 208(b)(1)(B).

DOJ does not understand the difference between questions of law, questions of fact, and mixed questions of law and fact.

Finally, DOJ either misunderstands or misapplies 8 CFR 1240.11(c) in their discussion. 1240.11(c)(3) states that I-589s filed in immigration courts "will be decided by the immigration judge… after an evidentiary hearing to resolve factual issues in dispute." While DOJ cites this exact language in 1240.11(c)(3) with the term "factual" highlighted (85 FR 36277), it goes on to claim without any support that "[n]o existing regulation requires a hearing when an asylum application is legally deficient." *Id.*

As discussed above, most issues in asylum, withholding, and CAT (including the two examples given by DOJ involving PSGs and nexus), are questions of fact or mixed questions of law and fact, requiring the submission and examination of written and oral evidence. Contrary to DOJ's unsupported assertion, the plain language of 1240.11(c)(3) requires "an evidentiary hearing" if there are any "factual issues in dispute." As previously discussed, PSG and nexus necessarily involve facts specific to the applicants, the persecutors, and/or their countries and are therefore present "factual issues in dispute."

DOJ's reliance on *Abudu* to support pretermission is misplaced.

The only other analogy that DOJ relies on for pretermission is motion to reopen, citing *INS v. Abudu*, 485 U.S. 94, 104 (1988). In *Abudu*, the Supreme Court states that:

> [W]e granted certiorari … *not to decide the substantive issues of what constitutes a prima facie case for establishing eligibility for asylum* on the basis of a well-founded fear of persecution, or of what standard of review applies, either initially or on motion to reopen, when the BIA rests its grant or denial of relief squarely on prima facie case grounds, *but rather to determine the standard a Court of Appeals must apply when reviewing the BIA's conclusion that an [noncitizen] has not reasonably explained his failure to assert his asylum claim at the outset. Id.* (emphasis added).

Yet DOJ cites *Abudu* in claiming that "pretermission due to a failure to establish prima facie legal eligibility for asylum is akin to a decision by an immigration judge or the BIA denying a motion to reopen to apply for asylum on the same basis," 85 FR 36277,

notwithstanding the clear language of the Supreme Court in *Abudu* describing the scope of its decision to the contrary.

Proposed 1208.20(e) violates Due Process and INA 240(b)(4)(B).

Finally, proposed 1208.20(e)(1) states that immigration judges "must consider any response to [DHS written or oral] motion before making a decision," but provides no timeframes or procedures for doing so. More disturbingly, proposed 1208.20(e)(2) states that immigration judges should give "at least 10 days' notice" before pretermitting an I-589 application and "must consider any filings by the parties within the 10-day period" before issuing a decision.

First, proposed 1208.20(e)(2) does not require immigration judges to state the reasons why they believe the applications should be pretermitted. But unless the immigration judges specify the grounds on which the applications may be pretermitted, the parties will have no idea what issues they should address and/or what evidence they should present.

Second, assuming that parties will even receive the judge's notice to pretermit the application before the 10 day period passes, it is utterly unreasonable to give parties 10 days or less to gather any necessary evidence and prepare a written brief to present their case on whether an application should be pretermitted. To pretermit applications under these circumstances would certainly be a violation of the applicants' due process rights, as well as their statutory rights to present their case under INA § 240(b)(4)(B). DHS and DOJ should therefore withdraw the proposed changes regarding pretermission in their entirety

Section C: Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal

The proposed changes in Section C would significantly alter substantive law on asylum, withholding of removal, and the Convention Against Torture (CAT) to make it nearly impossible for applicants to be granted protection. DHS and DOJ did not provide adequate analysis in proposing these sweeping changes, which contradict well-established principles and precedents. ASAP urges the agencies to withdraw the proposed changes in Section C to ensure that asylum, withholding of removal, and CAT remain available as potential avenues of relief for individuals fleeing harm.

If DHS and DOJ decide to move forward with any portion of Section C, the agencies should at least amend the regulations to clarify that none of the changes will

apply retroactively to individuals who file or will file their I-589 forms before this rule goes into effect. There is a longstanding presumption against retroactivity in American jurisprudence, which cautions against retroactively applying a new legal standard without an opportunity to address it. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *Retail, Wholesale & Dep't Store Union v. N.L.R.B.*, 466 F.2d 380, 390 (D.C. Cir. 1972). Many individuals have already prepared and submitted their I-589s and supporting evidence based on the expectations created through long-standing caselaw, and it would unjust to apply the drastic proposed changes to their cases retroactively.

The Notice Conflicts with BIA and Federal Court Caselaw on Membership in Particular Social Groups (PSGs)

Three-part test for PSGs

The first part of the proposed 8 CFR 208.1(c)/1208.1(c) codifies the three-part test for particular social group (PSG) under the 2014 BIA decisions in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). It also adds the requirement that the proposed PSG "cannot be defined exclusively of the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim."

While DHS and DOJ assert in their discussion that the proposed 208.1(c)/1208.1(c) "codify the longstanding requirements," they either ignore or at best pay lip service to federal court precedents that have explicitly rejected DOJ's PSG analysis. For example, DHS and DOJ fail to mention, much less discuss, the U.S. Court of Appeals for the Seventh Circuit's continuing rejection of the three-part test. *See e.g. Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc).

List of disfavored claims masquerading as PSGs

DHS and DOJ also fail to acknowledge and meaningfully deal with federal court precedents that they disagree with in their discussion of the second part of the proposed 8 CFR 208.1(c)/1208.1(c). This part of the proposed regulation is a list of claims that DHS and DOJ "in general would not favorably adjudicate." The "non-exhaustive" list is as follows:

1. Past or present criminal activity or association (including gang membership);
2. Presence in a country with generalized violence or a high crime rate;
3. Being the subject of a recruitment effort by criminal, terrorist, or persecutory groups;

4. Targeting of the applicant for criminal activity for financial gains based on perceptions of wealth or affluence;
5. Interpersonal disputes of which governmental authorities were unaware or uninvolved;
6. Private criminal acts of which governmental authorities were unaware or uninvolved;
7. Past or present terrorist activity or association;
8. Past or present persecutory activity or association; or
9. Status as an [noncitizen] returning from the United States.

85 FR at 36279.

First, the plain language of the proposed 208.1(c)/1208.1(c) makes it clear that the items on this list are not PSGs, but rather types of claims that DHS and DOJ do not like. Second, even if some of the claims on this disfavored list can be construed to fit under existing DOJ or federal court precedents governing PSGs, the broad and imprecise descriptions of the claims on this list make it difficult to determine whether these "groups" have in fact been addressed in existing precedents. For example, DHS and DOJ fail to cite any precedents to justify the inclusion of "past or present terrorist activity or association," or "past or present persecutory activity or association." 85 FR at 36279. Third, DHS and DOJ fail to mention, much less analyze and meaningfully address, federal court precedents that have explicitly held that the "groups" on the disfavored list may in fact constitute PSGs under certain case and/or country-specific circumstances.[15]

DHS and DOJ's failure to engage with existing precedents governing PSGs is fatal to this "general" list of disfavored "groups," because PSG determination is intended to be case-specific. As the BIA observed in *Acosta* over three decades ago, "[t]he particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). Given the case specific nature of PSG determinations, DHS and DOJ cannot simply create a list of claims that they do not like, then assert that these types of cases are "generally insufficient to demonstrate a particular social group that is cognizable" without providing sufficient legal and/or factual justifications that would override the

[15] Following is a necessarily partial and cursory list of such precedents, given the extremely limited amount of time that DHS and DOJ gave to stakeholders for comments on a rule which will transform virtually every aspect of the law governing asylum, withholding, and CAT. Former gang members – *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014); *Oliva v. Lynch*, 807 F.3d 53 (4th Cir. 2015); *Urbina Mejia V. Holder*, 597 F.3d 360 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). Witness to criminal activities – *Henriquez Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc); *Gashi v. Holder*, 702 F.3d 130 (2d Cir. 2012); *Garcia v. U.S. Att'y Gen*, 665 F.3d 496 (3d. Cir. 2011). Land ownership – *Cordoba v. Holder*, 726 F.3d 1106 (9th Cir. 2013); *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014).

longstanding case-specific nature of PSG determinations. *See Ordonez-Azman v. Barr*, No. 17-982-ag at 14 (2d Cir. July 13, 2020) (stating that the BIA "appear[ed] to have imposed a general rule, untied to any specific country or society" in analyzing a particular social group related to former gang members and "[i]f so, failed to adhere to its own precedents disclaiming per se rules and requiring a fact-based inquiry into the views of the relevant society...").

Finally, while DHS and DOJ claim in the discussion that "the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact and society specific nature of this determination," this is not clear in the regulatory language. First, DHS and DOJ fail to explain why PSGs may be found only in "rare circumstances," given the existing federal court precedents that have found PSGs in circumstances that appear on the list of disfavored claims. Second, the existence of a generally disfavored claims list, coupled with the lack of explicit regulatory language that PSG determination is case-specific, will confuse and mislead Immigration Judges and Asylum Officers into categorically denying all claims that they believe are on the disfavored list, without taking into account "the fact- and society-specific nature" in each case as they are required to do under longstanding federal court and DOJ case law governing PSG determination.

The list of generally disfavored claims is particularly dangerous in combination with some of the other proposed regulations in this Notice. For example, DHS and DOJ fail to provide any guidance to Asylum Officers and Immigration Judges on whether or how they should use this list of disfavored claims in relation to the credible fear process, pretermitting an asylum application before a full individual hearing, or issues of frivolousness. Using this list of disfavored claims to deny credible or reasonable fear, pretermit an I-589 application, or find an asylum application to be frivolous would violate the applicants' constitutional right to Due Process under the Fifth Amendment and their statutory right to present evidence in removal proceedings under INA 240(b)(4)(B) for the following reason set forth by the BIA:

> [T]he applicant has the burden to establish a claim based on membership in a particular social group and will be required to present evidence that the proposed group exists in the society in question…. Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as "distinct" or "other" in a particular society.
>
> *M-E-V-G-*, 26 I&N Dec. at 244.

However, such a heavy evidentiary burden to establish PSG cannot and should not be met at the credible or reasonable fear screening. Nor should an asylum application be pretermitted or found to be frivolous prior to an individual hearing in immigration court based on the above generalized list of disfavored claims. To do any of these things before the applicant has had "a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen]'s own behalf, and to cross-examine witnesses presented by the Government" would deprive the applicants of their constitutional right to Due Process and their right to meet the burden of proving that a PSG exists in their particular case under INA § 240(b)(4)(B).

DHS and DOJ must ensure that applicants have the opportunity to fully present their evidence regarding membership in a particular social group in an individual hearing before an Immigration Judge. DHS and DOJ should remove this list of disfavored claims.

Procedural requirements specific to PSG claims

The third part of the proposed 208.1(c)/1208.1(c) is what DHS and DOJ describe as "procedural requirements specific to asylum and withholding claims premised on a particular social group." Specifically, that part of the proposed regulation states that:

> No [noncitizen] shall be found to be a refugee or have it decided that the [noncitizen]'s life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.

DHS and DOJ claim that this is a codification of the recent BIA precedent in *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018). However, the language in proposed 208.1(c)/1208.1(c) is far broader in scope than *W-Y-C- & H-O-B-*, which is limited to whether new PSGs can be raised on appeal to the BIA.

As with the second part of the proposed 208.1(c)/1208.1(c), denying asylum and statutory withholding to people who cannot "articulate on the record, or provide a basis on the record for determining, the definition and boundaries of the alleged particular social group" *unless and until the applicants have had the full opportunity given to them*

under the law to present evidence would violate INA §§ 208, 241(b)(3), 240(b)(4), and 240(c)(6) and (7).

Given the explicit reference to "an immigration judge," no PSGs may be waived under proposed 208.1(c)/1208.1(c) during credible or reasonable fear process, or during affirmative asylum process before USCIS. As with the second part of the proposed 208.1(c)/1208.1(c), the applicants' rights under INA § 240(b)(4)(B) to present evidence, coupled with their burden to provide evidence to establish PSGs under *M-E-V-G-*, should prevent any immigration judge from waiving any possible PSGs unless and until the applicants have had a full individual hearing where they can present documents and testimony. To do otherwise would violate the applicants' rights under INA § 240(b)(4)(B) and Due Process to present evidence regarding PSGs.

Likewise, for the reasons discussed below, even after a full individual hearing on the respondents' application for asylum and statutory withholding, applicants may not be barred from proposing new PSGs in motions to reopen or reconsider.

Proposed 208.1(c)/1208.1(c) states that "any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim for ineffective assistance of counsel." However, applicants in immigration courts have long had a right to file motions to reopen or reconsider that have since been codified in statute and regulations. INA § 240(c)(6) governs motions to reconsider. The only statutory limitation on the content of motions to reconsider is that they "shall specify the errors or law or fact in the previous order and shall be supported by pertinent authority." INA § 240(c)(7) governs motions to reopen. The only statutory limitation on the content of motions to reopen is that they "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." *Id.*

For purposes of agency deference under Chevron, the statutory language is clear. There is nothing in INA § 240(c)(6) and (7) that allows DHS and DOJ to arbitrarily limit the content of motions to reconsider or reopen by barring the introduction of new PSGs, as long as the motions meet the other requirements of INA § 240(c)(6) and (7).

This is particularly the case with motions to reopen based on ineffective assistance of counsel, which are explicitly singled out in the proposed 208.1(c)/1208.1(c). Immigrants have long had a right to counsel of their choosing at no expense to the government, again since codified in the statute and regulations. INA § 240(b)(4)(A), 8 CFR Part 292; *See also Olvera v. INS*, 504 F.2d 1372 (5th Cir. 1974). Immigrants' right to

file motions to reopen based on ineffective assistance of counsel have long been recognized in immigration law. *See e.g. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

Counsel's failure to "articulate on the record, or provide[] a basis on the record for determining, the definition and boundaries of the alleged particular social group" would constitute ineffective assistance of counsel even under current law given *Matter of W-Y-C- & H-O-B-*, and even more so if the proposed 208.1(c)/208.1(c) goes into effect. Yet notwithstanding the devastating consequences of such ineffective assistance of counsel to the applicants, DHS and DOJ fail to explain why and how the law would permit them to categorically bar motions to reopen based on ineffective assistance of counsel under these circumstances, when such bar would be a clear violation of applicants' due process and statutory rights under INA § 240.

The only justification that DHS and DOJ provide in the discussion is "to encourage the efficient litigation of all claims" and "to avoid gamesmanship and piecemeal analyses." Again, such arguments fail to address the legal defects with the blanket bar on the introduction of new PSGs in motions to reopen or reconsider discussed above. Even as policy, such limited conclusory claims unsupported by evidence argue against giving any deference to DHS and DOJ on this issue. The closest thing to law cited by DHS and DOJ is 8 CFR 1003.23(b)(3), which is limited to discretionary relief and therefore does not apply to statutory withholding, which would also be affected by the proposed 208.1(c)/1208.1(c).

ASAP represents a mother and children who were denied asylum and withholding of removal after prior counsel failed to adequately investigate and present their claims, including by failing to argue for viable particular social groups. Our clients successfully submitted a Motion to Reopen to the BIA. The BIA found that the prior counsel's "deficiencies prevented complete presentation of [their] claims and full representation of their case" and remanded the case for further proceedings. On remand, the IJ denied their claims without a hearing and based solely on the written record. In so doing, the IJ prevented ASAP's clients from remedying their prior counsel's deficiencies, and again deprived them of a full and fair hearing on their claims. In fact, the Fourth Circuit recently left little doubt that an IJ's failure to provide an asylum seeker a meaningful opportunity to present probative evidence of their claims on remand violates basic due process protections. *See Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020) (IJ violated asylum seeker's due process rights by rejecting her claims without first providing her an opportunity to testify again on remand). A new hearing on the merits is essential to ensure that ASAP's clients, and similarly situated individuals, have the opportunity to correct the factual and legal deficiencies caused by prior ineffective counsel and fully present their claims for relief for the first time. DOJ and DHS should therefore remove the language barring motions to reopen or reconsider.

The Notice Introduces an Inappropriately Limited Definition of Political Opinion

Proposed 8 CFR section 208.1(d)/1208.1(d) redefines "political opinion" as "one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to a state or unit thereof." 85 FR at 36300.

One, the new definition of "political opinion" is unclear. What exactly does "an ideal or conviction in support of the furtherance of a discrete cause related to a state or unit thereof" mean? DHS and DOJ provide a long list of what "political opinion" is not in the second part of the proposed regulation, but the agencies fail to provide any guidance to the applicants or the adjudicators as to what this confusing new definition means.

Two, the plain language of this definition of political opinion is too narrow. To limit the definition of political opinion to "an ideal or conviction in support of the furtherance of a discrete cause *related to political control of a state or a unit thereof*, 85 FR at 36300, goes beyond any existing federal court or DOJ precedents governing political opinion, including *Saldarriaga v. Gonzales*, 402 F.3d 461, 467 (4th Cir. 2005), the only case cited by DHS and DOJ in support of the new limited definition of political opinion. In *Saldarriaga*, the Fourth Circuit stated that "whatever behavior an applicant seeks to advance as political, it must be motivated by *an ideal or conviction of sorts* before it will constitute grounds for asylum." *Id.* at 466 (emphasis added). However, it did not tie the "ideal or conviction of sorts" in any way to "political control of a state or a unit thereof," as the proposed 208.1(d)/1208.1(d) attempts to do.

A political opinion need not involve "political control of a state or a unit thereof." To use a very current example in the United States, people across the political spectrum have been reacting to the killing of George Floyd and other Black individuals by the police. However, depending on where people are on the political spectrum, they are not likely to agree on whether or how such killings should be addressed, much less who should have "political control of a state or a unit thereof." Some may not even have a preference for what, if anything, ought to be done, and are simply expressing their opinions. But all those reacting to these killings by engaging in whatever speech and activities that they see fit have political opinions and are engaging in political activities, by any common understanding of the terms "political opinion" and "political activity."

Moreover, DHS and DOJ's proposed limitations would define political opinion much more narrowly than it is understood in the context of core First Amendment jurisprudence; courts have long-held that a diverse set of activities, including organizing by minority groups outside of the official channels of state sanctioned political parties,

constitutes core political speech. *See*, *e.g.*, *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L. Ed. 2d 405 (1963) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. *Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents*. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups …[citations omitted]. The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, *at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society*. For such a group, association for litigation may be the most effective form of political association.") (emphasis added).

DHS and DOJ should provide justification for why their proposed changes to political opinion in the asylum context differ so greatly from the general understanding of political opinion, from previous case law on political opinion asylum claims, and from the concept of political speech under the First Amendment.

Set of Disfavored Claims

As with PSGs, the second part of proposed 208.1(d)/1208.1(d) is another set of claims that DHS and DOJ "in general will not favorably adjudicate." Such claims include:

> [C]laims of [noncitizen]s who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.

84 FR 36291.

As with the new definition of political opinion, this part of the proposed 208.1(d)/1208.1(d) is confusingly written and therefore difficult to understand. One, the plain language of the proposed regulation appears to bar "in general" all political opinion claims based on "generalized disapproval of, disagreement with, or opposition to … *non-state organizations*." (emphasis added). In support of barring political opinion

claims involving non-state organizations, DHS and DOJ state that "BIA case law makes clear that a political opinion involves a cause against a state or political entity, rather than against a culture," but only cite a single BIA case from 1996 in support of this proposition. *Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996). 85 FR at 36279.

However, *S-P-* does not support DHS and DOJ's assertion. *S-P-* did not involve a political opinion claim based on "generalized disapproval of, disagreement with, or opposition to … non-state organizations." Rather, the *en banc* Board in *S-P-* granted the respondent's application for asylum based on political opinion imputed to him by the Sri Lankan government. Therefore, the out-of-context quote from *S-P-* that DHS and DOJ cite is dictum, at best, and the holding of *S-P-* itself has nothing to do with DHS and DOJ's assertion that "BIA case law makes clear that a political opinion involves a cause against a state or political entity, rather than against a culture." DHS and DOJ cite no other BIA cases to support their statement regarding BIA case law.

The only other support that DHS and DOJ rely on to justify their general bar on political opinion cases involving non-state actors is a citation to paragraphs 80 to 82 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protections. 85 FR at 36279. However, DHS and DOJ fail to mention the actual UNHCR position on political opinion claims involving non-governmental actors. If DHS and DOJ had more carefully examined the February 2019 UNHCR Handbook that they cite, they would have found the UNHCR Guidelines on International Protection, which Volker Türk, the UNHCR Assistant High Commissioner for Refugees, describes in the foreword as "a series of legal positions on specific questions of international refugee law" which "complement and update the Handbook and should be read in combination with it."[16] UNHCR Guidelines on International Protection No. 7 and 12 deal specifically with "violence perpetrated by organized gangs, traffickers, and other non-State actors, against which the State is unable or unwilling to protect."[17]

Other UNHCR Guidelines, such as UNHCR Guideline on International Protection No. 10, appear to directly contradict the proposed regulation on the issue of political opinion and non-state organizations. For example, paragraph 51 of the UNHCR Guidelines on International Protection No. 10 states that "[t]he political opinion ground is broader than affiliation with a particular political movement or ideology; it concerns 'any opinion on any matter in which the machinery of the State, government, society, or

[16] Volker Türk, *Foreword to* UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection 9–10 (Feb. 2019), https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

[17] *Id.* at 10.

policy may be engaged.'"[18] In explicit opposition to the proposed 208.1(d)/1208(d), paragraph 53 UNHCR Guideline on International Protection No. 10 states that "[o]bjection to recruitment by non-State armed groups may also be an expression of political opinion."[19]

In addition, as a matter of policy and common sense, political opinions and activities are often linked to "generalized disapproval of, disagreement with, or opposition to … non-state organizations." For example, in the United States, people regularly disapprove of and disagree with non-governmental actors such as athletes who choose to kneel during the national anthem. People also protest non-governmental actors, such as Planned Parenthood and doctors who provide abortions. Yet such opinions and activities are commonly understood to constitute political opinions and activities. *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 496 (2014) (finding that a state statute had violated the First Amendment by failing to adequately tailor its restrictions on protests outside abortion clinics, therefore depriving the petitioners of a right "to converse with their fellow citizens about an important subject on the public streets and sidewalks.").

DHS and DOJ should consider how the above limitations to political opinion violate long-standing precedent and international obligations. None of the authorities cited in the Notice support or justify the changes to the consideration of political opinion claims. DHS and DOJ should therefore remove the limited definition of political opinion and the list of disfavored claims.

Requiring "behavior" undermines imputed political opinions

Finally, requiring "*expressive behavior* in furtherance of a cause against such organizations related to efforts by the state to control such organizations[,] or *behavior* that is antithetical to or otherwise opposes the ruling legal entity of the state or legal sub-unit of the state" undermines the well-established concept of imputed political opinion as political opinion by requiring "behavior" as a component of political opinion. *See e.g. Singh v. Holder*, 764 F.3d 1153, 1159 (9th Cir. 2014) ("It is settled law that an applicant may establish a political opinion for purposes of asylum relief by showing an 'imputed political opinion.") (internal citation omitted).

[18] UNHCR, Guidelines on International Protection No. 10 11 (Nov. 2014), https://www.unhcr.org/en-us/publications/legal/529efd2e9/guidelines-international-protection-10-claims-refugee-status-related-military.html.
[19] *Id.*

The very nature of imputed political opinion is that the persecutor is imputing or attributing a political opinion to the person that they have harmed or are attempting to harm, whether or not that person actually holds that political opinion. For this reason, "expressive behavior in furtherance of a cause" or "behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state" is not likely to exist in imputed political opinion cases, since the applicant need not in fact hold any political opinions, much less act on them. Imputed political opinion depends on what the persecutor believes, not what the person being persecuted believes. Therefore, requiring "behavior" would undermine virtually all imputed political opinion claims.

DHS and DOJ fail to address this important ramification in their discussion of the proposed 208.1(d)/1208.1(d). In fact, they add a footnote to the discussion to further limit the types of "expressive behavior" that would support political opinion claims. Without any citations or analysis, DHS and DOJ claim that "[e]xpressive behavior is not generally thought to encompass acts of civic personal responsibility such as voting, reporting a crime, or assisting law enforcement in an investigation." 85 FR 38680 fn. 30.

In conclusion, the foregoing discussion clearly shows that DHS and DOJ have failed to conduct the analysis required for deference under *Chevron* and *Brand X*. DHS and DOJ should therefore provide further analysis and consider removing this section.

The Notice Introduces New Standards for Persecution without Adequate Analysis or Justification

The Notice arbitrarily raises the type and level of harm required to "exigent threat"

One, the proposed 8 C.F.R. 208.1(e)/1208.1(e) raises the type and level of harm required to establish persecution, to "actions so severe that they constitute an exigent threat." "[E]xigent threat" appears to be a new legal term and standard in asylum and INA § 241(b)(3) withholding, yet DHS and DOJ fail to mention the heightened standard in their discussion. Furthermore, even the cases cited by DHS and DOJ in their discussion – much less other longstanding federal court and BIA precedents on type and level of harm – do not require "exigent threat" to establish persecution. The Merriam-Webster dictionary defines "exigent" as "requiring immediate aid or action." This is not the current standard for the type and level of harm that rises to the level of persecution.[20] Yet DHS and DOJ fail to even mention, much less meaningfully address and justify, why the standard for type and level of harm required to establish persecution should be

[20] See Ira J. Kurzban, Kurzban's Immigration Law Sourcebook, 731-43 (16th ed. 2018-19).

raised to "exigent threat," as would be necessary for agency deference to the heightened standard under *Chevron* and *Brand X*.

Conflict with existing law on "pattern and practice"

Two, as with PSGs and political opinion, the second part of the proposed 208.1(e)/1208.1(e) is yet another "nonexhaustive" list of harms that DHS and DOJ will not find to be persecution. Most problematic of the harms that DHS and DOJ will not recognize as persecution is the following:

> The existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

However, the requirement that an applicant be harmed personally by laws or policies contradicts longstanding regulation and case law on "pattern and practice." Specifically, 8 CFR 208.13(b)(2)(iii)/1208.13(b)(2)(iii) states that:

> [T]he asylum officer or the immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:
>
> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

First, DHS and DOJ fail to even mention the existence of their own regulation on pattern and practice. Second, the only attempt that DHS and DOJ make to address the conflict between the proposed 208.1(e)/1208.1(e) and the well-established law governing pattern and practice comes in a parenthesis to the sole case that they cite on this issue, *Wakkary v. Holder*, 558 F.3d 1049, 1061 (9th Cir. 2009).

While acknowledging that under *Wakkary* (not to mention 8 CFR 208.13(b)(2)(iii)/1208.13(b)(2)(iii)), "an applicant is not required to establish that his or her government would personally persecute the [noncitizen] up on return if he or she can establish a pattern or practice of persecution against a protected group to which they belong," DHS and DOJ summarily dismiss the conflict between existing law on pattern and practice and the proposed changes in the Notice by noting that the governmental conduct must be "systematic" and "sufficiently widespread." 85 FR at 36280. However, they fail to explain why "the existence of laws or government policies" does not demonstrate a pattern or practice of persecution in and of themselves, regardless of how often the laws or policies are enforced, nor what would constitute infrequent enforcement that would justify nullification of existing regulation and precedents on pattern and practice. Such paltry discussion provides insufficient grounds for agency deference under *Chevron* and *Brand X*.

The Notice Introduces Unclear and Unjust Standards for Nexus

As with PSGs, political opinion, and persecution, the proposed 8 CFR 208.1(f)(1)(i)-(viii)/1208.1(f)(1)(i)-(viii) present a fourth "nonexhaustive" list of claims that DHS and DOJ "in general, will not favorably adjudicate." The claims are as follows:

(i) Interpersonal animus or retribution;
(ii) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;
(iii) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;
(iv) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;
(v) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;
(vi) Criminal activity;
(vii) Perceived, past or present, gang affiliation; or
(viii) Gender.

85 FR 36292.

This list will look familiar by now because it duplicates many of the claims that have already been barred in the proposed regulation on PSGs[21] or the proposed regulation on political opinion.[22]

Nexus is a question of fact specific to each case.

One fundamental problem with codifying a list of generally disfavored claims on nexus is that nexus is "a classic factual question." *Crespin Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011). Determining the existence of nexus – whether the applicant was harmed or will be harmed *on account of* one or more of the five protected grounds for asylum and withholding – requires the adjudicator to consider facts specific to each case, such as direct or indirect evidence of the persecutor's motivation(s) for harming or attempting to harm the applicant. *See INS v. Elias Zacarias*, 502 U.S. 478, 484 (1992).

As the Fourth Circuit observed in *Crespin Valladares*, "the IJ's nexus determination qualifie[s] as a finding of fact entitled to deference." Neither the BIA or the circuit courts may "simply substitute[] its own judgment for that of the IJ." *Id.* (citing *Kabba v. Mukasey*, 530 F.3d 1239, 1246 (10th Cir. 2008)). Yet that is exactly what the list in proposed 208.1(f)(1)(i)-(viii)/1208.1(f)(1)(i)-(viii) would do. It would substitute DHS and DOJ's general disapproval of certain types of claims over an asylum officer or an immigration judge's determination on nexus based on their evaluation of the evidence specific to the applicant's case.

DHS and DOJ fail to acknowledge "mixed motive" cases.

Furthermore, as the law governing nexus in asylum and withholding have long acknowledged, the persecutor may have more than one motive for wanting to harm the applicant. In asylum, INA 208(b)(1)(B)(i) places the burden of proof on the applicant to "establish that race, religion, nationality, membership in a particular social group, or

[21] Proposed 8 CFR 208.1(c)/1208.1(c) – "[P]ast or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity based on financial gain based on perceptions of wealth and influence; interpersonal disputes of which governmental authorities were unaware or uninvolved; past or present persecutory activity or association; or status as an [noncitizen] returning from the United States."

[22] Proposed 8 CFR 208.1(d)/1208.1(d) – "[G]eneralized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or legal unit of the state."

political opinion was or will be at least *one central reason* for persecuting the applicant." (emphasis added).

In withholding of removal under INA 241(b)(3), there is a circuit split on what an applicant must show to establish nexus. The Sixth and the Ninth Circuits have explicitly held that the plain language of INA 241(b)(3) requires applicants applying for withholding of removal to show only "a reason," rather than "one central reason" required for asylum under INA 208(b)(1)(B)(i), to establish a nexus in statutory withholding cases. *Guzman Vasquez v. Barr*, 959 F.3d 253 (6th Cir. 2020); *Barajas Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017). Prior to those cases, however, the Third Circuit – in a footnote – cited with approval *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), where the Board held that the one central reason standard in INA 208(b)(1)(B)(i) also applies to withholding of removal under INA 241(b)(3). *Gonzalez-Posadas v. Attorney Gen. U.S.*, 781 F.3d 677, 685 n.6 (3d Cir. 2015).

It is telling that DHS and DOJ fail to mention any of the above issues in their discussion on nexus, much less discuss them in depth and explain how a list of generally disfavored claims on nexus may be reconciled with the case- and fact- specific nature of establishing nexus. The proposed 208.1(f)(1)/1208.1(f)(1) also fails to acknowledge – much less provide any guidance to adjudicators – on mixed motive cases. Such glaring gaps in the drafting of the proposed regulation and discussion fail to meet the standard for agency deference under *Chevron* and *Brand X*.

While the discussion acknowledges that "the regulation does not foreclose that, at least in rare circumstances, such facts could be the basis for finding nexus, given the fact specific nature of this determination," such admission of the fact specific nature of nexus is not explicitly stated in the regulatory language. First, DHS and DOJ do not explain why this should only happen in "rare circumstances," especially given how common mixed motive cases are. Second, the fact that this acknowledgment is only in the discussion but not in the proposed regulation itself will lead some asylum officers and immigration judges to categorically deny all claims on the list, without taking into account "fact specific nature" in each case as the law requires. Such categorical denials may be ultra vires of INA 208, 240(b)(4)(B), and 241(b)(3) if they were the basis of pretermitting I-589 applications under proposed 8 CFR 208.13(e)/1208.13(e), since the applicants would not have had the full opportunity to present direct and indirect evidence on nexus, as is their right to do under INA 240(b)(4)(B).

"Evidence based on stereotypes"

Proposed 8 CFR 208.1(g)/1208.1(g) would bar the admission of "evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender." The proposed regulation itself fails to provide any guidance on what such evidence may be. In their discussion of this proposed regulation, DHS and DOJ point to a footnote in *Matter of A-B-*, 27 I&N Dec. 316, 336, n. 9 (AG 2018), which refer to a single piece of evidence – "an unsourced partial quotation from a news article eight years earlier" to support a "charge that Guatemala has a 'culture of machismo and family violence'". Based on that single piece of evidence from a single footnote of a single case, DHS and DOJ propose a regulation which would take the unprecedented step of categorically barring a type of evidence in support of asylum and withholding.

The categorical bar on evidence may be ultra vires. INA 208(b)(1)(B)(ii) and 240(c)(4)(A) and (B) places the burden of proof on the applicant for asylum and withholding of removal to show eligibility for relief by presenting corroborative evidence. Furthermore, INA 240(b)(4)(B) gives respondents the right to "present evidence on the [noncitizen]'s own behalf." The Federal Rules of Evidence do not apply in immigration courts, so virtually all evidence presented by either DHS or the respondents are admissible, with immigration judges determining the proper weight to be given to each evidence. To categorically bar a type of evidence that the parties can submit may well be ultra vires of these sections of the INA, not to mention a possible violation of due process under the Fifth Amendment of the U.S. Constitution.

The proposed rule is also unclear on what evidence would be barred. It is not clear what constitutes "evidence promoting cultural stereotypes about an individual or a country based on race, religion, nationality, or gender" that would be subject to the categorical bar under the proposed 208.1(g)/1208.1(g). As discussed above, the only example that DHS and DOJ gave in their discussion was a single piece of evidence – "an unsourced partial quotation from a news article eight years earlier" to support a "charge that Guatemala has a 'culture of machismo and family violence'". While the specific evidence presented in *A-R-C-G-* may have not been to the Attorney General's liking, there have been numerous expert testimonies and in-depth organizational studies going back several decades on this very issue and routinely accepted by the federal courts as well as DHS and DOJ. However, neither the proposed regulation or the accompanying discussion provides any guidance on whether DHS and DOJ will now bar such well accepted evidence. Such lack of clarity will cause more, rather than less, confusion and additional litigation.

The Notice Arbitrarily Introduces New Standards for Internal Relocation

The proposed 8 CFR 208.13(b)(3)/1208.13(b)(3) (asylum) and 8 CFR 208.16(b)(3)/1208.16(b)(3) (withholding) rewrite the existing regulation entitled "[r]easonableness of internal relocation," eliminating factors specific to the applicants. While the current regulation directs adjudicators to consider factors such as "whether the applicant would face other serious harm in the place of suggested location; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints such as age, gender, health, and social and family ties," the proposed regulation eliminates all those factors. In their place, they put the following:

> [T]he totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant's demonstrated ability relocate to the United States in order to apply for asylum.

As a comparison of the current and proposed regulations clearly show, the proposed regulation eliminates any factors that would assist the adjudicators to determine whether and how a specific applicant may fare in their country of nationality and instead forces the adjudicators to only consider whether the applicant can be sent back regardless of their personal circumstances.

The only explanation that DHS and DOJ provide for such a wholesale change of factors for consideration in internal relocation is that the current regulations "inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate." 85 FR 36282. However, this does not justify the elimination of all factors that may affect a specific applicant's ability to internally relocate, such as the person's age, gender, health, and social and family ties. For example, a healthy, well-educated adult who has financial resources, family and friends in another part of the country will likely have an easier time relocating internally than a sick child without a parent or guardian or financial resources, who do not know anyone in a different part of the country. Yet the proposed regulation deletes common sense factors such as the applicant's age, gender, health, and social and family ties for consideration by the adjudicators.

The Notice also demonstrates hostility to non-governmental persecutor cases. Under the current regulations, DHS has the burden of showing the reasonableness of

internal relocation once the applicant has demonstrated past persecution, regardless of whether the persecutor is the government or a non-governmental actor. In contrast, the proposed 8 CFR 208.13(b)(3)(iii)/1208.13(b)(3)(iii) and 208.16(b)(3)(iii)/1208.16(b)(3)(iii) shifts the burden of proof for internal relocation to the applicants even after they have established past persecution, if the persecutor is a non-governmental actor. In addition, they will have to meet this burden using the new factors in the proposed 8 CFR sections 208.13(b)(3)/1208.13(b)(3) and 208.16(b)(3)/1208.16(b)(3).

Finally, proposed sections 208.13(b)(3)(iv)/1208.13(b)(3)(iv) and 208.16(b)(3)(iv)/1208.16(b)(3)(iv) categorically prohibit adjudicators from considering "gang members, rogue officials, family members who are not themselves government officials, or neighbors who are not themselves government officials" as government or governmentally sponsored persecutors. However, other than stating that this prohibition is "[f]or ease of administering these provisions," the discussion fails to explain why or how such a blanket prohibition is justified. Such a categorial bar will prohibit adjudicators from considering the quasi-governmental features of certain entities, such as MS-13 or Barrio 18 in El Salvador, Guatemala, and Honduras, or case-specific evidence presented by applicants on whether and when "rogue officials" may in fact have been acting in their governmental capacity.

DOJ is or should be aware of the deep connections between nongovernmental actors and the government in some countries. For example, DOJ was involved in the case against former Honduran congressman, and brother of the current President of Honduras, Tony Hernández. The DOJ press release stated that Hernández "coordinated and, at times, participated in providing heavily armed security for cocaine shipments transported within Honduras, including by members of the Honduran National Police and drug traffickers armed with machineguns and other weapons. Hernández also used members of the Honduran National Police to coordinate the drug-related murder of Franklin Arita in 2011, and he used drug-trafficking associates to murder a drug worker known as "Chino" in 2013."[23] When the government and criminal organizations are so entangled, including at the highest levels, it becomes difficult to distinguish between "gang members," "rogue officials," and the government itself. DHS and DOJ should therefore withdraw these proposed changes, or at least provide a reasoned explanation for making this distinction in the context of internal relocation.

[23] Department of Justice, Former Honduran Congressman Tony Hernández Convicted In Manhattan Federal Court Of Conspiring To Import Cocaine Into The United States And Related Firearms And False-Statements Offenses (October 18, 2019), available at https://www.justice.gov/usao-sdny/pr/former-honduran-congressman-tony-hern-ndez-convicted-manhattan-federal-court-conspiring

Many of ASAP's clients have suffered past persecution by nongovernmental actors, including those who had connections to the government and the police force. One of ASAP's clients was gang raped by members of Barrio 18 based on her relationship to a former police officer who had resisted the gang's influence over the police force. In another case, a client's father was murdered, and she received hundreds of death threats after she and her father ran for mayor in two nearby towns. In another case, ASAP's client was kidnapped at the age of 15 and forced to marry a gang member. He violently beat her and raped her for years, including while she was pregnant. She reported her captor to the police many times, but the police never took any action. DOJ and DHS have not provided sufficient justification for shifting the burden of proof to these clients, or to the many asylum seekers who are similarly situated.

The Notice Introduces Unprecedented Discretionary Factors that Would Nullify INA 208

In the proposed 8 CFR 208.13(d)/1208.13(d), DHS and DOJ create a brand new and unprecedented regulation in asylum and immigration law that attempts to eliminate asylum officers' and immigration judges' unique ability to exercise discretion, taking into account the facts of each particular case.

The first part of the proposed regulation, sections 208.13(d)(1)/1208.13(d)(1), lists "significant adverse discretionary factors" against discretionary grant of asylum, as follows:

(i) Unlawful entry or attempted unlawful entry into the U.S.
(ii) Failure to apply for protection in at least one country during transit to U.S.
(iii) Use of fraudulent documents to enter U.S.

Id.

Under the plain language and structure of the proposed 208.13(d)/1208.13(d), these "significant adverse discretionary factors" appear to be categorical bars to asylum with no exceptions. *Id.*

Next, proposed 208.13(d)(2)(i)/1208.13(d)(2)(i) lists nine other "adverse discretionary factors," the mere presence of which will bar asylum officers and immigration judges from exercising their discretion in favor of an asylum applicant:

(A) Spent more than 14 days in any one country immediately prior to their arrival in the United States unless s/he applied for protection in that country;
(B) Transited through more than one country on the way to United States unless s/he applied for protection in that country;

(C) Would be subject to mandatory denial of asylum under 8 CFR. 208.13(c)/1208.13(c) but for changes to criminal conviction or sentence;
(D) Cumulatively accrued more than one year of unlawful presence of more than one year cumulatively prior to filing the I-589;
(E) Failure to file taxes or fulfill tax obligations; also, failure to report taxable income;
(F) Two or more prior asylum applications denied for any reason (no discussion of this subsection in the discussion);
(G) Withdrew or abandoned an I-589;
(H) Failure to attend asylum interview at USCIS; or
(I) Failure to file a motion to reopen a final removal order based on changed country conditions within one year.

Id.

Unlike the "significant adverse discretionary factors" in proposed 208.13(d)(1), there appears to be two very limited exceptions to favorable exercise of discretion for these nine "adverse discretionary factors" in the proposed 208.13(d)(2)(ii)/ 1208.13(d)(2)(ii) in 1) in extraordinary circumstances, such as those involving national security or foreign policy, or 2) where the applicant demonstrates by clear and convincing evidence that denial of asylum will result in exceptional and extremely unusual hardship to the applicant.

<u>DHS and DOJ overturns Matter of Pula without saying so</u>

Traditionally, the exercise of discretion in immigration and asylum law is a balancing test of positive and negative factors specific to each case. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). In contrast, the proposed 208.13(d)/1208.13(d), even though entitled "[d]iscretion," is solely comprised of mandatory and virtually mandatory negative factors and gives adjudicators no guidance on any positive factors that should be considered in a balancing test on the exercise of discretion.

DHS and DOJ repeatedly cite to *Matter of Pula* in support of the proposed 208.13(d)/1208.13(d), but the proposed regulation would in fact nullify *Pula*. *Pula* is the seminal BIA precedent which created the carefully balanced and reasoned framework on the exercise of discretion in asylum cases. Asylum officers and immigration judges have followed this longstanding precedent for the last four decades without any issues. The contrast between *Pula* and the proposed 208.13(d)/1208.13(d) could not be starker.

When there are concerns about the manner in which an asylum applicant came to the United States, *Pula* requires asylum officers and immigration judges to consider "the totality of circumstances and actions of an [noncitizen] in his flight" in determining how much weight to give to any circumvention of orderly refugee procedures, versus the reasons for such circumventions. 19 I&N Dec. at 473. The BIA then provides the adjudicators with a comprehensive list of both negative and positive factors to balance. *Pula* is worth quoting at length, because it shows how a balancing test on the exercise of discretion in asylum cases really work:

> [W]hether the [noncitizen] passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States. In addition, the length of time the [noncitizen] remained in a third country, and his living conditions, safety, and potential for long-term residency are also relevant. For example, an [noncitizen] who is forced to remain in hiding to elude persecutors, or who faces imminent deportation back to the country where he fears persecution, may not have found a safe haven even though he has escaped to another country. Further, whether the [noncitizen] has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is a factor to consider. In this regard, the extent of the [noncitizen]'s ties to any other countries where he does not fear persecution should also be examined. Moreover, if the [noncitizen] engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered. The use of fraudulent documents to escape the country of persecution itself is not a significant adverse factor, while at the other extreme, entry under the assumed identity of a United States citizen with a United States passport, which was fraudulently obtained by the [noncitizen] from the United States government, is very serious fraud.
>
> In addition to the circumstances and actions of the [noncitizen] in his flight from the country where he fears persecution, general humanitarian considerations, such as an [noncitizen]'s tender age or poor health, may also be relevant in a discretionary determination. A situation of particular concern involves an [noncitizen] who has established his statutory eligibility for asylum but cannot meet the higher burden required for withholding of deportation. Deportation to a country where the [noncitizen] may be persecuted thus becomes a strong possibility. In such a case, the

> discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an [noncitizen] who has established a well-founded fear of persecution; the danger of persecution should outweigh all but the most egregious of adverse factors.

Id. at 473-74.

As this lengthy excerpt shows, *Pula* requires asylum officers and immigration judges to consider the asylum applicant as a whole, including all applicable negative and positive factors specific to that individual. In addition, *Pula* asks the adjudicators to also consider the unique nature of asylum, where the applicant may be harmed or killed if returned the country that they fled. That is different than other forms of discretionary relief in immigration law, such as cancellation of removal. Given that adjudicators do not need to exercise their discretion unless and until the applicants have first shown that they are legally eligible for asylum, the exercising discretion in asylum is different than exercising discretion in other forms of discretionary relief in immigration law, because the adjudicator will be sending individuals back to countries where they may be persecuted on purely discretionary grounds.

For this reason, *Pula* held that while "the circumvention of orderly refugee procedures … can be a serious adverse factor, … it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. This factor is only one of a number of factors which should be balanced in exercising discretion." Furthermore, the BIA in *Pula* withdrew the prior BIA precedent, *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982), "insofar as it suggests that the circumvention of orderly refugee procedures alone is sufficient to require the most unusual showing of countervailing equities." *Pula* at 473.

<u>"Significant adverse discretionary factors" in proposed 208.13(d)(1)/1208.13(d)(1) are mandatory, not discretionary.</u>

Now compare the BIA's thoughtful and comprehensive balancing test in *Pula* with the proposed 208.13(d)/1208.13(d). In contrast to *Pula*, using the applicants' travel and manner of entry to U.S. "to deny relief in virtually all cases" is precisely what the proposed regulation attempts to do.

One, the proposed 208.13(d)(1)(i), (iii)/1208.13(d)(1)(i), (iii) would categorically deny asylum to any applicant who entered or attempted to enter the United States unlawfully or used fraudulent documents to enter the United States. Such categorical bars are even worse than *Matter of Selim*, the case overturned by the BIA in *Pula*, since *Selim* merely found "the fraudulent avoidance of an orderly refugee process to be an

extremely adverse factor," rather than a mandatory bar to asylum, as the proposed 208.13(d)(1)(i) and (iii)/1208.13(d)(1)(iii) do.

In addition, the proposed 208.13(d)(1)(ii)/1208.13(d)(1)(ii) goes even further by mandatorily denying asylum to virtually everyone who did not apply for protection in another country before coming to the United States. In contrast, under *Pula*, whether an applicant could and/or should have applied for protection in another country would be one of many factors that adjudicators should consider under the totality of the applicant's specific circumstances.

Such broad, mandatory bars to asylum cannot be justified as an exercise of discretion. Agency discretion has never been used – or abused – in such a fashion in asylum. Insofar as DHS and DOJ attempt to use their "discretion" to categorially bar those who are legally eligible for asylum in the proposed 208.13(d)(1)/1208.13(d)(1), it will be found to be ultra vires of INA 208.

Adverse discretionary factors under 208.13(d)(2)/1208.13(d)(2)

In addition to the "significant adverse discretionary factors" which serve as mandatory bars to asylum in proposed 208.13(d)(1)/1208.13(d)(1), proposed 208.13(d)(2)(i)(A)-(I)/1208.13(d)(2)(i)(A)-(I) add another nine "adverse discretionary factors" which would also bar asylum unless the applicant can meet the impossibly high standard set for exceptions in the proposed 208.13(d)(2)(ii)/1208.13(d)(2)(ii).

One, some of the factors in the proposed 208.13(d)(2)(i)(A)-(I)/1208.13(d)(2)(i)(A)-(I) have not previously been considered adverse factors at all. For example, the fact that an asylum applicant "spent more than 14 days in any one country" on their way to the United States is currently not an adverse factor at all. Nor is having had "two or more prior asylum applications denied for any reason" currently considered an adverse factor. Yet DHS and DOJ fail to explain why they have decided to make these adverse discretionary factors that would bar asylum in virtually all situations. 85 FR 36284.

Two, in contrast to *Pula*, the proposed 208.13/1208.13 (d)(2) does not allow the adjudicators to consider the specific circumstances of how an adverse discretionary factor came about, or the severity of such an adverse discretionary factor. Under the plain language of the proposed regulation, the mere presence of an adverse discretionary factor in the proposed 208.13/1208.13 (d)(2)(i)(A)-(I) would bar the adjudicator from favorably exercising their discretion in an asylum case unless the applicant can "by clear and convincing evidence, demonstrate[] that the denial of the

application for asylum would result in exceptional and extremely unusual hardship to the [noncitizen]." 85 FR 36294.

As discussed above, this is not the traditional and current balancing test for exercise of discretion in discretionary immigration relief in general and asylum in particular. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987).

The heightened standard for 212(h) relief should not be used for asylum applicants.

DHS and DOJ cite to 8 CFR 212.7(d)/1212.7(d) as the only other example where they "have issued regulations on discretionary considerations.".85 FR 36283. Even more importantly, they adopt the regulatory language and the heightened standard of 212.7(d)/1212.7(d) in the proposed 208.13(d)(2)(ii)/1208.13(d)(2)(ii) by requiring the applicant "by clear and convincing evidence, [to] demonstrate[] that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the [noncitizen]." In doing so, DHS and DOJ ignore the very different nature of the populations affected by the current 8 CFR 212.7(d)/ 1212.7(d) versus the proposed 8 C.F.R. 208.13(d)(2)(ii)/1208.13(d)(2)(ii), and fail to provide a reasoned explanation for why the same standards should apply to such different populations.

Current 8 C.F.R. 212.7(d)/1212.7(d) applies to "immigrant [noncitizen]s who are inadmissible under section 212(a)(2) of the Act in cases involving violent and dangerous crimes" but are nonetheless statutorily eligible for a waiver under INA 212(h)(2). In contrast, the proposed 8 C.F.R. 208.13(d)(2)(ii)/1208.13(d)(2)(ii) applies to all asylum applicants who have met the statutory and regulatory eligibility for asylum.

First, asylum applicants who are inadmissible under INA 212(a)(2) because they have been convicted of violent and dangerous crimes are either 1) already statutorily barred from asylum under INA 208(b)(2)(A)(ii), or 2) barred under the normal balancing tests for discretionary reliefs in immigration asylum law discussed above.

Second and more importantly, the vast majority of people that would be subject to the proposed 8 CFR 208.13(d)(2)(ii)/1208.13(d)(2)(ii) – i.e. all asylum applicants who have met the statutory and regulatory eligibility for asylum – have no criminal records whatsoever. Furthermore, they may be persecuted if returned to the countries from which they fled. Yet DHS and DOJ have chosen to apply the same heighted standard of "exceptional and extremely unusual hardship" to these very different populations without any explanation, much less a detailed and reasoned one.

Proposed 208.13(d)/1208.13(d) would nullify INA 208

When giving guidance to agency adjudicators on the discretionary component to a statutory relief, federal courts issuing precedents or agencies issuing regulations cannot nullify the statute. For example, the Supreme Court has observed that "if the Attorney General determined that any entry fraud or misrepresentation, no matter how minor and no matter what the attendant circumstances, would cause her to withhold waiver, she would not be exercising the conferred discretion at all, but would be *making a nullity of the statute*." *INS v. Yang*, 519 U.S. 26, 31 (1996). (emphasis added).

The mandatory bars to asylum under the proposed 208.13(d)(1)/1208.13(d)(1) and the heightened standard in the proposed 208.13(d)(2)(ii)/1208.13(d)(2)(ii) are such nullifications of INA 208. Under the guise of discretion, any and all asylum applicants who have met the legal requirements for asylum but has a "significant adverse discretionary factor" under the proposed 208.13(d)(1)/1208.13(d)(1) would be barred from asylum without any exceptions.

Likewise, any and all asylum applicants who have a single "adverse discretionary factor" listed in the proposed 208.13(d)(2)(i)(A)-(I)/1208.13(d)(2)(i)(A)-(I) would be barred from asylum unless they meet the heightened standard of "exceptional and extremely unusual hardship." Such an inflexible rule is not an exercise of discretion, but a nullification of the very statute that the regulation is intended to implement. Exceptional and extremely unusual hardship has never been the standard for the exercise of discretion in asylum, and DHS and DOJ fail to provide a reasoned explanation as to why the agency believes such a seismic change in asylum law is required.

In conclusion, while DHS and DOJ claim that they are "build[ing] on the BIA's guidance regarding discretionary asylum determinations and codify specific factors in the regulations for the first time" with repeated citations to *Pula*, the discussion above clearly shows that they are in fact overruling *Pula* in the proposed 208.13(d)/1208.13(d) without admitting that they are doing so, nor providing a reasoned justification for why they are overturning a well-established precedent that has worked well for over four decades. While DHS and DOJ's policy choices in this proposed regulation are problematic for reasons discussed above, the fact that they did so citing *Pula*, the very case that holds just the opposite, demonstrates that the federal courts reviewing these regulations should not be given DHS and DOJ *Chevron/Brand X* deference on the proposed 208.13(d)/1208.13(d)(2).

DHS and DOJ should therefore completely withdraw the proposed "significant adverse discretionary factors" and "adverse discretionary factors" as they conflict with the statute and existing caselaw.

The Notice Arbitrarily Changes Standards for Firm Resettlement

The proposed 8 CFR 208.15/1208.15 replaces the existing regulations on firm resettlement. While DHS and DOJ's discussion of firm resettlement repeatedly cites *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), the seminal BIA precedent on firm resettlement, DHS and DOJ do not seem to know, or know and simply ignore, the content of *A-G-G-*.

The BIA's in-depth discussion of the history of the firm resettlement bar in *A-A-G-* makes it clear that from its inception in the aftermath of World War II to the present day, the concept of firm resettlement has always been about whether an asylum applicant "has acquired a new nationality, and enjoys the protection of the country of his new nationality." *A-G-G-* at 490 (quoting the 1951 United Nations Convention Relating to the Status of Refugees). Given this rationale for the firm resettlement bar, it does not make sense for the proposed 208.15(a)(2)/1208.15(a)(2) to bar asylum applicants for firm resettlement simply because they were able to physically reside in a country for a year a year or more. The criterion for firm resettlement is not physical presence, but whether the applicant had, or could have had but refused to apply for, legal status and protection from that country.

Two, DHS and DOJ again ignore *A-G-G-* when it shifts the burden of proof on firm resettlement to the asylum applicants. *A-G-G-* held that "[i]n the first step of the analysis, the DHS bears the burden of presenting prima facie evidence of an offer of firm resettlement." *A-G-G-* at 501. The BIA explained that it assigned the initial burden of proof to DHS because "the circuit courts of appeals have held that the DHS bears the initial burden of establishing that 'evidence indicates' that a mandatory bar to relief applies." *Id.* Yet DHS and DOJ fail to address *A-A-G-* or the underlying circuit court decisions at all in their discussion on burden shifting.

The Notice Introduces an Unreasonable Definition of Willful Blindness

The proposed 8 CFR 208.18(a)(1)/1208.18(a)(1) excludes from the definition of "torture" acts or lack of action by public officials who are "not acting under color of law." The proposed 8 CFR 208.18(a)(7)/1208.18(a)(7) limits awareness required for "acquiescence" to actual knowledge or willful blindness and defines "willful blindness" as being "aware of a high probability of activity constituting torture and deliberately

avoid[ing] learning the truth." *Id.* The proposed 8 CFR 208.18(a)(1)/1208.18(a)(1) further adds that "the official must have been charged with preventing the activity as part of his or her duties to intervene." *Id.*

The new definition of "willful blindness" under the proposed 8 CFR 208.18(a)(7)/1208.18(a)(7) requires CAT applicants to prove the unprovable. Without access to and active cooperation of the public official at issue (which the applicant clearly does not have), the applicant will not be able to show that the public official "was aware of a high probability of activity constituting torture and deliberately avoided learning the truth." *Id.*

DHS and DOJ erred by adopting the mens rea standard designed to "give officials due process notice of what conduct was criminal" and using it for the entirely different purpose of requiring CAT applicant to demonstrate that another person – the public official who acquiesced in their torture – "was *aware* of a high probability of activity constituting torture and *deliberately avoided* learning the truth." (emphasis added).

Requiring evidence of subjective frames of mind such as awareness and deliberate avoidance makes sense in its original context of giving public officials due process notice that their actions or the lack thereof may have criminal ramifications under CAT. However, using the same standard for a different person – not the public official but rather the person who was tortured – to prove the *mens rea* of the public official who may have acquiesced in their torture, does not make sense and places an impossible burden on the CAT applicant.

Lacking access to and active cooperation of the public official, a CAT applicant would never be able to show that the official "was aware of a high probability of activity constituting torture and deliberately avoided learning the truth." They would never be able to show that the official "deliberately avoided knowing the truth," rather than "recklessly disregarded the truth, or negligently failed to inquire."

It is unreasonable to require the CAT applicant to prove the mens rea of another human being, much less a public official who has acquiesced in their torture. Under this impossible standard, virtually no CAT applicant will be able to show that a public official acquiesced in their torture. DHS and DOJ should withdraw the proposed changes related to CAT.

Section D: Information Disclosure

Current 8 CFR sections 208.6 and 1208.6 already provide DHS and DOJ with broad authority to disclose information in an individual's I-589 application and/or CF/RF process when necessary.

First, 8 CFR 208.6(a) and 1208.6(a) allow the Secretary of the Homeland Security and the Attorney General to disclose such information in their discretion. Second, current 8 CFR 208.6 and 1208.6(c) provide a long list of situations where disclosure is explicitly allowed, as follows:

> (1) Any United States Government official or contractor having a need to examine information in connection with:
>
> > (i) The adjudication of asylum applications;
> >
> > (ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;
> >
> > (iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under 208.30 or 208.31;
> >
> > (iv) The defense of any legal action arising from the adjudication of which the asylum application, credible fear determination, or reasonable fear determination is a part; or
> >
> > (v) Any United States Government investigation concerning any criminal or civil matter; or
>
> (2) Any Federal, State, or local court in the United States considering any legal action:
>
> > (i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under 208.30 or 208.31; or
> >
> > (ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

Notwithstanding these already broad and discretionary exceptions to disclosure, the Notice adds even more exceptions to disclosure in subsections (d) and (e) to the proposed 8 CFR 208.6 and 1208.6. However, these subsections are overbroad, unclear, often duplicative, and will harm people fleeing violence.

The U.S. government has long acknowledged that these nondisclosure regulations:

> safeguard[] information that, if disclosed publicly, could subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin. Moreover, public disclosure might, albeit in rare circumstances, give rise to a plausible protection claim where one would otherwise not exist by bringing an otherwise ineligible claimant to the attention of the government authority or non-state actor against which the claimant has made allegations of mistreatment.[24]

DHS and DOJ fail to acknowledge these important rationales against disclosure of asylum-related information in the Notice discussion. They do not even attempt to explain whether and how they balanced the rationales for disclosure versus the rationales against disclosure in coming up with the proposed regulation. Nor do DHS and DOJ explain why they cannot investigate "fraud and abuse" or "criminal activity" under the broad exceptions that already exist in the current 208.6 and 1208.6(a) and (c).

The new exceptions to disclosure in proposed 208.6 and 1208.6(d) and (e) undermine important rationale against overbroad disclosures of asylum-related information.

First, the scope of information subject to disclosure in proposed 208.6 and 1208.6 (d) and (e) is too broad. (d) and (e) would permit disclosure of:

> [A]ny information contained in an application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, and any relevant and applicable information regarding an [noncitizen] who has filed such an application, and any relevant and applicable information regarding an [noncitizen] who has been the subject of a reasonable fear or a credible fear determination…

[24] USCIS Asylum Division, Fact Sheet: Federal Regulation Protecting the Confidentiality of Asylum Applicants, October 18, 2012, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Asylum-ConfidentialityFactSheet.pdf

85 FR 36301.

Second, the situations in which deeply personal and private information about asylum seekers may be released are vague and overbroad. As examples, 208.6 and 1208.6 (d)(1)(i) would permit DHS and EOIR to disclose asylum- or CF/RF-related information "[a]s part of an investigation of adjudication of the merits of that application or of any other application under the immigration laws." Subsection (d)(1)(iv) would permit disclosure "to deter, prevent, or ameliorate the effects of child abuse." Subsection (d)(1)(v) would permit disclosure "as part of any proceeding arising under the immigration laws."

Insofar as these subsections would permit the disclosure of an asylum seeker's personal and private information for use in other people's immigration proceedings, DHS and DOJ may put asylum seekers' or their families' lives at risk. For example, DHS and DOJ may wind up exposing women and their children who fled from abusive spouses and/or parents or letting gangs such as MS 13 or Barrio 18 know that people fled to the United States to escape harm by them.

Such failure to acknowledge important policy considerations against disclosure and balance competing interests for and against disclosure, combined with the overbroad scope of information that may be disclosed and the vague circumstances under which such information may be released, clearly argue against giving DHS and DOJ deference under *Chevron*. DHS and DOJ should therefore withdraw Section D in its entirety.

III. The Notice Must be Set Aside as Unlawful because the Acting Secretary of DHS Lacks Lawful Authority to Authorize its Promulgation

The Notice indicates that Acting DHS Secretary Chad Wolf has "delegate[ed] the authority to electronically sign this document to Chad R. Mizelle,"85 FR 36290, but Mr. Wolf cannot designate this authority to Mr. Mizelle, because Mr. Wolf holds the office of Acting DHS Secretary unlawfully. Mr. Wolf does not have a valid legal claim to the office of DHS Secretary under either the orders of succession proscribed by the Homeland Security Act or the Federal Vacancies Reform Act (FVRA), the only two possible statutory routes under which an Acting DHS Secretary may hold office. *See* 6 U.S.C 113(g); 5 U.S.C § 3345. Under section 3348 of the Federal Vacancies Reform Act (FVRA) all actions taken in an unlawfully held position — including designating authority to Mr. Mizelle to promulgate this rule — "shall have no force or effect." *Id.* § 3348. Furthermore, actions taken by an acting official who holds office illegally also violate the Administrative

Procedure Act because they are "not in accordance with law," and must accordingly be held "unlawful and set aside." 5 U.S.C. § 706(2)(A).

Mr. Wolf's appointment is the fruit of a poisoned tree that began when then-DHS Secretary Kirstjen Nielsen resigned. A November 15, 2019 letter by members of Congress to the Comptroller General of the United States details the succession issues that began when Kevin McAleenan was installed as Secretary of Homeland Security to replace Secretary Nielsen.[25] At the time of Secretary Nielsen's departure, Executive Order 13753 set out the order of succession for DHS in the event of a Secretary's "resignation." *See* Exec. Order No. 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016); see also, Department of Homeland Security, *DHS Orders of Succession and Delegation of Authorities for Named Positions* (Dec. 15, 2016) *as amended* (Apr. 10, 2019) (indicating that any changes Nielsen made to the orders of DHS succession applied only "in the event [the Secretary is unavailable] *to act during a disaster or catastrophic emergency*.") Under the Executive Order, Mr. McAleenan was not next in line to head DHS after Secretary Nielsen's resignation, but rather, at minimum, two Senate confirmed officials should have preceded him.[26] Accordingly, Mr. McAleenan had no valid legal claim to the office of the Secretary under the Homeland Security Act's succession provisions. And even if Mr. McAleenan could arguably have had authority under the FVRA, that authority expired after 210 days in office per the terms of that statute. *See* 5 U.S.C. § 3346(a)(1).

Changes that Mr. McAleenan later made to the order of DHS succession on November 8, 2019 were what ostensibly rendered Mr. Wolf Acting Secretary by order of succession. Department of Homeland Security, *Amendment to the Order of Succession for the Secretary of Homeland Security* (Nov. 8, 2019). These changes, however, were also unlawful because Mr. McAleenan held the office of Acting DHS Secretary unlawfully, in violation of both the Homeland Security Act and the FVRA. Because Mr. Wolf's appointment as Acting Secretary of Homeland Security was a result of the unlawful changes that Mr. McAleenan made to the order of succession, he too has no valid legal claim to the office of the Secretary. Just like Mr. McAleenan, all of Wolf's actions taken as Acting DHS Secretary therefore "shall have no force or effect," 5 U.S.C. § 3348, and must be held "unlawful and set aside," 5 U.S.C. § 706(2).

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[25] *See* Letter from Bennie G. Thompson, Chairman, Committee on Homeland Security, and Carolyn B. Maloney, Acting Chairwoman, Committee on Oversight and Reform, to Gene Dodaro, Comptroller General of the United States (Nov. 15, 2019) [hereinafter Thompson and Maloney, Letter] [available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf].

[26] *See* Thompson and Maloney Letter at 2.

The government must articulate a lawful basis of Mr. Wolf's delegate the legal authority to Mr. Mizelle to promulgate this regulation, and if unable to do so, remove it from the federal registry.

IV. The Notice Violates the Rehabilitation Act by Failing to Notice Disability and Provide Accommodations

The Notice proposes changes to the asylum process that will likely lead to violations of the Rehabilitation Act, but DOJ and DHS fail to acknowledge the need for reasonable accommodations or safeguards. As explained above, the proposed changes set forth in this Notice would make the asylum process extremely difficult for unrepresented individuals by requiring knowledge of complex immigration laws at every stage. In addition to conflicting with the INA and due process protections, the proposed regulations would also exclude many asylum seekers with disabilities from meaningfully accessing the asylum process, thus violating the Rehabilitation Act.

In ASAP's experience, many asylum seekers arriving at the Mexico-U.S. border have severe trauma-related disabilities that are further exacerbated by their detention in the United States. ASAP's clients have frequently been diagnosed with Posttraumatic Stress Disorder (PTSD) and major depression, which "substantially limit[]" their "major life activities."[27] Many asylum seekers also have mental disabilities that would prevent them from adequately representing themselves or even understanding the proceedings. The government has already been informed that many asylum seekers have a disability under the Rehabilitation Act. In January 2016, over 200 civil rights, faith, and labor organizations signed a letter to then-Secretary Johnson and Attorney General Lynch informing them that a substantial proportion of asylum seekers in removal proceedings had a disability.[28]

Mental disabilities often prevent individuals from fully sharing the facts of their cases, or from recalling traumatic events related to their claims. For example, some symptoms of PTSD would make it difficult to complete a CF or RF interview, or to fill out an I-589. People with PTSD may have difficulty remembering "key features of the traumatic event."[29] People with PTSD may also avoid any reminders of the traumatic event, including their own thoughts and feelings.[30] Under the new proposed rules,

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[27] 42 U.S.C. § 12102(1).

[28] Yale Law School, WIRAC: Immigration Raids Target Disabled (Jan. 5, 2016), https://law.yale.edu/yls-today/news/wirac-immigration-raids-target-disabled.

[29] National Institute of Mental Health, Post-Traumatic Stress Disorder, https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml (last visited July 14, 2020).

[30] *Id.*

adjudicators could pretermit I-589 applications without a hearing, making it difficult for asylum seekers with PTSD to explain their symptoms, including through a psychological expert. This would likely result in immigration judges pretermitting some asylum applications because the applicant was unable to present the full facts of their case due to disability.

For individuals with mental disabilities that affect their competency, the requirements at the CF and RF stage and at the I-589 stage would seem to require counsel as a reasonable accommodation. In *Franco-Gonzales v. Holder*, a federal district judge ordered U.S. Immigration and Customs Enforcement (ICE), the Attorney General, and EOIR to provide legal representation to immigrant detainees with mental disabilities who were facing deportation.[31] Here, too, many asylum seekers may have mental disabilities that would prevent them from understanding or adequately participating in their proceedings. Yet, the government does not acknowledge this or set forth any mechanism for identifying or accommodating such disabilities. DHS and DOJ should consider processes for determining when individuals have disabilities, and the type of accommodations that should be provided.

Failure to provide for reasonable modifications accommodating the disabilities of asylum seekers constitutes a violation of civil rights statutes protecting persons with disabilities. 29 U.S.C. § 794; 42 U.S.C. § 12102(1); 28 C.F.R. § 35.130; 6 C.F.R. §§ 15.1-15.70. The Rehabilitation Act prohibits government agencies from discriminating against individuals on account of qualifying disabilities. 29 U.S.C. § 794; 42 U.S.C. § 12102(1); 28 C.F.R. § 35.130. DHS regulations require that DHS agencies provide reasonable modification to disabled individuals, pursuant to the Act. 6 C.F.R. §§ 15.1-15.70.

DHS and DOJ must consider the effect of this rule on individuals with disabilities and discuss which safeguards and accommodations should be made in compliance with the Rehabilitation Act. DHS and DOJ must also consider what additional burdens this rule would create to identify and provide reasonable accommodations for individuals with disabilities. DHS and DOJ should remove any language in this rule that would prevent asylum seekers with disabilities from meaningfully accessing or participating in the asylum process.

V. The Proposed Changes to the I-589 Form Are Not Necessary and Violate the Paperwork Reduction Act

The proposed changes to the I-589 form violate the Paperwork Reduction Act (PRA). The PRA was enacted in part to reduce the burden paperwork can cause to

[31] *See Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

individuals and nonprofit institutions. *See* 44 U.S.C. § 3501(1). Here, the proposed changes to the I-589 result in four additional pages and numerous additional questions and sub-questions. The proposed I-589 form therefore demands significant additional information and time from asylum applicants, and by extension from nonprofits like ASAP that assist asylum seekers in completing the I-589 form.

This additional information is unnecessary because asylum applicants typically provide more documentation, including legal arguments prepared by an attorney, before and during an asylum interview or individual hearing. *See* 44 U.S.C. § 3508 ("Before approving a proposed collection of information, the Director shall determine whether the collection of information … is necessary for the proper performance of the functions of the agency…."). Adding these questions to the I-589 effectively requires asylum seekers and their attorneys to submit the information twice: once with the initial application and again closer to the actual adjudication of the merits of the claim.

To the extent that the changes to the I-589 are intended to allow for pretermission of asylum applications without a hearing in immigration court, such a process would violate due process protections under the Fifth Amendment of the U.S. Constitution, as the added questions are mostly factual in nature. The ability to pretermit cases is therefore not a legitimate reason for increasing the collection of information on the I-589 form. *See* 44 U.S.C. § 3501 (listing "ensur[ing] that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is *consistent with applicable laws*…" as one of the purposes of the Paperwork Reduction Act) (emphasis added). If the changes are not intended to replace a hearing on the factual bases of a person's claim, then the additional questions on the I-589 only add an additional burden on asylum seekers to provide information that could be provided closer to, or during, the hearing. As such, the proposed changes are in violation of the Paperwork Reduction Act.

Conclusion

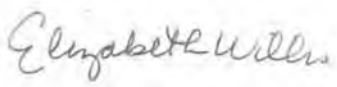
The proposed changes set forth in this Notice would drastically change the United States asylum system, making it impossible for many individuals fleeing persecution to ever receive asylum, withholding of removal, or protection under the Convention Against Torture. The sweeping changes represent a significant departure from well-established caselaw and from current practice and norms before DHS and DOJ. Many of the proposed changes also conflict with the INA, the U.S. Constitution, and international treaties. Despite these dramatic changes, the Notice does not clearly state its purpose or provide adequate justification or reasoning. Nor did the agencies allow for sufficient time for the public to respond to the 161-page Notice.

For these reasons, DHS and DOJ should withdraw the proposed changes in their entirety to ensure that the United States can remain a safe haven for those seeking asylum and other forms of protection.

Thank you for your time and consideration.

Sincerely,

Conchita Cruz
Co-Executive Director
Asylum Seeker Advocacy Project (ASAP)



Elizabeth Willis
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Zachary Manfredi
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EXHIBIT 26

DECLARATION OF NAOMI A. IGRA

CITY BAR JUSTICE CENTER

July 15, 2020

Lauren Alder Reid, Assistant Director,
Office of Policy,
Executive Office for Immigration Review,
5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041

Submitted via https://www.regulations.gov

RE: RIN 1125–AA94 or EOIR Docket No. 18–0002; Comment in Opposition to DOJ/DHS Joint Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

Dear Ms. Reid:

The City Bar Justice Center ("CBJC"), in conjunction with *pro bono* partner Willkie Farr & Gallagher LLP ("Willkie Farr"), submits this Comment in response to the Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (the "Notice") published in the Federal Register on June 15, 2020. The proposed rules (each a "Proposed Rule" and collectively, the "Proposed Rules") would radically alter the substantive and procedural rules governing all adjudications of applications for asylum, withholding of removal, and protection under the Convention Against Torture. Some of its most troubling changes would expand an Immigration Judge's ("IJ") ability to deny asylum applications without a hearing and extend the definition of a "frivolous" application, with its accompanying harsh penalty. We strongly oppose the proposed changes to the asylum process, asylum eligibility and eligibility for other related forms of protection.

As the nonprofit affiliate of the New York City Bar Association, CBJC increases access to justice by leveraging the *pro bono* efforts of New York lawyers, law firms, and corporate legal departments. Each year, CBJC assists more than 25,000 low income and vulnerable New Yorkers through limited and direct legal representation, community outreach, and education efforts on a wide range of civil-justice matters. CBJC's Immigrant Justice Project assists asylum seekers fleeing persecution, survivors of violent crimes and trafficking here in the United States, and individuals seeking humanitarian protection and other forms of relief. We represent clients before U.S. Citizenship & Immigration Services ("USCIS"), Executive Office for Immigration Review ("EOIR"), including both the immigration courts and the Board of Immigration Appeals ("BIA"), as well as federal courts. Our *pro bono* volunteers, in partnership with CBJC, have secured asylum for countless applicants over the course of almost 30 years.

Willkie Farr is an international law firm with over 700 attorneys, and a longstanding *pro bono* partner of CBJC. The firm takes great pride in the volume and variety of the work it performs on a *pro bono* basis and has a long-standing commitment to serving the underprivileged and promoting social justice. Through its partnership with CBJC and similar nonprofit organizations,

Willkie Farr attorneys across the United States have provided legal representation to individuals from across the world who have suffered persecution and been forced to flee their native countries as a result. Through its partnership with CBJC, Willkie represents clients before EOIR, USCIS, the BIA, and the federal appeals courts. The Proposed Rule would severely impede the ability of Willkie Farr (and other law firms) to continue its *pro bono* practice in the aid of asylum seekers and those seeking other forms of relief.

As a threshold matter, we object to the 30-day comment period. The Administrative Procedures Act ("APA") requires agencies to "afford interested persons an opportunity to participate" in rulemaking. Consistent with the APA, Executive Order 12866 requires agencies to "…afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." The paltry 30 days provided, particularly during a global pandemic, does not allow adequate time to respond meaningfully to the myriad of proposed changes. Indeed, it seems designed to overwhelm and stifle public comment on a Rule that upends the asylum system as it exists today.

Although we oppose the Notice in its entirety, we are unable to address the many proposed changes within the 30 days provided, so this Comment focuses on the pretermission and frivolousness provisions. Both would cause irreparable harm to all asylum seekers, and particularly *pro se* asylum applicants. They would also inhibit the ability of *pro bono* counsel to effectively represent asylum applicants and undercut CBJC's *pro bono* model and mission. We therefore submit this Comment to (A) provide discussion and insight regarding the overreaching and legally unsupported changes set forth in the Notice, including (I) the unauthorized license afforded to IJs to deny an asylum application without a hearing and (II) the expansion of the definition of frivolous and granting to asylum officers ("AOs") newfound power to find that an application is frivolous, (B) present contrary evidence to the supposed public policy basis of the Notice and (C) discuss the severe and detrimental impact of the Proposed Rule on *pro se* applicants and, by extension, *pro bono* representation.

Based on the foregoing, we urge the withdrawal of the proposed addition of new subsection (e) to 8 CFR § 1208.13, as it compromises the due process rights of asylum applicants. We similarly urge the withdrawal of the proposed changes to 8 CFR § 208.20 and 8 CFR § 1208.20, as they operate as a cudgel to subdue prospective asylum applicants rather than to address the Notice's unsubstantiated allegations of rampant fraud. In fact, because the CBJC believes the asylum system should not be rewritten via regulation, especially without giving the public adequate time to comment in the midst of a pandemic, we urge the agencies to withdraw this rulemaking in its entirety.

A. <u>The Proposed Rules Regarding Pretermission and Frivolous Applications Would Deny Asylum Applicants Their Rights and Are Contrary to Statutory Language and Existing Precedent</u>.

I. The Proposed Rules Regarding Pretermission Are Inconsistent With An Asylum Seeker's Right to Be Heard.

The Immigration and Nationality Act ("INA") expressly provides asylum seekers an opportunity to be heard on their claim for protection. The Proposed Rules set forth in the Notice

allowing IJs to pretermit an asylum seeker's application directly contradict the statutory rights of an asylum seeker to be heard. The Notice proposes to add a paragraph (e) to 8 CFR § 1208.13 that would allow IJs to pretermit and deny any application for asylum, statutory withholding of removal, or protection under the Convention Against Torture on the basis that, in the IJ's view, the applicant has not established a *prima facie* claim for relief or protection. Under the Proposed Rule, an IJ may pretermit an asylum seeker's case in two circumstances: (1) following an oral or written motion by the Department of Homeland Security or (2) *sua sponte* upon the IJ's own authority.

The Proposed Rule would allow (indeed, encourage) such determinations to be based on the Form I-589 application alone, frequently prepared by asylum seekers without representation[1] and without knowledge of the intricacies of U.S. asylum law. The applicant's only relief would be to respond within ten days to the IJ's written notice of pretermission. This is at best a hollow opportunity to respond. The very same unrepresented, non-English speaking applicants whose applications were deemed to be fatally deficient out of the box—again, without any hearing—will be in the very same situation as they were before, when they sought to present their case through a Form I-589 and what little documentary evidence they may have been able to access at that time. Applicants who struggle, whether through lack of legal representation, ignorance of the intricacies of asylum law and procedure, or inability to speak English, to present a *prima facie* case through the paper record will fare no better in responding to an IJ's written notice of pretermission.

As an example, the Notice implies that a failure to identify a particular social group ("PSG"**)** to which the asylum seeker belongs would be a fatal flaw in an application and grounds for pretermission. *See Notice* at 36277 citing *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). However, this ignores the realities of current case law on cognizable PSGs, which requires a precarious balancing act between a PSG that is "too broad to have definable boundaries" and one that is "too narrow to have larger significance in society."[2] Crafting a PSG—which has been described as "an enigmatic and difficult-to-define term"[3]—is a difficult task for legal professionals. It is practically impossible for unrepresented applicants to sufficiently delineate in their Form I-589 a PSG that will satisfy an IJ empowered and encouraged to deny asylum applicants relief without a hearing should the pretermission changes advanced in the Notice be put into effect.

The changes that the Notice seeks to impose on the asylum process will deprive both IJs and asylum applicants of the benefits that live testimony provides. Both case law and statute describe the importance of live testimony in the asylum process; as the Ninth Circuit stated, "[t]he importance of an asylum or withholding applicant's testimony cannot be overstated, and the fact that Oshodi submitted a written declaration outlining the facts of his persecution is no response to

[1] In 2017, approximately 23% of asylum seekers were unrepresented; this rose from 15.8% in 2012 and 13.6% in 2007. The odds of gaining asylum are five times higher when represented: 91% of asylum seekers without representation are denied. *TRAC Immigration Project, Asylum Representation Rates Have Fallen Amid Rising Denial Rates (2017), available at* https://trac.syr.edu/immigration/reports/491/#:~:text=Rising%20Denial%20Rates-,Asylum%20Representation%20Rates%20Have%20Fallen%20Amid%20Rising%20Denial%20Rates,asylum%20decisions%20were%20up%20sharply.&text=While%20asylum%20grants%20increased%2C%20denials,denied%20asylum%20to%2061.8%20percent.

[2] Fatma Marouf, *Becoming Unconventional: Correcting the 'Particular Social Group' Ground for Asylum*, 44 N.C. J. Int'l L. & Com. Reg. 489 (2019) citing *Matter of A-B-*, 27 I. & N. Dec. at 336.

[3] *Rios v. Lynch*, 807 F.3d 1123, 1126 (9th Cir. 2015).

the IJ's refusal to hear his testimony." *Oshodi v. Holder*, 729 F.3d 886 (9th Cir. 2013) (en banc); *see also* INA § 208(b)(1)(B)(iii) (mentioning "demeanor," "responsiveness," and "the consistency between the applicant's or witness's written and oral statements" as factors to be considered in asylum credibility determinations). When providing testimony, asylum seekers have additional means to express their credible fears and expand upon the information they provided in their I-589 applications. This is even more important for applicants who cannot read or write in English, as providing testimony is critical to explaining their claim when they cannot do so in the written application. Empowering IJs to make decisions based only on reviewing a Form I-589 application means that IJs facing heavy caseloads are likely to preemptively dismiss meritorious claims that are inartfully described.

The Notice further seeks to justify these radical changes by asserting that other immigration applications are subject to pretermission without a hearing, therefore there is "no reason to treat asylum applications differently." *Notice* at 36277. This statement ignores the fundamental difference between an asylum seeker and other individuals seeking redress under the INA, thereby discounting the oftentimes life threatening consequences of a denied asylum application. Asylum is a solemn protection for foreign nationals who flee persecution in their native countries, memorialized in international law and United States law. Under international law, the United States is obligated to extend protection to those who qualify for such relief. Refugees are, by definition, a most vulnerable group, often fleeing persecution and violence directed at their very existence. It is imperative that an asylum seeker's statutory and due process rights be protected during the application process.

i. The Notice's Claim That There Is No Statutory Basis for Requiring a Hearing Is Erroneous.

Citing a small portion of 8 CFR § 11240.11(c)(3), the Notice asserts that there is no statutory basis for requiring hearings. The Notice claims that "[c]urrent regulations require a hearing on asylum application only to resolve factual issues in dispute." *Notice* at 36277 citing 8 CFR § 11240.11(c)(3). The Notice's unfairly cabined reading of the regulation ignores the following sentence in 8 § CFR 1240.11(c)(3): "[a]n evidentiary hearing **extending beyond** issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required." (emphasis added) (Thereby contemplating a hearing, albeit limited in subject matter.) This sentence makes clear that an IJ is still required to hold an evidentiary hearing, even if the IJ determines there is a basis for mandatory denial.

The Notice's assertion that no statutory provisions require hearings also ignores the other statutory rights and protections for asylum applicants provided in both the INA and the CFR. For example, 8 CFR § 1240.10 states that in a removal proceeding, the IJ shall "advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government […]" Additionally, INA § 240(a)(1) states that, in general "an immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of the alien." Additional evidence for an asylum seeker's statutory rights to a hearing can be found in INA § 240(b)(1), stating that "[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses," and INA § 240(b)(4), stating

that "the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government […]" Furthermore, 8 CFR § 1208.13 specifically states that the "testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." There can be no other explanation for these provisions, other than the clear right of asylum seekers to present their case at a hearing—this language would otherwise be superfluous. Depriving asylum seekers of the opportunity to provide testimony removes an avenue for applicants, who may have had difficulty completing their Form I-589 and providing additional documentary information that meets the high and complex standards of the asylum process, to be granted asylum based on an otherwise sound case. The notion that an asylum application is entitled to a hearing is clear throughout applicable law and deprivation of such an opportunity is unlawful.

ii. The Notice Ignores The Inherently Factual Nature of Asylum Cases as Supported by Case Law.

As noted above, the Notice only cites a fraction of 8 CFR § 1240.11(c)(3) in support of its claim that hearings should only be held to resolve "factual issues" and are, therefore, not required when an IJ determines that an applicant has failed to establish a *prima facie* case. In doing so, the Notice ignores the inherently factual nature of the vast majority of asylum claims and seeks to sweep away entire rafts of case law recognizing to be true.

For example, although the Notice states that a failure at the application stage to show membership in a proposed social group would be grounds to pretermit a case (*id.*), the BIA has repeatedly stressed that the social group analysis is "inherently factual [in] nature." *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018). An IJ's determination of whether a particular social group is "socially distinct" must be made on the individualized record in the asylum applicant's particular case. An asylum applicant must be afforded the opportunity to provide evidence showing that her group is socially distinct, even if a prior precedent decision found a similar group to be not cognizable based on the record in that case. *See, e.g., Matter of M-E-V-G*, 26 I&N Dec. 227, 251 (BIA 2014) (noting that precedent decisions should not be read as "blanket rejection[s]" of all factually similar asylum claims because "[s]ocial group determinations are made on a case-by-case basis"); *Matter of S-E-G-*, 24 I&N Dec. 579, 587 (BIA 2008) (noting that the "evidence of record" did not "indicate that Salvadoran youth who are recruited by gangs but refuse to join […] would be 'perceived as a group' by society") (emphasis added); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) ("[t]o determine whether a group is a particular social group for the purposes of an asylum claim, the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question."). An IJ cannot conclude, without affording an applicant the opportunity to present his or her case and resolve any factual disputes, whether the applicant belongs to a valid PSG under law.

There are many other examples of factual issues that cannot be resolved without a hearing, such as an applicant's credibility and the question of whether inconsistencies in an application may be resolved. By taking a narrow, and incorrect, view of what constitutes a "factual dispute," the proposed Notice ignores the inherently fact-based nature of an asylum application.

iii. The Notice's Claim That There is No Case Precedent Requiring Hearings or Oral Testimonies Is Also Erroneous.

In addition to incorrectly claiming that there are no statutory requirements regarding hearings for asylum seekers, the Notice also erroneously contends that there is no case precedent that asylum applicants must be permitted to present oral testimony in support of their application. *Notice* at 36277. In an effort to support this position, the Notice claims that the BIA's decisions in *Matter of Fefe* and *Matter of E-F-H-L-* are no longer precedential; the former due to its partial reliance upon 8 CFR §§ 208.6 (1988), 236.3(a)(2) (1988), and 242.17(c) (1988), which are no longer in effect, and the latter because it was vacated on procedural grounds. *Notice* at 36277. However, the Notice's bases for claiming that these decisions should no longer have precedential value are without merit.

First, in *Matter of Fefe*, the BIA held "[the BIA] consider[s] the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself." Thus, under *Matter of Fefe*, an IJ should not deny or pretermit an asylum application based on the written Form I-589 alone. The Notice asserts that the regulations underpinning this decision are no longer in effect, and therefore *Fefe*'s holding is no longer applicable. However, while there has been a regulatory change, the current regulations at 8 CFR § 1240.11(c)(3) are substantially similar to those cited in *Fefe*. And while the Eighth Circuit questioned the continued precedential value of *Fefe*, it did not decide whether or not *Fefe* was still good law. *See Ramirez v. Sessions*, 902 F.3d 764, 771 (8th Cir. 2018). Additionally, the BIA expressly found that the regulatory changes did not undermine *Fefe*'s holding in *Matter of E-F-H-L-*. As *Matter of E-F-H-L-* was vacated solely on procedural grounds, its substantive reasoning is still persuasive.[4] Moreover, the BIA has continued to cite *Fefe* and reaffirm an asylum applicant's right to testify in unpublished decisions. *See, e.g.*, *E-A-M-L-*, AXXX XXX 266 (BIA Dec. 19, 2018) (unpublished). Finally, the rationale of *Fefe* remains true even if the regulations have changed slightly since then: applicants must be afforded a fair process. Denying an applicant the opportunity to present his or her case does not meet basic notions of fairness.

Additional precedent bearing on the right to testify can be found in *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (a noncitizen may establish eligibility for asylum through testimony alone, so long as "the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear") and *Interiano-Rosa*, 25 I&N Dec. 264, 266 (BIA 2010) (holding that even where a noncitizen does not meet the IJ's imposed deadline to provide documentary evidence in support of an application for relief, the IJ should still provide "an opportunity to proceed to a merits hearing with [the respondent's] testimony"). The Notice does not, because it cannot, dispute that these cases remain good law.

Ignoring the above, the Notice relies on a narrow reading of *Matter of A-B-* to support such a draconian change in procedure. *See Notice* at 36277; *see also Matter of A-B-*, 27 I&N Dec. 316,

[4] It should be noted that *Matter of E-F-H-L-*, 27 I&N Dec. 226 (AG 2018) was a self-certified case by the Attorney General to himself. This practice explicitly undermines and avoids established case law and regulations.

340 (A.G. 2018)[5] ("if an alien's asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group […]—an immigration judge or the Board need not examine the remaining elements of the asylum claim."). However, *Matter of A-B-* nowhere holds that an asylum applicant does not have the right to a hearing if their application is deficient or seems to be on paper "fatally flawed." Rather, it reaffirms the inherently factual nature of many asylum claims and exhorts IJs to employ "rigorous analysis" consistent with the standards outlined in *M-E-V-G-* and *W-G-R-* (discussed *supra*). *Id*. at 340. The precedent regarding the necessity and essential nature of allowing an asylum applicant to testify instead weighs on the side of allowing these types of issues to be tested and resolved at a hearing.

Similar to the claims that there is no statutory basis for requiring hearings in asylum cases, the Notice glosses over the context of the cases they are relying on and ignores, in large part, the body of case law that does not support their position.

iv. The Proposed Changes Would Deny Asylum Applicants Their Due Process Rights.

By allowing an IJ to pretermit an asylum seeker's case solely on the basis of the Form I-589, the Proposed Rule erodes an asylum applicant's due process rights to a full and fair hearing. The Notice ignores a wealth of established case law clearly stating that an asylum applicant's due process rights include the right to a full and fair hearing, including the opportunity to present evidence and testimony in a meaningful manner. *See Oshodi v. Holder*, 729 F.3d 883, 889-93 (9th Cir. 2013) (en banc) (stating that a "vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one's behalf" and holding that the IJ violated due process by denying asylum based on an adverse credibility finding after refusing to allow the applicant to testify to the contents of his application). This includes the due process right to be heard. *See Juncaj v. Holder*, 316 F. App'x 473, 480-81 (6th Cir. 2009) (holding that the IJ denied a noncitizen due process by failing to hold a hearing on the merits of his asylum application); *Podio v. INS*, 153 F.3d 506, 511 (7th Cir. 1998) (holding that the IJ failed to provide a fair hearing where he refused to hear testimony from the respondent's witnesses); *Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2003) (an IJ "violates due process by barring complete chunks of oral testimony that would support the applicant's claims"); *Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007) (holding that for a removal hearing to be fair, "the immigrant must be given the opportunity to fairly present evidence, offer arguments, and develop the record"); *Shoaira v. Ashcroft*, 377 F.3d 837, 842 (8th Cir. 2004) (same); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal quotations and citations omitted); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (noting that where credibility and veracity are critical to the administrative decision-making process, due process requires a hearing because "written submissions are a wholly unsatisfactory basis for decision"). *See also Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998) ("Justice requires that an applicant for asylum or withholding of deportation be afforded a meaningful opportunity to establish his or her claim.").

[5] Similar to *Matter of E-F-H-L-*, 27 I&N Dec. 226 (AG 2018), it should be noted that *Matter of A-B-* (A.G. 2018) was a self-certified case by the Attorney General to himself.

Due process also requires a neutral and impartial IJ who has not pre-judged an asylum applicant's claim. *See Serrano-Alberto v. Attorney Gen.*, 859 F.3d 208, 213 (3d Cir. 2017) (Due process includes "a reasonable opportunity to present evidence" and "a decision on the merits of [an asylum] claim by a neutral and impartial arbiter.") (internal quotations and citations omitted). *See also Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002) (holding that the IJ violated due process of *pro se* asylum seeker where the IJ pressured the noncitizen to "drop his asylum claim before any significant exploration of all relevant facts had occurred" and finding that "Cano was presented with the Hobson's choice of proceeding with a claim the decision-maker had labeled as baseless, or dropping his claim and receiving six months to make departure arrangements"). Allowing IJs to pretermit an asylum claim without ever hearing from the applicant denies applicants of this very fundamental element of due process—impartiality.

Finally, the Notice's equation of asylum applications with other immigration applications that may be pretermitted without a hearing due to legal insufficiency is facile and ignores the unique complexities of asylum cases. And the Notice's reliance on *Zhu v. Gonzales* for this point is misplaced. *See Zhu v. Gonzales*, 218 F. App'x 21, 23 (2d Cir. 2007) (finding that pretermission of an asylum application due to a lack of a legal nexus to a protected ground was not a due process violation ***when the alien was given an opportunity to address the issue***).[6] As discussed above, asylum seekers are a particularly vulnerable group, often fleeing persecution or violence that directly threatens their life. There is a marked difference between an individual who is affirmatively applying for an immigration benefit with the advantages of time, access to documents, representation, and more, as opposed to asylum seekers who have recently fled for their lives and have limited or no access to the documentary evidence to substantiate or support their claim. Testimony is indispensable in an asylum case. Other cases may be granted on papers alone, proving the applicant shows their statutory eligibility; because of the inherently factual nature and the necessity of credibility determinations, asylum cases cannot. It also ignores the United States' responsibilities under international law. As the BIA recognized in *Matter of S-M-J-*, "[a]lthough [it] recognize[s] that the burden of proof in asylum and withholding of removal cases is on the applicant, we do have certain obligations under international law to extend refuge to those who qualify for such relief." 21 I&N Dec. 722, at ___ (1997).

The Notice does not explain how the denial of a hearing at which an applicant can meaningfully present his or her case comports with an asylum applicant's rights to due process under existing—and still binding—precedent.

v. The Notice's Comparison of Asylum Applications to Motions to Reopen to Apply for Asylum Is Problematic.

The Notice states that pretermission due to a failure to establish *prima facie* legal eligibility for asylum is akin to denying a motion to reopen to apply for asylum on the same basis. To reach this conclusion, the Notice cites *INS v. Abudu* for the proposition that "the BIA may deny a motion to reopen to file an asylum application if alien has not made *prima facie* case for that relief." *Notice* at 36277. However, the Respondent in *INS v. Abudu* expressly ***declined*** to seek asylum in his

[6] Notably, the finding in *Zhu* was also based on the represented applicant being given a 30-day period to respond before any pretermission was effectuated—a far cry from the ten-day period contemplated in the Proposed Rule, which would apply equally to both represented and *pro se* applicants.

initial proceedings, and his motion to reopen his deportation proceeding to enable him to apply for asylum was denied because all the facts except for one had been available to the respondent before his initial hearing. *See INS v. Abudu*, 485 U.S. 94, 94 (1988). This is a far cry from pretermission of an initial claim where an applicant at the outset seeks to fully exercise their rights to asylum—which merits a different and lower standard, as expressly recognized by the Supreme Court. *See id*. at 111 ("[A]n alien who has already been found deportable has a much heavier burden when he first advances his request for asylum in a motion to reopen"). Holding an asylum seeker's initial application to the same standard as a motion to reopen to apply for asylum finds no support in *INS v. Abudu*, and such reasoning cannot justify the radical changes the Notice proposes to make.

II. The Proposed Rules Regarding Frivolousness Include Overreaching and Inequitable Changes.

As set forth in the Notice, the Departments propose to take a three-step approach to deny asylum applications *en masse* based on allegedly frivolous applications. The Notice seeks first to "clarify" that "knowingly" making a frivolous application—which was not previously defined in the INA—will now include both actual knowledge and willful blindness, which the Proposed Rule interprets to mean the applicant was "aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise." *Notice* at 36273. Second, the Proposed Rule would expand the definition of "frivolous," which currently only applies to those "material elements" of an asylum claim that are "deliberately fabricated," to also include applications that are "filed without regard to the merits of the claim" or are "clearly foreclosed by applicable law"; thus shifting the standard from a purely factual determination to a legal one. *Notice* at 36295. Third, under the Proposed Rule, AOs—who are not required to be attorneys—would be given the discretion to deny or refer an asylum claim to an IJ based solely on the AO's own determination of frivolousness. When coupled with the Notice's expanded discretion for IJs to pretermit cases, the functional outcome of these changes is the eradication of the individual's meaningful opportunity to be heard.

This three-prong approach, as further discussed below, is inconsistent with both a plain reading of the statute and legislative intent. And the resulting impact on applicants is not only severe, but also inconsistent with the intent behind identifying and declaring applications to be "frivolous." Under section 208(d)(6) of the INA, an immigrant may be permanently ineligible for any benefits under the INA if the Attorney General determines that such individual has knowingly made a frivolous application for asylum and has also received the notice required under paragraph (4)(A) of the same section. By expanding the definition of "frivolous" and allowing AOs to make that determination themselves, the Administration seeks to weaponize this lifetime ban and use it in a way that was never intended nor sanctioned by Congress.

Moreover, these proposed changes disenfranchise asylum applicants and particularly *pro se* applicants. Such *pro se* applicants are able to attest to the factual circumstances they experienced in connection with their asylum application, but are ill-equipped to evaluate the legal merits of their own claim in a foreign jurisdiction, in a judicial system they are not familiar with, and perhaps in a language they are not yet fluent in. The Proposed Rule as set forth in the Notice would create the unjust situation in which an applicant would be barred—for life—from relief under the INA if she submitted a legitimate asylum claim that was not presented correctly or was, unknown to her, foreclosed by applicable law just the day before.

The severity of this lifetime ban is not lost on an Administration that looks to weaponize it to thwart a crisis of "rampant" asylum fraud that simply does not exist.

i. The Purported Clarifying of the Term "Knowingly" and Expansion of the Definition of "Frivolous" Are Extreme Changes to the Current Landscape of Asylum Law and in Direct Conflict With Both a Plain Reading of the Text and Legislative Intent.

The Proposed Rule works to threaten tens of thousands of legitimate asylum applicants with a severe penalty that was contemplated by Congress as *only* applicable to those individuals who knowingly filed, with regards to a material element of the claim, a deliberately fabricated application. Because of the severity of this penalty, under the current framework, such a finding may only be made if an IJ or the BIA is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. 8 CFR § 1208.20. The legislature formulated this high standard for frivolousness and put in place the safeguards for a meaningful review and opportunity to be heard by an IJ or the BIA "with the severity of the consequences [of the lifetime ban] in mind." *In re Y-L-*, 24 I&N Dec. 151, 158. The Administration's Proposed Rules as set forth in the Notice ignore that intent and substitute the legislature's clear formulation for their own.

The Proposed Rule purports to "clarify" the legislature's intent in order to include a broadened definition of "knowingly" that encompasses an asylum claim made with willful blindness, which is proposed to be defined as the applicant "being aware of a high probability that his or her application was frivolous and deliberately avoid[ing] learning otherwise." *Notice* at 36273. The Notice states that the application must have been "knowingly made—*i.e.*, knowing of its frivolous nature[…]" to be considered frivolous. *Id.* This proposed amendment is coupled with an expansion of the definition of frivolous to include claims that are filed "without regard to the merits of the claim" or are "clearly foreclosed by applicable law." *Notice* at 36295. That the Notice seeks to "clarify" the meaning of "knowingly" to include willful blindness is an improper extension of the term and inconsistent with a plain reading of the statute's text and legislative intent.

The Notice states that "[t]he statutory text does not provide a definition of "frivolous," expressly restrict how it may be defined, or compel a narrow definition limited solely to the deliberate fabrication of material elements[…]" *Notice* at 36274. But this is wrong. The statutory text does, in fact, compel a narrow definition limited solely to the deliberate fabrication of material elements, thus restricting how the term "frivolous" may be interpreted. The legislature's express exclusion of purportedly "other types of frivolousness" such as "abusive filings, filings for an improper purpose, or patently unfounded filings" was purposeful. *Notice* at 36274. The Administration seems to suggest here that the legislature must have included an enumerated laundry list of those items that would *not* encompass frivolousness in order for the list they did draft (*i.e.*, *only* deliberate fabrication as to a material element of the claim) to be recognized as clear. A matter that is not covered by the plain text of the law is to be treated as not covered. *See generally, The District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia writing for the majority). The Administration cannot ignore the plain text of the law.

The current rule states that an asylum claim may be considered frivolous only if a material element of an asylum claim is determined to be deliberately fabricated. This is a cognizant departure from the language included in the then proposed rule, which sought to define a frivolous application as one that "is fabricated or is brought for an improper purpose." Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 468 (Jan. 3, 1997) (proposed rule). The Notice properly takes note of this amendment to the language between the proposed and final rule, stating that the final rule "did not explain why DOJ altered its proposed definition." *Notice* at 36274. But the legislature's intent is clear in its final language. The legislature's decision to replace the more broad "is fabricated or brought for an improper purpose," in the proposed rule, which would have been applicable to all aspects of an asylum claim (not only those that are material), with the more pointed "is deliberately fabricated," applicable only to material elements of an asylum claim in the final rule, necessarily means that the legislature intended to narrow this section's reach. The Notice ignores the drafting history, and the proposed different formulations, entirely.

The characterization of this measured substitution as "settling" is blatant misinterpretation. Regardless of a lack of explanation in the legislative history for the basis for this change, the fact of the change itself establishes the intent to narrow what can be considered as "frivolous." To broaden the meaning of "frivolousness" would, therefore, be inconsistent with the clear legislative drafting history and Congress's intent when this rule was first considered. The Proposed Rule states that "*one of* the central principles in asylum reform process begun in 1993" is "to discourage applicants from making patently false claims." Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 447 (emphasis added). The same Black's Law Dictionary cited in the Notice defines "false" as "[u]ntrue; [d]eceitful; lying; [n]ot genuine; inauthentic; [w]rong, erroneous." *Black's Law Dictionary* (11th ed. 2019). A false claim, or untrue claim, or wrong claim is not a *meritless* claim and the legislature that drafted the final rule properly understood and provided for such distinction; the current Proposed Rules as set forth under the Notice does not. *See generally*, *Heller*, 554 U.S. at 573 (stating that the "normal meaning [of a word] excludes secret or technical meanings").

The principle of discouraging applicants from making patently false claims is well codified in the final rule's requirement that an application be "knowingly" "deliberately fabricated" in order to be considered frivolous. The Notice's statement that its proposed change would "better effectuate the intent […] to discourage applications that make patently *meritless* or false claims" is disingenuous. Congress's intent to discourage patently false claims was appropriately and effectively discharged by the regulations that the Departments seek to displace. *See King v. Burwell*, 576 U.S. 988 (2015) ("[c]ontext always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them") (dissent). The plain language of the statute reflects Congress's intent to effect a narrow view of frivolous.

ii. The Expansion of the Definition of "Frivolous" Will Allow Adjudicators to Preemptively Deny Potentially Meritorious Asylum Claims.

The Administration proposes expanding the term "frivolous" to include applications "without merit" or those "filed without regard to the merits," as well as claims that are "clearly

foreclosed by applicable law." *Notice* at 36295. This staggering expansion of frivolousness beyond the realm of facts and into the world of legal sufficiency would require individuals who have fled their home country in fear of their life—who often do not speak English and cannot afford to hire an attorney—to understand the intricacies of American immigration law. These changes would force refugees to undertake significant, complex legal research during a period of immense trauma in their lives to assert a claim, or else risk a finding that they were willfully blind to the fact that their claim was legally meritless, ultimately culminating in the refugee's removal and permanent ineligibility for any U.S. immigration benefits. The effect of this proposed change is likely to prove cataclysmic to *pro se* applicants, who may be able to articulate the facts about what happened to them, but not form a coherent legal argument without the assistance of an attorney. As a result, well-meaning asylum seekers with a legitimate fear of persecution would be subjected to the harsh penalty—historically reserved for cases of fraud—of permanent ineligibility for any U.S. immigration benefits.

Further, the Administration is using the threat of permanent ineligibility for immigration benefits as a tool to dispel even *more* refugees, offering the option to accept a voluntary departure order back to their home country (the same country they just risked their life to flee from) instead of making a frivolous finding. However, as the Administration knows, even a timely voluntary departure does not protect a refugee from other inadmissibility bars and overstaying a voluntary departure period can bring extremely severe consequences—including a monetary fine of up to $5,000 and ineligibility for grants of cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. INA § 240(B)(d). Thus, if a refugee is ordered to voluntarily depart and fails to do so, but later becomes eligible to adjust his or her status, he or she would almost certainly be found ineligible to do so for 10 years. *Id.* The threat of a frivolousness finding that would result in permanent ineligibility for immigration benefits is designed to coax asylum applicants—including those with potentially meritorious claims—into just giving up and going "home" to a country where they are in mortal danger. This is an inappropriate and unjustifiable use of the Administration's power.

This follows in a long line of actions by the Administration designed to chip away at the resources available to migrants coming from Central America and further complicate the asylum process. *See, e.g.*, *Matter of A-B-* (2018) (in which Attorney General Sessions overruled BIA precedent which previously recognized domestic violence and gang violence as valid bases for asylum); 8 CFR § 1208.13(c)(4) (July 2019) (barring migrants who enter the southern border through Mexico from seeking asylum). The Proposed Rules now weigh the scales against asylum seekers by requiring them to advance legally precise case theories, often without the aid of legal help. Coupled with the improperly broadened definition of "frivolousness," asylum seekers' inability precisely to state their claims for asylum to the satisfaction of AOs or IJs empowered peremptorily to deny claims may also bar them from being able to claim any remedy whatsoever under U.S. immigration law. Given the current and ongoing flux in case law—often prompted by the Attorney General's recent embrace of the process of self-certifying cases in order to upend long-established precedent—the expansion of frivolousness to include claims "foreclosed by applicable law" is not only unreasonable but cruel.

Even if the Administration's recent actions tell us nothing else, they at least reveal that asylum law is evolving at a rapid rate with which even immigration law practitioners have difficulty keeping up. To require an asylum seeker to attest not only to their lived experience and

trauma, but also to the efficacy of complex legal arguments—or else risk expedited removal and the loss of immigration benefits for life—is unfair and unnecessarily penal in intent. If they were to go into effect, the Proposed Rules contemplated in the Notice would result in the wholesale denial of potentially meritorious asylum claims, ultimately culminating in legitimate asylum seekers' expulsion from the United States to a countries in which they are in grave danger, as well as a permanent ban on ever receiving U.S. immigration benefits. Such a result is unjust in every sense of the word.

iii. *Allowing an AO to Make a Threshold Determination of Frivolousness Forecloses Meaningful Factual Development and Facilitates Wrongful Pretermission.*

The Notice states that "[a]llowing asylum officers to refer or deny frivolous cases solely on that basis would strengthen USCIS's ability to root out frivolous applications more efficiently […] and would help the Department better allocate limited resources and time and more expeditiously adjudicate meritorious asylum claims." *Notice* at 36275. Given that IJs must review a claim *de novo*, it is unclear how an AO's determination of frivolousness would help encourage judicial efficacy. By focusing on the possible frivolousness of a non-material element of the claim, an AO is likely to do *less* fact-finding, therefore giving the IJ less information to review when making a determination and in turn causing the IJ to expend more time and resources reviewing the claim.

The expansion of an AO's ability to determine and refer cases to an IJ based on frivolousness would only result in a lowered burden if courts, through wrongful pretermission, as discussed above, decided not to hear cases. This combination of an AO's extended discretion to refer an applicant to an IJ coupled with an IJs heightened discretion to not hear cases under the Notice necessarily results in the removal of the individual's meaningful opportunity to explain discrepancies or purportedly implausible aspects of the claim. This removes a vital safeguard as discussed by the legislature and strips an applicant of any meaningful opportunity to be heard.

iv. *Credibility Determinations Already Provide Adjudicators With The Necessary Tools to Weed Out Fraudulent Asylum Applications.*

The stated legislative intent to "discourage applicants from making patently false claims" and to "reduce the likelihood that fraudulent or frivolous applications will enable deportable or excludable aliens to remain in the U.S. for substantial periods" is already provided for through an AO's ability to make factual credibility determinations and refer cases to IJs under such determinations. Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 447; S. Rep. No. 104-249 at 2 (1996). According to the USCIS RAIO Combined Training Program, AOs are instructed to provide the applicant an opportunity to explain any information in the Form I-598 that conflicts with interview testimony when making a credibility determination. *See* USCIS RAIO Combined Training Program, "Interviewing – Introduction to the Non-Adversarial Interview Training Module," 29 (December 20, 2019) (stating that AOs "must learn to distinguish between the likelihood that the interviewee is confused and the possibility that his or her non-responsiveness is an attempt to receive a benefit by fraud."). AOs are thus already implementing the goals of the legislature without the discretion to make frivolousness determinations, an intricate legal task. To improperly expand the scope of their

discretion could lead to a conflation of negative credibility and frivolousness that is inconsistent with case law and punitive to applicants.

In *Matter of B-Y-*, the BIA makes clear that a determination of credibility must be distinct from a determination of frivolousness. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010). The BIA states that such determinations must be made separately because the burden of proof differs as to credibility and frivolousness—the respondent has the burden of demonstrating credibility, while the Government bears the burden in the frivolousness determination. *Id*. *See also Scheerer v. United States Attorney General*, 445 F.3d 1311, 1322 (11th Cir. 2006) (reversing a finding of frivolousness and stating that "[u]nder 8 CFR § 208.20 a finding of frivolousness does not flow automatically from an adverse credibility determination"). *Matter of B-Y-* places a significant burden on IJs—one that would likely be lost on a non-attorney—to bifurcate findings of credibility and frivolousness because such findings of frivolousness "should not simply be left to be interfered or extrapolated from the strength of the overall adverse credibility determination." *Matter of B-Y*, 25 I&N at 241. This proposition is further supported by the Eleventh Circuit in *Scheerer*, which stated that "[i]nconsistencies between testimony and an asylum application […] do not equate to a frivolousness finding under Section 1158(d)(6), which carries with it much greater consequences. It is because of those severe consequences that the *regulation requires more*: a finding of deliberate fabrication of a "material element" of an application, plus an opportunity for the alien to account for inconsistencies." *Scheerer*, 445 F.3d at 1322 (emphasis added). This balancing is important given the severe repercussions of an application found to be frivolous and is only properly protected by a thorough review by an IJ or the Board and meaningful opportunity to be heard by such. *See* Asylum Procedures, 65 Fed. Reg. at 76,128.

Allowing AOs to refer cases solely on the basis of frivolousness thus does nothing to further implement the legislative intent to deter fraudulent applications. It is important to ask, then, what this Proposed Rule truly aims to do, particularly when the logical result is the compounding of two distinct determinations into a single standard, not made by an IJ or the Board, that likely results not only in the denial of reprieve but the active infliction of harm.

B. <u>The Purported Justifications for the Proposed Rules are False, Biased and Based Upon a Hostile View of Asylum</u>.

I. The Public Policy Notion that Fraudulent Asylum Applications Are Rampant and Increasing is False and Unsupported by Facts.

The current administration erroneously cites an increase in fraudulent asylum cases as the policy basis for the changes set forth in the Notice, particularly regarding the expansion of the definition of "frivolous." The Notice states that "[f]rivolous asylum applications are a costly detriment, resulting in wasted resources and increased processing times for an already overloaded immigration system. *See Angov v. Lynch*, 788 F.3d 893, 901-02 (9th Cir. 2015) ("[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. * * * [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. * * * Consequently, immigration fraud is rampant.")." *Notice* at 36273. But the Notice fails to cite any meaningful statistics to support it and instead only offers banal platitudes about judicial efficacy. If fraud is the underlying issue, as the Administration claims, then expanding the definition of "frivolous" would not have an effect. Not only does the Notice fail to explain the

link between fraud and frivolousness, the fundamental premise that there is rampant fraud which demands such draconian, and unrelated, measures is not supported by the facts.

Many of the Administration's claims of "rampant" fraud are based on a 2014 House Judiciary Subcommittee hearing to a 2009 internal USCIS report which claims there is evidence of a 70% rate of proven or possible fraud in asylum cases and states that "[i]f 70 percent of these grants were made based on fraudulent applications, American taxpayers are being defrauded out of hundreds of millions, if not billions, of dollars each year." *Asylum Fraud: Abusing America's Compassion?* Hearing before the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 113th Cong., 2d Sess. (2014). This 2009 report was based on a small sample of 239 affirmative asylum applications, from the short window of May to October 2005, which claimed to find "proven fraud" in 29 applications (12%). *Id*. This is hardly evidence, ten years after the fact, of a 70% fraud rate.

The Administration also points to the findings from Operation Fiction Writer, a criminal investigation of attorneys and application preparers who purportedly counseled asylum seekers to lie about religious persecution and forced abortions to bolster their claims. Although Operation Fiction Writer is one serious example of criminal immigration fraud from 2014, criminal prosecutions for immigration offenses have generally been down. Convictions for immigration offenses with a prison sentence of one year or more in November 2017 were down 10% from 2016 and 41.1% from five years earlier. TRAC Immigration Project, *Serious Criminal Immigration Convictions Still Infrequent Under Trump* (2018), available at https://trac.syr.edu/immigration/reports/496/. This evidence suggests that, if anything, asylum fraud has decreased.

II. The Notice Presents Its Opinion on Increasing Asylum Applications as Evidence of Malfeasance As Objective Fact.

The Notice also points to the significant increase in asylum cases and asylum seekers as a failure of the U.S. immigration system, with the President claiming that the approximately 1,700% increase in asylum claims over the past year is evidence that immigrants have found a way to "game the system." *See* Notice at 36273; Remarks by President Trump at the National Federation of Independent Businesses 75th Anniversary Celebration, June 19, 2018, available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-federation-independent-businesses-75th-anniversary-celebration/.

However, this supposed explanation ignores the fact that the significant increase in the number of asylum seekers can be directly tied to the humanitarian crises south of the border. The vast majority of defensive cases were filed by applicants from Northern Triangle countries (El Salvador, Guatemala, and Honduras) and Mexico. A 2018 Department of Homeland Security report detailing the amount of affirmative and defensive asylum cases between 2016 and 2018 states that "[s]imilar to [2017], the largest numbers of applications filed with the courts were from citizens of the Northern Triangle countries (78,762) and Mexico (24,412) (Table 6b). These four countries made up over a third (65 percent) of all defensive asylum applications filed with EOIR." Refugees and Asylees: 2018, *available at* https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf; *See also* U.S. Department of Justice,

Executive Office for Immigration Review, Statistics Yearbook: Fiscal Year 2018, available at https://www.justice.gov/eoir/file/1198896/download; Kristie de Pena, *Asylum Fraud Isn't What You Think It Is*, Niskanen Center, Aug. 14, 2018, *available at* https://www.niskanencenter.org/asylum-fraud-isnt-what-you-think-it-is/; Lindsay M. Harris, Sessions fundamentally misses the mark on asylum system, The Hill, Oct. 17, 2017, *available at* https://thehill.com/opinion/immigration/355734-sessions-fundamentally-misses-the-mark-on-the-asylum-system.

The Departments' efforts to deny Central American migrants *en masse* have been extremely successful. Following *Matter of A-B-*, asylum grant rates for El Salvador, Guatemala and Honduras—the same countries repeatedly and falsely accused by the Administration of filing fraudulent and meritless asylum applications (an accusation advanced without evidence in the Notice)—fell to an average of 14.4 percent (June to November 2018) compared to a 23.9 percent grant rate in the first five months of 2018—a nearly 10-point drop. All other countries saw virtually no change in grant rate, with only a 0.5-point decrease. *See* Syracuse University Transactional Records Access Clearing House (TRAC) Asylum Decision Tool, available at https://trac.syr.edu/phptools/immigration/asylum/. Similarly, at the time of its passage, the effect of the government's bar on applicants traveling through Mexico was "to effectively close the border to the vast majority of the 18,700 asylum seekers on Mexico's side of the border[,] most of [whom] have traveled from Central America and Cuba." Santiago Perez, *New Asylum Rule Strands Thousands at Southern Border*, The Wall Street Journal (July 16, 2019), available at https://www.wsj.com/articles/new-u-s-asylum-rule-strands-thousands-at-southern-border-11563285772. And that is to say nothing of the thousands of migrants who have attempted to travel to the United States to escape persecution since the Administration passed the rule in July 2019.

III. Supposed Gains in Judicial Efficiency Are Either Illusory or Disingenuous.

Any supposed gains in judicial efficiency through the expanded definition of frivolousness—with which the Proposed Rules metaphorically arms intrepid AOs and IJs to cut through the thick weeds of fraudulent asylum claims—is immediately undercut by vague language ripe for appellate challenges. By removing the requirements that a fabrication be "deliberate" and "material," and instead imposing broader standards, the Proposed Rule opens the door to increased litigation. Under the Proposed Rules, an application would be deemed frivolous "if applicable law clearly prohibits the grant of asylum." Notice at 36276. As the Notice itself takes pains to note that "reasonable arguments" to modify or even reverse existing law may not be frivolous, it is clear that there is ample room to litigate the "reasonableness" of claims. Due to the draconian penalty associated with a finding of frivolousness, applicants may be more inclined to appeal any such finding. Increased appellate litigation, at both the BIA and the Circuit Courts, undermines any justification based on judicial efficiency.

Similarly, it is important to note that the sweeping discretion to pretermit hearings is likely to prove tempting to IJs operating in a pressure-cooker environment of harsh performance metrics. In 2018, EOIR issued Performance Metrics requiring IJs to complete 700 cases per year, 95% at the first scheduled individual hearing, and further requiring a remand rate of less than 15%. *See* EOIR Performance Plan Adjudicative Employees, March 30, 2018 *available at* https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics. The metrics

place pressure on IJs to quickly adjudicate cases without granting continuances. Allowing IJs to pretermit asylum cases without holding a hearing, coupled with incentives for IJs to quickly process cases in order to meet the EOIR's performance metrics, will necessarily lead to the premature denial of applications that may have had a chance of succeeding at a hearing. That is, IJs will feel pressured to use pretermission to meet their metrics, having been stripped of other options. The increased "efficiency" comes at a grave price—a duplicitous trade off with due process.

C. The Proposed Rules Disproportionately Disenfranchise *Pro Se* Asylum Applicants and Will Hamper *Pro Bono* Representation.

CBJC provides free legal services to low-income New Yorkers, many of whom would otherwise be required to represent themselves *pro se*, by mobilizing *pro bono* lawyers, law firms, and corporate legal departments. As one of its core projects, CBJC's Immigrant Justice Project works to secure representation for vulnerable immigrants including asylum seekers, survivors of violent crimes and trafficking in the United States, and others seeking humanitarian remedies. After receiving a request for assistance, CBJC screens prospective clients, first by telephone and then in an in-depth meeting. Cases are accepted only after a legal analysis of the grounds for asylum. CBJC then pairs the asylum seeker with a *pro bono* attorney, continuing to provide mentorship and guidance throughout the representation. *Pro se* applicants receive the benefit of a high-quality representation without charge, while *pro bono* attorneys are able to take on challenging cases bolstered by the support and legal expertise of CBJC staff. This successful model has resulted in hundreds of individuals being granted asylum before the Asylum Office and in Immigration Court.

In an increasingly complicated legal framework, it is no surprise that the odds of gaining asylum are five times higher when represented: 91% of asylum seekers without representation are denied. *See* TRAC, Asylum Representation Rates Have Fallen Amid Rising Denial Rates (2017), *available at* https://trac.syr.edu/immigration/reports/491. Yet nationally, only 37% of asylum seekers are represented. *See* American Immigration Council, Access to Counsel in Immigration Court (2016), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. Legal representation has an undeniable impact on outcomes but unfortunately, asylum seekers, especially recent arrivals to the U.S. or those lacking resources, struggle to find competent counsel. *See Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings: New York Immigrant Representation Study Report*, 33 Cardozo L. Rev. 357 (2011-2012). With no right to counsel in immigration proceedings, legal services and *pro bono* attorneys provide an invaluable resource. Indeed, studies show that representation leads to higher appearance rates, as well as fairer, more efficient, and more consistent adjudication. *Pro bono* attorneys in particular have long been a recognized and appreciated bulwark of the Immigration Court system, "benefit[ting] both the respondent and the court, [by] providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented." *See* https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf; *see also* City Bar Justice Center Press Release, "NYC Bar Association Calls for Right to Counsel for Immigrant Detainees" (November 2009) (noting that representation increases judicial efficiency and decreases wastefulness).

Yet the Proposed Rules will result in the summary dismissal of countless claims by asylum seekers before legal service organizations like CBJC even have the opportunity to locate *pro bono* representation. Potentially meritorious cases would be pretermitted not because the applicant has no claim, but because they did not know how to articulate it within the confines of a written I-589 application. Such cases may never reach *pro bono* counsel. CBJC knows firsthand that this rule will lead to legitimate asylum seekers being deported. One particular case is illustrative: a potential client contacted CBJC after an IJ refused to let her testify and denied her asylum. CBJC accepted her case and found her *pro bono* counsel with Willkie Farr. After the BIA remanded based on denial of due process, Willkie Farr represented the client, who testified at a full hearing and ultimately prevailed based on her political opinion and particular social group membership. Under the proposed pretermission regulation, the initial denial would stand and the client would have been deported. Although that specific case is dramatically on-point, the impact of the Proposed Rule is in fact much broader. It is commonplace for CBJC to accept clients who have already submitted an I-589 asylum application but have not yet had their individual hearing. *Pro bono* attorneys then work with clients to refine and articulate their claims into an accepted legal framework. This involves not only a nuanced understanding of legal theory but also eliciting and including facts that an individual may think irrelevant—but which in fact prove critical to advancing their claim. Many of these cases are subsequently granted. Under the Proposed Rule, they would simply disappear.

The expansion of frivolousness also poses unique harms to *pro se* applicants and, by extension, potential *pro bono* representation. Though the Notice is careful to note that "reasonable arguments to extend, modify, or reverse the law as it stands" should not be considered frivolous, it is hard to see how a *pro se* applicant would be able to convincingly argue that existing case law should be either refined or reversed. Notice at 36276. This harm is especially acute given the turbulent state of asylum case law over the past several years. In one CBJC case, an Attorney General opinion undermining the entire legal theory of the case was issued just days before the scheduled hearing. *Pro bono* counsel was able to seek a briefing extension from the IJ and perform the exhaustive legal research required to advance the case. A *pro se* applicant would likely find this an impossible task. The expansion of frivolousness to encompass legal arguments is unjust, particularly as applied to *pro se* applicants, many of whom are also detained. Fear of the harsh consequences resulting from a finding of frivolousness may also disproportionately lead *pro se* applicants to accept voluntary departure, withdrawing their applications with prejudice and waiving any right to appeal. This iron fist in a velvet glove forecloses the efforts of any future *pro bono* counsel.

The proposals on pretermission and frivolousness effectively tie the hands of any *pro bono* counsel seeking to rehabilitate a case filed by a *pro se* applicant. By frustrating and complicating the process, the Administration may actually decrease judicial efficiency while concurrently stripping asylum applicants of a meaningful opportunity to gain asylum.

Conclusion

As asylum law currently stands, *pro se* asylum seekers have the odds stacked against them; the Proposed Rule will make it impossible for a *pro se* applicant to make a successful claim for asylum. This is because the Proposed Rule, through the expansion of the definition of frivolous and heightened deference to IJs to pretermit cases, seek to exclude, frustrate and ultimately

penalize any applicant that cannot navigate the complex waters the Administration has purposefully agitated.

Finally, we are again compelled to lodge our overarching objection to this Notice and the Proposed Rule in its entirety, beyond the sections on pretermission and frivolousness. The United States is currently grappling with a global health pandemic of unprecedented scope and uncertain future effects. The unique challenges posed by the pandemic have been recognized by the Departments in other contexts, yet ignored here. The Notice, with its inexcusably short 30-day comment period, operates to rewrite the entire asylum system by regulation without affording the public a meaningful opportunity to respond. It upends decades of established case law and in multiple instances ignores the very statute it supposedly implements. It is lawmaking by fiat, and it is made worse by directing its most drastic changes squarely toward a vulnerable and traumatized population.

For all the reasons set out above, the City Bar Justice Center and Willkie Farr urge the Departments not to put into effect the drastic changes to asylum law and procedure proposed in the Notice.

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EXHIBIT 27

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Office of Information and Regulatory Affairs,
Office of Management and Budget,
725 17th Street NW, Washington, DC 20503;
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

July 15, 2020

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

Dear Mrs. Alder Reid,

Ayuda writes to comment in strong opposition to the Notice of Proposed Rulemaking referenced above and published in the Federal Register on June 15, 2020. This Notice of Proposed Rulemaking seeks to overturn decades of U.S. and international law governing asylum in the United States, and it does so without justification. The results of these proposed rules will include not only depriving *bona fide* refugees of the protections of asylum, which Congress has long extended to them, but also confusion among adjudicators, conflicts between the statute and the regulations likely to lead to multiple legal challenges, diminished standing of the United States globally as these provisions violate international law, and increased burdens on small businesses (such as small immigration law firms) and non-profits such as Ayuda.

Ayuda is a 501(c)(3) organization that provides legal, social and language access services to low-income immigrants in Virginia, Maryland, and the District of Columbia. For over forty-five years, we have served tens of thousands of immigrants through our legal services program. For the last several fiscal years, Ayuda has served approximately 3,000 individuals in its

direct services programs.[1] More specifically relevant to these comments, Ayuda has represented hundreds of individuals from all over the world in asylum applications. In addition to the legal services that Ayuda offers, our social services program provides counseling and comprehensive case management services to hundreds of immigrant victims of violence each year.[2]

1. Introduction and Summary of Objections to the Proposed Regulations

The proposed rules suffer from multiple deficiencies, as detailed below, that are both procedural and substantive in nature. Of greatest concern, these proposed regulations are part of a concerted attack on asylum seekers and the very system of asylum in the United States. These proposed rules appear to be yet another effort to limit the access that Central Americans in particular have to asylum protections in the United States. (Though, to be clear, the harms inherent in these proposed regulations would affect individuals from all over the world seeking protection in the United States). Repeatedly, the proposed rules refer to efficiency, clarity, and consolidation – each of which is merely a trojan horse for what is an effort to severely limit, if not totally undermine, the statutory protections that these regulations purportedly seek to implement.

Because of this conflict between the proposed rules and the statute, several provisions of the proposed regulations, as detailed further below, far exceed the scope of the agency to issue regulations interpreting the statute. The agency may issue regulations only where there is a gap in the statutory language or some ambiguity as to the intent of the statute. In so doing, the agency's interpretation embodied in the regulations must be consistent with the statute itself. The proposed regulations include several provisions that plainly violate both the intent and the clear language of the INA, as demonstrated by several conflicts with decades of case law interpreting the INA issued by the Executive Branch itself.

Like many reforms before them, the proposed rules assume that asylum seekers are maliciously intending to defraud the United States government, exploiting supposed loopholes in the system and misleading adjudicators at every turn. Although in any group of people there are individuals ready to commit fraud, whether out of desperation or some other motivation,

[1] For additional detail about Ayuda's work, please see Ayuda's annual impact reports, available at: https://www.ayuda.com/about-us/impact-reports/. Attached or including all sources referenced in this comment would result in prohibitive length, so instead we have included hyperlinks to sources wherever possible. We respectfully request that the Agency review each of these sources as part of its consideration of our comments.

[2] The individuals contributing to these comments have more than fifty years of combined experience practicing immigration law, including Ayuda Pro Bono Attorney Larry Katzman (formerly Pro Bono Counsel at Steptoe and Johnson, Legal Director at Northwest Immigrants' Rights Project, and protection officer with the United Nations High Commissioner on Refugees, among other related qualifications), Ayuda Legal Director Laurie Ball Cooper (also adjunct professor of Refugee and Asylum Law at Scalia Law School, George Mason University and formerly adjunct professor at Washington College of Law, American University), Ayuda Managing Immigration Attorneys Katharine Clark (formerly Immigration Counsel, U.S. Senate Judiciary (Minority) Committee and Senior Litigation Counsel, Office of Immigration Litigation- Appellate Section, U.S. Department of Justice) and Joshua Doherty, Ayuda Crime Victims' Rights Fellow Katie Flannery (formerly Protection Officer at the United Nationals High Commissioner for Refugees), Staff Attorney Dana Florkowski, and law student intern Katie Weise. Resumes are attached, and we request that the Departments review our collective qualifications in assessing our comments and the experience that informs them.

Ayuda's experience is that individuals willing to subject themselves to the rigors of the existing asylum adjudication system in the United States are, in the vast, vast majority of cases, *bona fide* refugees fleeing persecution and seeking only the protection to which they are entitled by virtue of federal and international law.

One shortcoming of the system of asylum that such individuals in the United States must traverse is that the asylum system is difficult to understand, difficult to navigate, and confusing: an applicant proceeding without legal counsel is too often already set up to fail. These proposed regulations would further burden *pro se* asylum seekers, and the proposed regulations fail to examine or appreciate the effects on asylum seekers with no legal counsel – the majority of asylum seekers in the United States. In addition, the proposed regulations ignore the potential effects on legal service providers – those organizations, like Ayuda, providing free and/or low-cost legal services to those seeking asylum. The proposed regulations would increase substantially the hours of preparation that go into evaluating, preparing, and presenting asylum cases on behalf of Ayuda's clients (who live at or below 300% of the federal poverty line). This imposes financial costs on Ayuda in terms of staff time (and therefore financial resources to pay for that staff time) as well as opportunity costs. Each additional hour (or ten hours, as the case may be, or more) spent on existing asylum cases adds up to potential clients that Ayuda, and other organizations like us, will then be unable to assist because of these undue burdens. The proposed regulations ignore these costs completely, which is both a procedural oversight that renders the proposed regulations inadequate as a matter of law and a substantive oversight that underestimates, quite substantially, the negative effects of the proposed regulations.

As detailed further below, the proposed regulations do not provide adequate rationale for the restrictive changes proposed. Although it is not clear that any data could justify the proposed regulations because of their conflict with the statute, we are left with many questions in trying to assess the proposed regulations and their likely effects:

- How many asylum applications filed since 2010 have been deemed frivolous by USCIS and EOIR?
- How many asylum applications filed since 2010 have been referred to the fraud unit or its equivalent for suspected fraud?
    - On what basis have such applications been deemed suspicious?
    - What have been the results of those inquiries by the fraud unit?
    - What are the specific purported deficiencies in the current system for the detection of fraud that justify these proposed regulations?
- How many additional hours would the proposed regulations require from attorneys representing asylum seekers as compared to current law, both in calculating the financial/staff costs of shifting *decades* of case law and therefore requiring intense learning immediately after implementation *and* in terms of ongoing increased efforts required under these proposed regulations?
- How would asylum seekers without legal counsel, which comprise the majority of asylum seekers in the United States, be informed of these changes in regulations? How much would such efforts cost?
- In what ways would these proposed regulations, if made law, render asylum seekers ever more vulnerable to immigration legal services fraud (often known as notario fraud), and what would be the costs of that, financially, to asylum seekers

so defrauded, to the system, in terms of erroneous applications filed on behalf on *bona fide* refugees and taking government resources, and to asylum seekers and legitimate providers of legal services in terms of the need for rehabilitative legal services to correct erroneous filings?

- To what extent, and how, did the Departments consider the ongoing global COVID-19 pandemic and the limitations it has placed on asylum seekers worldwide in crafting these regulations and considering their effects?
- To what extent, and how, did the Departments consider the effects of civil unrest, conflict, and prevalent violence in countries through which asylum seekers may pass in proposing these regulations and considering their effects on asylum seekers? For example, did the Departments consider the effects of uncontrolled violence in third countries in determining whether the United States should require an individual to apply for asylum there? Did the Departments consider the porousness of borders and possibility of international or transnational criminal networks assisting in the location and ongoing persecution of asylum seekers in such supposedly safe third countries? Did the Departments consider the additional traumas experienced by many asylum seekers in their journey to the United States and the effects of such experiences on how asylum seekers present and share information in credible fear interviews, to which the regulations would apply heightened standards?
- Did the Departments consider the impact that these regulations would have on asylum seekers from different regions of the world, for example, comparing the likely effects of these regulations on asylum seekers from Africa versus asylum seekers from Latin America?
- Did the Departments intend these regulations to deter individuals from crossing the United States' Southern border in particular?
- Did the Departments intend these regulations to deter individuals from Central America, Hispanic and/or Latinx individuals, and/or Mexican nationals from entering the United States and seeking asylum?
- Did the Departments intend these regulations to result in increased deportations of individuals of Central American and/or Mexican nationalities in particular?
- Did the Departments consider the effects of these proposed regulations on women and individuals who are gender-non-conforming, transgender, and/or homosexual?

2. The 30-Day Comment Period is Insufficient

The 30-day period permitted for comments on these proposed regulations is woefully insufficient. The original notice of proposed rulemaking was over 150 pages of text. More significant than the length alone of the text is the dramatic nature of the proposed rules: because the proposed rules seek to overturn decades of case law interpreting the INA, and indeed in many places conflict with the statute itself and clear Congressional intent, responding to the proposed rule required extensive review of existing law to examine these conflicts. There is no emergent need for the proposed regulations to justify a 30-day comment period, and indeed this is

precisely the type of special circumstance given the extensive and broad-sweeping nature of the proposed regulations that warrants a longer, 180-day comment period.[3]

Moreover, this abbreviated notice and comment period took place in the context of a global pandemic. In June and July 2020, much of the country, and the areas in which Ayuda operates, remained at limited stages of openness in response to the public health crisis wrought by COVID-19. Ayuda team members, and other members of the public commenting and intending to comment on these regulations, continue to be affected by caring for other family members, including individuals suffering from COVID-19 and children and others without usual care arrangements due to the virus. In addition, cases and client matters are taking a prolonged period of time to prepare because of the effects of the virus and the related closures and precautionary measures, reducing the organizational and individual capacity of legal services providers.

Although extensive, Ayuda's comments did *not* cover several issues we hoped to cover and simply ran out of time to address, including (but not limited to) the following:

a. The changing burden of proof for reasonable fear interviews;
b. Fully briefing the shortcomings of the paperwork reduction act analysis in the proposed regulations;
c. Fully articulating the reasons that the proposed regulations require more than a 30-day comment period;
d. Detailing the many ways in which any retroactive application of the proposed regulations, which amount to a complete shift in governing law, to any applications filed on or before the eventual date of implementation, if implemented, would deny applicants due process of law; and
e. Examining the ways in which weakened confidentiality protections undermine the integrity of the asylum system and further place beyond reach the protection of asylum for those in the most danger, and, correspondingly, those who most need the protection asylum offers.

An extension of the time period allowed to submit comments is required to permit the public to meaningfully exercise its right to comment as required by law. A subsequent re-opening of the comment period will be necessary to remedy this problem, and any such subsequent re-opening of the comment period must be for an additional time of 60 days or more to allow for meaningful participation in the process. Ayuda and other providers and members of the public have had to shift workloads and priorities in order to respond to this 30-day notice and comment period in the first instance, and recovering from this period of what amounts to unjustifiable, unnecessary emergency response will require more than a mere additional 30 days. Ayuda requests that the comment period be re-opened for a minimum of 120 additional days in light of the extensive nature of the proposed regulations and the unique moment, in terms of the public health crisis, in which they have been issued.

3. Asylum/Withholding Only Proceedings

[3] https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

The Departments propose to deny access to Section 240 proceedings to persons who are subject to the expedited removal process and who are determined to have a credible fear of return to their country of origin. The Departments claim that they are authorized to do this under the statute and that doing so will provide so-called efficiency gains.

The efficiency rationale is repeated over and over in the proposed regulations and their related justifications. The Discussion, for instance, explains that this sea-change in procedure related to those applying for asylum, withholding, and CAT relief will avoid "lengthy and resource-intensive removal proceedings". In relying on cryptic comments from BIA decisions in determining Congressional intent, rather than engaging in their own intensive examination of the matter, the Departments assert that "Congress intended the expedited removal process to be streamlined, efficient, and truly 'expedited'."

Efficiency is favored not only for its obvious benefit of reducing or eliminating the court backlog (by denying applicants access to the courts) but also as a pretext to denial of legitimate asylum claims and reducing perceived flows of asylum seekers arriving at the border. How else are we to understand the context of this statement: "Section 240 proceedings are often more detailed and provide additional procedural protections, including greater administrative and judicial review, than expedited removal proceedings"? Or the assertion, in applying mandatory bars to asylum at the credible fear stage that it would be "pointless and inefficient" to adjudicate claims without also considering these bars. Related to this is the corollary proposal to mandate the applicability of internal relocation at this procedural stage.

It is precisely because the credible fear process affords far fewer procedural protections that such preclusive procedures and bars should not be closely examined and considered at the initial credible fear stage, which is by design cursory. Asylum officers do not have the time to engage in such comprehensive examinations within the context of credible fear interviews, which are often conducted in crowded detention centers with multiple other people overhearing such interviews – resulting in many applicants declining to share critical details in that process.

More significantly, asylum applicants are not equipped upon arrival to understand the nature of the necessary questions that would be required, or their gravity. Many are tired, hungry, frightened, and without any evidence to demonstrate eligibility and the absence of bars. Moreover, Ayuda has represented many clients who were not provided interpretation in their best language – including many individuals who are most comfortable speaking indigenous languages but who were provided only with Spanish interpretation. How on earth is the typical asylum applicant to explain, under these circumstances and to the asylum officer's satisfaction, that a minor transgression was not a "serious non-political crime" or that staying in a country of transit for a week or two did not amount to firm resettlement?

Only a very small portion of individuals going through credible fear interviews have counsel, so establishing credible fear to the heightened standards in these proposals or the absence of bars is unfair. In addition, many might be eligible for other forms of relief, such as a T or U visa (including, for example, based on abuses suffered during their journey to the United States and after arrival and even their treatment in detention centers in the United States), but

they would be unable to assert their potential eligibility for these forms of relief if they are placed in asylum/withholding only proceedings.

UNCHR, which provides guidance to states on the UN Convention and Protocol, is quite specific in required procedures for asylum applicants. In the *U.N. Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, [4] it explains why such a cursory review, and so early in the process, is contrary to these treaties that the U.S. has codified:

> [A]n applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. *In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documen*ts. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. (Emphasis added)

At paragraph 196.

The procedures discussed in the UNHCR Handbook relate to actual asylum determinations, which have heretofore been handled by immigration judges in Section 240 proceedings with attendant rights such as due process, right to representation (albeit at the applicant's expense), and appeal. The preliminary stage, which the credible fear level has been, has heretofore had a lower threshold, and justifiably so, for the reasons outlined above. The proposals would turn this "gatekeeping" stage on its head, raising the threshold while reducing legal rights – all in the name of efficiency and denying asylum seekers their day in court.

4. Frivolous Applications

The proposed expansion of the frivolousness definition will discourage the filing of meritorious asylum applications and violate due process by effectively foreclosing administrative and judicial review.

(a) <u>The rationale for the proposed expansion mischaracterizes the history of the current regulatory language.</u>

[4] Found at https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

The Departments' rationale for expanding the definition of "frivolous" relies on a fundamental mischaracterization of the regulatory history. The proposed regulation aims to "broaden" the definition of a frivolous asylum application to bring the definition of frivolous in line with what the Departments perceive as "prior understandings" of the term. 85 Fed. Reg. 115, 36274. However, the broader "improper purpose" language that the Departments cite with approval from the initial 1997 proposed regulation was rejected after thoughtful consideration in favor of the current definition. A finding of frivolousness now requires an immigration judge to find that an asylum applicant "deliberately fabricated" "material elements" of the claim. 8 C.F.R. 1208.20.

The fact that a broader definition was considered and rejected shows that the narrower definition was, in fact, the accepted "understanding" of the term "frivolous" at the time section 1158(d)(6) was enacted.[5] Moreover, the current requirement of materiality in order to find frivolousness is consistent with the requirement of materiality in analogous contexts elsewhere in the INA. *See, e.g.*, *Maslenjak v. United States*, 582 U.S. __ (2017), 137 S. Ct. 1918 (2017) (barring denaturalization for immaterial false statement in naturalization application). Thus, the proposal to expand the definition does not accurately account for the regulatory history or the larger context of similar determinations in other immigration-related contexts and demonstrates how much the proposed regulations are a departure from previous agency judgment.

(b) <u>The expanded definition of frivolousness does not achieve the stated goal.</u>

Furthermore, the expanded definition of frivolousness does not achieve the objective stated in the Departments' own prefatory discussion. This discussion indicates that the expanded definition will address applications only that are filed for an "ulterior purpose," such as "being placed in immigration proceedings to seek some other form of relief." 85 Fed. Reg. 115, 36276. The discussion purports to provide reassurance that "[o]f course, simply because an argument or claim is unsuccessful does not mean that it can be considered frivolous," and "[n]either could reasonable arguments to extend, modify, or reverse the law as it stands." *Id*.

However, these reassurances are meaningless because they appear nowhere in the proposed regulatory language itself, and the proposal is not limited to "improper purpose" filings. Instead, the proposed regulations permit a frivolousness finding, with all of its severe consequences, whenever an application is determined in the estimation of an asylum officer or an immigration judge to be "filed without regard to the merits of the claim" or is "clearly foreclosed by applicable law."

Given the extreme complexity of asylum law, it will often be entirely unclear whether an asylum claim is "unfounded" as a matter of law, where the applicant is truthfully representing his or her fear and past experience. For the same reason, it is plainly incorrect that an asylum applicant "presumably knows whether his or her application is . . . meritless." 85 Fed. Reg. 115, 36276. Indeed, the courts regularly characterize credible applications as "without merit" not because of fraud or false documents, but, for example, because a proposed social group is not

[5] The legislative history cited in the discussion is not to the contrary, as it speaks generally to Congress's desire to deter frivolous applications for asylum, without ever so much as discussing potential definitions of "frivolous." *See* S. Rept. 104—209 at 2 (cited at 85 Fed. Reg 115, 26275).

cognizable. *See e.g.*, *Hernandez-De La Cruz v. Lynch*, 819 F.3d 784 (5th Cir. 2016) (finding meritless an applicant's challenge to the rejection of his proposed social group of "former informants").

The complexity of these analyses can be seen in the different conclusions reached by different federal circuit courts as to what is required to set forth a meritorious asylum claim. It would be manifestly unjust for an asylum applicant to be barred forever from discretionary immigration relief merely because the applicant did not understand that in his judicial circuit a death threat could constitute persecution only under the most extreme circumstance, while in another circuit a death threat can much more easily constitute persecution or torture. *Compare Cano v. Barr*, 956 F.3d 1034 (8th Cir. 2020) (holding that asylum applicant did not suffer persecution when she was held at gunpoint and threatened with death while being forced to watch as her abductors brutally beat her son) *with Tairou v. Whitaker*, 909 F.3d 702, 707 (4th Cir. 2018) (death threat deemed to constitute persecution); *Cabrera-Vasquez v. Barr*, 919 F.3d 218, 224 n.3 (4th Cir. 2019) (death threat deemed to constitute torture).

This injustice is magnified for *pro se* asylum applicants, given that represented applicants are already two to five times more likely to obtain relief from removal in Immigration Court. *See* Ingrid Eagly & Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court*, September 2016, p. 19-22. In addition, the differences in interpretation between the circuits will not be rectified by the Departments' attempts to clarify and develop consistency in areas such as social group and political opinion, as discussed elsewhere in Ayuda's comments.

(c) <u>The proposed consequences for use of fabricated evidence are overbroad and unfair.</u>

Apart from the proposed provisions related to the merits of an applicant's asylum claim, the proposed provision regarding "false or fabricated evidence" is fundamentally overbroad and at odds with governing caselaw. Courts have long held that, because individuals fleeing persecution often must rely on false documents in order to escape imminent harm, asylum may not be denied due to the submission of fraudulent documents, so long as an applicant has established past persecution or a well-founded fear of future persecution. *See, e.g.*, *Zuh v. Mukasey*, 547 F.3d 504, 512 (4th Cir. 2008); *Huang v. INS*, 436 F.3d 89, 98 (2d Cir. 2006); *see also Matter of Kasinga*, (BIA 1996) (holding, *inter alia*, that use of a purchased British passport to fly to the United States did not amount to fraud). By proposing to authorize frivolousness findings based on false documents, the agency impermissibly attempts to skirt these longstanding rulings.

The Departments cite *Scheerer v. U.S. Att'y Gen'l*, 445 F.3d 1311, 1317-18 (11th Cir. 2006) and *L-T-M- v. Whitaker*, 760 F.App'x 498, 501 (9th Cir. Jan. 14, 2019) (unpublished) as decisions that will surely prompt a parade of horribles, in which the agency will be unable to make frivolousness findings in meritless cases filed by applicants who are abusing the U.S. asylum system. However, the sparse caselaw cited – only a single published decision – belies this concern. This is particularly evident in light of the hundreds of circuit court frivolousness affirmances in the circuits that decided these cases and elsewhere, which were not precluded by *Scheerer* and *L-T-M-*. *See, e.g.*, *Manhani v. Barr*, 942 F.3d 1176 (9th Cir. 2019) (affirming

frivolousness finding without citing or addressing *L-T-M-*); *Ndibu v. Lynch*, 823 F.3d 229, 235 (4th Cir. 2016); *Niang* v. Holder, 762 F.3d 251, 254-55 (2d Cir. 2014); *Ruga v. U.S. Att'y Gen'l*, 757 F.3d 1193, 1196 (11th Cir. 2014). Indeed, it does not appear that *L-T-M- v. Whitaker* has influenced subsequent jurisprudence even insofar as to prompt a single subsequent citation by a circuit court.

For that reason, we urge the Departments to strike sections (2), (3), and (4) from the proposed definition of "frivolous" at section 1208.20(c) of the proposed regulation. These proposed expansions of the frivolous definition are not in accordance with the "improper purpose" proposal that, in any event, was rejected as overbroad in 1997. Such an expansion will unjustly dissuade truthful survivors of persecution from filing meritorious asylum applications.

(d) The proposed scienter requirements for a frivolousness finding are unconstitutional and unnecessary in light of current caselaw regarding frivolousness.

We also urge the Departments to strike proposed sections 208.20(a)(2) and 1208.20(a)(2), requiring knowledge or willful blindness to the fact that an application is frivolous. The term "willful blindness" is not defined in this section of the proposed regulation, and this lack of clarity would lead to confusion and inconsistent adjudications. Indeed, such ambiguity would preclude asylum applicants from having fair notice of the conduct proscribed by the new bar and would render the regulation invalid on vagueness grounds. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding crime of violence definition void for vagueness for failure to provide fair notice of conduct proscribed).

While the term "willful blindness" is undefined in the context of frivolousness, elsewhere in the same proposed regulation, the Departments propose to use the term "willful blindness" to mean that a public official committing torture must be "aware of a high probability of activity constituting torture" and must "deliberately avoid[] learning the truth." 85 Fed. Reg. 115, 36303. Thus, if the term is to be applied consistently throughout the chapter, a frivolousness finding based on willful blindness will require a finding that an asylum applicant was at least aware of a high probability that the application was frivolous, and that the applicant deliberately avoided learning the truth.

In the context of section 1158(d)(6), this scenario is most similar to a frivolousness finding on an asylum application that is fabricated for a client by his or her representative, where the client was or should have been aware of the attorney's fraudulent actions. Courts have held that such a claim may be found frivolous under the current requirements of deliberate action. *See, e.g., Ndibu v. Lynch*, 823 F.3d 229 (4th Cir. 2016) (affirming frivolousness finding where applicant knew the application contained false information when he signed it); *Fernandes v. Holder*, 619 F.3d 1069 (9th Cir. 2010) (affirming frivolousness finding where asylum applicant signed blank application and attorney filled in a concocted claim). Because the "deliberate" action requirement already captures the sorts of abuses that the proposed regulation purports to target, a new regulatory *mens rea* for frivolousness is not necessary.

(e) The proposed provisions on appeals and motions to reopen violate asylum applicants' due process rights and are not ameliorative.

Finally, Ayuda urges the Departments to strike proposed sections 208.20(f) and 1208.20(f) in their entirety, as flagrant violations of due process that will deprive asylum applicants of their statutory rights to file appeals and motions to reopen. Immigration proceedings must conform to the Fifth Amendment's requirement of due process. *United States v. Nicholas-Armenta*, 763 F.2d 1089, 1090 (9th Cir.1985). *See also Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings."). An individual in removal proceedings has a statutory right to appeal and judicial review of a final removal order, and to file a motion to reopen removal proceedings. 8 U.S.C. 1229a(a)(1); 8 C.F.R. 1003.1(b)(3); *Lopez-Angel v. Barr*, 952 F.3d 1045, 1049 & n.1 (9th Cir. 2020) (explaining that denial of administrative appeal is functional equivalent of denial of judicial review, in light of requirement to exhaust administrative remedies). "The motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 239 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)). Where the Government impermissibly deprives individuals of their statutory rights under the INA, it deprives them of their due process rights under the Constitution. *See Brown v. Holder*, 763 F.3d 1141, 1147 (9th Cir. 2014) (transferring to district court for determination of whether USCIS violated due process rights by depriving applicant of statutory right to apply for naturalization).

The proposed regulation violates due process because it does not merely require applicants to waive their rights to appeal the frivolousness determination and withdraw the asylum application in order to avoid the grave and permanent consequences of a frivolousness finding. The proposed regulation instead requires asylum applicants to sacrifice their statutory and Constitutional right to appeal a decision that may be fundamentally defective in some other respect, such as a denial of withholding of removal or protection under the Convention Against Torture, in order to avoid the consequences of a frivolousness finding on a withdrawn application. By stripping an asylum applicant of appeal rights as to the full decision, proposed sections 208.20(f)(4) and 1208.20(f)(4) effectively moot sections 208.20(g) and 1208.20(g), which purport to preserve the right to seek withholding of removal and CAT protection despite a frivolousness finding. Such a right is meaningless without an accompanying right to judicial review. Indeed, by waiving an appeal in these circumstances, an asylum applicant would even lose the opportunity to challenge the immigration judge's finding of alienage, the foundational fact of any removal proceeding and of an immigration court's jurisdiction. Therefore, this mechanism for withdrawal does not "ameliorate" the severity of the proposed regulation, 85 Fed. Reg. 115 at 36277, but instead is so fundamentally coercive that a waiver of appeal under these circumstances would not amount to "volitional conduct," as required for a legally valid waiver of appeal. *Lopez-Angel*, 952 F.3d at 1048.

To the extent that the wavier of appeal and motion to reopen provisions, or any other part of the proposed regulation, are intended to conserve resources and decrease processing times for an "already overloaded immigration system," 85 Fed. Reg. at 36273, it is not constitutionally permissible to cast aside due process and statutory rights in order to serve such goals. Indeed, when looking at the larger regulatory context, it becomes clear that the stated motivation of efficiency is a pretext for stripping asylum applicants of due process rights and imposing harsher consequences for denials of asylum. For example, the proposed regulation imposes an additional

burden on asylum officers to engage in an entirely new area of legal analysis in order to make frivolousness determinations that will be duplicated by the immigration judge at a later stage in the proceeding. Making this additional determination will only place additional strain on agency resources, while placing due process rights in jeopardy.

5. Pretermission

In explaining the proposed rule on pretermission, the Departments assert "there is no reason to treat asylum applications differently" from other immigration applications which are subject to pretermission without a hearing. 85 FR 36264, 36277. This assertion ignores history, treaty obligations, Congressional intent, and the nature itself of an application for asylum, withholding, and/or CAT protections. The introduction of pretermission of protection claims jeopardizes our nation's protection regime for the most vulnerable migrants and diminishes the United States' position as a moral and compassionate leader in the international community.

(a) Claims arising from U.S. international treaty and *non-refoulement* obligations require more procedural safeguards than other types of applications.

Unlike most other immigration applications, asylum, withholding of removal, and CAT protection are rooted in the United States' international treaty obligations, including the absolute, non-derogable prohibition against *refoulement.*[6]

UNHCR is the international agency mandated to supervise and to provide guidance to nation states regarding the implementation of the 1951 Refugee Convention and its 1967 Protocol. UNHCR has stated that one core element of the convention's objective and purpose is to "ensure the protection of the specific rights of refugees."[7] The United States is bound to fulfill its treaty obligations in good faith and to comply with the objective and purpose of the treaties to which we are party. Vienna Convention on the Law of Treaties arts. 18 and 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.[8]

These international obligations mandate that the U.S. treat asylum, withholding, and CAT protection claims differently from other types of immigration applications. The U.S. Refugee Act of 1980 "set a humanitarian benchmark for all countries and peoples,"[9] aligning U.S. law with

[6] *See, inter alia,* United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, as made applicable by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223; 606 U.N.T.S. 267; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Oct. 21, 1994, 1465 U.N.T.S. 85; S. Treaty Doc No. 100-20 (1988).
[7] UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, available at https://www.refworld.org/docid/3b20a3914.html.
[8] The United States, though not a signatory to the Vienna Convention on the Law of Treaties, considers it to be binding as international customary law. https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm.
[9] https://www.unhcr.org/en-us/news/press/2020/3/5e713c8d4/commemorating-the-40th-anniversary-of-the-us-refugee-act.html.

the principles and obligations enshrined in the 1951 Refugee Convention and acknowledging the duty of the State to protect and assist people violently uprooted from their homes.

However, the proposed rule to require pretermission of protection claims slams the door on asylum seekers and survivors of torture and creates a system in which meritorious claims will certainly be pretermitted, resulting in the *refoulement* of unknown numbers of vulnerable individuals seeking protection in the United States. Pretermission of protection claims based on a perceived lack of merit is an aggressively accelerated procedure for claims that would have predictable and devastating results: the United States would violate the most fundamental principles of international law, including the absolute protection against *refoulement.*[10] The Departments' proposal to implement such a procedure demonstrates a cavalier approach to international and statutory obligations and is contrary to the object and purpose of the Refugee Convention and its Protocol.

(b) Congress intended for the U.S. immigration system to treat asylum seekers humanely and fairly.

In enacting the Refugee Act of 1980, Congress declared "the historic policy of the United States [is] to respond to the urgent needs of persons subject to persecution in their homelands[.]" Pub. Law 96-212, 94 Stat. 102. The proposed rule requiring pretermission of protection claims without a full and fair hearing oversteps the Departments' legal authority, particularly where such procedural change directly contravenes clear Congressional intent.

(c) Because of the nature of asylum, withholding, and CAT claims, pretermission is most likely to prejudice respondents with meritorious claims.

The very nature of asylum, withholding, and CAT protections and the characteristics of the populations they are intended to protect provide yet another compelling reasons to treat these claims differently from other immigration applications. Indeed, allowing or requiring pretermission of these types of claims would frustrate the very purpose of these applications.

Pretermission of claims is premised on an applicant's reasonable ability to articulate the basis for an application at first blush. However, *pro se* applicants, who are rarely familiar with U.S. asylum law and may not speak English, are unlikely to elucidate a cognizable social group, for instance, or (as UNHCR points out) even be aware that sexual orientation can constitute a basis for asylum. [11]

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[10] UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, paras. 4–5. See also Executive Committee, Conclusion No. 81 (XLVIII) "General" (1997), para. (h); Conclusion No. 82 (XLVIII), "Safeguarding Asylum" (1997), para. (d)(iii); Conclusion No. 85 (XLIX), "International Protection" (1998), para. (q); Conclusion No. 99 (LV), "General Conclusion on International Protection" (2004), para. (l)

[11] *See*, e.g., UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (2008), available at https://www.refworld.org/pdfid/48abd5660.pdf ("The applicant will not always know that sexual orientation can constitute a basis for refugee status or can be reluctant to talk about such intimate

Even more significantly, copious scientific, psychological, and social science research tells us that pretermission in the context of protection claims would be self-defeating. Research reflects the reality that individuals who have survived trauma, including torture, sexual assault, and other forms of persecution, struggle to recount and disclose their experiences.[12] For survivors of persecution and torture, research further demonstrates that their great difficulties in disclosing traumatic events—or their greater tendency to disclose them "late"—renders these most vulnerable applicants at highest risk of *refoulement* and denial.[13] For the same reasons, these individuals would be at highest risk of having their claims inappropriately pretermitted.[14]

Thus, by virtue of the very persecution and torture that should create pathways to meaningful protection in the United States, individuals with meritorious claims are instead most likely to be significantly harmed by the pretermission of their protection claims.

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matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case."); United Nations, *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶¶ 142, 253 (2004) ("Torture survivors may have difficulty recounting the specific details of the torture for several important reasons, including… [p]rotective coping mechanisms, such as denial and avoidance…"); UK Home Office, *Asylum Policy instruction: Sexual orientation in asylum claims, Version 6.0* (2016) ("Feelings of shame, cultural implications, or painful memories, particularly those of a sexual nature, may [lead] some claimants to feel reluctant about speaking openly about such issues and may therefore not be uncommon"); B. R. Marriott et al., *Disclosing traumatic experiences: Correlates, context, and consequences,* 8(2) PSYCH. TRAUMA: THEORY, RESEARCH, PRACTICE, & POL., 141 (2016), available at https://doi.org/10.1037/tra0000058; Matthew D. Jeffrys et al., *Trauma Disclosure to Health Care Professionals by Veterans: Clinical Implications*, 175 MILITARY MED. 719 (Oct. 2010) ("PTSD presents unique challenges related to the stages of change regarding disclosure"); Diana Bögner et al., *Impact of sexual violence on disclosure during Home Office interviews*, 191(1) British J. of Psych. 75, (2007), available at https://doi.org/10.1192/bjp.bp.106.030262 ("The results indicate the importance of shame, dissociation and psychopathology in disclosure… Judgments that late disclosure is indicative of a fabricated asylum claim must take into account the possibility of factors related to sexual violence and the circumstances of the interview process itself.").

[12] *Supra.*

[13] Int'l Rehabilitation Council for Torture Victims, RECOGNISING VICTIMS OF TORTURE IN NATIONAL ASYLUM PROCEDURES (2013), available at https://irct.org/assets/uploads/pdf_20161120143448.pdf.

> [14] [N]umerous factors that can discourage survivors from indicating that they had been tortured which are often compounded in a migration setting. Migrants, particularly in transit and migration settings, may not feel it is safe to disclose this information. Another deterrent may be related to the perceived stigma that is associated with torture and mental disorders. Moreover, many torture survivors may be unaware that simply telling their story, which had only negative connotations until that point, could actually be the key to their enjoyment of certain rights, and also therapeutically positive for their rehabilitation. Finally, language and cultural barriers frequently prevent survivors from speaking about what has happened to them
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> Voluntary Fund for Victims of Torture, UN Office of the High Commissioner for Human Rights, *Torture Victims in the Context of Migration: Identification, Redress and Rehabilitation* (2017), available at https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/UNVFVT_ExpertWorkshop2017.pdf.

(d) BIA and federal court precedential authority are contrary to the proposed rule

The Departments invoke insufficient legal justification for a procedure that would cause the United States to violate its obligations against *non-refoulement*, in addition to defying the intents of Congress. It also errs in applying Board precedent in attempting to support its proposed changes.

The Departments acknowledge that the BIA decision in *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989), is directly in opposition to the envisioned rule's pretermission procedures. While the Departments dismiss this inconsistency based on the fact that the regulations at issue in *Fefe* are no longer in effect, they fail to address the overarching statements of the Board related to general principles, regardless of the viability of any specific regulation. In *Matter of Fefe*, the Board clearly articulates the essential nature of the full examination of asylum applications:

> In the ordinary course, however, *we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself*. We note that there are often significant differences (either discrepancies or meaningful omissions) between the written and oral statements in an asylum application; these differences cannot be ascertained unless an applicant is subjected to direct examination. Moreover, if an applicant is not fully examined under oath there would seldom be a means of detecting those unfortunate instances in which an asylum claim is fabricated. On the other hand, there are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.[15] (Emphasis added)

In *Matter of Fefe*, the Board further reflects on the asylum standard articulated in another longstanding precedential decision, *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987),[16] In *Mogharrabi*, the Board stated that it is "difficult for any alien to satisfy this standard unless he presents testimony as his hearing which is consistent and corroborates any previous written statements in his Form I-589." 20 I&N Dec. 116 (BIA 1989), *citing* 19 I&N Dec. 439 (BIA 1987). These observations and principles are equally valid under any set of regulations, and they contradict the Departments' claims that *Matter of Fefe* is inapplicable because the regulations are no longer in effect.

The Departments also cite two recent Board decisions by the Attorney General in support of its notion that an immigration judge may pretermit applications for protection if the judge finds that a *prima facie* case is lacking. However, the holdings in both cases are incorrectly interpreted and applied.

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[15] *Id.* at 118.

[16] "The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

In the first case, *Matter of E-F-H-L*, the Board, looking to the statute rather than regulations, reasserted the validity of *Matter of Fefe*, holding:

> In the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of those applications, including an opportunity to provide oral testimony and other evidence, *without first having to establish prima facie eligibility for the requested relief*. 26 I&N Dec. at 324 (Emphasis added)

Although the Board's decision was technically vacated,[17] the decision raises no doubts about the validity of the Board's legal conclusion or its decision to follow *Matter of Fefe* many years after *Fefe* was decided and, as a result, offers no support for the Departments' contention that pretermission of asylum and withholding claims is allowable.

In the second cited case, the Departments rely on language from *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018), stating that, where an asylum application fails to establish a protected ground, then no further examination of the remaining elements is necessary to deny the claim. But reliance on this statement is completely misplaced, since the Attorney General's statement addresses the decision-making process on an asylum claim after all required evidence-gathering has been completed. While failure to prove any of the necessary elements in a legal definition may of course be dispositive in the outcome, it has no bearing on the *procedural* steps required before reaching a decision.

In fact, *Matter of A-B-* does not address pretermission at all. In stark contrast to the accelerated and procedurally deficient process that the proposed rules would impose, *Matter of A-B-* stresses the importance of "rigorous analysis" in determining asylum claims and emphasizes that all evidence must be considered and analyzed in adjudicating them ("Neither immigration judges nor the Board may avoid the rigorous analysis required in determining asylum claims…"). *Id.* at 340.

Further, the Attorney General rejects the analysis by the Board in *Matter of A-R-C-G-*, 26 I&N 388 (BIA 2014), citing its failure to observe its "duty" to "evaluate any claim… in the context of the evidence presented[,]" because the Board engaged in "little or no analysis." *Matter of A-B*, 27 I&N at 339, *citing* 26 I&N Dec. at 392 (BIA 2014). Thus, *Matter of A-B-* rejects, rather than supports, the Departments' proposal to allow pretermission of asylum, withholding, and CAT claims, instead stressing a retention of the current model of case-by-case analysis.

Similarly, the citations in *Matter of A-B-* supporting the language quoted in the proposed rule ("Of course, if an alien's asylum application is fatally flawed in one respect… an immigration judge or the Board need not examine the remaining elements of the asylum claim") offer no support for pretermission, either. In *Matter of A-B-*, the Attorney General cites to *Guzman-Alvarez v. Sessions*, 701 F. App'x 54, 56-57 (2d Cir. 2017), and *Perez-Rabanales v.*

[17] 27 I&N Dec. 226 (A.G. 2018). It was vacated for mootness rather than any legal flaw in the Board's reasoning. Subsequent to the Board's 2014 decision in *Matter of E-F-H-L-*, the respondent withdrew his application for asylum and withholding to pursue a family petition instead, and the immigration judge administratively closed the removal proceedings.

Sessions, 881 F.3d 61, 67 (1st Cir. 2018). 27 I&N Dec. at 340. The first case is unpublished and therefore of no precedential value. Also, both cases involve federal court review of whether proposed particular social groups are viable. Neither case discusses, or indeed even contemplates, pretermission of protection claims.

In addition, the Departments' decision to invoke *Zhu v. Gonzales*, 218 F. App'x 21 (2d Cir. 2007) is also curious since, aside from also being unpublished, this decision does not support the Departments' position on pretermission. The Departments state that *Zhu* establishes the notion that pretermission of asylum applications is permissible since "other immigration applications" are so subject. But, significantly, the Departments' interpretation of the holding in *Zhu* is incorrect. They write that pretermission does not violate due process as long as the respondent is given an opportunity to resolve the flaw in the application. But this is merely dicta, as *Zhu* rests on an IJ's authority to set filing deadlines pursuant to 8 C.F.R. § 1003.31(c), not pretermission.

Next, the Departments attempt to justify the pretermission concept by claiming that it is "akin to" a decision to an IJ or the Board requiring the setting out of a *prima facie* case in determining whether to grant a motion to reopen. But their reliance here on *INS v. Abudu*, 485 U.S. 94 (1988) fails because the situations are not analogous since the comparison ignores the heavy substantive burden required to reopen a case. In denying the motion to reopen, the Supreme Court noted this point explicitly:

> If respondent had made a timely application for asylum, supported by the factual allegations and exhibits set forth in his motion to reopen, the Immigration Judge would have been required to grant him an evidentiary hearing. However, an alien who has already been found deportable has a much heavier burden when he first advances his request for asylum in a motion to reopen. The BIA did not abuse its discretion when it held that respondent had not reasonably explained his failure to apply for asylum prior to the completion of the initial deportation proceeding.

Id. at 104. This "much heavier burden" for a motion to reopen is all the more reason to avoid imposing burdensome barriers to a full and fair consideration of protection claims at the first instance.

Finally, the Departments state in a footnote that they "do not believe that requiring a sufficient level of detail to determine whether or not an alien has a prima facie case for asylum, statutory withholding of removal, or protection under the CAT regulations would necessarily require a voluminous application." This references a House of Representatives Judiciary Committee Report from 1996 in connection with unenacted immigration reform legislation. The section of the Report explains the Judiciary Committee's support for imposing a 30-day filing deadline for asylum, stating its belief that filing an application soon after arrival to the United States was more important than failing a "comprehensive application." H.R. Rep. No. 104-469, part 1, at 175. The Committee encouraged the INS to adopt a simpler application form for asylum, with "generous allowance for amendment," to accomplish this goal. *Id.* at 176. The Committee's exhortation to provide such allowance for amendment is instructive of the reality and complexity of asylum applications, especially for *pro se* applicants.

Furthermore, it is unclear how the Departments can claim – without one shred of analysis – that the possibility of pretermission would not require voluminous applications, especially when accompanied by the other onerous changes and restrictions in the proposed regulations (e.g., heightened standards on particular social groups, political opinion, persecution, and nexus). In particular, voluminous applications will often be necessary to guard against the proposed expansion of grounds to deem applications as "frivolous" and the concomitant consequences.

Finally, the Departments cite no legal authority for the proposition that applications for withholding of removal or CAT protections may be pretermitted. It is unclear how the Departments believe they can require pretermission of these claims in a manner consistent with the United States' international obligations. In a 2007 Advisory Opinion, UNHCR noted that the principle of *non-refoulement* requires states to "adopt a course that does not result in [the removal of persons who are seeking international protection on their territory], *directly or indirectly*, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion."[18] Pretermission of withholding of removal and CAT claims is almost guaranteed to result in such prohibited removal. UNHCR advised that, in order to comply with obligations against *refoulement*, states must assure access to "fair and efficient asylum procedures." *Id.*

Even in an accelerated or streamlined process, such procedures must include a "complete personal interview by a fully qualified official… of the authority competent to determine refugee status."[19] The proposed procedure for pretermission does not meet these minimum standards to ensure the United States is in compliance with its most fundamental international obligations against torture.

(e) Pretermission of protection claims would deny procedural due process.

The proposed procedure for pretermission is fundamentally unfair and violates a non-citizen's right to due process, including the reasonable opportunity to present testimony and evidence, in removal proceedings. It is well-established in case law that non-citizens in removal proceedings are constitutionally guaranteed fair procedures and due process.[20] The Supreme

[18] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Jan. 26, 2007), available at https://www.unhcr.org/4d9486929.pdf (emphasis added).
[19] UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), para. 32, EC/GC/01/12 (2001), available at https://www.refworld.org/docid/3b36f2fca.html.
[20] *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100-01 (1903); *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019) ("The Due Process Clause of the Fifth Amendment guarantees that aliens in removal proceedings have 'a full and fair opportunity to be represented by counsel, to prepare an application for ... relief, and to present testimony and other evidence in support of [that] application.'"); *Chen v. Holder*, 578 F.3d 515 (7th Cir. 2009) ("[D]ue process requires, among other things, that an applicant receive a meaningful opportunity to be heard") (quoting *Kerciku v. INS*, 314 F.3d 913, 917 (7th Cir. 2003) (per curiam)); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) ("The Fifth Amendment's due process clause mandates that removal

Court has determined that the fundamental requirements of procedural due process, rooted in the Fifth Amendment to the U.S. Constitution, include notice of the government's proposed action, an opportunity for a fair hearing before an impartial decision-maker, the right to present evidence and confront the government's evidence, and the right to be represented by counsel.[21]

The reality is that the current regulations essentially proscribe pretermission, aside from the presence of mandatory bars to asylum eligibility. The Departments' efforts to read these regulations as supporting their proposal are, thus, unsuccessful.

While case law requires that non-citizens be provided a reasonable opportunity to present evidence in support of their claims, including testimony,[22] the Departments claim support from 8 C.F.R. § 1240.11(c)(3), which references "an evidentiary hearing to resolve *factual* issues in dispute" (emphasis in proposed regulation). 85 FR 36264, 36277. But this ignores the fact that decisions in asylum cases must always take into account *both* facts and law, applied to the individualized circumstances of the applicant.[23] Pretermission would reverse established and procedurally required elements, forcing immigration judges to consider the question of legal sufficiency in isolation and without providing respondents with their constitutionally and statutorily guaranteed right to a full and fair hearing. The Ninth Circuit has written that "the importance of an asylum or withholding applicant's testimony cannot be overstated court." *Oshdi v. Holder*, 729 F.3d 883, 889-90 (9th Cir. 2013).

Moreover, while the Departments refer to 8 C.F.R. § 1240.11(c)(3), they tellingly don't address a subsection of the same regulation, which requires that an asylum or withholding of removal applicant in removal proceedings "shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf." 8 C.F.R. § 1240.11(c)(3)(iii). In addition, the Departments do not reference 8 C.F.R. § 1229a(b)(4)(B), which guarantees non-citizens "a reasonable opportunity… to present evidence on the alien's own behalf[.]"[24]

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proceedings be fundamentally fair"); *cf. Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (describing motion to reopen as an "'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings") (quoting *Dada v. Mukasey*, 128 S. Ct. 2307 (2008)).

[21] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

[22] *See Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075–76 (9th Cir. 2005) (alien's due process rights violated where the IJ barred him from presenting his mother's testimony, refused to permit family members to develop the record as to the family's persecution, and refused to hear testimony from alien's expert witness).

[23] *See* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, para. 29, HCR/1P/4/ENG/REV.4 (2019) ("Determination of refugee status is a process which takes place in two stages. *Firstly*, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.") (emphasis added).

[24] *See also Naing Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007) (determining a "fair hearing" requires the immigrant "be given the opportunity to fairly present evidence, offer arguments and develop the record").

In short, the proposal to require pretermission of asylum claims directly and flagrantly violates the procedure due process rights of noncitizens.

(f) If not abandoned, the proposed rule on pretermission requires significant clarification.

The Departments should eliminate pretermission from the final rule. However, if the Departments insist on pushing forward with the proposed procedure, the following clarifications and changes should be implemented in the final rule:

- Ensure pretermission is permissive, not mandatory, to ensure immigration judges' authority to exercise their independent judgment and discretion, consistent with 8 C.F.R. § 1003.10;
- Eliminate pretermission for applications for protection under the CAT regulations, to ensure United States compliance with fundamental international obligations;
- Add language explicitly allowing for interlocutory appeals of pretermission decisions to the Board of Immigration Appeals;
- Provide a minimum of 90 days for parties to respond to an immigration judge's notice of intent to pretermit or a DHS motion to pretermit and add language explicitly allowing the immigration judge to exercise discretion in setting a longer deadline if warranted by circumstances in the case;
- Ensure that no application for asylum is pretermitted prior to the expiration of the respondent's one-year filing deadline;
- Add language clarifying that pretermission must strictly consider legal as well as factual matters and may not consider, implicitly or explicitly, the respondent's credibility.

6. Standards for decisions on the merits

The Departments also set forth several broad-sweeping changes to how asylum applications will be decided on the merits, including changes to the definitions of critical terms in the asylum statute such as "particular social group," "political opinion," and "on account of" (nexus). As detailed more fully below, these changes serve to dramatically narrow the availability of asylum's protections to individuals who are, in every way, just the refugees Congress wrote the INA to protect. Many of these proposed changes would have a disparate impact on women and individuals who are gender-non-conforming, transgender, and/or homosexual.

(a) Proposed Changes to the Standards for Adjudicating Claims Based Upon Membership in a Particular Social Group.

i. The proposed rule will essentially eliminate particular social group as a statutory basis for asylum.

The proposed rule creates such an overly narrow definition of "particular social group" claims that it may in practice eliminate entirely this statutory basis for asylum specifically enacted by Congress. This category of asylum claims was specifically included within the statutory bases for asylum in the INA (and also in the 1951 Refugee Convention) in order to recognize the myriad types of violence from which an individual may be fleeing and to capture those cases that do not fit neatly into the others.

ii. The proposal will eliminate individualized analysis of claims by adjudicators.

The Discussion appropriately highlights the problematic nature of seeking to define specific particular social groups where cases necessarily require individualized analysis, (see the discussion of *Grace v. Whittaker*, 344 F. Supp. 3d 96, 126 (D.D.C 2018) at Footnote 27). But the proposed regulation will, in effect, eliminate this case-by-case approach by defining a series of purported social groups that would automatically not satisfy the requirements for asylum eligibility.

Indeed, this list of cases seeks to do exactly what the Departments caution against. It will direct adjudicators to avoid undertaking the important fact-finding and careful analysis of claims in order to identify and consider viable bases for asylum. Instead, it will have them rely on these overbroad examples to swiftly deny legitimate asylum claims. Or, worse, the new regulation will encourage adjudicators to pretermit applications (as discussed in Section 5 above) without undertaking any direct investigation into the basis for a claim.

For example, the exclusion of particular social group claims for individuals hailing from countries "with generalized violence or a high crime rate" would result in the denial of cases where the individual's specific victimization takes place in a broader context of impunity for violence, thereby exacerbating the futility of seeking local recourse to combat the violence.

iii. The proposal places an unfair and punitive burden on the applicant.

The proposed rule introduces an additional requirement forcing the asylum seeker to articulately and narrowly define every particular social group or groups which he or she claims as the basis of his or her claim at the outset of the case. It deprives applicants of the ability to present refined or additional particular social groups at a later time. This requires asylum seekers to possess a nuanced knowledge of the intricacies and minutiae of asylum law that can be challenging even for experienced practitioners and judges. *See Matter of A-B-*, 27 I&N Dec. at 331 (describing the difficulty with which even the esteemed members of the Board have following its own guidance and understanding of the term "particular social group").

This requirement is particularly egregious because it specifically forecloses the ability for asylum seekers to seek to rehabilitate their claims after they suffered from receiving ineffective assistance of counsel. This limitation is overly punitive to asylum seekers, both those who are represented and especially *pro se* applicants. In addition, this regulation would preclude the introduction of additional formulations of particular social groups to which the claimant may belong which have subsequently become recognized as viable social groups by the courts, and it

purports to shift any fact-finding responsibility on the part of the asylum officer or immigration judge to identify plausible social groups raised by the testimony of the applicant.

Furthermore, this requirement ignores the fact that many asylum applicants must file their asylum applications without any assistance of counsel because they have been advised of the one-year filing deadline but remain unable to retain counsel. This is often the case, for example, for individuals who receive free consultations through Ayuda's in-house staff attorney consultations or Ayuda's pro bono clinics, but who are unable to retain private counsel and unable to be represented for free by Ayuda or similar legal service providers because of capacity constraints.

It is worth noting that it is unclear what problem, precisely, this provision of the proposed regulations seeks to resolve. Asylum seekers are already precluded from raising new particular social groups on appeal and must instead detail their claims before the immigration judge, at the latest.[25] The Departments fail to articulate why any further limitation on the timing of claim presentation is required.

iv. The revised regulations would not achieve the Departments' stated goal.

The Departments state that the primary reason for the enormous changes that the proposed regulations represent is to provide clearer guidance for adjudicators. However, it fails to do this. While it concedes that "additional evidence" could overcome factual deficiencies, it fails to elaborate on the nature of the evidence that would suffice. For instance, what must an asylum seeker from a country with "generalized violence or a high crime rate" demonstrate? The cited passage from *Matter of A-B-* suggests that only state involvement in the persecution will satisfy this greatly-heightened standard. This, coupled with a preclusion elsewhere in the NPRM of claims based on non-state actors, effectively closes off all non-state actor claims from most asylum-source countries in the world.

v. Decreased agency time per application, if even achieved, would be at the expense of fairness.

Another apparent reason for these restrictions is to provide greater efficiency, in the eyes of the Departments ("reduce the amount of time the adjudicators must spend evaluating such claims"). Virtual total elimination of a large percentage of social group claims will certainly decrease the amount of time that adjudicators spend on each case, but at the expense of decades of established case law and heretofore adherence to the letter and spirit of the Refugee Protocol and Convention.

Moreover, these requirements, in direct conflict with decades of case law and due process and fundamental fairness, would give raise to additional appeals, including to the federal circuit courts, and significant additional investment of time by all sides, including the Departments, in litigating such appeals. This cannot accurately be characterized as an efficiency gain: it merely shifts the burdens from the first effort at adjudication to subsequent efforts, involving additional

[25] *In Re W-Y-C-*, 27 I. & N. Dec. 189 (B.I.A. 2008).

divisions within and between the Departments as well as the federal courts, to say nothing applicants' own time and the time of legal service providers representing them.

vi. The changes violate the Administrative Procedures Act.

The Departments explained why, in their view, there is a need to refine legal analysis vis-à-vis social groups, but they provided absolutely no rationale as to why every refinement entails a restriction – or total foreclosure – of interpretation of the INA that would provide any guidance likely to support the claims of *bona fide* refugees to protection. In addition, the Departments do not provide any data, analysis or insight into why these seismic shifts in social group analysis and adjudication are warranted. And they concede that they have conducted no independent analysis of legislative intent, instead relying on offhand quotations from two precedents.

Without this additional background and context, the Departments have violated the APA by preventing interested parties, such as Ayuda, from having a meaningful opportunity to communicate information, concerns, and criticisms about these changes. The agency must "provide an accurate picture of the reasoning that has led the agency to the proposed rule". *Connecticut Light & Power Co. v. Nuclear Reg. Comm.*, 673 F.2d 525, 528, 530 (D.C.Cir.1982).

vii. The Departments do not properly consider the guidance provided by UNHCR.

The Departments bemoan the fact that the UN Convention does not define the term "membership in a particular social group". However, they seem unaware that UNHCR, which provides guidance to governments on the Convention, has issued Guidelines for International Protection on social group claims.[26] In many ways, these Guidelines support the spirit of the proposed rules. For instance, they specify that a social group cannot be defined exclusively by its feared persecution and that the category cannot be seen as a catch-all for all persons fearing persecution.

But, in stark contrast to what is proposed here, UNHCR emphasizes that persecution by non-State actors can be cognizable if it is "knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." (paragraph 20). The Departments' omission of this guidance seems particularly jarring given their reliance for guidance with respect to political opinion claims on UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, a document which incorporates the specific Guidelines referenced above both by citation and by directly incorporating it into the addenda of the Handbook.

[26] UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, UN Document Number HCR/GIP/02/02.

(b) The Proposed Rule Redefines Political Opinion Eviscerating Decades of Case Law (8 CFR § 208.1(d); 8 CFR § 1208.1(d)).

i. The proposed standard is too narrow and restrictive in its reimaging of claims based on political opinion.

The proposed regulation seeks to limit the availability of asylum based on persecution on account of political opinion only to those claims expressed by or attributed to a discrete cause relating to political control of a state or a unit thereof. It does not allow for asylum claims based on numerous legitimate political opinions that may not espouse, as a belief, specifically the overthrow of the systems of power.

The envisioned rule defines what is "political" much more narrowly than existing case law or the UN Convention. The court in *Saldarriaga v. Gonzales* (a decision that the Departments single out to serve as a model for the proposed regulation) says that an opinion is political if it is a sufficiently detailed articulation of an "an ideal or conviction of sorts[.]"[27]

But the proposed definition is breathtaking in its narrowness. The political opinion ground is broad and "designed to suit the situation of common [people], not only that of philosophers." *See* Grahl-Madsen, *The Status of Refugee in International Law* 251 (1966).[28] In other words, a political opinion is not limited to espousal of a formal political ideology or to the platform of a specific political party. Instead, § 101(a)(42)(A) protects *any* opinion on *any* matter in which the machinery of the State or uncontrolled non-state actors may be engaged against.[29]

By limiting cognizable opinion as that which is "related to political control of a state," the Departments adopt an overly restrictive view of what is political. They present the holding in *Saldarriaga v. Gonzales* as reflective of their view. However, the *Saldarriaga* court spends much effort emphasizing that political opinion must comprise more than a personal dispute. But there are many opinions and activities that lie between purely personal disputes and efforts to confront political control of a state.

ii. The proposal would reject many opinions and activities that are political in nature.

The leader of a conservation group who is advocating for stronger environmental protections would not be recognized, nor would women seeking enfranchisement or rights or LGBTQ individuals advocating for equal rights. These individuals are all expressing views that challenge governmental policies or laws but not necessarily state control.

[27] 402 F.3d 461, 466 (CA4 2005).
[28] Mr. Grahl was the original commentator on the Refugee Convention on which U.S. asylum law is based.
[29] *See* Goodwin-Gill, *The Refugee in International Law* 30 (Oxford: Clarendon Press,1983).

Even the *Saldarriaga* court recognized with approval that "demonstrating with students" and participating in a "protest march" for ethnic rights demonstrates political opinion for asylum purposes,[30] and less overtly symbolic acts (holding that applicant's provision of material information concerning a political insurgency reflected a political opinion) may also reflect a political opinion.[31] In other circuits, resisting corruption and abuse of power — including non-governmental abuse of power — can be an expression of political opinion,[32] as can the refusal to give technical assistance to the FARC in Colombia.[33]

The proposed regulation also makes dramatic and unsupported leaps in interpreting the holding of *Matter of S-P-*, which the Departments cite in support of their extreme and restrictive language redefining political opinion for asylum purposes. As stated in the Discussion, the BIA in *Matter of S-P-* found that a persecutor must have been "in part motivated by an assumption that [the asylum seeker's] views were antithetical to those of the government." 21 I&N Dec. 486,494 (BIA 1996). The proposed regulations, then, rely on the UNHCR's Handbook and the *Saldarriaga* decision to require that political opinion claims must show that the opinion is "intended to advance or further a discrete cause *related to political control of a state*" (emphasis added). The concept of "political control" is not cited in any of the sources upon which DHS and EOIR rely.

iii. <u>The proposal rejects a thoughtful and individualized approach to analysis.</u>

The Departments use a bludgeon-like one-size-fits-all approach when a more thoughtful and analytical approach is necessary in cases involving political opinion. The Discussion suggests that the holding in *Hernandez-Chacon v Barr*[34] adopted a too-permissive attitude towards what constitutes cognizable political opinion when it granted asylum based on opposition to a culture of male domination present in criminal gangs.

But absent from this cursory mention was that court's nuanced analysis of the nature of opinion that is "political." The *Hernandez-Chacon* court stressed, for instance, that a proper analysis "involves a 'complex and contextual factual inquiry' into the nature of the asylum applicant's activities in relation to the political context in which the dispute took place."[35] It then proceeded to engage in a review of recent precedents. Left unexplained in the Discussion is why the Departments dispensed out-of-hand this line of reasoning in favor of a one-dimensional standard.

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[30] *See., Camara v. Ashcroft*, 378 F.3d 361, 364 (4th Cir.2004)
[31] *See Briones v. INS*, 175 F.3d 727, 728-29 (9th Cir.1999) (en banc).

[32] *Castro v. Holder*, 597 F.3d 93, 101 (2d Cir. 2010) (quoting *Yueqing Zhang*, 426 F.3d at 54
[33] *Delgado v Mukasey*, 508 F.3d 702,, 706 (2nd Cir 2007).
[34] 948 F3d 94 (2nd Cir 2020)
[35] *Id*, at 103, *citing Castro v. Holder*, 597 F.3d 93, 101 (2d Cir. 2010) (quoting *Yueqing Zhang*, 426 F.3d at 548).

iv. The proposed rule is contrary to the UN Convention and UNHCR guidance.

The proposed regulation also implicitly eliminates any basis for political opinion based upon opposition to *de facto* political actors or non-state actors.[36] This restriction is contrary to UNHCR's guidance, which explicitly acknowledges that non-state actors can indeed be considered agents of persecution.[37] This definition calls into serious question the viability of political opinion asylum claims emanating from, for instance, pro-democracy activists in Venezuela who have opposed the dictatorial Nicolas Maduro government. Given the U.S. government's recognition of Juan Guaido[38] as the legitimate head of state of Venezuela, this regulation would purport to prohibit a political opinion asylum claim from Mr. Guaido's supporters notwithstanding the widespread violence and oppression which continues to be meted out by forces controlled by Mr. Maduro by forcing the conclusion that the asylum seekers' behavior is no longer "antithetical" to the "ruling legal entity of the state." Rather, their support is instead directly in favor of the ruling legal entity of the state.

v. The proposal does not achieve its stated purposes.

The Departments identify as their rationale for this further restriction on the ability of persecuted people to seek asylum (1) to avoid further strain on the INA's definition of refugee, and (2) to provide clarity to adjudicators. Regarding the first goal, it is rather the tortured re-defining of "political opinion" that excludes vast swaths of potential claims on the basis that they are not "related to political control of a state" that strains the commonplace definition of political opinion, as correctly applied through prior case precedent and UNHCR guidance.

Regarding the second purported goal of this regulation, the Departments do not provide any clarity insofar as they introduce heretofore undefined and novel terms and concepts, such as "discrete cause," "expressive behavior," and "political control of the state," which will surely cause significant confusion for adjudicators. The Departments' attempt to define "expressive behavior" through Footnote 30 does so with no substantive support, based on pure conjecture and in apparent ignorance that a "mere act of personal civic responsibility such as voting" or refusing to join the dominant political party can indeed have fatal implications for the asylum seeker and thus give rise to a viable claim.[39]

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[36] *See Jabr v. Holder*, 711 F/3d 835 (7th Cir. 2013).

[37] UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, ch. II (B)(2)(g), ¶ 65 (Feb. 2019).

[38] Statement for President Donald J. Trump Recognizing Venezuelan National Assembly President Juan Guaido as the Interim President of Venezuela, The White House, Jan. 23, 2019, https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/.

[39] *See Mandebvu v. Holder*, 755 F.3d 417, 428-32 (6th Cir. 2014), and *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997); *see also* "Bullets for Each of You": State-Sponsored Violence since Zimbabwe's March 29 Elections, Human Rights Watch, Jun 9, 2008, *available at*: https://www.hrw.org/report/2008/06/09/bullets-each-you/state-sponsored-violence-zimbabwes-march-29-elections.

(c) The Proposed Rule Narrowly Defines Harm Rising to the Level of Persecution, Impermissibly Altering the Accepted Definition (8 CFR § 208.1(e); 8 CFR § 1208.1(e)).

i. The proposed standard of "extreme" harm and "exigent" threats is too restrictive and without authority.

The proposed regulation would provide the first regulatory definition of persecution, dramatically uprooting decades of caselaw in order to implement a narrow concept of persecution that would preclude asylum seekers from obtaining the protection from harm that they require. For the past 35 years, the concept of persecution in asylum law has been defined by *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."

This proposed rule would further delimit the concept of persecution by requiring that the harm be "extreme" and threats be "exigent." These concepts further narrow the accepted definition that has governed asylum law for decades. "Extreme" harm goes well beyond the current definition that allows for harm that does not result in permanent or serious injury to nonetheless be considered persecution.[40]

ii. The proposal does not recognize the viability of emotional harm, harm to children, or the cumulative effects of harm.

In addition, the Discussion and language of the regulation do not acknowledge that persecution may be emotional as well as physical. This has been recognized by numerous circuits and was tacitly acknowledged by Congress.[41] This has also been recognized for a child in his or her reaction to injuries suffered by the parents.[42]

The Discussion then seeks to further restrict which acts may be considered persecution through overly-broad examples of which acts are *not* considered persecution. These regulatory exclusions would unfairly result in denials of legitimate claims by adjudicators who fail to consider the cumulative effects of harm, particularized violence that results within a context of broader violence, or the different impact of instances of harm on particularly vulnerable populations, such as children.

For instance, what may constitute "minor beating" of an adult that would not constitute persecution for asylum purposes could create lifelong psychological trauma for a young child. Indeed, the proposed regulations cite *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231 (11th Cir. 2013) to support their restrictive proposal regarding persecution; however, this decision explicitly acknowledges the need to "evaluate the harms a petitioner suffered cumulatively – that is, even if

[40] *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998).

[41] *See Kovac v. INS*, 407 F.2d 102, 106-07 (9th Cir. 1969). *See Also Gatimi v Holder*, 578 F3d 611 (7th Cir 2009).

[42] *Hernandez-Ortiz v Gonzales*, 496 F3d 1042 (9th Cir, 2007).

each fact considered alone would not compel a finding of persecution, the facts taken as a whole may do so." *Id.* at 1235.

iii. The proposal unduly eliminates the important role of threats in persecution.

In addition, the proposed regulation dismisses out of hand the use of threats as a means of persecution by stating that "repeated threats with no actions taken to carry out the threats" do not constitute persecution. This exclusionary definition fails to take into consideration the dynamics of power and the context within which threats may be made. A state actor may coerce the desired behavior by a simple threat due to the powerful means it controls. Although no further acts specific to an individual may have been carried out, if that state has engaged in violent and punitive behavior against similarly situated individuals, the threat against this particular asylum seeker is nonetheless sufficient to instill a very credible fear of future harm.

An example would be where a pro-democracy activist is threatened by state police with imprisonment and death should he not halt publishing an online message board for other pro-democracy activists. One of the activist's colleagues who runs a similar message board also received the threat and has subsequently been kidnapped, his dead body later found mutilated on the street. In this example, the oppressive state would not be required to take any further steps to compel the asylum-seeking activist's obeisance or flight, since the very credible nature of the threat has been made abundantly clear. This regulation would foreclose this activist's ability to seek asylum in the U.S.

iv. The proposal's focus on "intermittent harassment" would lead to unjust results.

In support of their argument regarding intermittent harassment, the Departments rely upon the case of *de Zea v. Holder*, in which the asylum seeker was shot at twice, ten years apart, and in neither instance do the Departments pay much attention to the threats he received. This case, which deals with an unusual situation, forms the backbone of the Departments' argument that intermittent harassment cannot constitute a basis for persecution. A much more typical case is where harassment and threats are more serious and, though not constant, are received much more frequently than every ten years. Are the Departments saying that this situation would not be deserving of protection? This could lead to very unjust results.

More broadly, this regulation would fail to recognize the significant chilling effect of state behavior on someone pursuing their legal rights; certainly, repeated detentions and threats would be sufficient to prevent an individual from, for instance, being politically active. In addition, these regulations would likely preclude individuals from seeking asylum on the basis of harm or threats of harm to family members or colleagues. *See Salazar-Paucar v. I.N.S.*, 281 F.3d 1069 (9th Cir. 2002) *and Matter of A-K-*, 24 I&N Dec 275, (BIA 2013).

v. The proposal departs from USCIS guidance for adjudicators, without explanation.

Lastly, the proposed regulations provide no explanation of the agencies' departure from the framework for contemplating persecution set forth in the Asylum Officer Basic Training Course.[43] These materials discuss and categorize various types of harms that can constitute persecution, such as human rights violations, discrimination and harassment, arrests and detention, economic harm, psychological harm, sexual harm, and harm to family members or other third parties. The discussion of the proposed regulations provides no explanation for discarding this framework and upending decades of interpretive caselaw included therein.

By defining "persecution" so narrowly, this regulation will have the effect of depriving countless legitimate asylum seekers that are fearing real harm if returned to their country of origin of the safety and protection they should be afforded under our asylum laws. The purported rationale for doing so is to define persecution and clarify what does and does not constitute persecution. However, through this regulation, rather than seeking to provide this definition and clarity based on the current state of the law, the Departments instead seek to unilaterally and dramatically restrict which types of harms can be considered persecution, in contravention to decades of caselaw and guidance from the UNHCR that demands a "particular geographical, historical and ethnological context" to evaluate claims of persecution. *See UNHCR Handbook* at ¶ 53.

(d) The Proposed Rule Inexplicable contradicts decades of case law defining the standards for determining what persecution is *on account of* a protected ground.

Ayuda strongly opposes the proposed changes to the nexus requirement, which outlines nine[44] categories of claims where the Secretary of Homeland Security and Attorney General will "not favorably adjudicate" asylum and withholding claims. Thus, the proposed changes, in essence, completely foreclose nine of the most common avenues of asylum for our clients and are contrary to longstanding legal precedent and congressional intent. Further, because the list is said to be non-exhaustive, one can anticipate additional critical areas being declared off-limits in the future.

The Departments provide virtually no rationale for these seismic changes. First, they write that nexus requirements have been shaped more by case law than by rulemaking. But while the rules proposed here are purported to be "rooted in case law," the Departments are extremely selective as to which case law they rely upon, with no explanation as to why they exclude contrary case law and longstanding asylum principles.

Second, the commentary also says that the changes will "further the expeditious considerations of asylum and withholding claims." While we favor the efficient use of government resources in adjudications, efficiency cannot come at the expense of our country's

[43] USCIS Training Module: Definition of Persecution and Eligibility Based on Past Persecution, AILA Doc. No. 17051034, June 12, 2015, *available at*: https://www.aila.org/infonet/uscis-training-module-definition-of-persecution.
[44] The rules list eight changes but then add "cultural stereotypes".

statutory, treaty, and moral obligations to ensure due process for asylum seekers. These rules seem to us to be a continuation of efforts by this administration to curtail human rights in an effort to cut off the flow of immigrants. While we are cognizant of the immense asylum backlogs at both USCIS and EOIR, short-circuiting due process is not the legal or moral way to lessen the backlogs.

The Departments' final justification is that these changes will "provide clearer guidance" for asylum adjudicators in determining nexus. However, as discussed below, some of the proposed standards do just the opposite by providing muddled or unclear language or tests.

In reality, the proposed changes constitute a frontal assault on the long-standing legal rights of women, girls, LGBTI individuals, and individuals fleeing gang persecution and other non-state actors engaging in extra-legal activity to a full and fair asylum process. Courts have consistently held that asylum law requires case-by-case adjudication on the facts and merits of each claim. But the nexus section proposes sweeping blanket denials of asylum claims by closing off entire areas of inquiry and preventing adjudicators from considering case- and country-specific factual elements.

The Departments claim that these rules do not absolutely foreclose claims that possess applicable elements of the listed *nexi*. The Departments themselves note that "additional evidence" and attention to the "fact-specific nature" of determinations could be the basis for finding nexus in "rare circumstances." But these are presented as an after-thought, with no guidance as to what such additional evidence should demonstrate. So, we see through such noise and realize that these nexus restrictions will eliminate perhaps 99% of historically-deserving claims – or, as the Discussion phrases it, "in rare circumstances."

And the impact will have adverse consequences beyond the immediate issue of nexus. For instance, the proposed rules will allow adjudicators to pretermit applications for asylum, withholding, and CAT relief that do not present *prime facie* claims for relief. Assumptions regarding the sufficiency of nexus, made by a cursory review of applications without any contact with the applicant, will result in inappropriate rejection of claims on this basis. So, an application that describes a personal animus will be pretermitted without interviewing the asylum seeker to discover that such animus is, in reality, based on religious antipathy or opposition based on imputed political opinion.

i. Gender-Based Violence

Principally, the proposed rule would categorically eliminate claims where an individual suffered persecution on account of their gender. Many of Ayuda's clients have fled severe domestic violence, human trafficking, sexual assault, female genital mutilation, and persecution on account of their LGBTQ identity. These clients and thousands of other asylum seekers across the country would be ineligible for asylum under this new rule. For over 30 years, legal precedent from both the BIA and a cross-section of circuits has held that individuals who have suffered or fear violence based on their gender are eligible for asylum.[45] In addition, USCIS has

[45] *See* Matter of Acosta, 19 I.& N. Dec. 211 (BIA 1985) (recognizing that "sex" is a common characteristic of a particular social group that its members cannot change or should not be required to change); Matter of Toboso Alfonso, 20 I.&N. Dec. 819 (BIA 1990) (recognizing sexual orientation as an

issued detailed guidance for asylum officers on how claims based on sexual orientation and gender identity can support an asylum grant based on membership in a particular social group.[46]

The Departments cannot disregard these precedents or agency guidance in dismantling asylum protection for all survivors of gender-based violence. In fact, the Departments have provided only a disingenuous fig leaf to justify this legal sea change in asylum law. For instance, the administration provides a single precedent, *Niang v Gonzales,* from the Tenth Circuit, including a quotation from the decision to suggest that gender cannot constitute a social group. But the very next sentence in the *Niang* opinion clarifies that gender *can*, in fact, constitute a social group:

> But the focus with respect to such claims should be not on whether either gender constitutes a social group (*which both certainly do*) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted "on account of" their membership. 8 U.S.C. § 1101(a)42(A). (Emphasis added)[47]

Excluding any claim where gender is one of the central reasons for persecuting the applicant (nexus) is contrary to the case-by-case adjudication required under U.S law.

ii. <u>"Interpersonal Animus"</u>

Additionally, the rule further restricts access to the asylum system for survivors of gender-based violence by barring claims based on "interpersonal animus" where the persecutor has not targeted other members of the particular social group. Ayuda works with many asylum seekers who have fled very abusive domestic violence from countries that do not afford adequate protection. The husbands and boyfriends of these asylum seekers do not attack every woman in their sights.

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immutable characteristic); Matter of Kasinga 21 I.&N. Dec. 357 (BIA 1996) (holding that female genital mutilation was persecution on account of the applicant's gender and membership in a tribe); Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000) (recognizing that transgender identity constituted a cognizable particular social group because sexual orientation and sexual identity are immutable characteristics that an individual should not be required to change); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (holding that "Somali females" constitute a particular social group and "that a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM"); Cece v Holder, 733 F.3d 662, 672 (7th Cir. 2013) (holding that "young, Albanian women who live alone" constitute a particular social group); De Pena-Paniagua v. Barr, 957 F.3d 88, 89 (1st Cir. 2020) (holding that there is no categorical rule prohibiting applicants from establishing asylum based on their membership in a particular social group defined as women "unable to leave" a domestic relationship).

[46] *See also* U.S. CITIZENSHIP AND IMMIG. SERV., RAIO DIRECTORATE – OFFICER TRAINING: GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 20-21 (2015)("In an LGBTI claim, you would consider evidence that the persecutor banned or tried to change the applicant because the persecutor knows or believes the applicant belongs to a sexual minority.") Available at: https://www.aila.org/infonet/uscis-guidance-adjudicating-lgbti-refugee-asylum

[47] 422 F3d. 1187, 1200 (10th Cir. 2005)

Yet, this violence occurs intimately on account of the woman's gender and the persecutor's view on her proper role in their relationship and in society. Domestic violence abusers target their victims as a mechanism for maintaining power and control. Under this rule, these victims would be barred from seeking asylum because their partner did not threaten another woman in their community. Moreover, it is often the case that the very reason the state permits or assists the persecutory in perpetuating this violence is because of the way that the state itself views women writ large and their proper role in society.

Indeed, there has never been a fixed, well-defined requirement in asylum law that the persecutor must target other individuals.[48] The NPRM cites only one precedent (by the BIA) as controlling, *Matter of R-A-*. The selection of this decision is curious because it is contrary to the departments' position here. *R-A-* was remanded twice by two different Attorneys General. DHS submitted a brief in the case that conceded that the applicant should be granted asylum based upon the social group of "married women in Guatemala who are unable to leave the relationship" where no evidence was presented that the abuser victimized any other members of that group.

In fact, *Matter of R-A-* runs exactly counter to a subsequent BIA decision, *Matter of A-R-C-G-*. The Board reversed the IJ's denial and found that the social group of unmarried Guatemalan women who are unable to leave their relationship satisfied all of the BIA's recently-clarified test for the viability of social group claims: immutability, particularity, and social distinction.[49] If the Departments are going to cherry-pick case law, they should be careful to select settled and viable precedent.

It should also be noted that, under the proposal, a Catholic asylum seeker fleeing persecution on account of her religion would not have to prove that her persecutor attacked other Catholics. This rule imposes additional barriers to seeking asylum based on membership in a particular social group and will disproportionately harm individuals fleeing domestic violence and violence on account of their gender identity.

iii. Personal animus or retribution

Ayuda also disagrees with the way that the ban on claims based on "personal animus or retribution" has been framed. Ayuda recognizes that asylum law does not – and should not – protect against purely personal acts of reprisal. However, our concerns are two-fold.

First, Ayuda fears that this language will cause many valid asylum claims to be rejected at the credible fear stage. In USCIS's own training guidelines, the agency cautions adjudicators that:

> Persecution that at first glance may appear to be based on a personal vendetta or dispute may actually be on account of a protected ground….when the persecutor and the applicant have a personal relationship, the persecutor might target the applicant because

[48] *See* U.S. CITIZENSHIP AND IMMIG. SERV., RAIO DIRECTORATE – OFFICER TRAINING: NEXUS AND THE PROTECTED GROUNDS, 19 (2019) ("While evidence that the persecutor seeks to harm others is relevant, it is not required.") Available at: https://www.uscis.gov/sites/default/files/files/nativedocuments/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf

[49] 26 I&N Dec. 388, 392-395 (BIA 2014).

> of a belief or trait that is not immediately obvious to the adjudicator. You should carefully consider whether the applicant is in fact being targeted because of a belief or trait that might define a social group.[50]

Second, Ayuda fears that many claims based on particular social group and imputed political opinion will be summarily and unfairly rejected. Regarding social group, there is a danger that instances of intrafamilial violence, such as honor killings,[51] domestic violence, sexual assault, and trafficking involving family members, will be dismissed without a proper and full analysis of the persecutors' motives.

Likewise, injuries inflicted in disputes that may appear to be purely personal in nature often mask motivations based on the imputation of political opinion. For instance, while the facts in *Zoarab v Mukasey* cited in the discussion suggest purely personal motives, other similar situations require a more thorough analysis. In *Khudaverdyan v Holder*,[52] the court reversed a denial at EOIR because what appeared to be a personal dispute between an Armenian national and a police official was in fact motivated by the official imputing a political opinion to the asylum applicant. The court urged a full case-by-case analysis, warning that something that "begins as a personal dispute can be interpreted as political dissent."[53]

While the Departments do not completely bar such claims, their ominous warning that a nexus could be found to exist in "rare circumstances," without emphasizing the need for a fact-specific analysis, heightens the danger of summary rejection of deserving claims at the credible fear or adjudication stage. Adjudicators should instead be required, as they are currently under asylum regulations, to fully assess the persecutor's motives in relation to the five statutorily protected grounds.

iv. Persecution By Gangs and other Non-State Organizations

Furthermore, the proposed rule would completely bar claims where an individual has faced persecution because he resisted recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations. The Departments argue that this proposal is supported by the Supreme Court's ruling in *INS v. Elias-Zacarias*; however, they have reached a conclusion that is inaccurate and much broader in scope than the Supreme Court reached. In *Elias-Zacarias*, the Supreme Court held that a guerilla organization's attempt to forcibly recruit a person does not *per se* constitute persecution on account of political opinion.[54] However, recruitment could constitute persecution had the respondent provided sufficient evidence that he was recruited due to his political opinion.[55]

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[50] *Id.* at 20, 45.
[51] *See e.g.* Sarhan v Holder, 658 F.3d 649, 656 (7th Cir 2011) (holding that a planned honor killing was not a personal dispute between a brother and sister, but rather was based on her membership in a particular social group and the "complex cultural construct that entitles male members of families dishonored by perceived bad acts of female relatives to kill those women.")
[52] 778 F3d 1101, (9th Cir 2015).
[53] *Id*, at 1108.
[54] INS v. Elias-Zacarias, 502 U.S. 478, 479 (1992).
[55] *See id.* at 482.

So, contrary to the Departments' suggestion and resulting proposed rule, *Elias-Zacarias* does not foreclose all political opinion claims based on guerilla or gang recruitment. Rather, a fact-specific inquiry is required into whether the victim was targeted due to his own political beliefs.

Even in the wake of *Elias-Zacarias*, appellate courts have continued to affirm that claims based on recruitment require a detailed examination of the specific factual situation.[56] Ayuda represents many asylum seekers who have fled Guatemala, Honduras, and El Salvador due to pervasive gang recruitment and violence. Under this new rule, our clients will have no opportunity to present evidence that their refusal to join a gang is motivated by their political opinion or their membership in a cognizable particular social group. The Administration's blanket ban on recruitment-related claims is plainly contrary to Supreme Court and Circuit Court precedent, and Ayuda urges the Departments to rescind it.

v. Generalized disapproval, disagreement, or opposition to gangs, criminal, terrorist, guerilla, or other non-state actors

Furthermore, the rule further restricts access to the asylum system by foreclosing any claims based on "generalized disapproval, disagreement, or opposition to" gangs, criminal, terrorist, guerilla, or other non-state actors absent "expressive behavior in furtherance of a discrete cause against organizations related to control of a state." Principally, this rule is contrary to recent precedents in multiple circuits, holding that opposition to non-state actor violence can constitute a political opinion or form the basis of a particular social group.[57] Second, USCIS's own training guidelines emphasize the need for an individualized analysis of political opinion cases involving opposition to gangs.[58] The Departments provide virtually no justification for abandoning such recent case law and agency guidance.

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[56] *See* Marroquin-Ochoma v. Holder, 574 F.3d 575, 577 (8th Cir. 2009) ("At the outset, we reiterate that "careful attention to the particular circumstances surrounding the alleged persecution remains necessary even if the persecution is generally categorized as extortion or recruitment."); Zhang v. Gonzales, 426 F.3d 540, 546–47 (2d Cir. 2005) (rejecting "the categorical rule that opposition to government extortion cannot serve as the basis for a claim based on political opinion" and instead requiring "examination of the political context in which the dispute took place.").

[57] Regalado-Escobar v. Holder, 717 F.3d 724, 729 (9th Cir. 2013) ("When a political organization has a pattern of committing violent acts in furtherance of, or to promote, its politics, such strategy is political in nature; it advances a political goal through certain means rather than others. Therefore, *opposition to the strategy of using violence* can constitute a political opinion that is a protected ground for asylum purposes."); Marroquin-Ochoma 574 F.3d 574, 578 (8th Cir, 2009) (recognizing that "opposition to a gang such as Mara Salvatrucha may have a political dimension."); N-L-A- v. Holder, 744 F.3d 425, 439 (7th Cir. 2014) (holding that "Colombian land owners who refuse to cooperate with the FARC" are a cognizable particular social group).

[58] U.S. CITIZENSHIP AND IMMIG. SERV., RAIO DIRECTORATE – OFFICER TRAINING: NEXUS AND THE PROTECTED GROUNDS, 19 (2019) ("To show that violence inflicted by gang members has a nexus to the applicant's actual or imputed political opinion, an applicant needs evidence that he or she was politically or ideologically opposed to the gang's particular ideals or to gangs in general (or that the gang believes this) and not merely that he or she did not want to be personally involved in or had an aversion to specific activities of the particular gang").

Additionally, as referenced in our introduction to the Nexus section, while the rule purports to provide clearer guidance for asylum adjudicators, the language in the rule is vague and will be difficult to apply in practice. What counts as "expressive behavior" against a gang? Does attending a community meeting about keeping youth in schools and off the streets count as "expressive behavior" or "generalized opposition"? What about refusing to pay a gang member who demands extortion money for "protecting your business"? What about voting for a local official who is strongly anti-gang? What about campaigning for a local official who is strongly anti-gang?

In short, this rule will result in the obliteration of a major component of one of the statutory bases for asylum without justification. And, in the process, it creates confusion and a lack of clarity for adjudicators. In addition, the rule fails to consider that, in many situations, remaining neutral is a political opinion.[59] In many of our clients' home countries, gangs or other non-state actors will violently attack community members who do not actively support their cause.

vi. Perceived past or present gang affiliation

This rule completely bars claims where an individual was persecuted on account of their "perceived, past or present gang affiliation." The administration argues that this category is supported by case law, yet multiple Circuit Courts have held that past gang membership can constitute a particular social group and persecution on account of that membership can be grounds for asylum and withholding of removal.[60] Moreover, as both the Fourth and Seventh Circuits have recognized, the INA does not disqualify past gang members from qualifying for asylum or withholding of removal, and attaching this condition is "untenable as a matter of statutory interpretation and logic."[61]Ayuda agrees with the Fourth, Sixth, and Seventh Circuits

[59] See Arriaga-Barrientos v. U.S.I.N.S., 937 F.2d 411, 413 (9th Cir. 1991) (holding that "political neutrality is a political opinion or in other words, that the absence of a political opinion is a political opinion.")

[60] Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009) (holding that a former member of MS-13 was a member of a particular social group because "being a former member of a [gang] is a characteristic impossible to change, except perhaps by rejoining the group."); Martinez v. Holder, 740 F.3d 902, 911 (4th Cir. 2014) (holding that former gang membership is an immutable characteristic and that it "would be perverse to interpret the INA to force individuals to rejoin such gangs to avoid persecution"); *see also* Urbina–Mejia v. Holder, 597 F.3d 360, 366 (6th Cir. 2010) (holding that former gang membership is an immutable characteristic).

[61] Martinez, 740 F.3d at 912 ("Nothing in the statute suggests that persons categorically cannot be members of a cognizable "particular social group" because they have previously participated in antisocial or criminal conduct. Rather, Congress has identified only a subset of antisocial conduct that would bar eligible aliens from withholding of removal, defined by the alien's engaging in past persecution, committing a particularly serious crime, or presenting a danger to the security of the United States….But Congress has said nothing about barring former gang members."). *See also* Benitez Ramos v. Holder, 589 F.3d at 439-30 ("there are hints in the Arteaga opinion that being persecuted for being a former member of a gang should not be a basis for asylum or withholding of removal either. That is not Congress's view. It has barred from seeking asylum or withholding of removal any person who faces persecution for having [committed specific crimes]…But it has said nothing about barring former gang members, perhaps because of ambiguity about what constitutes a 'gang'").

that persecution on account of past gang membership is a ground for asylum and withholding of removal, and the administration's failure to consider this extensive case law and congressional intent is arbitrary and capricious.

vii. Evidence of Social Norms and Attitudes

Finally, Ayuda firmly opposes the ban on considering evidence of social norms and attitudes in the nexus analysis. The proposed rule bars consideration of any cultural stereotypes related to race, religion, nationality, and gender, such as evidence that a country has a "culture of machismo" or a "culture of family violence." The decision to ban all evidence of truly pervasive social norms is arbitrary and capricious under Section 706(2)(A) of the Administrative Procedure Act. An agency's action is arbitrary and capricious if it fails to "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[62]

Here, the Department of Justice and the Department of Homeland Security have utterly failed to articulate a rational connection between the facts and their choice to ban all evidence of social norms. The NPRM cites deficiencies related to outdated and uncited sources, such as the use of a partial quote from an 8-year-old news article to prove Guatemala's culture of machismo. However, it is entirely irrational to equate unsupported, outdated sources with extensively documented and credible evidence. The Departments could have simply prohibited the use of uncited sources, but, rather, they banned all evidence of pervasive social norms, including extensively documented evidence from the U.S. Government.

Under this new rule, a Serbian transgender asylum seeker with HIV could not present evidence from the U.S. State Department's 2019 Human Rights Report that "homophobia and transphobia were deeply rooted in [Serbian] society."[63] The immigration court could not consider the State Department's thorough analysis that there is "significant prejudice against persons with HIV/AIDS in all aspects of public life, including employment, housing, and access to public services."[64]

Yet, evidence of pervasive social norms and attitudes is critical circumstantial evidence in asylum cases. Our attorneys frequently utilize extensively documented evidence from government reports and country experts to help demonstrate the nexus requirement and a persecutor's motive. Persecutors are often emboldened when community members tolerate violence against a particular social group because the persecutor has no reason to fear retribution or interference. In addition, the proposed rule belies the Departments' mention of "fact-specific" evidence, which could explain perceived nexus deficiencies.

Furthermore, evidence of pervasive social attitudes also frequently reveal that it would be unsafe to relocate internally to another part of the country. This proposal is arbitrary and capricious under the APA standards and is inconsistent with the Supreme Court's decision in *INS v. Elias Zacarias*, which held that asylum seekers can demonstrate the persecutor's motive

[62] Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 43 (1983).
[63] U.S. Department of State 2019 Human Rights Report: Serbia. https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/serbia/
[64] Id.

through either direct or circumstantial evidence.[65] Ayuda urges the Departments to rescind this proposed ban entirely.

In conclusion, the proposed changes to the nexus requirement would eviscerate the U.S. asylum system and overrule established legal precedent. Under these proposed changes, the vast majority of our clients would no longer qualify for asylum.

(e) Internal Relocation

The current regulations have long provided valuable guidance to adjudicators in determining whether internal relocation is possible for an asylum seeker and, if possible, whether it is reasonable for him/her to do so. They succinctly provide a non-exhaustive list of five factors to be considered.

i. Deficiencies in the current system are not explained.

The Departments propose wholesale changes to the current factors for adjudicators to consider when determining whether an applicant can reasonably relocate within their home country. But the rationale provided for such enormous revisions is scant. The Discussion to the proposed regulations explains that the primary goal for the substantive changes is to ensure that adjudicators have "practical guidance" in determining the reasonableness of expecting internal relocation by providing "the most relevant factors for adjudicators to consider".

But it doesn't explain why the current non-exhaustive list of factors does not provide "practical guidance". Its conclusion that the utility of this list is "undermined" by the caveat that the factors "may or may not be relevant" to the determination is ludicrous. Of course, not all factors will be relevant in every single case, and adjudicators certainly understand this.

ii. Elimination of current factors poses enormous barriers to internal relocation.

While the proposal maintains a "totality of the circumstances" test, it eliminates all five of the enumerated factors in the current regulations and replaces them with three new ones. But the current list includes practical and realistic factors impacting whether someone can reasonably live safely in another part of their own country.

For instance, why is "ongoing civil strife" in one's country of origin no longer to be specifically considered by adjudicators? In *Awale v Ashcroft*, internal relocation was found to be not practical because of evidence presented that members of Somali minority clans continue to be "subjected to harassment, intimidation and abuse by armed gunmen" and that travel is difficult because rival groups control routes of transportation.[66]

[65] INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).
[66] 384 F3d 527, 532 (8th Cir. 2004)

It is also unclear, and not explained, why the factor in current regulations of the presence of "social and cultural constraints, such as age, gender, health, and social and familial ties" is not considered relevant as indicative of the reasonableness of internal relocation and therefore is stricken. In *Knezevic v Ashcroft*, the court was swayed by evidence showing that Bosnian Serb applicants, ages 75 and 66, would have great difficulty finding employment and thereby be able to support themselves.[67]

Age is only one of many factors that can impose impractical and often insurmountable barriers to relocation. Single and unprotected women and mothers, minors, members of religious and ethnic minorities, persons who are disabled, and persons suffering from physical or mental health issues (often as a result of the very persecution they seek to escape) may face much greater hurdles to being able to live safely and support themselves in many developing countries than in the United States.

These practical considerations are included in the existing list of factors that the Departments would arbitrarily eliminate.

iii. <u>The proposed factors are exceedingly narrow.</u>

The absence of explanatory background or context continues with the presentation of the proposed regulations. We welcome the preservation of the "the totality of the relevant circumstances" test, but, in listing three new factors, the strong suggestion in the proposed rule is that these are the <u>only</u> factors that are relevant to be considered by the adjudicator. While not specifically foreclosing the consideration of other factors, there is no language inviting or encouraging the adjudicator to take other circumstances into account.

No guidance is provided to adjudicators as to why these three factors are listed and in what context they should be considered. It is not clear what "geographic locus of the alleged persecution" means, for instance, or why it is more relevant than the excised factors.

Similarly, the "size of the country" is a factor but without any guidance as to how this is to be analyzed. By inclusion of this factor, the Departments seem to be making an assumption that a larger country would be easier for an asylum seeker to relocate in than a smaller country. While this may seem logical, examples belie this rationale. Afghanistan is the size of Texas but numerous precedents attest to citizens' inability to safely relocate there.

Such a blanket assumption with no encouragement of a specific analysis would unduly force the denial of deserving asylum applicants. Colombia is as big as California and Texas, combined but non-government forces in the recent past have prevented Colombians from safely relocating.

[67] 367 F3d 1206, 1214 (9th Cir 2004)

In addition, the new regulations provide insufficient guidance as to how the "reach and numerosity" of alleged persecutors are to be factored in.

iv. One factor is, in fact, a mandatory adverse factor.

The proposal purports to list four factors in its revised list. However, the fourth factor listed in the proposed rules – the asylum applicant's "demonstrated ability to relocate to the U.S." – is, in reality, an adverse factor that adjudicators will now be required to consider. Because the INA requires that asylum seekers be physically present in the US., every would-be asylee or applicant for withholding would automatically enter the asylum office or the immigration court with one strike already against them, whether their entry into the U.S. was lawful or not.

Furthermore, the addition of this factor is like mixing apples and oranges. The internal relocation discussion has historically focused on factors in one's own country that prevent a safe and reasonable change of residence. The reach and numerosity of persecutors have no bearing on one's ability or need to flee to the U.S. for protection.

v. The proposed regulations do not provide a meaningful opportunity to communicate concerns.

Given the Departments' proposed wholesale changes to the current factors for adjudicators to consider, the failure to provide rationale or justification is glaring. They do not provide any data, analysis, or insight into why the factors currently listed in 8 CFR 208.13 are deemed not relevant or less relevant than the proposed factors in determining whether internal relocation is reasonable.

This is a violation of the APA, which directs that interested parties be afforded a meaningful opportunity to communicate information, concerns, and criticisms to the agency during the comment period. To achieve this, the agency must "provide an accurate picture of the reasoning that has led the agency to the proposed rule". *Connecticut Light & Power Co. v. Nuclear Reg. Comm.*, 673 F.2d 525, 528, 530 (D.C.Cir.1982). The commentary is devoid of such reasoning.

This is not a mere exercise in semantics. Enormous stakes are involved. What hangs in the balance is whether applicants who have already demonstrated past persecution by government actors (where ICE seeks to overcome the presumption) and by non-government actors should nevertheless be denied the safety of the United States and be removed back to dangerous circumstances.

vi. Changes in the burden of proof apply too broad of a brush.

We appreciate that the new rules would retain the presumption of countrywide danger when past persecution by the government is established. However, the exclusion of this presumption when past persecution is not by the government or is not "government-sponsored" unfairly shifts the burden. It is not correct to state that non-government entities

normally are not expected to have a national reach. Just the reverse is the reality in many countries. This includes non-governmental groups, such as gangs and ultra-left or ultra-right groups that control vast territories of their countries and that often work in tandem with law enforcement or other government bodies. The same is true regarding many religious extremist groups where the separation of church and state does not exist.

(f) Firm Resettlement

The proposal would greatly extend the bar to asylum eligibility beyond the current regulations and, significantly, beyond the plain meaning of the statutory language. It is, thus, *ultra vires.*

Under the statute, INA 208(b)(2)(A)(vi), asylum is barred in cases where "the alien *was firmly resettled* in another country prior to arriving in the United States." (emphasis added). While Congress did not define either "firmly" or "resettled" in the statute, the proposed regulations are in direct conflict with the understood meanings of each of the words as well as the past tense indicated by the use of the word "was."

It seems clear that the proposed regulations would contradict the plain meaning of Congress' terminology in the statute. The inclusion of the word "was" in the phrase "was firmly resettled" is indicative of the past tense – an applicant must have already been firmly resettled for this bar to apply. Any reading that looks to whether an applicant *could have* resettled, and not whether the applicant *was already* resettled, is in direct conflict with the plain meaning of the statute and thus, exceeds the intent of Congress. So, for instance, to consider a person who transited through any country where they could have applied for any form of indefinitely renewable status as firmly resettled is an unsupportable reading of the statute.

Similarly, while the current regulations have provided a framework for determining when someone is "firmly resettled," in the absence of statutory definitions, the proposals would contradict the plain meaning of these words. The statute's inclusion of "firmly" to modify "resettled" indicates that an applicant's resettlement in a third country must be solid, fixed, or not subject to change or revision. (*see* "firm," *Merriam Webster* (2020), *available at* https://www.merriam-webster.com/dictionary/firmly?src=search-dict-hed*).* An analysis of multiple factors regarding the applicant's past physical presence in a third country is necessary to determine if the applicant was "firmly" resettled.

In addition, common definitions for the word "resettled" are in direct conflict with proposed circumstances one and three. "Settle" is defined as, among other things, **"**to place so as to stay" and "to establish in residence." *See* "settle," *Merriam Webster* (2020), *available at* https://www.merriam-webster.com/dictionary/settle#h1. But the proposals would encompass situations that would not constitute "resettlement."

i. Redefinition of What Constitutes permanent legal status in a third country.

The first circumstance would bar an asylum applicant who resided in a third country while in permanent legal immigration status. This is similar to the current framework. However,

the commentary in the first circumstance includes additional conditional and tenuous situations that would also constitute a bar to asylum based on firm resettlement.

Primarily, the proposed regulation would bar a person if they "could have resided" in a "non-permanent but potentially indefinitely renewable legal immigration status" in "a country through which the alien transited prior to arriving in or entering the United States." This is far beyond the clear intent of the statute, which requires that a person's resettlement be "firm."

For support of this excessive and illegal departure from the statute, the Departments rely on a recent BIA decision, *Matter of K-S-E-*.[68] But, in that case, the applicant acknowledged receiving an offer of permanent residence in a third country. That detail hardly supports the extreme restriction of access to asylum that this proposal represents, i.e., someone who "could have" received a "potentially renewable" status. The NPRM also cites a passage in *Matter of A-G-G-*,[69] but, again, this references a mechanism for obtaining permanent residence.

In addition, this proposed provision would amount to a Safe Third Country agreement since it would penalize a refugee for failing to apply for status in a country through which they transited. This is in clear contravention of INA §258 (a)(2)(A), since it would place an expectation on these persons to apply in countries that the U.S. has not determined have "full and fair" asylum procedures. Until the current administration, the U.S. had entered into such an agreement with only one country (Canada). This proposal is reminiscent of this administration's efforts to restrict access to asylum by creating the equivalent of Third Country Agreements with multiple Central American countries.

ii. Extension of Bar to Individuals merely residing "voluntarily" in a third country, regardless of status.

The second circumstance would bar applicants who "resided voluntarily, and without continuing to suffer persecution, in any one country for more than a year." In drafting this, the Departments were clearly influenced by cases such as *Matter of A-G-G-*, where a Mauritanian citizen fled to Senegal, where he married a Senegalese citizen, had children and held a job, resided for eight years, and never applied for any immigration status, though he could have applied for permanent status as the spouse of a Senegalese citizen.

But most situations are less clear-cut than that presented in *A-G-G-*. Much more typically, asylum seekers remain in another country temporarily without forming significant economic or social roots, while they arrange onward travel. Sometimes, refugees are so traumatized by the persecution they suffered that they need some period of time to stabilize psychologically in order to determine their next steps.

[68] 27 I&N Dec 818 (BIA 2020)
[69] 25 I&N Dec 486 (BIA 2011)

iii. Access to asylum in other countries

The Discussion suggests that the enhanced restrictions are, in part, justified by the "increased availability of resettlement opportunities" around the world. It references the number of countries that have signed the Refugee Convention since 1990, according to a UNHCR list.

But this is taking false comfort in a list while ignoring real-world realities. In countries that are Western democracies and on the UNHCR list, additional requirements and other conditions severely restrict access to asylum. For instance, Belgium imposes a time limit for applying for asylum of "eight working days" after arriving in the country.[70] In Australia, all asylum seekers are forced to await the long process on an island far off the Australian coast, where they live under "appalling" conditions.[71]

And during the Covid-19 pandemic, Amnesty International reports that countries that might normally process asylum seekers have closed their borders. This includes countries that are on the UNHCR list as signatories to the Convention, such as Burundi, Ethiopia, Kenya, and Uganda.[72] So, refugees may find themselves unable to reach a country where they could otherwise apply for asylum. Under the proposed procedures, they would be barred from U.S. asylum processes because of their inability to apply in a country in which they are trapped.

The Departments' failure to recognize the changed refugee landscape during the pandemic and to make appropriate accommodations is short-sighted and unfair.

The circumstances proposed by the Departments would encompass situations in which the applicant clearly had not been firmly resettled in a third country. These enumerated circumstances are overbroad and unreasonable readings of the statute. If enacted, the Departments' proposed reading of "was firmly resettled" would not be worthy of deference when challenged in federal court.

(g) Discretionary Determinations

The Departments seek to restrict the discretion of adjudicators by proposing a list of three "significantly adverse" factors that must be considered in the exercise of discretion, plus nine additional "adverse" factors that would "ordinarily result in the denial of asylum." The Departments' proposal weights these twelve adverse factors so heavily that the regulations, if enacted, would result in the denial of practically all asylum applications. The weight that these factors are to be given under the proposed regulations fly in the face of decades of precedent and the moral and legal obligations of our nation. In the commentary to support their proposals, the Departments consistently cite regulations, statutes, and case law in an incredibly inaccurate and irresponsible manner.

[70] https://www.asylumineurope.org/reports/country/belgium/asylum-procedure/procedures/registration-asylum-application
[71] https://www.amnesty.org/en/latest/news/2016/08/nauru-australias-shame-and-a-warning-for-europe/
[72] https://www.amnesty.org/en/latest/news/2020/06/east-africa-people-seeking-safety-are-trapped-at-borders-due-to-covid-19-measures/

To introduce this portion of the regulations, the Departments make several citations they state are in support of their proposal. A closer examination of these sources makes clear that there is no legal support for the drastic changes proposed by the Departments. The Departments cite *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987) to defend the new discretionary factors, stating that the case includes "a lengthy list of possibly relevant factors for consideration."

While this is true, the Departments gloss over what is arguably the most important part of *Pula*'s holding – "the discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; *the danger of persecution should generally outweigh all but the most egregious of adverse factors*." *Matter of Pula*, 19 I&N Dec. at 474 (emphasis added). Thus, absence of one shred of compassion or humanity in its laundry list of factors is at complete odds with the individualized analysis and holding in *Pula* or are country's legal and moral obligations. The Board in that decision actually reversed the IJ's denial of asylum on discretionary grounds and granted asylum. So, the Departments' proposal to introduce three factors that would be "significant adverse factors" and nine factors that would "ordinarily result in the denial of asylum as a matter of discretion" is not supported by *Pula*, but rather undermined by it.

In an attempt to further support the proposed regulations, the Departments compare the proposed regulations pertaining to discretion to regulations issued on discretionary considerations for other forms of relief, listing 8 CFR 212.7(d) and 1212.7(d). The Departments suggest that these prior regulations on discretion make it "similarly appropriate to establish criteria for considering discretionary asylum claims." The Departments fail to address two important differences between the cited regulations and the proposed ones.

First, 8 CFR 212.7(d) and 1212.7(d) state that the Attorney General generally would not exercise discretion to waive grounds of inadmissibility where an applicant had been convicted of violent or dangerous crimes, except in extraordinary circumstances. By limiting discretion to waive grounds of inadmissibility triggered by violent or dangerous crimes, the regulations laid out specific and compelling circumstances that applied only to a narrow subset of applicants. The same cannot be said of the present proposal, which seeks to limit discretion in such a broad manner that nearly every asylum applicant would be rejected as a matter of discretion.

The Departments' reliance on the above CFR sections, that deal with persons who have committed "violent or dangerous crimes" is ironic, given the demonization of asylum applicants in this proposal. This is apparent from the unrelenting focus on fraud, lying, forum-shopping, and gaming of the system without countervailing attention to a nuanced exploration of benign motivations or the impacts of harm and trauma.

Moreover, the regulations at 8 CFR 212.7(d) and 1212.7(d) relate to a statute that specifically confers the Attorney General discretion, INA 212(h) ("The Attorney General may, *in his discretion*, waive the application…") (emphasis added). The inclusion of the phrase "in his discretion" here, where it is not included in the asylum statute, suggests a broader range of discretion for the Attorney General. *See Zadvydas v. Davis*, 533 U. S. 678, 697 (2001) (stating "[t]he Government points to the statute's word "may." But while "may" suggests discretion, it does not necessarily suggest unlimited discretion"). Thus, while "may" connotes discretion, it

does not suggest "unlimited discretion," and the comparison to 8 CFR 212.7(d) and 1212.7(d) is insufficient to justify the sweeping changes the Departments seek to make through regulation.

Finally, while some discretionary decisions are shielded from judicial review by statute, discretionary decisions on asylum applications are exempted by statute and caselaw and remain judicially reviewable. 8 U.S.C. 1252(a)(2)(B)(ii); *see also Kucana v. Holder,* 558 US 233 (2010), FN 13 ("Congress excepted from §1252(a)(2)(B)(ii) 'the granting of relief under [§]1158(a).' Section 1158 concerns applications for asylum"). Therefore, discretionary decisions on asylum applications made under the proposed regulations will be judicially reviewable.

As the Departments conclude their commentary introducing the adverse discretionary factors they propose, the Departments make the claim that this proposed regulation would "build on the BIA's guidance regarding discretionary asylum determinations." No support could be found in existing BIA precedent for such a sweeping and restrictive view of discretion. To the contrary, a number of precedential cases reflect and build upon *Pula*'s holding that the most important factors when making discretionary determinations are humanitarian-related, i.e., the persecution the applicant suffered or would suffer. *See e.g. Matter of Pula, Supra*; *Matter of Chen,* 20 I&N Dec. 16 (BIA 1989) (holding that even though there was little likelihood of future persecution, the past persecution suffered by the applicant was a strong factor in the discretionary decision to grant asylum); *Matter of H-,* 21 I&N Dec. 337, 347 (BIA 1996) (stating "[c]entral to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past"). It is with this decades-long focus on humanitarian relief and the consideration of compassion that the Departments' proposed discretionary factors must be considered.

i. The first three factors

First, the Departments propose three "specific but nonexhaustive factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion." The Departments propose that these factors be "significant adverse factors" when making discretionary decisions. As discussed above, per federal court precedential guidance, the most important factor that adjudicators have weighed has been the persecution the applicant could suffer if deported. *See Matter of Pula,* 19 I&N Dec. 467. The Departments do not include this among their three factors; since restriction and efficiency appear to be the primary goals of these proposals. How else to explain why all three factors (plus the additional nine) would weigh so heavily against an exercise of discretion?

A. Unlawful entry or attempted unlawful entry

The Departments propose that entering or attempting to enter the United States unlawfully should be a significant adverse factor. Once again, the Departments cite *Matter of Pula* as precedent but, tellingly, are silent on the humanitarian concerns of the Board in *Pula,* and that such concerns should outweigh all but the most egregious of adverse factors.

The Departments state that they are concerned by the resources needed to "apprehend, process, and adjudicate the cases of the growing number of aliens who illegally enter the United States putatively in order to claim asylum." The U.S. government's own data contradicts the claim that there are a growing number of individuals entering the United States without inspection. According to Customs and Border Protection, October of 2019 represented the fifth straight month of decline in border apprehensions.[73] The Departments' concern for the "growing number of aliens who illegally enter the United States" is therefore misplaced.

In addition, the government has taken direct actions to impede asylum seekers from entering the U.S. at ports of entry to ask for asylum. Through metering, thousands of asylum applicants have been forced to wait in Mexico for months after attempting to present themselves at a port of entry to enter the U.S. to seek asylum only to be turned away.[74] The administration then enacted the so-called "Migrant Protection Protocols," forcing countless asylum applicants to remain in Mexico while they waited for their hearings.[75] There have been over 1,000 reported cases of violent crimes, including kidnapping, torture, and rape, among asylum seekers subjected to MPP.[76]

CBP has the discretion to return asylum seekers to Mexico under MPP, and also has the discretion to remove asylum seekers from the program and allow them to enter the U.S. to await their hearings.[77] DHS does, in fact, have the discretion to address the issue of entry without inspection at the Southern border – but such discretion does not exist in the adverse discretionary factors proposed here. If DHS were truly concerned about the number of people entering the U.S. outside of ports of entry, it would erase barriers to entering at ports of entry, not erect them. This would greatly reduce the resources needed to apprehend, transport, safeguard, and process such persons.

B. Failure to seek asylum or refugee protection in at least one country through which the applicant transited

The Departments cite Asylum Eligibility and Procedural Modifications, 84 FR at 33831 as justification for this proposal. This Rule has since been enjoined, and the Court of Appeals for the 9th Circuit has found that it is arbitrary and capricious and in conflict with 8 USC 1158. *See East Bay Sanctuary Covenant v. Barr* at 54 (9 Cir. July 6, 2020) (affirming preliminary injunction against the government, finding that the Rule is in contradiction with 8 USC 1158 and was arbitrary and capricious); *see also I.A. v. Barr* at 2 (D. D.C. June 30, 2020)[78] (finding that the Government "unlawfully promulgated the rule without complying with the APA's notice-and-comment requirements"). As a Rule that has been found arbitrary and capricious and

[73] https://www.cbp.gov/newsroom/national-media-release/southwest-border-apprehensions-decline-october
[74] https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border
[75] Id.
[76] https://www.washingtonpost.com/opinions/the-real-border-crisis-is-trumps-remain-in-mexico-policy/2020/03/06/02d6964c-5cd8-11ea-9055-5fa12981bbbf_story.html
[77] https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border
[78] https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv2530-55

contrary to the statute, 84 FR at 33831 is hardly a justification for such a drastic shift in discretionary determinations.

There are many justifiable reasons why a legitimate asylum seeker would not seek asylum in a transit country. These include the absence of full and fair refugee (asylum) procedures, barriers to applying for asylum, danger to foreigners in transit countries, and compromised functioning caused by the effects of traumatization.

To illustrate just one of these reasons that asylum seekers may not apply in a transit country due to appalling and dangerous conditions there, Mexico is listed as a signatory to the 1951 UN Convention and 1967 Protocol.[79] However, "68.3 percent of the migrant and refugee populations entering Mexico reported being victims of violence during their transit toward the United States".[80] Human Rights First has recently documented over 340 public reports of rape kidnapping, torture, and other violent attacks against asylum seekers in Mexico.[81]

Guatemala is also a state signer to the UN Convention and Protocol. However, children attempting to apply for asylum there would face extreme danger. The living conditions in Guatemala's state-run welfare facilities are inhumane. In 2017, more than 40 Guatemalan girls burned to death after they were locked in an orphanage.[82] Other children are held in cages, tied to wheelchairs, and bound to railings like animals. *Id.* And numerous children are trafficked for sex and forced labor from within Guatemala's orphanages, and often sterilized to cover up institutionalized sexual abuse.[83]

The Departments reveal their biases when they claim that not applying for asylum in a country that an applicant travels through "may reflect an increased likelihood that the alien is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection." Similar reasoning was provided in the now-enjoined Rule.

But as the Ninth Circuit explains in *East Bay Sanctuary Covenant v. Barr*, "There is no evidence in the record to support the…assumption that [asylum seekers who transited through Mexico or Guatemala and did not apply for asylum there] are not credible." *East Bay Sanctuary Covenant v. Barr* at 42. The Departments in this proposed rule likewise provide no data on the

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[79] https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html

[80] *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1118 (N.D.Cal. 2018)

[81] Available at https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf.

[82] *See* Anastasia Moloney, *Guatemala's orphanage children caged, abused: report*, Thomson Reuters (July 16, 2018), http://www.reuters.com/article/us-guatemala-child-abuse/guatemalas-orphanage-children-cagedabused-report-idUSKBN1K7007.

[83] *See* Eric Rosenthal, *A Mandate to End Placement of Children in Institutions and Orphanages*, Georgetown Law: Human Rights Institute (Jan. 2017), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Perspectives-on-Human-Rights-Rosenthal.pdf.

veracity of asylum claims made by individuals who have transited through another country on the way to the United States.

In addition, these provisions contravene the UN Refugee Convention. Article 33(1) of the 1951 Convention prohibits state parties from "expel[ling] or return[ing] (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The article has a broad reach, reflecting that the principle of *nonrefoulement* applies both within a state's territory and at its border. S*ee Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 180–82 (1993).

The principle of *non-refoulement* is "the cornerstone of asylum and of international refugee law" and one of the core principles of the 1951 Convention. Note on International Protection ¶ 10; Handbook 9. The proposal does not comply with Article 33(1)'s prohibition against *refoulement*. By denying asylum seekers the right to seek asylum because they have crossed through a third country en route to the United States, they would be at risk of removal to the very states that they have sought to escape. *See* 8 U.S.C. § 1231(b). Such a return to persecution—whether directly or, through chain *refoulement*, indirect—is forbidden by Article 33(1) and is inconsistent with the "international community['s commitment] to ensure to [all] those in need of protection the enjoyment of fundamental human rights, including the rights to life . . . and to liberty and security of [the] person."9 Note on International Protection ¶ 10; UNHCR Exec. Comm., Conclusion No. 6 (XXVIII) ¶¶ (a)–(c) (1977).

C. Use of fraudulent documents to enter the United States

The Departments express concern that "the use of fraudulent documents makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources." The Departments do not provide any data on the frequency with which applicants use fraudulent documents to enter the U.S. or the resources required to identify fraudulent documentation. The exclusion of such data prevents Ayuda and other commenters from conducting a thorough analysis of this proposed factor and thus violates the requirements of the APA.

Ayuda appreciates the Departments' inclusion of an exception for applicants arriving directly from their home country. This indicates that the Departments recognize the important humanitarian concerns present for asylum seekers – some asylum seekers may face danger should their true identity be known. While the proposed regulations recognize this danger in the applicant's home country, they don't recognize that the applicant may continue to face danger in a second country they transit through in order to reach the United States. The regulations also fail to consider that an applicant may use false documents out of a fear of persecution should they be returned to their home country and a belief that the U.S. government would deport them if their true identity were known.

ii. The additional nine factors

In addition to these three factors, the Departments propose nine additional factors that would even further restrict adjudicator discretion, stating that the presence of any of these nine

factors would "ordinarily result in the denial of asylum as a matter of discretion." The Departments incorrectly claim this would be "similar to how discretion is considered in other applications." Once again, the Departments cite to 8 CFR 212.7(d) and 1212.7(d), which limit the use of discretion only when the applicant's inadmissibility involves violent or dangerous crimes, and where a broader use of discretion is given to the Attorney General by statute.

The Departments go on to cite *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), which also addresses only violent or dangerous offenses, and required that the gravity of the applicant's offenses be weighed against the extraordinary circumstances or exceptional and extremely unusual hardship. The Departments also cite *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019), which is a cancellation of removal case and therefore does not reflect the same humanitarian considerations as cases based in persecution abroad.

The factors proposed by the Departments are a drastic departure from the current standard, in which only violent or dangerous offenses would result in this general discretionary bar, and the most heavily weighted discretionary factor is the persecution abroad. Once again, humanitarian concerns are largely absent from the conversation. The proposal would reduce adjudicators to automatons and keepers of a checklist of numerous "significantly adverse factors", stripped of virtually any discretion.

A. Factors one and two: Whether an applicant had spent more than fourteen days in any one country that permitted application for refugee, asylee, or similar protections prior to entering the United States, or transit through more than one country prior to arrival in the United States

The Departments introduce these two factors together and use the same argument to justify the factors in the commentary. The Departments suggest that these factors are "supported by existing law surrounding firm resettlement and aliens who can be removed to a safe third country." As discussed elsewhere in this comment paper, existing law surrounding firm resettlement does *not* support these assertions. In fact, existing caselaw and the plain language of the statute is in direct conflict with the Departments' understanding. The Departments' proposal is arbitrary and capricious, as explained above when addressing the initial three discretionary factors.

The Departments also misunderstand the concept of safe third country agreements, which do not lend any support to the proposed factors. An applicant can be removed to a "safe third country" that has a "bilateral or multilateral agreement" with the U.S., and that country is 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." 8 USC 1158(a)(2). This refers to specific bilateral or multilateral agreements between nations. Presently, the U.S. has entered into a formal safe third party agreement with only one country, Canada.

The application of the "safe third country" bar could presumably be challenged if a signatory country did not provide full and fair access to asylum procedures or did not adequately

protect applicants from persecution, and preliminary research on countries with which the United States recently entered such agreements suggests these challenges have merit.[84] It appears that the proposed regulations are an attempt to circumvent such challenges, as the regulations would allow a discretionary denial even where the third country did not provide adequate access to asylum procedures or where the applicant was persecuted in the third country.

The Departments provide several exceptions, including where the applicant transited through a country not party to the Refugee Convention, Refugee Protocol, or Convention Against Torture. This exception is inadequate and does not ensure that applicants have full and fair access to asylum, as many countries party to these agreements do not provide sufficient protection. In countries that are Western democracies and are parties to all of these agreements, additional requirements and other conditions severely restrict access to asylum.

As detailed above, many countries have severely restricted access to asylum in the midst of the COVID-19 global pandemic, meaning that many refugees are unable to reach safe harbor where they can in fact apply for asylum, no matter how many countries they pass through en route to the United States.[85] The duration of the pandemic is unknown but could be lengthy, and its scope was certainly known long before the Departments' issued the proposed regulations. The Departments' failure to acknowledge limitations that this might place on asylum seekers and to attempt to accommodate for them is inexcusable.

B. Factor three: Criminal convictions that remain valid for immigration purposes

The Departments do not provide any justification for this factor, but rather provide citations to a number of cases defining "valid for immigration purposes." What constitutes a conviction "valid for immigration purposes" is not in question here. The question is whether *any* conviction valid for immigration purposes should "ordinarily result in the denial of asylum." For instance, one of the cases cited in the Discussion, *Matter of Thomas & Thompson,* involves the impact of a conviction on an LPR seeking to avoid removal. Because the court did not engage in analyzing the INA with regard to asylum law, this precedent is of no value to the discussion of this instant proposal.

The Departments' proposal that any valid conviction ordinarily would result in the denial of asylum would mean that an individual convicted of, for example, driving without a valid license, would need to demonstrate "extraordinary circumstances" in order to overcome this negative discretionary factor. The Departments do not cite a single policy concern or benefit to the public in enacting this factor.

Certain criminal convictions and categories of crime are already addressed as bars to asylum in the statute, so it is clear that Congress considered criminal convictions and their consequences when drafting our asylum system. Because Congress did not call for a bar on asylum for any individual with any criminal conviction, and because this regulation would result

[84] https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie/; https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained.
[85] https://www.amnesty.org/en/latest/news/2020/06/east-africa-people-seeking-safety-are-trapped-at-borders-due-to-covid-19-measures/

in the discretionary denial of asylum in cases of even the most minor convictions, it is obvious that the proposed discretionary factor reaches outside of Congressional intent and is therefore *ultra vires*.

C. Factor four: Unlawful presence of more than one year's cumulative duration before filing an application for asylum

The Departments only attempt to explain or justify this adverse factor is that it is "consistent with the unlawful presence bar" at INA 212(a)(9)(B)(i)(II) and the permanent bar under INA 212(a)(9)(C). However, these bars do not make a person inadmissible for admission as an asylee or refugee nor act as a bar to asylum eligibility.

Additionally, the statute already addresses situations where asylum applicants have been present for more than one year before filing for asylum, often referred to as the "one-year filing deadline." INA 208(a)(2)(B). Significantly, the statute includes two exceptions to the one-year filing deadline: changed circumstances and exceptional circumstances. Because the one-year filing deadline is already in place, the proposed regulations are merely an attempt to circumvent the essential exceptions Congress put in place to protect vulnerable applicants who did not meet the one-year deadline.

D. Factor five: failure to file taxes or fulfill related obligations

The Departments propose that an applicant who has ever failed to file taxes should "ordinarily" be denied asylum as a matter of discretion. But there are many reasons why a well-meaning and otherwise law-abiding non-citizen might fail to file a required tax return.

The U.S. tax code is confusing, and few taxpayers are able to file income taxes without the assistance of tax preparers or tax preparation programs. Tax preparation is expensive, and American taxpayers will pay around two billion dollars on tax preparation software alone this year.[86] While tax preparation software is available for free to taxpayers making below a certain income, the software has been intentionally hidden from Google searches and is notoriously inaccessible, with millions of taxpayers paying for software that should have been free.[87]

Asylum applicants may be unaware of the requirement to file taxes, or they may believe that they do not need to file taxes because taxes are already deducted from their paychecks. An asylum applicant may be a national of one of the many foreign countries that do not require any affirmative action be taken by taxpayers to pay their taxes or that have pre-filled forms that require only minutes of taxpayer effort even for complicated cases.[88]

In addition, the tax code and filing procedures in the U.S. are complicated – the Internal Revenue Code was 2.4 million words long in 2019.[89] While some information about tax filing is

[86] https://www.nytimes.com/2017/04/14/opinion/filing-taxes-in-japan-is-a-breeze-why-not-here.html
[87] https://www.cbsnews.com/news/turbotax-h-r-block-tax-software-overcharged-14-million-file-free-irs-inspector-report/
[88] https://www.nytimes.com/2017/04/14/opinion/filing-taxes-in-japan-is-a-breeze-why-not-here.html
[89] https://taxfoundation.org/brazil-us-tax-complexity/

provided online by IRS.gov, the information is provided only in English and five other languages.[90]

As a nonprofit organization serving low-income immigrants, Ayuda is especially concerned about how this adverse factor will disproportionally impact asylum seekers who lack financial and community resources. Many of our clients lack the financial resources to pay a tax preparer for assistance or to pay for the use of tax software, and many more do not have the technological access or ability to use tax preparation software even when it is provided for free. This regulation would disproportionately impact applicants who are low-income, who do not speak English, who are illiterate or partially literate, and who do not have access to technology. There is no identifiable benefit behind the proposed regulation, but the incredible harm is apparent.

The Departments provide no justification beyond the false assertion that this would "hold all asylum applicants to the same standards as most individuals in the United States". But it is apparent that the true purpose is to create yet another barrier to asylum. The Departments ignore the humanitarian nature of asylum and would *refoule* (return) individuals or families to danger of torture or death. Again, to quote the Board in *Matter of Pula,* the danger of persecution should generally outweigh all but the most egregious of adverse factors."[91] To remove a would-be asylee because of the failure to file a tax return, even an intentional failure, is heartless, indefensible, and contrary to this country's legal and moral obligations.

E. Factor six: having had two or more applications for asylum denied for any reason

The inclusion of "for any reason" is the most troubling part of this proposed adverse factor. This would require adjudicators to ignore entirely the circumstances behind which an asylum application could have been denied. For example, an applicant may have consulted with a *notario* or been the victim of ineffective assistance of counsel and had asylum applications denied through no fault of their own. Another possibility warranting an exception to this rule is if an applicant is a *refugee sur place.* It is conceivable that circumstances in the country of origin changed or deteriorated after their arrival in the U.S. such that they now have a new well-founded fear of persecution.

Ayuda agrees that the applicability of this factor will be exceedingly rare. But to rule out eligibility "for any reason" is too extreme.

F. Factor seven: having withdrawn with prejudice or abandoned an asylum application

The withdrawal of an asylum application with prejudice or the abandonment of an asylum application does not always indicate that the initial application lacked merit. We are aware anecdotally that some immigration judges will require the withdrawal of an asylum

[90] https://www.irs.gov/newsroom/help-available-at-irsgov-in-different-languages-and-formats
[91] *Matter of Pula*, 19 I&N Dec. at 474

application with prejudice if an applicant for asylum wishes to return to the master calendar docket to pursue an alternate form of relief – such as Special Immigrant Juvenile Status – for which the individual is also eligible. It is quite possible, and in fact not uncommon, for an asylum applicant to be eligible for multiple forms of relief. Asylum applicants should not be punished for pursuing all relief available to them.

In addition, there are countless reasons that an individual may abandon an asylum application that should not warrant a negative exercise of discretion. Individuals who are victims of *notarios* or victims of fraud by their immigration lawyers may unintentionally abandon applications due to ineffective assistance of counsel. Individuals may be forced to flee their homes due to domestic violence or other criminal activity and miss interview dates. Ayuda has seen instances with their own clients where hearing notices and other legal documents may be hidden or destroyed by abusers as a method of control. This could result in the unintentional abandonment of an asylum case. While administrative efficiency is an important goal, and wait times are a concern, safeguarding humanitarian protections outweighs this.

G. Factor nine: failure to file a motion to reopen within one year of changed circumstances

While it is not entirely unreasonable to view the failure to file a motion to reopen within one year of changed circumstances as a negative factor, it is also necessary to consider any extraordinary circumstances that may have prevented the applicant from filing a motion to reopen within one year. The consideration of extraordinary circumstances and the use of the doctrine of equitable tolling is consistent with the treatment of motions to reopen in other contexts. For example, in the context of other motions to reopen, all Circuits but the First Circuit have recognized the application of equitable tolling where a Respondent missed the 90-day deadline to reopen proceedings.[92]

In addition, the imposition of an ironclad time period (one year) is unreasonable and contrary to the very case precedent cited by the Departments in the Discussion. In *Wang v BIA*, the court rejected a four-year delay in filing a motion to reopen based on ineffective assistance of counsel. But it is instructive that the court wrote that "there is no magic period of time for equitable tolling premised on ineffective assistance of counsel. Rather, the nature of the analysis in each case is a two-step inquiry that first evaluates reasonableness under the circumstances, namely, whether and when the ineffective assistance [was], or should have been, discovered by a reasonable person in the situation."[93]

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[92] *American Immigration Council*, citing Iavorski v. INS, 232 F.3d 124 (2d Cir. 2000); Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005); Kuusk v. Holder, 732 F.3d 302 (4th Cir. 2013); Lugo-Resendez v. Lynch, 831 F.3d 337 (5th Cir. 2016); Harchenko v. INS, 379 F.3d 405 (6th Cir. 2004); Pervaiz v. Gonzales, 405 F.3d 488 (7th Cir. 2005); Hernandez-Moran v. Gonzales, 408 F.3d 496 (8th Cir. 2005); Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001) (en banc); Riley v. INS, 310 F.3d 1253 (10th Cir. 2002); Avila-Santoyo v. Att'y Gen., 713 F.3d 1357 (11th Cir. 2013) (en banc), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf

[93] *Wang v BIA*, at 715, *citing Iavorski* v USINS, 232 F.3d 124, 134 (2nd Cir 2000).

iii. The revised discretionary factors are, seen as a whole, contrary to the INA and arbitrary and capricious.

The Departments propose to change completely the way discretion is considered in asylum cases. The Departments' proposal is arbitrary and capricious and contrary to the statute as written. The proposed discretionary factors would result in the discretionary denial of most asylum applications and are designed with only one interest in mind: preventing the just administration of asylum in furtherance of the current administration's anti-immigrant policies.

Further, while the proposals list factors rather than mandates, the overall tone and expectation essentially remove the element of discretion from adjudicators' determinations and leave no doubt that the presence of any of the factors will be fatal to an asylum application. This restrictive tone is clear from such terms as "significantly adverse", would "ordinarily result in the denial of asylum as a matter of discretion" and that only "extraordinary circumstances" demonstrated by a very high standard ("clear and convincing evidence") and resulting in "exceptional and extremely unusual hardship" would suffice to overcome one of these factors.

The proposals' breadth and overall restrictive and uncompassionate tone put large segments of the asylum applicant population at severe disadvantages, although the proposals offer no recognition of this. These segments include children, those suffering from trauma or other mental health issues, and *pro se* applicants.

7. Rogue Officials (CAT)

The regulations at 8 CFR 1208.18(a)(1) stem from the language of the Convention Against Torture and include torture inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." As the Departments state, federal courts have generally implied that this is to be read as dividing into two groups of persecutors, with one group being public officials, and the other group being individuals acting in an official capacity (for example, individuals deputized to perform government duties). *See e.g. Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017); *Rodriguez-Molinero v. Lynch*,808 F.3d 1134 (7th Cir. 2015).

i. Official Capacity

The Departments review several case precedents but provide no rationale for the enhanced standard, other than to increase the requirements for applicants for CAT relief to prevail. There are several deficiencies in the approach taken by the Departments.

First, while they focus on "rogue officials", they never define "rogue". The suggestion is that the focus should be on individual, out-of-control officers acting alone in not following the law. However, Merriam Webster defines the word as "corrupt, dishonest" with the example given of "rogue cops".[94]

[94] https://www.merriam-webster.com/dictionary/rogue

So, the proposed standard ignores a common situation that has been recognized by the federal courts: the situation in which government corruption is so deep and entrenched that law enforcement officials are essentially acting under "color of law". In *Ramirez-Peyro v Holder,* for instance, the court cited the U.S. State Department in observing the "deeply entrenched culture of impunity and corruption in [Mexico's government]."[95] It then reversed the IJ and BIA's denial of CAT protection since the torture he feared by police officers connected to Mexico's drug cartel would be a public official acting "under color of law when he misuses power possessed by virtue of . . . law and made possible only because he was clothed with the authority of . . . law."[96]

In *Barajas-Romero v Lynch,*[97] the court quotes from the U.S. Department of State Human Rights Report for Mexico in describing the endemic corruption in the country. In particular, it cited reports "that police, especially at the state and local level, were involved in kidnapping, extortion, and in providing protection for, or acting directly on behalf of, organized crime and drug traffickers." [98] When official corruption is this entrenched, it is difficult to understand how the offending officers are "rogue". And the Discussion does not explain why "or" in the current regulations needs to be changed to "and" to require both actions in one's official capacity and instigation, consent, or acquiescence.

Official corruption between extrajudicial organizations, such as violent gangs in the Northern Triangle, is well-documented there and in other parts of the world. The proposed regulations should recognize this reality in providing potential CAT protection to victims of such groups.

Another scenario not contemplated by the proposal is where there is no functioning government in wide swaths of a country. For instance, in *Gomez-Beleno v Holder*[99], the court found that the BIA "failed to consider whether the term 'government' in the regulations implementing CAT applies to the FARC as the *de facto* government in parts of Colombia".[100]

ii. Acquiescence

The proposed regulation would heighten the official acquiescence standard. It relies on a string of decisions that analyze "willful blindness", which is sometimes referred to as "deliberate ignorance". All of these precedents are criminal cases and draw on concepts within criminal law.

The problem with this approach is that, unlike in the criminal context, the public official in a Torture Convention claim resides in another country and typically is not subject to cross examination and impeachment. Applicants for CAT relief have no access to the offending public officials, as well as, usually, no records or documentary evidence nor witnesses, in order to prove

[95] 574 F3d 893 (9th Cir 2009).
[96] *Id,* at 901, citing *United States v. Colbert,* 172 F.3d 594, 596 (8th Cir.1999) (citing *West v. Atkins,* 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)); *see Screws v. United States,* 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).
[97] 846 F3d 1134 (7th Cir 2015).
[98] *Id.* At 362.
[99] 644 F3d 139 (7th Cir, 2011).
[100] *Id,* at 146.

what were the knowledge and motivations of the official. As such, this standard is patently unfair, since it imposes an insurmountable barrier to proof.

8. Conclusion

As detailed more fully above, Ayuda objects to the proposed regulations nearly in their totality. Seen together, the Departments' proposals and justifications can only be described as a complete attack on the asylum system – designed to limit asylum to protection available essentially only to the main character in Casablanca – the male political activist who opposes, directly, his home-country but government. This alone would be an impermissible narrowing of the protections of asylum, ignoring several prongs of the statute and the 1951 Refugee Convention. However, the Departments go beyond this to instead say that even this the refugee must have never made a mistake, never faced an impossible situation, never in fleeing for his life been unable to explain with legal specificity, in a language potentially not his own, and in a traumatic detention-center setting, the most difficult details, perhaps, of his life.

And, of course, asylum is meant for more than this individual. Asylum is for the protestor, for the norms-bender, for the dissident, for the protestor, for those victimized for *who they are*, for *what they stand for*, for *what the believe.* Asylum is for the heroes, the wounded, the desperate. It is for all those who are fleeing persecution, and it is already more difficult to obtain than it ever should be. The Departments' proposed regulations take an already difficult-to-navigate system and place it, quite simply, beyond the reach of all but the most select few refugees.

And asylum is not for the select few. Asylum is for the persecuted, seeking safety.

We hope that the Departments will re-visit and withdraw these proposed regulations. At the very least, we hope that the Departments will open a new (and adequate, as detailed above) notice and comment period to allow Ayuda and others to more fully examine and comment upon this dramatic departure from decades of case law implementing the Refugee Act in the United States.

In addition, if the Departments move forward with these proposed regulations, we urge the Departments to make clear in any final regulations that the application of such regulations will only be to applications filed on or after a date established *after* the publication of the final rule. These proposed regulations are a dramatic departure from decades of case law, as detailed above, and to apply them retroactively to already pending applications at the time of any final rule would be unconstitutional.

It bears repeating: asylum is for the persecuted. The fleeing. The injured. The traumatized. Asylum is the protection available to these in what may be the worst moment of their lives. To further complicate and place beyond reach what is already the protection of last resort is not only inconsistent with the APA, US law, and international law as detailed above: it is cruel.

We urge the Departments to revoke the proposed regulations and reconsider entirely.

Sincerely,

Laurie Ball Cooper
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EXPERIENCE

Ayuda, Silver Spring, MD
Managing Attorney, Immigration, July 2019-present

Management: Supervise attorneys and legal assistants on immigration representation; manage grants in Ayuda's Maryland office; assist with organizational communications, policy, and community outreach tasks.

Direct Legal Services: Represent clients in immigration and related state court matters including removal defense, administrative appeals, affirmative and defensive asylum, SIJS filings, family-based immigration petitions, and T and U visa applications.

U.S. Senate Judiciary Committee, Ranking Member Dianne Feinstein, Washington, D.C.
Counsel, *August 2018-June 2019*

Oversight: Staffed Senator Feinstein for Judiciary Committee and Immigration Subcommittee hearings. Drafted oversight letters to federal agencies on immigration and LGBTQ issues.

Legislation: Draft and introduce legislation on immigration issues. Evaluate legislation for co-sponsorship and votes.

Services to Constituents and Advocates: Worked with state staff to assist California constituents.

U.S. Department of Justice, Office of Immigration Litigation (OIL), Washington, D.C.
Senior Litigation Counsel, *April 2014 – August 2018;* ***Trial Attorney***, *July 2007 – April 2014*

Division-Wide Honors: Civil Division Rookie of the Year, 2009; Division-Wide Special Commendation, 2011.

Supervision and Coordination: Reviewed pleadings as Subject Matter Expert on Nationality/Citizenship for 250 attorneys. Taught classes at DOJ and DHS. Coordinated inter-agency nationality policy. Gave technical assistance on draft legislation.

Appellate Litigation: Presented over 40 oral arguments and filed over 100 briefs before U.S. Courts of Appeals. Appellate litigation resulted in 10 published wins in the federal courts of appeals.

District Court Litigation: Conducted and responded to extensive written discovery. Gathered evidence from domestic and international sources. Took and defended over 50 depositions. Drafted dispositive motions. Served as lead counsel at trials.

Additional Responsibilities: Responded to FOIA requests; fielded questions from state and federal prosecutors regarding immigration consequences of convictions; analyzed Division hiring practices as part of Civil Division Diversity Committee.

U.S. Department of Justice, Executive Office for Immigration Review
***Judicial Law Clerk**, September 2006 - July 2007, Boston, Massachusetts/**Summer Internships**, 2004 & 2005*

Drafted detailed decisions and memoranda for 12 Immigration Judges in over 175 cases. Hired and managed interns.

EDUCATION

Georgetown University Law Center, Juris Doctor, Washington, D.C., May 2006.
Honors: Full-Tuition Dean's Scholarship; Certificate in Refugee and Humanitarian Emergencies

Teaching: Senior Writing Fellow, September 2005- May 2006; Law Fellow, September 2004- May 2005.

Internships: Center for Applied Legal Studies (3 semesters representing asylum applicants), Catholic Charities Immigration Legal Services (VAWA petitions), Public Employees for Environmental Responsibility

Brown University, Bachelor of Arts, Providence, RI, May 2003: English Literature. *Magna cum laude*; *Phi Beta Kappa*
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Education

American University Washington College School of Law, March 2016
Certificate in U.S. Immigration Law

University of Pennsylvania Law School, May 2013
J.D. *cum laude*
Certificate in Global Human Rights

University of California, Berkeley, May 2009
B.A. with High Honors, Interdisciplinary Field Studies. Minor, Public Policy.

Work Experience

Ayuda, Fairfax, VA July 2018—present
Equal Justice Works Crime Victims Justice Corps Fellow

- Provide direct immigration legal services to immigrant survivors of labor and sex trafficking before USCIS and EOIR.
- Accompany survivors to law enforcement interviews and advocate on their behalf.
- Train legal and non-legal providers on how to identify trafficking survivors and provide referrals.
- Conduct outreach and education activities, provide referrals, and leverage pro bono resources.

UN High Commissioner for Refugees Egypt, Cairo, Egypt February 2017—July 2018
Assistant Refugee Status Determination (RSD) Officer

- Conducted refugee status determination (RSD) interviews in accordance with established norms and standards, with a special focus on exclusion cases, complex cases (including complex credibility determinations), unaccompanied and separated child applicants, stateless applicants, and applicants from uncommon countries of origin.
- Undertook country of origin research on individual claims and prepare reasoned recommendations on whether asylum seekers should be recognized as refugees under UNHCR's mandate.

Egyptian Foundation for Refugee Rights, Cairo, Egypt July 2015—September 2016
RSD & Resettlement Team Leader

- Prepared and reviewed testimonies and legal briefs for RSD first instance, appeal, and reopening applications, as well as resettlement referrals to UNHCR.
- Accompanied asylum seekers to interviews at UNHCR.
- Trained staff on interviewing skills, refugee law, and legal writing.

Asylum Access Tanzania, Dar es Salaam, Tanzania September 2014—July 2015
Legal Advocate

- Represented individuals undergoing refugee status determination (RSD) process in Tanzania.
- Authored legal analysis and draft text to improve refugee legislation and policy reform.

International Justice Project, Newark, NJ December 2013—August 2014
Program Director

- Conducted individual needs assessments for Darfurian refugee clients and referred them to appropriate service providers. Screened clients for asylum and other immigration assistance.
- Recruited and supervised staff and interns.
- Attended domestic and international meetings on behalf of the IJP.

- Organized development campaigns and wrote grants to sustain and expand operations.

Associate Program Officer September 2013-December 2013

- Researched international criminal justice and accountability and supported UN-level advocacy.

Penn Law Transnational Legal Clinic, Philadelphia, PA, USA August 2012–May 2013
Law Student Representative

- Successfully moved for BIA to terminate removal proceedings against U visa clients.
- Submitted report on immigrant rights for 2013 review of U.S. compliance with ICCPR.
- Authored case study on Buduburam Refugee Camp in for Liberian refugees in Ghana to inform how the international community manages prolonged refugee crises.
- Trained medical students and grassroots leaders in Port-au-Prince, Haiti, to identify human rights violations.

Southern Africa Litigation Centre, Johannesburg, South Africa May 2012–Aug. 2012
International Summer Human Rights Fellow

- Researched Art. 1F of the Refugee Convention for litigation challenging wrongful grant of asylum by South Africa to suspected Rwandan war criminal.
- Developed litigation manual on forced HIV testing and unlawful disclosure of HIV status.

International Refugee Rights Initiative, Kampala, Uganda May 2011–Aug. 2011
International Summer Human Rights Fellow

- Prepared and filed request for provisional measures to ACHPR to secure release of female Darfurian human rights defender from detention in Sudan.
- Conducted field research with Darfurian refugees on expectations for South Sudanese independence.

Pro Bono Experience

Florence Immigrant & Refugee Rights Project (remote) December 2016
Pro Bono Attorney (remote drafting)

- Drafted appellate brief on unreasonable bond set for a detained asylum seeker in Arizona.

CARA Project, Dilley, TX and remote October 2016—February 2017
Pro Bono Attorney

- *On-the-ground:* Provided legal assistance to detained Central American mother and child asylum seekers. Prepared clients for credible/reasonable fear interviews with USCIS. Drafted declarations for IJ review of negative findings.
- *Remotely*: Drafted requests for reconsideration and/or re-interview for especially vulnerable detained women and children in Dilley and Karnes facilities in expedited removal proceedings.

Asylum Access Refugee Toolkit (remote) March 2015—June 2017
Expert Editor

- Edited online content for factual accuracy, feasibility, accessibility, and gender inclusivity.

Skills and Certifications

Languages: English (native), Spanish (proficient)

Bar membership: New York (2014), Washington D.C. (2020)

JOSH DOHERTY

EXPERIENCE

Ayuda, Inc. Washington, D.C.

Managing Attorney, DC Immigration *July 2018 – Present*

- Supervise members of the D.C. immigration program, providing substantive supervision on cases and administrative management of caseloads, professional goals and development, including Attorneys, B.I.A. Accredited Representatives, Legal Fellows, Paralegals, and Legal Assistants; manage substantive implementation and financial management of federal and local grants, and the D.C. immigration office's *lo bono* fee-for-services program, a budget totaling over $750,000 per year; coordinate with other grant managers to ensure appropriate usage of grant funds; direct recruitment and staffing efforts for the D.C. immigration program; assist Development program in preparing new grant applications that will support Ayuda's D.C. immigration program.
- Screen individuals for potential immigration relief during immigration intake appointments; represent clients before U.S. Citizenship & Immigration Services (USCIS), Arlington and Baltimore immigration courts, and the District of Columbia Superior Court's Domestic Relations Branch; work directly with clients in multilingual setting on complex immigration cases including U visas, T visas, adjustments of status, Special Immigrant Juvenile Status (SIJS), naturalization, removal defense, Temporary Protected Status, VAWA, asylum, and other humanitarian and family-based immigration cases; work with parents and guardians to obtain custody and SIJS predicate orders in family court; mentor *pro bono* attorneys by providing expert guidance as needed; engage with media and community groups to conduct "Know Your Rights" presentations.

Supervising Immigration Attorney *Aug. 2017 – June 2018*

- Supervise entry-level immigration staff attorneys and legal fellows; manage Ayuda's D.C. Immigration internship program, including recruitment, training, and supervision of interns, along with coordination with Ayuda's other internship and fellowship programs; report on grant goals and deliverables for services provided to survivors of domestic violence, sexual assault, and stalking; manage the Mexican Consulate's External Legal Assistance Program (PALE) $21,000 grant to provide immigration legal services to Mexican nationals.
- Screen individuals for potential immigration relief during immigration intake appointments; represent clients before U.S. Citizenship & Immigration Services (USCIS), Arlington and Baltimore immigration courts, and the District of Columbia Superior Court's Domestic Relations Branch; work directly with clients in multilingual setting on complex immigration cases including U visas, T visas, adjustments of status, Special Immigrant Juvenile Status (SIJS), naturalization, removal defense, Temporary Protected Status, VAWA, asylum, and other humanitarian and family-based immigration cases; work with parents and guardians to obtain custody and SIJS predicate orders in family court; mentor *pro bono* attorneys by providing expert guidance as needed; engage with media and community groups to conduct "Know Your Rights" presentations.

Immigration Staff Attorney *Dec. 2014 – July 2017*

- Screened individuals for potential immigration relief during immigration intake appointments; represent clients before U.S. Citizenship & Immigration Services (USCIS), Arlington and Baltimore immigration courts, and the District of Columbia Superior Court's Domestic Relations Branch; work directly with clients in multilingual setting on complex immigration cases including U visas, T visas, adjustments of status, Special Immigrant Juvenile Status (SIJS), naturalization, removal defense, Temporary Protected Status, VAWA, asylum, and other humanitarian and family-based immigration cases; worked with parents and guardians to obtain custody and SIJS predicate orders in family court; mentored *pro bono* attorneys by providing expert guidance as needed; managed Ayuda's D.C. Immigration internship program, including recruitment, training, and supervision of interns, along with coordination with Ayuda's other internship and fellowship programs; reported on grant goals and deliverables for services provided to survivors of domestic violence, sexual assault, and stalking; coordinated with the Mexican Consulate's External Legal Assistance Program (PALE) to provide immigration legal services to Mexican nationals; engaged with media and community groups to conduct "Know Your Rights" presentations.

Domestic Violence/Sexual Assault Staff Attorney *Feb. 2016 – July 2016*

- Conducted legal intakes, crisis screening, safety planning, and cycle of domestic violence and abuse education for domestic violence survivors; provided legal advice and counsel on clients' rights with respect to civil protection order and family law matters in the District of Columbia, as well as rights and risks in criminal matters; represented clients seeking civil protection orders in D.C. Superior Court; provided support to clients pursuing civil protection order and family law matters pro se, including advice on gathering evidence, documenting a case, and preparing and filing applications; conducted domestic violence-related "Know Your Rights" and other outreach presentations; screened clients for a variety of service needs and provide intra-office referrals to social services and immigration programs, or external referrals for other needs.

Immigration Law Clerk *Aug. 2014 – Dec. 2014*

- Performed client intakes and communicated case developments to clients in French and Spanish; prepared and managed asylum, U-visa, Temporary Protected Status, naturalization, family-based, and other humanitarian petitions for submission to USCIS

Domestic Violence & Family Law Intern *Aug. 2012 – Jan. 2013*

- Performed client intakes and communicated case developments to clients in French and Spanish; prepared trial materials including pretrial statements, direct examinations, and a motion to reconsider; researched family law and domestic violence issues, including whether a rapist could seek custody of a child born from his rape and the effect of an abuser's diplomatic immunity on a victim's access to justice; prepared and served subpoenas; drafted immigration documents in U-visa cases.

National Network to End Domestic Violence's WomensLaw.org project Washington, D.C.

Volunteer Hotline Editor (May 2011 – Present);
Volunteer Hotline Responder (Sept. 2010 – May 2011) *Sept. 2010 – May 2014*

- Through the WomensLaw.org email hotline, supervised and edited emails of Volunteer Responders, providing feedback to Responders and performing final revision of emails prior to sending to the Hotline User; drafted email responses to individuals who contacted the website seeking general legal information on issues relating to domestic violence, custody, and other gender issues; wrote or reviewed emails to over 400 hotline users, many of whom are survivors of domestic violence unable to afford private legal representation and may be reaching out for help leaving an abusive situation for the first time.

United Nations International Law Commission
Geneva, Switzerland

Legal Liaison to Commission Member Sean Murphy *May – Aug. 2013*

- Researched and drafted formal statements and memoranda on topics such as Immunity of State Officials from Foreign Criminal Jurisdiction, the Obligation to Extradite or Prosecute, and the Protection of Persons in the Event of Disasters.
- Researched and drafted memorandum analyzing domestic legislation worldwide addressing disaster risk reduction.

American Bar Association Commission on Domestic & Sexual Violence Washington, D.C.

Law Clerk *May 2012 – Aug. 2012*

- Researched, compiled statutory charts and wrote memoranda on legal issues relating to domestic and sexual violence, including current USAID policy on women's rights, use of GPS tracking technology for domestic violence offenders, state treatment of domestic violence in custody and parental kidnapping laws, and the military's response to sexual assault.

American Red Cross Washington, D.C.

Legal Intern, International Humanitarian Law Dissemination Program *May 2011 – July 2011*

- Drafted a briefing sheet on Additional Protocol II of the Geneva Conventions of 1949 to clarify myths and misconceptions to inform Members of Congress and their staffers; wrote articles and briefs, and conducted presentations on various IHL issues including sexual violence in Libya, IHL in current events and guerrilla warfare during the American Civil War for use by IHL instructors.

Law Office of Charles A. Tievsky, PLC, Reston VA *Aug. 2008 – Jan. 2010*

Paralegal

- Prepared filings and collected documents and information for family and employment-based immigration cases (including H-1b, EB-1, EB-2, EB-3, E-2, Labor Certification, Adjustment of Status, Change of Status, Naturalization, FOIA, Employment Authorization, and Trade-NAFTA).

EDUCATION

The George Washington University Law School Washington, D.C.
J.D. *with honors* (ranked 165 out of 530) *May 2014*
GPA: 3.516 – Thurgood Marshall Scholar (top 15-35% of the class as of Fall 2013), Presidential Merit Scholar, Member – The George Washington International Law Review
Study abroad: GWU/Oxford University International Human Rights Law Program, Oxford, England, Summer 2011

The George Washington University Elliott School of International Affairs Washington, D.C.
M.A. in International Affairs (Int'l Law & Organizations; Int'l Affairs & Development major fields) *May 2014*
GPA: 3.93 – Michele Manatt Fellow

University of Richmond Richmond, VA
B.A. *Magna cum Laude*, in International Studies: International Economics (French and Spanish minors) *May 2008*
GPA: 3.72 – National Merit Scholar, UR Honors Scholar, University Scholar, Holt Scholar
Study abroad: University of Virginia Hispanic Studies in Valencia, Spain, Spring 2007; School for International Training,
Antananarivo, Madagascar, Fall 2006; University of Richmond/Universidad Blas Pascal, Córdoba, Argentina, Summer 2005

Language Skills: French (fluent), Spanish (fluent)

PROFESSIONAL ASSOCIATIONS

- **Admitted to the Bar of the Supreme Court of Virginia** (Active Member since December 2014)
- **Admitted to the Bar of the District of Columbia** (Active Member since March 2016)
- **National Network to End Domestic Violence** (Charter Member)

Katie Wiese

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER **Washington, D.C.**
Juris Doctor **Expected May 2022**
GPA: 3.88 (Top 10%)
Honors: Blume Public Interest Scholar; Dean's List Fall 2019
Activities: Public Interest Fellow; Board Member of Advocates Against Sexual Violence

OCCIDENTAL COLLEGE **Los Angeles, CA**
Bachelor of Arts, *summa cum laude*,
in Diplomacy and World Affairs (DWA), with Honors **May 2015**
GPA: 3.96
Honors: Phi Beta Kappa and Mortar Board National Honor Societies, Dean's List, Margaret Bundy Scott Scholarship (Highest Merit Scholarship), Honors and Distinction on Senior Thesis, Annual Award for Highest Student Achievement in the DWA Major (3 Consecutive Years)
Activities: Honor Board Juror and President, Research Assistant for DWA Professor, United Nations Program Participant, Dean's Conduct Review Committee Member, Orientation Leader, Peer Advisor for DWA Department, Great Strides Program Facilitator, Varsity NCAA Volleyball, Study Abroad in Guatemala

EXPERIENCE

AYUDA **Washington, D.C.**
Legal Intern **May 2020 – Present**

- Prepare and manage humanitarian immigration petitions under the supervision of an attorney, including asylum, U-Visa, T-Visa, and Violence Against Women Act claims
- Work directly with immigrant clients to draft personal statements and prepare immigration forms; conduct relevant country condition research; write memos, court motions, and briefs

U.S. DEPARTMENT OF STATE - TRAFFICKING IN PERSONS OFFICE Washington, D.C.
Program Assistant for Public Engagement
and Intergovernmental Affairs **July 2016 – May 2019**

- Strengthened partnerships with trafficking survivors to integrate survivor expertise into the federal government's policies; provided programmatic and technical support to the President's U.S. Advisory Council on Human Trafficking
- Supported congressional, interagency, and strategic outreach matters; conducted research on human trafficking issues and drafted public outreach materials
- Drafted and edited sections of the annual *Trafficking in Persons Report*; planned the Secretary's annual report rollout event
- Researched and compiled daily news brief to inform Department colleagues of country-specific and global developments related to human trafficking; presented to international delegations and civil society; managed office website and contact database system

D.C. RAPE CRISIS CENTER **Washington, D.C.**
Hotline Advocate (Volunteer) **January 2017 – May 2019**

- Provided crisis intervention, trauma-informed support, and referrals to survivors of sexual assault and other callers who contacted the confidential 24-hour hotline; answered calls for three 4-hour shifts per month and completed case logs
- Certified as a crisis intervention advocate and first responder after completing 60 hours of training on trauma-informed care, systems of power, neurobiology, mental health, and developmental trauma

POLARIS **Washington, D.C.**
Policy Fellow **January 2016 – May 2016**

- Conducted legal and statutory research related to human trafficking, immigration, and labor rights; monitored pending trafficking legislation and provided technical assistance during the bill drafting process; wrote briefings and helped direct lobbying efforts
- Represented Polaris at congressional hearings; prepared legislative outreach materials and letters of support; drafted blogs; conducted research and outreach for the Global Modern Slavery Directory

FREE THE SLAVES **Washington, D.C.**
Research Associate **August 2015 – December 2015**

- Member of the Standards & Norms Working Group, analyzing the current frameworks on standards of care for human trafficking survivors; researched European protocols and contributed to a paper for the Freedom from Slavery Forum

UNITED KINGDOM MISSION TO THE UNITED NATIONS **New York, NY**
Attaché **August 2014 – December 2014**

- Represented the United Kingdom in UN General Assembly and Security Council meetings; drafted concise and confidential reports to inform UK policy decisions on human rights and international development issues
- Conducted research and helped negotiate UN resolutions on child marriage, violence against women, migration, extrajudicial killings, and peacebuilding issues

SKILLS AND CERTIFICATIONS

- Proficiency in Spanish
- Certified as a crisis intervention advocate for survivors of trauma

Dana M. Florkowski

Attorney licensed in Virginia and the District of Columbia
(202) 387-4848 – 6925B Willow St NW, Washington, DC 20012

Education:

The George Washington University Law School – Washington, DC
May 2018
Juris Doctor
Member: Federal Circuit Bar Journal, Immigration Law Association, ACLU at GW Law
GPA: 3.464, graduated with Honors

The University of Georgia – Athens, GA
May 2014
Bachelor of Arts in International Affairs
Bachelor of Arts in German Language
Minor in Spanish Language
Certificate in Latin American and Caribbean Studies
GPA: 3.72, Magna Cum Laude, graduated with Honors

Employment Experience:

Ayuda, Staff Attorney – Washington, DC August 2018-present

- Prepare various humanitarian and family-based immigration applications, including U visas, T visas, SIJS petitions, asylum applications, and family petitions
- Represent clients in removal proceedings before the Arlington and Baltimore immigration courts
- Respond to Requests for Evidence and work with clients to identify potential supporting corroborating evidence and prepare personal statements

GW Law Immigration Clinic, Student-Attorney – Washington, DC August 2017 – May 2018

- Prepared asylum and U Visa applications and represented clients in other immigration matters
- Successfully represented an asylum seeker in her Individual Calendar Hearing before the Arlington Immigration Court

GW Law School, Research Assistant – Washington, DC August 2017 – May 2018

- Assisted Professor Catherine Ross in researching, editing, and citation for the new edition of her Family Law casebook

Kids in Need of Defense (KIND), Legal Intern – Falls Church, VA June 2017 - August 2017

- Worked with supervising attorney on Special Immigrant Juvenile Status (SIJS) and asylum cases by drafting motions, researching and preparing briefs and country conditions reports, and drafting client declarations with clients
- Conducted intake screenings to assist in determining potential availability of immigration relief

Trow & Rahal, P.C., Law Clerk – Washington, DC January 2017 - April 2017

- Worked with supervising attorneys to prepare employment- and family-based Adjustment of Status applications
- Prepared I-765, I-90, and I-131 applications for existing clients

National Immigration Law Center (NILC), Legal Intern – Washington, DC January 2017 - April 2017

- Performed research relating to potential and existing immigration-related Executive Orders, challenges to ICE enforcement actions, and related subjects
- Drafted memoranda for office circulation on recently filed immigration-related lawsuits

Ayuda, Legal Intern – Washington, DC May 2016 - November 2016

- Worked with supervising attorney on SIJS, U-Visa, and T-Visa cases
- Assisted in court preparation and drafted complaints and motions for state custody hearings in SIJS cases

Access to Law Foundation, Inc./A Salmon Firm, LLC, Paralegal – Norcross, GA June 2014 - July 2015

- Provided support for attorneys working primarily in immigration law

Leadership Experience:

GW Law Immigration Law Association (ILA) – Washington, DC
August 2015 - present

- President, 2017-2018
- Alternative Spring Break Coordinator, 2016-2017
- 1L Representative, 2015-2016

American Civil Liberties Union-GW – Washington, DC
April 2017 - present

- Secretary, 2017-2018

Language Skills:

Spanish Language, Professional Working Proficiency

LAURIE BALL COOPER

Laurie.BallCooper@ayuda.com

EDUCATION

Yale Law School, Juris Doctor *June 2010*

Charles Albom Prize for Excellence in Appellate Advocacy in Connection with a Clinic
Yale Journal of International Law 2006-2008, Articles Editor 2007-2008

Princeton University, Woodrow Wilson School, Masters of Public Affairs *June 2010*

Duke University, Bachelor of Arts (Public Policy Studies) *May 2004*

Magna cum laude; Phi Beta Kappa; Highest Distinction in Public Policy Studies

FULL TIME POSITIONS

Legal Director, Ayuda *2018*

Oversee and supervise Ayuda's legal program, including immigration, family law, and consumer protection (Project END), including providing substantive supervision, mentorship, and primary responsibility for questions of legal ethics and staff training. Manage multiple grants, amounting to close to two million dollars in program funding. Maintain a small caseload of immigration matters.

Senior Immigration & Pro Bono Coordinating Attorney, Ayuda *2018*

Represent clients in a wide array of immigration matters, focused on humanitarian relief, and help coordinate and develop Ayuda's pro bono program, including through managing free immigration consultation clinics in addition to coordinating, supporting, and developing infrastructure for long-term representation of Ayuda's clients by pro bono attorneys from private law firms, including managing relationships with both clients and pro bono partners.

Associate, Human Rights Group, Cohen, Milstein, Sellers & Toll, PPLLC *2017 – 2018*

Represented survivors of human rights violations, with a focus on human trafficking, in complex federal litigation at all stages of investigation, trial, and appeal. Experiences included investigating and preparing complaints for novel human rights cases; responding to motions to dismiss, discovery motions practice (including arguing discovery motions in federal court), preparation of expert reports, fee petitions, and assisting with Petition for Certiorari.

Senior Staff Attorney, Housing Unit, Legal Aid Society of the District of Columbia *2013 -2017*

Represented low-income District tenants in D.C. Superior Court in eviction matters and affirmative litigation and before the Office of Administrative Hearings, the Housing Authority, and as amicus before the D.C. Court of Appeals; engage in law reform work on behalf of low-income District residents, including related to language access and rental housing protections.

(Staff Attorney September 2013 – September 2016; Senior Staff Attorney September 2016 – March 2017)

Skadden Fellow and Immigration Staff Attorney, Tahirih Justice Center *2011-2013*

Represented immigrant survivors of gender-based violence in USCIS petitions and before immigration court in matters including, among others, asylum, U visa, T visa, and VAWA self-petition applications.

Law Clerk to The Hon. M. Margaret McKeown, U.S. Court of Appeals for the Ninth Circuit *2010-2011*

Research & Policy Manager, Mozaik Community Development Foundation, Bosnia-Herzegovina *2004-2006*

TEACHING EXPERIENCE

Adjunct Professor, George Mason University Antonin Scalia Law School *January 2014 – Present*

Refugee and Asylum Law spring seminar for five semesters; Poverty Law fall seminar for one semester.

Adjunct Professor, Washington College of Law, American University *January 2014 – May 2016*

Gender, Cultural Difference, and International Human Rights spring seminar for three semesters.

ADDITIONAL PROFESSIONAL EXPERIENCE

Immigration Legal Services Clinic, Law Student Intern & Director, Yale Law School*2007-2008; Spring 2010*

Represented asylum seekers and other immigrants in administrative and court proceedings, including federal district court and the Second Circuit Court of Appeals; supervised students as student director.

Iraqi Refugee Assistance Project, Yale Law School and University of Jordan Law Faculty *2009-2010*

Assisted with and developed curriculum for a pilot, international clinic representing Iraqi refugees

Tahirih Justice Center, Legal and Policy Intern, Falls Church, VA *Summer 2009*

Human Rights First, Law and Security Program, Legal Intern, New York, NY *July-August 2008*

Human Rights Watch, Western Balkans Unit, Intern, Brussels, Belgium *May-July 2008*

Domestic Violence Clinic, Law Student Intern, Yale Law School *Spring 2008*

Represented survivors of domestic violence in Connecticut family court, conducted intake at local shelter.

State Court of Bosnia-Herzegovina, Office of the War Crimes Prosecutor, Intern, Sarajevo *Summer 2007*

Assisted the special team for Srebrenica with ongoing trials and investigations.

Yale Law School, Research Assistant, Professors Harold Koh and Judith Resnik *2007-2008, 2010*

SELECTED PUBLICATIONS

Sessions Holds Safety Beyond the Grasp of Abuse Victims, *The Washington Post* (June 17, 2018).

Legal Responses to the Crisis of Forced Moves Illustrated in Evicted, 126 YALE L.J. F. 448 (2017).

Rethinking Rapid Re-Housing: Toward Sustainable Housing for Homeless Populations, 19 U. PA. J. L. & SOC. CHANGE (February 2017), with Ana Vohryzek

Reducing Gender-Based Violence* in *The SAGE Handbook on Gender and Psychology (Michelle K. Ryan and Nyla R. Branscomb, eds.) (SAGE UK: 2013), with Elizabeth Levy Paluck and Erin K. Fletcher

Reducing Societal Discrimination Against Adolescent Girls: Using Social Norms to Promote Behavior Change (Nike Foundation/Girl Hub: 2013), with Erin K. Fletcher

Social Norms Marketing Aimed at Gender-Based Violence (IRC: 2010), with Elizabeth Levy Paluck

Entre la mística y la estigmatización en dictadura y democracia: narraciones orales de la poblacion La Victoria, Chile (Duke University Working Paper Series: 2004)

OTHER QUALIFICATIONS

Languages: Fluent in Spanish and Bosnian/Croatian/Serbian

Bar Admissions: District of Columbia; California (inactive); U.S. Court of Appeals for the 9th Circuit; Central District of California; Federal District Court for the District of Columbia.

LARRY KATZMAN
Silver Spring, MD 20910
larrykatzman@verizon.net
240-381-4695 (cell)

WORK EXPERIENCE

2019 – Present: **Ayuda, Washington, DC**
Volunteer Attorney (retired) for non-public legal services provider

2008 – 2018: Present: **Steptoe & Johnson, LLP, Washington, DC**
Deputy Public Service Counsel

2006 – 2008: **American Immigration Lawyers Association (AILA), Washington, DC**
Deputy Director of Liaison

2004 – 2006: **Transactional Records Access Clearinghouse (TRAC), Washington, DC**
Director of Immigration Project

2001 – 2004: **United Nations High Commissioner for Refugees (UNHCR), Washington, DC**
Protection Officer (U.S. attorney corps)

1991 – 2001: **Northwest Immigrant Rights Project (NWIRP), Seattle, WA**
Positions held: Asylum Director; Pro Bono Coordinator; Legal Director

IMMIGRATION LEGAL SKILLS

- Developed relevant practice experience for over 20+ years in all areas of removal defense, including asylum U/T visas, SIJS, VAWA, and criminal issues
- Experienced in other immigration work, including derivative applications, adjustments, employment cards, appeals, and amici briefs
- Collaborated with many immigrations stakeholders and policy-makers (UNCHR, Steptoe, AILA)

PRO BONO SKILLS

- Have unique perspective on the pro bono process from my work at both legal referral organizations (such as NWIRP) and law firms (Steptoe) that provide legal assistance

PROJECT MANAGEMENT SKILLS

- Expanded a small asylum program into one involving 200 lawyers and 100 cases per year (NWIRP)
- Created immigration data gathering and analysis project from inception (TRAC)

TRAINING SKILLS

- Mentor pro bono attorneys on their cases and provide in-house training (Steptoe)
- Have given Know-Your-Rights presentations at immigration centers and at forums in immigrant communities (NWIRP, AILA)
- Regularly trained juvenile court judges on SIJS law and procedure (NWIRP)
- Regularly trained local government officials in Caribbean nations on refugee/asylum laws and procedures (UNHCR)

EXHIBIT 28

DECLARATION OF NAOMI A. IGRA

Form I-589 Public Comments and Response Matrix
Department of Justice and Department of Homeland Security
Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review
OMB Control Number, 1615-0067

Nature of Comments	Public Comments	Departments' Responses
Time and Cost Burden, Generally	The commenters expressed concern that the proposed revisions substantially increase the time and cost burden on asylum applicants. The commenters believe that the proposed revisions significantly increase the time and cost burdens for aliens seeking protection from persecution and torture, and that the increased burden would fall particularly heavily on unsophisticated aliens without representation and often without strong or any English language skills, aliens with claims based on membership in a particular social group, and aliens with political opinions reflecting the modern world. The commenter noted that in the Form I-589 supporting statement, the Departments acknowledged a six-hour increase in the estimated time burden, but the Departments reported no change to the estimated annual cost burden on applicants. The commenter noted that, for the newly proposed version of the Form I-589, the average time estimated to complete the form is a full 50 percent higher than what was calculated in the Form I-589 Supporting Statement available on the Office of Information and Regulatory Affairs (OIRA) website from May 2019 (18 hours as opposed to 12 hours). The commenter noted that the other numbers in the May 2019 Supporting Statement are almost identical to those set forth in the current NPRM, and that there is no explanation in the current NPRM as to why the cost burden would be almost identical as the May 2019 Form I-589 Supporting Statement while the estimated number of hours needed to complete the form would increase by 6 hours. The commenter believes that the actual collection of information required in the proposed revisions is extraordinarily burdensome, far exceeding the 18 hours indicated in the notice of information collection. The commenter claims that the revised form would lead applicants and legal representatives to spend several additional workdays on each application. The commenter noted that the sensitivity and emotional cost of recounting acts of	**Response:** The Departments acknowledge that the proposed and final Form I-589 and accompanying instructions issued in conjunction with the Procedures for Asylum and Withholding of Removal; Credible Fear, and Reasonable Fear Review Notice of Proposed Rulemaking (NPRM) and Final Rule increase the time and cost burdens for applicants and legal representatives. *See* 85 FR 36264 (June 15, 2020). In the NPRM, the Departments stated that the estimated hour burden had increased from 12 hours to 18 hours. *See* 85 FR at 36290. The estimated hour burden has been increased to 18.5 hours. This estimate is higher than the estimate provided in the NPRM because the Departments reevaluated their projections and determined that the hourly burden per response was likely to be higher than had been initially estimated. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Final Rule, III. Regulatory Requirements, G. Paperwork Reduction Act. The estimated total cost burden has been increased to $70,406,400 as a result of a reevaluation of the estimated cost that applicants may incur for additional

Nature of Comments	Public Comments	Departments' Responses
	persecution, intimidation, and harm take a devastating toll that cannot be measured solely in economic terms. The commenter believes that the Form I-589 Supporting Statement does not explain what the connection is between the average hourly wage in the United States and the cost of completing the form. The commenter states that while the Departments may be making this calculation based on the time that an individual would be unable to work because they would be burdened with completing the form, the calculation makes little sense when the primary cost of completing the application would be paying for an attorney.	expenses. More information will be provided in the I-589 supporting statement. In response to the commenters' concerns, the Departments have abandoned or revised certain proposed questions to help reduce the burden on applicants and legal services providers. Additional details regarding which proposed questions have been abandoned or revised are provided in the responses below. The Departments also updated the Form instructions to reflect regulatory text changes made in the Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Final Rule, as compared to the NPRM.
Impact on Asylum Applicants	The commenters expressed concern that the changes to the form will disadvantage asylum applicants and put genuine asylum seekers at risk of erroneous denial and subsequent deportation to a country where they will face harm. The commenter believes that the proposed revisions are inconsistent with fundamental due process principles, and likely to have a devastating impact on pro se applicants, particularly on indigent or unrepresented parties,	**Response:** The I-589 Form and instructions provide adequate detail and guidance on the information that must be provided in the application. The additional questions are meant to account for the regulatory changes in the related rulemaking action. The questions that have been added to the form have

Nature of Comments	Public Comments	Departments' Responses
	and/or those with limited English or education, and that due process requires a meaningful opportunity to be heard and to present evidence orally. The commenter believes that asylum seekers who are detained are unlikely to have legal representation, and have often recently arrived in the U.S., with little or no English language skills, familiarity with the U.S. legal system, or expertise in our asylum laws. The commenter claims that applicants will now, essentially, be required to present all of their legal arguments through the extensive and highly complicated questions on the revised form. The commenter also claims that, without the assistance of an attorney, it will likely be impossible for asylum seekers to fully complete the new version of this form. The commenter believes that the proposed revision would severely impact the rights of asylum seekers subject to the Migrant Protection Protocols (MPP). The commenter believes that access to counsel for aliens subject to MPP is even less available than for those held in ICE detention and that those aliens lack access to safety and security, along with the ability to access interpretation resources that would be available in the United States. The commenter notes that given these obstacles, most asylum applicants in MPP proceedings are only able to submit threadbare applications with the support of volunteer interpreters unfamiliar with asylum law. The commenter believes that given these conditions, the proposed revisions would require more time from asylum seekers and volunteers and increase the probability of errors. The commenter believes that any error would have potentially devastating consequences, including having an immigration judge pretermit an application if it is not filled out correctly, or having an immigration judge make a frivolous finding under the expansive new definition in the proposed rule, which could subject the asylum seeker to a permanent bar on all immigration relief based on an immigration judge's opinion that the application was without merit.	accompanying explanations in the instructions and are designed to elicit the relevant information needed for adjudicators to make informed decisions. The Departments acknowledge that applicants may make errors when completing the I-589 Form, and consistent with current practices and procedures, adjudicators will continue to weigh any evidence presented and assess any errors, as needed. The comments related to the Asylum Application, Interview, and Employment Authorization for Applicants, 85 FR 38532, are outside the scope of this information collection action. The Departments recognize that completing the I-589 form will take additional time, as was explained in the Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review NPRM. *See* 85 FR at 36290. However, the I-589 form and instructions revisions associated with the rule do not prevent applicants from applying for asylum or work authorization. A Form I-589 is required of aliens who apply for asylum affirmatively before U.S. Citizenship and Immigration Services (USCIS) or defensively, before the

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	The commenter state that the proposed changes to the form have the potential to prevent thousands of asylum seekers from having a fair chance at applying for asylum, simply because they do not speak or read English. The commenter states that the vast majority of clients are survivors of torture and trauma, and many clients are unable and unwilling to speak about what happened to them when they first arrive in the United States. The commenter works with clients over an extended period of time to help clients rebuild their sense of safety and trust, and notes that takes time to prepare clients to safely revisit traumatic events in their mind so they can collect details needed for their personal statement. The commenter believes that penalizing asylum seekers because of their inability to converse in English or because they need time, expertise, and flexibility to recall traumatic events is cruel and inhumane. The commenter believes that in addition to the cost of attorneys' fees, there would be additional out of pocket costs for asylum seekers who would, for the first time, have to prove that they have paid income taxes. The commenter believes that, as a result of newly promulgated rules governing initial employment authorization documents for asylum seekers, the vast majority of asylum seekers who file a Form I-589 after August 25, 2020, will likely not be able to obtain an employment authorization document (EAD) before their asylum application is adjudicated. The commenter believes that the unfortunate result of the Asylum Application, Interview, and Employment Authorization for Applicants Final Rule (Asylum EAD Final Rule), 85 FR 38532, will likely be that many asylum seekers will be unable to work lawfully and will therefore have to spend time and money with a tax professional in order to file taxes prior to applying for asylum. The commenter believes that the Asylum EAD Final Rule will also put pressure on counsel and asylum seekers to file the I-589 Form as quickly as possible to get the much longer, 365-day clock started. The commenter believes that there is significant tension between the Asylum EAD Final Rule and this information collection, which may require many weeks and	Executive Office for Immigration Review (EOIR) (including those individuals placed in the MPP program). The Departments recognize the potential challenges faced by individuals subject to MPP but must balance these difficulties with the requirements of the proposed regulatory changes. Completing the revised I-589 form may take additional time, but the form and instruction changes allow for the alien to provide the required information for adjudication by an immigration judge or asylum officer, in concert with proposed regulatory changes. The Departments disagree that the addition of income tax payment-related questions in Part C. Additional Information about Your Application, Questions 19.E. through 19.G., will lead to additional costs for asylum applicants. Regardless of whether the Form I-589 includes a tax payment-related question, an applicant's tax payment obligations remain the same. Nevertheless, in response to the commenters' concerns, the Departments have abandoned or revised certain proposed questions to help reduce the burden on applicants and legal services providers. Additional details regarding which proposed questions have been

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	multiple meetings with counsel to prepare. The commenter urges the agencies to rescind this data collection, at least until they are able to accurately assess the cost of the changes in the form and provide the public with accurate data.	abandoned or revised are provided in the responses below.
Impact on Unaccompanied Alien Children	The commenters believe that the proposed revisions pose specific challenges for unaccompanied alien children (UAC). The commenter states that applicants for protection, particularly children, who fear or have experienced cruel or inhuman treatment may be unable to elaborate on their experiences in detail at the time they prepare their written applications. The commenter notes that the applicant may need to file the application rapidly to avoid being forced to seek an exception to the one-year filing deadline, or at the behest of an immigration judge. The commenter notes that, at that point, the applicant may not have obtained assistance of counsel or therapeutic support for the process of recounting traumatic events. The commenter believes that requests for detailed information should be eliminated from the proposed instructions and replaced with an instruction reminding the applicant of future opportunities to supplement the record. The commenter believes that, like the general population of noncitizens in removal proceedings, UAC often must face the system without legal representation. The commenter notes that UACs are a vulnerable population that often do not know or understand the circumstances of their persecution or their flight from their country of origin. The commenter believes that the proposed revisions force UAC to provide details not previously required regarding the circumstances of their persecution, the reason for their persecution, their travel through other countries, their family members' travel through other countries, and their family members' immigration history in other countries, including the United States. The commenter believes that the proposed revisions pose an added challenge for	**Response:** The Departments acknowledge the concerns of the commenters, but disagree that the proposed revisions that require applicants to provide additional details about their claims on the Form I-589 should be eliminated. The additional questions on the form offer applicants, including unaccompanied alien children, additional opportunities to provide information that is relevant to the adjudication. The accompanying instructions also provide additional information to help applicants complete the form. Moreover, information regarding the applicant's ability to supplement the application is provided in Part I. Filing Instructions, Section V. Obtaining and Completing the Form. The Departments considered the alternative proposal of creating a second form for unaccompanied children; however, the Departments decided to continue using a single form for all applicants in the interest of maintaining consistency and continuity across adjudications.

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	all applicants, and UAC are particularly harmed by these complex questions. The commenter believes that if the Departments persist in revising the form, they must consider creating a second form for UAC, who should not be expected to answer many of the questions contained in the form.	
Impact on Legal Services Providers	The commenters believe that the proposed revisions to the form and instructions place a burden on legal services provides and preclude legal services providers from providing pro se legal assistance to applicants. The commenter believes that, given the additional four pages of substantive questions on the proposed form, attorneys who prepare the application would no longer be able to file a basic form with the intention of filling in the details of the claim later, after weeks or months of working closely with their client prior to an interview or hearing. The commenters believe that, instead, attorneys would need to understand every detail of the case, from the exact delineation of the applicant's particular social group, to whether a public official who acquiesced in torture was acting in an official capacity, and how that official became aware of the harm that the applicant suffered. The commenter notes that attorneys cannot generally elicit this level of detail about a case in the first few meetings. The commenter believes that, in addition to the time that an attorney must spend with a client to reach a level of trust to elicit this level of factual detail, the NPRM does not take into account the fact that the proposed rule radically changes how asylum applications would be adjudicated. The commenter claims that, as a result, even an experienced asylum attorney would have to spend more hours on every case researching how the new rules intersect with existing law, what injunctions are currently in effect against rules that have been successfully challenged, and would need to speak with colleagues about how the new rules are being interpreted. The	**Response:** The Departments acknowledge that the revised Form I-589 and accompanying instructions increases the time and cost burdens for applicants and legal services providers. The Departments are balancing the need to obtain information to make informed decisions against the burden that the application places on applicants and legal services providers and believe that the revised I-589 form and instructions strike the adequate balance, in light of the related regulatory changes. The additional questions in the form are designed to help implement the related regulatory changes. The form and instruction changes are also meant to encourage asylum applicants to provide meaningful and relevant information on the application. The estimated total cost burden has been increased to $70,406,400 as a result of a reevaluation of the estimated cost that respondents may inquire for additional expenses. More information will be

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	commenter believes that the notion that the cost to a client for this level of attorney work would run from $20 to $1000 is absurd and the Supporting Statement that set the highest possible cost for attorneys' fees in completing the I-589 is likely a vast underestimate. The commenter believes that attorneys who meet their clients after they have already submitted their application *pro se* will have a huge burden of making amendments and explaining to the department or court the reasons why the application may have been completed as a result of an error related to language or educational barriers or both. The commenter believes that attorneys will have to take on the large task of ensuring that any mistakes or issues with the initial applications are remedied prior to their client's next steps in the application process which in itself is a time-consuming process. The commenter notes that many asylum seekers are survivors of torture and trauma and the process of drafting a client declaration and developing a claim often takes several months and sometimes years. The commenter believes that the deep stigma, shame, and mental health ramifications of the persecution endured, combined with a lack of accessible and affordable mental health services for asylum seekers, can make it very difficult to fully flesh out the asylum claim before an asylum interview or master calendar hearing in immigration court. The commenter believes that the inability of attorneys to make valid and impactful changes to their clients' record will cause further delay and backlogs in an already overwhelmed system. The commenter believes that these hurdles, created by the new form, do not create an environment conducive with efficiency; but rather, put obstacles in place for each and every person that comes in contact with the immigration system no matter what role they play. The commenter believes that the proposed revisions ignore the significant reliance interests of the commenter and organizations like it. The	provided with the I-589 supporting statement The submission of complete applications ensures that asylum officers and immigration judges have the information needed to make informed decisions about applications for asylum, withholding of removal, and deferral of removal, as needed. The Departments believe that the changes to the form and instructions neither preclude nor inhibit asylum applicants from seeking or obtaining *pro se* legal assistance. Nevertheless, in response to the commenters' concerns, the Departments have abandoned or revised certain proposed questions to help reduce the burden on applicants and legal services providers. Additional details regarding which proposed questions have been abandoned or revised are provided in the responses below. The Departments believe that the commenter's statements about reliance interests and burden pertain to the regulatory changes ("The commenter trains its staff, volunteers, and pro bono attorneys on *asylum law* …The commenter also has intake procedures …that screen for and

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	commenter is dedicated to providing legal counsel and support to those seeking refuge in the United States. As such, the commenter has developed a wealth of materials, information, and media to educate, assist, and support asylum seekers. The commenter trains its staff, volunteers, and *pro bono* attorneys on asylum law using curricula that have been standardized and perfected. The commenter also has intake procedures and forms and Know Your Rights materials that screen for and discuss the parameters of asylum as it currently exists. The commenter believes that the proposed revisions would cause the commenter to expend significant resources to revise, reprint, and retrain staff on all of the materials and procedures, to the detriment of the commenter and the communities it serves. The commenter believes that the information required by the proposed revisions effectively precludes *pro se* assistance. The commenter believes that the proposed revisions effectively preclude nonprofit organizations from providing *pro se* help because they require an applicant to provide legal analysis, making it nearly impossible for a *pro se* adviser to avoid applying applicable laws to the facts of the case in order to complete the form. The commenter believes that the estimated 18-hour response time for the revised form will severely limit the number of applicants who can receive assistance and counsel from non- profit legal service providers. Assuming that the commenter could find a way to provide *pro se* assistance, the commenter believes that the amount of time required to complete the form would pose another insurmountable obstacle.	discuss the *parameters of asylum as it currently exists*,") (emphasis added). The Departments stated in the proposed rule that "Comments received on the information collection that are intended as comments on the proposed rulemaking rather than those specific to the collection of information will be rejected." The Departments recognize that some of commenter's materials would need to be amended, but all of the form and instructions revisions are intended to reflect only the changes proposed by the rule. Accordingly, the Departments will not respond further on the reliance interests portion of the comment.
Impact on Asylum Officers and Immigration Judges	The commenter believes that most of the threshold questions and prompts on the form have become more specific and rigid, and that asylum officers and immigration judges will bear the burden of fact checking and researching country conditions. The commenter believes that the heightened burden on the applicant will create an even higher responsibility for asylum officers and immigration	**Response:** The Departments disagree that the revised Form I-589 and accompanying instructions imposes a burden on asylum officers and immigration judges. The additional questions on the form are designed to help implement the revised regulations and ensure that asylum officers

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	judges to ensure that applications are all in compliance with the newly proposed rules, specifically, the rules related to the level of detail required for describing the persecution an applicant has faced. The commenter believes that asylum officers and immigration judges are ostensibly given broader discretion when it comes to granting asylum and these decisions must be made on the basis of very rigid and structured parameters that do not in fact allow the officer or judge to use their best judgment, but rather require all successful asylum applications to fit within certain parameters. The commenter believes that requiring applicants to articulate the "boundaries of a particular social group" and the "knowledge requirement for persecution by a government official" are all facts and evidence that an applicant may not have readily available to them within the one-year filling timeframe. The commenter believes that the full articulation of a particular social group and its boundaries generally requires extensive country conditions research and even expert testimony on country conditions. The commenter believes that the physical application does not have enough room to allow an applicant to thoroughly discuss these claims in depth as required under the new rules. The commenter believes that asylum officers and immigration judges will bear the burden of fact checking and researching country conditions themselves before deciding whether an applicant is, in fact, a part of a social group or if they have been targeted by their home government. The commenter believes that the current rules allow applicants to provide a full developed record at a later date and leaves room for a speedier asylum application process. The commenter believes that this makes sense given that country conditions are constantly evolving and will have to be revisited at the time of adjudication.	and immigration judges have the information needed to make informed decisions about applications for asylum, withholding of removal, and deferral of removal. Asylum officers receive significant specialized training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles and also receive information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, torture of persons in other countries, and other information relevant to asylum determinations. See 8 CFR 208.1(b). Asylum officers are thus qualified to make determinations regarding asylum claims. Immigration judges also receive extensive training and possess the experience necessary to adequately interpret and apply the relevant regulations and statutes. *See* 8 CFR 1003.10(b). Immigration judges already have extensive experience weighing evidence and interpreting and applying complex laws as required by statutes and regulation.

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Complexity of Form and Instructions	The commenters believe that the proposed revisions include complex legal questions that combine facts and law, and that the proposed revisions are confusing and make it impossible for pro se applicants to have their cases heard. The commenter believes that the form and instructions to file for asylum and related relief should be simple enough for unrepresented applicants to complete the form and have a day in court before the immigration judge or an interview before an asylum officer. The commenter is concerned that this form will lead to confusion and many asylum seekers being unjustly barred from asylum. The commenter is very concerned that the additional four pages of complex questions on the proposed form will make it impossible for pro se applicants to have their cases heard at all. The believes that the additional questions in the proposed form include complex questions combining facts and law. The commenter believes that pursuant to recently imposed policies under which U.S. Citizenship and Immigration Services (USCIS) may reject any forms with any blank fields, applicants may be unable to have their applications accepted and adjudicated at all. The commenter believes that pro se applicants face the real risk of answering these questions incorrectly and then facing adverse credibility decisions when an adjudicator faults them for testifying inconsistently with the responses on their form. The commenter believes that expanding the form and requiring applicants to make complicated legal conclusions does not minimize the burden of the collection of information on those who are to respond. Furthermore, the commenter believes that the proposed revisions are not necessary for the proper performance of the functions of the Departments. The commenter claims that the revisions will sow confusion in an already chaotic and complex asylum system where many aliens struggle to navigate the application process and court system without legal representation. The	**Response:** The Departments acknowledge the concerns of the commenters. However, the Departments disagree that the additional questions will make it impossible for applicants to have their claims considered by the Departments. The Departments disagree that the revised form and instructions are meant to intimidate or discourage asylum seekers. To the contrary, the proposed revisions give applicants additional opportunities to provide information by adding prompts and questions that elicit the relevant information. For example, the revised questions related to past harm, mistreatment, or threats and fear of future harm or mistreatment in Part B. Information About Your Application, Question 1.A through 1.D., include more opportunities for applicants to provide the appropriate details about the harm they experienced or fear and the reason(s) for harm, mistreatment, or threats. This revised section offers additional, focused prompts to encourage applicants to provide the information needed. The Departments believe that the form allows ample opportunity for applicants to present relevant information, including applicants who are detained. Even if an applicant provides irrelevant information,

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	commenter believes that the proposed revisions are clearly meant to intimidate and discourage asylum seekers and further obscure the immigration system for applicants, which is a shameful abdication of the U.S. government's obligations under international law. The commenter believes that the proposed revisions pose specific challenges for detained applicants. The commenter states that the proposed revisions require more time and details from applicants, which will make the application process even more difficult for detained applicants. The commenter believes that the proposed revisions will also force applicants to provide more detailed information about their claims, possibly before they have had the opportunity to consult with an attorney, which may lead to some applicants providing irrelevant information that weakens their claim. The commenter claims that even applicants who manage to secure counsel are often only able to meet with their attorneys once or twice before their hearings due to unreliable phone access and limited space for attorney meetings at detention centers.	asylum officers and immigration judges are adequately trained to distinguish relevant information from irrelevant information and consider credibility and the weight of any evidence presented. The Departments consider the comment related to the rejection criteria for the Form I-589 to fall outside of the scope of this information collection action, and therefore, decline to respond to the comment. As explained below, in response to the commenters' concerns, the Departments have revised or abandoned some of the proposed questions in the interest of simplicity and clarity.

Membership in a Particular Social Group	The commenters believe that asking applicants seeking protection on account of membership in a particular social group (PSG) to identify PSGs on the form presents a hurdle for pro se applicants and violates applicants' due process rights. The commenters believe that adding a requirement to identify the particular social group on the form imposes high time and cost burden on applicants and will present a huge hurdle for *pro se* applicants, who are already at a disadvantage. The commenter believes that properly identifying a particular social group that meets the requirements of the law requires expertise in U.S. asylum law that is far beyond the ability of most *pro se* applicants with meritorious claims. The commenter claims that the increased burden stems from the proposed rule's attempt to narrow the definition of "particular social group," which undermines the 1951 Convention and Refugee Act by providing a non-exhaustive list of nine specific bases that will no longer meet the definition of a particular social group. The commenter believes that the new form would force asylum seekers to articulate their particular social group(s) on the form, and even those applicants who rely on ineffective counsel would be unfairly precluded from later asserting a legitimate basis for asylum protection, in violation of the Fifth Amendment, contrary to long-established precedent. The commenter claims that demanding that asylum seekers articulate the particular social group on the form facilitates the agency's violation of applicants' due process rights. The commenter is concerned about asylum seekers having to articulate their specific particular social group in the proposed form because legal analysis surrounding particular social groups is in constant flux and what may be a widely accepted particular social group at the time an asylum seeker files for asylum might no longer be considered viable in the months or years it takes for the applicant to be scheduled for an individual hearing. The commenter urges the agencies to remove the prompt. The commenter claims that for pro se individuals, again many of whom will be detained, to have to articulate the precise particular social group formulation or else waive the ability to raise that group upon appeal, is	**Response:** As proposed, the Departments are including a prompt for applicants to provide information about their membership in a particular social group, if applicable. The Departments revised the originally proposed prompt in response to the concerns raised by the commenters. *See* Form I-589, Part B. Information about Your Application, Question 1. The additional prompt in the form and explanation in the instructions related to membership in particular social groups is related to the regulatory text proposed in the NPRM and included in the final rule in 8 CFR 208.1(c). *See* Instructions for Form I-589, Part 1. Filing Instructions, II. Basis of Eligibility, A. Asylum. The form gives applicants ample opportunity to offer information related to their membership in a particular social group, if applicable. Adjudicators are experienced with addressing the substance rather than the form of a claim, and aliens will have an opportunity to correct articulation deficiencies before an immigration judge renders a decision. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Final Rule, 4.1 (Membership in a Particular Social Group). The Departments disagree that the prompt requires expertise in asylum law, is a violation of substantive or procedural due

	unreasonable and undermines U.S. obligations to protect those fleeing persecution and threats to their life or freedom under the regulations implementing Article 33 of the Refugee Convention and the 1967 Refugee Protocol. The commenter believes that expecting asylum applicants, especially those appearing pro se, to delineate and articulate the particular social group in their initial asylum filings is simply unrealistic and undermines due process and U.S. obligations to provide a meaningful process of protect refugees. The commenter noted that the new box could easily be used to confound applicants during a hearing if they identified a particular social group that, upon further research and testimony is not the actual group that forms the legal basis for a claim**.** The commenter believes that at a minimum, the prompt should be revised to ensure that the applicant provides a description to the best of his or her ability and an acknowledgment that this information may be supplemented at the time of hearing. The commenter maintains that if such guidance is not provided, an immigration judge would then have the opportunity to pretermit the claim based on the applicant's inability to adequately state a legally cognizable social group. The commenter claims that survivors of abuses such as forced marriage, "honor" crimes, and human trafficking most often apply for asylum on account of their membership in a particular social group, and that they will undoubtedly and arbitrarily suffer immensely as a result. In the commenter's experience, few if any child applicants are equipped to articulate a particular social group in a manner that Question 1 calls for, especially during the early stages of their case. The commenter believes that, for most child applicants, even coming to understand the concept of a particular social group (and the factors that contribute to whether a particular social group is legally cognizable) requires significant time and explanation in developmentally appropriate terms, often over the course of numerous meetings.	process rights, or otherwise incongruous with the 1951 Convention and Refugee Act. The regulatory intent is to allow for an alien to either articulate or provide a basis for determining the contours of a particular social group. The Departments have long held that applicants both with or without counsel must provide evidence of eligibility for protection including, if applicable, their membership in a particular social group. In *M-E-V-G-*, 26 I. & N. Dec. 227, and *W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014), the Board of Immigration Appeals clarified the term's scope, ruling that a "particular social group" must be: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *M-E-V-G-*, 26 I. & N. Dec. at 237. The Board emphasized that social distinction and particularity were "fact-based" and depended on evidence of how the group was perceived in the society in question. *Id.* at 242. The Departments' proposed prompt aims to document claims on the record at the very outset of an alien's desire to apply for protection. Rather than delimit due process, this prompt affords more process to allow for a fulsome review of the alien's claim for asylum or for withholding of removal.

		For additional responses to the commenter's claim that expecting an alien to articulate a particular social group undermines U.S. obligations or is in violation of U.S. law, see Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Final Rule, 4.1 (Membership in a Particular Social Group).
Non-Government Actors and the Role of the Government	The commenters believe that the proposed revisions related to non-government actors increase the burden on victims of persecution by non-government actors. The commenter believes that the proposed revision requires asylum seekers seeking protection based on persecution committed by non-state organizations to provide significant details about the role of the government in the persecution. The commenter claims that the form gives the impression that persecution can only occur if the government is involved, and the questions ignore the reality that the political landscape of the modern world has drastically changed since the 1951 Convention and 1967 Protocol. The commenter believes that placing an additional time burden on applicants facing persecution by non-state organization disfavors applicants with claims based on gang, criminal, and terrorist organizations that governments are unable or unwilling to control. The commenter claims that the proposed revisions hinder the Departments' ability to carry out statutory mandates and address the needs of modern refugees, respond to modern conflicts around the world, and provide protection to victims of these non-state organizations. The commenter opposes the proposed questions for applicants seeking protection under the Convention Against Torture regulations to explain the exact role of government officials and believes these questions will be impossible for most pro se applicants to answer. The commenter believes that an individual who has fled torture will generally not know whether or not a government official was acting in their "official capacity" and even if	**Response:** In response to commenters' concerns, the Departments abandoned certain proposed revisions in the form and accompanying instructions related to harm and torture by non-government actors and the role of the government. *See* Form I-589, Part B., Information about Your Application, Questions 1.A. through D.; Instructions for Form I-589, Part II. Basis of Eligibility, Part B.

	the applicant may ultimately be able to retain an expert witness and/or do further investigation about conditions in their country to support their claim before an individual hearing, it is absurd to require this level of detail at the filing stage of the process. Furthermore, the commenters believe that the proposed questions asking about torture by non-government actors are confusing at best and misleading at worst. Moreover, the commenters claim that the question would require a CAT protection applicant to guess how a government official would respond if they were made aware of the torture. The commenters believe that applicants for protection from torture should not be required to guess about what their government might do. The commenter states that in circumstances involving threats or harm to children, adult family members or caregivers are usually involved in the decision of whether to report incidents to government officials, and/or carry out the reporting. The commenter notes that child applicants therefore rarely have direct knowledge of the full circumstances surrounding police reports without seeking additional information from others involved, usually with the assistance of counsel.	
Deferral of Removal under CAT	The commenter believes that the form should mention deferral of removal under the CAT regulations. The commenter states that the proposed form specifically states on page 1 and page 5 that it is to be used for both statutory withholding of removal and withholding under the CAT regulations. The commenter believes that neither the form nor the accompanying instructions clarify that this form is also the one that applicants for deferral of removal under the CAT regulations must use to apply for protection. The commenter believes that it is confusing to specify one use of the form under the CAT regulations and to leave out the other use, and that the form and instructions should be rewritten to clarify that the Form I-589 is the correct form to seek deferral of removal.	**Response:** The Departments do not agree that deferral of removal under the CAT regulations needs to be mentioned on the Form I-589. The accompanying instructions provide an adequate overview of the statutory and regulatory framework for withholding of removal and deferral of removal under the CAT regulations. *See* Instructions for Form I-589, Part 1. Filing Instructions, II. Basis of Eligibility, B.-D.

Similarly Situated	The commenters believe that it is unduly burdensome and unrealistic to require asylum applicants to provide information about similarly situated persons. The commenter believes that one example of a significant increase in the information collection burden with no stated purpose in the proposed rule is the question about the past harm and torture experiences that includes a reference to "other similarly situated persons". The commenter notes that proposed question 1.A. in Part B., Information about Your Application, adds the language "other similarly situated persons" and deletes the modifier "close" when referring to friends or colleagues. The commenter claims that both changes significantly expand the universe of information requested, presupposing that the applicant has knowledge of harm that may have occurred to anyone in his or her orbit and extending to people who may be completely unknown to the applicant. The commenter believes that these revisions should be deleted as overly burdensome and outside the applicant's scope of knowledge. The commenter notes that the term "similarly situated" is not defined. The commenter believes that applicants who do have even partial knowledge of harm, threats, or torture to the individuals in this list may fear for victims' safety upon disclosing it, especially in writing. The commenter claims that applicants may hesitate to disclose the information requested for fear of breaking victims' trust if they provided sensitive details in confidence. The commenter believes that this question unfairly sets applicants up for negative credibility determinations through no fault of their own and that a similar question could be asked during the asylum interview in a trauma-informed manner. Thus, the commenter believes that the question should be eliminated.	**Response:** In response to the commenters' concerns, the Departments abandoned the proposed revisions to include a reference to "similarly situated persons" in Part B. Information about Your Application, Questions 1.A. and 1.C. of Form I-589.
Nexus	The commenters believe that the proposed revisions require applicants to make sophisticated arguments regarding nexus requirements and should be removed.	**Response:** The Departments disagree that the additional prompt in Form I-589, Part B, Information About Your Application, related to why the harm, mistreatment, or

	The commenter believes that Question 1.A.4. of Part B, which asks asylum applicants to explain why they believe the harm they suffered is on account of a protected ground requires the applicant to engage in a sophisticated legal analysis which increases the time burden and will undoubtedly lead to user confusion. The commenter notes that case law has provided ample interpretation of the nexus requirement, and that an applicant need not and cannot prove the exact motivation of the persecutor. The commenter claims that the proposed instructions simply reiterate the regulatory text, without any acknowledgement of existing case law or the fact that asylum rules are modified constantly by agency and judicial interpretation. The commenter is concerned that pro se applicants will not understand the relationship between the instructions and the cited proposed regulations. The commenter believes it would be impossible for many asylum applicants, especially those who are unrepresented to fully comprehend what they must demonstrate to prove that harm is "on account of" their protected characteristic at the outset of their case when completing Form I-589. The commenter believes that the proposed rules in 8 CFR § 208.1(f) and 8 CFR § 1208.1(f) subject all asylum seekers to a laundry list of measures designed to deny asylum to most applicants on nexus grounds, while failing to require adjudicators to engage in a mixed motive analysis. The commenter believes that the nexus question on the proposed form therefore lays a trap for asylum seekers, and that if they do not explain why they believe they were harmed, the case could face pretermission. The commenter also believes that if an alien states a reason from the laundry list of automatic denials, such as anything related to "personal animus" or "gender", the adjudicator may deny the case without having to determine whether this was only one reason among others. The commenter strongly opposes the inclusion of this question, which will lead to many applicants' claims being unfairly denied. In the commenter's experience, child applicants are frequently unable to understand or fully articulate the reason(s) they were harmed. The	threats occurred or would occur requires sophisticated legal analysis or lays a trap for asylum applicants. *See* Form I-589, Part B, Information About Your Application, Questions 1.A.4. and 1.B.3. Questions 1.A.4. and 1.B.3. invite applicants to explain why they believe they were harmed, mistreated, or threatened, or could be harmed or mistreated, and now include additional guidance to prompt applicants to explain why the applicant believes the harm is on account of a protected ground. The form already asks applicants to check any of the protected grounds boxes in Part B, Information about Your Application, and thus, the additional guidance in Questions 1.A.4 and 1.B.3 are meant to complement this line of inquiry and offers applicants the opportunity to provide relevant information to support the claim. Applicants are not expected to engage in any sort of legal analysis, but rather, they are expected to provide information related why they believe they have been or will be harmed. With regard to child applicants, the Departments recognize that children may face challenges when completing the Form I-589. Information regarding an applicant's ability to supplement the application is provided in Part I. Filing Instructions, Section V. Obtaining and Completing the Form. Also, the

	commenter notes that a legal determination that harm was experienced "on account of" a protected ground involves consideration of both direct and circumstantial evidence the latter of which children are often less capable of readily identifying.	Departments continue to maintain the ability to request additional information, as needed. The additional information in the prompt is designed to provide greater clarity as to the type of information being requested. Therefore, the Departments retained the proposed prompt. For additional responses to the commenters' concerns related to the role of adjudicators when making assessing nexus, *see* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Final Rule, 4.4. (Nexus).
Previous Applications and Travel History	The commenters expressed concern that the proposed questions about previous applications for refugee status, asylum, and withholding of removal require applicants to provide information that may not be available to them. The commenters are also concerned that the proposed questions about travel history will force asylum applicants to provide information that is not relevant and has no legal bearing on their cases. The commenters noted that the questions regarding past immigration history currently contained in Part C, Additional Information about Your Application, Questions 1 and 2, have been significantly expanded in the form to encompass Questions 1 through 4, which ask for extensive information on the activities of the applicant and family members regarding prior applications for asylum, travel through other countries, and immigration status in those countries. The commenters believe that, while the current form frames these questions so that an applicant may provide narrative answers, the proposed revisions break many of the initial	**Response:** The Departments believe that the additional questions in Part. C, Additional Information About Your Application, of the Form I-589 related to previous applications and travel history are appropriate and relevant to the adjudication. The additional questions and prompts in Part C, Additional Information about Your Application, Questions 1 through 4, help provide adjudicators with relevant information, including prior applications for protection pursued by the applicant or certain family members, prior denials, countries through which the applicant and certain family members traveled, and countries in which the applicant or certain family members

	questions down into yes or no answers for which the applicant may not have sufficient knowledge. The commenter notes that there is no opportunity to answer "I do not know" or to provide additional explanation. The commenter believes that much of the information requested is likely outside the scope of the applicant's knowledge and may require legal expertise. In the commenter's experience, unaccompanied and separated children frequently do not have sufficient information about the whereabouts and activities of their family members to accurately answer these questions. The commenter believes that, at a minimum, these questions must include a response option where the applicant does not know the answer. The commenter is concerned that the proposed I-589 form requires applicants to include information that is not legally relevant about siblings' applications for status in the United States or potential for application for status abroad. The commenter believes that, given the sensitive nature of information disclosed in asylum applications, it may not be appropriate for an asylum seeker to have to discuss their application with a sibling. The commenter believes that the scope of Question 4 in Part C, which requests the travel history and information about applications for lawful status pursued in other countries for the applicant's spouse, children, and other family members is wide and the purpose is unclear. The commenter believes that it is possible that asylum seekers will either provide more or less information than the Departments need and could take many hours and expend substantial money trying to include comprehensive responses to questions which likely have no legal bearing on the case. The commenter believes that the new form would also force asylum applicants to evaluate the immigration law of any countries they or their family members previously visited. The commenter claims that the scope of Question 4.B. in Part C could include trips that took place years prior to any persecution and even trips that family members made before the asylum applicant was born. Furthermore, the commenter claims that answering this question requires asylum applicants and their lawyers to research the historical immigration laws of third countries in order to determine whether	resided. These matters come into play when adjudicators assess bars to applying for asylum and eligibility for asylum, as well as discretion. The Departments disagree that the questions do not allow for applicants, including children, to provide additional explanation or require legal expertise. As indicated in the Form I-589, Part C. Additional Information about Your Application, applicants may use Form I-589, Supplement B, or attach additional sheets of paper as needed to complete the responses to the questions contained in Part C. Thus, the Departments retained the additional questions. Nevertheless, in response to commenters' concerns, the Departments revised the proposed questions related to travel history and previous applications. *See* Form I-589, Part C., Additional Information about Your Application, Questions 1 through 4.

	the asylum seekers or their family members could have applied for any lawful status. The commenter notes that this research will not only take a tremendous amount of time, but it is also likely to lead to user and adjudicator confusion since it requests information that is not relevant to the claim.	
Discretionary Factors	The commenters believe that the proposed revisions in Form I-589, Part C., Additional Information about Your Application, Questions 9 and 10, related to the adverse discretionary factors require complex legal analysis and are biased against the applicant. The commenter believes that the proposed revision prioritizes gathering transit-related information, uncovering possible technical errors, and exploiting administrative deficiencies over the legitimacy of asylum claims. The commenters claim that these proposed discretionary factors strip decision makers of meaningful discretionary authority and require blanket denials. The commenters believe that the questions regarding discretionary factors make clear how dramatically the proposed rule would change the asylum system as it has existed for decades in the United States. The commenter believes that each discretionary question requires complex legal analysis, it would be impossible for most pro se applicants to fully comprehend and complete these questions, and even for experienced attorneys, these additional questions will add a substantial burden in time and cost in completing them. The commenter believes that the result could be that the applicant leaves the question blank, and has the I-589 form rejected, or the applicant could guess at the answer and potentially face an adverse credibility finding if they guessed incorrectly. The commenter claims that the structure of the questions and the accompanying boxes that allow an applicant to provide information about the exceptions are confusing and biased against the applicant. The commenter is concerned that, in many circumstances throughout Questions 9 and 10, "I don't know" is a reasonable answer, whereas a binary option may lead the applicant to fail to complete the	**Response:** The Departments disagree that the questions related to discretionary factors require complex legal analysis or are biased against the applicant. The questions are designed to elicit information related to the adverse discretionary factors in 8 C.F.R. sections 208.13(d) and 1208.13(d) and corresponding exceptions, and give applicants the opportunity to provide the relevant information. As indicated in the Form I-589, Part C., Additional Information about Your Application, applicants may use Form I-589, Supplement B, or attach additional sheets of paper as needed to complete the responses to the questions contained in Part C. Nevertheless, in response to the commenters' concerns, the Departments revised certain questions and explanations in the form and instructions. See Form I-589, Part C., Additional Information about Your Application, Questions 18 and 19; Instructions for the Form I-589, Section V. Obtaining and Completing the Form, Part C. Additional Information about Your Application.

	question, or to answer "incorrectly," both of which could be used to deny the application, question the applicant's credibility, or even lead to a determination of a frivolous filing. The commenter also notes that neither the proposed instructions nor the proposed form provides the applicant with guidance about the nature of positive factors. The commenter believes that the applicant will likely need to submit significant evidence to address this question, and yet no guidance is offered regarding these new measures. The commenter claims that this is particularly troublesome with respect to claims filed by unaccompanied children, for whom the TVPRA has explicitly required that the asylum process be adapted to their particularly needs and vulnerabilities.	For responses to comments related to the discretionary factors themselves, see Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Final Rule, 4.7 (Factors for Consideration in Discretionary Determinations).
Frivolous Filings	The commenters believe that the proposed revisions related to frivolous filings do not sufficiently provide applicants notice of the revised definition of the term, frivolous, or the consequences of filing frivolous applications. The commenter believes that while the new I-589 references the consequences of filing a frivolous application, neither the new form nor the new instructions explain the new and expansive definition of frivolous under the proposed rule. The commenter notes that asylum seekers, many of whom are unrepresented, will first have to read the new proposed rule to understand how frivolous is defined, and will then need to understand whether the reason they fear returning to their country meets this new definition. The commenter strongly opposes the additional references to filing a frivolous application without any explanation of how the proposed rule would expand this definition. The commenter believes that, while the proposed form and instructions include information about the proposed change that would allow asylum officers to find an application frivolous, neither the form nor the instructions provides any information about how the proposed rule would significantly expand the definition of frivolous. The commenter believes that the warning is meaningless if the asylum seeker is not apprised of the fact that if an adjudicator determines that the	**Response:** The Departments believe that the Form I-589 and accompanying instructions provide applicants with sufficient notice regarding frivolous filings and related consequences. As such, the Departments retained the proposed references to the rules related to frivolous filings and associated warnings. *See* Form I-589, Part D. Your Signature; Instructions for Form I-589, Part 1. Filing Instructions, V. Obtaining and Completing the Form, Part D. Your Signature. For additional responses to commenters' concerns about the definition of frivolous, see Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Final Rule, 3.1 (Frivolous Applications).

	application lacks merit, the asylum seeker may be forever barred from any immigration benefit. The commenter is concerned that the proposed form and instructions would implement a radically expanded definition without giving asylum seekers fair notice of the change.	
Confidentiality	The commenters believe that the proposed revisions related to confidentiality will discourage asylum applicants from providing information. The commenter believes that the proposed instruction related to confidentiality fails to provide sufficient clarity to an asylum applicant, in particular, one fleeing gender-based violence, about the universe of entities or persons to whom the information may be shared. The commenter believes that, without clearer and more definite assurances of confidentiality, survivors and other asylum seekers likely be discouraged from fully disclosing the harms they have experienced, potentially jeopardizing their asylum claims, to protect themselves. The commenter is concerned that where applicants have abusers or traffickers who have connections to law enforcement, the sharing of information may also place survivors at risk. The commenter believes that there must be clearer limits on disclosure, including for law enforcement purposes with specific, proscribed information sharing in exceptional circumstances. The commenter believes that neither the proposed form nor the corresponding instructions provide further explanation for what the categories enumerated in the proposed regulations mean; any specific or adequate reason that such broad and seemingly public disclosure is necessary; or any safeguards to mitigate the harm if an exception is utilized, such as redactions or protective orders. Furthermore, the commenter expressed concern that the proposed confidentiality regulations and the confidentiality warning in the instructions are likely to have a chilling effect on the full disclosure by the applicant of sensitive and traumatic circumstances that serve as the basis for their asylum claim.	**Response:** The Departments believe that the information provided in the Instructions for Form I-589 regarding confidentiality is appropriate and properly mirrors the regulation. *See* 8 CFR 208.6 and 1208.6. The Departments retained the information with a minor change (added "state" to the clause about the mandatory reporting requirement) to mirror the regulatory text in 8 CFR 208.6 and 8 CFR 1208.6. *See* Instructions for Form I-589, Part 1. Filing Instructions, III. Confidentiality.
Recommendations for Form I-589 Instructions	The commenters believe that the proposed revised instructions for the Form I-589 are confusing and create the expectation that applicants need to conduct legal research. The commenters believe that the proposed revisions	**Response:** The Departments believe that the revised instructions for the Form I-589 are sufficiently clear and provide the

	to the instructions fail to provide guidance to applicants on how to complete the Form I-589, and will instead, further confuse applicants.	necessary background information and guidance to applicants on how to complete the form.
	The commenter recommended that the instructions should not solely refer to the "CAT regulations", but rather, specifically to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.	**Response:** The Departments believe that the recommended change is outside of the scope of this information collection action; and therefore, decline to make the recommended change. Both the prior and new versions of the instructions for the Form I-589 refer to the Convention Against Torture. See Instructions for Form I-589, Part 1. Filing Your Application, II. Basis of Eligibility, D. Legal Sources and Guidance Related to Eligibility.
	The commenter believes that the definition of torture included in the proposed revisions to the instructions is insufficient and should include examples of "public official", "acquiescence", "color of law", "official capacity." The commenter notes that the instructions refer to the proposed regulations regarding the definition of particular social group, political opinion, persecution, and nexus; however, the proposed revisions do not refer to the fact that federal Circuit Courts often define the contours of these terms, and the law may differ among circuits.	**Response:** The Departments believe that the proposed revisions in the instructions provide the appropriate additional information and properly align with the regulations and case law. *See* Instructions for Form I-589, Part 1. Filing Your Application, II. Basis of Eligibility. The Departments decline to make the recommended change.
	The commenter notes that on Page 2, Part 1, Section I (Who May Apply and Filing Deadlines), the proposed instructions state, "You must submit certain documents for your spouse and each child included as required by these instructions. Children 21 years of age or older and married children must file separate applications." The commenter claims that this incorrectly implies by omission that children who are under 21 and unmarried do not have the right to file applications separately from a parent on whom they are dependent.	**Response:** The Departments believe that the recommended change is outside of the scope of this information collection action; and therefore, decline to make the recommended change. Both the prior and new versions of the instructions include this instruction. *See* Instructions for Form I-589, Part 1. Filing Instructions, I. Who May Apply and Filing Deadlines.

	The commenter notes that in the proposed particular social group instruction in Part 1, Section II.A., the statement makes clear that an applicant is not required to "articulate" the formulation of a claimed particular social group before the immigration judge, and may provide a basis on the record for determining the definition and boundaries of the alleged particular social group. However, the commenter believes that the syntax of this instruction renders it confusing and that the instruction should be revised. The commenter believes that the proposed instruction related to the failure to define a particular social group is groundless and therefore, improper, and that, under the principle of *esjudem generis*, the protected grounds of a particular social group must not be adjudicated differently than the four other protected grounds. The commenter believes that a heightened requirement cannot apply to particular social group claims as distinct from claims based on race, religion, nationality, or political opinion.	**Response:** The Departments decline to make the recommended changes. The Departments believe that the proposed revisions in the instructions provide the appropriate additional information and properly align with the regulations and case law. *See* Instructions for Form I-589, Part 1. Filing Instructions, II. Basis of Eligibility, A. Asylum. For additional responses to comments related to membership in a particular social group, see Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Final Rule, 4.1 (Membership in a Particular Social Group).
	The commenter is concerned that in Part 1, Section II.B., the proposed instructions introduce, but cannot effectively illuminate numerous legal concepts, including acquiescence, rogue officials, and breach of a legal responsibility. The commenter believes that, in effect, the applicant is prompted to pre-judge his or her own claim for relief, instead of adducing information, in writing and at a hearing, that enables the adjudicator to determine eligibility. Moreover, the commenter is concerned that, for certain cases, the proposed instructions require the applicant to "explain whether and how" an official or person acting in an official capacity "had awareness of the activity and breached his or her legal responsibility to intervene to prevent such activity." The commenter believes that, to the extent that this instruction calls for an assessment of how a third person acquired awareness, compliance with this instruction is not only infeasible,	**Response:** The Departments disagree that the instructions prompt applicants to pre-judge their own claims for relief. The Departments believe that the revised instructions provide the appropriate additional information and properly align with the regulations and case law. *See* Instructions for Form I-589, Part 1. Filing Your Application, II. Basis of Eligibility. Notwithstanding, as described above, the Departments revised the form and accompanying instructions in response to

	but an attempt to speculate on the applicant's part that may expose the asylum applicant to the more severe penalties envisioned under the expansion of the definition of frivolous filings proffered in the proposed rule.	concerns raised by several commenters related to questions and instructions focused on harm and torture by non-government actors and the role of the government.
Form Versions	The commenters are concerned that the form revision is based on the form version approved on September 10, 2019, rather than the most recent version changed by the Asylum Application, Interview, and Employment Authorization for Applicants Final Rule (Asylum EAD Rule), 85 FR 38532, that became effective on August 25, 2020. The commenter believes that the public is unable to evaluate an accurate draft of the final Form I-589 and instructions, and the inability to accurately comment is a consequence of the agencies' patchwork attempts to overhaul the nation's asylum system through piecemeal regulations proposed in rapid succession during a global pandemic. The commenter believes that the sweeping nature of these revisions means that the commenter is unable to provide comprehensive comments to every revision or to even fully understand how they interact with one another. The commenter is concerned that there are conflicting new versions of the I-589 and does not understand how comments on the current proposed version of the I-589 will affect the final form when there is apparently a more recent version than the one on which the information collection is based. The commenter urges the agencies to rescind this information collection and reissue it at a later date using a version of the I-589 form that integrates the newest version of the existing I-589 form.	**Response:** The proposed revisions to the Form I-589 and accompanying instructions were provided on the form edition approved by the Office of Management and Budget (OMB) on September 10, 2019, which was the OMB approved form at the time of the publication of the NPRM and accompanying information collection notice in the Federal Register. The revisions to the Form I-589 and instructions associated with the Asylum EAD Final rule had not been approved by OMB at the time of the publication of the information collection notice in the Federal Register. Given that the Form I-589 revisions associated with the Asylum EAD Final Rule have been approved by OMB and the form is currently available to the public for use, the revised Form I-589 and instructions now include the Asylum EAD Final Rule-related revisions.

Comment Period	The commenter believes that even though the information collection allotted the required 60 days for comment submission, the first 30 days were effectively nullified. The commenter submitted a 101-page comment on that proposed rule and still did not have time to adequately address every concern that the proposed rule raised. Since the commenter had to divert substantial resources to that comment, it was not possible to focus on the information collection during that time period. The commenter notes that with so many complex, far-reaching rulemakings on the same topic at the same time, the public did not really have a full 60 days to respond to the substantial changes in the proposed I-589 and accompanying instructions. For this reason, the commenter asks that the information collection be rescinded and reissued with a new 60-day comment period.	**Response:** The Departments appreciate the comment but note that the form revisions are intended to reflect only the changes proposed by the rule. The Departments believe 60 days provides a meaningful period for comment on the forms, especially because the rule itself had a 30-day comment period. Further, as the commenter notes, the Departments are in compliance with the Paperwork Reduction Act (PRA) and its relevant regulations. See, e.g., 5 CFR 1320.11.
Federal Vacancies Reform Act	The commenter believes that the information collection instrument is void as a threshold matter because it was issued in violation of the Federal Vacancies Reform Act (FVRA). The commenter believes that the form was signed by Chad Mizelle in his purported capacity as "Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security." The commenter believes that because the DHS General Counsel does not have the authority to sign proposed or final rules under the Homeland Security Act or existing DHS delegations, the Information Collection also includes a paragraph in which purported Acting Secretary Chad Wolf "delegate[s] the authority" to	**Response:** The NPRM and the final rule, including associated form revisions, were signed by Chad Mizelle, the Senior Official Performing the Duties of the General Counsel for DHS. As indicated in the proposed rule at section V. Regulatory Requirements, H. Signature, Chad Wolf, the Acting Secretary of Homeland Security, reviewed and approved the proposed rule and delegated the signature

	sign the document to Mr. Mizelle. However, the commenter believes that both Mr. Wolf and Mr. Mizelle are serving in violation of the FVRA, 5 U.S.C. §§ 3345 & 3346. As a result, the commenter believes that both Mr. Wolf's delegation and Mr. Mizelle's signature are without force and effect under the FVRA, 5 U.S.C. § 3348(d)(1), and contrary to law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and the form must be withdrawn.	authority to Mr. Mizelle. *See* 85 FR 36290. Secretary Wolf is validly acting as Secretary of Homeland Security. On April 9, 2019, then-Secretary Nielsen, who was Senate confirmed, used the authority provided by 6 U.S.C. 113(g)(2) to establish the order of succession for the Secretary of Homeland Security. This change to the order of succession applied to any vacancy. Exercising the authority to establish an order of succession for the Department pursuant to 6 U.S.C. 113(g)(2), superseded the FVRA and the order of succession found in E.O. 13753. As a result of this change and pursuant to 6 U.S.C. 113(g)(2), Mr. McAleenan, who was Senate confirmed as the Commissioner of CBP, was the next successor and served as Acting Secretary without time limitation. Acting Secretary McAleenan subsequently amended the Secretary's order of succession pursuant to 6 U.S.C. 113(g)(2), placing the Under Secretary for Strategy, Policy, and Plans position third in the order of succession below the positions of the Deputy Secretary and Under Secretary for Management. Because these positions were vacant when Mr. McAleenan resigned, Mr. Wolf, as the Senate confirmed Under Secretary for Strategy, Policy, and Plans, was the next successor and began serving as the Acting Secretary.

		The Secretary is authorized to delegate his or her authority to any officer or employee of the agency and to designate other officers of the Department to serve as Acting Secretary. *See* INA 103 (8 U.S.C. 1103) and 6 U.S.C. 113(g)(2). The HSA further provides that every officer of the Department "shall perform the functions specified by law for the official's office or prescribed by the Secretary." 6 U.S.C. 113(f). Thus, the designation of the signature authority from Acting Secretary Wolf to Mr. Mizelle is validly within the Acting Secretary's authority.
Paperwork Reduction Act	The commenter believes that the proposed Information Collection is contrary to the intent of the PRA. The commenter believes that the burden shifting in the Collection and outline above run contrary to the purpose of the Paperwork Reduction Act ("PRA") precipitating the Notice. The commenter believes that the information collection clearly violates the explicit purpose of the PRA. The commenter claims that the additional information that the information collection attempts to collect is not factual data, such as biographical data or employment history, that may be, indeed, more efficiently collected via a paper application than an oral, in-person interview. Rather, the commenter believes that the collection requires individuals, through unduly burdensome paperwork, to engage and articulate complex legal analysis and to anticipate and address, through increased paperwork, the legal arguments that an asylum officer, trial attorney, or immigration judge would pose. The commenter believes that while the form provides limited space to provide the collection's requested information, the additional questions cannot be properly answered in that limited space. The commenter claims	**Response:** The Departments disagree that the proposed information collection is contrary to the purposes of the PRA. As articulated at 44 U.S.C. 3501, the purposes of the PRA include to: "minimize the paperwork burden . . . ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government … improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society; minimize the cost to the Federal Government of the creation, collection, maintenance, use, dissemination, and disposition of information;". The Departments believe that this information

	that for an applicant to fully respond to the information collection request, the applicant must include mountains of supplemental information via paperwork that again is simply contrary to the intent of the PRA.	collection will aid the Departments in implementing the changes proposed in the rule in the most transparent and efficient manner. In response to specific comments received, the Departments are amending the form and instruction to make them more applicant friendly. Additionally, as the Departments anticipated there may be an additional impact to applicants, they accordingly modified the PRA burden statement to reflect a possible 6 hour increase in reporting burden per response.
Formatting, Redundancy, and Error	The commenters believe that the proposed revisions include formatting changes and redundant questions that make the Form I-589 less user-friendly and may lead applicants to inadvertently commit mistakes. The commenter believes that the proposed revisions are poorly organized. They will inevitably lead to consistent user error, straining the Asylum Office and the immigration courts. The commenter notes that the proposed revisions split discrete sections across multiple pages. The commenter believes that Part A.II., which requires information about the applicant's children, is confusing, and there is discontinuity that is bound to confuse some applicants. The commenter claims that it will likely lead to many applicants failing to mark "yes," even though they do, in fact, want to include their child in the application. The commenter strongly recommends that the Departments reconfigure the form so that each discrete section about each child is contained on just one page. The commenter believes that Part B., Information about Your Application, Question 1.A., which breaks down the question of what happened to an individual into distinct parts, may make it easier for some applicants to identify the important elements in their claim and is therefore, more in	**Response:** The Departments believe that the revised form and instructions are comprehensible, organized, and properly formatted. The form and instructions provide the relevant information and properly align with the regulations and case law. Moreover, the additional questions in the form give applicants the opportunity to provide information that is pertinent to different aspects of their claims, including bars to applying for asylum, bars to eligibility for asylum, and discretionary factors and related exceptions. The Departments corrected the grammatical error that appeared in the proposed Form I-589, Part C. Additional Information about Your Application, Question 4.B.

	keeping with creating an accessible form. The commenter notes that for other applicants, the breakdown may simply create more opportunities for an applicant to inadvertently contradict earlier statements. The commenter believes that, while a more precise set of questions may be valuable generally, in the context of the current revisions, these changes are likely to contribute to additional obstacles for some applicants. The commenter believes the proposed revisions are poorly labeled and confusing. The commenter believes that another formatting flaw with the proposed form is that creates new boxes to break down questions from the previous form, including Part B, 1.A.1-4, 1.B.1-3, 1.C.1-4, 1.D.1-3, Part C. Questions 3-4, 9.C., and 10.I. The commenter notes that some of these boxes are labeled, while others are not. The commenter recommends that the Departments assign either numerical or letter identifiers for each box. The commenters believe that the proposed revisions contain many redundant questions, including the second unlabeled box under Part C., Questions 3, 4.A, 4.B, 10.A., 10.C., and 10.H. The commenter believes that these proposed revisions are incomprehensible and unnecessary, and the Departments could more efficiently solicit this information by simply asking, "Have you, your spouse, or children ever applied for or received, any permanent lawful status?" and providing a box to allow the applicant to explain. The commenter believes that Part C. Question 4.B. is grammatically incorrect and unfair, and it should read, "Have you, your spouse, your child(ren) or other family members, such as your parents or siblings, ever *applied for*, *received*, or *been eligible to apply for*, but did not, any lawful status in any country other than the one from which you are now claiming asylum?" However, the commenter notes that even with this grammatical correction, the question is confusing and convoluted.	

EXHIBIT 29

DECLARATION OF NAOMI A. IGRA

TAHIRIH JUSTICE CENTER®

Protecting Immigrant Women and Girls Fleeing Violence

July 15, 2020

Submitted via https://www.regulations.gov/

Re: Comments in Response to the United States Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) and Department of Justice (DOJ) Office for Immigration Review (EOIR) (the Departments) Joint Notice of Executive Proposed Rulemaking (NPRM or the rule): *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review;* RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020

The Tahirih Justice Center[1] (Tahirih) submits the following comments to DHS USCIS and DOJ EOIR in response to the above-referenced NPRM issued by the Departments on June 15, 2020.[2] Tahirih opposes the rule as both a matter of public policy and because it patently violates numerous laws, including the Immigration & Nationality Act (INA), the Administrative Procedure Act (APA), and the international obligations of the United States as a State party to the United Nations (UN) Convention Relating to the Status of Refugees and 1967 Protocol (collectively, the Convention). *See generally* UNHCR, *The 1951 Refugee Convention*.[3] While we condemn the rule in its entirety, in light of our particular mission, experience, and expertise, our comments highlight the devastating impact the rule will have on a uniquely vulnerable population of asylum seekers: immigrant survivors of gender-based violence. *See generally* U.S. Dep't of State, *Gender and Gender-Based Violence*.[4]

I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 survivors of gender-based violence since its inception twenty-three years ago. Our clients are primarily women and girls

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[1] https://www.tahirih.org/. We note that although these comments are the official comments of Tahirih as an organization, individual Tahirih employees may also have submitted comments on the NPRM in their personal capacities. The agencies must, of course, also consider those individual comments.

[2] Whenever possible, we have provided the relevant text of secondary sources cited in this comment as attachments to the comment. However, because the agencies have given the public only 30 days to comment on a complex rule during a pandemic, we have not been able to provide all of those sources. All sources cited in this comment—including, but not limited to, court opinions, legislative history, and secondary sources—are to be considered part of the administrative record.

[3] https://www.unhcr.org/1951-refugee-convention.html.

[4] https://www.state.gov/other-policy-issues/gender-and-gender-based-violence/#ftn1.

who endure horrific human rights abuses such as domestic violence, rape and sexual torture, forced marriage, human trafficking, widow rituals, female genital mutilation/cutting (FGM/C), and "honor" crimes.[5]

Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our clients' stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence both abroad and within the U.S. *See, e.g.*, Tahirih Justice Center, *Tahirih in the News*;[6] Tahirih Justice Center, *Congressional Testimony*;[7] Tahirih Justice Center, *Comments*.[8]

Among the clients we have served are Mariam*[9] from Mali, who learned at a very young age that her community did not value women and girls and about how they are punished. She recounts:

> *In my family, there is no joy when a girl is born. When a boy is born, relatives gather at the parents' home. They offer small gifts of gold in celebration, and they sacrifice three to four animals. They celebrate the day with food, conversation, and laughter. When a girl is born, my relatives kill just one lamb. No one talks. No one celebrates. They eat quickly and leave.*
>
> *All of my uncles have more than one wife, and they treat them very poorly. They only talk to their wives to give them orders. I have heard my uncles and aunts fighting, and it always gets physical. I have seen my uncles hit their wives with belts, shove them against walls, and push them to the ground and kick them.*
>
> *The day after my 16th birthday, my father circled a date on the calendar: August 28. He told me this was the day that I would be married. My soon-to-be-husband was a wealthy man from Mali. He was older than my father! I begged my father to stop the marriage, but he insisted it was final. In that moment, I felt like my life was over. My mom learned that my fiancé had AIDS. Villagers said his first wife died of the disease.*
>
> *Desperate for a way out, I told my uncles I was no longer a virgin. They beat me so badly that I thought I would die. Then, they locked me in a room used to store crops.*

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5 For background information on these types of gender-based violence, *see, e.g.*, UNHCR, *Guidelines on the Protection of Refugee Women* 17, https://www.unhcr.org/3d4f915e4.html; UN Women, *Defining "honour" crimes and "honour" killings*, https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html; https://en.wikipedia.org/wiki/Female_genital_mutilation; https://en.wikipedia.org/wiki/Forced_marriage; https://www.widowsrights.org/.

6 https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news.

7 https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131.

8 https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=261.

9 An * after a name denotes a pseudonym.

There was no bathroom or windows, just a hole in the wall for food. I couldn't tell if it was night or day, and I knew that if my life ended, they would not care.

Eight months passed before my mom rescued me. My uncles went away on a business trip, and she broke through the bolt on the door. With the help of my sister I escaped to the United States and applied for asylum. I'll never forget the day I received my asylum approval. I am free! I can live my life without fear of being forced back to Mali, where my uncles would kill me.

Very soon, I will graduate from college with a degree in agribusiness. I hope to get a job in banking or at a government agency and then pursue an MBA. And I want to get married and start a family, but at my own pace.

Another client, Meena* from Iran, was taught early on that her sole purpose was to serve men. She would be "transferred" from a childhood serving her father, to a lifetime of serving a husband. She explains:

I grew up in a very conservative community in southwest Iran. For as long as I can remember, my father treated me and my mother like servants in our own home. No matter how hard we tried to please him, he found a reason to beat us and threaten to kill us. I'll never forget the time he hurled a butcher knife at my head when I was 10 because I didn't say "hello" to my uncle when he entered our home. I threw my hands up to protect my face, and the knife went through my right hand, causing severe bleeding. I was not allowed to see a doctor.

My father got away with this because women were treated as property or worse in my family — my paternal relatives beheaded their wives and daughters for disobeying orders and fleeing arranged marriages. Despite my persistence to get out of the house and go to school, my father told me I would never be a source of pride because I am a girl. He said being obedient to men was my destiny as a woman.

When I turned 15, my father arranged for me to marry my cousin. I dreaded a life of never-ending misery. My mother, a brave and strong-willed woman, decided it was time to save us both. In the middle of the night, with only a few clothes and a blanket, we ran away. We spent the next seven years in hiding.

During my travels abroad with relatives, I befriended an American man. I fell in love, and when he proposed, my mother and I agreed I should accept his offer. My fiancé helped me obtain a visitor's visa to come to America but he soon revealed that he was already married and abandoned me. I felt so alone, with no home, no family, and no resources.

My attorneys and social service aides helped me access the food, shelter, and support services I needed to survive. Their unwavering support gave me the courage to move forward and share my story with an asylum officer. After several difficult months, I was granted asylum. I felt like I had a second chance at life.

I found work as a translator for the U.S. military and have been working in this position for the past three years. Today, I am determined to earn a degree in criminal justice because I want to have a career protecting others. I just received a full scholarship to go to college. Never in my life would I have imagined writing these words except in a dream.

And finally, Koumba* from Benin began her fight for justice when she was raped at the age of 11 by a man from her father's village. Four years later, she was raped a second time by a different man. She then learned that she had been promised to this man in marriage. Koumba* suffered for a long time with shame from the rapes, but she tried her best to establish as normal a life as possible.

Koumba* eventually attended university, earned her degree, and worked as a human resources professional for an insurance company. A decade passed, and she fell in love with a man from her church and married him. Koumba* put her past abuse behind her and built a happy new life with her husband.

In 2010, Koumba*'s world was violently upended when the rapist to whom she had been promised in her teens passed away. To her shock and dismay, this man and his family had never forgotten that Koumba* had been promised to him like property. Now, upon the rapist's death, his brother "inherited" Koumba*. At his direction, members of a sect from his village kidnapped her. Koumba* was forced to perform widow rituals, which included washing the dead man's body as well as her own intimate parts with the same water. She was then forced to spend the night lying next to the corpse of her rapist. She knew she would get no help from the local police, so at the first opportunity, she fled to another town.

Unfortunately, her safety was temporary. A few months later, Koumba* was kidnapped again. This time, the dead man's brother kept her in a dark hut with her arms and legs tied to a bed and raped her every day. Once again she escaped, this time the night before their formal marriage ceremony was to take place. Because she knew that she could no longer live in Benin in safety, she gave up her career and everything she had worked for in her native land and fled to the United States. After facing additional hardship here, she was finally able to apply for and win asylum.

A. Asylum Seekers Fleeing Gender-Based Violence are a Uniquely Vulnerable Population

Gender-based violence is ubiquitous:[10] Even women and girls who are also targeted for persecution for reasons unrelated to their gender are unfortunately likely to suffer gender-based discrimination or violence in some form. And gender-based violence in all of its forms involves a unique set of common characteristics that leave survivors of such violence uniquely vulnerable. That set of characteristics includes (i) persecution at the hands of family members, communities, and other non-state actors; (ii) severe ostracization and searing social stigmas; (iii) disbelief of survivors; (iv) internalized shame; (v) the inability to disclose gender-based violence to or in the presence of children or male family members; (vi) the absence or nonenforcement of laws to protect survivors; (vii) laws permitting gender-based discrimination or violence; (viii) cultural acceptance of gender-based

[10] *See generally* UNFPA, *Against My Will: Defying the Practices That Harm Women and Girls and Undermine Equality* (2020), https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf.

violence; (ix) barriers to medical or mental health treatment for survivors; (x) forced dependence or unequal caretaking responsibilities; (xi) multiple victimization and revictimization; and (xii) ongoing gender-based violence even after a survivor reaches the United States.

Survivors of gender-based violence—who include entrepreneurs, physicians, teachers, historians, grocery clerks, lawyers, authors, caregivers, politicians, entertainers, and scientists—are thus isolated, traumatized, and cut off from family and community resources, and those who do manage to escape are in desperate need of counsel,[11] medical, mental health, and other services as they navigate our system. *See, e.g.*, Tahirih Justice Center, *Immigrant Survivors Fear Reporting Violence* (May 2019).[12] Yet due to the nature of gender-based violence, survivors are *least* likely to be able to access such services. Access to corroborating evidence to support their claims is also very limited. In fact, as noted by U.N. High Commissioner for Refugees (UNHCR), in "gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution." UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01, at 10 (2002) (*Gender Guidelines*).[13] The formidable obstacles survivors already face in seeking safety have only been amplified by the global pandemic. *See, e.g.*, Rená Cutlip-Mason, *For Immigrant Survivors, the Coronavirus Pandemic is Life-Threatening in Other Ways*, Ms. Magazine (Apr. 14, 2020);[14] Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020).[15]

B. The NPRM Would Inexplicably Eviscerate Humanitarian Protection for Survivors of Gender-Based Violence

As a law student in 1996, Tahirih founder and CEO Layli Miller-Muro[16] was involved in a landmark asylum case on behalf of Fauziya Kassindja[17] from Togo. Ms. Kassindja recounted her escape, at just 17 years of age, from imminent FGM/C and a forced polygynous marriage[18] to a man more than twice her age: "On Thursday they said I'd be married. On Friday they told me they'd cut

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[11] This is particularly the case for detained asylum seekers. *See, e.g.*, Tahirih Justice Center, *Nationwide Survey: A Window into the Challenges Immigrant Women and Girls Face in the United States and the Policy Solutions to Address Them* (Jan. 31, 2018), http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf.

[12] https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5d290b07a8dea8000138bf97/1562970888076/2019-Advocate-Survey-Final.pdf.

[13] https://www.unhcr.org/3d58ddef4.pdf.

[14] https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life threatening-in-other-ways/.

[15] https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf.

[16] *See* https://en.wikipedia.org/wiki/Layli_Miller-Muro.

[17] *See* http://www.pbs.org/speaktruthtopower/fauziya.html.

[18] *See* https://en.wikipedia.org/wiki/Polygyny.

me. At midnight, I escaped." Ms. Kassindja was ultimately granted asylum and her case, *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), set national precedent establishing gender-based persecution as a ground of asylum in the United States.[19] Soon thereafter, Congress enacted legislation criminalizing FGM/C of a minor. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, div. C, title VI, § 645(b)(1), 110 Stat. 3909-709 (1996), *codified at* 18 U.S.C. § 116. Thirty-five states have since followed suit. *See* Equality Now, *FGM in the US: What Is Female Genital Mutilation (FGM)?*.[20]

For decades, the United States has more generally recognized the pervasive, severe, and acute threat that gender-based violence poses to the lives and safety of women and girls. Since 1984, for example, bipartisan majorities of Congress have enacted the Family Violence Prevention and Services Act (FVPSA), Pub. L. 98-457, title III, 98 Stat. 1749, 1757, *codified at* 42 U.S.C. §§ 10401-12,[21] the Violence Against Women Act (VAWA), Pub. L. 103-322, 108 Stat. 1796 (1994), and the Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. 106-386, 114 Stat. 1464 (2000). And nine states plus Washington, D.C. and the U.S. Virgin Islands have enacted criminal laws barring forced marriage. *See* Tahirih Justice Center, *Criminal Laws Addressing Forced Marriage in the United States* (Aug. 2019).[22]

The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980), did not explicitly name persecution based on "gender" as a ground for asylum. That omission reflects Congress's adoption of the UN Convention's then nearly 30-year old refugee protection framework, which was drafted from a male-centered perspective. *See* UNHCR, *Gender Guidelines* 2. But "properly interpreted," the definition of "refugee" included in the Convention, and adopted by Congress, "covers gender-related claims." *Id.* at 3. As UNHCR put the matter in 2002 guidelines for interpreting the Convention, "it is widely accepted that [gender] can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment…as such, there is no need to add an additional ground to the 1951 Convention definition." *Id.* And those guidelines, which remain in effect today, "provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary" in all countries, including the United States, that are parties to the Convention. *See id.* at 1.[23]

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[19] Following the decision, Ms. Miller-Muro founded Tahirih to help more women and girls targeted for violence and torture simply because they are female.

[20] https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/216/attachments/original/1565706130/FGMintheUS_factsheet_Aug2019.pdf?1565706130.

[21] *See also* Nat'l Resource Ctr. on Domestic Violence, *Learn About FVPSA*, http://www.learnaboutfvpsa.com/35yrs-impact.

[22] https://preventforcedmarriage.org/wp-content/uploads/2015/01/Forced-Marriage-Criminal-Statutes_2019.pdf.

[23] UNHCR's views on the proper interpretation of asylum law are entitled to particular deference because they reflect extensive input by member states—including the United States. *See, e.g.*, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the Convention* (1992) https://www.unhcr.org/4d93528a9.pdf; *see also, e.g.*, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (Department of Immigration and Humanitarian Affairs, Australia, July 1996); *Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Immigration and Refugee Board, Canada,13 November 1996); *Position on Asylum Seeking and Refugee Women* (European Council on Refugees and Exiles,

The U.S. government routinely recognizes that the definition of "refugee" encompasses those persecuted on account of gender. The State Department, for instance, has emphasized in the refugee protection context that the "empowerment and protection of women and girls has been a central part of U.S. foreign policy and national security" and that "gender-based violence[ ] is a critical issue" that is "intricately linked to" the Department's strategic goals. Bureau of Population, Refugees, and Migration, *Gender and Gender-Based Violence*.[24] To that end, the State Department has "implement[ed]" an entire strategy to combat gender-based violence around the world. *Id.*; *see* USAID, *United States Strategy to Prevent and Respond to Gender-Based Violence Globally* (2016).[25] And as noted above and shown in detail below, the agencies and the federal courts have, in the decades since *Kasinga*, consistently treated gender-based persecution as grounds for asylum.

The NPRM, in contrast, would plainly bar asylum for survivors of violence inflicted on account of their gender. It is nothing short of astounding for the U.S. government to outlaw gender-based violence within the United States; retain its status as a Refugee Convention State party; currently proclaim itself a "leader within the humanitarian community on the protection of women and girls" (Bureau of Population, Refugees, and Migration, *Gender and Gender-Based Violence*); and, in the very next breath, decimate humanitarian protections for women and girls. Even more incomprehensible is that just last year, the same agencies that now seek to dismiss gender-based violence as unworthy of redress deemed even *unproven acts* of domestic violence so egregious that they sought to categorically bar perpetrators of such violence from asylum. *See* DOJ & DHS, *Procedures for Asylum and Bars to Asylum Eligibility*, 84 Fed. Reg. 69,640 (Dec. 19, 2019). Finally, and most importantly: To say that the rule will swiftly, cruelly, and arbitrarily sentence women and girls to torture and death is not hyperbole. It is the plain, simple truth. *See, e.g.*, Human Rights Watch, *Deported to Danger* (Feb. 5, 2020).[26]

II. Comments on the NPRM as a Whole

The NPRM should be withdrawn in its entirety. As discussed above, it will lead to the persecution, torture, and death of survivors of gender-based violence—and countless others. Unsurprisingly, the entirety of the NPRM also violates federal law in at least four ways.

December 1997); *Gender Guidelines for the Determination of Asylum Claims in the UK* (Refugee Women's Legal Group, July 1998); *Gender Guidelines for Asylum Determination* (National Consortium on Refugee Affairs, South Africa, 1999); *Asylum Gender Guidelines* (Immigration Appellate Authority, United Kingdom, November 2000); *Gender-Based Persecution: Guidelines for the investigation and evaluation of the needs of women for protection* (Migration Board, Legal Practice Division, Sweden, 28 March 2001); *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (UNHCR, Geneva, 1995); *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* (Report of Inter-Agency Lessons Learned Conference Proceedings, 27-29 March 2001, Geneva).

[24] https://www.state.gov/other-policy-issues/gender-and-gender-based-violence/#ftn1.

[25] https://www.state.gov/wp-content/uploads/2019/03/258703.pdf.

[26] https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and.

A. Pretext

As an initial matter, the NPRM is nothing more than a pretext for enshrining anti-asylum seeker sentiments in the Code of Federal Regulations. The Supreme Court recently made clear that "[t]he reasoned explanation requirement of administrative law … is meant to ensure that agencies offer genuine justifications for important decisions." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). To that end, the agencies' actual reasoning must be provided so that it "can be scrutinized by courts and the interested public." *Id.* at 2576. And as part of disclosing their "actual reasoning," administrative agencies "must 'disclose the basis'" of their actions. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Bd.*, 313 U.S. 177, 197 (1941)). The provision of "contrived reasons would defeat the purpose of the enterprise." *Dep't of Commerce*, 139 S. Ct. at 2576.

The agencies have not taken this basic step. In fact, the agencies have not even satisfied the bedrock criterion of "disclos[ing] the basis" of their proposed actions. *Burlington Truck Lines*, 371 U.S. at 168. The NPRM discloses no basis at all for the entirety of the package of sweeping changes it proposes. That fact, standing alone, renders the proposals arbitrary and, thus, void under the APA.

Moreover, any rationale that the agencies may attempt to advance at a later stage will unquestionably be pretextual rather than "genuine justifications." *Dep't of Commerce*, 139 S. Ct. at 2575. The NPRM is a miscellaneous grab-bag of proposals: It would change both substance and procedure; both credible-fear proceedings and full asylum proceedings; both required showings by asylum seekers and the exercise of discretion; and both legal questions and factual evidence. Only one common thread runs through this mishmash of proposals: All of the changes, without exception, would make the road to relief more difficult for asylum seekers. That fact is, without more, sufficient to give rise to the strong inference that barring the door to asylum seekers is the underlying goal of the agencies.

That inference is further supported by at least four features of the new rule. *First*, the agencies have not even attempted to identify any other unifying principle in (much less rationale for) the NPRM. *Second*, the NPRM makes clear that the agencies have not considered any alternatives to the proposals included in the NPRM. In particular, the agencies have not considered any changes that would make it easier to seek or obtain asylum in the United States. *Third*, as shown above (*see* Section I.B, *supra*), the treatment of domestic violence in the NPRM is diametrically opposed to the treatment of domestic violence in an NPRM issued by the same agencies only months earlier. The only consistency between the NPRM and the earlier proposal is that both would bar individuals from asylum—one on the ground that they committed gender-based violence, the other on the ground that they survived gender-based violence. *Fourth*, despite the length of the NPRM, many of the individual proposals in the NPRM contain no justification at all. And the purported justifications for individual provisions that the agencies have included are uniformly so thin as to reinforce the inference that they are nothing more than a pretense.[27]

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[27] We show this failure of justification below in our comments on the individual provisions. To be clear, our comments concerning the absence or inadequacy of justifications for individual proposals also stand on their own as reasons why those proposals are arbitrary. Any response by the agencies to the general point that the NPRM's reasoning is pretextual therefore does not discharge the agencies' duty to respond to our comments on individual provisions.

The inference also finds support in the statements of those who signed or influenced the rule. To start at the top, President Donald J. Trump has stated that immigrants attempting to cross the southern border of the United States should be shot. Eugene Scott, *Trump's most insulting—and violent—language is often reserved for immigrants*, Wash. Post (Oct. 2, 2019).[28] He has suggested that the border should include an "electrified" wall with "spikes on top that could pierce human flesh." *Id.* He has referred to immigrants as "animals" who "infest" the United States. Juan Escalante, *It's not just rhetoric: Trump's policies treat immigrants like me as "animals,"* Vox (May 19, 2018);[29] Brian Resnick, *Donald Trump and the disturbing power of dehumanizing language*, Vox (Aug. 14, 2018).[30] And he has, without citing to any evidence, both associated immigrants generally with "[d]rugs, gangs, and violence" (Dara Lind, *Trump just delivered the most chilling speech of his presidency*, Vox (June 28, 2017)),[31] and said that Mexican immigrants "bring[ ] drugs," "bring[ ] crime," and are "rapists." Scott, *supra*.

More specifically, President Trump has referred to asylum seekers as "invad[ing]" and "infest[ing]" the United States. Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 6:52 AM);[32] Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 8:02 AM).[33] He has claimed without evidence that support for asylum seekers is equivalent to support for "crime," "drugs," and "human trafficking." *Remarks: Donald Trump Meets With Representatives of Law Enforcement* (Sept. 26, 2019).[34] And he has made clear his view that all asylum seekers should "IMMEDIATELY" be deported without any legal process whatsoever, in clear contravention of the INA and international law. Donald J. Trump (@realDonaldTrump), Twitter (June 30, 2018, 3:44 PM).[35]

President Trump has also repeatedly claimed that the asylum system routinely grants relief to people without legitimate claims. He has, for instance, claimed that there is routine "abuse" of the asylum process. Exec. Order No. 13,767, *Border Security and Immigration Enforcement* (Jan. 25, 2017). He has referred to the lawful asylum process as a "loophole" exploited by those with "fraudulent or meritless" claims. *Remarks by Pres. Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018).[36] He has referred to asylum as a "hoax" and a "scam" and claimed, in clear contravention of U.S. and international law, that "we're not taking [asylum seekers]

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[28] https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/.

[29] https://www.vox.com/first-person/2018/5/18/17369044/trump-ms-13-gang-animals-immigrants.

[30] https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omarosa-dehumanization-psychology.

[31] https://www.vox.com/policy-and-politics/2017/7/28/16059486/trump-speech-police-hand.

[32] https://twitter.com/realDonaldTrump/status/1009071403918864385.

[33] https://perma.cc/35AQ-NSDH.

[34] https://factba.se/transcript/donald-trump-remarks-law-enforcement-september-26-2019.

[35] https://twitter.com/realDonaldTrump/status/1013146187510243328?s=20.

[36] https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/.

anymore." *Trump on Asylum Seekers*: 'It's a Scam, It's a Hoax', Daily Beast (Apr. 5, 2019).[37] He has expressed the unelaborated view that "asylum procedures are ridiculous" and that "you have to get rid of [immigration] judges" to get the outcomes he prefers. *Remarks by President Trump and NATO Secretary General Jens Stoltenberg Before Bilateral Meeting* (April 2, 2019).[38] He has claimed that asylum laws are "horrible" and "unfair" (*Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border* (Mar. 15, 2019))[39] and that asylum claims are "frivolous" and "bogus" (*Remarks: President Trump Signs Taxpayer First Act in the Oval Office* (July 1, 2019)).[40] None of these statements were supported by so much as a shred of evidence, and no supporting evidence exists for any of them.

These views constitute just a small sample of President Trump's anti-immigrant, and anti-asylum seeker, statements.

Attorney General William Barr, who signed the NPRM on behalf of DOJ, likewise has a long history of statements that, at the time of his confirmation, led to the accurate prediction that he would "be a loyal foot soldier for Trump's aggressive immigration agenda." Dara Lind, *William Barr hearing: attorney general nominee's immigration record aligns with Trump's*, Vox (Jan. 16, 2019).[41] For instance, in 1992, when the acquittal of the white Los Angeles police officers who savagely beat Rodney King led to violence, Barr made the astonishing claim that "[t]he problem of immigration enforcement" was in part responsible for the violence. Ronald J. Ostrow, *William Barr: A "Caretaker" Attorney General Proves Agenda-Setting Conservative*, L.A. Times (Jun 21, 1992).[42] Like Trump, Barr has long believed—without a shred of supporting evidence—that large numbers of asylum seekers present "patently phony claims." *Asylum and inspections reform: Hearing before the Subcommittee on International Law, Immigration, and Refugees of the Committee on the Judiciary, House of Representatives* (Apr. 27, 1993).[43] And more recently, while criticizing so-called "sanctuary" policies, Barr baselessly referred to all undocumented people as "criminal aliens." *E.g.*, Justine Coleman, *Barr announces 'significant escalation' against 'sanctuary' localities*, The Hill (Feb. 10, 2020).[44]

There is little public information about Chad Mizelle, who illegally signed the NPRM on behalf of DHS (*see* Section II.C, *infra*). However, Mizelle is universally described as having been made purported Acting General Counsel of DHS thanks to his close ties to White House immigration adviser Stephen Miller. *See, e.g.*, Geneva Sands, *Stephen Miller ally tapped as top Homeland Security*

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37 https://www.thedailybeast.com/trump-on-asylum-seekers-its-a-scam-its-a-hoax.

38 https://perma.cc/5ZKY-P53D.

39 https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border-2/.

40 https://factba.se/transcript/donald-trump-remarks-bill-signing-taxpayer-act-july-1-2019.

41 https://www.vox.com/2018/12/7/18128926/barr-confirmation-senate-immigration-trump.

42 https://www.latimes.com/archives/la-xpm-1992-06-21-op-1236-story.html.

43 https://archive.org/stream/asyluminspection00unit/asyluminspection00unit_djvu.txt.

44 https://thehill.com/regulation/court-battles/482425-barr-announces-significant-escalation-against-sanctuary-cities.

attorney, CNN (Feb. 12, 2020);[45] Meghana Srivastava, *Cornell Law Alum Named Homeland Security Head Lawyer*, Cornell Sun (Feb. 19, 2020).[46] Presumably, then, Mizelle broadly shares Miller's views toward asylum seekers and other immigrants.

Miller's view of asylum seekers is that the United States should treat the children in families seeking asylum "badly enough" that parents will no longer seek refuge in this country. Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, The New Yorker (Feb. 21, 2020).[47] He, too, has claimed without evidence that there is an "'asylum fraud crisis' at the border." *Id.* More generally, Miller has, by his own admission, dedicated his entire life to making the lives of immigrants more difficult. *Id.* Miller's central driving belief is that immigrants bring crime to the United States. SPLC, *Emails Confirm Miller's Twin Obsessions: Immigrants and Crime* (Nov. 25, 2019).[48] That belief, however, has been repeatedly and conclusively refuted. *See, e.g.*, Jason L. Riley, *The Mythical Connection Between Immigrants and Crime*, Wall St. J. (July 14, 2015);[49] Christopher Ingraham, *Two charts demolish the notion that immigrants here illegally commit more crime*, Wash. Post (June 19, 2018);[50] Walter Ewing et al., *The Criminalization of Immigration in the United States* (July 13, 2015);[51] Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, The Marshall Project (May 13, 2019).[52]

Thus, even if the text of the NPRM left any doubt about the true goal of its proposals—and it does not—that doubt would be dispelled by the statements of those who approved the NPRM or were in a position to dictate its contents. Because the NPRM does not, and cannot, justify that true goal of making it effectively impossible for asylum seekers to receive relief in the United States, it must be withdrawn in its entirety.

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45 https://www.cnn.com/2020/02/12/politics/chad-mizelle-department-of-homeland-security/index.html.

46 https://cornellsun.com/2020/02/19/cornell-law-alum-named-homeland-security-head-lawyer/.

47 https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession.

48 https://www.splcenter.org/hatewatch/2019/11/25/emails-confirm-millers-twin-obsessions-immigrants-and-crime.

49 https://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798.

50 https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/.

51 https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states.

52 https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime.

B. Impermissible Retroactivity

Almost all of the NPRM's provisions are, by their terms, illegally retroactive in effect. The NPRM proposes to make its redefinition of "frivolous" only prospective in application (*see* 85 Fed. Reg. at 36,304), but it is silent as to whether its remaining provisions would apply to applications filed before its provisions become effective. The natural inference is therefore that the agencies intend all of the NPRM's remaining provisions to apply to applications for asylum and related relief that are pending at the time the rule becomes effective. Thanks to a variety of factors, prominently including USCIS's decision to shift to a last-in-first-out priority system in adjudicating asylum claims and DOJ's meddling in the dockets of the immigration courts (*see* Section III.D.1, *infra*), there are many such applications—including some that have been pending for at least five years.

The application of the NPRM to pending applications would violate the well-settled presumption against retroactivity. A regulation may not be applied retroactively unless Congress has included a clear statement that the agencies may promulgate regulations with that effect. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001). There is no statute that authorizes either DHS or DOJ to promulgate regulatory changes to the asylum system that have retroactive effect.

The application of the NPRM's proposals to pending asylum applications is therefore illegal if that application qualifies as "retroactive." It does. "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *St. Cyr*, 533 U.S. at 317 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The phrase "new legal consequences" encompasses any provision that would "take[ ] away or impair[ ] vested rights acquired under existing laws" or that would "create[ ] a new obligation, impose[ ] a new duty, or attach[ ] a new disability, in respect to transactions or considerations already past." *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269)). And the inquiry into whether a provision does so must "'be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* (quoting *Martin v. Hadix*, 527 U.S. 343, 358 (1998)).

There can be no doubt that each provision of the NPRM would either impair rights concerning, or place new disabilities on, asylum applications already filed. This is obvious with the NPRM's procedural proposals. The new rule concerning pretermission would retroactively disentitle asylum seekers with pending applications from the only process in which may individuals can effectively convey the persecution inflicted on them—*i.e.*, an oral hearing before an immigration judge. *See* Section III.D.2, *infra*. The proposed changes to confidentiality, meanwhile, would open prior applicants to the possibility of unforeseen reprisals by government agencies or private actors. And the new credible-fear procedures would, if applied to individuals who are in the middle of the CFI process when the regulation takes effect, unlawfully disentitle those individuals to (among other things) consideration under settled credible-fear standards and placement in full removal proceedings under 8 U.S.C. § 1229a.

The NPRM's proposed substantive standards would also have an impermissible retroactive effect as applied to pending applications. All of those standards—including, but not limited to, the previously unthinkable list of bars to the favorable exercise of discretion—would overrule BIA opinions, seek to override opinions from the federal courts of appeals, newly shift burdens of proof, or otherwise expressly or implicitly change settled law. And without exception, the changes wrought by the NPRM would work to the detriment of asylum applicants. Further, many of the new standards,

such as the laundry lists of generally barred claims in the portions of the NPRM concerning PSGs, nexus, and the exercise of discretion, would also disentitle those with pending applications from receiving the case-by-case adjudication on all of the individual circumstances that asylum seekers have always received under U.S. and international law. *See* Section III.A.1.b.i, *infra*. Applicants who submitted applications on the basis of existing law would therefore find themselves newly disadvantaged in numerous, serious ways. For this reason, too, the NPRM must be withdrawn in its entirety.

C. Violation of the Vacancies Act

The NPRM is also invalid, and must be withdrawn, in its entirety because it was issued in violation of the Federal Vacancies Reform Act (FVRA). The NPRM was signed by Chad Mizelle in his purported capacity as "Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security." 85 Fed. Reg. at 36,306. Because the DHS General Counsel does not have the authority to sign proposed or final rules under the Homeland Security Act or existing DHS delegations, the NPRM also includes a paragraph in which purported Acting Secretary Chad Wolf "delegate[s] the authority" to sign the document to Mizelle. *Id.* at 36,290. However, both Wolf and Mizelle are serving in violation of the FVRA, 5 U.S.C. §§ 3345 & 3346. As a result, both Wolf's delegation and Mizelle's signature are without force and effect under the FVRA, 5 U.S.C. § 3348(d)(1), and contrary to law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The NPRM, and any final rule based on the NPRM, are accordingly void.

D. Insufficient Time for Public Comment

Finally, the agencies have provided insufficient time for public comment, and have done so without any attempted justification.[53] The NPRM contains highly technical and complex regulatory changes that span 63 pages—and that follow nearly 100 pages of preamble. Those changes must be addressed individually in comments, because they have nothing in common beyond working against asylum seekers. And the changes will directly implicate the lives and safety of, at a minimum, thousands of people.

Yet the public has been given a mere 30 days to respond. Even under normal circumstances, at least 60 days would be needed for the public to engage in a meaningful review and analysis of such a lengthy and disjointed rule. And these are not normal circumstances: The public is at an even greater disadvantage now due to the COVID-19 global pandemic.

The 30-day period has also proven insufficient in practice, as our experience highlights. At Tahirih all employees continue to perform mandatory telework, many while simultaneously caring for babies, toddlers, and/or school-age children. As a result, full-time Tahirih employees were expected to work no more than 32 hours per week during the comment period, with the expectations for part-time employees—two of whom were crucial to the drafting of these comments—reduced

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[53] The agencies received numerous letters from potential commenters requesting extensions of the comment period. *See Letter from Bahá'ís of the United States et al.* (July 1, 2020); *Letter from Ravi Ragbir, Director, New Sanctuary Coalition* (June 18, 2020); *Letter from Rep. Jerrold Nadler, Chair, House Judiciary Committee and Zoe Lofgren, Chair, Subcommittee on Immigration and Citizenship* (June 22, 2020); *Letter from 502 Organizations* (June 18, 2020). So far as we know, the agencies did not see fit to respond to any of those requests.

proportionally. Thus, extensive as these comments may appear, they do not represent Tahirih's full response to the rule. And they do not, because they cannot, include all of the analysis and evidence that Tahirih would have provided if given at least 60 days to respond to the rule. The agency's decision not to provide more than 30 days for comment has therefore impaired Tahirih's opportunity and ability to comment on the rules.[54]

Furthermore, that decision is arbitrary. The NPRM contains no reasons for permitting only a 30-day comment period. And there can be no legitimate urgency to the agencies' proposals, because effectively no asylum seekers are arriving in the United States at this moment. After all, because of COVID-19, U.S. borders are indefinitely closed, and air travel into the country is severely curtailed. Nor is there any urgent need to apply the rule to asylum seekers who have already submitted applications to EOIR or USCIS. Many EOIR courts remain closed for non-detained hearings, and USCIS has extended due dates for responses that would be due through September 11, 2020, because of difficulties caused by the pandemic. Further, the CFI and RFI portions of the rule are simply inapplicable to individuals with pending applications. And in any event, any application of the NPRM's proposals to pending applications would, as shown above, be impermissibly retroactive. There is, in other words, no plausible and non-arbitrary reason for the agencies to have provided only 30 days for comment on the NPRM's complex and disjointed proposals.

III. Comments on Individual Proposals in the NPRM

The individual proposals in the NPRM are no better thought out than the rule as a whole. To the contrary, as explained below, each individual proposal is contrary to law, arbitrary, or both.

A. Substantive Inquiries in Asylum Adjudications

1. "Particular Social Group"

Each of the changes that the NPRM proposes with respect to PSGs would preclude many survivors of gender-based violence from receiving asylum even though they satisfy the definition of "refugee" in the INA. Each is both contrary to law, arbitrary, or both. And each must accordingly be withdrawn.

a. "Circularity"

The NPRM proposes to codify a variant of the rule against so-called "circularity." Under the general understanding of that rule, "a particular social group cannot be defined exclusively by the alleged persecutory acts or harms" giving rise to the asylum claim. 85 Fed. Reg. at 36,291. The NPRM would, however, define as circular not only those PSGs that are exclusively defined by persecution but also those that do not "exist[ ] independently of the alleged persecutory acts or harms that form the basis of the claim." *Id.* In doing so, the NPRM apparently seeks to adopt the circularity analysis in *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018), which treats—and has been interpreted by the BIA

[54] Among other things, the restricted time frame has left us unable to comment on the effect of the NPRM on LGBTQI/H asylum seekers. Although the existence of other comments on those effects does not cure the prejudice to Tahirih, we point the agencies to the comment submitted by Immigration Equality, which specifically addresses the effects the NPRM would have on LGBTQI/H people.

as treating—any group even partially defined by "the persecution of [its] members" as "categorical[ly]" circular. *De Pena-Paniagua v. Barr*, 957 F.3d 88, 93 (1st Cir. 2020).

The NPRM's expansion of the meaning of circularity is inconsistent with international law. Although the phrase "particular social group" in the Refugee Convention is not a "'catch all' that applies to all persons fearing persecution," the Convention requires only that a social group not be "defined exclusively by the fact that it is targeted for persecution." UNHCR, *Guidelines on Int'l Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02 (2002), at 2.[55] Thus, "the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society." *Id.* at 4 (internal quotation omitted). The Convention, in other words, allows PSGs that do not "exist[ ] independently" of the persecution. 85 Fed. Reg. at 36,291. But the agencies do not even acknowledge, much less justify, this departure—and their proposal is therefore arbitrary.

The proposed expansion of the meaning of circularity also represents a dramatic departure from longstanding precedent. The courts of appeals have routinely said that a PSG is not circular unless it is defined entirely by persecution. *See, e.g.*, *De Pena-Paniagua*, 957 F.3d 88; *Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020); *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc); *De Castro-Gutierrez v. Holder*, 713 F.3d 375 (8th Cir. 2013); *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2011); *Kante v. Holder*, 634 F.3d 321 (6th Cir. 2011); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). Notably, the federal appellate cases on which the NPRM purports to rely are to the same effect. *See Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018) (quoting *Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011) for the proposition that a PSG is circular if it is "defined only by the characteristic that is persecuted); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). And the BIA, too, has long accepted PSGs that include references to the persecution that drives asylum seekers to the United States. *See, e.g.*, *Kasinga*, 21 I. & N. Dec. 357 ("young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice").

The NPRM arbitrarily fails to recognize the magnitude of the difference between the test uniformly applied by the courts of appeals and the test it proposes. The NPRM says only that the two are "not precisely the same." 85 Fed. Reg. at 36,278 n.38. In fact, comparing the two is—in the words of a case the NPRM cites on this point—"like comparing carrots to cucumbers." *Perez-Rabanales*, 881 F.3d at 67. Under the federal courts' test, "an unfreed slave in first century Rome" who is "persecuted precisely because he had been enslaved" would be able to seek relief. *De Pena-Paniagua*, 957 F.3d at 94. Under the NPRM's proposed test, he would not.

A comparison of two cases on which the NPRM purportedly relies—*Matter of A-B-* and *Perez-Rabanales*—further clarifies the difference. The First Circuit in *Perez-Rabanales* correctly held that the PSG accepted by the BIA in *Matter of A-R-C-G-*, 26 I. & N. Dec. 390 (BIA 2014)—namely, "married women in Guatemala who are unable to leave their relationship"—represents a non-circular reference to a group "viewed by society as a discrete class of persons." *Perez-Rabanales*, 881 F.3d at 67. In contrast, *Matter of A-B-*, which sought to overturn decades of case law, opined that the same PSG was impermissibly circular as a matter of law. 27 I. & N. Dec. at 334-35. By treating these

[55] https://www.unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html.

approaches as essentially equivalent even though they generate extremely different outcomes, the NPRM makes clear that it is the agencies, not the courts, who are "confus[ed]." 85 Fed. Reg. at 36,278 n.28. And its proposal to redefine circularity is therefore arbitrary.

Unsurprisingly, the NPRM's *ipse dixit* claiming that the courts have been "confus[ed]" about the meaning of circularity (85 Fed. Reg. at 36,278 n.38) is false. As the caselaw above makes clear, the courts have adopted a broadly uniform approach to circularity that asks whether a group is "viewed by society … as either distinct or uniquely vulnerable prior to the commission of the acts of persecution of which they complain." *Perez-Rabanales*, 881 F.3d at 67. And they have recognized that groups defined in part by reference to persecution can satisfy that criterion—a fact illustrated by, among many others, the PSG in *Kasinga*. There, the persecution was female genital mutilation/cutting—and the acronym "FGM" expressly appears in the PSG formulation the BIA accepted. But it is self-evident that the PSG is not impermissibly circular. And although the agencies apparently do not agree with that analysis, the NPRM does not even attempt to explain why. Nor does the NPRM make any attempt to justify the absurd consequence that it would bar asylum for individuals who *are* part of particular social groups as that term has always been understood.

Moreover, the analysis of circularity in *Matter of A-B-* on which the NPRM relies is contrary to the evidence. The Attorney General in that case simply assumed that an inability to leave was always on account of the persecution at issue—*i.e.*, physical abuse. But as the First Circuit recently put the point, there is no "basis other than arbitrary and unexamined fiat" for any such "categorical[ ] decree." *De Pena-Paniagua*, 957 F.3d at 94.

There are, in fact, a multitude of reasons other than physical abuse that can give rise to an inability to leave a relationship. Economic dependence is one. *See, e.g., De Pena-Paniagua*, 957 F.3d at 94. Social and cultural norms are another. *See id.* In some countries, those norms are backed by the force of the state. *See, e.g.*, U.S. Dep't of State, *Afghanistan 2018 Human Rights Report* 30.[56] Because people who engage in abuse seek to control every aspect of a survivor's life, an inability to leave can also result from enforced isolation from family and friends, the unavailability of means of communication, and the inability to access money or key documents are still other factors that can render it impossible to leave but that are separate from physical abuse. *See, e.g.*, Anne L. Ganley, *Health Resource Manual* 16, 37 (2008); Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* 36 (2019); Zlatka Rakovec-Felser, *Domestic Violence and Abuse in Intimate Relationships from Public Health Perspective*, 2:1821 Health Psych. Research 62, 63 (2014); Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 Sex Roles 743 (2005). "[P]hysical abuse might" therefore be visited upon people "because they are among those unable to leave, even though such abuse does not define membership in the group of" those "who are unable to leave." *De Pena-Paniagua*, 957 F.3d at 94. The Attorney General's failure to recognize as much was arbitrary—and so is the agencies' decision to blindly follow the same misguided path.

b. List of Disfavored PSGs

The NPRM next states that DHS and DOJ will, "in general, … not favorably adjudicate claims" where a PSG "consist[s] of or [is] defined by" the following disjointed laundry list of topics:

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[56] https://www.state.gov/wp-content/uploads/2019/03/AFGHANISTAN-2018.pdf.

> Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States.

85 Fed. Reg. at 36,291. Under the proposal, even this list "is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list." *Id.*

i. As a Whole

The NPRM's laundry list of disfavored PSGs violates the APA for at least seven reasons.

First, the laundry list is contrary to law. The INA, the 1967 Protocol, and BIA precedent all make clear that PSGs put forward by asylum seekers must be considered on a case-by-case basis, with key consideration given to the specific group at issue and the facts in the record. *See, e.g.*, 8 U.S.C. § 1158; UNHCR, *Gender Guidelines* at 3; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Ordonez Azmen v. Barr*, No. 17-982 (2d Cir. July 13, 2020); *Herrera-Reyes v. Att'y Gen. of the U.S.*, 952 F.3d 101, 110 (3d Cir. 2020); *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014) (citing *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (BIA 2014)); *Rivera-Barrientos*, 666 F.3d at 648 (citing *Niang v. Gonzales*, 442 F.3d 1187, 1196 (10th Cir. 2005)); *Jian Hui Shao v. Mukasey*, 546 F.3d 138, 148 (2d Cir. 2008) (citing *In re J-H-S-*, 24 I. & N. Dec. 296, 197-98 (BIA 2007)); *Zavala-Bonilla v. INS*, 730 F.2d 562, 565 (9th Cir. 1984); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). The NPRM would, without explanation, upend that procedure and instead impose near-blanket rules that some categories of PSGs may not proceed. The agencies are, in other words, attempting to "dictat[e] the … decision" of the immigration courts, the BIA, and the federal courts in individual cases. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S 260, 267 (1954). That the agencies may not do. *Id.*

To be sure, the proposed language states only that this is a "general" rule, but the NPRM provides no meaningful guidance for distinguishing when an exception would be permitted. Thus, assuming the laundry list is not merely hortatory, it imposes a near-dispositive presumption that violates the required, case-specific analysis demanded by the INA. The laundry list in the NPRM is therefore contrary to international law that binds the United States, to federal statute, and to the agencies' own longstanding position.

Second, the agencies have failed to provide any colorable justification for their decision to depart from their prior practice and categorically bar certain PSGs. The NPRM claims that the list is intended "to ensure the consistent consideration of asylum and statutory withholding claims." 85 Fed. Reg. at 36,278. But the agencies have not provided any plausible explanation for the view that any standards (much less their chosen standards) are needed to guide the courts or asylum officers in determining which PSGs are cognizable.

The NPRM does attempt to imply that guidance *must* be necessary, because "[t]he definition of 'particular social group' has been the subject of considerable litigation and is a product of evolving case law." 85 Fed. Reg. at 36279. But as the NPRM itself concedes, the BIA "'has articulated a consistent understanding of the term'" particular social group. *Id.* (quoting *Matter of A-B-*, 27 I.&N. Dec. at 321). And the agencies have not even attempted to provide evidence that either the federal courts or USCIS asylum officers have acted differently. The agencies have, in other words, failed to consider whether a problem actually exists; they have instead proposed a purported "solution" in search of a problem.

Third, the proposed laundry list of disfavored PSGs would directly impede the agencies' stated objective of consistency. The NPRM suggests that it is enunciating only a general rule subject to exceptions, rather than a universal rule. But the agencies have not explained—or apparently even considered—when an exception would be appropriate. The NPRM, in other words, would take an area of law that it concedes is well-settled and inject a novel, formless inquiry. That is a recipe for *in*consistency and increased case processing times.

Fourth, the NPRM provides no justification at all for any of the specific items on the laundry list of forbidden PSGs. It simply asserts, without evidence or argument, that "[w]ithout additional evidence, these circumstances are generally insufficient to demonstrate a particular social group that is cognizable." 85 Fed. Reg. at 36,279. The use of such a brazen *ipse dixit* without more renders each entry on the list arbitrary. *See, e.g.*, *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997). And there is no plausible justification for any of the items on the list.

Fifth, the NPRM also incorrectly assumes that many of the items on the list do no more than codify settled law—when they in fact seriously distort preexisting precedent and practice. Because "an agency may not depart from a prior policy *sub silentio*" (*FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009)), the NPRM's failure to acknowledge any of the individual changes it proposes, much less explain them in a rational way (which the agencies cannot do), independently renders its proposals arbitrary.

Sixth, the agencies' decision to include a laundry list of disfavored PSGs is invalid insofar as the proposed list is based on the analysis in *Matter of A-B-*. *See* 85 Fed. Reg. at 36,279 (repeatedly citing *A-B-*). The Attorney General in *Matter of A-B-* disapproved *Matter of A-R-C-G-* on the theory that the latter case "recognized an expansive new category of particular social groups." 27 I. & N. Dec. at 319. That characterization is false. The BIA in *Matter of A-R-C-G-* instead narrowly held, on the basis of longstanding principles, that a particular domestic violence survivor had put forward a cognizable PSG, but that whether the PSG is cognizable "will depend on the facts and evidence in each individual case." 26 I. & N. Dec. at 395. The post-*A-R-C-G-* decisions of the courts of appeals cited in *A-B-* make that clear. Those opinions did not, as the Attorney General claimed in *Matter of A-B-*, express "skepticism" about *A-R-C-G-*. 27 I. & N. Dec. at 332. Instead, they applied *A-R-C-G-* by finding that the factual records before them warranted a different conclusion. *See, e.g.*, *Vega-Ayala v. Lynch*, 833 F.3d 34, 39 (1st Cir. 2016); *Cardona v. Sessions*, 848 F.3d 519, 520-21 (1st Cir. 2017); *Guzman-Alvarez v. Sessions*, 701 F. App'x 54, 56-57 (2d Cir. 2017); *Marikasi v. Lynch*, 840 F.3d 280, 290-91 (6th Cir. 2016); *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 853 (8th Cir. 2017); *Jeronimo v. U.S. Att'y Gen.*, 678 F. App'x 796, 800-01 (11th Cir. 2017).

Seventh, in proposing these categories of generally barred PSGs, the agencies have arbitrarily failed to consider an important aspect of the problem—namely, the real-world implications of their

proposal. The fact that the NPRM expressly states a general rule rather than a universal rule shows that the agencies recognize that some PSGs included in the list can give rise to meritorious claims for asylum. But the agencies never take the obvious and necessary next step: They never consider whether their laundry list of generally barred PSGs will result in the erroneous denial of meritorious claims (and violations of the duty of *non-refoulement*). This problem is made worse by the agencies' failure to define when exceptions to the general rule would be appropriate—a failure that will, in some immigration courtrooms, doubtless result in the application of the categories as a general bar to asylum and withholding of removal. *See* TRAC, *Asylum Decisions*[57] (showing that, in some areas of the country, denial rates are in excess of 95%).

ii. Specific PSGs

Each individual entry in the laundry list of disfavored PSGs is also arbitrary and contrary to law.

(a) "Interpersonal Disputes" and "Private Criminal Acts"

The proposal to generally bar all asylum claims stemming from "interpersonal disputes" and "private criminal acts" of which "the government were unaware or uninvolved" (85 Fed. Reg. at 36,279) would, if enacted, violate the APA in at least six independent ways.

First, the proposals are contrary to law. Nothing in the INA either states or implies that interpersonal or "private" acts cannot generally give rise to asylum. To the contrary, the statute makes clear that such acts can do so if they rise to the level of persecution, are taken on account of a protected ground, and are inflicted by actors the government is unable or unwilling to control. 8 U.S.C. §§ 1101(a)(42)(A) & 1158(b)(1)(A). The NPRM's attempt to create what amounts to categorical exceptions to that statutory framework lies well beyond the limits of the agencies' authority.

To be clear, this aspect of the NPRM threatens to bar from relief individuals who clearly meet the definition of "refugee" in the INA. Claudine*, for example, suffered two intersecting forms of persecution—her family's experience of political persecution left her vulnerable to gender-based violence, and her persecutor's position of political power enabled him to abuse her with impunity. She had no choice but to flee her home and seek safe haven abroad. She explains:

> *When I was a child, my country experienced political unrest and my family and I became refugees in another country. While abroad, a good family friend, Marc*, briefly moved in with us, hoping to convince my parents to join his political movement back in our home country.*
>
> *One day, while my parents were away, Marc* raped me. He took out a knife and cut my stomach, as if to mark his territory. Being just a child, I laid on the floor in shock until my mother came home.*
>
> *My community learned about the assault and shunned me. Feeling desperate, ashamed, and alone, I tried slitting my wrists. Thankfully, I didn't succeed. Life started to improve when my family was able to move back to our home country. However, my new life did*

[57] https://trac.syr.edu/phptools/immigration/asylum/.

not last long. Marc moved next door. My family was powerless to remove Marc* because he had become a ranking member of the dominant political party.*

Marc started taunting me. One day, he threatened to have a "talk" with my younger sister, who was in elementary school at the time. I wanted to protect my sister, so I followed my sister and Marc* to his house. There, he brutally raped me. Again. He cut my stomach once more to mark his crime.*

The police dismiss women's reports of rape, so I didn't even try. My first rape was too shameful for my family and me. I kept this one a secret. I persevered. I moved on with my life and enrolled in university. There, I became involved with a new political party that had split from Marc's. However, Marc's* political party grew in power and started threating members of mine. Police made constant arrests and would often torture and murder anyone they took in. Marc* consistently called my phone just to harass me.*

I had to escape, so I fled to the United States and applied for asylum. Eventually I was able to talk about what happened to me and I was finally granted asylum.

Asylee Kae* provides another example. Kae* survived her abusive stepfather and FGM/C as a child and was threatened with yet more gender-based violence when her family discovered she had converted to a different religion. Kae*'s stepfather, a powerful man in the local government, was not only abusive to his children, but also to his three wives. His power protected him from any form of police intervention, and Kae* knew early on that she could never ask for help. Her cries would fall on deaf ears. When she was 10 years old, Kae*'s stepfather required that she undergo FGM/C. She was taken to an old house where two women, who had no professional training, forced her down on the carpet where she was cut. She bled profusely and fell ill with an infection. To this day, Kae* is haunted by what happened to her.

Despite her traumatic childhood, Kae* did very well in her studies and had the opportunity to continue her education in the United States. She moved to Houston, where she excelled academically. She lived with her stepsister, and her stepfather paid for their rent, food, and tuition.

Suddenly, the arrangement changed. Her stepfather and mother came to visit and discovered that Kae* had converted to another religion. Kae*'s stepfather was outraged. He immediately returned home, had her stepsister move out, and cut off all communication and financial ties with Kae*. A few months later, Kae*'s mother called to tell her that she must marry a man in her home country. He was more than 20 years Kae*'s senior and shared the same religion as her family, meaning that she would be forced to abandon her faith. And he already had one wife. The forced marriage was the only way Kae* would be accepted back into her family, but Kae* had always been strongly opposed to polygamy and wanted to practice her own religion. She wanted a future free of violence for both herself and her children. She wanted to choose her own path. Eventually she applied for and was granted asylum.

Second, it is manifestly unreasonable to use the PSG analysis to place entire groups of persecutors outside the asylum laws. After all, the PSG analysis turns on the nature of the group to which a survivor belongs, not on the identity of the persecutor. *See, e.g.*, *Acosta*, 19 I. & N. Dec. at

232-34; *De Pena-Paniagua*, 957 F.3d at 94-97. These proposed bars on PSGs are therefore "circular" by the agencies' definition: They are defined by reference to the persecution at issue.

Third, a general bar on asylum in all situations in which the government is "uninvolved" in the persecution is arbitrary and contrary to law. As a threshold matter, this requirement has nothing to do with the question of whether a PSG is cognizable. Rather, it involves the question of what showing an asylum seeker must make concerning the conduct of the government in her country of origin.

Further, the NPRM silently proposes a dramatic alteration of the well-established standard governing that question. "[T]he Board of Immigration Appeals and the Federal circuit courts of appeals," as well as EOIR and DHS, "universally acknowledge that for purposes of asylum and withholding of removal under the [INA] 'persecution' may involve a 'government's inability or unwillingness to control *private* conduct.'" Joseph Hassell, *Persecutor or Common Criminal? Assessing a Government's Inability or Unwillingness to Control Private Persecution*, EOIR Immigration Law Advisor (Sept. 2014) (quoting *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) and citing further cases) (emphasis in original).[58] By substituting "uninvolved" for "unable or unwilling," the NPRM would foreclose large categories of previously meritorious claims. The NPRM, however, does not even acknowledge that it would have this sweeping effect. And the agencies' silence reflects the lack of any non-arbitrary justification for this change.

The case of Uwa* from Nigeria illustrates that the government can be "unable or unwilling" to control a persecutor without being involved in the persecution. As an independent, well-educated, primary breadwinner, Uwa* outraged her husband's family. They pressured Uwa*'s husband to "control" her, including through violence. She refused to submit to their oppression, took her daughters, and left. Specifically wanting to share her story to both educate and feel supported by others, Uwa* explains:

> *In the community where I was born, a woman's place is thought to be in the home. But I had other plans. I was determined to pursue a higher education and obtain economic independence, so I attended college, obtained multiple degrees and worked hard to have a very successful career in banking and finance in the top banks in the capitol, Lagos.*
>
> *Unfortunately, my husband Ndulu*'s family did not care about my career. They were from a different tribe than I was, and they told Ndulu* that women from my tribe were too hard to control. Though my job supported my husband, many of his siblings, and his extended family, living with them was misery. I was constantly insulted, with Ndulu*'s family calling me names like "useless woman" and mocking my tribe. Whenever I tried to assert my independence, they turned their insults to Ndulu* for not controlling me better.*
>
> *Soon, Ndulu* too began to insult me, beat me physically, and then rape me, in order to "teach me" to be "his woman." For over two years I suffered his abuse. Ndulu* dragged me from my bed and beat me with an electrical cord, slammed me into the*

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58 https://www.justice.gov/sites/default/files/eoir/legacy/2014/10/03/vol8no7.pdf.

headboard, slapped me, hit me, and kicked me. Once Ndulu's beatings left me unconscious in a pool of blood and nearly caused me to miscarry our daughter. He kept me from seeking medical attention in all but the most dire of circumstances, so to this day my body bears the marks of his abuse.*

I tried to get help. I went to our church's marriage committee for counseling but Ndulu continued to threaten and abuse me in front of the committee, yelling 'Leave me alone. If I had a gun I would kill her and nothing would happen to me!' Next, I tried the police, but they told me, 'Woman, that is a family affair. Go and submit to your husband.' Finally, I decided to do the unthinkable and file for divorce. Nigerian women simply don't divorce their husbands. I had a very hard time finding a lawyer to represent me, and even when I found an attorney he eventually withdrew his representation because of Ndulu's* death threats against him.*

After a period spent in hiding and with no other options, I fled with my children to the United States where I applied for and was granted asylum. I am now studying to become a nurse so that I may realize the goals of economic independence and self-sufficiency that have always been so important to me.

The case of Aicha from Niger is also instructive. She recounts:

From a very young age, I witnessed and experienced violence in my home country. My father beat my mother, one of his four wives, sometimes so badly that she could not speak or eat for weeks. At age 15, my family began pressuring me to undergo female genital mutilation, but after seeing what my sister had gone through – the razor, the blood, the pain – I didn't want it. Because of my refusal, my family took away meals as punishment, and they cut me anyway.

At age 17, I was forced into marriage with a 52-year-old man. I cried on my wedding day, and that night began years of rape and beating that broke my body and my soul. After a beating that sent me to the clinic for stitches, I went to the police, but they had been paid by my husband to ignore my plea for help. I knew then that I had to escape. At the age of 19, I fled first to Togo, but my husband had family there, so I traveled to the United States in hope of finding safety. However, I just found more violence, as strangers who had initially offered me help forced me to cook and clean and forced sex on me.

I didn't speak any English. I didn't have any friends or family nearby and was not allowed to have visitors at the home where I was staying. And because of my past experience with police, I didn't think I could call them for help. I did not know at the time what human trafficking was, but I knew what I felt – being treated like a slave was wrong. I experienced persistent panic attacks, and when it got to the point where I had to be hospitalized, the woman I worked for told me not to come back.

I knew I had to seek real help. Eight years after I first arrived in the U.S., my attorney helped me file my asylum application and it was granted.

The NPRM's proposed standard would also perversely require survivors of persecution by non-state actors to report persecution to authorities even where laws against gender-based violence are limited or non-existent. Paula Tavares & Quentin Wodon, *Ending Violence Against Women and Girls: Global and Regional Trends in Women's Legal Protection Against Domestic Violence and Sexual Harassment* (Mar. 2018).[59] Even if a country does have laws on the books that purport to protect survivors, prosecutors may routinely fail to bring charges, and judges and juries may render weak verdicts or acquittals. Reporting gender-based violence in and of itself can even be life threatening due to retribution for doing so. While some law enforcement officers ignore or dismiss reports of gender-based violence, others may even be complicit in harming survivors as perpetrators themselves or those with family or other relationships to them.

Current asylum law permits asylum applicants to submit evidence as to why reporting gender-based violence to the authorities was not possible or dangerous. There is no legitimate justification for prohibiting an applicant from even presenting such evidence. It is absurd for a rule designed to protect asylum seekers to require that they potentially risk their lives to qualify for its protection. Rather, survivors should be permitted to seek asylum as victims of systemic human rights abuses, sanctioned by the state. They should not be punished twice: first by the failure of their own government to protect them, and second by our asylum system's refusal to accept evidence of that failure.

Fourth, the NPRM's use of the word "private" has the same effect: It implicitly raises the "unable or unwilling" standard on some claims. And the NPRM again fails even to recognize as much. The use of the word "private" is therefore arbitrary and contrary to law for the same reasons.

Fifth, the "interpersonal" category is even more sweeping and therefore also contrary to the INA. "Interpersonal" simply means "between persons." Webster's New World College Dictionary 706 (3d ed. 1997). That fact inescapably means that *all* persecution is "interpersonal." Persecution is not committed by cows, trees, or buildings; it is committed by one human being against another. The plain meaning of the "interpersonal" violence category would therefore bar *all* asylum claims in contravention of the INA. And once again, the NPRM fails to acknowledge this effect.

Sixth, the "interpersonal" and "private" categories are also contrary to the APA to the extent that, in the agencies' view, those categories apply to domestic or other gender-based violence. Any such application would be at odds with the evidence. Decades of research make clear that gender-based violence, including domestic violence, is *not* simply a private matter based on personal animosity. *See, e.g.*, Karen Musalo, *El Salvador – A Peace Worse Than War: Violence, Gender, and a Failed Legal Response*, 30 Yale J.L. & Feminism 3, 35 (2018); Comisión Internacional Contra la Impunidad en Guatemala, *Human Trafficking for Sexual Exploitation Purposes in Guatemala* (2016);[60] UN Women, *A Framework to Underpin Action to Prevent Violence Against Women*

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[59] http://pubdocs.worldbank.org/en/679221517425064052/EndingViolenceAgainstWomenandGirls-GBVLaws-Feb2018.pdf

[60] https://www.refworld.org/docid/584aaeac4.html.

(2015);[61] The Geneva Declaration, *Lethal Violence against Women and Girls* (2015);[62] United Nations Secretariat Department of Economic and Social Affairs, *The World's Women 2010*; [63] U.N. Secretary-General, *In-Depth Study on All Forms of Violence against Women,* U.N. Doc A/61/122/Add. 1 (July 6, 2006);[64] National Research Council, *Understanding Violence Against Women* (Nancy A. Crowell & Ann W. Burgess, eds. 1996); *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, 43 U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/Res/48/104 (1994);[65] Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 305 (1994). And the agencies do not cite any meaningful contrary evidence.

In fact, this proposal reverts us back several decades, prior to passage of the FVPSA and VAWA. Domestic violence in the United States was dismissed as a private family matter, meant to stay behind closed doors with victims suffering in silence. The government remained on the sidelines precisely for this reason, yet this was circularly used to justify its failure to intervene. The rule's retrogressive framing of family violence as a "personal dispute," even when an asylum seeker can document that it is severe, pervasive, and widely tolerated by authorities and others in her country, runs afoul of the United States' own domestic laws and policies. Rather, it is a core function of the government to protect individuals from gender-based violence. This function cannot simply be abdicated by deliberately obscuring such violence from view. In short, domestic and other gender-based violence cannot reasonably be seen as only "intrapersonal" or "private," and any application of the NPRMs proposed categories to that violence would be arbitrary.

The application of the "interpersonal" and "private" categories to domestic and other gender-based violence would also violate the Equal Protection Clause of the Fourteenth Amendment. The presumption created by these categories would disproportionately affect women, who are much more likely than men to experience violence by an intimate partner. *See, e.g.*, UN News, *67% of Women Have Suffered Some Type of Violence in El Salvador* (April 17, 2018); U.S. Dep't of State, *Guatemala 2018 Human Rights Report* 16 (2018);[66] U.S. Dep't of State, *Afghanistan 2018 Human Rights Report* 30; U.S. Dep't of State, *Saudi Arabia 2018 Human Rights Report* 44 (2018);[67] U.S. Dep't of State, *Kenya 2018 Human Rights Report* 23 (2018);[68] U.S. Dep't of State, *Russia 2018 Human Rights*

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61 https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/prevention_framework_unwomen_nov2015.pdf?la=en&vs=5223.

62 http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf.

63 https://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010%20Report_by%20chapter%28pdf%29/Violence%20against%20women.pdf.

64 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement.

65 https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.21_declaration%20elimination%20vaw.pdf.

66 https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf.

67 https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf.

68 https://www.state.gov/wp-content/uploads/2019/03/Kenya-2018.pdf.

Report (2018);[69] U.S. Dep't of State, *Burma 2018 Human Rights Report* 37 (2018);[70] U.S. Dep't of State, *Haiti 2018 Human Rights Report* 19–20 (2018);[71] Nat'l Coalition Against Domestic Violence, *Statistics*.[72] "Worldwide, almost one third (30%) of women who have been in a relationship report that they have experienced some form of physical and/or sexual violence by their intimate partner in their lifetime." World Health Org., *Violence Against Women*.[73] In fact, we are unaware of any published opinion considering a PSG involving only those who identify as straight, cis men. And the NPRM proposes no rational explanation linking this disproportionate effect on women to a legitimate government policy—much less show that it bears a substantial relationship to an important government objective. *See Craig v. Boren*, 429 U.S. 190, 197 (1976). To the contrary, given that there is no evidence to support the NPRM's assertion of widespread confusion over the definition of PSG, the only apparent goal of these categories is to reduce the number of people—especially women—who receive asylum in the United States.

(b) Remaining Factors

The remaining categories in the NPRM are equally infirm. The NPRM's attempt to disapprove of all PSGs within countries "with generalized violence or a high crime rate" (85 Fed. Reg. at 36,279), for instance, would work another sea change in the law that cannot possibly be squared with the INA. That category would, if enacted, prevent asylum seekers from the most violent countries in the world from basing PSGs in part on their nationality. But the social distinction requirement makes it effectively impossible to craft a cognizable PSG that does *not* refer to the asylum seeker's country of origin. This proposal would therefore upend 8 U.S.C. § 1158 by preventing people fleeing the most violent countries in the world from receiving asylum or withholding of removal in the United States.

The "generalized violence" category is also arbitrary to the extent that it seeks to codify the statement in *Matter of A-B-* that certain "claims are" purportedly "unlikely to satisfy the statutory grounds for" showing government inability or unwillingness to control the persecutors. 27 I. & N. Dec. at 320 (cited by 85 Fed. Reg. at 36,279). Attempting to codify that rule in regulations concerning PSGs once again impermissibly conflates two distinct elements of the test for asylum, because whether the government can control persecutors represents a distinct inquiry from whether a PSG is cognizable. And the agencies do not acknowledge, much less justify, this conflation.

The purported bar on PSGs defined by past criminal conduct, including membership in gangs (85 Fed. Reg. at 36,279), suffers from at least four fatal defects. It would change the law without explanation or justification by silently seeking to overturn the decisions of multiple federal courts of appeals. *See, e.g.*, *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). By muddying the waters in this way, it would run directly counter to the stated goal of the laundry list—*i.e.*, legal consistency (85 Fed. Reg. at 36,278). It would be contrary to the intent behind the bars to asylum in the INA, which preclude asylum based on a range of criminal

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69 https://www.state.gov/wp-content/uploads/2019/03/RUSSIA-2018-HUMAN-RIGHTS-REPORT.pdf.

70 https://www.state.gov/wp-content/uploads/2019/03/BURMA-2018.pdf.

71 https://www.state.gov/wp-content/uploads/2019/03/HAITI-2018.pdf.

72 https://ncadv.org/statistics.

73 https://www.who.int/news-room/fact-sheets/detail/violence-against-women.

conduct but pointedly do *not* preclude individuals from relief on the ground of previous gang membership. 8 U.S.C. § 1158(b)(2)(A)-(B). And it would work that contravention of congressional intent without even attempting to explain "why the statutory bars" on certain former persecutors "should be extended by administrative interpretation to former members of gangs." *Ramos*, 589 F.3d at 430.

The NPRM's proposed bar on "past persecutory activity" (85 Fed. Reg. at 36,279) is contrary to the APA in the same ways as the proposed bar on past criminal conduct. In fact, it would create even greater uncertainty, because the NPRM leaves the phrase "past persecutory activity" entirely undefined.

The NPRM next proposes to make gang recruitment-related PSGs generally non-cognizable (85 Fed. Reg. 36,279), but there is no support for doing so in the cases cited by the NPRM. And the NPRM does not, because it cannot, advance any ground for believing that the courts should not continue to consider recruitment-based PSGs on a case-by-case basis.

There is similarly no legal basis—and no ground advanced in the NPRM—for precluding the courts from assessing PSGs that touch on wealth on a case-by-case basis. 85 Fed. Reg. at 36,279. And the fact that the BIA thirteen years ago held, on a particular record, that "affluent Guatemalans" is not a cognizable PSG does not even begin to support the NPRM's sweeping proposal to bar all PSGs that mention wealth. *See In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (cited at 85 Fed. Reg. at 36,279).

Finally, the claim that any group premised on individuals returning from the United States will necessarily be "too broad" to qualify as a PSG (85 Fed. Reg. at 36,279) is factually and legally erroneous. As a factual matter, the number of people returning to some countries from the United States will be quite small. And as a legal matter, the fact that a group is potentially large does not by itself mandate the conclusion that the group is particular. *See, e.g.*, *De Pena-Paniagua*, 957 F.3d at 97; *Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010); *Malonga v. Mukasey*, 546 F.3d 546, 553-54 (8th Cir. 2008); *Ucelo-Gomez*, 509 F.3d at 73 n.2; *Niang*, 422 F.3d at 1199-1200.

c. Particularity and Social Distinction

The NPRM would require a PSG to be not only "based on an immutable or fundamental characteristic" but also "defined with particularity" and "recognized as socially distinct in the society at question." 85 Fed. Reg. at 36,291. The NPRM, however, arbitrarily fails to provide any reason for its proposal to codify these standards. That failure is unacceptable, because—as applied by the BIA—the particularity and social distinction requirements cut across each other. Specifically, under the BIA's interpretation of those requirements, an asylum seeker "identify a group that is broad enough that the society as a whole recognizes it, but not so broad that it fails particularity." *W.G.A. v. Sessions*, 900 F.3d 957, 964 n.4 (7th Cir. 2018). This "create[s] a conceptual trap that is difficult, if not impossible, to navigate," and that has led the BIA to effectively end grants of asylum based on PSGs that have not been previously approved. *Id.* And given that the NPRM would sweep away numerous other BIA precedents with no justification, the lack of an explanation for the agencies' choice to adhere to BIA precedent on this score is doubly arbitrary.

Further, if the agencies are to codify these prerequisites to PSGs, they must "consider all reasonable alternatives presented to" them. *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43

(1983)). To date, the agencies have failed to consider the alternate possibility of simply codifying the original definition of PSG set forth in the foundational case of *Matter of Acosta*, 19 I. & N. Dec. at 233. That definition, which requires PSGs to be based on immutable characteristics, has the signal virtue of being simple and straightforward. In fact, the *Acosta* definition would be understood even by many *pro se* asylum seekers. The particularity and social distinction requirements, on the other hand, are complex enough—and cut against each other enough—that they are incomprehensible even to some trained lawyers.

The definition in *Acosta* is also much more closely grounded in the statutory text than the requirements proposed in the NPRM. After all, "'general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.'" *De Pena-Paniagua*, 957 F.3d at 96 (quoting *Acosta*, 19 I. & N. Dec. at 233). And each of the grounds for asylum in the INA "'describes persecution aimed at an immutable characteristic.'" *Id.* (quoting *Acosta*, 19 I. & N. Dec. at 233). "'The shared characteristic' underlying a particular social group, therefore, 'might be an innate one such as sex, color, or kinship ties.'" *Id.* (quoting *Acosta*, 19 I. & N. Dec. at 233). The definition in *Acosta*, unlike the requirements proposed in the NPRM, is also consistent with international law. *See, e.g.*, UNHCR, *Gender Guidelines* at 7.

The agencies have also failed to consider a second alternative closer to the proposal in the NPRM. The UNHCR now defines a PSG in ways that include both immutability and the simple requirement that the group "be perceived as a group by society." *Id.* at 7. That definition, like the *Acosta* definition, is reasonably; it also remains significantly closer to the other grounds for asylum in the INA than the agencies' proposal. It is therefore arbitrary for the agencies to rubber-stamp existing BIA precedents without considering other options—especially in a rule that proposes to overturn numerous other BIA cases.

d. Procedural Matters

As a procedural matter, the NPRM proposes to require the specific PSGs on which an asylum seeker will base her claims to be put forth before the immigration judge or be forfeited forever. The NPRM again arbitrarily fails to provide so much as a word of explanation for this proposal. In particular, although it cites to a BIA opinion declining to entertain a PSG proffered for the first time on appeal where the asylum seeker had counsel in immigration court (*Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (BIA 2018)), the NPRM does not acknowledge, much less attempt to justify, the fact that its new procedure would also apply to asylum seekers who are not represented in immigration court.

That failure also amounts to an arbitrary failure to consider a significant aspect of the issue. Over the past five years, between 15% and 24% of all asylum seekers have been unrepresented by counsel. TRAC, *Record Number of Asylum Cases in FY 2019*.[74] People representing themselves lack significant legal training in U.S. asylum law, often speak little or no English, and have no way to fully familiarize themselves with the intricate rules surrounding PSGs. To require people in that situation to define their own PSGs dooms every pro se asylum seeker to failure on a PSG theory (no matter the underlying merits of the claim) and makes a mockery of the immigration courts.

[74] https://trac.syr.edu/immigration/reports/588/.

The NPRM's proposal also violates due process. The Supreme Court made clear decades ago that immigrants "within the territory of the United States," including those who are "unlawfully present" as well as immigrants with status and asylum seekers, are protected by the Due Process Clause of the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 212 (1982). And the "specific dictates of due process" derive from "three distinct factors": (1) "the private interest that will be affected" by a government action; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value * * * of additional or substitute procedural safeguards"; and (3) "the Government's interest." *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Here, the private interest at stake—avoiding the violence or torture that results from *refoulement*—is the most weighty interest conceivable. The government's countervailing interest is, given the NPRM's silence, nonexistent. And working with pro se asylum seekers, many of whom are unable to obtain counsel because the government has detained them in areas with very few lawyers, imposes a minimal burden on the government. Finally, we know that additional measures, such as allowing immigration judges and the BIA to reformulate proposed PSGs, provide effective and valuable safeguards.

For asylum seekers who are initially represented by counsel, meanwhile, the proposed procedural change would unlawfully revoke the right to raise an ineffective assistance claim later in the proceedings. As by numerous courts of appeals have recognized, asylum seekers have the due process right to the effective assistance of counsel in removal proceedings. *See Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Iavorski v. INS*, 232 F.3d 124, 128-29 (2d Cir. 2000); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Allabani v. Gonzales*, 402 F.3d 668, 676 (6th Cir. 2005); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005); *cf. Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006) ("[This circuit] has repeatedly assumed without deciding that an [individual's] claim of ineffective assistance may implicate due process concerns under the Fifth Amendment."). The NPRM would unconstitutionally attempt to revoke this right. It would also arbitrarily do so without acknowledging, much less justifying, that result.

2. Nexus

a. Laundry List of Barred Grounds

The NPRM's proposal as to nexus consists largely of a second laundry list of disfavored categories. This list would generally bar claims based on seven grounds: "[i]nterpersonal animus or retribution"; "[i]nterpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue"; "[g]eneralized disapproval of, disagreement with, or opposition to" gangs and other criminal groups; "[r]esistance to recruitment" by gangs and others; "targeting … for financial gain based on wealth or affluence"; "[c]riminal activity"; "[p]erceived, past or present, gang affiliation"; and "[g]ender." 85 Fed. Reg. at 36,292.

i. As a Whole

Like the laundry list in the PSG section of the NPRM, the laundry list in the nexus section must be withdrawn for a variety of reasons.

First, a general requirement that asylum claims will fail if there is evidence of particular motives is directly contrary to the INA. As the NPRM acknowledges (85 Fed. Reg. at 36,281), the

statute requires that a protected ground be only "one central reason for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). This language is clear and unambiguous: As the courts of appeals have uniformly recognized, it means that a protected ground need not constitute a persecutor's sole or even primary motive to satisfy the "one central reason" standard. *See, e.g.*, *Lara v. Barr*, 962 F.3d 45 (1st Cir. 2020); *Guzman-Vazquez v. Barr*, 959 F.3d 253 (6th Cir. 2020); *Ordonez v. Barr*, 956 F.3d 238 (4th Cir. 2020); *Enamorado-Rodriguez v. Barr*, 941 F.3d 589 (1st Cir. 2019); *Garcia-Moctezuma v. Sessions*, 879 F.3d 863 (8th Cir. 2018); *Gonzalez Ruano v. Barr*, 922 F.3d 346 (7th Cir. 2019); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148 (11th Cir. 2019); *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017); *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017); *Sharma v. Holder*, 729 F.3d 407 (5th Cir. 2013); *Shaikh v. Holder*, 702 F.3d 897 (7th Cir. 2012); *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010); *Rodas Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010); *Yinggui Lin v. Holder*, 565 F.3d 971 (6th Cir. 2009); *Ndayshimiye v. Att'y Gen. of the U.S.*, 557 F.3d 124 (3d Cir. 2009); *Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009). And an applicant for withholding of removal must meet the even lower standard of showing that a protected ground was "a reason" for the persecution. *Barajas-Romero*, 846 F.3d at 360.

The NPRM's laundry list would violate the statutory language. By stating that evidence of certain motives leads to claims that *cannot* receive asylum or withholding, it puts certain mixed motives beyond the reach of the statute. But because Congress has stated generally that "the applicant"—*i.e.*, all asylum applicants—must satisfy only the "one central reason test"—the agencies are not free to craft exceptions that place a higher burden on only some applicants. *See, e.g.*, *Bostock v. Clayton Cnty.*, ___ U.S. ___, 2020 U.S. LEXIS 3252, at *27-*28 (June 15, 2020) (discussing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* § 9, at 101 (2012) ("general words (like all words, general or not) are to be accorded their full and fair scope").

Second, the laundry list of claims that generally fail on the basis of nexus also violates the case-by-case adjudication requirement discussed above (*see* Section III.A.1.b.i, *supra*).

Third, the NPRM fails to recognize that it would supersede the statutory "one central reason" test in situations where its laundry list applies. The NPRM, in other words, would invert the statutory standard under the guise of advancing that standard. The laundry list of claims that purportedly fail at nexus is thus utterly arbitrary in addition to violating the plain text of the statute.

Fourth, the list is also arbitrary because, as with the list in the PSG section, the agencies have failed to consider the real-world effects of their proposal. As with the PSG list, there can be no question that the nexus list will result in the *refoulement* of asylum seekers who are entitled to relief under the INA. And as with the PSG list, this problem is made even worse by the fact that the agencies have not attempted to define when exceptions to the general bar on relief are appropriate. A general rule with no identified or identifiable exceptions is effectively a universal rule.

Fifth, the only justification put forward for the laundry list is equally arbitrary. The NPRM asserts that there is a need for bright-line rules around nexus. But the NPRM provides no reason why the courts should not continue to "shape" the nexus inquiry "through case law." 85 Fed. Reg. 36,281. In particular, the NPRM does not identify so much as a single development in the case law that it believes is erroneous or inconsistent with the statute. And the shaping that the NPRM seeks to pretermit is the inevitable result of the case-by-case determination of asylum applications required by

statute and international law. The NPRM's attempt to pretermit consideration by the courts thus cannot stand.

Sixth, as with the PSG list, the agencies provide no justification whatsoever for any individual entry on the laundry list. And no plausible rationale exists for any of those entries.

ii. "Gender"

The NPRM more specifically would prevent claims based on "gender" on purported nexus grounds. 85 Fed. Reg. at 36,281. There are at least nine independent reasons—in addition to the six reasons enunciated above for withdrawing the entire laundry list—why this specific proposal cannot stand.

First, any general rule that claims premised on gender lack a nexus to a protected ground is nonsensical. The inclusion of gender in the nexus list means that, in the agencies' view, gender can be used to define a particular social group—but that any persecution inflicted on the basis of gender cannot have been inflicted on the basis of a particular social group, even one defined in part by gender. That position cannot withstand even cursory scrutiny and is, therefore, arbitrary.

Second, the proposal interprets the statutory term "particular social group" in an unreasonable way. As shown above (*see* Section III.A.1.c), "gender" is—like family—a prototypical protected social group. And although "gender" appears in the "nexus" section of the NPRM, the agencies are effectively saying that gender cannot be part of the PSG analysis. That is contrary to precedent and an unreasonable interpretation of the INA.

Third, the inclusion of gender violates the constitutional guarantee of equal protection. The NPRM makes no attempt to state such an objective or to show how a nexus-based bar on gender asylum advances that objective. Indeed, the NPRM does not even provide a rational basis for singling out gender.

Fourth, the inclusion of gender in the laundry list is contrary to the evidence. The NPRM's theory, as demonstrated by the categories of "interpersonal" violence, appears to be that gender-based claims are purely personal disputes. And as shown above (*see supra* Part III.A.1.b.ii.(a)), that theory is at odds with the evidence.

Fifth, the NPRM's failure to include a rationale for listing gender as failing the nexus requirement is, without more, sufficient to render that inclusion arbitrary. And no non-arbitrary rationale for the inclusion of gender exists.

Sixth, assuming *arguendo* that a rationale can be implied from the NPRM's one-sentence quotation of *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005), that rationale is itself arbitrary. If it provides a reason at all, the quotation suggests that the agencies believe that the continued acceptance of claims based on gender will result in too many meritorious asylum claims. Any such rationale is contrary to the INA. Nothing in the "one central reason" language or the nexus language in the definition of "refugee" even begins to suggest that nexus can be rejected in any particular situation simply because accepting it might allow other persecuted asylum seekers to obtain relief.

For example, assume that 50.1% of a populous country follows one religion, while the remaining 49.9% of the country follows a second. Further assume that the majority relentlessly persecutes that highly numerous minority. There would self-evidently be no basis in the INA for rejecting the nexus simply because the persecuted minority is numerous. Similarly, if 20% of a country's population exerts control over the rest of the population through persecutorial violence tied to racial distinctions, there is no basis under the statute for holding that nexus does not exist simply because the persecuted are in the majority.

So, too, with gender—as *Niang* itself illustrates. After all, in the sentence *immediately following* the quotation in the NPRM, the Tenth Circuit states that gender *can* provide a basis for relief and that a case-by-case analysis of nexus is necessary. *Niang*, 422 F.3d at 1199-1200; *see also* Section III.A.1.b.ii.(b), *supra* (citing further cases). That rule mirrors international law: In its guidelines on claims involving gender-based persecution, UNHCR specifically notes that "[a]dopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status" and that "[t]he refugee claimant must establish that he or she has a well-founded fear of being persecuted" on account of a protected ground. UNHCR further emphasizes that while a group's size has been used "as a basis for refusing to recognise 'women' generally as a particular social group," this "argument has no basis in fact or reason, as the other grounds are not bound by this question of size." UNHCR, *Gender Guidelines* at 7.

Seventh, the NPRM fails to mention, much less reckon with, the cases in which immigration judges, the BIA, and the courts of appeals have held that gender-based persecution provides a valid ground for asylum. *See, e.g.*, *De Pena-Paniagua*, 957 F.3d 88; *Cece*, 733 F.3d 662; *Sarhan v. Holder*, 658 F.3d 649, 654-57 (7th Cir. 2011); *Perdomo*, 611 F.3d 662; *Agbor v. Gonzales*, 487 F.3d499 (7th Cir. 2007); *Hassan v. Gonzales*, 484 F.3d 513, 517-18 (8th Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006); *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2004), *vac'd on other grounds sub nom. Keisler v. Gao*, 552 U.S. 801 (2007); *Niang*, 422 F.3d 1187; *Mohammed v. Gonzales*, 400 F.3d 785, 795-98 (9th Cir. 2005); *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 639-42 (6th Cir. 2004); *Yadegar-Sargis v. INS*, 297 F.3d 596, 603-04 (7th Cir. 2002); *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (Alito, J.); *Kasinga*, 21 I. & N. Dec. 357; *cf., e.g.*, *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) ("Sexual orientation can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group."); *Karouni v. Gonzales*, 399 F.3d 1163, 1171-72 (9th Cir. 2005) (reaching the same conclusion).

UNHCR likewise recognizes countless forms of gender-based persecution for purposes of asylum:

> The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identify documents…In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.

UNHCR, *Gender Guidelines* at 5. A rule that fails to recognize, much less provide a plausible justification for, such a dramatic departure from these well-settled legal principles is arbitrary. And no plausible justification exists.

The case of Talya* is illustrative. Talya* helped support her family while she attended school to fulfill her dreams of becoming a nurse. During lunch with a "friend" one afternoon, several men entered the restaurant, sat down with the two girls, and became aggressive. Talya* quickly removed and destroyed her phone's SIM card, preventing the men from finding her family's contact information. Moments later, she was forced into a car at gunpoint, and the ringleader threatened to kill her. When the men suddenly released her "friend," Talya* realized they were traffickers and she had been set up. They drove for seven hours to an isolated house where she was confined to a small room and guarded by an armed man. He was instructed to kill her if she tried to escape. Talya* was raped by her kidnapper every night. He threatened to locate and punish her family if she protested. One day, Talya's* guard seized her birth certificate because the men planned to sell her. On the way back to the city, Talya* begged the guard to let her go. In a moment of compassion, he dropped her off at a bus station with a dire warning: "they will kill you if they find you." Talya* immediately took the bus home and arranged to meet her family in a safe place. Talya*'s family had very little money, knew the journey would be perilous, and dreaded separation from Talya* but fearing the worst, her mother arranged for her to flee to the United States. She is now safe after securing legal relief here and she looks forward to becoming a nurse and dedicating her life to helping others.

Eighth, because it would exclude meritorious claims for relief, the rule against gender-based asylum would violate the government's duty of *non-refoulement* as codified in the withholding of removal statute, 8 U.S.C. § 1231(b)(3)(A).

Ninth, the rule against gender-based asylum would aid and abet violations of the law of nations in contravention of the Alien Tort Claims Act ("ATCA"). There is a specific and universal obligation to prevent domestic violence and other violence against women in international law. That obligation is embodied in, among other things, Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women. *See Convention on the Elimination of All Forms of Discrimination Against Women*, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13;[75] U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 19: Violence against women, 1992*.[76] The NPRM, however, would specifically require the removal of people whose lives are in danger as a result of domestic and other gender-based violence to countries with long histories of violating this well-settled principle of international law. By doing so, the NPRM would make the U.S. government the aider and abettor of such violations. That result would place the government squarely in violation of the ATCA. *See, e.g., Doe v. Exxon Mobil Corp*., 654 F.3d 11 (D.C. Cir. 2011), *vac'd on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

iii. "Interpersonal" Persecution

The NPRM's laundry list of claims that are, as a general matter, supposedly unable to meet the nexus requirement also includes "personal animus or retribution" and "interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an

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75 https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx.

76 https://www.refworld.org/docid/52d920c54.html.

alleged particular social group in addition to the member who raised the claim at issue." 85 Fed. Reg. at 36,281. The NPRM's citation to *Matter of A-B-*, which asserted that "[g]enerally, claims by [individuals] pertaining to domestic violence … will not qualify for asylum," because such violence is purportedly "private" and based only "on a personal relationship with a victim" (27 I. & N. Dec. at 320, 338), strongly implies that these categories, too, are meant to foreclose claims premised on gender-based violence. Both categories are therefore invalid for all fourteen reasons above.

They are also arbitrary for additional, and independent, reasons. As shown above, the overwhelming evidence demonstrates that gender-based violence is not purely interpersonal. The application of these items to claims of gender-based persecution is therefore contrary to the evidence.

Further, the agencies have provided—and can provide—no rational justification for the "personal animus" category. The agencies quote *Zoarab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008), for the proposition that "[a]sylum is not available to [anyone] who fears retribution solely over personal matters." But that quote highlights the illegality of the NPRM's proposal. By making anyone "who claims persecution" based on "personal animus" ineligible for relief (85 Fed. Reg. at 36,292), the agencies also seek to foreclose claims in which personal animus is *one* driver, but not the *sole* driver of persecution. In other words, they seek to foreclose mixed motives claims. The quotation from *Zoarab*, far from supporting the NPRM, thus underscores its deficiencies.

The second category, for situations in which a persecutor has not persecuted others, is likewise arbitrary. As with the "interpersonal" category in the PSG laundry list, the agencies fail to acknowledge that the qualifier "interpersonal" is no qualifier at all; rather, it means that this category applies to *all* asylum applicants. Further, the agencies may not bar the initial victims of a persecutor from relief. After all, a persecutor may have the requisite motive to inflict violence on others but lack the means or opportunity to do so. And they also may not, consistent with definition of "refugee" in the INA, require individuals to prove that persecutors manifested animus against others. The question is only why a persecutor acted against *the applicant*, who is exceedingly unlikely to have evidence of the persecutor's statements or actions against a broad range of others.

iv. "Criminal activity"

Just as the agencies' attempt to limit claims based on "interpersonal" persecution will apply to all claims, their attempt to generally bar claims based on "criminal activity" (85 Fed. Reg. at 36,292) also sweeps broadly in ways the NPRM arbitrarily fails to recognize. Acts like murder, rape, and torture—the very acts that constitute persecution—are routinely criminalized around the world. A bar on claims based on "criminal activity" is therefore a bar on all claims based on persecution not expressly sanctioned by a state. That result is inconsistent with the INA, which allows claims based on the actions of non-state actors that the state is unable or unwilling to control. 8 U.S.C. § 1101(a)(42)(A).

b. Limitations on Country Conditions Evidence

The NPRM also proposes to bar "evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes were offered to show that a persecutor conformed to a cultural stereotype." 85 Fed. Reg. at 36,282. The agencies' explanation of this provision makes clear, however, that they have arbitrarily elided the distinction between stereotypes on one hand and legitimate country-conditions evidence

on the other. The proposal would therefore illegally result in the exclusion of significant evidence necessary for asylum seekers to show an entitlement to relief.

A stereotype is a "fixed or conventional notion or conception … held by a number of people, and allowing no individuality [or] critical judgment." Webster's New World College Dictionary 1314 (3d ed. 1997). For example, a pernicious and false stereotype, which is reflected in the comments by Attorney General William Barr quoted above, sees all asylum seekers as mere economic migrants seeking to game the U.S. immigration system. An equally pernicious and false stereotype, repeatedly peddled by both President Donald Trump and Stephen Miller, is that undocumented immigrants are criminals who terrorize U.S. citizens. As shown above (*see* Section III.A.1.b.ii.(a), *supra*), the NPRM's attempt to paint all domestic violence as driven only by interpersonal disputes is a similarly false stereotype. The "patriarchal attitudes … concerning the roles and responsibilities of women and men in the family, the workplace, political life and society" that are prevalent in countries such as Guatemala represent other notable and "deep-rooted stereotypes." U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination Against Women: Guatemala* 4 (2009).[77]

The NPRM, however, makes clear that it has no interest in ending the use of such stereotypes. In fact, as shown at various places in this comment, the NPRM actively perpetuates several of the stereotypes identified above. The provision against "stereotypes" would instead preclude asylum seekers from presenting legitimate country-conditions evidence.

The NPRM cites as its only so-called "stereotype" the statement that Guatemala has a "'culture of machismo.'" 85 Fed. Reg. at 36,282 (quoting *Matter of A-B-*, 27 I. & N. Dec. at 336 n.9). That statement is not a stereotype. It is not "fixed," it is not "conventional," and it most certainly does allow for individuality and critical judgment on during case-by-case adjudication. Rather, it is a *general* description of *prevailing* attitudes in Guatemala and neighboring countries that is grounded in fact and based on decades of research and reporting about that country. *See, e.g.*, Eileen Wang et. al., *Experiences of Gender-Based Violence in Women Asylum Seekers from El Salvador, Honduras, and Guatemala: A Retrospective, Qualitative Study* (March 8, 2019); Musalo, *supra*; Inter-American Dialog, *High Rates of Violence Against Women in Latin America Despite Femicide Legislation: Possible Steps Forward* (2018); Candace Piette, *Where women are killed by their own families*, BBC (Dec. 5, 2015);[78] Julie Guinan, *Nearly 20 years after peace pact, Guatemala's women relive violence*, CNN (Apr. 7, 2015);[79] Joyce Gelb & Marian Lief Palley, *Women and Politics Around the World: A Comparative History and Survey* (2009); Special Rapporteur on violence against women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Addendum: Guatemala* (2005);[80] Immigration and Refugee Board of Canada, *Human Rights Brief: Domestic Violence in Guatemala* (1994).[81] It is also based on reports from the U.S. State Department. *See, e.g.*, *Guatemala 2018 Human Rights Report* 16-17; U.S. Dep't of State, *Guatemala 2016 Human Rights*

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77 https://www.refworld.org/publisher,CEDAW,,GTM,49e83edd2,0.html.

78 https://www.bbc.com/news/magazine-34978330.

79 https://www.cnn.com/2015/04/02/world/iyw-guatemala-gender-violence/index.html.

80 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/108/17/PDF/G0510817.pdf?OpenElement.

81 https://www.refworld.org/publisher,IRBC,COUNTRYREP,GTM,3ae6a8108,0.html.

Report 18-21.[82] And in the context of *A-R-C-G-*, which gave rise to the quote the NPRM seeks to disapprove, it also reflects the individual experiences of an asylum seeker. *See Matter of A-R-C-G-*, 26 I. & N. Dec. at 389-90. The NPRM's failure to distinguish between (i) inflexible, reflexive stereotypes, and (ii) evidence of prevailing conditions that admits of exceptions and is drawn from systematic research and reporting—a distinction that any rational judge will be able to draw without difficulty—renders this proposal arbitrary.

The proposal is also arbitrary because the agencies have once again failed to acknowledge or reckon with the consequences of their proposal. Those consequences would be perverse. Paradoxically, the NPRM disparages the submission of the key corroborative evidence it simultaneously requires applicants to submit to support their claims; immigration judges and asylum officers would have to selectively ignore significant content in the very country conditions reports they are mandated to consult and apply. In cases involving gender-based violence, for instance, UNHCR notes that

> …country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status.
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> UNHCR, *Gender Guidelines*, at 10.

The NPRM's view of what constitutes a "stereotype" would also prevent an ethnic Tutsi fleeing the Rwanda in the 1990s from presenting evidence that large numbers of the ethnic Hutu majority in that country were active, or at least complicit, in genocide. And it would prevent Guatemalan people of indigenous descent from showing that the majority of the country views them as lesser. It would, in short, prevent demonstrations of nexus under the guise of a bar on stereotypes.

It would also bar the presentation of legitimate evidence necessary for other portions of the asylum inquiry. For instance, nothing less than evidence concerning the broad conditions in a whole country will suffice to show the impossibility of internal relocation—which asks whether there is any safe refuge in a country—in some cases. The agencies' redefinition of "stereotypes" to include country conditions therefore has the severe consequence of barring legitimate claims. The agencies themselves, however, have arbitrarily failed to acknowledge as much.

3. Political Opinion

The NPRM's proposed restrictions on "political opinion" as a basis for asylum are inconsistent with the plain meaning of that term. The NPRM proposes to restrict the term to an opinion "expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof"

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[82] https://www.justice.gov/sites/default/files/pages/attachments/2017/03/09/dos-hrr_2016_guatemala.pdf.

and to foreclose claims based on any opinion concerning a non-state organization that lacks a direct tie to the state. 85 Fed. Reg. at 36,291. But the term "political" is unambiguous. And it includes anything "concerned with government, the state, or politics" (Webster's New World College Dictionary 1045 (3d ed. 1997)), which is to say anything to do with "political affairs," "participation in" such affairs, and "political opinions [and] principles" (*id.*). The NPRM's proposed definition is therefore at odds with the plain text of the INA.

The proposed restrictions are also arbitrary and unreasonable. The agencies claim that the definition is necessary to "avoid further strain on the INA's definition of refugee." 85 Fed. Reg. at 36,280. But given that the *agencies'* proposed definition cannot stand with the text of the INA, it is the NPRM that would "strain … the INA's definition of refugee."

The agencies' only other proffered justification—that the term "political opinion" has been "difficult … to uniformly apply" (85 Fed. Reg. at 36,279) fares no better. The two cases the NPRM cites as supposedly contradictory are not: The cases involved different individuals and reached different outcomes based on different opinions and distinguishable facts. *Compare Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020), *with Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005).

In fact, although the agencies fail to acknowledge as much, the NPRM's proposed definition of "political opinion" is contrary to the uniform construction given to that term by the federal courts. The courts routinely hold, in line with the plain definition of "political opinion," that relevant opinions extend beyond who controls a state. *See, e.g.*, *Hernandez-Chacon*, 948 F.3d 94 (BIA did not adequately consider claim for asylum based on persecution on account of political opinion where applicant argued she would be persecuted by gang members because of her opposition to male-dominated social norms in El Salvador and her taking stance against culture that perpetuated female subordination and brutal treatment of women); *Faruk v. Ashcroft*, 378 F.3d 940 (9th Cir. 2004) ("We have established that persecution for marrying between races, religions, nationalities, social group members or political opinion is persecution on account of a protected ground."); *Sangha v. INS*, 103 F.3d 1482 (9th Cir. 1997) (holding that "[p]ast persecution of family members is routinely considered as evidence of possible imputed political opinion"); *Fatin*, 12 F.3d 1233 ("[W]e have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes.").

Even the cases cited by the NPRM fail to support its proposed definition. The Fourth Circuit in *Saldariagga* expressly held that "political opinion" reaches a "cause"—not just control of the state. 402 F.3d at 466. And the BIA's nuanced opinion in *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996), which sought evidence of imputed anti-government opinion in a case in which the asserted political opinion directly involved the government, is likewise at odds with the blunt, unthinking approach in the NPRM. The agencies have, in short, provided no non-arbitrary justification for their proposed definition of "political opinion," and they have also arbitrarily failed to recognize that their definition is at odds with preexisting law.

Further, international law is to the same effect as federal court decisions. According to UNHCR:

> Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-

> conformist behaviour which leads the persecutor to impute a political opinion to him or her… the image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. Women are less likely than their male counterparts to engage in high profile political activity and are more often involved in 'low level' political activities that reflect dominant gender roles. For example, a woman may work in nursing sick rebel soldiers, in the recruitment of sympathisers, or in the preparation and dissemination of leaflets.

UNHCR, *Gender Guidelines*, at 8.

Under the NPRM's exceptionally narrowed definition, by contrast, asylum seekers targeted for trying to advance equal access to education, employment, marriage, property ownership and inheritance, legal systems, and even the political process would not be eligible for relief. And persecution on account of "feminism" as a political opinion—the right to equality under the law for women and men—would not be accepted, no matter how extreme the harm inflicted on activists.

Finally, the NPRM fails to mention—much less seek to justify—the absurdities that would result from the application of its definition. As applied to the United States, the NPRM's proposed definition would mean that opinions and activism on topics including criminal justice, abortion, and civil rights are somehow not "political" because they do not go directly to the control of the federal, state, or local governments. And it would, as the NPRM all but admits, create equally bizarre results when applied to other countries. 85 Fed. Reg. at 36,279 (citing *Hernandez-Chacon*, 948 F.3d at 102-03). For instance, in countries where people are persecuted because they are feminists, a woman could be raped for educating other women about birth control or beaten for attending school. The proposed definition would preclude such claims, even though the plain meaning of the term "political" leaves no doubt that feminism is a political opinion. *See Fatin*, 12 F.3d at 1242.

4. Persecution

Persecution has traditionally been understood in our domestic asylum laws and under international refugee protection principles to mean a "threat to life or freedom." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* § 51 (1979) (*Handbook*).[83] The NPRM, however, proposes to drastically limit the definition of persecution to harm so severe that it "constitute[s] an 'exigent' threat," and to do so by negative inference from still another laundry list. Like the other laundry lists, however, this one violates the well-settled principle that asylum cases must be decided on their individual facts. *See also id*. To take one example, a threat of minor vandalism is very different from, say, a threat by a mob to kill an asylum seeker while beating him and dousing him in kerosene. *See Doe v. Att'y Gen. of the U.S.*, 956 F.3d 135 (3d Cir. 2020) (rejecting the argument that the latter threat was not persecution because it was "unfulfilled"). Yet the NPRM would lump both together—a result that is irrational as well as contrary to law.

Further, the NPRM would treat all asylum seekers the same, even though violence can rise to the level of persecution when directed against children even when it does not when directed against adults. *See, e.g.*, *Santos-Guaman v. Sessions*, 891 F.3d 12, 18 (1st Cir. 2018); *Hernandez-Ortiz v.*

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[83] https://www.unhcr.org/4d93528a9.pdf.

Gonzales, 496 F.3d 1042, 1045 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 105 (2d Cir. 2006); *Liu v Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004). Indeed, the predecessor agency to both EOIR and USCIS expressly recognized as much. Jeff Weiss, Acting Director, INS Office of Int'l Affairs, *Guidelines for Children's Asylum Claims* (1998).[84] The agencies may not silently change that position without a sound rationale, which they have not attempted to—and cannot—provide.

The NPRM also ignores the possibility that various harm can cumulatively amount to persecution (*see, e.g.*, UNHCR, *Handbook* § 201)—as well as the uniform decisions of the federal courts holding as much. *See, e.g.*, *Karki v. Holder*, 715 F.3d 792, 805 (10th Cir. 2013); *Fei Mei Cheng v. Att'y Gen. of the U.S.*, 623 F.3d 175, 192-94 (3d Cir. 2010); *Bracic v. Holder*, 603 F.3d 1027, 1036 (8th Cir. 2010); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008); *De Santamaria v. U.S. Att'y Gen.*, 525 F.3d 999, 1008 (11th Cir. 2008); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1048-49 (9th Cir. 2005); *Porodisova v. Gonzales*, 420 F.3d 70, 79-80 (2d Cir. 2005). There is no discussion of the vastly different forms of harm experienced by different asylum seekers. For example, survivors of intimate partner violence might experience it as relentless cumulative harassment, intimidation, threats, or acts of violence to themselves or their children, resulting in chronic, extreme, and debilitating post-traumatic stress disorder. Under this provision, such harm will be arbitrarily dismissed regardless of the devastating impact on the individual who must endure it. The agencies have thus arbitrarily ignored three critical aspects of the problem. And the fact that the list rests on faulty assumptions means that it will inevitably result in *refoulement*—a possibility that the agencies have also chosen to ignore.

In addition, the NPRM provides no rational justification for proposing a laundry list. It contends that there is a "wide range of cases interpreting 'persecution'" (85 Fed. Reg. 36,280), but that is unremarkable: Decades after the enactment of the INA, there are bound to be many cases interpreting a core term of asylum law. And the mere fact that many cases exists does not show regulations are necessary; after all, there would be just as many cases discussing the meaning of "persecution" if regulations defining the term had issued 30 years ago. The agencies could, of course, attempt to show some confusion or inconsistency among the cases—but with one exception (which incorrectly interprets the case law), they fail utterly to do so.

The purported explanation of the rule also misstates settled legal standards. It cites *Matter of A-B-* for the proposition that "persecution requires an intent to target a belief, characteristic or group." 85 Fed. Reg. at 36,280 (discussing *Matter of A-B-*, 27 I. & N. Dec. at 337). This has nothing to do with the definition of persecution—it is instead a purported restatement of the nexus standard. And it is inconsistent with the statutory statement of nexus, which requires only that a protected ground be "one central reason" for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). The NPRM is arbitrary to the extent it bases its attempt to define persecution on this impermissible definition of a separate concept.

The individual items in the laundry list are also contrary to law and arbitrary. For example, the first item on the list would place every "instance of harm that arises generally out of civil, criminal, or military strife in a country" outside the definition of "persecution." 85 Fed. Reg. 36,280. That result is flatly contrary to the INA. Although some violence inflicted during conflicts is not persecution on account of a protected ground—a statement that encapsulates the limited holding of the BIA opinion that the agencies attempt to cite in support of the NPRM (*see Matter of Sanchez & Escobar*, 19 I. &

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[84] https://www.aila.org/infonet/ins-guidelines-for-childrens-asylum-claims.

N. Dec. 276 (BIA 1985))—some violence does rise to that level. And the INA prohibits the agencies from turning away asylum seekers who suffer such violence on the ground that it does not constitute "persecution." *See* 8 U.S.C. §§ 1101(a)(42)(A) & 1158(b)(1)(A).

The list entry concerning "threats" (85 Fed. Reg. at 36,281) is similarly arbitrary, because the NPRM fails to consider the significant on-the-ground effects a rule placing threats beyond the realm of "persecution" would have. The NPRM would turn away a person who experiences credible death threats because they have not yet been murdered and would turn away a person who experiences credible threats of sexual assault because they have not yet been raped. Essentially, the agencies propose to require asylum seekers to take the chance that they will survive an actual murder attempt, and to undergo the serious psychological and physical harm of rape, before they enjoy even the possibility of receiving asylum in the United States. That result cannot be squared with the INA's definition of "refugee" or justified in a non-arbitrary way. *See, e.g.*, *Antonio*, 959 F.3d at 794.

Further, the NPRM significantly misstates the existing case law as it concerns threats. The agencies contend that "courts have been inconsistent in their treatment of threats as persecution." 85 Fed. Reg. at 36,281 n.32. But that is not so: It has been settled for more than 40 years that persecution encompasses "threat[s] to [the] life or freedom of … those who differ in a way regarded as offensive." *Acosta*, 19 I. & N. Dec. at 222-23 (citing cases). And the extant cases, including all of the cases cited in the NPRM, uniformly demonstrate that certain severe threats, most commonly serious threats of death, can constitute past persecution.

To be clear, none of the cases cited in the NPRM's footnote on this subject actually holds that threats never constitute past persecution. Rather, all but one of those cases expressly hold or suggest that at least some threats *can* constitute past persecution (*Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000); *Zhen Hua Li v. Att'y Gen.*, 400 F.3d 157, 164 (3d Cir. 2005); *Boykov v. INS*, 109 F.3d 413, 417 (7th Cir. 1997); *Ang v. Gonzales*, 430 F.3d 50, 56 (1st Cir. 2005)), while the final case holds only that specific, relatively less serious threats did not constitute past persecution (*Guan Shan Liao v. United States DOJ*, 293 F.3d 61, 70 (2d Cir. 2002)). There is, in fact, no good-faith way to read the cases cited in the NPRM in any other way. The agency's claim that judicial discrepancies require a regulation on this topic is therefore patently false.

The remaining entries in this laundry list arbitrarily downplay the severity and traumatic effects of various actions, including detention, violent harassment, and state coercion. *See* 85 Fed. Reg. at 36,280-81. In particular, the NPRM would silently overturn cases holding that detention can rise to the level of persecution. *See, e.g.*, *Shi v. U.S. Atty. Gen.*, 707 F.3d 1131, 1237 (11th Cir. 2013); *Haider v. Holder*, 595 F.3d 276, 286 (6th Cir. 2010); *Beskovic v. Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006). It would silently overturn the cases, cited above, making clear that persecution can be found on the basis of an accumulation of incidents over time. And it silently implies that criminal laws subjecting individuals to death on protected grounds cannot give rise to a well-founded fear of persecution if the state uses the law to kill relatively few people. Absent a non-arbitrary justification for these results—which the NPRM does not even try to provide, because no such justification exists—these factors must also be withdrawn.

5. Internal Relocation

The NPRM's proposed changes to the internal relocation analysis would arbitrarily replace a set of factors that bear directly on whether internal relocation is feasible with a set of factors that has

extremely limited relevance to that question. The current regulation governing internal relocation states that "adjudicators should consider," among other things, (1) "whether the applicant would face other serious harm in the place of suggested relocation"; (2) "any ongoing civil strife in the country"; (3) "administrative, economic, or judicial infrastructure"; (4) "geographical limitations"; and (5) "social and cultural constraints." 8 C.F.R. § 208.13(b)(3); *accord id.* § 1208.13(b)(3).

Contrary to the NPRM, all of the factors in the current regulations bear directly on whether "the applicant could avoid future persecution by relocating to another part of the country." 8 C.F.R. § 208.13(b)(1)(B). In particular, the infrastructure factor—the only factor the NPRM specifically singles out as supposedly irrelevant (85 Fed. Reg. at 36,282)—directly goes to the question whether officials in a proposed part of the country would have the ability to control persecutors. Absent administrative infrastructure, such officials would not exist; absent economic infrastructure, they would not be able to respond; and absent judicial infrastructure, their orders would not be enforceable.

In contrast, the factors proposed by the NPRM do not bear directly on the question whether someone could avoid future persecution by relocating to another part of the country. The "size of the country" at issue (85 Fed. Reg. at 36,293), for instance, is usually not relevant. The persecutor in an asylum case is, by definition, either the state or an actor the state is not willing or able to control—and there is no reason to believe that either state persecution or state acquiescence is limited to a particular locality. The U.S. government does not act in one way in New York and in another way in North Dakota—and it is folly to expect other governments to act differently.

The "geographic locus" of the persecution (85 Fed. Reg. at 36,293) is similarly irrelevant. A persecutor who acted in one place because that is where a survivor was located is exceedingly unlikely to cease their violence simply because the asylum seeker moves. Rather, if the persecutor can follow, they are likely to follow. For the same reason, the "size, reach, or number of the alleged persecutor [sic]" (*id.*) has no bearing on whether internal relocation is reasonable, because even a single persecutor with local reach might well have the power to follow the asylum seeker.

Any consideration of an asylum seeker's "demonstrated ability to relocate to the United States" would be triply arbitrary. Whether an asylum seeker can move represents a categorically different inquiry from whether an asylum seeker is safe in their new home. In many cases—as in asylum seekers from the Northern Triangle—the United States is the first safe haven they encounter, because there is formal freedom of movement among Northern Triangle countries under the Central America-4 Free Mobility Agreement, and because persecutors routinely show their willingness and ability to follow survivors into Mexico. One example includes Beatrice*, a woman whom Tahirih counseled. Beatrice* fled Central America after suffering years of domestic abuse including regular beatings and rapes. Her husband became increasingly violent toward both her and their children over time. She finally fled to Tijuana, found a shelter, and applied for asylum. After several weeks, however, she realized that she and her children were no longer safe in Mexico either. Her husband's relative, also from their country, managed to find them in Tijuana and violently attack them.

Given that someone to whom the internal relocation inquiry is applied has definitionally reached the United States, this factor is not a "factor" at all but rather an inappropriate, universal thumb on the scale against a grant of asylum. There is simply no connection between the NPRM's proposed factors and "whether … persecution generally occur[s] nationwide." 85 Fed. Reg. at 36,282. Indeed, the list of factors in the NPRM is so unmoored from reality that it will routinely cause the government to abet violations of international law in violation of the ATCA.

Finally, the NPRM is arbitrary insofar as it argues that the current regulations provide insufficient guidance by stating that factors "'may, or may not' be relevant" or "'determinative'" in any given case. 85 Fed. Reg. at 36,282. That language is nothing more than a realistic, and necessary, recognition that asylum cases are decided on their individual facts. Any attempt to provide that certain factors—especially the irrelevant factors proposed by the NPRM—must be considered and determinative of every set of facts is therefore arbitrary.

The NPRM also proposes to shift the burden of proof on internal relocation to asylum seekers whenever "the persecutor is not the government or a government-sponsored actor." 85 Fed. Reg. at 36,293. The NPRM's sole justification for this change is that "a private individual or organization would not ordinarily be expected to have influence everywhere in a country." *Id.* at 36,282. That statement is both incorrect and irrelevant. The agencies themselves routinely claim that private organizations have influence that crosses borders and, in fact, extends into this country. *See, e.g.*, ICE, *Combating Gangs*;[85] DOJ, *Department of Justice Fact Sheet on MS-13* (Apr. 18, 2017).[86] Case law also illustrates the nationwide reach of much persecution inflicted by non-state actors. *See, e.g.*, *Antonio*, 959 F.3d 778; *Cece*, 733 F.3d 662.

Furthermore, even a single persecutor acting alone may have the ability to move—and if the persecutor moves to follow an asylum seeker, internal relocation is unreasonable. In some cases, however, it will be difficult for an asylum seeker to show that a persecutor will follow unless the persecutor has already done so. In such cases, the NPRM's proposed shift of the burden of proof will inevitably result in refoulement by returning a country in which prior persecutors can, and do, find and commit violence against the asylum seeker.

Finally, the rule arbitrarily sets standards that survivors of gender-based violence will rarely, if ever, meet. A survivor often fears persecution from one individual. A common tactic of perpetrators is to threaten to find and punish victims for escaping, no matter where they escape to. A survivor would have to be harmed because her persecutor carried out his threats, and then have objective evidence of such harm, in order to even have a chance of meeting the NPRM's proposed burden as to internal relocation. It is, of course, highly unlikely that a survivor could do so, no matter how severe the persecution. It is unjust to impose such an unrealistic burden under these circumstances.

For example, Camille* from Burkina Faso was unable to relocate within her country. From the moment of her birth, Camille's* religion set her apart from others in her tribe. Her parents were Catholic. They raised Camille* to share their religion, but they did not protect her from life-threatening customs that prevailed in her community.

At age 7, Camille* was sent to a hut in the woods. Inside, a villager cut her genitals with a rudimentary blade. She walked back to her village with blood streaming down her legs.

At 19, she was forced into marriage and had to leave her family and friends behind to live in her husband's village. Upon arrival, Camille's* sister-in-law examined her genitals and declared that she must undergo another cutting. A few days later, a group of women attacked Camille*, sitting on

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85 https://www.ice.gov/features/gangs.

86 https://www.justice.gov/opa/speech/file/958481/download.

her stomach and pinning down her arms and legs as a second FGM was performed. A month later, Camille* and her husband moved into the city.

Once the new couple was away from home, their relationship took a surprising turn; it flourished. Her husband broke away from the traditions of the men of his community. He refused to take a second wife, and he eventually converted to Catholicism for Camille*. The birth of their first child—a girl—was difficult, likely as a result of complications from FGM/C, and Camille* was in labor for three days. With an intimate understanding of the dangers of FGM/C and the support of her husband, Camille* became a traveling nurse, educating people in rural villages about the life-threatening effects of FGM/C.

Camille's* career as a nurse, however, did little to prepare her for the sudden death of her husband. Doctors told her he died of a heart attack or stroke. "*My world died with him that day,"* Camille* recalls. When Camille* returned to her husband's village for his funeral, his family forced her to undergo a humiliating ritual. They shaved her head and paraded her naked around the village while people beat her with sticks to exorcise the demons that they believed had killed her husband. According to the tribe's tradition, Camille* now belonged to the family, like a piece of property passed from one person to the next. The family demanded that Camille* marry her late husband's younger brother, in part so that he would inherit her husband's money. Camille* refused.

Her defiance enraged the brother and marked the beginning of a violent 12-year campaign against Camille* and her children. The family sold her home in the city without her knowledge. Camille* was forced to move. She sought help from her family and several governmental agencies, including the police, but no one was able to protect her. The abuse, led by her husband's brother, escalated. He stalked her at home and at work. On one occasion, he came into her house, grabbed her by the neck, and took out a knife. Camille*'s youngest son tried to save her and was stabbed. Less than a year later, her tormenter attacked her with a stick outside the hospital where she worked, threatening to kill her with his bare hands.

Camille* had two choices: escape or die. "*There was nowhere safe in my country for me*," she says. "I fought for 12 years, and I cannot fight any longer." Camille* escaped to the United States and sought and was granted asylum.

Ana* from Honduras similarly tried several times to escape violence within her own country and abroad but was always discovered and returned to harm. When Ana* was 23 years old, she met a man named Wilmer, and they moved in together. Wilmer eventually began to abuse Ana* and, as a tactic of isolation, he forbade Ana* from leaving the house unaccompanied. Ana tried to separate from Wilmer many times, even moving in with her brother, but Wilmer came after her each time. She could not even contact the police because Wilmer had a friend on the force who would make sure to protect him. After years of living in fear, Ana* knew that she had to flee Honduras for her safety. After unsuccessfully trying to flee to the United States, she returned to Honduras and Wilmer found her again. The abuse continued. Ana* fled for a second time and was finally granted asylum.

Aicha's case described above also illustrates the challenges survivors face in fleeing their persecutors even when they flee to non-contiguous countries. Aicha first tried to flee from Niger to Togo, but her husband's family was in Togo so she no safer there than she had been in Niger.

6. Firm Resettlement

The NPRM's proposed changes to the "firm resettlement" rule are contrary to the plain text of the INA. The statute provides that an individual who "was firmly resettled in another country prior to arriving in the United States" is ineligible for asylum. 8 U.S.C. § 1158(b)(2)(A)(vi). In this context, the word "firm" means "fixed; stable," "continued steadily; remaining the same," or "unchanging; resolute; constant." Webster's New World College Dictionary (3d ed. 1997), at 509. And because to "settle" is "to establish as a resident or residents" (*id.* at 1228), to "resettle" is to do so again. To be "firmly resettled" in another country, then, is to be a fixed, stable resident of that country.

None of the NPRM's proposals can plausibly be seen as consistent with the statutory text. It is laughable to call anyone who "could have resided in any permanent legal status or … renewable legal immigration status" in a country in which they fleetingly set foot (85 Fed. Reg. at 36,286) "firmly resettled" in that country. Someone who only "potentially" might be able to stay in a country "indefinitely" (*id.*) is also not established as a resident of that country until that potential turns into a reality. Someone who is voluntarily present for the relatively short duration of one year (*id.*) is also not established as a resident—as DOJ's statements about DACA recipients make abundantly clear. *See, e.g.*, Oral Arg. Tr., *DHS v. Regents of the Univ. of Cal*. (Nov. 12, 2019) (describing the fact that DACA is "only granted in two-year increments" as evidence that it is "a temporary stop-gap measure that could be rescinded at any time").[87] And being a "citizen" of another country who was fleetingly "present" in that country (*id.*) has nothing at all to do with "residence." To the contrary, someone with citizenship in country A but who resides in country B is, by definition, *not* a resident in—and therefore not settled in—country A at all.

For the same reasons, even if the phrase "firmly resettled" were ambiguous—and it is not—each of the NPRM's proposed expansions of that concept would be unreasonable. Furthermore, the rationales that the agency has provided for those proposed expansions are arbitrary. The agency claims that there are now more "resettlement opportunities," because "[f]orty-three countries have signed the Refugee Convention since 1990." 85 Fed. Reg. at 36,285 & n.41. But the question whether someone is *actually* resettled in a country has nothing to do with whether there is an *opportunity* for resettlement. Furthermore, the agency's logic is fallacious. The fact that a country signs the Refugee Convention bears no relationship to whether the country provides (1) actual pathways to asylum or other status; (2) full and fair procedures; or (3) a safe haven that would permit refugees to avoid persecution. And as shown by sources cited throughout this comment, countries such as Afghanistan, Haiti, Russia, Mexico, Guatemela, Honduras, and El Salvador—all signatories to the Convention (UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*)[88]—are countries in which these criteria are not met. In particular, none of those countries provides a possible escape from persecution for survivors of gender-based violence.

For the same reasons, the proposed expansion of "firm resettlement" does not advance the "interest of those genuinely in fear of persecution in attaining safety as soon as possible." 85 Fed. Reg. at 36,285. Passing through a country does not make it a safe. *See* Section III.A.7.c, *infra*. The

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[87] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-587_886a.pdf.

[88] https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

ability to stay in a country without authorization for a year does not make it safe for long-term resettlement and does not account for the possibility of a well-founded fear of future persecution. And being a citizen of a country, without more, does not make it safe. To take just one example, a survivor of gender-based violence from Honduras who is also a citizen of Guatemala, and passes through Guatemala when fleeing Honduras, is not safe from persecution in Guatemala.

Furthermore, the proposed redefinition of "firm resettlement" ignores the on-the-ground experiences of survivors and other asylum seekers. Limited access to financial resources might make flight directly from a home country to the United States very challenging for women and girls. Their escape will be circuitous and arduous, and they might be more likely to need false documents or to leave under false pretenses, if they would otherwise need permission of an abusive male relative to exit their country. Once a survivor has reached a country of transit, resettlement may be unsafe despite an offer of refugee or asylee status. As noted above, persecutors are known to pursue survivors in neighboring countries after they try to escape, and a survivor might also face threats to her safety as a woman residing alone in the country, or even in a refugee camp where there is little if any protection from sexual assault. *See* UNHCR, *Guidelines on the Protection of Refugee Women*.

The NPRM would also shift the initial burden of proof as to firm resettlement without even acknowledging, much less justifying, the change. At present, the government "bears the burden of presenting prima facie evidence of firm resettlement." *Matter of A-G-C-*, 25 I. & N. Dec. 486, 501 (BIA 2011). Under the NPRM, however, the burden would immediately be placed on the asylum seeker to negative the possibility of firm resettlement whenever "the evidence of record indicates that the firm resettlement bar may apply." 85 Fed. Reg. at 36,303. In other words, the NPRM would eliminate the government's burden *sub silentio*. Such a change is arbitrary by definition.

Further, the NPRM's proposal would needlessly prolong and complicate proceedings in immigration court. The agencies have not provided any definition of what it means for "the evidence of record" to "indicate[ ] that the firm resettlement bar *may* apply." *Id.* (emphasis added). Without such a definition, immigration judges and practitioners will suffer confusion, not present under current law, about whether firm resettlement is an issue in a case.

7. Discretionary Factors

The final two laundry lists in the NPRM include entries that would bar a favorable exercise of discretion under 8 U.S.C. § 1158(b)(1)(A) in effectively every asylum case. Specifically, the NPRM proposes three "significant adverse discretionary factors": (1) any "unlawful entry or attempted unlawful entry" not "made in immediate flight from persecution in a contiguous country"; (2) with trivial exceptions, "[t]he failure … to apply for protection" in a third country through which an individual transited; and (3) the "use of fraudulent documents to enter the United States" unless an individual traveled to the United States directly from their home country. 85 Fed. Reg. at 36,292.

The NPRM also proposes no fewer than nine factors that would bar asylum except "in extraordinary circumstances." 85 Fed. Reg. at 36,293. Those factors are: (1) spending more than 14 days in almost any third country en route to the United States; (2) traveling through more than one country en route to the United States; (3) being subject to a criminal conviction or sentence that would bar asylum "but for the reversal, vacatur, expungement, or modification of [the] conviction or sentence"; (4) accruing "more than one year of unlawful presence" before applying for asylum; (5) failing to timely report income to the IRS, to file any tax return, or to pay any tax due; (6) the previous

filing of two or more denied applications for asylum; (7) a finding that the asylum seeker withdrew with prejudice, or abandoned, a prior asylum application; (8) failing to attend an asylum interview; and (9) failing to file a motion to reopen based on changed country conditions "within one year of those changes in country conditions." *Id.*

Like the laundry lists concerning PSGs, nexus, and persecution, these lists must be withdrawn in their entirety—and each individual entry on the lists must also be withdrawn—as arbitrary and contrary to law.

a. Generally

The lists must be withdrawn in their entirety for at least seven reasons. *First*, whether read together or alone, the lists will functionally exclude almost all asylum seekers from the remedy of asylum. They are therefore contrary to the statutory presumption in § 1158(a)(1) that all refugees may apply for, and are eligible for, the remedy of asylum.

Second, the NPRM provides no explanation at all for the agencies' choice to codify lists of adverse factors. Instead, it notes only that the agencies have issued guidance on the exercise of discretion in other circumstances, without ever suggesting why it is reasonable to do so here. 85 Fed. Reg. at 36,283. That fact, without more, makes the proposal arbitrary.

Third, the agencies do not appear to have considered any alternatives to the lists of adverse factors. The agencies could, for instance, discuss positive factors instead of, or in addition to, negative factors. Or the agencies could continue to trust the immigration courts and the BIA to properly conduct a totality-of-the-circumstances analysis. After all, the immigration courts have done so for decades, and the NPRM expresses no disapproval whatsoever of the job the courts have done over that period of time. This failure to consider significant alternatives is also sufficient, standing alone, to render the proposed lists arbitrary.

Fourth, as with all of the other proposals in the NPRM, the agencies have made no attempt to consider the real-world consequences of the proposed lists of adverse factors. In particular, they fail to acknowledge—much less justify—the inescapable consequence that the lists would make effectively every asylum seeker ineligible for asylum.

Fifth, the NPRM's claims that the lists "build on the BIA's guidance" (85 Fed. Reg. at 36,283) and on "prior precedent from the Attorney General" (*id.* at 36,284) are simply false. The only examples the NPRM provides of prior bars involve individuals who committed violent crimes—and one of those examples is not even from the realm of asylum law. But none of the factors that the agencies now propose has exclusively to do with violent crime, and only one of those factors even carries the potential ever to overlap with the commission of violent crime. The agencies do not acknowledge, much less attempt to justify, the disconnect between existing rules barring those who commit certain violent crimes from asylum and their much more wide-ranging proposals. Further, as shown at length below, the NPRM proposes to dramatically reweight some factors and invent others out of whole cloth. The list of discretionary factors is therefore also arbitrary for the reason that it does not, and cannot, advance the only arguable goal enunciated by the NPRM.

Sixth, the exceptions to the lists are insufficiently crafted. The list of "significantly adverse" factors has no express exceptions at all. That fact both suggests that the agency has not even attempted

to consider countervailing equities and ensures that the implementation of the list by immigration judges will be messy and inconsistent. And although the list of general bars does have exceptions, those exceptions are so narrow as to be meaningless. The list of general bars is, in other words, a functionally universal rule masquerading as a more flexible guideline. The result is that it violates the requirement that asylum determinations be made on a case-by-case basis. And the agency's failure to recognize the universal nature of the list, much less justify that nature, also renders the list arbitrary.

Seventh, the separate justification for the list of effective bars on asylum—that the issues it covers are ones that "adjudicators might otherwise spend significant time evaluating and adjudicating" (85 Fed. Reg. 36,284)—is false. The agencies make no pretense of having evidence to back that justification. And in our experience, none of the nine issues is one that routinely arises in asylum proceedings. That is no surprise, given that none of the nine is connected in any way to any requirement for asylum enunciated in the INA, preexisting regulations, or existing opinions of the BIA or the federal courts. To the contrary, the proposed list would require adjudicators to consider these issues for the first time. It would therefore inject new issues into asylum proceedings rather than removing issues that already exist, and it would require immigration judges, the BIA, and the federal courts to spend significant time addressing issues that would otherwise not arise. The inevitable effect of agencies' proposed list of bars is therefore directly at odds with the stated goal of that list.

b. Unlawful Entry

The NPRM's proposal to make almost any "unlawful entry" or "attempted unlawful entry" a "significant adverse discretionary factor" (85 Fed. Reg. at 36,283) is contrary to the INA. The BIA recognized more than thirty years ago that it is inappropriate to require an "unusual showing of countervailing equities" to overcome an unlawful entry. *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987). After that holding, Congress amended § 1158(a)(1) to state that it does not matter "whether or not" an asylum seeker entered "as a designated port of arrival." IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-579 (1996). The statute, in other words, now states that anyone may apply for, and receive, asylum no matter their method of entry into the United States. 8 U.S.C. § 1158(a)(1); *cf. E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020). And the courts have thereafter continued to hold that, although an unlawful entry can be given *some* weight in the asylum analysis, the statute does not permit that fact alone to carry significant weight. *See, e.g.*, *E. Bay Sanctuary Covenant*, 950 F.3d at 1275-76; *Huang v. INS*, 436 F.3d 89, 99 (2d Cir. 2006); *Hussam F. v. Sessions*, 897 F.3d 707, 718 (6th Cir. 2018); *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008).

The NPRM's attempt to dramatically increase weight to illegal entries is also contrary to the Refugee Convention, which precludes states from "impos[ing] penalties" on the basis of "illegal entry or presence." Refugee Convention art. 31(1). By precluding individuals from seeking asylum on the basis of illegal entry, the NPRM's proposal also stands in significant "tension with the United States' commitment to avoid refouling individuals to countries where their lives are threatened." *E. Bay Sanctuary Covenant*, 950 F.3d at 1276-77.

Finally, the NPRM's illegal-entry bar is arbitrary. Contrary to the agencies' assertion, there is no "growing number of [people] who illegally enter the United States." 85 Fed. Reg. 36,283. To the contrary, the number of people encountered by CBP along the Southwest border plummeted by almost 69% from June 2019 to June 2020. *See* CBP, *Southwest Border Migration FY2020*.[89] And that drop

[89] https://www.cbp.gov/newsroom/stats/sw-border-migration.

cannot be written off as an artifact of COVID-19. Even in October 2019, before COVID-19 even appeared, border encounters were down almost 69% from May 2019—and they have not returned even to that level in any month since. *See id.* The rationale behind the proposal is therefore contrary to the agencies' own evidence.

Even if there were an increasing number of people crossing between ports of entry—and there is not—that circumstance would be nothing more than a reflection of the agencies' own recent (and illegal) policy choices. Over the last four years, the agencies have effectively closed ports of entry to all asylum seekers. They have done so through the official (and illegal) means of the third-country transit bar, the farcically named "Migrant Protection Protocols," safe-third-country agreements with the Northern Triangle countries, and a drastically overbroad border closure purportedly related to COVID-19. *See* DHS & DOJ, *Asylum Eligibility & Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019), *enjoined by E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019), *and vac'd by Capital Area Immigrants' Rights Coalition v. Trump*, D.D.C. No. 1:19-2117, Dkt. 72 (June 30, 2020); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) (holding "Migrant Protection Protocols" illegal); DHS & DOJ, *Implementing Bilateral & Multilateral Asylum Cooperative Agreements Under the Immigration & Nationality Act*, 84 Fed. Reg. 63,994 (Nov. 19, 2019), *challenged by U.T. v. Barr*, D.D.C. No. 1:20-cv-116; CDC, *Control of Communicable Diseases*, 85 Fed. Reg. 16,559 (Mar. 24, 2020); Camilo Montoya-Galvez, *Federal judge skeptical of Trump order used to expel migrants at border*, CBS News (June 25, 2020)[90] (reporting on oral ruling blocking removal of child under the CDC order). They have done so through the unofficial (but equally illegal) means of "metering" entry at ports of entry. *See, e.g.*, *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019). And they have done so by failing to properly train DHS agents, to monitor agents with a history of routinely (and illegally) lying to and abusing asylum seekers, and by failing to impose any consequences on agents who break the law. *See, e.g.*, Brief *Amici Curiae* of Tahirih Justice Center, et al., *Hernandez v. Mesa*, S. Ct. No. 17-1678 (Aug. 9, 2019),[91] and sources cited therein; *Letter from Am. Immigration Council & ACLU re: CBP Officers Conducting Credible Fear Interviews* (Apr. 30, 2019), and sources cited therein.

The result of these combined policies and failures is clear: Notwithstanding the fact that it is entirely legal under U.S. law to present at a port of entry and seek asylum, the agencies have made it impossible for individuals to do so. Faced with such a situation, crossing between ports of entry is the only way to vindicate an individual's right to apply for asylum in the United States. The NPRM therefore proposes to penalize asylum seekers for the agencies' own illegal actions.

The NPRM accuses people who commit illegal entry of only "putatively" crossing the border to seek asylum. 85 Fed. Reg. 36,283. But there is no evidence that the vast majority of those who enter "in order to seek asylum" (*id.*) are anything other than bona fide asylum seekers. To the contrary, this accusation constitutes the sort of pernicious stereotype that the agencies claim to want to eradicate. *See id.* at 36,282. It is therefore arbitrary.

These deficiencies are exacerbated, rather than cured, by the purported exception for those "in immediate flight from persecution or torture in a continuous country." 85 Fed. Reg. at 36,283. That

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90 https://www.cbsnews.com/news/federal-judge-trump-order-migrant-expulsions-policy-aclu/.

91 https://www.tahirih.org/wp-content/uploads/2019/08/17-1678-SCOTUS-Amicus-Brief_Tahirih-Justice-Center.pdf.

exception effectively encompasses only people who happen to be tortured in the areas of Canada or Mexico that immediately abut the United States. It is therefore so narrow as to be entirely meaningless. It is also unjustified and arbitrary, especially in light of the policies noted below (*see* Section III.A.7.c, *infra*) that have effectively (though illegally) closed U.S. ports of entry to all asylum seekers, including those with a well-founded fear of persecution in Mexico.

c. Transit Bars

The NPRM includes three transit-related bars: the proposal to make a significantly adverse factor the "failure … to seek asylum or refugee protection in at least one country through which [a person] transited before entering the United States" (85 Fed. Reg. at 36,283) and the proposed bars on asylum for any person who either "spent more than 14 days in one country" or "transit[ed] through more than one country" en route to the United States. *Id.* at 36,284. These provisions are both contrary to the INA and arbitrary.

The new proposed transit bars, like the agencies' previous interim final rule on the same topic (*see* 84 Fed. Reg. 33,829), violate the INA in numerous ways. As an initial matter, the NPRM would nullify the general rule in § 1158(a)(1). Under the NPRM's proposal, the only individuals who would remain eligible for asylum absent the most extraordinary of circumstances are (1) Mexican and Canadian citizens and residents; (2) individuals who fall into an exception to the safe-third-country agreement with Canada and spend less than 14 days in that country; (3) individuals who survive a sea journey to the United States with no more than one stop; and (4) the small number of individuals who have the resources to purchase direct or one-stop airfare to the United States. Notably, women fleeing gender-based persecution are much less likely than men to have such resources available to them. Women may be subject to discriminatory laws or practices prohibiting them from owning land or other assets or from holding certain jobs. And, women fleeing forced marriage or "honor" crimes at the hands of their families or communities certainly could not turn to them for assistance in order to escape.

Of these exceptions, the one for Mexican nationals is easily the most numerically significant—and Mexican nationals accounted for only 6% of the asylum applications filed in immigration courts between 2001 and 2019. TRAC, *Asylum Decisions*.[92] The result is that, under the NPRM, the general rule in § 1158(a)(1) would be gutted: While Congress expressly mandated that individuals must generally be allowed to apply for asylum, the NPRM's transit bars would render that an empty exercise by ensuring that no one could receive asylum.

Contrary to the agencies' *ipse dixit* (85 Fed. Reg. at 36,284), the NPRM's transit bars are also inconsistent with Congress's judgment concerning the circumstances in which the United States may force individuals to apply for asylum in another country. Congress enacted two statutory provisions on that topic. One provision, the "[s]afe third country" exception, states that an individual "may be removed, pursuant to a bilateral or multilateral agreement, to a [third] country … in which the [individual'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 [individual] would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection." 8 U.S.C. § 1158(a)(2)(A).

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92 https://trac.syr.edu/phptools/immigration/asylum.

The second provision renders ineligible for asylum any individual who "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). An individual is presumed to have firmly resettled in another country if she has "an offer of permanent resident status, citizenship," or equivalent status from that country. 8 C.F.R. § 208.15. Because evidence of persecution in the third country rebuts a showing of firm resettlement, an individual ineligible for asylum in the United States under this provision has still "by definition" found a safe home in another country. *Arrey v. Barr*, 916 F.3d 1149, 1159-60 (9th Cir. 2019).

Three features of these provisions are immediately apparent. First, they are very narrowly drawn. Second, they require asylum seekers to look to another country only if that country provides a "'safe option.'" *E. Bay Sanctuary Covenant v. Barr*, 2019 U.S. Dist. LEXIS 124268, at *39 (citing *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013)). And third, they take careful account of whether an asylum seeker has already received protection from the third country or, at the least, can avail himself of a full and fair asylum procedure in that country. Thus, to be consistent with § 1158, any regulations requiring additional individuals to seek asylum in a third country must exclude only narrow classes of individuals and must take account of both the safety of those countries and the fairness of their asylum procedures.

The proposals in the NPRM satisfy none of these requirements. Where Congress enacted provisions that require only small numbers of asylum seekers to seek refuge elsewhere, the NPRM would require the vast majority of asylum seekers to do so. Where Congress required asylum seekers to seek protection only in *safe* third countries, the NPRM fails to consider whether an asylum seeker would be persecuted in the third country. And where Congress carefully took account of the fairness of other countries' asylum procedures, the NPRM asks only the question whether those countries are formal signatories to the Refugee Convention, Refugee Protocol, and CAT—a question that has no relationship to whether a country actually has a full and fair asylum system and is both capable of processing claims and protecting refugees. Perversely, if finalized, this NPRM would ensure that the United States itself would fail this test. The NPRM is therefore in no way consistent with Congress's judgment about when asylum seekers must seek relief in other countries. *See* Slip op., *E. Bay Sanctuary Covenant v. Barr*, 9th Cir. Nos. 19-16487 & 19-16773, at 27-36 (July 6, 2020).[93]

All three of the transit-related factors are also manifestly arbitrary. The NPRM states, in language so hedged as to be virtually meaningless, that "the Departments believe that the failure to seek asylum or refugee protection in at least one country through which a[person] transited while en route to the United States may reflect an increased likelihood that the [person] is misusing the asylum system." 85 Fed. Reg. at 36,283 (emphases added). In other words, the agencies have taken the position that it is appropriate to impose drastic bars on asylum on the basis of the bare possibility that the current system might one day attract a trivial number of fraudulent claims. That is irrational.

Further, there is not a shred of evidence to back the agencies' stated belief. *See* slip op., *E. Bay Sanctuary Covenant*, at 41-45. And there is a mountain of contrary evidence. There is, for instance, ample evidence that Mexico is unsafe for many asylum seekers, including women, LGBTQI/H people, and anyone fleeing persecution in Central America. *See, e.g.*, Human Rights First,

[93] https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/06/19-16487.pdf.

Is Mexico Safe for Refugees and Asylum Seekers?;[94] Amnesty International, *Mexico 2017/2018*;[95] NACLA, *Surviving One of Mexico's Most Dangerous Places for Women* (Apr. 2, 2019);[96] World Health Organization, *Femicide* 3.[97] Indeed, women and girls face alarming rates of femicide, extortion, kidnapping, and sexual assault in Mexico, as illustrated by just a small sample of Tahirih clients including:

- A 20-year-old woman from Honduras who was raped in Mexico after fleeing her country with her two young sons, ages 2 and 4;
- A 19-year-old Salvadoran woman traveling with her younger brother who was kidnapped in Mexico by the Gulf Cartel *en route* to the United States and was sexually assaulted by one of her kidnappers;
- A 16-year-old girl from Honduras who was raped and sex trafficked in Mexico; and
- A 17-year-old Honduran girl, a 16-year-old Guatemalan girl, and a 15-year-old Guatemalan girl, who were raped in Mexico after fleeing home.

There is also ample evidence that women, LGBTQI/H people, and indigenous peoples are unsafe in all three Northern Triangle countries. *See, e.g.*, Azam Ahmed, *Women Are Fleeing Death at Home. The U.S. Wants to Keep Them Out*, N.Y. Times (Aug. 18, 2019);[98] *see also, e.g.*, *Human Trafficking for Sexual Exploitation Purposes in Guatemala*, *supra*; Guatemala 2018 Human Rights Report, *supra*; El Salvador 2018 Human Rights Report, *supra*; U.S. Dep't of State, *Honduras 2018 Human Rights Report* (2018);[99] *Teenage Girls Most at Risk Amid Rising Sexual Violence in El Salvador—Report*, The Guardian (Apr. 17, 2019);[100] Immigration & Refugee Board of Canada, *El Salvador: Information Gathering Mission Report—Part 2. The Situation of Women Victims of Violence and of Sexual Minorities in El Salvador*;[101] U.N. Office on Drugs and Crime, *Int'l Homicide Statistics Database*.[102]

And there can be no doubt that persecution in other areas of the globe also crosses national borders. This is certainly the case for survivors of gender-based violence who are often followed by their persecutors to wherever they try to escape, including neighboring countries as in the case of Beatrice* described above. Persecutors may also enlist proxies to pursue, capture, punish and return

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94 https://www.humanrightsfirst.org/sites/default/files/MEXICO_FACT_SHEET_PDF.pdf.

95 https://www.amnesty.org/en/countries/americas/mexico/report-mexico/.

96 https://nacla.org/news/2019/02/04/surviving-one-mexico%E2%80%99s-deadliest-places-women.

97 https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf?sequence=1.

98 https://www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.html.

99 https://www.state.gov/wp-content/uploads/2019/03/HONDURAS-2018.pdf.

100 https://www.theguardian.com/global-development/2019/apr/17/teenage-girls-el-salvador-rising-sexual-violence-report.

101 https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=57f7ac384.

102 https://tinyurl.com/UNHomicideDatabase.

survivors to them. A survivor might also face threats to her safety as a woman traveling alone in a country of transit, or without permission from a male relative. All of the available evidence therefore serves to refute the sole premise of these proposals. *See* Slip op., *E. Bay Sanctuary Covenant*, at 36-41. Put another way, the agencies have once again attempted to justify a draconian restriction on the basis of the very sort of stereotype they claim to abhor. 85 Fed. Reg. at 36,282.

Moreover, even if the agencies' conjecture were backed by evidence, the rule would not be tailored to prevent the kind of fraud the agencies guess might occasionally occur. A rule tailored in that way would, at a minimum, (1) include rational ties, backed by evidence, between the underlying bar and fraud, and (2) include clear exceptions for anyone and everyone who might face persecution in countries through which they traveled as well as categorical exceptions for third countries with asylum systems that do not, or cannot, process significant numbers of application. The NPRM, of course, has neither feature.

Worse still, the agencies have apparently not even contemplated the possibility that people subject to this discretionary bar would be subject to persecution while awaiting asylum adjudications in other countries. Nor have the agencies contemplated the possibility that many countries through which asylum seekers pass lack asylum systems that are fair and have the capacity to process more than a handful of claims. *See, e.g.*, *Guatemala 2018 Human Rights Report*, *supra*; David C. Adams, *Guatemala's "Embryonic" Asylum System Lacks Capacity to Serve as Safe U.S. Partner, Experts Say*, Univision News (Aug. 2, 2019);[103] Sharyn Alfoni, *"Our Whole Economy is in Shatters": El Salvador's President Nayib Bukele on the Problems his Country is Facing*, CBS News (Dec. 15, 2019);[104] Yael Schacher, *Letter to USCIS* (Dec. 23, 2019);[105] UNHCR, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on his Mission to Honduras* (Apr. 2016);[106] UNHCR, *Honduras Fact Sheet* 2 (Mar. 2017);[107] Daniella Silva, *U.S. signs asylum deal with Honduras that could force migrants to seek relief there*, NBC News (Sept. 25, 2019);[108] Michelle Hackman and Juan Montes, *U.S., El Salvador Reach Deal on Asylum Seekers*, Wall St. J. (Sept. 20, 2019);[109] Patrick Timmons, *Mexico facing two-year backlog as asylum requests soar*, UPI (Aug. 31, 2018);[110] *Central American Refugees in Mexico: Barriers to Legal Status, Rights, and Integration,*

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103 https://tinyurl.com/tb55o7t.

104 https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/.

105 https://tinyurl.com/LettertoUSCISRequestComments.

106 https://www.refworld.org/docid/575fb8db4.html.

107 https://reporting.unhcr.org/sites/default/files/UNHCR%20Honduras%20Fact%20Sheet%20-%20March%202017.pdf.

108 https://www.nbcnews.com/news/us-news/u-s-signs-asylum-deal-honduras-could-force-migrants-seek-n1058766.

109 https://www.wsj.com/articles/u-s-el-salvador-reach-deal-on-asylum-seekers-11569006377.

110 https://www.upi.com/Top_News/World-News/2018/08/31/Mexico-facing-two-year-backlog-as-asylum-requests-soar/2031535567041/.

PRP 206 (2019);[111] U.S. Dep't of State, *2019 Trafficking in Persons Report: Guatemala*;[112] Congressional Research Service, *Guatemala: Political & Socioeconomic Conditions and U.S. Relations* 2;[113] Amnesty International, *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum*;[114] *E. Bay Sanctuary Covenant*, 2019 U.S. Dist. LEXIS 124268, at *76; Slip op., *E. Bay Sanctuary Covenant*, at 37-40. And the agencies have failed to do so even though these facts have been repeatedly brought to their attention. *See, e.g.*, Compl., *U.T. v. Barr*, D.D.C. No. 1:20-cv-116, Dkt. 3 (Jan. 15, 2020); Tahirih Justice Center, *Comments in Response to Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019), USCIS-2019-0021, EOIR Docket No. 19-0021*;[115] Tahirih Justice Center, *Comments in Response to Interim Final Rule: EOIR Docket No. 19-0504/ AG Order No. 4488-2019: Asylum Eligibility and Procedural Modifications*.[116] That failure, too, renders the NPRM's transit-related bars manifestly arbitrary.

The agencies have also failed to recognize that their own preexisting policies would render all non-Mexican asylum seekers who approach the southern border ineligible for asylum under these proposals. As noted above, for years now, the agencies have "metered" entry at the southern border. Doing so has forced all asylum seekers to wait in Mexico for months. Thus, even if an asylum seeker from Guatemala transited through Mexico in 7 days and approached a port of entry (thereby avoiding the illegal-crossing negative factor), U.S. government policy would render that person ineligible for asylum by forcing her to remain present in Mexico for a period of more than 14 days. The illegal and misnamed "Migrant Protection Protocols," which have left asylum seekers stranded in hugely dangerous conditions on the Mexican side of the border for months and even years (*see, e.g.*, Human Rights First, *Delivered to Danger*)[117], would doubtless be construed by the agencies to have the same effect (*see, e.g.*, *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848 (S.D. Cal. 2019) (rejecting the argument that DHS policies preventing entry meant individuals are now subject to the agencies' 2019 third-country transit bar)). Both the fact that the NPRM would have this outcome if adopted, and the agencies' failure to consider the outcome, render the transit bars arbitrary.

Finally, the agencies have not even attempted to explain "why the [NPRM] provides no special protection for unaccompanied minors." Slip op., *E. Bay Sanctuary Covenant*, at 45. They have thus "'entirely failed to consider an important aspect of the problem.'" *Id.* at 45-46 (quoting *State Farm*, 463 U.S. at 43). The transit-related proposals in the NPRM are also arbitrary for that reason.

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111 https://repositories.lib.utexas.edu/bitstream/handle/2152/75036/prp_206-central_american_refugees_in_mexico_barriers_to_legal_status_rights_and_integration-2019.pdf?sequence=3&isAllowed=y.

112 https://www.state.gov/reports/2019-trafficking-in-persons-report-2/Guatemala.

113 https://fas.org/sgp/crs/row/R42580.pdf.

114 https://www.amnestyusa.org/reports/overlooked-under-protected-mexicos-deadly-refoulement-of-central-americans-seeking-asylum/.

115 https://www.regulations.gov/document?D=USCIS-2019-0021-0067.

116 https://www.regulations.gov/document?D=EOIR-2019-0002-1184.

117 https://www.humanrightsfirst.org/campaign/remain-mexico.

d. Fraudulent Documents

The third "significantly adverse" factor—the use of fraudulent documents by those who pass through a third country (85 Fed. Reg. at 36,283)—is also arbitrary. The NPRM's explanation for its proposed rule—*i.e.*, that such use "makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources" (*id*.)—applies to all entries with fraudulent documents. But the NPRM correctly recognizes that "the use of fraudulent documents to escape the country of persecution should not itself be a significant adverse factor." *Id.* at 36,283 n.35. That consideration, too, is universal. After all, perpetrators of gender-based violence, such as domestic violence, forced marriage, or "honor" crimes, might block a survivor from securing proper documentation, or laws in a woman's country might require a male relative's approval in order for her to obtain documents in her name. In such situations, survivors may literally have no choice but to procure false documents in order to escape.

In short, the NPRM has identified two countervailing, universal factors. The NPRM, however, gives those factors different weight in different situations, holding the use of false documents against asylum seekers based on their method of transit to the United States. That distinction is arbitrary. After all, an asylum seeker using false documents to flee persecution does so no matter her country of origin—and using false documents for that purpose is different in kind from the use of false documents to file a fraudulent claim for relief. *See, e.g.*, *Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007); *In re Pula*, 19 I. & N. Dec. at 474.

Further, the NPRM fails to provide any explanation of its proposed distinction. That failure, too, is arbitrary. And assuming, *arguendo*, that the NPRM's unstated rationale for the distinction it draws is the same as the rationale for the proposed transit bars, that rationale remains arbitrary when imported to this context. It again fails to take into consideration the fact that countries through which an asylum seeker transits might themselves be ones in which she is subject to persecution—or ones in which there is, as a functional matter, no asylum system capable of fairly hearing her application.

e. Convictions

The next factor—vacated, expunged, or modified convictions or sentences—is likewise arbitrary. The NPRM never considers how much weight a conviction or sentence that is reversed, vacated, expunged, or modified should be given in the asylum context. In particular, it fails to consider whether a conviction entered on erroneous grounds should ever be sufficient to expose asylum seekers to the violent consequences of refoulement.

f. Unlawful Presence

The proposed bar on those with more than one year of unlawful presence is both contrary to law and arbitrary. Congress, in 8 U.S.C. § 1158(a)(2)(B), set a one-year statute of limitation on asylum claims and created exceptions to that time period. The NPRM would, however, undo those exceptions and bar from asylum almost all individuals who could satisfy the statutory standard. Further, the agencies have apparently not given consideration either to the real-world consequences of this proposal, or to whether it is merited in the asylum realm. For reasons above—including that official ports of entry have been effectively closed to asylum seekers for years and that the well-recognized aftereffects of trauma mean that many asylum seekers cannot apply within one year—it is not.

Aicha's asylum case, described above, was initially denied because she did not file for asylum within one year of arriving in the United States. However, once here, she was exploited by strangers who initially offered to help her. Instead they subjected her to forced household and sexual labor, and false imprisonment. She was isolated and feared trying to contact police because of her experience in her home country. After experiencing persistent panic attacks to the point of hospitalization, she was left on her own by her captors. It took her six years to be able to heal enough to apply for asylum. Likewise, Aida's* case below illustrates the need for more flexibility, not less, in allowing survivors to heal before requiring them to file for asylum. Aida's* application for asylum included a lengthy psychological evaluation performed. She was diagnosed with severe post-traumatic stress disorder, depression, and anxiety, and the expert noted that she applying for asylum immediately would have likely re-traumatized her and impeded her recovery. These unimaginable circumstances reflect the horrifying reality asylum seekers face. Requiring a survivor like Aicha or Aida* to have applied for asylum within one year of arrival is fundamentally at odds with this reality.

g. Remaining Factors

The remaining provisions of the list would all return asylum seekers to persecution for trivial reasons. Violence as punishment for failing to file one tax return. Death as punishment for a missed asylum interview. Rape as punishment for involuntarily being deemed to have "abandoned" an earlier asylum application. Yet the agency makes no attempt to justify, or even consider, this imbalance between these severe consequences—which will inevitably occur in some subset of cases—and the relative triviality of the actions or failures to act that would trigger them under the NPRM. Each of the remaining discretionary factors is accordingly arbitrary.[118]

Further, the NPRM's justification for precluding those who fail to file a single tax violation from receiving asylum is false. It is simply not the case that "most individuals in the United States" are subject to "standards" under which they run the risk of persecution or torture for the failure to file or pay taxes or to report income. 85 Fed. Reg. at 36,284. Rather, at worst, those individuals face penalties imposed by the IRS or state agencies—just as asylum seekers already do. And any asylum seekers who fail to file taxes and report income very likely do so because of restrictions on employment authorization documents—restrictions that DHS has illegally tightened to such a degree that almost no asylum seekers will be able to work legally while their cases proceed. DHS did so while knowing full well that depriving asylum seekers of work authorization would leave them destitute. *See, e.g.*, DHS, *Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38,532, 38,567 (June 26, 2020) (advancing the chilling suggestion that "[a]sylum seekers who are concerned about homelessness … become familiar with the homelessness resources provided by the state where they intend to reside").

The NPRM arbitrarily provides no rationale at all for its proposal concerning "multiple asylum applications." 85 Fed. Reg. at 36,284. It does imply that the next factor in the list—"having an application withdrawn with prejudice or abandoned an asylum application"—is an indicator of "abusive … applications." *Id.* But in many cases, it is not. Asylum seekers often have their applications deemed withdrawn or abandoned for reasons far beyond their own control—including that the agencies failed to inform the asylum seeker of a court date, that the agencies failed to note

[118] It is no answer to cite the possibility of withholding of removal. As the agencies are well aware, the standard for withholding is substantially higher than the standard for asylum—meaning that, if these bars take effect, some people affected by them *will* be returned to persecution.

the correct time and place of the proceedings, or that the proceedings were conducted in a language the asylum seeker does not understand. In effect, then, this proposal seeks to penalize many asylum seekers for the agencies' own errors. It is accordingly arbitrary.

The same considerations apply to the factor concerning missed interviews. Notably, the agencies make no attempt to state the reasons for missed interviews—*e.g.*, whether individuals left the United States, withdrew the application for another reason, failed to receive the notice, could not attend the interview, or simply failed to show up. The NPRM assumes that all those who miss the interviews fall into the last category, but there is no evidence for that assumption, and common sense refutes it.

These factors especially disadvantage survivors suffering from post-traumatic stress disorder as a result of persecution. PTSD can severely disrupt day-to-day life and interfere with even basic administrative tasks. *See, e.g.*, Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (Oct. 2009).[119] In addition, asylum-seeking survivors simultaneously experiencing intimate partner violence in the United States constantly contend with their abusers' attempts to thwart their independence. This can take many forms, including preventing survivors from filing paperwork or paying bills, attending key appointments with government agencies, or communicating with and meeting with service providers trying to help them as they prepare their case.

Finally, the proposed time limit on motions to reopen is both contrary to law and arbitrary. That limit cannot possibly be reconciled with 8 U.S.C. § 1229a(c)(7)(C)(ii), which expressly provides that "[t]here is no time limit on the filing of a motion to reopen" in an asylum proceeding. The NPRM, however, seeks to impose an effective limit by precluding asylum if the motion is filed after a given point. And the fact that Congress *did* include a time limit for initial applications (see 85 Fed. Reg. at 36,285 (citing 8 U.S.C. § 1158(a)(2)(B)) simply provides further evidence that its statement that no such deadline exists for motions to reopen must be taken at face value. Further, the NPRM presumes that the date when "changed country conditions" occur can be determined with precision. That, in turn, presumes that country conditions turn on a dime—which is, of course, not so. And the NPRM fails to recognize that fact, much less provide guidance on when a "change" occurs. This factor will, if implemented, therefore give rise to protracted disputes over when a change occurred and be antithetical to judicial economy.

B. Claims Under the Convention Against Torture

The NPRM proposes yet another series of changes aimed at dramatically restricting relief under the Convention Against Torture when the torture has been committed by a government official. *See* 85 Fed. Reg. at 36,286-88. These proposed changes wholly ignore the actual conditions under which people flee for their lives. They also introduce requirements of proof that would be difficult for anyone in the United States with access to government materials under FOIA to be able to provide, let alone individuals who have fled their homes in other countries because of such torture. Indeed, the proposed rules would require an applicant to both divine and prove that an official claiming to be acting in an official capacity and wearing an official uniform was *not* acting as a "rogue official." But a CAT applicant cannot know, much less provide documentary proof, that an official was not acting

[119] https://www.tahirih.org/wp-content/uploads/2009/10/Precarious-Protection_Tahirih-Justice-Center.pdf.

in a "rogue" capacity—and there is no reason whatsoever to think otherwise. Requiring this level of detailed information about a government official who has tortured or threatened the applicant with torture is unreasonable, largely impossible, and unworkable.

Taken literally, the proposed rules would allow asylum officers and immigration judges to find that police officers and military officials who rape, extort, or severely beat private citizens are not acting under color of state law by reasoning that, because these sorts of actions can have no legitimate purpose, the only explanation is that the officer was "rogue" in their conduct. Similarly, where government officials are ineffective at enforcing laws due to disinterest, bias, or cultural disapproval of laws against gender-based violence, the proposed rule would require a finding that the government did not "acquiesce," as it is "unable to prevent" those attitudes or the torture that occurs as a result. 85 Fed. Reg. at 36,288. This is contrary to decades of practice on this issue, as many of the cases cited in the rule note—and the NPRM offers no explanation for this change.

Read together, the proposed changes to CAT claims in the NPRM would make it virtually impossible for survivors of gender-based violence to succeed in CAT claims. For example, a survivor of torture inflicted by a police officer spouse would have to show that her the torture was inflicted deliberately to further an official purpose, despite both the survivor's utter powerlessness in light of the spouse's position of and the spouse's immunity from accountability as an official. This provision would likely exclude survivors of extreme torture like Aida* from protection:

Aida* from Central America was severely traumatized for 11 years. She endured violent beatings and sexual assault within her family, who effectively gave her to Juan, a high-ranking army officer who was 27 years her senior. He raped her regularly, poured boiling water on her, gouged her with fence wire, burned her with a branding iron, and rubbed salt on her open wounds. When Aida* was 15, Juan discovered she was pregnant from the rapes and he beat her until she aborted twins. Juan then hired his nephew to murder Aida*. She was shot in the stomach but recovered. Eventually she fled to the United States and received asylum after a grueling healing process.

In countries where certain forms of intimate partner violence, sexual assault, and "honor crimes" are either legal or not illegal, there would be no affirmative duty of an official to protect a survivor from this harm. A government official could be enlisted by a woman's family to torture her to compel her to submit to a forced marriage. Under the rule, the official would be considered "rogue," yet the survivor would still suffer at the hands of authorities with absolutely no possibility of recourse at all. Claudine's* case recounted above is illustrative, as her persecutor Marc* was a member of the ruling political party in her country. Yet, under the NPRM, Claudine* would likely be denied asylum despite Marc's* ability to torture her with the impunity he enjoyed as such.

These rules are contrary to the recognition in both domestic and international law that that public officials do inflict torture under color of law for personal benefit. *See Khouzam v. Ashcroft,* 361 F.3d 161 (2nd Cir. 2004) ("As two of the CAT's drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.") Likewise, nearly every circuit to address the concept of "willful blindness" in the CAT context has settled on an approach that is more permissive than the one in this Proposed Rule. *See Zheng v. Ashcroft*, 332 F.3d1186, 1197 (9th Cir. 2003); *Khouzam v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004); *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007); *Amir v. Gonzales*, 467 F.3d

921, 927 (6th Cir. 2006); *Silva-Rengifo v. Attorney General*, 473 F.3d 58, 69 (3d Cir. 2007); *Hakim v. Holder*, 628 F.3d 151, 157 (5th Cir.2010).

Finally, we note that on July 14, 2020, Attorney General William Barr—who signed the NPRM on behalf of DOJ—made clear in *Matter of O-F-A-S-*, 28 I. & N. Dec. 35 (AG 2020), that a "rogue official" analysis has no place in CAT cases. It would be utterly arbitrary for the Attorney General to take that position in *O-F-A-S-* and then endorse final regulations including such an analysis.

C. Credible Fear Interviews

1. Asylum-Only Proceedings

The NPRM proposes to exclude applicants for admission seeking safety from persecution and torture from the normal removal proceedings that have been used for nearly twenty-five years, and to shunt them instead into a new and significantly more limited "asylum-and-withholding-only" proceeding. This proposal raises a myriad of problems: It violates the INA, it lacks justification, it fails utterly to explain the departure from 24 years of practice, it makes procedures more complex rather than more efficient, and it would improperly and unfairly cut off access to relief that Congress provided.

a. Inconsistency with the INA

The NPRM asserts that the Departments may choose to severely limit proceedings for asylum seekers because the expedited removal provisions of 8 USC § 1225(b)(1) do not explicitly mandate full removal proceedings for persons who establish credible fear. Without that mandate, the agencies say, they are free to institute any other proceeding they choose. This position is untenable.

When Congress enacted IIRIRA, it created two specific removal processes: expedited removal proceedings in Section 235 (codified at 8 U.S.C. § 1225) and regular removal proceedings in Section 240 (codified at 8 U.S.C. § 1229a).[120] Under this statutory framework, Section 240 proceedings are the default and "exclusive" admission and removal proceedings "unless otherwise specified" in the Act. 8 U.S.C. § 1229a(a)(3). And Congress has specified that certain classes of individuals are not to be placed in full removal proceedings. It has, for example, excluded persons convicted of particular crimes from Section 240 proceedings. *See* 8 U.S.C. § 1229(a)(3); *see also* 8 U.S.C. § 1187(b) (prohibiting Visa Waiver program participants from contesting inadmissibility or removal except on the basis of asylum.)

Indeed, within the expedited removal statute itself, Congress specified one group of arrivals – stowaways – who are excluded from Section 240 proceedings. *See* 8 U.S.C. § 1225(a)(2). In contrast, Congress deemed asylum seekers to be applicants for admission under 8 U.S.C. § 1225(a)(1), and it *did not* similarly exclude them from Section 240 proceedings. *See id.* § 1225(b). Thus, Congress created the default rule that arriving individuals are to be placed in Section 240 proceedings, and it specifically excluded one subset of arriving persons from Section 240—but did not exclude asylum seekers from those proceedings. The plain text of the INA thus precludes the agencies' claim that

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[120] For ease of reference, we will generally use the term "Section 240" as it is commonly used among practitioners and courts.

they are free to make up new procedures to apply to arriving asylees. *See Henson v. Santander Consumer USA, Inc*., 137 S. Ct. 1718, 1723 (2017) ("differences in language … convey differences in meaning").

Unsurprisingly, IIRIRA's legislative history unanimously confirms that conclusion. As the Conference Report presented by the Joint Committee from the House and the Senate explained:

> If the officer finds that [an individual] has a credible fear of persecution, the [individual] shall be detained for further consideration of the application for asylum under *normal non-expedited removal proceedings*.

H. Rept. 104-828, at 209 (1996) (emphasis added).

That straightforward understanding that normal removal proceedings apply for those screened out of the expedited removal process appears repeatedly in the rest of the Act's legislative history. In presenting presented the compromise bill to the Senate, for instance, Senator Hatch stated as follows:

> Under the revised provisions, [individuals] coming into the United States without proper documentation who claim asylum would undergo a screening process to determine if they have a credible fear of persecution. *If they do, they will be referred to the usual asylum process.*

142 Cong. Rec. S, 11491 (Sept. 27, 1996) (emphasis added). Likewise, in explaining the new credible fear standard itself, Senator Hatch noted: "The standard adopted in the conference report is intended to be a low screening standard *for admission into the usual full asylum process*." *Id.* (emphasis added).

Moreover, even the original drafters of the more onerous—and rejected—House screening standard plainly expected that those who passed the threshold would be afforded the full adjudication of their claims for relief:

> If the [individual] meets this [credible fear] threshold, the [individual] is permitted to remain in the U.S.to receive *a full adjudication of the asylum claim—the same as any other [non-citizen] in the U.S.* Under this system, there should be no danger that [a person] with a genuine asylum claim will be returned to persecution.

H. Rept. 104-469 at 158 (1996).

Ignoring this statutory language and history entirely, the NPRM states that a "negative inference" justifies its new interpretation. The agencies note that 8 U.S.C. § 1225(b)(2) specifically "mandates" Section 240 proceedings for "other classes of [individuals]," but that § 1225(b)(1) does not. It then claims that "[t]hat negative inference is reinforced by the fact that [individuals] in expedited removal are expressly excluded from the class of [people] entitled to section 240 proceedings under section 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A). *See* INA 235(b)(2)(B)(ii), 8 U.S.C. 1225(b)(2)(B)(ii)." 85 Fed. Reg. at 36,266. But the agencies have it backwards. As explained above, where Congress has explicitly excluded some classes of people (stowaways) from the "normal" 240 default and exclusive proceedings, but it has not explicitly excluded others (those who have established credible fear), those who have not been specifically excluded must be included in the general 240 proceedings.

Moreover, there are three additional problems with this argument. *First*, if the agencies were correct, then they have been violating the statute for the past 25 years by expressly providing section 240 proceedings to the very class of applicants they now claim is expressly excluded from them.

Second, the argument fails to recognize that credible fear screening creates an *exit* from expedited removal proceedings. By design, those who establish credible fear are effectively screened out of expedited removal proceedings – they are no longer subject to expedited removal. *See* 8 U.S.C. § 1225(b)(1)(B)(ii)–(iii) (those with credible fear to be detained and "referred" for consideration of their claims, and those who have not established fear ordered removed without "further hearing or review" as an expedited removal order).

Third, the "negative inference" the agencies claim is nothing of the sort. To the contrary, "the function of § [1225](b)(2)(B)(ii) is to make sure we understand that the *automatic* entitlement to a regular removal hearing under 1229a, specified in (b)(2)(A) for a (b)(2) applicant, does not apply to a (b)(1) applicant." *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1086 (9th Cir. 2020) (emphasis added). Instead, the agencies screen (b)(1) applicants to determine which of the two statutorily established methods of removal will apply: expedited removal for those without fear, and normal removal for those who establish fear. The statute has never been and cannot now reasonably be understood to exclude all (b)(1) applicants from a full removal hearing, once they are no longer subject to the alternative of expedited removal.

The agencies also claim, without support, that those applicants who have established credible fear are entitled "only" to a proceeding on the application for asylum. 85 Fed. Reg. at 36,266. But the statute does not use the term "only." The agencies themselves have inserted that word. Nor is that word implicit in the statute. To the contrary, as demonstrated above, the statutory structure, legislative history, and 23 years of administrative practice indicate quite the opposite. The same is true for the agencies' attempt to limit applicants to "only" withholding or CAT relief. Congress, in 8 U.S.C. § 1225(a), explicitly deemed every unadmitted or arriving person (except stowaways) an "applicant for admission." Those without a claim of fear are subject to expedited removal proceedings and not allowed to seek admission, but those who are screened out of expedited removal are no longer in that category. The agencies' argument that asylum is not admission is beside the point: In the context of removal, asylum is not a standalone claim. Rather, it is a defense to a removal charge. There is no rational basis or statutory authority for excluding those with credible fear from seeking any relief Congress has authorized them to seek.

b. Arbitrary and capricious

In the NPRM, the agencies state that severely limiting the process due to an asylee who has shown credible fear is "better policy." 85 Fed. Reg. at 36,266. But the justifications offered in the NPRM do not support that view.

First, the proposed policy is a dramatic change from decades of practice, yet the agencies offer no discussion of why the current practice is problematic, or how this change will improve the process. The agencies dismiss the original administrative decision to place those claiming asylum after a positive fear finding into the regular asylum procedures as based on "very limited" analysis. *Id*. But the agencies completely ignore the heart of that analysis:

> Once an [individual] establishes a credible fear of persecution, *the purpose behind the expedited removal provisions of section 235 of the Act to screen out arriving [individuals] with fraudulent documents or no documents and with no significant possibility of establishing a claim to asylum has been satisfied.* Therefore, the further consideration of the application for asylum by an [individual] who has established a credible fear of persecution will be provided for in the context of removal proceedings under section 240 of the Act.

DOJ, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,321 (Mar. 6, 1997).

Second, the current practice of placing those applicants with credible fear into Section 240 proceedings does not "effectively negat[e]" DHS's prosecutorial discretion. 85 Fed. Reg. at 36,266. DHS certainly has discretion to place an arriving person without documentation directly into Section 240 proceedings instead of into expedited removal.[121] But that initial discretion is just that: initial. And once an applicant establishes fear, DHS has no discretion to exercise, as the applicant is no longer subject to expedited removal procedures but must instead be referred for full consideration of his claims. Just as a grand jury's decision not to indict does not "negate" prosecutorial discretion to initiate grand jury proceedings and seek indictment, neither does an asylum officer's finding of credible fear "negate" DHS's initial discretion to place the applicant in expedited removal or Section 240 proceedings. Instead, in both cases, prosecutorial discretion may initiate proceedings, but an independent third party's decision controls the direction of the case. If it were otherwise, DHS's discretion to place someone in expedited removal would exceed statutory bounds.

Third, the agencies' claim that "[b]y deciding that the [individual] was amenable to expedited removal, DHS already determined removability" (85 Fed. Reg. at 36,266) also overreaches. Under § 1225(b)(1), a DHS inspector has initial discretion to place into expedited removal proceedings an applicant she determines "is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title." But that initial inadmissibility determination is not the ultimate determination for those applicants who can show credible fear, as DHS may not continue to seek their expedited removal based on that inadmissibility. Instead, once an applicant for admission has established credible fear, she is entitled to an immigration judge's determination of her claims for relief, notwithstanding DHS's initial determination. Under 8 USC § 1229(a), an "immigration judge *shall* conduct proceedings for deciding the inadmissibility or deportability of" the applicant. Nothing in the expedited removal statute or its history suggests that Congress intended to cut off applicants who establish fear from seeking all the relief for which they might be eligible.

Fourth, the agencies assert that their limited procedure is more consistent with Congress' intent than placing applicants into regular 240 proceedings. It is telling that after 23 years of placing applicants with credible fear into Section 240 proceedings—beginning immediately after the statute was enacted—Congress has never suggested that the agencies got that wrong. Indeed, as we have

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[121] A DHS inspector's "discretion" to choose to skip over expedited removal even when an applicant lacks documentation, and to place an applicant directly to Section 240 proceedings, simply affords DHS the discretion to avoid wasting resources on a credible fear interview when the claim for asylum or CAT relief is quite clear at inspection. It is not at all clear what the agency means by suggesting that its discretion to make that decision is negated by the post-credible fear referral to Section 240 proceedings.

shown above, every piece of legislative history confirms that Congress intended and expected that asylum seekers who establish credible fear would be placed into "normal" removal proceedings. For support, the best the agencies can muster is the *ipse dixit* that because Congress intended expedited removal to be quick, a new quick procedure is consistent with that intent. But the agencies rely on statutory review limitations and short timeframes relating to *negative* credible fear findings and *removal* decisions to justify limiting *positive* fear findings and *asylum* decisions. This mixes apples and oranges, as the statute does not similarly limit or time the latter. *See* 8 U.S.C. § 1225(b)(2)(iii) (establishing time frames for review of negative fear findings, but no time frames in that provision for decisions following positive fear findings).

Fifth, the agencies fail to explain or consider how the proposed rule will function in light of the expanded expedited removal scope promulgated by the administration. Under those regulations, any non-citizen detained anywhere in the county who cannot demonstrate two years of presence to the satisfaction of the immigration officer, and whom DHS determines to be inadmissible under § 1225(b)(1), may be subject to expedited removal. Assuming such a non-citizen can establish fear of persecution or torture, they would then be forced into limited asylum-and-withholding-only proceedings. That would effectively deny them access to any other form of relief for which they might be eligible, including different forms of cancellation of removal, adjustment of status, and different types of waivers. For example, a non-citizen may be eligible for adjustment of status (a green card) if the applicant is married to a U.S. citizen and otherwise eligible. Similarly, a non-citizen may be eligible for a U- or a T-visa, or for relief under VAWA as a self-petitioner or as an applicant for cancellation of removal. There are procedures in Section 240 proceedings to allow respondents to raise those issues: For example, a survivor of gender-based violence who has a pending U or T visa petition with USCIS can request additional time in Section 240 proceedings to permit the agency to provide a prima facie determination on the petition or complete adjudication of the petition. But under the proposed rules, an immigration judge would be strictly limited to considering *only* the asylum/CAT/withholding claims. Therefore, the judge would likely refuse to grant continuances or requests for stays of removal. This would cut off access to potential relief relating to these other claims. This is both arbitrary and in violation of law.

The consequences of expanded expedited removal are particularly dire for survivors of gender-based violence. As noted above, those who are technically exempt from expedited removal because they have been present in the United States for the past two years can still be subjected to it if they cannot immediately prove their two-year presence upon apprehension. Many asylum seekers who fled gender-based violence in their home countries continue to endure it in the United States. Human traffickers and perpetrators of domestic violence notoriously withhold or confiscate survivors' identity or other official documents to control them and keep them dependent. Abusers also prevent survivors from holding bank accounts, utility bills, bus passes, or even library cards, in their own name. *See, e.g.*, Ganley, *Health Resource Manual* 37; Snyder, *No Visible Bruises*; Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 Women's Health & Urb. Life 15, 21-24 (2012); Misty Wilson Borkowski, *Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration Relief*, 31 U. Ark. Little Rock L. Rev. 567, 569 (2009); Nat'l Domestic Violence Hotline, *Abuse and Immigrants*;[122] Edna Erez & Nawal Ammar,

[122] https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2.

Violence Against Immigrant Women and Systemic Responses: An Exploratory Study (2003);[123] Julieta Barcaglioni, *Domestic Violence in the Hispanic Community* (Aug. 31, 2010);[124] Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), at 7-8;[125] Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 Feminist Criminology 32, 46-47 (2009); Immigration & Customs Enforcement, *Information for Victims of Human Trafficking* (2016);[126] National Sexual Violence Resource Center, *Assisting Trafficking Victims: A Guide for Victim Advocates* 2 (2012);[127] *see also* Violence Against Women Act of 2000 Section-by-Section Summary, 146 Cong. Rec. S10188-03, at S10195 (2000) (noting that, before VAWA, abusive U.S. citizen and lawful permanent resident spouses used their ability to petition for a permanent visa for their abused spouses "as a means to blackmail and control the spouse"). Not only do survivors have limited access to documents that may help establish length of presence for these reasons; a survivor may risk her safety by trying to retain possession of her own documents in defiance of her abuser.

Survivors who are swiftly removed while their petitions for relief are pending will face an inappropriately uphill battle to securing relief in direct contravention of the express intent and will of a bipartisan Congress. Upon removal, survivors will be largely unable to coordinate with counsel if represented, or to respond to Requests for Evidence and other critical notices about their cases. Most critically, they will once again be vulnerable to life-threatening violence that will prevent them from ever safely returning to the United States even if their petitions are ultimately granted. And deported survivors of human trafficking with pending T-visa petitions who are not protected through "continued presence" will have their petitions denied outright for failure to maintain presence in the United States as required for the visa.

2. Consideration of Precedent

The proposed rule claims to simply codify existing practice and clarify that immigration judges must apply the law of jurisdiction where the credible fear interview is held. However, the rule is contrary to existing practice, and it requires asylum officers and immigration judges to deny relief to applicants who are statutorily eligible.

First, well-settled USCIS policy has long provided that where there is a conflict or question of law, "generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard" regardless of where the credible fear interview is held. *See, e.g*. USCIS, 2017 Credible Fear Training 17;[128] RAIO Training Course, Credible Fear (Feb. 28,

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123 https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf.

124 https://safeharborsc.org/domestic-violence-in-the-hispanic-community.

125 https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf.

126 https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf.

127 https://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf.

128 https://www.aila.org/infonet/raio-and-asylum-division-officer-training-course.

2014), at 16;[129] RAIO Training Course, Credible Fear of Persecution and Torture Determinations (Apr. 14, 2006), at 14.[130] *See also* 8 C.F.R. § 208.30(e)(4) ("the asylum officer shall consider whether the [individual's] case presents novel or unique issues that merit consideration in a full hearing before an immigration judge"). This longstanding policy plainly is in accord with what Congress envisioned: "Legal uncertainty must, in the credible fear context, adhere to the applicant's benefit." 142 Cong. Rec. H616 (daily ed. Apr. 18, 1996) (statement of Rep. Smith). The NPRM fails to even note this departure from practice, much less to explain it.

Second, the NPRM fails entirely to account for the fact that asylum merits claims are often not held where the credible fear hearing is held. Thus, contrary to 8 U.S.C. § 1225(b)(1)(B)(v), the rule could require asylum officers to order the expedited removal of applicant who has shown she "could establish eligibility for asylum under section 1158 of this title" in another circuit or district. Indeed, this proposed rule is flatly contrary to the decision in *Grace v. Whitaker*, 344 F. Supp. 3d 96, (D.D.C. 2018), which held that the same provision in a USCIS guidance was contrary to the INA. "The government's reading would allow for an [individual's] deportation, following a negative credible fear determination, even if the [individual] would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading leads to the exact opposite result intended by Congress." *Id.* at 140. And the proposed rule also violates *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), because it exceeds the agencies' limited ability to displace circuit precedent on a specific question of law to which an agency is entitled to deference. *Grace*, 344 F. Supp. at 136-37.

Finally, this provision is especially harmful for survivors of intimate partner violence who apply for asylum on that basis. To the extent that the asylum laws we operate under today originate from a 70-year old, male-centered refugee protection framework, more nuanced and careful analysis is often required in gender-based claims. Immigration judges have commonly misread *Matter of A-B-*, 27 I. & N. Dec. 227 (AG 2018), as a general rule foreclosing claims involving domestic violence. This misreading is contrary to the well-established requirement, reiterated in the rule itself, that the merits of asylum must be considered on a case-by-case basis. *See* Section III.A.1.b.i, *supra*. Imposing a blanket prohibition on such claims is also contrary to the plain language of *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). And in 2016, UNHCR confirmed that the Refugee Convention's protection may extend to claims from Central American women fleeing gender-based violence such as the respondent in *Matter of A-B-*. *See* UNHCR, *UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender* (Nov. 2016);[131] UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* (Mar. 15, 2016);[132] UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015).[133]

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[129] http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf.

[130] http://www.virginiaraymond.com/wp-content/uploads/2014/11/Credible-Fear-31augu2006-USCIS.pdf.

[131] https://www.unhcr.org/en-us/5822266c4.pdf.

[132] https://www.refworld.org/docid/56e706e94.html.

[133] http://www.unhcrwashington.org/womenontherun.

3. Heightened Screening Standard

The NPRM proposes to raise the burden of proof, at the expedited removal screening stage, for applicants for admission who may be eligible for withholding of removal or relief under the Convention Against Torture. As the proposed rule concedes, the government has for decades conducted one screening at expedited removal that considers whether there is a significant possibility that an applicant could establish eligibility for relief under any of those claims. That process has met the balance Congress struck between an efficient immigration system and ensuring that "there should be no danger that [a person] with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 104-469, pt. 1, at 158 (1996). As the Conference Report on IIRIRA explained:

> The purpose of these provisions is to expedite the removal from the United States of [individuals] who *indisputably* have no authorization to be admitted to the United States, while providing an opportunity for such an [individual] who claims asylum to have the merits of his or her claim promptly assessed….

H.R. Rep. No. 104-828, at 209 (Conf. Rep.) (emphasis added).

The NPRM would raise the screening standard from showing a significant possibility that the applicant will be able to establish eligibility for statutory withholding of removal to "a reasonable possibility that the [person] would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion." 85 Fed. Reg. at 36,268; *see* 8 C.F.R. §§ 208.16, 208.30(e)(2), 1208.16. Separately, for applicants expressing a fear of torture, the agencies propose "to raise the standard of proof from a significant possibility that the [person] is eligible for withholding or deferral of removal under the CAT regulations to a reasonable possibility that the [person] would be tortured in the country of removal." 85 Fed. Reg. at 36,268; *see* 8 C.F.R. §§ 208.18(a), 208.30(e)(3), 1208.18(a). These proposed changes to the screening standard lacks an adequate or rational explanation for departing from decades of practice, is arbitrary and capricious, and violates the United States' obligations of *non-refoulement*.

First, the agencies suggest that the higher burdens of proof will increase efficiency.[134] 85 Fed. Reg. at 36,270-71. They will not. When the agencies first implemented screening for CAT and withholding of removal, they explained: "This screening [for reasonable fear] will be conducted in conjunction with the existing credible fear of persecution screening process, *so that it will not complicate or delay the expedited removal process established by Congress for arriving [individuals].*" DOJ, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8748, 8479 (Feb. 19, 1999). Though the NPRM dismisses this conclusion as an "assumption," the agencies offer no evidence that existing procedure of using one standard to screen for any claim for relief complicated or delayed the expedited removal process. Government data does not support that argument. The number of immigrants removed from the United States through the expedited removal process has increased fairly steadily over the years, reaching a high of 192,416 in fiscal year 2013.

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[134] The agencies claim that raising the burden of proof in fear screening is simply an "expansion" of DHS's already-existing practice. However, as the cases identified in the footnotes make clear, the only two attempts to apply this new standard have both been halted in full or in part by the courts. The agencies may not attempt to pass off this new and far-reaching rule as simply more of the same. It is not.

DHS Office of Immigration Statistics, *Annual Report, Immigration Enforcement Action* (March 2019) at 12 (Table 6).[135] Forty-three percent of all removals during 2018 were through the expedited removal process, a proportion that has remained fairly steady over the past decade. *Id.* And there is no showing that requiring asylum officers to evaluate varying claims relating to the same group of facts with three different screens would be simpler. To the contrary, this rule makes that determination more complicated, not less.

Moreover, even if the agencies were correct that this rule would increase efficiency, there is no countervailing consideration of its cost. Reasoned decision-making requires that both sides of the balance be examined. Agency action is lawful only if it rests "on a consideration of the relevant factors." *State Farm*, 463 U.S. at 43. Here, the inevitable cost is that some survivors of persecution and torture—who could not bring with them sufficiently high levels of evidence as they fled—will be returned to persecution and torture.

Second, the agencies claim that raising the screening bar is necessary to "align" the screening with the burden of proof in the merits proceeding for each kind of relief. But asylum officers screening for fear under existing law must *already* take the merits burden of proof into account. Under existing rules, an asylum officer must determine whether there is a "significant possibility" that an applicant "could be eligible" for each type of potential relief: asylum, withholding, and/or CAT. That determination necessarily includes assessing whether the applicant can meet the relevant burden of proof. Thus, when an asylum officer elicits facts in a fear interview that raise the possibility of CAT relief, the officer must determine whether there is a significant possibility of eligibility for CAT relief, which requires evaluating whether the applicant could establish that she would more likely than not be tortured if returned to her country of origin or other removal country. Imposing a higher screening burden, then, does not ensure that the proper merits burden is considered at screening. Instead, it serves only to require more and stronger evidence before the merits stage, and at a moment when applicants are least likely to be able to amass it.

Third, and relatedly, the agencies utterly ignore the timing and nature of the screening process itself. Recognizing that expedited removal screening occurs immediately at entry, Congress firmly rejected imposing a higher level of proof at the screening stage for asylum. The legislation was designed to provide major safeguards to prevent the persons with a significant chance of obtaining asylum from being returned to persecution. Recognizing that in expedited removal proceedings, the asylum officer's "power to send people summarily back to dangerous places" is "extraordinary," Representative Christopher Smith stressed the importance that "the process be fair—and particularly that it not result in sending genuine refugees back to persecution." 142 Cong Rec. H11054, H11066-67 (daily ed. September 25, 1996) (statement of Rep. Smith). And Senator Hatch expressed concern "about the harsh consequences that could result to asylum applicants who do have a valid claim but who may not speak English, may not have the necessary proof of their claim with them." 142 Cong. Rec. S4457-91 (daily ed. May 1, 1996) (statement of Sen. Hatch). These concerns apply equally to applicants seeking relief under CAT or withholding, as the agencies can have no legitimate interest in sending people back to persecution or torture.

The agencies fail to consider the many practical reasons justifying the existing low threshold screening standard. The regulations provide that the initial screening interviews are to be conducted "in a non-adversarial manner," 8 C.F.R. § 208.30(d), so attorneys are rarely present at this stage.

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135 https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf.

However, applicants who have just arrived from other countries and are not represented by counsel are unlikely to understand American legal standards or processes. In addition to significant language and cultural barriers, refugees who have just fled from persecution in their home countries may be fearful or reluctant to talk about that persecution with U.S. authorities. *See, e.g., Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998).

The agencies also fail to take into account how trauma affects the fear screening process. Tahirih clients are survivors of violence in countries and cultures around the world. They have survived rape, severe and routine beatings, FGM/C, and attempted femicide. They have been trafficked for profit, subjected to slavery, and coerced into relationships with men who use violence—sexual, verbal, emotional, and physical abuse—to establish power over them, effectively forcing them into the submissive role they are expected to fill in their societies as women in a domestic relationship. They have been subject to acid attacks and attempted murder as a matter of family "honor."

Finding the courage to escape that violence does not mean escaping the associated trauma. Like survivors of other traumatic events—war, hurricanes, criminal attacks—immigrant survivors of gender-based violence are marked by that trauma in ways both visible and invisible. For those who successfully make their way to the U.S. border to seek asylum based on such persecution, that trauma is likely to be, if anything, sharpened by a dangerous journey, fear of the asylum process, fear of being returned to their conditions of persecution, and—especially now—fear of border officials. Especially in the fear screening that occurs at or near the time of reaching the border, that trauma is likely at its zenith. And virtually any survivor interview at the border is affected by this trauma.

The effects of trauma in a screening fear interview are real and indisputable. Decades of research confirm that trauma affects demeanor in ways that could easily affect credibility: nervousness, passivity, inability to make eye contact, reluctance to speak, speaking too fast, giving too much detail or not enough. *See, e.g.*, Dept of Health and Human Services, SAMSA, *A Treatment Protocol: Trauma-Informed Care in Behavioral Health Services* 61-62 (2014) (common effects of trauma include "exhaustion, confusion, sadness, anxiety, agitation, numbness, dissociation, confusion, physical arousal, and blunted affect");[136] *id.* at 69 (noting that signs of dissociation include fixed or "glazed" eyes, sudden flattening of affect, long periods of silence, monotone, responses that are not congruent with the present context or situation). Trauma may also result in vague or evasive testimony due to the victim's desire to avoid or stop a flood of memories of the abuse. It might result in a withdrawn or detached witness if a victim tries to dissociate from the memory or event. Indeed, the experience of simply testifying about sexual abuse can be traumatic, because it forces the victim to "relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring." Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Nat'l Crime Victim Law Institute, Violence Against Women Bulletin at 1-2 (Sept. 2011) (internal quotation marks and alteration omitted). Research supports similar conclusions about the trauma of human trafficking: "The stress of the trafficking situation is almost guaranteed to create dissonance between thoughts, feelings, and behavior that can greatly reduce flexible coping and rational decisions that could be expected of people in free conditions." T. K. Logan et al., *Understanding Human Trafficking in the United States*, 10 Trauma, Violence, & Abuse 3, 16 (January 2009).

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[136] https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf.

Courts across the country have recognized the effects of trauma on survivor interviews and testimony. The Fourth Circuit called it "unsettling" that the BIA simply dismissed the "potential impact" of torture on an applicant's testimony. *Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015). Similarly, the Third Circuit has recognized the "numerous factors that might make it difficult for an [individual] to articulate his/her circumstances with the degree of consistency one might expect from someone who is neither burdened with the language difficulties, nor haunted by the traumatic memories, that may hamper communication between a government agent in an asylum interview and an asylum seeker." *Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d. Cir. 2003) (vacating a BIA decision based in part on inconsistencies between the asylum testimony and the credible fear interview). And the Ninth Circuit has noted that

> [v]ictims of repeated physical or sexual abuse, for example, remember the gist of their experiences. However, they often confuse the details of particular incidents, including the time or dates of particular assaults and which specific actions occurred on which specific occasion. As events recur, it can become difficult to remember exactly when specific actions occurred even though memory for what happened is clear.

Singh v. Gonzales, 403 F.3d 1081, 1091 (9th Cir. 2005) (citing Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1514-15 (2001)); *see also, e.g.*, *Fiadjoe v. Att'y Gen*., 411 F.3d 135, 154 (3d Cir. 2005) ("Women who have been subject to domestic or sexual abuse may be psychologically traumatized. Trauma … may have a significant impact on the ability to present testimony."); *id.* (holding that INS Guidelines entitled "Consideration for Asylum Officers in Adjudicating Asylum Claims from Women" are as applicable to an immigration judge's credibility determinations as they are to an asylum officer's credibility determination).

UNHCR's recommendations for ensuring that women's refugee status determinations are appropriately made are particularly instructive. They include the following:

- Separate, private interviews away from male family members, during which women are explicitly notified of their right to pursue asylum as a principal applicant, and not merely as a derivative of their husbands;

- Treating language access and legal advice as "essential; informing women that they may choose to have female interviewers and interpreters; interviewers and interpreters should be culturally competent and sensitive to other factors such as educational level and religion and should understand how culture and trauma influence behavior;

- Interviewers should demonstrate objectivity and compassion, avoiding interruption and "body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate"; and

- Counseling and auxiliary services should be made available before and after interviews and referrals should be provided as appropriate.

UNHCR, *Gender Guidelines*; *see also, e.g.*, Executive Committee of the High Commissioner's Programme, *Refugee Women and International Protection No. 64*, § (a)(iii) (1990).[137] The NPRM fails to address these highly relevant issues in seeking to impose a higher burden, especially when the existing standard already takes the merits burdens of proof for each kind of relief into account.

Fourth, the agencies suggest that DOJ's language imposing the higher burden to a particular group in a previous rule supports their rationale. 85 Fed. Reg. at 36,270. It does not. Significantly, in that rule, DOJ applied a higher screening standard *only* to a discrete and objectively identifiable group of people "subject to streamlined administrative removal processes for aggravated felons under section 238(b)of the Act and for [people] subject to reinstatement of a previous removal order under section 241(a)(5) of the Act." 64 Fed. Reg. at 8484-85. DOJ specifically distinguished that group as being "[u]nlike the broad class of arriving [individuals] who are subject to expedited removal." *Id.* The agencies offer no explanation for why they now believe the broad class with multiple claims and concerns can fairly and efficiently be treated as if they were a narrowly defined class whose members can raise only one claim. Nor have they explained how screening for multiple claims of relief under three burdens of proof instead of one makes the process more effective or efficient. And finally, the agencies have failed to explain by what authority they add to and raise the statutory burden of proof in Congress' carefully described credible fear procedures. 8 U.S.C. § 1225(b).[138]

Fifth, the NPRM proposes a new and unjustified definition of "significant possibility" as "a substantial and realistic possibility of succeeding." Again, the agencies have failed to show any confusion over the past 23 years requiring clarification as to the statutory term. Moreover, the agencies' only source for this definition is a District of Columbia Court of Appeals decision about a local District of Columbia law relating to spoliation of evidence. That case has no bearing on what Congress meant in the immigration context when it set what it "intended to be a low screening standard for admission into the usual full asylum process." 142 Cong. Rec. S11491-02 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

Nor are the agencies without guidance as to what Congress meant. The Supreme Court held before IIRIRA was enacted that a person has a well-founded fear of persecution, and thus is eligible for asylum if "the applicant only has a 10% chance of being…persecuted." *Cardoza-Fonseca*, 480 U.S. at 440. Against that background, Congress set a far lesser burden: it required an asylum seeker to show only a "significant possibility" that they "could establish eligibility" for asylum. Therefore, under the IIRIRA, "to prevail at a credible fear interview, the [individual] need only show a 'significant possibility' of a one in ten chance of persecution, i.e., a fraction of ten percent." *Grace*, 344 F. Supp. 3d at 127; *see Armstrong v. Exceptional Child Ctr., Inc*., 135 S. Ct. 1378, 1386 (2015) ("when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute is presumed to incorporate that interpretation") (internal quotation marks omitted).

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137 https://www.unhcr.org/en-us/excom/exconc/3ae68c441f/refugee-women-international-protection.html.

138 The wildly different standards the government seeks to apply leads it to some convoluted grammatical gyrations; the government is forced to refer to both credible fear proceedings and "credible fear" proceedings (one with and one without quotation marks), because it seeks to hijack a statutorily-defined process with burdens of proof never included or contemplated by Congress when it defined that process. *See* 85 Fed. Reg. at 36,269 n.15.

Moreover, Congress actually considered and rejected a standard in which "only applicants with a likelihood of success will proceed to the regular asylum process." H. Rep. 104-469, pt. 1, at 158 (1996) (emphasis added); *see* H.R. 2202, 104th Cong. § 235(b)(1)(B)(v) (1995). As the Conference Report explained:

> The purpose of these provisions is to expedite the removal from the United States of [individuals] who *indisputably* have no authorization to be admitted to the United States, while providing an opportunity for such an [individual] who claims asylum to have the merits of his or her claim promptly assessed….

H.R. Rep. No. 104-828, at 209 (Conf. Rep.) (emphasis added).

The proposed rule, which echoes the rejected focus on a substantial possibility of succeeding instead of on the possibility of establishing eligibility, strays far from its statutory mooring. It would pervert the credible fear process into one that immediately removes everyone except those who can immediately prove they are likely to succeed. And where there is no indication of confusion as to the statutory meaning, and where the new definition is likely to cause confusion, the proposed rule is arbitrary.

4. Other Proposed Changes

The remaining hodgepodge of proposed amendments to the CFI process should likewise be withdrawn.

a. Asylum Bars

The NPRM proposes that, contrary to decades of practice, asylum officials should now adjudicate the merits of mandatory bars to asylum, in the middle of a credible fear screening. 85 Fed. Reg. at 36,272. This is contrary to law and to existing practice. Under 8 U.S.C. § 1225(b), Congress required asylum officers to determine whether there is a significant possibility that an applicant could, in some future proceeding, establish eligibility for asylum.

The proposed rule is also unworkable. The mandatory bars are often extremely fact-sensitive and heavily litigated, and how they apply often apply differs from circuit to circuit. For example, 8 U.S.C. § 1158(b)(2) bars asylum if "there are serious reasons for believing that the [person] has committed a serious nonpolitical crime outside the United States prior to the arrival of the [person] in the United States." But determining whether a serious crime was political or not is a very fact-specific inquiry. The nature of the offense, its intended target, the circumstances surrounding the conviction, and the conditions of where it took place are all significant factors to weigh. The context also matters. Without the opportunity to develop facts and argument, an asylum officer could, facially at least, apply a mandatory bar to a survivor of human trafficking who was forced by her traffickers to engage in crimes such as commercial sex/prostitution, drug smuggling, etc. That finding would not only unduly bar her from asylum under the "serious non-political crime" bar, it would result in her expedited removal right back to her trafficker. The brief and non-adversarial credible fear interview

is a wholly inappropriate forum for these decisions, which require evidence and responses from both sides.[139]

b. Merits Adjudication

The proposed rule requiring asylum officers to determine and apply asylum bars also requires a *merits adjudication* of eligibility in the credible fear hearing. The rule would thus require asylum officers to exceed their statutory authority. It would also violate due process by requiring fact-finding in a procedure that affords applicants neither notice nor an opportunity to respond with evidence. Front-loading highly fact-specific and nuanced legal considerations when asylum seekers cannot possibly put their best case forward and generally lack guidance from counsel is patently inappropriate.

As UNHCR aptly notes in its guidelines for considering claims involving gender-based persecution, survivors of sexual trauma in particular may need "second and subsequent interviews…in order to establish trust and to obtain all necessary information…interviewers should be responsive to the trauma and emotion of claimants and should stop an interview where the claimant is becoming emotionally distressed." UNHCR, *Gender Guidelines at* 9. Furthermore, applicants should not have to describe the "precise details of the act of rape or sexual assault itself," not least because "in some circumstances," a "woman may not be aware of the reasons for her abuse." *Id.* at 10.

Trauma is likely to be freshest for survivors arriving at the border, so that they are at their most vulnerable, and least equipped to effectively communicate with immigration officials due to profound traumatization, hunger, exhaustion, lack of understanding of our legal process, and language and cultural barriers. They may have been separated from family and still be suffering acute physical effects of violence in addition to emotional trauma. It is fundamentally incompatible with the purpose of asylum itself to expect survivors to collect their thoughts, let alone corroborative evidence to support highly fact-specific inquiries. Mandated consideration of the merits during initial screenings for asylum is certain to shut survivors out of the process before they ever have their day in court.

Furthermore, the narrowly proscribed "rare circumstances" exception within the rule's prohibition on claims asserting "gender" as the nexus is effectively meaningless 85 Fed. Reg. at 36,282. Its parameters will go untested because virtually no survivor will be able to articulate and corroborate the facts required to meet such exceptions on the spot. The agencies are not fooling anyone by including them in the rule; their sole purpose is to "check the box" to satisfy the non-negotiable legal requirement of a case-by-case analysis in asylum claims. Moreover, survivors would be required to make their claims to an officer least qualified to assess them, and with virtually no accountability measures to ensure proper decision-making.[140] As screenings are increasingly conducted by minimally trained border agents with an enforcement rather than trauma-informed or

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[139] Nor does the possibility of an immigration judge review of the decision cure the problem. The judge's review is based on the asylum officer's written summary, and in any event cannot redress the applicant's inability to respond with written or other evidence unobtainable during the brief credible fear proceedings.

[140] https://www.americanimmigrationcouncil.org/sites/default/files/research/.
still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf.

legal background,[141] more and more asylum seekers with meritorious claims are being unduly turned away.[142]

The NPRM suggests that waiting for an actual adjudicatory procedure is "pointless and inefficient" when the agencies would prefer to make that decision at an earlier point. 85 Fed. Reg. at 36,272. But the credible fear process Congress enacted was not designed to adjudicate the merits of asylum claims. Contrary to the agencies' claim, it is not pointless to adjudicate the merits of an asylum claim in the very forum designed to do that.

There is no review in immigration court of denials of initial fear screenings unless an applicant proactively requests such review. Due to the crippling impact of trauma as described above, pervasive social stigmas and accompanying fear of reporting gender-based violence, especially to government officials, it is highly unlikely that survivors will take it upon themselves to (1) disclose key, required elements of their claims; (2) have sufficient objective evidence corroborating such claims; and (3) affirmatively request an appeal or understand the consequences of declining to do so.[143]

D. Procedural Proposals

1. "Frivolous" Applications

The NPRM's proposal to change the test for frivolous applications rests on the notion that entirely baseless applications are so numerous that they have overwhelmed the system. 85 Fed. Reg. at 36,273. The NPRM, however, presents no evidence for that assertion. Instead, it uses ellipses to badly mischaracterize a decision by a Ninth Circuit judge (who was forced to resign after committing serious gender-based misconduct) that likewise provides no evidence of widespread fraud. *See id.* (quoting *Angov v. Lynch*, 788 F.3d 893, 901-02 (9th Cir. 2015) (Kozinski, J.)). In fact, the reason that the NPRM fails to cite any actual evidence of pervasive frivolousness, or of pervasive fraud, is that no such evidence exists.[144] *See, e.g.*, 85 Fed. Reg. at 38,590.

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[141] https://www.borderpatroledu.org/become-cbp-officer/.

[142] https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf.

[143] https://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal.

[144] Any attempt by the agencies to use denial rates in asylum cases as evidence of purported frivolousness would be arbitrary. The available evidence makes clear that the outcome of an asylum seeker's claim is primarily based on two factors not related to the merits of the claim—whether the asylum seeker is represented by counsel, and the identity of the immigration judge. *See, e.g.*, TRAC, *Asylum Decisions*, https://trac.syr.edu/phptools/immigration/asylum; TRAC, *Asylum Decisions Vary Widely Across Judges and Courts—Latest Results*, https://trac.syr.edu/immigration/reports/590/; TRAC, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, https://trac.syr.edu/immigration/reports/491; TRAC, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018*, https://trac.syr.edu/immigration/reports/judge2018/denialrates.html; Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 48-58 (2015). Moreover, the fact that denial rates are rising reflects only that the Attorney General and the BIA have previously attempted to use case law to establish some of the illegal and arbitrary measures proposed in the

Without evidence of pervasive fraud, there is no evidence that fraudulent applications have overwhelmed the system. In fact, the available evidence demonstrates that the backlog in immigration court is not due to any action by asylum seekers. After all, the number of immigration judges has increased at a *higher* rate than the number of new proceedings in immigration court. *See* TRAC, *Immigration Court Backlog Surpasses One Million Cases*.[145]

Any increased burden on the immigration courts instead stems directly from recent executive-branch policies. One recent decision of the Attorney General—*Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018)—"removed 330,211 previously completed cases and put them back on the 'pending' rolls." TRAC, *Immigration Court Backlog Surpasses One Million Cases*. Standing alone, that flagrantly illegal decision (*see Morales v. Barr*, ___ F.3d ___, 2020 U.S. App. LEXIS 19911 (7th Cir. June 26, 2020); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019)) accounts for more than one-quarter of all currently pending cases (*see* TRAC, *Immigration Court Backlog Tool*).[146] The Remain in Mexico program, meanwhile, serves to overwhelm immigration courts at the southern border rather than allowing claims to be heard by courts throughout the United States. *See, e.g.*, Brief of *Amicus Curiae* Local 1924 in Support of Plaintiffs-Appellees, *Innovation Law Lab v. McAleenan*, 9th Cir. No. 19-15716, Dkt. 39, at 25-26. And the "[s]hifting scheduling priorities" and shifting "legal standards" that immigration judges must apply likewise contribute to the backlog. TRAC, *Immigration Court Backlog Surpasses One Million Cases.* Assuming *arguendo* that the system is overwhelmed, then, that state of affairs is the fault of the agencies themselves, not of the imaginary influx of "frivolous" asylum applications. And as shown at various places in this comment, adoption of the NPRM would further increase the backlog by unsettling settled law and injecting novel inquiries into asylum cases. The basis for this change is accordingly arbitrary.

Further, the NPRM fails to grapple with the key question whether it is appropriate to broaden the situations in which immigration judges impose the harsh penalties associated with findings of frivolousness. *See* 8 U.S.C. § 1158(d)(6). That question takes on great urgency given the NPRM's harsh, broad expansion of what constitutes a frivolous application. Yet the agencies ignore it entirely.

More specifically, although the NPRM proposes to define "knowledge" to include "willful blindness," it provides no justification whatsoever for this proposal. 85 Fed. Reg. at 36,273. The proposal is accordingly arbitrary.

In fact, there is no plausible reason to include "willful blindness" in the definition of knowledge in the context of asylum applications. As shown above, asylum law necessarily proceeds on a case-by-case basis, with—for instance—a PSG that does not entitle one asylum seeker to relief nevertheless potentially applying someone else to relief on a different set of facts. Further, many asylum seekers, especially those in civil detention, are forced to proceed pro se. And pro se asylum speakers, many of whom face language barriers and lack legal training, are exceedingly unlikely to have the slightest idea whether their claim is frivolous, however that term is defined. The use of a "willful blindness" standard here will therefore do nothing more than waste government resources and chill potentially meritorious claims.

NPRM. *See, e.g.*, *Matter of A-B-*, 27 I. & N. Dec. 227; *Matter of O-F-A-S-*, 27 I. & N. Dec. 709 (BIA 2019).

[145] https://trac.syr.edu/immigration/reports/536/.

[146] https://trac.syr.edu/phptools/immigration/court_backlog/.

The NPRM's proposed definition of "frivolous" is also arbitrary. As an initial matter, the NPRM does not provide a plausible argument that the current definition is unworkable. The NPRM cites only two cases to argue that the current definition is too limited in "discouraging false claims." 85 Fed. Reg. at 36,274. But the citation to one of those cases notes only the facially despicable nature of a claim based on denial of the Holocaust (*see id.* (citing *Scheerer v. U.S. Att'y Gen*., 445 F.3d 1311 (11th Cir. 2006)))—and awful as it is, that basis has no bearing on the question whether the claim was "false" or falsified. That leaves only *L-T-M- v. Whitaker*, 760 F. App'x 498 (9th Cir. 2011), an unpublished case in which a court of appeals held that the knowing submission of a false medical record did not render an application frivolous under the current definition. The NPRM, in other words, scoured decades of experience with the current definition and turned up precisely one colorable example in which a false claim was found not to be frivolous. And as the NPRM concedes, the courts of appeals much more routinely uphold findings of frivolousness in the exceptionally rare case where an asylum seeker submits a false document. *See* 85 Fed. Reg. at 36,274. The proposed redefinition of "frivolous" is therefore a solution in search of a problem.

Even assuming, contrary to the evidence, that there is an epidemic of "false" claims not being tagged frivolous, the NPRM's proposed definition of frivolous would remain arbitrary. A redefinition aimed at any such problem would simply add proposed 8 C.F.R. § 208.20(c)(2), which states that an application is frivolous if it "[i]s premised on false or fabricated evidence" and would not be granted absent that evidence. 85 Fed. Reg. at 36,295. Trauma has well-known and well-established adverse effects on memory and the ability to recount experiences. *See, e.g.*, Catrina Brown, *Women's Narratives of Trauma: (Re)storying Uncertainty, Minimization and Self-blame*, 3 Narrative Works 1, 11-12, 17 (2013); Christine Sanderson, *Counselling Skills for Working with Trauma: Healing From Child Sexual Abuse, Sexual Violence and Domestic Abuse* 31 (2013); Angela E. Waldrop & Patricia A. Resick, *Coping Among Adult Female Victims of Domestic Violence*, 19 J. Family Violence (2004); International Association of Chiefs of Police, *Sexual Assault Incident Reports: Investigative Strategies* 5;[147] Office on Violence Against Women, Dep't of Justice, *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers* (July 30, 2014).[148] A rational rule would therefore also specify that an adverse credibility determination, without more, is not grounds for a frivolousness finding. That is, however, not what the NPRM does. Rather, the NPRM also proposes to tag as "frivolous" any application that is "filed without regard to the merits of the claim" or "clearly foreclosed by applicable law." 85 Fed. Reg. at 36,295. Those provisions are arbitrary, because they have nothing to do with the supposed problem of "false" claims.

The inclusion of the phrase "filed without regard to the merits of the claim" is also arbitrary for the independent reason that it has no settled meaning and is not explained by the NPRM.

Furthermore, he redefinition of "frivolous" to include cases that the government believes are "clearly foreclosed" would remain arbitrary even if it were rationally related to some problem identified by the NPRM. Like many other features of the NPRM, this proposal is flatly inconsistent with the fact that asylum decisions are, by law, reached on a case-by-case basis. The redefinition also fails to acknowledge, much less grapple with, the fact that many applications are filed by pro se individuals with no knowledge of what is "foreclosed" by applicable law and what is not. It would be

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147 https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf.

148 https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers.

manifestly unfair to inflict the "severe" consequences of a finding of frivolousness (*Scheerer*, 445 F.3d at 1317) on pro se asylum seekers simply because they have run afoul of a precedential opinion. And it is no response to say that only asylum seekers who know the law will be deemed to have filed frivolous applications, given that the NPRM proposes to expand the definition of "knowingly" beyond actual knowledge.

In addition, the NPRM effectively proposes to force all survivors of gender-based violence, including those appearing pro se, to have their claims deemed frivolous. The rule's prohibition on "gender" as a nexus between persecution and a protected ground does contain an exception in undefined "rare circumstances." However, the broad definition of "frivolous," and its harsh consequences will deter and prevent anyone from successfully arguing that their case meets the exception. Also, a survivor whose case is deemed frivolous under the rule will be permanently ineligible for any relief (other than withholding of removal), including VAWA cancellation of removal, or a VAWA, U-visa, or T-visa petition. As explained above, survivors like Aicha applying for asylum who are also experiencing intimate partner violence or trafficking in the United States are often blocked by their captors from accessing counsel and other service providers. Traumatized and isolated, they are in no position to learn about their legal rights or access or pay lawyers to help them frame their claims in order to preserve their right to seek other relief.

In Koumba*'s case, counsel was crucial for her in securing relief. Koumba* had minimal resources when she arrived in the United States, and weak competence in English. She was tricked by a fellow church goer into paying him $500 for an asylum application even though she later learned that it was available online for free. She filed the application on her own. Without assistance, the application was returned to her three times due to errors and inadequacies. The first time, she failed to include the required number of photocopies, and the second time she hadn't checked the correct boxes. Eventually she attended her asylum interview and her application was referred to the immigration court. Dreading having to recount her story and relive her trauma in front of a judge, she fell into a deep depression. Her husband, however, saw Tahirih staff at his church giving a presentation one day, so he called Koumba* and told her to come quickly for a consultation. Tahirih took on Koumba* as a client and persuaded the asylum office to give her a second interview since she was initially denied asylum for a minor technical reason. The asylum office then asked that DHS terminate proceedings. Tahirih quickly prepared Koumba*'s new application and represented Koumba* for her second interview. Empowered and confident, Koumba* was finally granted asylum.

Aida*, whose case involved severe torture as detailed above, enlisted Tahirih's help including the securing of an expert on the dynamics and psychological impact of domestic violence. Tahirih helped Aida* establish how the trauma she endured caused her delay in filing. Tahirih also helped Aida* explain that she did file for asylum soon after she discovered that her brother had been murdered, likely by Juan in order to punish Aida* for escaping. Finally, in Camille's* case also described above, her counsel was able among other things to track down her medical records to effectively document her brutal abuse.

The proposal to allow USCIS asylum officers to refer "frivolous" applications to immigration court suffers from the same infirmities. The NPRM states that the proposal is intended to "root out frivolous applications more efficiently, deter frivolous filings, and ultimately reduce the number of frivolous applications in the asylum system." 85 Fed. Reg. at 36,275. The NPRM, however, provides no evidence that any affirmative asylum applications are frivolous—much less that there is a systemic

problem of frivolous applications that requires a response. And the NPRM provides no such evidence of a systemic problem because none exists.

Further, it is inappropriate to give asylum officers any role in frivolousness determinations. Although the NPRM does not even acknowledge as much, affirmative asylum interviews are not adversarial proceedings, and DHS is not represented at the interviews. Requiring asylum officers to confront asylum seekers about supposed frivolousness therefore requires the officers to act as both decisionmaker while also acting as a shadow prosecutor. That conflation of roles—and the injection of prosecutorial functions where they do not belong—is pernicious at the best of times, and when carried out in the context of interviews with trauma survivors who have little knowledge of U.S. law, the result will inevitably be that asylum seekers are unable to tell their stories. *See, e.g.*, Mark S. Silver, *Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Toward a Better Legal Outcome* 6-7 (6th ed. 2017); Heather J. Clawson et al., U.S. Dep't of Health & Human Servs. Office of the Assistant Sec'y for Planning & Evaluation, *Treating the Hidden Wounds: Trauma Treatment & Mental Health Recovery for Victims of Human Trafficking* 3 (2008).[149] The proposal is, in other words, a self-fulfilling prophecy: By forcing asylum officers to adjudicate frivolousness, the NPRM will create more applications that appear frivolous—but those additional referrals will actually result from the adversarial questioning required by the NPRM rather than from a lack of merit in the underlying claim.

To make matters worse, the NPRM proposes to remove procedural safeguards against findings of frivolousness. It does so, once again, on the "belie[f]" that significant numbers of asylum seekers submit "knowingly frivolous applications." 85 Fed. Reg. at 36,276. But once again, the NPRM includes no evidence to back that belief, because none exists; the agencies' "belief" is nothing more than a pernicious stereotype that has no place in the law at all, much less in asylum law.

Further, as stated above, the NPRM is flatly wrong to assert that asylum seekers will know whether their application is frivolous under the proposed definition—and it would also remove the requirement of actual knowledge. Nor will the statutory notice required by 8 U.S.C. § 1158(d)(4)(A), which goes only to the consequences of filing a frivolous application, suffice to put asylum seekers on notice that their application is frivolous. The NPRM would, for example, allow a pro se asylum seeker who submits a claim premised on gang-based violence in good faith to suffer the consequences of filing a "frivolous" application without warning and without any advance knowledge of why the application would be deemed frivolous. That result will do nothing except deter meritorious claims and result in mass *refoulement*.

The so-called "safety valve" in the NPRM (85 Fed. Reg. at 36,277) is nothing more than the caricature of an actual safety valve. Essentially, the safety valve would force anyone who submits an application deemed "frivolous" to forgo all relief and take voluntary departure. Given the utter absence of evidence that the asylum system is overrun with fraudulent or false applications, this means that the "safety valve" forces asylum seekers back into the very violence and persecution they fled in the first place. That is no safety valve at all.

Finally, taken together, these changes violate asylum seekers' rights to due process. Here, the private interest at stake is extraordinarily significant, given the consequences of a frivolousness

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[149] https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf.

finding and the likely consequences of *refoulement*; the government's stated interest is so negligible as to be irrational; and the obvious additional safeguards are ones that the NPRM proposes to abolish.

2. Pretermission

The proposal to allow immigration judges to "pretermit" an asylum application without a hearing would, if enacted, make a mockery of due process and the government's duty of non-refoulement. The NPRM would require—not just allow, but require—judges to deny applications without a hearing if the application itself does not "establish[ ] a prima facie claim for relief." 85 Fed. Reg. at 36,302. The NPRM provides no rationale for this proposal. It states only that "neither the INA nor current regulations require more" and then claims that "pretermission … is consistent with current practice." *Id.* at 36,277. But even if there were no bar to pretermission (and, as described below, there is), that would not make pretermission a good idea. Rather, it would do no more than open the door to the inquiry whether a requirement of pretermission, an allowance of pretermission, or a ban on pretermission makes the most sense. The agencies do not even pretend to have undertaken that inquiry, with the result that the proposal is arbitrary on its face.

Far from being a good idea, pretermission in the context of asylum claims would have extraordinarily malignant effects. "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting Elizabeth Hull, *Without Justice for All* 107 (1985)). The law has not become less complex since 1987. And many asylum seekers proceed pro se and have limited English proficiency, much less familiarity with the intricacies of U.S. asylum law. Their ability to present a prima facie case for asylum in writing thus bears no relationship to the merit of their underlying claim.

Further, it should go without saying that refugees are often unable to take all of the documentation relevant to claims for relief with them when they flee their homes. In fact, "cases in which an applicant can provide" documentary "evidence of all of his statements will be the exception rather than the rule." UNHCR, *Handbook* § 196. As the BIA said in *Matter of Fefe*—in a statement that did *not* turn on then-applicable regulatory requirements—"the full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself." *Matter of Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989). The agencies' failure to consider this aspect of the problem—the effect of pretermission on pro se applicants—also renders the proposal arbitrary.

Survivors of gender-based violence, like all asylum seekers, will suffer swift pretermission for failing to establish a *prima facie* claim. Again, along with the new "frivolous" standard, pretermission will prevent even those who might ultimately meet the "rare circumstances" exception in gender-based cases from framing and presenting evidence of such circumstances in court. Those who simultaneously have pending VAWA or U-visa petitions will likely be removed in the meantime, before decisions on their petitions that could have permitted them to remain in the U.S. have been rendered. As a result, survivors and their children who return with them will face new unlawful presence bars requiring waivers to be filed from abroad. They will have limited if any access to counsel and face additional, undue barriers in responding to Requests for Evidence and other critical correspondence about their cases. And most critically, they will be vulnerable to life-threatening violence and other harm that will prevent them from ever safely returning to the United States even if their petitions are ultimately granted. And T-visa petitioners who are deported (*i.e.*, those who do

not have "continued presence") will eventually have their petitions denied outright for failure to maintain presence in the United States. These results grossly undermine the express intent of Congress in enacting these remedies for survivors.

Moreover, the NPRM is incorrect that there is no bar to pretermission under current law. The agencies have not considered whether pretermission would violate the statutory and international-law rule against *non-refoulement*, and it would. As noted above (*see* Section III.A.1.d, *supra*), a significant percentage of asylum seekers are unrepresented. The agencies have not shown—and cannot show—that pro se asylum seekers with meritorious cases are able to show a prima facie case for relief on their written applications. All evidence is, in fact, to the contrary. In particular, between October 2000 and March 2020, 48% of represented asylum seekers received relief in immigration court, while only 17% of unrepresented asylum seekers did so. TRAC, *Asylum Decisions*. And the vast majority of asylum seekers who fail to find representation do so for reasons unrelated to the merits of the case. In particular, detained asylum seekers—especially those detained by ICE in areas with exceedingly few lawyers—have difficulty finding representation *because* they are detained. *See, e.g.*, *id.*; Eagly & Shafer, *supra*. There can thus be no doubt that requiring applications to be pretermitted without a hearing will result in the illegal return of asylum seekers to persecution.

The proposed provision giving an asylum seeker an opportunity respond to the pretermission motion or show-cause order (see 85 Fed. Reg. at 36,277) will not change that result. There can be no rational expectation that a person without legal representation, who is almost certainly not versed in U.S. asylum law and very likely does not understand legal English, can correctly remedy deficiencies identified by an immigration judge. The way for an asylum seeker to do so is to be interviewed—i.e., to have an opportunity to present her full story with an interlocutor able to elicit and understand those details and how they mesh with U.S. law. Immigration court by no means provides a perfect opportunity for such interactions—but it is immeasurably better than written papers. The agencies have nevertheless refused to consider these on-the-ground effects before making their proposal.

As with the changes regarding "frivolous" applications, the NPRM's proposals concerning pretermission also violate due process. Here, the private interest in literally life and death, because the proposed rules bear no relationship to the merit of underlying asylum claims; the government's interest is so negligible as not to be articulated in the NPRM; and the procedural safeguards are again ones that already exist.

3. Confidentiality

The NPRM would expressly allow disclosure of information in an asylum application "as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the [person's] immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse." 85 Fed. Reg. at 36,301.

The release of information from asylum applications will put asylum seekers at grave risk of harm. In disclosing critical details of persecution, an asylum seeker will necessarily implicate her persecutor. A persecutor may seek retribution by further harming the applicant upon deportation if her claim is denied. Or, he may punish her by harming family members at home while she awaits

adjudication of her application or if she prevails in her claim. As noted by UNHCR, with regard to asylum claims based on persecution in the form of human trafficking:

> …trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination.

See UNHCR, *Gender Guidelines*, at 5. This is precisely the reason why existing rules prohibit release of inherently sensitive information in asylum applications other than in exceptional circumstances.

While this confidentiality provision appears purely procedural, it may in fact compromise asylum seekers' claims on the merits. A survivor fearing punishment from her persecutor for revealing details of her ordeal may be deterred from doing so at all. Yet withholding such information will certainly weaken her case substantively. It will also unjustly make her appear less credible. Perversely, this provision requires asylum seekers to choose *how*, not *whether*, they risk punishment: they can do so by presenting a weak claim, or by presenting a strong claim. Those who choose to risk retaliation by revealing the full details of their claims but who fail nonetheless, are undoubtedly at greatest risk of harm upon *refoulement*. UNHCR is likewise clear that this catch-22 has no place in the asylum process. Rather, an adjudicator should

> …take the time to introduce him/herself and the interpreter to the claimant, explain clearly the roles of each person, and the exact purpose of the interview. The claimant should be assured that his/her claim will be treated in the strictest confidence.

UNHCR, *Gender Guidelines*, at 9. The adjudicator should further

> gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed.

Id. And those fleeing gender-based persecution in particular, who may have internalized shame and stigmas,

> may be reluctant to identify the true extent of the persecution…They may continue to fear persons in authority, or…rejection and/or reprisals from their family and/or community…An open and reassuring environment is often crucial to establishing trust between the interviewer and the claimant, and should help the full disclosure of sometimes sensitive and personal information. The interview room should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances.

Id. at 8-9.

Asylum seekers may also simultaneously experience gender-based violence in the United States, as explained above. The abuse could be either related or unrelated to the persecution they are fleeing abroad. Abusers notoriously lodge false accusations against survivors to punish them for reporting abuse, or to manipulate and wreak havoc on their lives to reinforce control. For example, in

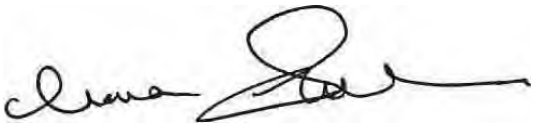
Uwa's* case described above, once she applied for asylum, her abusive husband contacted the U.S. Embassy in Nigeria to falsely accuse her of kidnapping their children in order to damage her case. Tahirih was ultimately able to help obtain documents from Nigeria proving that Uwa* did in fact have legal custody of their children, and she eventually prevailed in her claim. This provision unfairly puts survivors at the mercy of abusers who trigger disclosure of information in their asylum applications. Under the NPRM, disclosure could be triggered if an abuser reports fabricated allegations of crime, child abuse, or immigration violations to law enforcement or DHS.

IV. Conclusion

The NPRM must be withdrawn in its entirety.

Sincerely,

Richard Caldarone
Litigation Counsel



Irena Sullivan
Senior Immigration Policy Counsel

/s/Julie Carpenter

Julie Carpenter
Senior Litigation Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF HOMELAND SECURITY *et al.*,

Defendants.

Case No. 3:20-cv-09253-JD

[PROPOSED] ORDER TO SHOW CAUSE WHY A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUCTION SHOULD NOT ISSUE

Assigned to Hon. Judge James Donato

TO DEFENDANTS Chad F. Wolf, in his official capacity under the title of Acting Secretary of Homeland Security; Kenneth T. Cuccinelli, in his official capacity under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security; U.S. Citizenship and Immigration Services; U.S. Immigration and Customs Enforcement; Tony H. Pham, in his official capacity under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement; U.S. Customs and Border Protection; Mark A. Morgan, in his official capacity under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection; U.S. Department of Justice; William P. Barr, in his official capacity under the title of U.S. Attorney General; Executive Office for Immigration Review; and James McHenry, in his official capacity under the title of Director of the Executive Office for Immigration Review:

YOU (AND EACH OF YOU) ARE HEREBY ORDERED TO SHOW CAUSE at _____ (time) on _____ (date), or as soon thereafter as counsel may be heard in the courtroom of the Honorable _____, located at _____, why you, your officers, agents, servants, employees, and attorneys and those in active concert or participation with you or them, should not be enjoined from implementing or enforcing the rule titled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020) ("Final Rule") and any related policies or procedures, including the Policy Memorandum entitled *Guidance Regarding New Regulations Governing Procedures For Asylum and Withholding of Removal and Credible Fear Reviews* issued by the Department of Justice on December 11, 2020.

PENDING HEARING on the above Order to Show Cause, you, your officers, agents, servants, employees, and attorneys and all those in active concert or participation with you or them ARE HEREBY ENJOINED from implementing or enforcing the Final Rule and any related policies and procedures, including the Policy Memo. Plaintiffs have shown that because the Final Rule is scheduled to go into effect on January 11, 2021, which is 30 days after it was published, Plaintiffs cannot maintain the status quo on the ordinary schedule for hearing a preliminary injunction. Plaintiffs have further shown that immediate and irreparable injury will result to the Plaintiffs, which are nonprofits that help

low-income immigrants seek asylum and provide resources and training to others who help asylum-seekers. Plaintiffs will be forced to "divert resources away from [their] core programs to address the new policy." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020). The Rule's changes will cause "ongoing harms to [Plaintiffs'] organizational missions," and Plaintiffs will thus "provid[e] fewer services to fewer individuals," frustrating their missions. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 854 (9th Cir. 2020). For the same reasons, the Rule "directly threatens their standard caseload, and consequently, their caseload[] dependent funding." *Id.* These harms are all imminent and irreparable.

This TRO is effective immediately. The Court waives the security requirement under Federal Rule of Civil Procedure 65(c) because Plaintiffs have demonstrated that Defendants will not incur any costs or damages in complying with the TRO because the Final Rule has not gone into effect and maintaining the *status quo* comes at no additional cost to the Defendants.

This Order to Show Cause and supporting papers must be served on Defendants no later than _____ days before the date set for hearing, and proof of service shall be filed no later than _____ days before the hearing. Any response or opposition to this Order to Show Cause must be filed and served on Plaintiffs' counsel through ECF no later than _____ *(date)*. Any reply shall be filed and served no later than _____ *(date)*.

SO ORDERED.

DATED:_____

_____
Hon. _____
United States District Judge