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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

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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.

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 Angelica 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 ALLOWED 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 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 coronavirus¹³ 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 asylum¹⁶ 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

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 offices¹⁸ 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 DHS²¹ 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

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

the NPRM notes that “a similar timeframe would apply if DHS moves to prepermit, 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, prepermit 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

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 prepermission 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

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 proceedings⁶⁶—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

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,

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 pretermitt 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 process⁸¹ 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

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

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 identity 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 pretermite asylum applications without even holding an evidentiary hearing and thus not ever giving asylum seekers an opportunity to clarify their proposed PSGs.¹⁰³

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

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/AdministrationDismantlingUSAAsylumSystem.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 counsel¹¹⁶ 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

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

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-à-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

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

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.

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:

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

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

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 opinion¹⁶⁵ 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

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 courts¹⁷⁸ 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.

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 court¹⁸² 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

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 appeals¹⁹¹ 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:

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.

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

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

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 Depots Refugees* at 3 (June 2020), <https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAAsylumSystem.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 Meriam 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

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 decision²³² 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

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 withdrawn 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

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.

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 reasoning²⁵⁰ 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

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

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

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 *Essouhou 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

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 BIA²⁷⁸ 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

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/background/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 Appeals³¹² 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

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 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

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

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 Syria³⁴⁰ 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

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 discretionary 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

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/BARRLED_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,

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 states 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

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

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 regulations⁴⁰⁰ 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

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 *refoulement* 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 Canada⁴¹¹ 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

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

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_StakholderPrivateAgenda_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:

⁴²⁷USCIS, *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 case⁴³¹ 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 appeals⁴³⁴ 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.

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

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 rule⁴⁵¹ 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 Convention 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 and 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,

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 country 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

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 it 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:

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:

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

⁴⁷² *Id.* at *8.

⁴⁷³ See *Iruegas-Valdez v. Yates*, 846 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

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

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 Code⁴⁹² 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 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

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 flux⁵²⁴ 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

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

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

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

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

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

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 face 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.

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

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

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

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,

A handwritten signature in blue ink that reads "Anna Gallagher". The signature is written in a cursive style with a large initial "A".

Anna Gallagher
Executive Director