



July 15, 2020

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Submitted via <http://www.regulations.gov>

Re: Executive Office for Immigration Review, Department of Justice and U.S. Citizenship and Immigration Services, Department of Homeland Security, Joint Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* (EOIR Docket No. 18-0002, RIN 1125-AA94)

Dear Ms. Reid:

The American Immigration Council (Council) and the American Immigration Lawyers Association (AILA), through their joint initiative, the Immigration Justice Campaign (Justice Campaign), submit the following comments in response to the above-referenced Executive Office for Immigration Review (EOIR) and U.S. Citizenship and Immigration Services (USCIS) rule, EOIR Docket No. 18-0002, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (June 15, 2020) (the “Proposed Rule”).

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and Constitutional rights of noncitizens, advocates on behalf of asylum seekers before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Immigration Justice Campaign is a joint initiative of AILA and the Council. The Campaign’s mission is to strengthen the community of defenders, comprised of attorneys and other supporters, who are ready to vigorously advocate for the rights of detained immigrants in removal proceedings and advocate for systemic change. The primary focus of the Campaign is to

channel the energy of the broader legal community into pro bono work for detained immigrants and asylum seekers. The Campaign has a network of more than 12,000 volunteers across the country who serve noncitizens detained in Texas, Colorado, New Jersey, California, and throughout the southeast.

It is the long-settled policy of both Congress and the executive branch to provide asylum seekers a fair and meaningful opportunity to seek and apply for asylum in the United States. For four decades, federal law—consistent with the United States’ international treaty obligations—has ensured the right for those fleeing persecution to seek protection in the United States. That long-established commitment is undergirded by fundamental principles of the U.S. legal system: that an adjudication of essential rights and liberties must be fair and must comport with basic due process principles. The Proposed Rule would upend those long-standing protections.

Through the notice of proposed rulemaking, EOIR and USCIS seek to severely restrict the definition of a refugee—making it insurmountably difficult for asylum seekers to qualify for protection. In addition, the Proposed Rule seeks to establish new standards at all stages of the asylum process. Although the stated justification for the Proposed Rule is to streamline the asylum process, the practical effect will be to deny those seeking protection in the United States meaningful access to the asylum process and a meaningful opportunity for a fair hearing. The Proposed Rule also will eliminate the discretion of factfinders and transfer decision-making authority away from immigration judges (IJs) to asylum officers, and require those officers to make case-determinative decisions about a variety of matters that have traditionally been entrusted to IJs, who have extensive knowledge of and experience with immigration law and its application across a wide range of cases and legal issues.

Based on our expertise and experience, the Proposed Rule’s changes will violate the clear intent of Congress—reiterated over and over for four decades—that the United States provide a meaningful and fair path to protection for those fleeing persecution. We submit the following comments in opposition to the Proposed Rule and, for the reasons stated below, urge EOIR and USCIS to withdraw the Proposed Rule.

Further, the Council and AILA, through the Campaign, note that the Departments of Justice and Homeland Security failed to provide a sufficient period for interested parties to comment on this Proposed Rule. Under most circumstances, agencies must provide public comment periods of at least 60 days in length.¹ There is no evidence that 60 days would be unfeasible or unlawful in the present case. Moreover, the rushed 30-day comment period is particularly inappropriate given the sweeping scope of this Proposed Rule and the ongoing coronavirus pandemic. Many individuals interested in commenting on this Proposed Rule are dealing with unanticipated and emergent matters resulting from the pandemic. The Council, AILA, and IJC, along with 500 other organizations, called on the Departments of Justice and Homeland Security to extend the

¹ *See, e.g.*, Exec. Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (directing agencies generally to furnish “not less than 60 days” for public comment); Exec. Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (“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.”).

comment period associated with this Proposed Rule.² The Departments have failed to act on this request.

I. THE PROPOSED RULE CONTRAVENES THE REFUGEE ACT BY SO RADICALLY NARROWING THE DEFINITION OF A REFUGEE THAT IT WILL BE IMPOSSIBLE FOR MOST ASYLUM SEEKERS TO QUALIFY FOR ASYLUM

By radically narrowing the definitions of “particular social group,” “political opinion,” and “persecution,” the Proposed Rule will effectively ban a large number of asylum claims.³ The Proposed Rule intends to exclude—as a categorical matter—claims of persecution on account of domestic violence, gang violence, and generalized violence, among others. This sweeping approach is antithetical to the intent of the statute, which provides for an independent, fact-specific analysis based on the individual asylum seeker’s particularized circumstances. Implementation of the Proposed Rule will result in asylum seekers being returned to countries in which they will face persecution, in direct contravention of the U.S.’s statutory and treaty obligations.

The rationale for providing this permanent and inclusive system was to codify humanitarian principles of protection. In the hearings leading up to the enactment of the Refugee Act, humanitarian concern was repeatedly cited in Congressional testimony as the driving force behind the legislation. Congressman Peter Rodino described the final version of the 1980 Refugee Act as:

[O]ne of the most important pieces of humanitarian legislation ever enacted by a United States Congress.... [It] 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 who fall victim to tyrannical and oppressive governmental regimes.⁴

The Refugee Act expressly incorporated the 1951 Refugee Convention definition of a refugee, with the intent of conforming U.S. law to the international norm.⁵ The inclusion of the term “particular social group” matched the language of the Convention and the Protocol and thus incorporated into domestic law a definition of refugee that was malleable rather than static, and able to change as world conditions and societal opinions changed. In the years since the passage of the 1980 Act, developing case law has reflected the intent of the drafters, with the recognition of new particular social groups as circumstances change.⁶

² See Letter to Department of Justice and Department of Homeland Security, June, 18, 2020 (last accessed July 9, 2020), available at: <https://www.tahirih.org/wp-content/uploads/2020/06/Request-for-Extension-of-Asylum-Rule-Comment-Period-from-502-organizations.pdf>.

³ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,277-81 (proposed June 15, 2020) [hereinafter “Proposed Rule”].

⁴ 26 Cong. Rec. 1519, 1522 (1980).

⁵ S. Rep. No. 590, 96th Cong., 2d Sess. 1, at 19 (1980).

⁶ See, e.g., *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).

Recent case law has already narrowed many of the asylum claims in the manner that the Proposed Rule seeks to codify, but the effect of codifying this narrowing of scope through a rule would remove the flexibility and discretion of asylum officers and IJs, and prescribe a single prescriptive outcome. This would be to the detriment of asylum seekers and in contravention of the United States' obligations. The Proposed Rule purports to recognize the necessity of maintaining individualized, fact-specific determinations,⁷ but in practice the effect of the Proposed Rule will be to foreclose the ability of large numbers of asylum seekers from being able to access such individualized assessments.

A. Narrowing the Definition of “Persecution” Will Lead to Severe Harm to Many Asylum Seekers

The Proposed Rule seeks to restrict the definition of “persecution” to exclude certain types of harm from constituting persecution, including (1) “intermittent harassment, including brief detentions, repeated threats with no effort to carry out the threats, or non-severe economic harm or property damage,” (2) “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,” and (3) “instance[s] of harm that arise[] generally out of civil, criminal, or military strife in a country.” The Proposed Rule would categorically exclude these harms from asylum protection, rather than allowing the adjudicator to conduct the case-by-case, individualized assessment of the facts and evidence required by the Refugee Convention and the U.S. Refugee Act.

These categorical exclusions would also make it impossible for the adjudicator to assess harms cumulatively, in direct contravention of U.S. law and United Nations High Commissioner for Refugees (UNHCR) guidance. Because of the widely varied nature of persecution in different countries, with different persecutors and different victims of persecution, it is crucial that adjudicators maintain the flexibility to assess harms cumulatively. While one brief detention, for instance, may not constitute persecution, a series of repeated brief detentions may, when considered cumulatively, constitute persecution. The failure to consider instances of harm cumulatively will mean that the U.S. returns people to countries where they will face serious danger.

The proposed exclusions would run counter to decades of established case law, in which courts have held that the types of harm the Proposed Rule now seeks to exclude may constitute persecution. The Proposed Rule's statement that “intermittent harassment, including brief detentions, repeated threats with no effort to carry out the threats ... do not constitute persecution” targets a common situation that many asylum seekers experience before fleeing and coming to the United States. Many asylum seekers experience a series of brief detentions by the government in their country of origin, which threaten to escalate into a long-term detention if the individual remains in the country. Similarly, many asylum seekers experience a pattern of intermittent, but escalating, harassment and death threats which threaten to ripen into full blown physical attacks. Courts in a variety of circuits have repeatedly recognized that such situations

⁷ “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.” Proposed Rule, 85 Fed. Reg. at 36,279.

can rise to the level of persecution, particularly when part of a pattern of escalating harassment.⁸ As the Third Circuit recently emphasized, “to expect [an asylum seeker] to remain idle in that situation—waiting to see if his would-be executioners would go through with their threats—before he could qualify as a refugee would upend the ‘fundamental humanitarian concerns of asylum law.’”⁹

In another radical attempt to gut the Refugee Act, the Proposed Rule proposes to exclude persecution based on “instance[s] of harm that arise[] generally out of civil, criminal, or military strife in a country.” However, the Board of Immigration Appeals (BIA) has acknowledged that persecution often takes place in the context of civil war,¹⁰ and courts have held that a fear of persecution is not negated simply because there is general violence and disorder.¹¹ By contrast, the proposed change would impose a bright-line, categorical exclusion of all harm arising in the context of civil, criminal, or military strife and eliminate the adjudicator’s ability to conduct a case-by-case assessment to determine whether, in the particular circumstances of that case, an instance of harm may rise to the level of persecution, even though it arises against the backdrop of civil war.¹²

The Proposed Rule proposes to exclude as persecution “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.” This change would again exclude entire classes of asylum seekers and run counter to the spirit and purpose of asylum law. For example, this change would exclude asylum claims from women fearing punishment under Shari’ah law, LGBT

⁸ The following courts have found that death threats can constitute persecution, even when no action is taken to carry out on the threat. *See, e.g., Tairou v. Whitaker*, 909 F.3d 702, 707–08 (4th Cir. 2018) (holding death threats alone constituted persecution); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (same); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 744–46 (9th Cir. 2006) (same); *Marcos v. Gonzales*, 410 F.3d 1112, 1118–21 (9th Cir. 2005) (same); *Thomas v. Ashcroft*, 409 F.3d 1177, 1187–89 (9th Cir. 2005) (en banc), vacated on other grounds, 547 U.S. 183 (2006) (escalating scheme of intimidation and real threat of physical violence are enough); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (death threats to mother qualified as persecution); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126–27 (4th Cir. 2011) (targeted death threats amount to persecution); *Sok v. Mukasey*, 526 F.3d 48, 53–55 (1st Cir. 2008) (Immigration Judge reversed for failing to consider death threats because “we have often acknowledged that credible threats can, depending on the circumstances, amount to persecution, especially when the assailant threatens the petitioner with death, in person, and with a weapon”); *Un v. Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005) (credible verbal death threats may fall within the meaning of persecution). The following courts have found that brief detentions can constitute persecution. *See, e.g., Kantoni v. Gonzales*, 461 F.3d 894, 897–98 (7th Cir. 2006) (reversing denial of Togo woman who was detained briefly and threatened because a “credible threat that causes a person to abandon lawful political or religious association or beliefs is persecution”); *Javhlan v. Holder*, 626 F.3d 1119 (9th Cir. 2010) (finding persecution where Mongolian who refused to join Communist Party was briefly held for 4 or 5 hours and received many threats to her life resulting in mental anguish, a nervous breakdown, and partial stroke).

⁹ *Doe v. Atty. Gen. of the U.S.*, 956 F.3d 135, 144 (3d Cir. 2020) (quoting *Matter of S-P*, 21 I&N Dec. 486, 492 (BIA 1996)).

¹⁰ *See Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990); *Matter of H-*, 21 I&N Dec. 337, 343 (BIA 1996).

¹¹ *See, e.g., Sinha v. Holder*, 564 F.3d 1015, 1023–25 (9th Cir. 2009) (widespread violence to Indo-Fijians does not diminish individual claim or fear); *Konan v. U.S. Att’y Gen.*, 432 F.3d 497, 503–06 (3d Cir. 2005) (where gendarme in Côte d’Ivoire was killed by rebel forces, son had imputed claim for asylum because attack was in part to kill government supporters not simply police officers, and general civil unrest does not negate claim).

¹² The case of *Ordonez-Quino v. Holder*, 760 F.3d 80 (1st Cir. 2014) is instructive. In that case, the applicant alleged that he had suffered persecution as a result of the Guatemalan army’s attacks on his Mayan Quiché family during the Guatemalan civil war. The Immigration Judge had found that the Guatemalan military attacked the applicant’s community during the war because they thought there were guerrillas within or nearby, not because the community was Mayan Quiché. The First Circuit disagreed, holding that racism was an underlying cause of the Guatemalan civil war and the cause of the particular brutality with which military operations were carried out against Mayan communities. Under the proposed changes, this kind of individualized, nuanced assessment would not be permitted. Instead, all claims based on instances of harm arising out of civil strife would be summarily rejected.

asylum seekers fearing punishment under Russia’s anti-gay “propaganda” laws, or Hong Kong dissidents fearing punishment under China’s new National Security Law. In some countries, there are government laws or policies that provide that women who are guilty of adultery can be sentenced to death by stoning. Even if this punishment is infrequently enforced, the laws or policies are still sometimes enforced, and there is no way to know when they will be enforced versus not. Thus, there is still a reasonable possibility that the asylum seeker’s feared harm will occur, and that is enough to meet the standard of proof for asylum (which was intentionally set at a low standard¹³). The Proposed Rule ignores this possibility and categorically proscribes to the adjudicator that such harms do not constitute persecution.

B. Narrowing the Definition of “Particular Social Group” Improperly Targets Central American Asylum Seekers, Aiming to Ensure that No One from El Salvador, Guatemala, or Honduras is Granted Asylum

The Proposed Rule further undermines the 1951 Convention and Refugee Act by providing a nonexhaustive list of nine specific bases that will no longer meet the definition of a particular social group.¹⁴ Such blanket denials of asylum based on broad categories of applicants are contrary to the mandate of providing case-by-case assessments to each asylum seeker. In fact, the Proposed Rule explicitly recognizes that categorical rules regarding particular social groups contradict the “individualized analysis required by the [Immigration and Nationality Act (INA)].”¹⁵ One of the stated goals of the Proposed Rule is to “reduce the amount of time the adjudicators must spend evaluating” claims.¹⁶ This cannot justifiably come, however, at the expense of stripping adjudicators of discretion by mandating categorical denials, excluding broad categories of asylum seekers from eligibility, and eliminating the required individual assessment of each asylum seeker. To do so defeats the entire purpose of the asylum system.

It is clear that the government is aiming this section of the Proposed Rule at a certain group of asylum seekers: those from the Northern Triangle of Central America (El Salvador, Guatemala, and Honduras). Claims that would be categorically denied under the Rule include those connected to gang violence, gender-based discrimination, and domestic violence. Such claims constitute a large majority of asylum cases from these Central American countries.¹⁷ Barring these applications categorically is wholly improper as it does not necessarily follow that fleeing a country with a high crime rate means that an applicant was not persecuted or is otherwise ineligible for asylum.¹⁸

The Proposed Rule erects yet another obstacle to asylum for anyone whose claim is based on membership in a particular social group by adding a new procedural requirement that an asylum

¹³ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

¹⁴ Proposed Rule, 85 Fed. Reg. at 36,278-79.

¹⁵ See *id.* at 36,278 n.27 (citing *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018)). The court in *Grace* stated that “[a] general rule that effectively bars the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress’ intent to bring ‘United States refugee law into conformance with the [Protocol].’” *Grace*, 344 F. Supp. 3d at 126 (citations omitted).

¹⁶ Proposed Rule, 85 Fed. Reg. at 36,279.

¹⁷ The Proposed Rule’s categories correspond almost directly with the most common types of claims; it appears as though this was the Administration’s specific intent.

¹⁸ See, e.g., *Juan-Pedro v. Sessions*, 740 F. App’x 467 (6th Cir. June 29, 2018) (recognizing particular social group even though asylum seeker fled from country with widespread violence).

seeker must define a particular social group in their application on the record. Failure to do so waives that argument for all purposes.¹⁹ This requirement will present a huge hurdle for *pro se* applicants, who are already at a disadvantage attempting to navigate a complicated legal system after experiencing severe trauma, often in an unfamiliar language. 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. This bar applies even to motions to reopen based on an ineffective assistance of council claim, raising substantial due process concerns given that applicants in immigration proceedings have a right to effective assistance of counsel “stem[ming] from the Fifth Amendment’s guarantee of due process.”²⁰ Thus, 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.

C. The Proposed Rule Improperly Amends the Definition of “Political Opinion”

The Proposed Rule seeks to limit the definition of political opinion as only the furtherance of a discrete cause related to state actors, generally precluding claims of persecution in opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior. This definition of political opinion is unacceptable for several reasons.

Restricting the definition of political opinion to ignore modern forms of persecution and limiting the ways opinions can be expressed goes against the purpose of the Refugee Act and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). In 1996, IIRIRA amended the definition of political opinion to include 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.”²¹ This was a previously unforeseen form of political persecution that expressed itself through actions rather than words. Congress’ reasoning for amending the definition was that certain BIA opinions had “effectively preclude[d] from protection persons who have been submitted to undeniable and grotesque violations of fundamental human rights. . . . The United States should not deny protection to persons subjected to such treatment.”²² The Proposed Rule should not restrict the definition of political opinion so that it does not deny protection to persons facing violations of fundamental human rights, either through actions or words.

The Proposed Rule ignores the reality that the political landscape of the modern world has drastically changed since the 1951 Convention and non-state organizations, such as gang, criminal, and terrorist organizations, play a substantial role in the persecution of refugees. For example, the Northern Triangle presents an ongoing refugee crisis, as governments have lost control over their territories and transnational criminal organizations have taken power as the de

¹⁹ This waiver applies on appeal, on motions to reopen, and on motions to reconsider. *See* Proposed Rule, 85 Fed. Reg. at 36,279.

²⁰ *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015); *see also* *Rodrigues-Lairz v. INS*, 282 F.3d 1218, 1226 (9th Cir. 2002) (“Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.”).

²¹ H.R. Rep. No. 104-469, pt. 1, at 77 (1996).

²² *Id.* at 174.

facto governments.²³ This has even been acknowledged by the political leadership of countries like El Salvador, whose president stated in December 2019 that the gangs “have a de facto power, a real one. They charge taxes ... [and] they have a quasi security force.”²⁴ Political persecution has become a substantial problem in these countries and many refugees come to the United States seeking protection from political persecution propagated by these organizations.²⁵ By disfavoring claims against gang, criminal, and terrorist organizations, the Proposed Rule will be incapable of properly addressing the needs of modern refugees, responding to modern conflicts around the world, and providing protection to victims of these non-state organizations.

D. The Proposed Rule Improperly Narrows the Circumstances That Would Establish Nexus

The INA, as amended by the Refugee Act of 1980 and the REAL ID Act of 2005,²⁶ provides that an individual is eligible for asylum if s/he can demonstrate 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.²⁷ The requirement that the fear be *on account of* an enumerated ground is commonly called the “nexus requirement.”

Case law has provided ample interpretation of the nexus requirement. An applicant need not—indeed cannot—prove the exact motivation of the persecutor, but the applicant must establish “facts on which a reasonable person would fear that the danger arises on account of” a protected ground.²⁸ Courts have agreed that the standard is whether the persecutor’s motivation to harm the applicant is based on a protected characteristic, and whether the protected characteristic is “at least one central reason” for the harm.²⁹

The Proposed Rule seeks to improperly narrow the nexus requirement so as to render it unattainable, listing various grounds as presumptively excluded from the reasons that persecutors

²³ See Max G. Manwaring, *A Contemporary Challenge to State Sovereignty: Gangs and Other Illicit Transnational Criminal Organizations in Central America, El Salvador, Mexico, Jamaica, and Brazil* (Dec. 2007), https://www.files.ethz.ch/isn/47273/150108_TCOs_CentralAmerica.pdf.

²⁴ Sharilyn Alfonso, *Our Whole Economy is in Shatters: El Salvador’s President Nayib Bukele on the Problems Facing His Country*, 60 Minutes, Dec. 15, 2019, <https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/>.

²⁵ See Oscar Martinez et al., *Killers on a Shoestring: Inside the Gang of El Salvador*, N.Y. Times (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/world/americas/el-salvador-drugs-gang-ms-13.html>; CGRS, Central America: Femicides and Gender-Based Violence, <http://cgrs.uchastings.edu/our-work/central-america-femicides-and-gender-based-violence>; Deborah Hastings, *In Central America, Women Killed ‘With Impunity’ Just Because They’re Women*, N.Y. Daily News (Jan. 10, 2014), <http://www.nydailynews.com/news/world/femicide-rise-central-america-article-1.1552233>; *Violence Against Women in Latin America: Everyday Aggression*, The Economist (Sept. 21, 2013), <http://www.economist.com/news/americas/21586575-laws-punish-domestic-violence-are-too-often-honoured-breach-everyday-aggression>; Pamela Constable, *Could Kids Fleeing Central America be Sent Back to Face More Gang Violence?*, Wash. Post (July 25, 2014), http://www.washingtonpost.com/local/gang-member-deportations-in-90s-factor-in-border-crisis-some-contend/2014/07/25/10c5adda-0d1d-11e4-8341-b8072b1e7348_story.html.

²⁶ Pub. L. 109-13, § 101 (found at INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i)).

²⁷ 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).

²⁸ *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211; *Matter of S-P-*, 21 I&N Dec. 486, 490 (BIA 1996); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).

²⁹ INA § 208(b)(1)(B)(i), as amended by § 101(a) of the REAL ID Act, P.L. 109-13, 119 Stat. 302 (2005).

might target an applicant.³⁰ The Proposed Rule states, “Without additional evidence, these circumstances will generally be insufficient to demonstrate persecution on account of a protected ground.”³¹ Thus, by listing gender as an impermissible ground on which to base an asylum claim, as the Proposed Rule does, the practical effect of the narrowing of the nexus requirement is to effectively bar the asylum seeker from raising the factual reason for her persecution as a basis for seeking asylum. Such a result is fundamentally inconsistent with the statutory scheme as enacted by Congress.³²

Additionally, the Proposed Rule seeks to “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.”³³ There is no reason to bar such indirect evidence, particularly in a situation where direct evidence of a persecutor’s intent is likely to be impossible to adduce. Indeed, such evidence is often critical to establishing essential elements of the claim; for example, that a particular group of individuals are “socially distinct” within the society in which they reside.

E. The Proposed Rule Redefines and Expands the Concept of “Firm Resettlement” to Preclude Asylum Eligibility

The Proposed Rule would dramatically redefine what constitutes “firm resettlement.” Pursuant to U.S. law, an asylum seeker who “*was firmly resettled* in another country prior to arriving in the United States” (emphasis added) is ineligible for asylum.³⁴ The current regulation and historical precedent have established that firm resettlement only applies to a migrant who establishes permanent status in a third country, like permanent resident status or citizenship. The Proposed Rule now instructs adjudicators to consider as an “adverse factor” any travel through another country where the asylee could have sought asylum or refugee status, regardless of whether that country has a functioning asylum system and regardless of whether the migrant actually obtained that status.

The Proposed Rule seeks to eviscerate the definition of firm resettlement that has guided judges and applicants for 30 years by applying it to anyone who might theoretically have qualified for even a non-permanent legal status in a third country. The only reasons given for the change are “the increased availability of resettlement opportunities,” as evidenced by the fact that “forty-three countries have signed the Refugee Convention since 1990,” and a suggestion that anyone who travels to the United States via any route other than a non-stop flight is not “genuinely in

³⁰ “[T]he 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.” Proposed Rule, 85 Fed. Reg. at 36,281.

³¹ *Id.* at 36,281-82.

³² Furthermore, the rule’s rejection of asylum on the basis of “gender” does not grapple with the consequences that could cause for LGBT asylum seekers. As the Supreme Court recently clarified in *Bostock v. Clayton County*, 140 S.Ct. 1731 (June 15, 2020), the terms “sex” and “gender” may encompass aspects of sexual orientation and gender identity that go beyond simply biological sex. As written, the Proposed Rule’s exclusion could lead to the rejection of asylum for gay, lesbian, trans, or gender non-conforming asylum seekers who have long been recognized as eligible for asylum protection. At the very least, the final rule must address the rule’s impact on these populations.

³³ Proposed Rule, 85 Fed. Reg. at 36,282.

³⁴ INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi).

fear of persecution.” Neither justification withstands scrutiny. The mere fact that a country has signed the Refugee Convention does not mean that the country has a functioning asylum system. Afghanistan, for instance, which acceded to the Convention in 2005, does not, according to the U.S. State Department, currently have any laws governing asylum.³⁵ Countries that have an asylum system do not necessarily have a functioning asylum system capable of providing permanent protection to those fleeing persecution. Guatemala, for instance, “is hamstrung by a limited legal framework that only allows high level officials to approve claims, which causes massive bottlenecks in a system that has only recently begun to function at all.”³⁶ The fact that a country is party to the Refugee Convention does not mean that country provides a safe haven for a particular asylum seeker. Many asylum seekers, including those fleeing transnational gangs, continue to experience vulnerability or even persecution as they transit signatory countries.

II. THE PROPOSED RULE LIMITS ADJUDICATORS’ DISCRETIONARY AUTHORITY BY IMPROPERLY PRIORITIZING TRANSIT-RELATED FACTORS, TECHNICAL ERRORS, AND ADMINISTRATIVE DEFICIENCIES OVER THE LEGITIMACY OF ASYLUM CLAIMS

As the Proposed Rule correctly notes, asylum was created as a form of discretionary relief that allows the Secretary of Homeland Security or the Attorney General to grant asylum to anyone determined to be a refugee.³⁷ The Proposed Rule seeks to tie the hands of adjudicators and remove their exercise of discretion by codifying several “nonexhaustive factors that adjudicators must consider” when evaluating a claim for asylum that bar a decision maker from “favorably exercis[ing] discretion” if any of nine enumerated “adverse” factors are present.³⁸

The Proposed Rule argues elimination of this discretion is warranted to prevent spending “significant time evaluating and adjudicating claims.”³⁹ However, by stripping decision makers of meaningful discretionary authority and requiring blanket denials based on the presence of these factors, the Proposed Rule runs contrary to the spirit of asylum law, which mandates individualized review of each asylum claim based on the merits of the claim itself, not on meeting technical or administrative requirements.⁴⁰ The Refugee Act and the INA, for example, require an “individualized analysis” and “case-specific factually intensive analysis for each alien.”⁴¹

A. The Proposed Rule Improperly Prioritizes Asylum Seekers’ Flight from Persecution Over the Merits of Their Claim in the Exercise of Discretion in Violation of Congressional Intent

The Proposed Rule would restrict asylum eligibility for those asylum seekers whom the administration determines should or could have sought protection in third countries. These new

³⁵ See U.S. Dep’t of State, 2019 Country Reports on Human Rights Practices: Afghanistan, § 2F (March 11, 2020).

³⁶ Human Rights Watch, “Deportation with a Layover: Failure of Protection under the U.S.-Guatemala Asylum Cooperative Agreement,” May 19, 2020, <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

³⁷ INA § 208(b)(1)(A); 8 U.S.C. § 1158(b)(1)(A).

³⁸ Proposed Rule, 85 Fed. Reg. at 36,283.

³⁹ *Id.* at 36,284.

⁴⁰ See e.g., *Grace*, 344 F. Supp. 3d at 126-27.

⁴¹ *Id.* at 126.

transit-related adverse discretionary factors constitute a significant departure from past procedure and Congressional intent and introduce significant additional challenges for applicants with legitimate claims for asylum.

The transit-related adverse discretionary factors included in the Proposed Rule constitute yet another attempt by this administration to impose such restrictions on asylum seekers. On July 16, 2019, the administration promulgated an interim final rule (the “Asylum Transit Ban”) denying asylum eligibility to all individuals who transited through another country prior to reaching the southern border of the U.S. unless the asylum seeker applied for and was denied protection in a third country; was a trafficking victim; or transited only through countries not party to the 1951 Refugee Convention, 1967 Refugee Protocol, or Convention Against Torture (CAT).⁴² As with the Asylum Transit Ban, the new adverse discretionary factors included in the Proposed Rule would significantly limit asylum eligibility for asylum seekers transiting through third countries to reach the United States—which is, to say, nearly all asylum seekers. However, the Proposed Rule goes significantly beyond the administration’s prior effort, which was focused predominantly on asylum seekers at the southern border of the United States. The Proposed Rule calls for broad-based restrictions on asylum claims where an asylum seeker transited through *any* third country, anywhere in the world. Specifically, the Proposed Rule would impose two limitations for asylum seekers traveling through third countries en route to the United States (“pass-through” countries).⁴³

The transit-related adverse discretionary factors upend practice that has been in place since Congress first enacted the Refugee Act in 1980 and are inconsistent with the text and purpose of the Refugee Act and IIRIRA, as well as with the United States’ long-standing treaty obligations. Congress has never sought to block valid asylum claims based on the history of an asylum seeker’s transit alone; to the contrary, Congress has made clear that “there should be no danger that an alien with a genuine asylum claim will be returned to persecution.”⁴⁴ It has long been understood that “many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way,”⁴⁵ and that “a refugee need not seek asylum in the first place where he arrives” given that “it is quite reasonable for an individual fleeing persecution to seek a new homeland that is insulated from the instability” of her country of origin.⁴⁶ The transit-related adverse discretionary factors in the Proposed Rules seek to change that.

⁴² See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (proposed July 16, 2019). The Asylum Transit Ban has been vacated for a failure to follow notice and comment requirements. See *Capital Area Immigrants’ Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72 (D.D.C. June 30, 2020).

⁴³ First, Section 208.13(d)(1)(ii) instructs the decision-maker to consider as a “significant adverse discretionary factor[]” “[t]he failure of an alien to apply for protection from persecution or torture in at least one country . . . through which the alien transited before entering the United States,” unless certain limited exceptions apply. Proposed Rule, 85 Fed. Reg. at 36,293. Second, Section 208.13(d)(2)(i) provides that the decision-maker “will not favorably exercise discretion” for an applicant who “[i]mmediately prior to his arrival in the United States or en route to the United States . . . spent more than 14 days in any one country” unless certain limited exceptions apply. *Id.*

⁴⁴ H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

⁴⁵ *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 57 & n.6 (1971).

⁴⁶ *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003).

B. Consideration of Transit Through More Than One Country as an Adverse Discretionary Factor Will Effectively Bar Almost Every Asylum Seeker from Protection

The Proposed Rule directs adjudicators to consider the fact that an applicant traveled through more than one country prior to arriving in the U.S. as a “significant adverse discretionary factor” absent “extraordinary circumstances”—irrespective of the merits of the asylum seeker’s claim or the legitimate threat of persecution or reprisal. As discussed above, many asylum seekers with valid claims lack adequate travel documentation precisely because of governmental persecution in their countries of origin, making it difficult for asylum seekers to arrive directly in the U.S. to make a claim. This is particularly true for asylum seekers from distant parts of the world, including Africa and Asia, from which transit to the United States is nearly impossible without passing through at least one additional country.

The Proposed Rule also ignores the fact that many asylum seekers are simply not safe from persecution by transnational criminal groups in “pass-through” nations, even in those countries that are signatories to the 1951 Refugee Convention.⁴⁷ For example, many asylum seekers continue to be pursued as they travel through Mexico to the United States’ southern border.⁴⁸ The same is true of many asylum seekers fleeing transnational persecution in other parts of the world.⁴⁹

If the Proposed Rule is implemented, large numbers of asylum seekers will become categorically ineligible for asylum in the United States. Even more troubling, the Proposed Rule would place many individuals at serious risk of being returned to the same countries where they were persecuted—whether directly, or indirectly, by returning them to a country which may, in turn, return them to their countries of origin.

⁴⁷ As the Ninth Circuit recently explained in striking down the July 2019 third-country transit ban, countries may be a signatory to the Refugee Convention without offering any meaningful access to asylum:

The sole protection provided by the Rule is its requirement that the country through which the barred alien has traveled be a “signatory” to the 1951 Convention and the 1967 Protocol. This requirement does not remotely resemble the assurances of safety built into the two safe-place bars of § 1158. A country becomes a signatory to the Convention and the Protocol merely by submitting an instrument of accession to the U.N. Secretary General. It need not “submit to any meaningful international procedure to ensure that its obligations are in fact discharged.” *See* Declaration of Deborah Anker, Harvard Law School, & James C. Hathaway, University of Michigan Law School, ¶¶ 5, 7. Many of the aliens subject to the Rule are now in Mexico. They have fled from Guatemala, Honduras, and El Salvador. All four of these countries are parties to the Convention and Protocol. 84 Fed. Reg. at 33,839.

East Bay Sanctuary Covenant v. Barr, Nos. 19-16487, 19-16773, ___ F.3d ___, 2020 WL 3637585 (9th Cir. July 6, 2020).

⁴⁸ *See, e.g.*, U.S. Dept. of State, Mexico 2018 Human Rights Report 19, <https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf> (Central American gangs have “spread farther into” Mexico and “threatened migrants who had fled the same gangs in their home countries”).

⁴⁹ The Departments speculate 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.” Proposed Rule, 85 Fed. Reg. at 36,283. To the contrary, this likely reflects that asylees are not safe or protected before reaching the United States.

C. Inclusion of 14-day Stays in Third Countries as “Significant Adverse Discretionary Factors” Ignores Realities of Asylum Applicants

The Proposed Rule also directs adjudicators to consider the fact that an applicant spent more than 14 days in another country prior to reaching the U.S. as a “significant adverse discretionary factor.”⁵⁰ Not only does this direction blatantly ignore the realities of asylum seekers,⁵¹ who are often forced to trek with few resources through other countries in order to claim protection, but it also constitutes an improper intrusion into the adjudicators’ discretionary authority and is inconsistent with Congressional intent and longstanding international obligations.

The Proposed Rule lists three exceptions that do nothing to mitigate the harm of this proposed change: 1) if the applicant applied for and was denied asylum in the third country, 2) if the applicant demonstrates that he or she is a victim of trafficking, and 3) if the third country was, at the time of transit, not a party to key international protection agreements.⁵² As set forth above, many refugees are simply not safe in “pass-through” countries such as Mexico, even if those countries have adopted the relevant international protection agreements, as Mexico has done. It is not only pointless, but dangerous, for these applicants to apply for asylum in those second countries, to wait for an application to be denied, and to endure the risk of further persecution in the interim. Further, this Proposed Rule shifts the United States’ treaty obligations to other nations and subverts the very purpose of the Refugee Act itself. As the Supreme Court has observed, “[i]f one thing is clear from the legislative history of . . . the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [1967 Protocol], to which the United States acceded in 1968.”⁵³ The UNHCR has long instructed that “asylum should not be refused solely on the ground that it could be sought” elsewhere.⁵⁴

D. Removing Discretion to Apply Exceptions to the One-Year Filing Deadline Violates Congressional Intent and Fundamental Notions of Due Process

The Proposed Rule’s new discretionary factor analysis would also largely eliminate the exceptions to the one-year filing deadline for asylum claims. These changes contradict clear congressional intent and violate fundamental notions of due process. Currently, there are two statutory exceptions to the one-year filing deadline: (1) “changed circumstances which materially affect the applicant’s eligibility for asylum;” or (2) “extraordinary circumstances relating to the delay in filing.”⁵⁵ The Proposed Rule significantly limits the applicability of these exceptions. First, the Proposed Rule requires that failure to file within one year be treated as an adverse discretionary factor for applicants who entered unlawfully (or otherwise accrued more than a

⁵⁰ Proposed Rule, 85 Fed. Reg. at 36,293; Section 208.13(d)(2)(i).

⁵¹ For example, the administration formalized a “metering policy” implemented by U.S. Customs and Border Protection as part of a broader Turnback Policy intended to restrict the number of asylum seekers inspected and processed at ports of entry at the southern border. *See* Office of Inspector General, Dept. of Homeland Security, Report OIG-18-84 (2018). “Metering” was intended to “regulate the flow of individuals at ports of entry” (*id.*) by limiting the number of asylum seekers examined, creating significant backlogs of asylum seekers waiting at the border.

⁵² *Id.*

⁵³ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

⁵⁴ UNHCR Exec. Comm., Conclusion No. 15 (XXX) ¶ (h)(iv) (1979).

⁵⁵ INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

year of unlawful presence).⁵⁶ Second, the Proposed Rule narrows the scope of the changed circumstances exception for applicants who received a final removal order, requiring applicants with new asylum claims based on changed circumstances to file a motion to reopen within one year.⁵⁷

Congressional history makes clear that the exceptions to the one-year filing deadline were enacted to ensure “that those with legitimate claims of asylum are not returned to persecution, particularly for technical difficulties.”⁵⁸ The exceptions to the one-year deadline were enacted to ensure accessibility to protection. As former Senator Orrin Hatch noted, “We continue to ensure that asylum is available for those with legitimate claims of asylum. The way in which the time limit was rewritten in the conference report—*with the two exceptions specified*—was intended to provide adequate protections to those with legitimate claims of asylum.”⁵⁹ Effectively eliminating these exceptions for anyone with one year of unlawful presence thus violates both the explicit terms of the statute and congressional intent, which specifically sought to ensure that the one-year time limitation did not foreclose legitimate asylum claims.

Moreover, a federal court has confirmed that the one-year filing deadline should not be used as a categorical bar for legitimate asylum claims.⁶⁰ The court in *Mendez Rojas v. Johnson* found that the government failed to adequately notify asylum seekers in its custody of the one-year deadline and concluded that “the failure to provide . . . notice of the one-year application period violates the intent to ensure that asylum is available for those with legitimate claims of asylum. This is particularly true where unsuccessful efforts to seek asylum have failed due to technical defects, which the adopted exceptions were specifically designated to prevent.”⁶¹ The Proposed Rule’s consideration of failure to file within one year as an adverse discretionary factor for those who have accrued a year of unlawful presence prioritizes administrative deficiencies and technical errors over the legitimacy of asylum claims.

As an additional barrier to legitimate asylum relief, the Proposed Rule requires decision makers to consider failure to file a motion to reopen immigration proceedings based on changed country conditions within one year as a “significant adverse factor.”⁶² This raises substantial due process concerns as many applicants will almost certainly be unaware—and not previously adequately notified—of a one-year deadline, similar to the plaintiffs in *Mendez Rojas*.

III. THE PROPOSED RULE’S PROCEDURAL CHANGES WILL STRIP ASYLUM SEEKERS OF MEANINGFUL REVIEW OF THEIR CLAIMS

A. The Proposed Rule Undermines the Credible Fear Process, Which Will Lead to Bona Fide Asylum Seekers Returning to Danger

The Proposed Rule strives to raise the burden of proof that those seeking protection in the United States must meet to pass the initial screening process—the credible fear process—that permits

⁵⁶ Proposed Rule, 85 Fed. Reg. at 36,293; Section 208.13(d)(2)(i)(D).

⁵⁷ *Id.* at 36,285, 36,293; Section 208.13(d)(2)(i)(I).

⁵⁸ 142 Cong. Rec. S11,840 (daily ed. Sept. 20, 1996) (statement of Sen. Hatch).

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. 2018).

⁶¹ *Id.* at 1183.

⁶² Proposed Rule, 85 Fed. Reg. at 36,283.

their placement in regular removal proceedings that allow for a full hearing before an IJ where additional due process protections apply. Therefore, if implemented, the Proposed Rule likely will result in far more bona fide asylum seekers receiving negative fear determinations, being denied any judicial review of these determinations, and subsequently being expeditiously removed from the U.S. to face persecution, in direct contravention of U.S. statutory and treaty obligations.

Fleeing their countries of origin in search of protection, many asylum seekers arriving in the United States will not have proper documentation allowing them to enter, thus making them inadmissible and subject to placement in expedited—or streamlined—removal proceedings. Currently, an asylum seeker subject to expedited removal who expresses a fear of return to his or her country of origin may be referred for a “credible fear interview” during which an asylum officer evaluates whether he or she has a “credible fear” of persecution or torture. Pursuant to Section 235 (b)(1)(B)(v) of the INA, a credible fear exists if there is a “significant possibility” that the applicant could establish eligibility for asylum, withholding of removal, or protection under CAT. A higher standard of proof is applied to those who are subject to reinstatement of prior removal orders; they must make the higher showing that they have a “reasonable fear” of persecution or torture.

The Proposed Rule would raise the burden of proof for withholding of removal and CAT protection and require officers conducting credible fear interviews to perform several analyses involving different standards of proof. The officer conducting the interview would need to evaluate the applicant’s fear under the “significant possibility” standard for asylum, and then the “reasonable possibility” standard for withholding of removal and CAT protection. Far from introducing the “clarity” and “efficiency” the Proposed Rule claims to offer, this will lead to inefficiency and confusion—but far more troublingly, to increased credible fear denials for bona fide applicants. When this heightened standard for withholding and CAT claims is considered along with the rest of this Proposed Rule, which would—among other things—introduce additional bars to asylum that would make individuals categorically ineligible for asylum relief (see *infra* Part I above), it is apparent that the intent of this change is to prevent people fleeing persecution from accessing the U.S. asylum system, in direct contravention of U.S. statutory and treaty obligations.

Evidence shows that this proposed change would dramatically decrease the number of asylum seekers who would be able to present their full case to an IJ: from 2014 to 2019, an average of 76% of screening interviews that used the “significant possibility” standard allowed individuals to continue through the process, compared with 30% of interviews that used the “reasonable possibility” standard during the same time period.⁶³ In practical terms, the Proposed Rule would potentially bar thousands of individuals who have legitimate protection claims from presenting their case before an IJ.

Moreover, Congress explicitly rejected imposing a standard higher than demonstrating a “significant possibility” of persecution if removed from the United States, because such a higher standard could bar meritorious claims. Congress originally debated a definition of “credible fear”

⁶³ See Gov’t Accountability Office, *Actions Needed to Strengthen USCIS’s Oversight and Data Quality of Credible and Reasonable Fear Screenings*, 26 (Feb. 2020), <https://www.gao.gov/assets/710/704732.pdf>.

that would have required an individual to show that it was “more probable than not” that the individual would qualify for asylum. That language was dropped in favor of the “significant possibility” standard. As Congressman Henry Hyde described at the time of passage, the “standard [was] redrafted in the conference document to address fully concerns that the ‘more probable than not’ language in the original House version was too restrictive.”⁶⁴

The United States has long understood the importance of ensuring that the procedures used to screen those who seek asylum are not so onerous as to prevent legitimate asylum seekers from having their claims heard. As Senator Ted Kennedy has pointed out, “expedited exclusion procedures” that do not afford procedural safeguards such as “[a] hearing” and “access to counsel” run the risk that the United States will “turn away true refugees.”⁶⁵ Raising the fear standard from “significant possibility” to “reasonable possibility” heightens the risk that the United States will indeed “turn away true refugees.”

The proper forum for adjudicating protection claims is a hearing before an IJ, at which the individual has more opportunity to retain and be represented by counsel and has a full and fair opportunity to present evidence and testimony supporting the asylum claim. Considering the complex factual and legal analysis that must take place during a removal hearing, such as questions of nexus between the potential persecution and the codified ground for asylum, or questions of acquiescence of torture by a government official, it is clear that most cases should be heard by an IJ, apart from cases that have no merit—cases that are already screened out by the “significant possibility” standard.

B. The Fear Interview Is Not an Adequate Mechanism to Determine Who Is Subject to a Bar to Asylum

The Proposed Rule also would alter current procedures by allowing asylum officers, rather than IJs, to determine whether a statutory bar to asylum eligibility applies. INA § 208(b)(2)(A)(i)–(vi) and 8 U.S.C. § 1158(b)(2)(A)(i)–(vi) and INA § 241(b)(3)(B)(i)–(iv) and 8 U.S.C. § 1231(b)(3)(B)(i)–(iv) lay out statutory bars to asylum and withholding of removal. People found subject to any of these bars will be denied asylum or withholding of removal *even if* they can demonstrate that they have a credible fear and reasonable possibility of suffering persecution if removed from the United States. Because the consequences of denying an applicant asylum or withholding of removal are so severe, determination of the applicability of these often-complex statutory bars should remain within the purview of an IJ during a full hearing process.

Moreover, the proposed changes undercut the Congressional objectives of both the Refugee Act and IIRIRA. As aptly described by Congress in IIRIRA, “the entire [immigration proceeding] system is streamlined, with the objective of completing proceedings *before the immigration judge*” (emphasis added).⁶⁶ Congress’ purpose for enacting the credible fear interview was not to determine whether an applicant qualifies for asylum, but “to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process.”⁶⁷

⁶⁴ Representative Hyde (IL). Conference Report on H.R. 2202, Illegal Immigration Reform and Immigrant Responsibility Act of 1996; *Congressional Record*, Vol. 142, No. 134 (Sept. 25, 1996) p. H11081.

⁶⁵ Immigration Control and Financial Responsibility Act of 1996, 142 Cong. Rec., S3282 (daily ed. Apr. 15, 1996).

⁶⁶ H.R. Rep. No. 104-469, pt. 1, at 139 (1996).

⁶⁷ *Id.* at 158.

By requiring asylum officers to make determinations for mandatory bars during credible fear interviews, the proposed changes would undermine the process Congress specifically created to ensure that asylum applications are fairly reviewed.

By giving asylum officers the authority to determine during an initial screening the applicability of the statutory bars for both asylum and withholding of removal, the Proposed Rule will bar protection seekers with meritorious claims from accessing protection. Under existing practice, if an asylum officer believes that a mandatory bar may apply, the officer would note that in the record, but would nonetheless allow the applicant to proceed to a full removal hearing before an IJ under section 240 of the INA so long as the applicant established a credible fear of persecution and did not arrive as a stowaway.⁶⁸

Requiring asylum officers to determine the applicability of mandatory bars will expand the scope of the credible fear interview process to include extensive factual investigations, causing additional cost and delay, imposing additional burdens on asylum officers, and going far beyond the purpose and intent of the credible fear screening. The bars to eligibility are complex from both a legal and factual standpoint, and the credible fear interview is wholly inadequate as a mechanism for determining who is subject to them. For example, the bars include the exceedingly complex inadmissibility bar based on “terrorism”—one of the most complicated sections of the INA, as well as a bar based on certain criminal convictions, which implicates the complicated interplay between immigration and criminal law, and the application of which requires both complex legal knowledge and the appropriate factual background on particular criminal convictions. An officer conducting a credible fear interview—under a compressed timeline with an applicant who is almost always in Immigration and Customs Enforcement (ICE) custody, without legal representation, and often recently arrived in the U.S.—could not reasonably determine with any semblance of fairness or due process, that an applicant is subject to, for example, a criminal or terrorism-related bar. Combined with the reversal of the presumption toward judicial review of negative determinations (discussed below), this provision will operate to bar otherwise meritorious applicants from the ability to present their asylum case and obtain protection.

C. Changing the presumption for IJ review of negative credible fear determinations will endanger asylum seekers

The Proposed Rule also intends to limit judicial review of credible fear determinations. Under 8 CFR § 208.30(g), when an applicant receives a negative credible fear determination, the screening asylum officer is required to inquire whether the applicant wishes to seek review of the negative determination by an IJ. If the applicant fails to respond to the officer’s inquiry, the lack of response is treated as an affirmative response and the determination is reviewed by an IJ.⁶⁹ The intent of this rule was to ensure that applicants, many of whom are non-English speakers and appear *pro se*, are given fair opportunities for review even when they do not “clearly and

⁶⁸ 8 CFR § 208.30(e)(5)(i).

⁶⁹ 8 CFR § 208.30(g).

knowingly” understand the process.⁷⁰ The process is intended to protect against unnecessarily punishing applicants in the event of confusion or miscommunication, and to ensure that the U.S. upholds its statutory and treaty obligations not to return people to persecution or torture.

The Proposed Rule would amend 8 CFR § 208.30(g)(1) and 8 CFR § 208.30(g)(2) to reverse the standard so that the implication of lack of a response would change from *automatic review*, to *declination of review*. This proposed change serves no purpose other than to punish *pro se* applicants and will ensure that protection seekers with meritorious claims are returned to face persecution in their home countries. For credible fear interviews, access to legal representation is significantly restricted to “consulting” and applicants often only have days to find representation.⁷¹ *Pro se* applicants have a disproportionately negative likelihood of success in immigration proceedings compared to their represented counterparts.⁷²

Furthermore, a negative inference would resolve all interpretation errors against an applicant, denying review even if the respondent would have requested it but for the interpretation error. This poses a particularly high risk of error for speakers of rare languages, such as Mayan indigenous languages, where interpretation resources are limited and respondents are often forced to proceed in a second language such as Spanish in which they may not be fluent.⁷³ Ultimately, a negative inference will mean that far fewer asylum seekers will have the opportunity for an IJ to review an asylum officer’s negative determination—a significant due process protection built-in to the asylum process—and increases the likelihood that people with genuine persecution claims will be returned to countries where they will face severe harms.

D. Pretermission of asylum claims without a hearing will deprive asylum seekers of due process

The Proposed Rule also seeks to establish a mechanism by which IJs may deny an application without an oral hearing if the IJ finds that the asylum seeker has not made out a *prima facie* case on paper.⁷⁴ Such pretermission will undermine rather than reinforce the efficiency of the immigration system—the expressed purpose of this regulation. For example, pretermission will increase the burden on immigration courts and the BIA when asylum seekers seek to appeal the denial to the BIA. Should the BIA reverse a decision pretermitting an asylum application and remand, the IJ will be forced to hold an initial asylum hearing for the first time potentially years later. Evidence will be more likely to have become stale, witnesses may be less accessible, and the accompanying burdens on the respondent will be higher. This will create further

⁷⁰ See Asylum Procedures, 65 Fed. Reg. No. 76,122, 76,129 (Dec. 6 2000) (to be codified at 8 CFR § 208.30(g)) (Commenters recommended that negative determinations under 8 CFR § 208.30(g) should require automatic review. However, the Attorney General determined it would go against the intent of the statute where the applicant “clearly and knowingly decides not to pursue a review.”).

⁷¹ See 8 U.S.C. § 1225(b)(1)(B)(iv); see also 8 CFR § 208.30(d)(5).

⁷² See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 9 (2015) (“With respect to the efficacy of representation, we find that immigrants who are represented by counsel do fare better at every stage of the court process—that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain the relief they seek.”).

⁷³ See Rachel Nolan, *A Translation Crisis at the Border*, The New Yorker, December 30, 2019, <https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border>.

⁷⁴ Proposed Rue, 85 Fed. Reg. at 36,277.

inefficiencies in the appeals process, requiring the BIA to address questions of fact and law prior to the development of a full record.

In the first place, the proposed regulation provides little guidance as to what may constitute a “*prima facie* case.” The absence of clear guidance as to what grounds may constitute the basis for pretermission is all the more significant because, in the *asylum context specifically*, an applicant’s legal eligibility for asylum is inextricably intertwined with the applicant’s factual account of persecution, which itself depends in large part on a credibility determination. IJs are well trained and experienced in conducting hearings, performing credibility assessments, and applying law to facts. It is impractical at best to ask IJs to isolate “purely legal” issues that could support a pretermission decision. For example, an IJ’s determination that an applicant had not plausibly alleged that she was a member of a “particular social group” would require not only a legal analysis of precedent and regulations defining the contours of the “particular social group” category, but a careful analysis of the facts alleged by the applicant—which many applicants will be unable to articulate fully in writing.

The Proposed Rule is also inconsistent with the well-established and vital duty of IJs to develop the record in immigration proceedings, advise applicants of their rights, and explain any allegations against the applicant.⁷⁵ Most asylum seekers—who often speak little to no English, are not knowledgeable about asylum law, and are not represented by counsel⁷⁶—simply cannot present a full picture of the record on paper. A hearing at which an IJ may examine the applicant personally is an indispensable tool for judges to develop the record fully—especially in asylum cases, in which the applicant’s credibility is essential to the judgment.⁷⁷ Furthermore, as courts have repeatedly acknowledged, “the facts underlying an application for relief from removal may continue to develop up to the time of, and even during, the final individual hearing on the merits.”⁷⁸ Pretermittting an application would completely prevent that factual development.

⁷⁵ See INA § 240(b)(1) (requiring IJs to “administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses”); 8 CFR §1003.10(b) (same and requiring IJs to take other actions that are “appropriate and necessary for the disposition of” an individual case); 8 CFR §1240.10(a) (requiring IJs to, *inter alia*, advise noncitizens of certain rights in proceedings and explain factual allegations and charges in non-technical language); *Matter of E-F-H-L-*, 26 I & N Dec. 319, 323-324 (BIA 2014), *vacated on other grounds* (recognizing that IJs have a “duty to fully develop the record”).

⁷⁶ As Congress observed when drafting and enacting IIRIRA, “[r]efugees often arrive with little or no money [and] poor English.” H.R. Rep. No. 104-469, pt. 1, at 214 (1996). See also Eleanor Acer & Tara Magner, *Restoring America’s Commitment to Refugees and Humanitarian Protection*, 27 Geo. Immigr. L.J. 445, 450 (2013) (“Many asylum seekers do not speak English and struggle after their arrival simply to meet their basic needs. Many have little or no understanding of the complexities of U.S. asylum law and procedures, while others are not aware that their fear of persecution could make them eligible for asylum. . . . Others may face great challenges in retaining legal representation. Many asylum seekers do not have the resources to afford private counsel, and free legal counsel is very difficult to obtain given the lack of government-funded representation and the limited availability of *pro bono* representation.”).

⁷⁷ The credibility determination is sufficiently important that Congress has unequivocally established that the credible testimony of an applicant may *alone* be sufficient to carry an applicant’s burden of proof. See 8 U.S.C. 1158(b)(1)(B)(ii).

⁷⁸ *Matter of E-F-H-L-*, 26 I & N Dec. 319, 323-324 (BIA 2014), *vacated on other grounds* *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (citing *Litvinov v. Holder*, 605 F.3d 548, 555–56 (8th Cir. 2010); *Hoxha v. Gonzales*, 446 F.3d 210, 214, 217–18 (1st Cir. 2006); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003); *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998)).

Moreover, the Proposed Rule is inconsistent with fundamental due process principles, and likely to have a devastating impact on pro se respondents.⁷⁹ Particularly with respect to indigent or unrepresented parties, and/or those with limited English or education, due process requires a meaningful opportunity to be heard and to present evidence orally.⁸⁰ Asylum seekers who are held in ICE detention are unlikely to have legal representation,⁸¹ 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. A ten-day period during which applicants could supposedly cure legal defects in their applications will present a significant hurdle for represented applicants and will be an unsurmountable obstacle to the vast majority of unrepresented asylum seekers.

Finally, the Proposed Rule would severely impact the rights of asylum seekers placed into the so-called Migrant Protection Protocols (MPP). Access to counsel for individuals placed into this program is even harder than for those held in ICE detention. Out of 65,246 people placed into MPP from January 2019 through May 2020, just 4,364 (6.7%) were represented by counsel.⁸² Not only do respondents placed into MPP proceedings overwhelmingly lack counsel, they often lack access to safety and security, and the ability to access interpretation resources that would be available in the United States. Given these obstacles, most asylum applicants in MPP proceedings are only able to submit threadbare asylum applications with the support of volunteer interpreters unfamiliar with asylum law. Pretermission would deny the vast majority of MPP respondents the ability to ever present their asylum claim in front of a judge.

The proposed pretermission procedures are inconsistent with Congressional goals in passing both the Refugee Act and IIRIRA, and with the United States' treaty obligations of more than fifty years. In drafting and enacting the legislation that ultimately became IIRIRA, Congress sought to ensure "there should be no danger that an alien with a genuine asylum claim will be returned to persecution."⁸³ But enabling pretermission of applicants' claims without the opportunity for a hearing to explore such claims will do just that by denying applicants a full and fair opportunity to establish a meritorious claim.

E. The Proposed Rule Improperly Expands Grounds Upon Which an Asylum Application Can Be Deemed "Frivolous" and Gives Undue Authority to Asylum Officers to Deem an Application Frivolous

The consequences of filing a frivolous asylum application are devastating: One who has filed a frivolous asylum application is not only permanently barred from asylum, but also barred from

⁷⁹ See *Oshodi v. Holder*, 729 F.3d 883, 889-93 (9th Cir. 2013) (en banc) (holding that an alien's Fifth Amendment due process right to a full and fair hearing, which includes the opportunity to present evidence and testify on one's behalf, was violated where the Immigration Judge refused to allow an applicant to testify regarding the contents of his applications);

⁸⁰ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. . . . Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.").

⁸¹ See American Immigration Council, *Access to Counsel in Immigration Court* (Sept. 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> (noting that only 14% of detained immigrants are represented).

⁸² Transactional Records Access Clearinghouse, *Details on MPP (Remain in Mexico) Deportation Proceedings*, <https://trac.syr.edu/phptools/immigration/mpp/>, last accessed July 9, 2020.

⁸³ H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

almost any immigration benefits or relief from removal.⁸⁴ Under current law, only an IJ or the BIA may determine an application is frivolous through an adjudicative process, and only “if any of its material elements is deliberately fabricated.”⁸⁵ The Proposed Rule would radically change the scope of the frivolous asylum application rule, and would allow relatively low-level Department of Homeland Security officials to deem an application frivolous. And rather than providing robust procedures to guard against improper application of the bar, the Proposed Rule strips away procedural safeguards and opens the door to inconsistent and erroneous adjudications. This strong, punitive measure resulting in potentially dire consequences, goes far beyond the stated objective of deterring fraudulent applications, and confers on asylum officers overly broad and inappropriate discretion.

Like many other aspects of the Proposed Rule, discussed *infra*, which together operate to impede reasoned adjudication of meritorious applications, the proposed changes to the definition of “frivolousness” will further increase the challenges to obtaining a hearing on the merits for *all* asylum seekers. Under the Proposed Rule, the standard for an application to be deemed frivolous would be radically altered from “deliberately fabricated” to “patently without substance.” When one considers the complexities of asylum law, it becomes very troubling to realize that applicants (most of whom are non-English speakers and acting *pro se*) may be in danger of being permanently barred from filing an asylum application that is found to be “patently without substance.” The formulaic process of (non-judicial) asylum officers marking applications as frivolous will only serve to add a hurdle to applicants presenting their cases to reviewing IJs.

The Proposed Rule takes the further step of broadening the knowledge requirement for the frivolousness penalties to apply. Under current procedure, an individual is penalized only if s/he “knowingly made a frivolous application for asylum.” Under the Proposed Rule, the definition of “knowingly” would be expanded to include “willful blindness.” As defined by the Proposed Rule, “[w]illful blindness means the alien was aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise.”⁸⁶ Expanding the definition in this way will penalize, among others, *pro se* applicants, who generally lack an understanding of the complexities of asylum law—especially given the expansion of the frivolousness definition to include claims that are “patently without substance.”

The Proposed Rule attempts to justify this expansion of the definition of frivolousness by claiming that it will capture a greater number of frivolous applications. There is a serious logic problem with this. The Rule will certainly lead to more applications being deemed “frivolous” but that will only be the inevitable result of the broader definition. This aspect of the Proposed Rule—akin to criminalizing common, non-harmful behavior in order to appear tough on crime—will merely create the appearance that more frivolous applicants are thwarted. In reality, this proposed change will likely result in erroneous adjudications and a stifling of novel and potentially meritorious legal theories. Moreover, the existing procedure already provides ample opportunity to weed out bad faith actors—those who would deliberately falsify an asylum application. The attempt to broaden this definition as a means of weeding out meritless applications has the potential to cast nearly all asylum seekers as bad faith actors—especially

⁸⁴ INA § 208(d)(6), 8 U.S.C. § 1158(d)(6).

⁸⁵ 8 CFR § 208.20.

⁸⁶ Proposed Rule, 85 Fed. Reg. at 36,283.

those who are *pro se* who may not understand the nuance of complex asylum law. Such a change is out of line with the policy of the United States to afford individuals seeking refuge within its borders a fair and adequate process to do so.

The Proposed Rule also proposes two new grounds to declare an application frivolous, specifically where an application is filed “without regard to the merits of the claim” and where an application is “clearly foreclosed by applicable law.” Both proposals create significant interference with the right to counsel.

The first new ground does not provide any explanation of what it means to file an application “without regard to the merits,” other than suggesting that filing an application with the sole intent to be placed into removal proceedings would qualify.⁸⁷ The second new ground allows IJs to declare an application frivolous if it is “clearly foreclosed by applicable law.”⁸⁸ Because attorneys have a duty to zealously represent their clients, they are at times required to preserve arguments which are “foreclosed by applicable law” but which are winnable on appeal. This is particularly true where an issue may have been decided by the BIA but remains unaddressed by a federal circuit court. Under the Proposed Rule, a respondent who presented a claim for asylum currently barred under BIA precedent but with a likelihood of success on a petition for review⁸⁹ could be subject to the extreme sanction of having an application deemed frivolous. Not only would this limit the development of precedent, it could interfere with the right to counsel by preventing attorneys from pressing cutting-edge legal arguments. It could also have a chilling effect, preventing asylum seekers who have novel claims from applying for protection, fearing that their claim will be deemed frivolous.

IV. CONCLUSION

AILA and the Council, through the Justice Campaign, oppose the proposed regulations because they will return vulnerable individuals who deserve protection to danger and potential death. These and other policies are choking off access to asylum and are fundamentally undermining the U.S. commitment to protect those fleeing persecution and harm. We urge the agencies to reconsider the proposed rule and withdraw it from consideration.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE AMERICAN IMMIGRATION COUNCIL

⁸⁷ Proposed Rule, 85 Fed. Reg. at 36,273-77.

⁸⁸ The proposed rule offers no explanation *at all* as to what this means, or what standards an IJ is required to use.

⁸⁹ For example, where multiple circuits had already overturned a BIA precedent decision, but the circuit where the respondent was applying for asylum had not yet addressed the issue.