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Re: **Department of Homeland Security (DHS) and Department of Justice (DOJ) Proposed Rule: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Applicants, RIN 1125-AA94, EOIR Docket No. 18-0002**

Dear Assistant Director Reid:

The Massachusetts Law Reform Institute (MLRI) respectfully submits this comment on behalf of the Immigration Coalition (IMCO) of the Massachusetts Law Reform Institute, which consists of the 14 regional legal aid programs in the Commonwealth of Massachusetts, including Greater Boston Legal Services, the largest and oldest legal service provider in New England and co-founder of the coalition, along with 140 other immigration service providers, representing thousands of low-income immigrants in the state and the region. A list and brief description of the coalition members signing on to these comments individually is attached as an Appendix. We submit these comments to oppose the Department of Homeland Security and Department of Justice's Notice of Proposed Rulemaking entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review Applicants", EOIR Docket No. 18-0002 (published in the Federal Register on June 15th, 2020), and urge that the Proposed Rule be withdrawn.

IMCO service providers represent individuals and families who live below the federal poverty level and have a mission to serve this population, as well as advance laws, policies and practices which secure economic security for this population and reduce the number of persons living in poverty. Denying and deterring the option of asylum to destitute refugees is antithetical to the coalition's mission of providing access to legal services, ensuring an immigration system that is fair and just, and helping immigrant clients access protections and opportunities, including the ability to find safety in a country that is not their own.

The services and expertise of local legal aid programs, social service, health care and human service providers, and community organizations that serve low-income people, inform our concern about the disastrous effect the Proposed Rule will have on asylum seekers, and in particular asylum seekers who are low-income and pro se, and on their families as well. The essential need for physical safety from persecution and securing the basic building blocks of food, clothing and shelter is recognized in our asylum law codified in the Immigration and Nationality Act, Section 208, and the international conventions that the United States has signed on to. As well, asylum-seeking immigrants across the country and in our New England area fill critical roles in our employment workforce and add to the fabric of our society. Denying their right to seek safe haven in our country not only contravenes existing law, but stands in direct contradiction to the freedom to secure a safe life for oneself and one's family which this country has been built on. As a coalition motivated to secure justice for immigrants, IMCO members are greatly alarmed at the profound consequences this rule will have upon refugees seeking asylum and we oppose the Proposed Rule, which will not further the stated purpose of the rule, is not justified by any other public policy consideration, and violates Congressional intent and international obligations, as well as the fundamental priority the United States places upon being a beacon of freedom.

As detailed below, this Proposed Rule is deeply problematic in a number of ways. If finalized, it would gut asylum protections in the United States by adding new categorical bars and changing standards that have been in place for decades. The proposed standards violate the bedrock principle that an asylum case should be adjudicated based on an individualized evaluation. For the reasons detailed below, we strongly urge the Departments to withdraw the rule proposal in its entirety, and instead dedicate their efforts to ensuring that individuals fleeing violence are granted full and fair access to asylum protections in the United States.

I. INTRODUCTION

BY PROMULGATING REGULATIONS THAT EXPAND THE BARS TO ASYLUM BEYOND THOSE INCORPORATED BY CONGRESS INTO THE REFUGEE ACT, THE DEPARTMENTS WILL UNLAWFULLY ABROGATE THE CONVENTION AND PROTOCOL

By ratifying the 1967 Protocol Relating to the Status of Refugees, the U.S. agreed to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees ("the Convention"). *See U.S.T.* 6223, 6259-6276, T.I.A.S. No. 6577 (1968); *Cardoza Fonseca,* 480 U.S. at 424. "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees […] The Conference Committee Report, for example, stated that the definition was accepted 'with the understanding that it is based directly upon the language of the Protocol, and it is intended that the provision be construed consistent with the Protocol.'" *Cardoza Fonseca,* 480 U.S. at 436, 437.

By promulgating a rule which expands the bars to asylum beyond those incorporated by Congress into the Refugee Act, the Departments will render great numbers of individuals who have established that they are, in fact, refugees, eligible only for the protection of withholding of removal under INA §241(b)(3)(B). An individual granted asylum becomes eligible for a host of benefits, including the right to work with authorization, the right to petition for family members, the right to obtain a travel document to travel abroad, the right to apply for lawful permanent resident status, and, ultimately, the right to apply for U.S. citizenship. Those granted withholding of removal, on the other hand, have none of those benefits. They are protected against return to the country from which they fled, but must live under removal orders, deprived of the right to bring family to the U.S., and unable to travel outside of the U.S. to see them. They will never be able to assimilate in the U.S., as they will never obtain permanent status, and remain subject to possible removal to an alternative country. *See Burbiene v. Holder,* 568 F.3d 251, 256 (1st Cir. 2009) (there can be no derivative beneficiaries of a grant of withholding of removal); *Matter of I-S- & C-S-,* 24 I. & N. Dec. 432, 434 (BIA 2008) (withholding of removal is not discretionary and does not afford the respondents any permanent right to remain in the United States); *Re A-K-,* 24 I. & N. Dec. 275, 279 (BIA 2007) (the Act does not permit derivative withholding of removal under any circumstances).

Withholding of removal without asylum deprives individuals of a number of benefits protected by the Convention and the Refugee Act. *See e.g.* Convention Relating to the Status of Refugees, art. 17 ("Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees."); Convention Relating to the Status of Refugees, art. 28 ("Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require."); Convention Relating to the Status of Refugees, art. 31 (prohibiting penalizing a refugee based on her illegal entry or presence); *See also* Protocol, Art. 1, 19 U.S.T. 6223 (adopting Articles 2 through 34 of the Convention).

Rulemaking can be used to interpret otherwise ambiguous statutory provisions, but an agency cannot simply rewrite the law through regulation, and an agency, through its interpretation of a statute cannot abrogate a treaty. Federal law "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *See Weinberger v. Rossie*, 456 U.S. 25, 32 (1982); *United States v. Lachman*, 387 F.3d 42, 55 (1st Cir. 2004); *United States v. Hensel*, 699 F.2d 18, 27 (1st Cir. 1983). By relegating individuals who would otherwise be eligible for asylum to the lesser protection of withholding of removal through regulations, the Departments will unlawfully place the U.S. in violation of its obligations under the Convention and Protocol.

II. SUBSTANTIVE ASYLUM STANDARDS

8 C.F.R. 208.1 (c) <u>Particular Social Group</u>

1. **Requiring that a particular social group must share a common immutable characteristic, be defined with particularity, and be socially distinct represents a**

radical departure from over twenty years of U.S. asylum law, and from the definition applied by the UNHCR and other parties to the Refugee Convention

The proposal to incorporate a three-part test for asylum based on membership in a particular social group is in contradiction to the intent of Congress in passing the Refugee Act as well as U.S. obligations under the Convention Relating to the Status of Refugees (*adopted* Jul. 28, 1951, *entered into force* Apr. 22, 1954, 189 U.N.T.S. 137 (the Convention). The Departments should withdraw this proposed standard and instead reaffirm the long-standing definition articulated in *Matter of Acosta* 19 I&N Dec. 211, 233 (BIA 1985) and based on the analysis arising from the Convention. While recent BIA cases, through a series of varying decisions such as *Matter of S-E-G-,* 24 I&N Dec. 579 (BIA 2008) and *Matter of E-A-G-,* 24 I&N Dec. 591 (BIA 2008)), have begun to radically depart from the more than twenty years of U.S. asylum law articulated in *Acosta*, the standard in those cases reflected in this Proposed Rule is contrary to the definitions and analysis applied by the United Nations High Commission for Refugees (UNHCR) and other states parties to the Convention.

To be cognizable, a particular social group must consist of persons who "share a common, immutable characteristic," which "might be an innate one such as sex, color, or kinship ties" or "a shared past experience such as former military leadership or land ownership." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), *see Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993); *see also Escobar v. Gonzalez*, 417 F.3d 363, 367 (3d Cir. 2005). Under this longstanding analysis, the meaning of a particular social group is discerned by the commonly used canon of statutory construction—specifically *ejusdem generis*. That doctrine, the Board explained in *Acosta,* "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words." 19 I&N Dec. at 233. Looking to the surrounding words in the list of grounds for persecution, the Board found that each "describes persecution aimed at an immutable 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 to be required to be changed." *Id*. Based on that understanding, the Board determined that "membership in a particular social group" should be read to encompass "persecution that is directed toward an individual who is a member of a group of persons all of whom share *a common, immutable characteristic*." *Id.* (emphasis added) (noting that "whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences").

The definition of "refugee" incorporated into the Refugee Act mirrors the articulation of the five enumerated grounds found in the Convention. *See* Convention, Chapter 1, article 1(A)(2); Protocol Relating to the Status of Refugees, Article 1.1.; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (noting that "one of Congress' primary purposes [in passing the Refugee Act] was to bring United States refugee law into conformance with the 1967 United Nations Protocol relating to the Status of Refugees." (internal quotation marks omitted)). Given that "the definition of 'refugee' that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the Convention," *Cardoza-Fonseca*, 480 U.S. at 437, the views of other state signatories to the Convention are relevant to the proper interpretation of the

INA. *See Negusie v. Holder*, 555 U.S. 511, 537 (2009) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language.") (Stevens, J., concurring in part and dissenting in part). The *Acosta* analysis is consistent with UNHCR interpretation:

> a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

UNHCR, Guidelines on International Protection: "Membership of a particular social group in the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (hereinafter "UNHCR PSG Guidelines"), U.N. Doc. HCR/GIP/02/02 (May 7, 2002).

The *Acosta* framework is also well-established in the definitions developed in law applied by other signatories to the Convention. *See e.g. Canada (Attorney General) v. Ward*, an "immutable characteristic." [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.); *Islam & Shah v. Sec'y of State Home Dep't*, [1999] 2 AC 629, 644-45 (U.K.); *Fornah (FC) v. Sec'y of State for Home Dep't*, [2006] UKHL 46; *Refugee Appeal No. 76044* para. 92 (NZ RSAA, 2008); *accord Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667 (Aust.).

The standard adopted in the Proposed Rule incorporates as additional *requirements* factors which were intended to be *alternative* means of analyzing membership in a particular social group. Where, under the *Acosta* standard, and the standard articulated by the UNHCR, an applicant could establish membership in a particular social group based on a shared immutable characteristic or her *perceived* membership in such a group, the standard adopted in the Proposed Rule conflates the alternatives and instead requires that that the individual possess the shared immutable characteristic *and* that the group be perceived as a group by society. This is in contradiction to the intent of Congress in passing the Refugee Act and US obligations under the Convention. The Departments should withdraw from the three-part test incorporated into the Proposed Rule and instead reaffirm the long-standing definition articulated in *Matter of Acosta.*

2. Inclusion of the non-exhaustive list of circumstances under which the Departments will generally not favorably adjudicate asylum claims based on social group membership is confusing, ahistorical, and creates a presumption of denial, all of which is contrary to domestic and international asylum law

- A factors list is improper

Inconsistent with long-standing law is the inclusion of a non-exhaustive list of circumstances under which the Departments will generally not favorably adjudicate claims. Applying such a "list" is inconsistent with the principle that each asylum case is to be evaluated on its merits, depending on the facts of the individual case as reflected in the record before the adjudicator:

> "There is no "closed list" of what groups may constitute a "particular social group" within the meaning of Article 1A(2). **The Convention includes no specific list of social groups**, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, 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."

UNHCR PSG Guidelines, para. 3; U.S. Citizenship and Immigration Services, RAIO Combined Training Course, Nexus—Particular Social Group 12 (July 27, 2015) ("Social distinction must be evaluated on a case-by-case basis and society-by-society basis.").

> A general rule that effectively bars the claims based on certain categories of persecutors...or claims related to certain kinds of violence is inconsistent with Congress' intent to bring 'United States refugee law into conformance with the [Protocol].'.... The new general rule is thus contrary to the Refugee Act and the INA. In interpreting 'particular social group' in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General has failed to 'stay [ ] within the bounds' of his statutory authority.

Grace v. Whitaker, 344 F. Supp. 3d 96, 26 (D.D.C. 2018).

The Proposed Rule aims to effectively create categorical bars to certain particular social groups; but this is inconsistent with case law, including the cases cited in the preamble to the rule. The Proposed Rule would bar certain factors from being considered in the particular social group cognizability analysis simply because some courts have found that those factors *alone* cannot be the basis for a particular social group, or because that factor was *part* of a particular social group that the court determined was not cognizable in the *context* of the case or country at hand. Imposing such categorical generalizations will prevent the case-by-case analysis, based upon the facts on the record before the adjudicator, of asylum claims that both the body of asylum law and due process principles require. *Perez-Alvarez v INS*, 857 F.2d 23 (1st Cir. 1988).

The compilation of such a negative list of factors, without reference to examples of particular social groups that will be generally found, confuses rather than clarifies how the definition of particular social group should be applied to individual cases. Rather, the inclusion of this

negative list promotes the erroneous conclusion that particular social group is a disfavored category which should rarely be used. That will mean that asylum will be improperly denied to legitimate refugees whose claims Congress determined should at least be considered simply because the agency will not allow them to establish their claims. *See Succar v. Ashcroft,* 394 F.3d 8 (1st Cir. 2005) (distinguishing the determination of whether an individual is statutorily eligible to seek relief from the agency's discretionary authority to ultimately deny it.)

As one example, the list includes **past or present terrorist or persecutory activity or association and past or present criminal activity or association (including gang membership)**. Without providing a principled analysis of how the three elements articulated in the proposed particular social group definition would apply, the Proposed Rule disqualifies these groups based on the nature of the experiences which bind their members. This consideration should not be addressed in the particular social group analysis, however, but should be evaluated in light of the bars to asylum set forth in INA §208(a)(2)(A), 8 CFR §208.13(c). The bars in these provisions specifically address the criminal conduct and other behavior which Congress determined may bar asylum protection, yet Congress chose not to include a bar related to membership or association with a gang. There is no ambiguous provision here, therefore, that would be amenable to clarification through regulation. The purpose of regulations is to clarify the law – not to rewrite it.

In addition, several federal courts have found that groups consisting of former gang members may constitute particular social groups in some circumstances. *See e.g. Urbina–Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir.2010); *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009); *Martinez v. Holder*, 740 F.3d 902, 911-13 (4th Cir. 2014). This principled analysis recognizes that former membership is an immutable characteristic which cannot be changed. Nor should asylum requirements foreclose the possibility that an individual may be wrongly accused of criminal or persecutory behavior, criminal activity, or gang membership and persecuted on the basis of imputation of that activity or membership. A case-by-case analysis of the particular social group facts and elements, with a separate determination of whether any of the bars apply to the particular applicant based on his or her actions, is essential to the principled application of the law so as to protect *bona fide* refugees.

- The specific factors included on the list are improper

The Proposed Rule also seeks to bar particular social groups defined by **presence in a country with generalized violence or a high crime rate.** It has never been the case that simple presence in a country with generalized violence or a high crime rate will serve as the sole defining characteristic of a particular social group, and the inclusion of this provision gives the misleading impression that a particular social group will not be found if you come from such a country. A country's state of generalized violence and crime *cannot* bar applicants from that country from access to asylum protection. The existence of a particular social group must be evaluated according to whether the facts of the case meet the elements of the particular social group analysis. *See Alvarez Lagos v. Barr,* 927 F.3d 236, 251 (4th Cir. 2019) ("But as we have explained, that the "'criminal activities of [a gang] affect the population as a whole'…is simply 'beside the point' in evaluating an individual's asylum

claim."; *Paloka v. Holder*, 762 F.3d 191, (2d Circ. 2014) ("[B]eing a victim of a crime or even being a likely target for criminal opportunistic behavior does not necessarily preclude the existence of a valid asylum claim if the claimant would likely be targeted because of her membership in a sufficiently defined social group."); *Ahmed v. Kesler*, 504 F.3d 1182, 1195 (9th Cir. 2007) ("[E]ven though generalized violence as a result of civil strife does not necessarily qualify as persecution, neither does civil strife eliminate the possibility of persecution. At the same time, the existence of civil strife does not alter our normal approach to determining refugee status or make an asylum claim less compelling, from claiming a particular social group partially characterized by such violence.); *See* UNHCR, The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other situations of Violence (2012), 16-17 ("Whole communities may risk or suffer persecution for convention reasons. The fact that all members of the community are equally affected does not in any way undermine the legitimacy of any particular individual claim.").

The Proposed Rule's inclusion of **"the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups"** adds nothing to a reasoned analysis of particular social group and, without more, seems to confuse the potential persecution with the protected ground upon which the persecution is based. While attempted recruitment, standing alone, has generally not been found to be sufficient to establish a particular social group, an applicant may, for example, be subject to attempted recruitment because of a protected characteristic defined by another immutable characteristic, or he may be targeted in part because of his response to recruitment efforts in the past. For example, an individual's resistance to recruitment efforts may result in his expression of an anti-gang political opinion or the imputation of such an opinion to him. Similarly, depending on the facts of the individual case, individuals recruited in the past by a criminal, terrorist, or persecutory group may be targeted for the very act of resistance. *See e.g. Cruz v. Whitaker*, 758 Fed. Appx. 169 (2d Cir. 2019) (holding that the applicant had sufficiently raised a pattern and practice claim based on "evidence showing that gangs target young men who resist gang recruitment" and remanding for further consideration of the particular social group "young, poor men who resist gang recruitment."); see also UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Ganges (March 2010) ("[T]he recruitment practices of Central American gangs frequently target young people. Thus, an age-based identification of a particular social group, combined with social status, could be relevant concerning applicants who have refused gangs.").

Similarly, the inclusion of "**the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence**," does nothing to further a reasoned analysis of membership in a particular social group, and will only lead to greater confusion among adjudicators. First, the fact that an individual or a group may extort money from an individual as part of the persecution is not determinative of whether the individual is being targeted based on membership in a particular social group. The law clearly recognizes that persecution can be based on mixed motivations and that a protected ground need only be one central reason for the harm. Second, there is no general rule that perception of wealth or affluence cannot be sufficient to define a particular social group, depending on the particular facts of the case. While wealth, in isolation, may generally not be viewed as an immutable

characteristic, there are numerous examples of cases throughout history where past wealth, perceived wealth, education and social class have been the basis upon which groups have been targeted. For example, the Khmer Rouge under Pol Pot targeted the wealthy and educated classes of Cambodia. For almost thirty years, the BIA recognized that land ownership may form the basis of a particular social group within the meaning of the INA. *See Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013); *see also Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672-73 (7th Cir. 2005), (finding that the educated, landowning class in Colombia comprised a particular social group). The imposition of a blanket rule which will exclude such cases from consideration is contrary to the law.

The list of examples for what would be insufficient to establish a PSG under the new rule will have a uniquely negative impact on those seeking asylum because they have fled from their countries due to their sexual orientation, gender identity, or HIV status. The Proposed Rule specifies that **interpersonal disputes or private criminal acts of which governmental authorities were unaware or uninvolved** would not qualify as a "particular social group." This undermines the reality of the experiences of a LGBTQ+ individual fleeing homophobic violence and creates insurmountable barriers to those seeking the protection of the United States based ion their sexual orientation, gender identity, or HIV status. The provisions impose a standard which is unrealistic and does not comport with the lived experience of LGBTQ+ individual seeking protection. Oftentimes, the perpetrators of violence based on sexual orientation or gender identity (and those affected by HIV who are often assumed to be gay) are "non-government actors." These individuals are often attacked by members of the community, members of their family, rogue community members who hear rumors about them, spouses who learn of their sexual orientation, employers, or private individuals who are respected in the community who are identified as having official decision-making power (ie. elders or local leaders). In these societies, where there are often laws against the very existence of LGBTQ+ individuals or the cultural norms vehemently oppose these individuals the police, courts, and other official systems in their home countries will not or cannot protect them. Social norms can also hide homophobic based violence from public view, and governments often allow those norms to go unchecked and unchallenged.

Neither the category "**Interpersonal disputes of which governmental authorities were unaware or uninvolved"** nor "**private criminal acts of which governmental authorities were unaware or uninvolved**" describes in any way the elements of a particular social group, and they do nothing to further an understanding of the law. Rather these categories seem aimed at foreclosing asylum to applicants raising claims based on harm by private actors and inserting a requirement that governmental authorities be aware of the specific circumstances of the individual applicant and take no action to provide protection. Neither of these restrictions is supported by the law. First, the law is completely clear that harm which forms the basis of an asylum claim may be inflicted by the government or by a private actor that the government is unable or unwilling to control. *See* UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (December, 2011), para. 65. Second, an applicant may demonstrate a failure of state protection in any of a number of ways, including by showing an inability to access protection, a lack of government resources to provide protection, or that seeking protection would be a futile act because of the experiences of others similarly situated

persons or for some other reason. *See e.g. Doe v. Attorney Gen. of the United States*, 956 F.3d 135, 146 - 147 (3d Circ. 2020) (The absence of a report to the police does not reveal anything about a government's ability or unwillingness to control private attackers; instead it leave a gap in proof about how the government would respond if asked, which the petitioner may attempt to fill by other methods. … Here the record is replete with evidence that Ghanaian law deprive gay men such as Petitioner of any meaningful recourse to government protection and that reporting his incident would have been futile and potentially dangerous."). There has never been a requirement that the government be aware of the circumstances of the specific individual. *Id.* To support the notion that asylum cannot be based on an interpersonal dispute, the Departments cite a 1975 case of the BIA raising a claim to asylum filed by a Haitian woman based on domestic abuse. *See Matter of Pierre*, 15 I&N Dec. 461 (BIA 1975). That case was issued prior to the passage of the Refugee Act, prior to the development of a deeper understanding of the nature and causes of domestic abuse, and prior to an extensive body of law which recognizes that harm by private actors, including family members, can serve as the basis for asylum. *See e.g. Matter of Kasinga*; 21 I&N Dec. 357 (BIA 1996); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

Inclusion of these provisions would potentially lead to the denial of asylum to great numbers of asylum seekers with well-settled bases for asylum. For example, a gay person from Uganda or from another country were his life would be in jeopardy, would potentially be denied protection if the harm he faces comes from people within his community or from his family. He would be expected to prove that the government was aware of the harm he faced and did not protect him, when the very fact of seeking protection would expose his status to the government and would subject him to greater danger. A woman seeking protection from domestic abuse, female genital cutting, forced marriage, or another harmful practice inflicted by her family or her community would be expected to seek governmental protection despite the fact that seeking that protection might be futile or might subject her to greater harm. This is simply not the law. The provisions are extremely misleading, and they should be removed from the Proposed Rule.

Finally creating a categorical bar to individuals based on status as an alien returning from the United States violates the bedrock principle that each case should be adjudicated based on the record of that case. It assumes that there would never be a situation where individuals returning or deported from the United States would have a distinct identity within a particular country or culture and that they could be targeted for harm on that basis. For example, an individual returning to a country controlled by a group which has been at war with the U.S. and which views individuals who have been in the United States to have collaborated with the U.S government or have been tainted by U.S. culture could face persecution based on their status.

The examples listed in the Proposed Rule, particularly when couched completely in negative terms and with virtually no analysis, provide little guidance on the particular social group analysis and, in fact, only serve to create confusion. We urge that the list, in its entirety, be stricken from the Proposed Rule.

3. Requiring that an individual define the exact parameters of any applicable particular social group before an immigration judge and that failure to do so waives the claim for all purposes places an unfair and often insurmountable burden on the applicant

First, the determination of what constitutes a particular social group is an extremely complex area of law which is constantly evolving and which is subject to differing interpretations depending on the federal circuit in which the immigration court hearing the case sits. A formulation which may not have been a legally recognized particular social group when the case was initially presented may later become an acceptable interpretation though a subsequent court decision. An attorney or an applicant cannot be expected to anticipate any and all particular social group formulations which might later be recognized.

This is a particularly onerous provision for the vast numbers of unrepresented asylum seekers forced to present their cases without the assistance of an attorney. It is completely unreasonable to expect that any unrepresented asylum seeker with little education and a lack of facility with the English language could possible digest the complex rules which the Departments are now considering, evaluate those rules in light of forty years of case law and numerous federal and international guidances and interpretations, and anticipate where the law might evolve over the next several years. The purpose of the law is to provide protection for refugees – not to play "gotcha" at the expense of someone's life.

An applicant for asylum should be expected to present the facts which led them to flee their country, to support those facts with evidence that is reasonably available, and to try to place their experience in context. It is the function of the Immigration Judge - the legal expert - to assess those facts in light of the appropriate legal standard and to determine whether the applicant's situation meets the requirements of the law. To shift that burden to such an unreasonable degree on an applicant seeking protection is true to neither the letter nor the spirit of the Refugee Act.

This is particularly so in the case of an applicant who might later be able to reopen her case based upon ineffective assistance of counsel. Reopening under those circumstances requires a finding that the applicant's attorney has not provided adequate representation. To recognize that fact by reopening the proceedings, yet hold the applicant to the parameters of that inadequate representation, defies logic and would constitute a gross violation of due process. Finally, the result of the implementation of this Proposed Rule will likely have the unintended effect of forcing applicants and their representatives to present "laundry lists" of any potential particular social group that has been raised or which could be anticipated to be recognized in the future, further complicating the burden on the Immigration Judge.

4. The proposal to pretermit and deny applications for PSG will disproportionately harm pro se non-represented applicants

Allowing immigration judges to pretermit or deny applications for relief would especially prejudice those who are not represented and/or who are in detention during their removal proceedings and thus have less access to legal services that could help them formulate a cognizable claim—even though many of those individuals may have such claims. It is an

overbroad measure that will interrupt the court's ability to perform the fact-finding and evidence-weighing functions with which it is charged.

Individuals fleeing their countries for fear of losing their lives and other forms of persecution do not generally do so with a legally formulated defense and strong grasp of U.S. asylum law in their minds. Much like a person in the U.S. who calls the police during an incident of domestic violence in their home, asylum-seekers take the action of fleeing to the U.S. border because they are forced to seek safety in the moment and hope that help will reach them, not because they have studied the legal process that may result and are prepared to present the facts in a formula that is recognized by the adjudicators. Nor is such forestudy or preparation a prerequisite of seeking asylum under international law. It is the adjudicator's job to allow for the development and introduction of evidence towards a claim of asylum or relief under the CAT, and then decide whether that evidence is sufficient.

Some very fortunate asylum seekers will encounter legal advocates or be able to hire attorneys who can help them articulate their situations in a way that translates into a viable prima facie claim under the complexities of U.S. asylum law. Such articulation is not fabrication, but rather an applicability of the facts to the law, and the presentation of facts which a pro se applicant might not otherwise mention or know those facts are important or relevant. In this way, pro se applicants may have viable claims and not know which facts to present in order to present a prima facie claim under immigration law at the outset. For example, many indigenous individuals who have been persecuted by their governments, such as young persons who do not have a long personal history or knowledge of how the harm then encounter fits into the history of such persecution or civil unrest or civil war in their country, likely cannot articulate how their personal persecution fits into the larger context of their country and the asylum law framework. Such a person may identify immediate losses, such as loss of job or income, while the larger reason they were driven from their job or home may form the basis of their asylum claim but is not articulated at the outset of their claim prior to case development or access to a legal advocate or an immigration judge.

Even for those asylum seekers with such knowledge or ability to articulate their personal history in the context of their country's current problems, many aspects of asylum law are sophisticated and the burden of presenting them in a legal framework at the outset is unrealistic. Crucial concepts such as particularity, social distinction, immutability and nexus are legal terms of art unlikely to be able to be presented without case development or guidance from some legal interaction with a lawyer or immigration judge beyond the initial interactions with an asylum officers at the border or a large masters calendar session with only a few minutes with the immigration judge. For example, a person who experienced persecution because he or she presents as gender-nonconforming may not know there are other gender-nonconforming people in their country who are treated similarly, or may not know facts about their country that show nexus of the persecution that they experience to their protected characteristic. Even knowing that such treatment is widespread may not inform as to whether their personal situation meets a standard of being "socially distinct" as required for an asylum claim or that such a legal measure exists.

Allowing pretermission will prejudice the most vulnerable - children and young adults who rarely have language or knowledge to put forth legal claims on their own, pro se and uneducated refugees who lack such tools as well, and survivors of trauma who suffer sequelae of persecution which prevent them from speaking of their experiences or are delayed in revealing their details until a safe space has been assured. As neuro-science has developed in the past few decades, a greater understanding of the recognition in the Diagnostic and Statistical Manual of Mental Disorders (DSM) has developed that in both acute stress disorder and post-traumatic stress disorder ("PTSD"), "avoidance" is a real and unconscious symptom in which a person may not remember or be able to describe in detail "external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s)."American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, DSM-V-TR (2013). Additionally, the traumatic effects of persecution or feared persecution also can severely limit a survivor's ability to functionally communicate with others even in non-adversarial settings. The DSM-V documents that, for individuals with PTSD, "impaired functioning is exhibited across social, interpersonal, developmental, educational, physical health, and occupational domains. In community and veteran samples, PTSD is associated with poor social and family relationships." DSM-V-TR (2013). *See* Section D *herein*, (discussion of the effect of trauma and mental health and meeting the one year deadline).

Federal circuit courts have recognized that limited or even false information upon entry are consistent with a history of or fear of persecution or torture. See *Rodriguez Galicia v. Gonzalez,* 422 F.3d 529, 536-38 (7th Cir. 2005); *Kaur v. Aschroft,* 379 F.3d 876, 889 (9th Cir. 2004); *Yongo v. INS*, 355 F.3d 27, 33-34 (1st Cir. 2004); *Balasubramanrim v. INS,* 143 F.3d 157, 164 (3rd Cir. 1998). Many of these applicants were ultimately found to qualify for asylum or related relief, despite likely not being able to survive the proposed "prima facie" claim determination. The very real psychological barriers encountered by a survivor of persecution and torture are seemingly ignored under these proposed standards.

Recent studies document that legal representation is the most determinative factor in whether an individual will successfully obtain immigration relief. *See* Ingrid Eagly & S. Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 8 (2015) ("National Study"). Individuals with counsel fare better at every stage of the court process with increased success in outcomes, including on asylum claims, and are also 15 times more likely to even submit an application for relief. *See* National Study, at 9.

Lack of counsel and outcome disparity is even worse for detained immigrants. Yuki Noguchi, *Unequal Outcomes*, NPR (Aug. 15, 2019). Detainees have only a 14% representation rate in removal proceedings, compared to 66% for non-detained immigrants. *See* National Study at 32. Represented detainees are three times as likely to obtain relief as unrepresented detainees and 11 times more likely to seek relief. *See* National Study at 57. Revising the regulations to allow for pretermission before an asylum seeker, especially a detained asylum seeker, even has a chance to consult with a lawyer is essentially denying them the right to counsel provided in the statute and due process. Pretermission is also contrary to the duties set forth in the regulations for the Immigration Judge to "fully develop the record," along with the duty to

advise immigrants about free legal counsel, which has been found to be so fundamental that IJ's are held to a standard of scrupulousness in compliance with that duty. *See Mendoza-Garcia v. Barr,* 918 F.3d 498, 504 (6th Circuit, March 13, 2019) ("it is the IJ's duty to fully develop the record. 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.")

"In any removal proceeding 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." 8 U.S.C § 1362. The INA refers to counsel as a "privilege," and courts have found that the right to counsel is also protected by the Fifth Amendment. *Morales v. INS*, 208 F.3d 323, 327 (1st Cir. 2000). The liberty interests at stake in removal proceedings have long been recognized as significant. "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). Regulations expand and apply these rights to all hearings, including master calendar, bonds, and merits hearings, and require that a person be advised of the right to be represented and create a system of standards of practice to make that right meaningful. 8 C.F.R. § 292.5(b), 1240.10(a)(1), 1240.11(c)(1)(iii), 1003.16(b), 1240.3, 1240.10(a)(2) and 1003.101 et. seq. Statutory provisions also include the right to reasonable opportunity to present evidence and to a record. 8 U.S.C. § 1229a(b)(4)(B). The Executive Office of Immigration Review (EOIR) therefore maintains a list of pro bono resources, by geography, which Immigration Judges are required to ensure that respondents get and failure to provide the list has been found to violate the statutory right to counsel and implementing regulations. 8 C.F.R. §§ 1240.10(a)(1)-(2); *Leslie v. Atty. Gen. of the U.S.*, 611 F.3d 171, 180 (3d Cir. 2010); *Picca v. Mukasey*, 512 F.3d 75 (2d Cir. 2008). Although the right to counsel in immigration proceedings is not a public guarantee of universal representation, as in criminal matters, this extensive statutory and regulatory scheme is designed to ensure that access to counsel is meaningful by placing some responsibility on the government, including Immigration Courts, for providing and protecting that access given the consequences of deportation. Pretermission directly violates these protections and is wholly misplaced and in conflict with these regulations.

The U.S. is committed by tradition, by international covenants and by statute to providing safety to people who have been persecuted or who have a well-founded fear of persecution in their home countries. A decision as important as whether to grant asylum should not be compromised by arbitrary and unreasonable restrictions on asylum seekers' ability to present a complete and organized case to the asylum officer within an unreasonably short time frame.

8 C.F.R. 208.1 (d) <u>Political Opinion</u>

The Proposed Rule would impose a radically narrow definition of political opinion and severely limit asylum protections for individuals fleeing persecution by non-state actors. This change would reverse decades of established precedent and endanger the lives of thousands of bona fide asylum seekers.

1. The proposed definition would radically narrow the political opinion ground, arbitrarily rejecting well established international and domestic jurisprudence

As drafted, the Proposed Rule would only recognize as political opinions "ideal[s] or conviction[s] in support of the furtherance of a discrete cause related to political control of a state or a unit thereof." By way of justification, the drafters of the Proposed Rule offer a false distinction between matters involving state or political entities and matters of "culture." 85 Fed. Reg. 36279 (June 15, 2020 (Hereinafter "Proposed Rule").

In contrast to this narrow definition, the United Nations Human Rights Council ("UNHCR") defines "political opinion" to include "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged." UN High Commissioner for Refugees (UNHCR*), Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, available at: https://www.refworld.org/docid/3d36f1c64.html [accessed 13 July 2020]

The international community has generally embraced the broad definition espoused by the UNHCR. *See e.g., Refugee Appeal Nos. 76478, 76479, 76480 & 76481*, Nos. 76478, 76479, 76480 & 76481, New Zealand: Refugee Status Appeals Authority, 11 June 2010, ("[F]or the purposes of interpreting Article 1A(2) of the Refugee Convention, the word 'political' is not to be properly understood as being limited to opinions contextualized by engagement with the process of government or electoral issues but rather can encapsulate opinions across a broader range of fields."); Refugee Appeal No. 76044, No. 76044, New Zealand: Refugee Status Appeals Authority, 11 September 2008. ("'Culture' and 'tradition' are not apolitical, nor are they detached from the prevailing power relations and the economic and social circumstances in which they operate."); *Perampalam v. Minister for Immigration and Multicultural Affairs*, FCA 165, Australia: Federal Court, 1 March 1999 ("Political opinion is clearly "not limited to party politics in the sense that expression is understood in a parliamentary democracy."); Gutierrez Gomez EG (Non-state actors: Acero-Garces disapproved) (Colombia) (2000) [2000] UKIAT 7 (UK) ("[E]ven in contexts where the persecutor may be simply another private individual, if his persecutory actions against a claimant are motivated by an intention to stifle his or her beliefs, the opinion being imputed can be seen as political[.]"; Canada (Attorney General) v. Ward [1993] 2 S.C.R. 689 (defining 'political opinion' to include "any opinion on any matter in which the machinery of state, government, and policy may be engaged" and recognizing the applicant's political opinion: "killing of innocent people to achieve political change is unacceptable[.]")

U.S. case law has similarly rejected such "impoverished view[s]" of political opinion as those proposed here. *Zhang v. Gonzalez*, 426 F.3d 540, 546 (2nd Cir. 2005), quoting *Osorio v. INS*, 18 F.3d 1017, 1030 (2d Cir.1994). Federal Courts have eschewed per se rules, instead

requiring a thorough and contextual factual inquiry which considers political opinion claims in light of the society and culture where they arise. *See, INS v. Elias-Zacarias,* 502 U.S. 478, 579 (1992) (determining whether resistance to recruitment by guerilla forces constitutes a political opinion requires a fact-specific inquiry, not application of a categorical rule); *see also*, *Zang* at 546; *Vumi v. Gonzales*, 502 F.3d 150, 157 (2d Cir.2007). Applying a contextual and fact-based case-by-case analysis, courts have recognized a wide range of political opinions as legitimate grounds for asylum. *See e.g*., *Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010) (holding that opposition to government corruption may constitute a political opinion); *Osorio v. INS*, 18 F.3d 1017, 1029‑31 (2d Cir. 1994) (holding that ″union activities [can] imply a political opinion,″ and not merely economic position.); *Hernandez-Chacon v. Barr,* 948 F.3d 94 (2nd Cir. 2020) (holding that refusal to acquiesce to sexual assault can be considered a political opinion in light of the social context.); *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993) (stating "we have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes."); *Chang* v. *INS*, 119 F.3d 1055 (3rd Cir. 1997) (holding that not reporting colleagues' infractions to the Chinese government constituted a political opinion and stating "simply because he did not call himself a dissident or couch his resistance in terms of a particular ideology renders his opposition no less political."); *Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir 2005) ("whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum."); *Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir.1993) (holding that opposition to FMLN guerillas may constitute a political opinion for purposes of asylum); *Marquez v. INS*, 105 F.3d 374, 381 (7th Cir.1997) ("[w]idespread corruption may not be a ground for asylum, but political agitation against state corruption might well be[.]"); *Jabr v. Holder,* 711 F.3d 835 (7th Cir.2013) (respondent's rejection of Islamic Jihad's recruitment attempts may constitute a cognizable political opinion); *Sagaydak v. Gonzalez,* 405 F.3d 1035 (9th Cir. 2005) (a Ukrainian government auditor's refusal to accept a bribe from a private company was an expression of a protected political opinion).

Breaking from this established precedent, the instant notice contends that under BIA case law "a political opinion involves a cause against a state or a political entity." 85 Fed. Reg. 362679. This is flat out wrong, and the one case cited makes no such holding. *See Matter of S-P-,* 21 I&N Dec. 486, 489 (BIA 1996). The respondent in *S-P-* claimed he was persecuted by the Sri Lankan army because of his imputed anti-government political opinion. *Id*. at 494. In light of this, the BIA's opinion addressed whether the respondent's persecutors were in fact motivated by his opposition to the government. In the sentence quoted by the Departments, the BIA indicated that anti-government views were at issue "here," not that anti-government views must be present in all cases. The Departments take this quote completely out of context, in an effort to attribute their own radical position to the BIA. 85 Fed. Reg. 362679.

2. The proposed definition of political opinion is so narrow as to exclude prototypical forms of political thought and expression

Even a cursory look at prototypical political conflicts in the United States illustrates how the Department's proposal alters the meaning of 'political opinion' beyond recognition. The early 1960's sit-ins which desegregated lunch counters and other private entities are a classic

example of political activism. *See* 85 Fed. Reg. 36280. However, under the Proposed Rule, these protests would not be deemed manifestations of political opinion because racial segregation of private business was a cultural institution, not a legal mandate or government policy. *See, Heart of Atlanta v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). The activists who confronted this social ill were not voicing opposition to a political or state entity, but fighting for social and cultural change. It was not until years later, with the passage of the civil rights act, that segregation of private businesses became a "cause related to political control of a state or a unit thereof." 85 Fed Reg 36300; *Id*.

Many quintessential contemporary forms of political expression in the United States could similarly be labeled cultural, social or otherwise unrelated to matters of state or political control. LGBT pride parades, abortion clinic protests, and the 1995 "Million Man March" are just a few examples of American political expression which focus on social and cultural change.

The proposed changes to political opinion will significantly impact those seeking asylum because of their sexual orientation or because they were advocating on behalf of LGBTQ+ individuals or a cause related to LGBTQ+ identity. The Proposed Rule narrowly defines political opinion as one possessed by an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit or expressive behavior against private entities which the government is trying to control. This Proposed Rule change does not take into account that many individuals who are fleeing from violence related to their political activities or beliefs regarding issues of LGBTQ+ identity are often not advocating against the government, defending groups from governmental control or repression, or trying to change laws. This narrowing of the definition does not reflect the many ways individuals strive to promote social change in their world. Many LGBTQ+ advocates or allies, because of feared danger to themselves or others, wide spread stigma, or fear of being identified as part of the LGBTQ+ community do not engage in political advocacy in the traditional way. Often political advocacy presents in discussion between individuals, at informal meetings, at meetings and gatherings in religious institutions, at underground meetings, in informal closed social media or digital communication, and other venues where they will not be discovered. Further, individuals seeking asylum based on their opinions regarding LGBTQ+ and related causes come from in countries where they will face severe physical repercussions, detention, sexual violence, or torture at the hands of the government if they speak out against the government or advocate for government change and therefore they choose not to engage in traditional political advocacy. If the definition of political opinion is narrowed in this manner, the only individuals who will have viable asylum claims based on their political opinion are those exceptional publicly known activists who are willing to risk their lives to stand up to repressive governments and would exclude all other individuals advocating for equal rights, social acceptance, or societal change for purposes of asylum relief.

The Proposed Rule is inconsistent with well-established domestic and international law and would eliminate asylum protections for prototypical forms of political thought. It represents an intolerable distortion of asylum law and should not be promulgated as drafted.

3. The rule would arbitrarily remove asylum protection for certain individuals whose political opinions are in opposition to non-state actors

Asylum applicants who claim persecution by non-state actors must establish that the government is "unwilling or unable" to control their persecutors. *See e.g.*, *Matter of A-B-,* 27 I&N Dec. 316, 319 (A.G. 2018), *citing Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *citing Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975), *citing Matter of Euseph*, 10 I.&N. Dee. 453, 455 (BIA 1964). The Proposed Rule would introduce an entirely new "state action" requirement to be arbitrarily imposed only on a sub-group of those seeking asylum protection on political opinion grounds.

Under the Proposed Rule, individuals who face persecution for their political opposition to non-state groups would be denied asylum unless their political opinions fall within one of two enumerated categories. First, an applicant could prevail if their opposition to the non-state group was expressed through expressive public acts "related to efforts by the state to control" the group. Second, the applicant could succeed if they had expressed their opposition through behavior that is "antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state." As in the previous section, this rule is premised on the fallacy that by definition, political opinions must pertain to state and government entities.

The Supreme Court has already established a framework for determining whether an applicant's opposition to a non-state group constitutes a political opinion for asylum purposes. See, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). Nothing in the Court's opinion suggests the criteria proposed by the Departments are relevant or appropriate. *Id*. Rather, the decision indicates that a principled and idealistic opposition to a revolutionary Marxist group would constitute a political opinion, independent of whether the applicant had also voiced agreement or disagreement with the state. *Id*. at 482, 3. Applying this precedent, federal courts have engaged in fact-specific contextual analysis to determine whether opposition to a non-state entity constitutes a political opinion in a given case. *See e.g., Delgado v Mukasey*, 494 F.3d 296 (2nd Cir. 2007) (respondent's refusal to cooperate with the FARQ gave rise to an imputed political opinion); *Martinez Buedia v. Holder,* 616 F. 3d 711 (7th Cir. 2010) (refusal to cooperate with the FARQ for ideological reasons is an expression of political opinion); *De Brenner v. Ashcroft* (8th Cir. 2004) (Respondent was persecuted on account of imputed political opinions antithetical to the Shining Path's Marxist ideals); *Regalado-Escobar v. Holder* (9th Cir. 2013) (opposition to the FMLN's violent tactics constitutes a political opinion).

As the Departments offer no compelling reasoning to support this arbitrary and sweeping departure from established law, this section of the Proposed Rule should not be promulgated in its current form.

8 CFR 208.1 (e) <u>Persecution</u>

Through the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat 102, Congress incorporated this country's obligations under the 1967 United Nations Protocol Relating to the Status of

Refugees, 19 U.S.T. 6223 (Nov. 6, 1968) ("Protocol") and the 1951 Convention on the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) ("Convention") into federal law; Ca*rdoza Fonseca,* 480 U.S. at 436; *See* Anker, Deborah, *The Law of Asylum in the United States*, §1.1 (2017). Fundamental to those obligations is the duty to provide protection to individuals fleeing persecution when their own governments have failed in their duty to provide that protection. The Proposed Rule seeks to specify a fixed definition of the term, "persecution." The Proposed Rule would require that persecution be evaluated as "an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat." In addition, the Proposed Rule sets out several examples of circumstances which would not be considered persecution. The definition imposed by the Proposed Rule ignores decades of nuanced interpretation by the Board of Immigration Appeals (BIA), federal courts, USCIS, and the UNHCR, imposes an impermissibly restrictive interpretation of what will be considered persecution, and will result wrongful denial of protection to untold numbers of asylum seekers with meritorious claims for asylum.

It has been long-recognized that the term "persecution" is incompatible with a static definition dictating that certain types of harm will be considered persecution while categorically excluding others. Rather than including such a fixed definition, the Convention's preamble frames refugee law within a human rights context, specifically referencing core international human rights legal instruments. *See* D. Anker at §4.2; *See* Convention Relating to the Status of Refugees, Preamble ("considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental human rights and freedoms without discrimination…"). The UNHCR Handbook, recognizing the need for flexibility in assessing potentially persecutory behavior, specifically adopts the human rights framework for evaluating that behavior:

> There is no universally accepted definition of "persecution," and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership if a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (1992) para. 51; *See also* Goodwin-Gill and Jane McAdam, The Refugee in International Law (3d ed. 2007), pp. 93-94 ("Persecution is a concept only too readily filled by the latest examples of one person's inhumanity to another… Little purpose is served by attempting to list all its known measures.").

Similarly, the USCIS Asylum Office has applied a broad, human rights framework in determining what behavior will be considered to be persecution. *See* USCIS, RAIO Combined Training Course, Definition of Persecution and Eligibility Based on Past

Persecution (June 2015), pp. 16-17 ("violations of "core" or "fundamental Human Rights, prohibited by international law, may constitute harm amounting to persecution. … Other fundamental rights are also protected by customary international law…".):

> As explained in greater detail in RAIO Training Modules, Refugee Definition and Definition of Persecution and Eligibility Based on Past Persecution, the term "persecution" is not defined by treaty, statute, or regulation, and you must rely on guidance from various sources, including international human rights norms, to evaluate whether harm constitutes persecution.

USCIS, RAIO Combined Training Course, Gender-Related Claims (May 2013). The adoption of a human rights framework allows for a realistic consideration of the harms faced by the applicant in the context of that individual's personal circumstances within her particular country and in light of evolving human rights norms. The definition of persecution incorporated into the Proposed Rule rejects that long-held approach and imposes a static, restrictive interpretation that is completely unresponsive to the needs of the refugees the Refugee Act of 1980 was designed to protect.

1. **By requiring that persecution be an "extreme concept" that "includes actions so severe that they constitute an exigent threat," the Proposed Rule improperly implies that, to be considered persecution, there must be a threat of imminent physical harm**

The overly restrictive language used by the Proposed Rule implies that persecution will be found only when there is a threat of imminent physical harm and runs contrary to the long-held principles that persecution be defined on a case-by-case basis in light of normative human rights standards. Federal Courts have routinely stressed that the term persecution does not require physical harm, and that persecution is a broader concept than a threat to "life or freedom." *INS v. Stevic*, 467 U.S. 407, 428 (1984). Persecution has been defined as encompassing "the infliction of harm or suffering on those who differ…in a way regarded as offensive," or "oppression which is inflicted on groups of individuals because of a difference the persecutor will not tolerate." *Kovac v. INS*, 407 F.2d 102, 107 (9th Circ. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir 1985). While persecution has been found to require more than unpleasantness or harassment, to qualify for protection, an applicant need not have suffered "serious injuries," *See* USCIS: RAIO, Definition of Persecution and Eligibility Based on Past Persecution at 14, *citing Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998); *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004); *Sanchez-Jimenez v. U.S. Att'y Gen*., 492 F.3d 1223 (11th Cir. 2007).

Serious threats of harm made against an applicant may constitute persecution even if the applicant was never physically harmed, *see Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002), a*mended by Salazar-Paucar v. INS*, 290 F.3d 964 (9th Cir 2002), as can threats which are not explicit. *See Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014). Examples of non-physical harms which have been found to be persecution include, among others: deliberate imposition of severe economic disadvantage or deprivation of liberty, food,

housing, employment or other essentials of life, *see Matter of T- Z-*, 24 I&N Dec. 163 (BIA 2007); *Vincent v. Holder*, 632 F.3d 351, 355 (6th Cir. 2011); severe discrimination, *see Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004); arrests and detentions, *see Shi v. US Att'y Gen*. 707 F.3d 1231 (11th Cir. 2013); psychological harm, *see Ouk v. Gonzalez*, 464 F.3d 108, 111 (1st Cir. 2006); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 2004); being forced to witness harm to others, *Id*.; and being forced to engage in conduct that is abhorrent to abhorrent to that individual's deepest beliefs, *see Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

2. **By setting forth a standard which categorically mandates that certain circumstances will not constitute persecution, and by viewing individual harms in isolation, the rule fails to apply long-standing principles requiring a case-by-case evaluation of persecution**

The approach taken in the Proposed Rule also makes generalizations concerning harms that will categorically *not* be considered persecution, while suggesting that persecution will be defined by individual acts viewed in isolation. This runs counter to the Convention and the Refugee Act, as well as well-developed case law regarding the nature of persecution which mandates that persecution must evaluated on a case-by-case basis, looking at the record of the individual case before the adjudicator.

> Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (1992), para. 52.

Since its beginnings, asylum law has sought to evaluate persecutory behavior in the specific context of the individual case, which involves the political, social and cultural context in which the harm occurs, as well as the particular strengths and vulnerabilities of the victim. For example, it is widely recognized that harm to a child can be substantially less than harm to an adult, yet still be considered persecution. *See Ordonez-Quino v. Holder*, 760 F.3d 80, 91 (1st Cir. 2014) ("Where the events that form the basis of a past persecution claim were perceived when the petitioner was a child, the fact-finder must "look at the events for [the child's] perspective, [and] and measure the degree of [his] injuries by their impact on [a child] of [his] age[],""), *quoting Hernandez Ortiz v. Gonzales*, 496 F.3d 1042, 1047 (9th Cir. 2007); *see also* Jeff Weiss, US Dep't of Justice, Guidelines for Children's Asylum Claims, (Dec. 10, 1998). Similarly, harm to a child's family or community - upon which the child depends –

may contribute to a finding of persecution against the child himself. *Ordonez-Quino,* 760 F.3d at 91; *see Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir 2006) (*per curiam); see also Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2006). The courts have considered the age at which the harm is inflicted in assessing the long-term consequences to the individual of that harm. *See e.g. Ordonez-Quino,* 760 F.3d at 91.

Harms can also take on a different meaning depending on the psychological vulnerabilities or beliefs of an individual. For example, in *Fatin v. INS, supra*, the Third Circuit found that, while the imposition of laws which place severe restrictions on the behavior of women could be persecution if those laws force an individual to violate deeply held beliefs, that would not be the case if the individual did not hold such beliefs. Similarly, while forcing an individual to renounce his or her religion or to engage in conduct that violates deeply held religious principles would be persecution, imposing that same conduct on an individual who does not share those beliefs may not be. Indeed, the type of persecution inflicted on an individual is often chosen because of the impact that the particular harm will have on the individual based on their psychological, religious or cultural beliefs or practices.

Courts have also considered the political, social, and cultural context in which the harm occurs in determining the persecutory nature of the harm. For example, deprivation of an education in the context of the systemic racism against the Mayan community of Guatemala will carry a different impact than would deprivation of an education solely due to lack of finances or infrastructure. *See Santos-Guaman v. Sessions*, 891 F.3d 12 (1st Cir. 2018). Threats of detention made against a gay man in Uganda will carry a particular meaning given the treatment he can expect to receive based on his sexual orientation or identity. Anti-Semitic attacks by a non-governmental actor take on a different meaning when viewed in the context of Nazi Germany than they would hold in, for example, the United States.

Similarly, harms which in and of themselves may not constitute persecution can, over time, accumulate, and, when viewed in their totality, constitute persecution. *See Shi v. U.S. Att'y Gen.,* 707 F.3d 1231, 1235 (11th Cir. 2013) ("It is important to note, however, that we evaluate the harms a petitioner suffered cumulatively – that is, even if each fact considered alone would not compel a finding of persecution, the facts taken as a whole may do so."). For example, a single discriminatory act, in isolation, may not amount to persecution; however when combined with other discriminatory acts over time, or combined with another form of harm, may, viewed as a whole, rise to the level of persecution:

> [A]n applicant may have been subjected to various measure not in themselves amount to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to a well-founded fear of persecution on "cumulative grounds." Needless to say, it is not possible to lay down a general rule as to what cumulative

> reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

UNHCR Handbook, ¶ 53.

Through the requirement of an exigent threat to the individual, the rule also potentially forecloses the possibility of establishing a well-founded fear of persecution based upon the treatment of similarly situated individuals, in contrast to the long-standing principle that an individual need not demonstrate and not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if. This is well-settled law which has been incorporated into the regulations. 8 CFR § 208.13

3. The inclusion of a list of harms that will not be found to be persecution will create confusion and will send a message that there is a presumption against a finding of persecution

Finally, the inclusion of a list of harms that will *not* be found to constitute persecution, the Proposed Rule sends a message that there is a presumption against a finding of persecution. The rule purports to provide this list to "better clarify what constitutes persecution." However, the inclusion of a list of circumstances which would not be considered persecution without further discussion of the interplay of those circumstances with persecutory acts provides little meaningful guidance, and it will encourage superficial reviews of asylum claims and wrongful denials. The following is the list of harms which the Proposed Rule would categorically exclude from the definition of persecution.

i. Generalized harm that arises out of civil, criminal, or military strife in a country

While a showing of generalized harm during widespread strife does not, in and of itself, establish persecution, neither does it diminish an individual's asylum claim. Each applicant must meet his or her burden to show that he or she, as an individual, has been persecuted in the past or has a well-founded fear that she will be persecuted in the future. Each must establish that a protected ground is one central reason for the harm experienced or feared. The size of the group targeted or the number of people harmed has no relation to whether that harm is persecution. "[I]t is irrelevant whether one person, twenty persons, or a thousand persons were targeted or placed at risk, so long as there is a nexus to a protected ground." *Mengstu v. Holder*, 560 F.3d 1055, 1058 (9th Cir. 2009).

For example, the fact that vast numbers of individuals were massacred during the genocides in Rwanda and Guatemala does not diminish the fact that those individuals were targeted on account of their race or ethnicity. An individual harmed during widespread race riots or riots targeting a particular religious minority is still targeted because of a protected ground. *See Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004) ("We have cautioned that "[t]he difficulty of determining motive in situations of general civil unrest should not… diminish the protections of asylum for persons who have been punished because of their

actual or imputed views…". Military actions, civil unrest, and criminal attacks are often targeted at individual communities on account of a protected characteristic of the victims. The fact that the harm is directed at large numbers of the community does not diminish the danger to an individual within that community who is specifically harmed because of a protected characteristic.

ii. Treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional

This instruction provides no meaningful guidance to an asylum seeker or an adjudicator except, perhaps, to indicate U.S. laws and the U.S. Constitution are not the minimum benchmark for what behavior will be considered persecutory. While the Proposed Rule indicates that not all treatment falling into the listed categories will be considered persecution, it provides no guidance on when and under what circumstances that treatment will rise to the level of persecution. Because of this, it risks creating confusion in the adjudication of asylum claims and a presumption that most claims will be denied. A more principled and effective approach would be to reference the human rights framework which has been adopted by our courts, USCIS, and the UNHCR as the framework within which to evaluate the cumulative nature and impact of the harm to which the applicant has been subjected or which she fears.

iii. Intermittent harassment, including brief detentions

This provision also provides no meaningful guidance on when harassment and detentions rises to the level of persecution. Courts have delineated that intermittent harassment or brief detentions do not constitute persecution, but made clear that an adjudicator must evaluate the facts of the individual cases and the meaning of the harassment and detentions in light of the circumstances. For example, in its training materials, the Refugee, Asylum, and International Operations Directorate (RAIO) puts forth a nuanced approach of looking more closely at the treatment in a whole context:

> Generally, a brief detention without mistreatment will not constitute persecution. Prolonged detention is a deprivation of liberty, which may constitute a violation of a fundamental human right and amount to persecution. Similarly, multiple brief detentions may, considered cumulatively, amount to persecution. Evidence of mistreatment during detention also may establish persecution.

RAIO Combined Training Course, Definition of Persecution and Eligibility Based on Past Persecution 20 (June 12, 2015). In evaluating whether detention is persecution, the RAIO indicates that the adjudicator should consider a number of factors, including: the length of detention; the legitimacy of the government action, any mistreatment during detention, and whether judicial processes or due process rights are accorded. *Id*. *See also* UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee (2012) (HCG/GIP/12/19)

("Detention, including in psychological or medical institutions, on the sole basis of sexual orientation and/or gender identity is considered in breach of the international prohibition against the arbitrary deprivation of liberty and would normally constitute persecution.").

It is very common for LGBTQ+ asylum applicants to have experienced detentions - brief or otherwise - especially in countries where there are laws and societal norms punishing same sex relationships. The rule fails to require adjudicators to consider cumulative harm of even brief detentions, and magnified harm, where even if brief, the impact is large. Denying an LGBTQ+ asylum seeker who has been detained on account of their sexual or gender identity based on an adjudicator's view that the detention being too "brief" runs contrary to established case law which rejects the axiom that an asylum seeker must remain in their home country until they are harmed severely, or almost killed. Asylum seekers should not be required to put themselves in jeopardy of more danger or further detainment to meet this arbitrary factor.

iv. Threats with no actual effort to carry out the threats

This provision places an unreasonable burden on the applicant and is a serious departure from the commonly applied standard which requires the adjudicator to look at their overall context, including such factors as the severity of the harm threatened, the frequency of the threats and the effect the threats have on the life of the victim. The Third Circuit in *Doe v. Attorney General of the United States*, 956 F.3d 135, 143-44 (3d Cir. 2020) recently found that, to constitute persecution, a threat must be concrete and menacing. "A threat is "concrete" when it is "corroborated by credible evidence," and it is "menacing" when it reveals an "intention to inflict harm."" Physical harm to the applicant is one factor in the cumulative analysis, it is not required to render a threat "concrete and menacing." … "the ultimate question, … is whether the "aggregate effect " of the applicant's experience, "including or culminating in the threats," put the applicant's "life in peril or created an atmosphere of fear so oppressive that it severely curtailed [his] liberty." *See also* RAIO Training Materials, *id*. (instructing that threats can constitute persecution if received "over a prolonged period of time, causing the applicant to live in a state of constant fear.").

v. Non-severe economic harm or property damage

While the BIA has found that economic harm must be above and beyond the economic difficulties generally shared by others with the applicant's country of origin will not be found to be persecution, *Matter to T-Z-*, 24 I&N De. 163, 173 (BIA 2007), reduction of an analysis of economic harm and property damage to this single negative statement will do nothing to assist the adjudicator and will lead to denial of meritorious claims. The BIA has acknowledged that economic harm can rise to the level of persecution when the applicant faces a "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life. *Id*; *See also Vicente-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008); *Borca v. INS*, 77 F.3d 210 (7th Cir. 1996) (holding that total economic deprivation is not required to establish persecution). Factors which the BIA has indicated should be considered in assessing the persecutory nature of economic harm include, the applicant's earning and net worth, other employment available, loss of housing and health

benefits, loss of school tuition and educational opportunities, loss of food rations, and confiscation of property. Similarly, to assess the effect of property damage, the harm must be considered in the context of the applicant's life. For example, the burning of an individual's home by a mob in his community because he is believed to be gay in Uganda, is very different from vandalizing an individual's car in response to a personal argument in a traffic jam. This example, without greater context or explanation, serves only to confuse the question of when economic harm or property damage will constitute persecution, and it should be omitted from the Proposed Rule.

vi. Existence of government laws or policies that are unenforced or infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally

The provision will create extreme confusion because it appears to address the applicant's burden of proof rather than addressing the definition of what will constitute persecution, and because it changes the burden of proof in violation of the statute. To establish eligibility for asylum, an applicant must establish that she has a well-founded fear or persecution on account of one of the five protected grounds. This has been defined by the Supreme Court to require only a one in ten chance that the applicant will face persecution. *Cardoza-Fonseca v. INS*, 480 U.S. 421, 431 (1987) (In a country where every tenth adult male is put to death or sent to a labor camp, "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."). The existence of a persecutory law which targets an applicant based upon a protected characteristic which the applicant possesses would certainly meet the applicant's burden under the law to demonstrate that their fear is, in fact, reasonable. Shifting the burden to the applicant to additionally show how frequently the law is enforced or that the law will apply to them personally is a clear violation of the statute, and it would impose an insurmountable burden for most unrepresented applicants to meet.

8 CFR 208.1 (f) <u>Nexus</u>

The section provides a list of circumstances under which the Departments will not provide protection. The only attempt at explaining why these particular circumstances are excluded are citations to individual cases, many of which are taken out of context, and many of which are contradicted by other decisions. The list has little to do with nexus, and is geared toward excluding from protection whole groups of people while sidestepping any meaningful analysis or direction. To establish a nexus between the persecution and a protected characteristic for purposes of asylum, an applicant needs to show that the characteristic is "one central reason" for the harm. The Proposed Rule provides absolutely no guidance as to why the circumstances listed cannot be "one central reason" for the harm which the applicant has experienced or which he or she fears. It fails to acknowledge that persecutors can often have complex motivations and may have more than one reason for targeting the victim, and that a protected ground need only be one of those reasons as long as it is a central reason. "That is, it cannot be incidental, tangential, superficial, or subordinate to another reason for the harm." *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007). The listed circumstances make no effort to provide guidance on how to analyze mixed motivation cases, and will lead to denial of protection to large numbers of individuals with meritorious claims.

(i) Interpersonal animus or retribution; and (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

This provision oversimplifies a very complex issue and will lead to the wrongful denial of protection to individuals based solely on the fact that they have a personal relationship with their persecutors. It is extremely common that persecution by a nongovernmental actor is directed at someone the persecutor knows or with whom he has a personal relationship. This does not diminish, however, the fact that he may be targeting the person because of a protected characteristic, by personal animus rooted in a protected characteristic, or a combination of personal animus and a protected ground. For example, it has been well accepted in U.S. law, as well as internationally, for more than twenty years, that individuals can be eligible for protection based upon harmful traditional practices such as female genital cutting (FGC) or forced marriage. *See Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of S-A-K- & H-A-H-,* 24 I&N Dec. 464 (BIA 2008). In such cases, the harm is often inflicted by family members. *See also Matter of S-A-,* 22 I&N Dec. 1328 (BIA 2000) (young woman granted protection based on persecution by her father for her failure to abide by his conservative interpretation of his religious beliefs). In such cases, the individual persecutor is often acting against the individual, rather than someone else who possesses the same characteristic *because* of their personal or family relationship. A mother may subject her daughter to FGC to ensure that she is marriageable. A father may force his daughter to leave school at a young age and enter into a forced marriage because he wants to protect her honor or the family's honor. In either case, the parent takes that action against the child because, as the parent, they see it as their responsibility to do so. This does not diminish the fact, however, that they also do it because, as a female of their tribe, ethnicity, culture or religion, the daughter is expected to conform to the requirements of that tribe, ethnicity, culture or religion.

Additionally, there has never been a requirement that an applicant for asylum or withholding of removal show that her persecutor targeted other members of the particular social group at issue. First, this has absolutely nothing to do with the motivation of the persecutor. In the cases cited above, the parents are clearly motivated by a protected characteristic of their daughter. It is nonsensical to suggest such a prosecutor would attempt to force other young women to whom they are not related to undergo FGC or to enter into forced marriages. That is unrealistic and simply not the standard. The law is clear that, to be eligible for protection, an applicant must prove past persecution or a well-founded fear of persecution, and that one central reason the persecutor targeted or would target her is a *protected characteristic that she possesses*. *See INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987).

In addition, placing the additional burden to show the persecutor acted against others bearing the same characteristic also places an often-insurmountable burden of proof on the applicant. The applicant knows their personal experience. To expect them to know how the persecutor treats others or has treated others is a burden that most applicants cannot meet, and the

inclusion of this provision will result in the denial of asylum to large numbers of asylum applicants with meritorious claims.

The proposed changes would have a disproportionate negative impact on those seeking asylum on account of sexual orientation, gender identity, or HIV status. The specificity that the nexus requirement will fail where the harm is due to "personal animus or retribution", "interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group", or claims where the nexus to the persecutor or persecutors relates to "pernicious cultural stereotypes" is contrary to established law and targets some of the most marginalized asylum seekers, such as LGBTQ+ members of society, including transgender individuals.

The Proposed Rule ignores the reality that non-governmental actors who target LGBTQ+ individuals for harm often do so out of the exact type of personal animus contemplated as being a non-qualifier for establishing nexus. Oftentimes the harm directed at an LGBTQ+ individual is from someone acting out of a sense of personal outrage stemming from a number of sources: religious teachings, cultural and familial beliefs and practices, traditional teachings, political incitement, internalized oppression, misguided stereotypes, or propensity for violence targeted at an outcast member of their society.

While LGBTQ+ asylum seekers are often targeted by governments imposing laws against same sex relationships, targeted harm by individuals or groups of individuals is especially frequent in countries where the government turns a blind eye to such persecution. For those cases where an LGBTQ+ member is targeted by unknown assailants, the victim often remains unaware and uninformed if others have been targeted in the same way and by the same people. In cases where the persecution is by a known assailant like a family member, neighbor or acquaintance, motivation is often propelled by shame and outrage, especially in a culture where one's family is intrinsically their identity. Family cases can also involve other types of harmful actions, such as forced marriage in order to either hide the sexual orientation behind the cloak of marriage, or due to traditional belief in marriage as essential for a female, or from misguided belief that marriage will "cure" same sex orientation. Such relationships often become abusive, especially if the sexual orientation is discovered, and these relationships - arising from conformist traditional beliefs and practices surrounding marriage, gender and sexual orientation - often center on interpersonal animus.

Likewise, transgender individuals are often targeted by individuals or groups that have a fundamental deep personal animus toward transgender individuals and persecute them in the context of widespread societal rejection of them. The targeted transgender individual might be the only transgender individual the persecutor has ever knowingly encountered or harmed, and these proposed changes would establish a nexus scheme that is unworkable and would essentially preclude all such claims.

(iii) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in

furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;

The nexus element of asylum adjudication requires an asylum seeker to show they were persecuted "on account of" one of the law's five enumerated grounds. *See e.g., Lopez Lopez v. Sessions,* 885 F.3d 49 (1st Cir. 2018). This is necessarily a case-specific question of fact. *See id.* As the Departments cannot possibly know what motivates the mistreatment of asylum applicants who have yet applied for relief, any categorical declaration regarding nexus is absurd.

The Departments state that this section of the Proposed Rule is grounded in case law. 85 FR at 3628. Specifically, the preamble cites *Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005). However, asylum's "nexus" element plays only a minor role in the *Saldarriaga* case, appearing in dicta. *Id*. at 468 ("Finally, it bears mention that, even if petitioner were found to have manifested a political opinion as the statute requires, there is no indication that the cartel members would persecute him *in response to* that manifestation.") The respondent in *Saldarriaga* feared persecution by a Columbian drug cartel that he had informed against. The court held that the respondent had failed to demonstrate that his decision to inform on the cartel was based on principle as opposed to personal interest. The Court's passing reference to nexus indicates only that the respondent failed to meet his burden in that case. The Court in that case in no way endorses any sort of categorical rule.

Heading notwithstanding, this section of the Proposed Rule has little to do with nexus. Nearly identical language appears in the 'political opinion' section of the proposal, and its inclusion here is uninformative and needlessly redundant. 85 Fed. Reg. 36292.

Inserting duplicative and unrelated criteria into the nexus element of the asylum law will not advance either of the Departments' stated goals of preserving resources and protecting those who are truly in danger. 85 Fed. Reg. 36292. Accordingly, this section should not be promulgated.

(iv) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations

As in the previous section, this represents a misguided attempt to shoehorn a fundamental rethinking of the asylum grounds into the nexus element. Whether and when resistance to recruitment constitutes expression of a political opinion has been the subject of considerable litigation. *See e.g., INS v. Elias-Zacarias,* 502 U.S. 478, 579 (1992); *Matter of S-E-G,* 24 I&N Dec. 579 (BIA 2008). The question is entirely separate from the nexus inquiry, which requires the adjudicator to ask whether the respondent has established that she has been, or will be persecuted on account of this opinion. This section proposes a categorical rule declaring that non-state organizations are never motivated to persecute individuals based on their resistance to recruitment. A categorical rule can never be an adequate substitute for the factual case-by-case analysis mandated by precedent in this line of cases. Accordingly, this section should not be promulgated as drafted.

(v) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence, or perceptions of wealth or affluence

In support of this proposition, the preamble to the Proposed Rule cites *Aldana-Ramos v. Holder*, 757 F.3d 9, 18 (1st Cir. 2014) for the proposition that "criminal targeting based on wealth does not qualify as persecution 'on account of' membership in a particular group." 85 FR at 3681. By misrepresenting the full extent and scope of *Aldana-Ramos*, this section of the Proposed Rule continues the unfortunate trend of knee-jerk exclusion of whole groups from asylum eligibility rather than analyzing the individualized circumstances of each under all the elements, as the Convention requires. "Each case depends on the facts." *Aldana-Ramos* 757 F.3d *at 19*. For example in *Aldana-Ramos*, the First Circuit recognized the complexity of mixed motivation, and in fact, remanded the case for failure by the Board to consider the family membership claim:

> There may be scenarios in which a wealthy family, targeted in part for its wealth, may still be the victims of persecution as a family. For instance, a local militia could single out a prominent wealthy family, kidnap family members for ransom, effectively drive the family into poverty, and pursue them through them throughout the country in order to show the local community that even its most prominent families are not immune and that the militia's rule must be respected.

Aldana-Ramos 757 F.3d at 19. In *Matter of Acosta*, the first case in which the BIA defined the term "particular social group," the BIA held that "persecution on account of membership in a particular social group" is "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *19 I&N* Dec. 211, 233 (BIA 1985). Whether an applicant can establish a showing of persecution based on membership in a particular social group must be decided on a case-by-case basis. *See Raza v. Gonzales,* 484 F.3d 125, 129 (1st Cir. 2007).

The Proposed Rule ignores the reasoning in caselaw that has found that persecution based on wealth *can* be, and has been, sufficient to establish nexus to a particular social group. History is replete with examples of groups targeted for harm by the government or non-state actors based upon their wealth or social class, or perceptions thereof. As an example, after the Russian Revolution, "kulaks"—the supposedly wealthy peasant class—were viewed as class enemies to be liquidated on account of their immutable heritage. *Sicaju–Diaz v. Holder,* 663 F.3d 1, 3–4 (1st Cir. 2011).

"To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. Society can consider persons to comprise a group without being able to identify the group's members on sight." *Paloka v. Holder*, 762 F.3d 191, 196 (2d Cir. 2014) (citing *M–E–V–G–, 26 I&N* Dec. at 237). There are plausible circumstances under the Convention in which individuals may be part of a socially distinct group based on wealth, singled out for persecution on that basis, and not afforded state protection based on that status. For almost thirty years, the BIA has recognized that land ownership may form the basis of a particular social group within the meaning of the INA. *Cordoba v. Holder*, 726 F.3d 1106,

1114 (9th Cir. 2013). Further, in *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672-73 (7th Cir. 2005), the Seventh Circuit concluded that the educated, landowning class in Colombia comprised such a social group. The reasoning of the court in *Tapiero* was straightforward - the Orejuelas fell into a distinct social group: the educated, landowning class of cattle farmers targeted by FARC, whose wealth, along with their ownership of land, social position as cattle farmers, and education made them targets of FARC's violent campaign.

If found to establish all of the required elements, there is no lawful basis to exclude applicants from asylum eligibility based on wealth or perceptions of wealth. Implementing a blanket exclusion of wealth as a basis for asylum eligibility also raises the risk that adjudicators will place undue emphasis on this characteristic at the expense of careful consideration of the complex, intricate and overlapping ways in which wealth relates to more well-established protected grounds such as family, race, and political opinion.

(vi) Criminal activity

Most forms of persecution – rape, killing, kidnapping, to name a few– are criminal acts in virtually all countries across the world. International and domestic refugee law recognizes that seemingly private acts of violence "can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." Anker, *supra* note 1 at §4:10. A blanket exclusion of persecution based on "criminal activity" from asylum eligibility would have the perverse effect of barring most asylum claims in contravention of domestic and international legal standards. Applicants already bear the burden of proving that they have suffered, not random criminal acts, but instead concerted, targeted criminal activity that rises to the level of persecution. *See e.g. Gormley v. Ashcroft*, 364 F.3d 1172, 1176-77 (9th Cir. 2004). Formalizing an exclusion of applicants based on criminal activity appears simply to be a "backdoor" method of barring asylum claims based on harm from non-state actors in contravention of the Convention.

(vii) Perceived, past or present, gang affiliation

This section of the Proposed Rule directly contradicts precedent on this issue. "Perceived, past or present, gang affiliation" has been recognized as a protected social group. *Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015). In *Oliva*, the court held that the applicant's past and future threatened persecution were "on account of" his membership in the MS-13 gang. *Id*. Similarly, in *Martinez v. Holder*, 740 F.3d 902, 906 (4th Cir. 2014,)the court held that the applicant's particular social group of MS-13 gang members from El Salvador was immutable for withholding of removal purposes because "…the only way that Martinez could change his membership in the group would be to rejoin MS-13."

There are many such examples from courts around the country. *See Benitez Ramos*, 589 F.3d 428-29 (holding that "tattooed, former Salvadoran gang members" would qualify as a protected social group); *See also In re Enamorado*, United States Immigration Ct., Harlingen, TX (November 22, 1999) (holding that former membership in a gang could constitute a social group to meet the statutory grounds for asylum).

(viii) Gender

The Proposed Rule lists gender among a series of "circumstances" based upon which the Attorney General will NOT find a nexus to a protected ground. The placement of gender on this list holds no basis in law or in logic. To establish nexus to a protected ground, the applicant need only show that the ground is one central reason for the infliction of harm. The Proposed Rule provides no explanation or guidance on why gender is listed in nexus. If the rule seeks to assert that an individual can never show that the person's gender was one central reason for their harm, that rule is contradicted by a long history of harmful treatment inflicted on women based, at least in part, on their gender, including female genital mutilation, forced marriage, forced prostitution, trafficking, and domestic violence. If the Proposed Rule is intended to say that harm based on gender can never be tied to a one of the protected grounds, that is also contradicted by a long line of cases and guidances that recognize that gender can define, in whole or in part, a particular social group under the refugee definition. Most recently the First Circuit recognized that "gender" meets the three characteristics set forth by the BIA required of a particular social group: immutability, particularity, and social distinction:

> But it is not clear why a larger group defined a "women," or "women in country x' – without reference to additional limiting terms – fails either the "particularity" or "social distinction" requirement, certainly it is difficult to think of a country in which women are not viewed a "distinct" from other members of society. In some countries, gender serves as a principal, basic differentiation for assigning social and political status and rights, with women sometimes being compelled to attire and conduct themselves in a manner that signifies and highlights their membership in their group. It is equally difficult to think of a country in which women do not form a "particular" and "well-defined" group of persons.

De Pena-Paniagua v. Barr, No. 18-2100 (1st Cir. April 24, 2020*). See also Ticas-Guillen v. Whitaker*, 744 F. App'x 410, 410 (9th Cir. 2018) (finding that Immigration Judge's ground for denial – that the proposed social group, "women in El Salvador," was just too broad to satisfy the particularity requirement cannot stand and that gender and nationality can form a particular social group); *Silvestre Mendoza v. Sessions*, 729 F.2d App'x 597, 598-99 (9th Cir. 20180(mem.)(remanding to the BIA for consideration of whether "Guatemalan women" is a particular social group); *Paloka v. Holder*, 762 F.3d 191, 194 (2d Cir. 2014) (remanding to the BIA for consideration of the particular social groups of "unmarried women," "young women in Albania," and "unmarried young women in Albania"); *Hassan v. Gonzalez*, 484 F.3d 513, 518 (8th Cir. 2007) (recognizing a particular social group of "Somali females," and that a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of female genital mutilation). *See also Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) (citing "sex" as a defining characteristic of a particular social group).

The Departments cite *Niang v. Gonzales* for the proposition that there may be understandable concern in using gender as a "group-defining characteristic" because "[o]ne may be reluctant

to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there." 422 F.3d 1187, 1199-1200 (10th Cir. 2005). This evidences a clear misunderstanding of the asylum standard and the function of the protected characteristic within that standard. In order to establish that an individual is a refugee within the meaning of the INA, an individual must show past persecution or a well-founded fear of persecution on account of one of the five protected grounds and a failure of state protection. Race, religion, nationality and political opinions are all broad categories encompassing large portions of the population. The protected ground – in this case, particular social group – is but one part of the definition of refugee. Only a portion of those falling within the particular social group will qualify for protection, as applicants must also meet the other elements. Nonetheless, the size of the pool of people bearing the protected characteristic has never been a valid reason to deny protection.

> Courts have found appropriate certain large, particular social groups where the group is defined with reference to an underlying immutable characteristic. *See Perdomo*, 611 F.3d at 669 (explaining that the Ninth Circuit has "rejected the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum"); see also *Malonga v. Mukasey*, 546 F.3d 546, 553-54 (8th Cir. 2008) (rejecting the IJ's denial of petitioner's particular social group solely on the basis that his ethnic group was part of a tribe comprising forty-eight percent of the country's population). In *Kadri v.Mukasey*, this circuit explained that sexual orientation, for example, "can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group." 543 F.3d 16, 21 (1st Cir. 2008) (*citing Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005)). And in *Silva v. Ashcroft*, this circuit noted that a particular social group may refer to an innate characteristic such as gender. 394 F.3d 1, 5 (1st Cir. 2005).

De Pena-Paniagua v. Barr, at 23. By categorically barring consideration of particular social groups based on gender, the Proposed Rule ignores thirty-five years of developing case law and will result in the wrongful denial of protection to countless bona fide refugees.

(2) [Reserved] - No comment needed at this time

8 CFR 208.1 (g) <u>Stereotypes</u>

The Departments propose to make clear that pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim. *See Matter of A-B-,* 27 I&N Dec. at 336 n. 9 ("On this point, I note that conclusory assertions of countrywide negative cultural stereotypes, such as *A-R-C-G-*'s broad charge that Guatemala has a 'culture of machismo and family violence' based on an unsourced partial quotation from a news article eight years earlier, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such

asylum determinations."). Accordingly, the Proposed Rule would bar consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes were offered in support of an alien's claim to show that a persecutor conformed to a cultural stereotype.

This section of the Proposed Rule represents a disturbing departure from the long-standing requirement for adjudicators to carefully consider evidence of country conditions when evaluating individual asylum claims. Thorough review of applicants' circumstances in the context of general conditions—including political, social, cultural and economic conditions--in the country of origin are critical in the adjudication of these claims. As the Board noted in *Matter of S-M-J-*, "[b]ecause the burden of proof is on the [applicant], [he or she] should provide supporting evidence, both of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available." 21 I&N Dec. 722, 724 (BIA 1997).

What the Department refers to as "pernicious cultural stereotypes" could easily refer to many forms of essential evidence brought by applicants seeking to meet their burden of proof. Depending on their case, applicants must show various forms of animus within their home countries, including racism, anti-women attitudes, and bigoted attitudes towards religious groups, any of which may be essential to providing context and explanation for the persecutor's conduct. Dismissing evidence of material country conditions as cultural stereotypes, and preventing adjudicators from considering this evidence in evaluating a prosecutor's conduct, will have a particularly chilling effect on the ability of unrepresented asylum seekers to present their claims, given their already limited access to evidence.

The position of the Departments here with respect to country conditions evidence is in conflict with that of reviewing courts. Federal courts have often remanded where immigration judges have blocked or improperly discounted country expert testimony and found it "particularly troubling when immigration courts overlook country condition reports submitted by petitioners. … The [Board] has repeatedly emphasized the importance of providing background evidence *concerning general country conditions, especially where it tends to confirm the specific details of the applicant's personal experience*." (emphasis added). *Chen v. Gonzales,* 417 F.3d 268, 273 (2d Cir. 2005); *Diallo v. I.N.S.*, 232 F.3d 279, 288 (2d Cir. 2000).

This section of the Proposed Rule also impermissibly conflicts with the social distinction requirement for evaluating particular social groups, as the evidence used necessarily to establish that a group is socially distinct may be dismissed for representing cultural stereotypes. This will present a "Catch 22" for many applicants seeking asylum based on membership in particular social groups. Gender provides an illuminating example. As discussed elsewhere in this comment, the female gender has been considered by courts to constitute a socially distinct group within many societies, based on evidence provided by applicants showing that the government and other groups in society treat women differently, including in causing or condoning high rates of gender-related violence and demarcating and enforcing rigid gender roles based on cultures of machismo. However, if applicants presenting such evidence are dismissed as promoting "pernicious cultural stereotypes" regarding machismo, they will effectively be foreclosed from presenting their valid asylum claims. In

adjudicating claims for asylum based on gender, for example, evidence of stereotypes against women or men must be provided to offer necessary context. Without an understanding of the culture of machismo, persecution against women simply because of their gender cannot be effectively understood.

8 CFR 208.6 Disclosure to Third Parties

The proposed changes pertaining to disclosure to third parties strip the asylum seeker of his or her right to confidentiality as established by U.S. and international law, and will deter bona fide refugees from seeking asylum for fear of having their information exposed to their country of origin.

The Proposed Rule contradicts the well-established right to privacy of asylum-seekers

The Proposed Rule departs from U.S. and international law establishing the importance of a refugee's right to confidentiality from third parties. The importance of confidentiality procedures in asylum law is especially important because of the vulnerable nature of asylum seekers. International law dictates that asylum procedures shall at all stages "respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request." UNHCR, *Advisory opinion on the rules of confidentiality regarding asylum information* ("Advisory on confidentiality") (March 2005), https://www.refworld.org/pdfid/42b9190e4.pdf.

No information regarding an individual's asylum application should be shared with the applicant's country of origin. *Id*. 8 CFR 208.6 prohibits the disclosure to third parties of information pertaining to asylum applications, credible fear determinations, and reasonable fear determinations, except under specified circumstances. "This regulation safeguards information that, if disclosed publicly, could subject the claimant to retaliatory measures by government authorities or nonstate actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin." USCIS Asylum Division, *Fact Sheet: Federal Regulation Protecting the Confidentiality of Asylum Applicants* (October 2012). Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination, and records pertaining to any reasonable fear determination, shall not be disclosed without the written consent of the applicant, except as permitted by [208.6] or at the discretion of the Attorney General. 8 CFR 208.6. The current regulation identifies circumstances under which confidential information contained in an asylum application may be shared with U.S. governmental officials, for example, for the purpose of adjudicating the asylum claim. 8 CFR 208.6(c)(i). The rule also strictly prohibits U.S. officials from disclosing applicant information to third parties. 8 CFR 208.6.

The proposed addition of paragraphs to 8 CFR 208.6 create an unnecessary threat to the well-established standard of confidentiality in asylum law

The addition of paragraphs to 8 CFR 208.6 not only lack justification as to why they would satisfy any necessary purpose, but also create a needless threat to the well-established standard of confidentiality in asylum law. Paragraph (d) allows for disclosure of an applicant's information regarding several additional factors, including state or federal criminal

investigations (ii), the government's defense of legal action relating to the applicant's immigration or custody status including petitions for review (vi), and for the purpose of deterring, preventing, or ameliorating the effects of child abuse (iv). These additions could very well lead to the incentivization of criminal investigations of applicants and will disproportionately affect those seeking to challenge their immigration status. Further, the regulation's proposal to disclose information regarding child abuse is without justification and may disproportionately affect applicants with children. Without any justification or legitimate purpose, these additions provide no real benefit and are at the expense of the privacy of refugees, a right which should only be interfered with when absolutely necessary.

Increasing the possibility of disclosure will inhibit bona fide refugees from fully expressing explaining their cases or making a claim for refugee status

By adding additional ways in which information may be disclosed to third parties, the regulations risk preventing applicants from fully explaining their case.

> Asylum-seekers provide information to the country of asylum for their own protection and because they have a duty to co-operate with the authorities and to substantiate their claim. They do so on the understanding that the information they provide will not be shared with others without their consent. The practice of disclosing confidential information to the country of origin may inhibit asylum-seekers from fully explaining their cases, or even from making a claim for refugee status. Overall, it would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin.

UNHCR, *Advisory opinion on the rules of confidentiality regarding asylum information* ("Advisory Opinion") (March 2005), https://www.refworld.org/pdfid/42b9190e4.pdf. Applicants who fear the authority of persecutors in their home country are unlikely to express the full extent of their circumstances regarding persecution if they fear the disclosure of information regarding their case. Additionally, information regarding the asylum-seeker's personal experiences may place the family or friends of the applicant who still reside in the country of origin in danger. *Advisory Opinion*. The attempt to add more circumstances under which an applicant's information may be released to a third party risks preventing bona fide refugees from making a successful claim for refugee status for fear of disclosure.

8 CFR 208.13 (B) <u>Reasonableness of internal relocation</u>

The Proposed Rule creates a presumption that, when the persecutor is a non-state actor, internal relocation is reasonable, and it shifts the burden of proof to the asylum applicant to establish, by a preponderance of the evidence, that it would be unreasonable to relocate. We oppose the Proposed Rule's changes to asylum law as it is a dramatic departure from long-standing precedent, it does not comply with U.S. law or with U.S. obligations under the Convention, and it unreasonably increases the burden on the most vulnerable asylum seekers.

The Proposed Rule regarding internal relocation radically departs from current asylum regulations and decades of precedential case law

The current regulation, promulgated in 2000 to clarify the standard to be applied in determining whether internal relation is possible, provides a two- part inquiry: 1) whether the "applicant could avoid future persecution by relocating" and 2) whether, "under all the circumstances, it would be reasonable to expect the applicant to do so." 65 Fed. Reg. 76133 (codified at 8 C.F.R.Section 1208.13(b)(1)(i)(B)). Significantly, the regulation as it now stands mirrors the standard set out in the UNHCR Handbook:

> The fear of being persecuted need not always extend to the whole territory of the refugee's county of nationality. The ethnic clashes of in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

UNHCR Handbook para. 91.

The stated purpose of the Proposed Rule is to address the inadequacy of the guidance in the current regulation and to create a streamlined presentation. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review. 85 Fed. Reg. 36264, 36282.

However, the Proposed Rule would confuse and disrupt a settled area of the law. The current regulations, which provide a detailed list of relevant factors for adjudicators to consider, have guided decision-makers for more than 20 years. *See* 8 USC § 208.13 (b)(3). The factors included in the current regulations provide sufficient structure while remaining open-ended enough to allow for the many circumstances faced by individual applicants and the factual differences among applications. Immigration judges and asylum officers are in the best position to evaluate the specific circumstances of the individuals before them. *See, e.g. Matter of M-Z-M-R* (BIA decision, 2012) states "[u]nder the regulation, even if an applicant is able to relocate safely, it may nevertheless be unreasonable to expect the applicant to do so." *Matter of M-Z-M-R-*, 26 I.&N. Dec. 28 (BIA 2012). See also *Maldonado v. Lynch* (9th Circuit, 2015) (finding that, although the burden for CAT lies with the applicant, the applicant is not required to prove that internal relocation is impossible, and the IJ must consider multiple factors to make that determination).

The Proposed Rule will likely make the internal relocation analysis more confusing. Before assessing whether internal relocation is presumed to be reasonable, the adjudicator must first determine whether the persecutor is a state actor. 85 Fed. Reg. 36282. This analysis, which

includes "rogue officials" as non-state actors, will greatly complicate a decision- maker's ability to apply the correct standard. For instance, in countries like Venezuela, Syria, and Somalia that have been ravaged by war and where different factions are vying for control, it may not be clear who is acting under the authority of the state. Furthermore, if the persecutor is a state actor, that may necessitate a secondary analysis of whether that person is acting in his official capacity or whether the actor is a rogue official. 85 Fed. Reg 36293. By law enforcement standards in the United States, it may be clear when an officer is acting outside the scope of his official capacity, but it is not so in other countries. For instance, in countries like Kenya and Uganda, where government corruption is rampant and officials act with impunity, it may be unclear whether a state worker acted in his official capacity or not. U.S. Department of State, *Kenya 2019 Human Rights Report,* (10 March 2020) https://www.justice.gov/eoir/page/file/125 7481/download; U.S. Department of State, *Uganda 2019 Human Rights Report*, (10 March 2020) https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/uganda/. The Proposed Rule does not make clear what analysis should be applied to determine whether an actor is a rogue official – law enforcement standards and best practices in the United States or in the applicant's country of origin?

By framing persecutors as state versus non-state actors, applicants with bona fide claims will be denied asylum, as this analysis does not take into account the actual experiences of refugees and asylum applicants who are fleeing countries where governments are not capable of controlling instances of persecution. In those countries, internal relocation is not possible or a reasonable option for applicants. For many applicants, relocation is not possible because of cultural norms, lack of family ties, economic limitations, or other factors. The suggestion that that internal relocation must be reasonable for most applicants if they were able to travel to the United States also fails to take into account the many complex factors that determine the options for individuals to reach safety. The proper reasonableness analysis must take into account the totality of the applicant's circumstances, not just whether the applicant was able to travel to the United States or any other factor in isolation.

The Proposed Rule contravenes the Refugee Act and the Refugee Convention

Most importantly, the Proposed Rule is in direct conflict with the Refugee Act. Under U.S. law, an applicant is eligible for asylum if she has been persecuted in the past *or* she would be persecuted in the future. By its plain language, the statute presumes future persecution once the applicant has met her burden of demonstrating past persecution. By shifting the burden with regard to internal relocation, the Proposed Rule attempts to change the overall burden of proof, effectively eliminating asylum based on past persecution by a non-government actor. This the Proposed Rule cannot do: an agency cannot change the law through regulation.

Nor does Proposed Rule comply with either the Refugee Convention, to which the U.S. is bound, or our own Refugee Act, with regard to the standard of proof. To be eligible for asylum, an applicant must demonstrate a well-founded fear of persecution – that a reasonable person in his or her circumstances would fear persecution on one of the protected grounds. *See Cardoza-Fonseca, supra.* (finding that this standard can be met by establishing a

one-in-ten chance of persecution). This requires a two-part analysis: 1) does the person possess a fear of persecution; and 2) is that persecution reasonable. The UNHCR Guidelines addressing internal relocation incorporate this standard, mandating both a subjective and an objective analysis taking into account the specific circumstances of the individual claimant. UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* ¶ 23, U.N. Doc. HCR/GIP/03/04. (July 23, 2003), https://www.unhcr.org/en-us/publications/legal/3f28d5cd4/guidelines-international-protection-4-internal-flight-relocation-alternative.html (hereinafter "UNHCR Guidelines"). This standard is consistent with U.S. asylum law, is reflected in our current regulations, and is a reasonable standard by which to address the actual circumstances faced by a refugee. For example, a twelve-year-old child fleeing persecution cannot be expected to relocate to another part of a country where they have no family. Additionally, it would be vital to consider the individual's psychological welfare as an important element in this analysis and other practical and supportive factors such as family ties. (UNHCR Guidelines at ¶25). The proposed changes discount the importance of the United States' commitment to human rights as a signatory of the Protocol. Finally, the Proposed Rule violates our own asylum statute by shifting the burden of proof on a key element an applicant must prove and heightening that burden of proof beyond that allowed by the statute.

The Proposed Rule also removes two important elements found in the current regulations. First, it removes the element of harm from the analysis. Under the current regulation, DHS may rebut the presumption by proving first that the applicant could avoid persecution by relocating and that relocating would also be reasonable. The Proposed Rule seems to conflate these two separate elements and it is unclear how each should be addressed by the decision maker. The elimination of language regarding the applicant's physical well-being is alarming and seems to suggest that it is presumed an applicant would be safe by moving to a different part of their country of origin. Second, it eliminates the totality of the circumstances test. The Proposed Rule uses the term "reasonable" instead of "reasonable under all circumstances." This change in language is worrisome. The Proposed Rule does not provide guidance as to what test a decision maker should use or what factors should be considered in determining reasonableness. The standard should not be changed from reasonable under all circumstances.

Internal relocation is often not reasonable for victims of sexual and gender-based violence, even in cases in which a "non-state" actor is the persecutor

The absence of a state actor of persecution does not mean that internal location is a viable or safe option for asylum seekers, as the Proposed Rule presumes. Amnesty International, in one such example, noted in 2013 that internal relocation was not viable for refugees from Somalia precisely because the government had little control over the "serious human rights and humanitarian abuses including physical and sexual violence, looting, diversion of aid as well as many abuses of socio-economic rights." Amnesty International, *Somalia: Mogadishu cannot qualify as an Internal Flight Alternative* (26 September 2013) https://www.refworld.org/docid/524574664.html. Likewise, many human rights organizations find similarly that in Central American countries like El Salvador and Honduras, international

organized criminal groups such as Mara Salvatrucha and Calle 18 operate, threaten, and kill with impunity, making internal relocation a non-solution. Latin America Working Group, *Nowhere to Call Home: Internally Displaced in El Salvador and Honduras*, (2017) https://www.lawg.org/nowhere-to-call-home-internally -displaced-in-honduras-and-el-salvador/. By presuming it is reasonable for asylum applicants who suffered past persecution to relocate within their country of origin, the Department is ignoring and underestimating the egregious human rights violations committed in many countries from which refugees flee.

The "non-governmental" persecutors who perpetrate sexual violence and intimate partner violence are able to inflict these harms without any penalty largely based on cultural norms that consider domestic violence a family issue rather than a legal or greater societal one. United Nations, *International Day for the Elimination of Sexual Violence in Conflict*, (19 June 2020) https://www.un.org/en/obser vances/end-sexual-violence-in-conflict-day; Phumzile Mlambo-Ngcuka for UN Women, *Violence Against Women and Girls: the Shadow Pandemic*, (6 April 2020) https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic. Time and time again, we as legal service practitioners have clients who recount graphic violence at the hands of organized criminal organizations, domestic abusers, child abusers, and traffickers to the police or relevant authorities, and have no recourse to police or other protection. UN Women, *Facts and figures: Ending violence against women,* (November 2019) https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-fi gures. While the immediate harm in these cases is not inflicted by state actors, the ability of those persecutors to act throughout the country is no less strong. Nor should the law assume that an individual subjected to persecution in one part of the country be less vulnerable to the same abuse by a different actor in another part of the same county. Women in Central American countries suffer from some of the highest rates of femicide in the world; laws protecting women and children go unenforced and fewer than 3% of femicide cases are resolved by the judicial systems there. Center for Gender & Refugee Studies at University of California – Hastings, *Central America: Femicides and Gender-Based Violence*, (2020) https://cgrs.uchastings.edu /our-work/central-america-femicides-and-gender-based-violence. In Kenya, intimate partner violence is not prioritized; in fact, women are often blamed for being the victims of their intimate partner's violence. Nieman Foundation for Journalism at Harvard, *Domestic Violence in Kenya: Stop Blaming Women, Nieman Reports*, (21 August 2019) https://niemanreport s.org/articles/kenya-blaming-the-victim-excusing-the-perpetrator/. Vulnerable populations who have already suffered persecution should be presumed to be unable to relocate within their country of origin.

The unreasonableness of the Proposed Rule is particularly evident when looking at the circumstances of LGBTQ+ asylum seekers. It is implausible to expect an individual who is the target of persecution based on their sexual orientation or gender identity to provide proof that they cannot settle in another part of the country, that they cannot find social acceptance in another region of the country, that there is a part of the country where the persecutor can't find them or send a representative to find them, that they can find an area of their country where

they can escape rumors or harm based on their sexual orientation or gender identity, or that without family or community support it would be possible to survive. Further, some LGBTQ+ asylum seekers may never have travelled outside their native regions in their home countries, further exacerbating their inability to provide proof that their internal relocation would be impossible because it is an unknown factor for them. For those who have fled to a region, either in the hope that a city might provide more anonymity, they often find themselves in more danger. Crowded cities contain more police and government officials, more religious institutions, more weapons, and more access to information, print media, and social media. Most persecuted gays and lesbians come from nations that fail to uphold the rule of law or promote a sense of shared citizenship. Given this context, it is unreasonable and unfair to place the burden of proof with regard to internal relocation upon asylum seekers.

Those who do relocate internally are considered to be Internally Displaced Persons (IDPs). Reports from human rights groups including the UNHCR document danger and re-victimization of IDPs in many of the same ways that caused the initial internal relocation. United Nations High Commissioner on Human Rights, *Internally Displaced People*, (2020) https://www.unhcr.org/en-us/internally- displaced-people.html; Internal Displacement Monitoring Centre, *Internal Displacement Updates*, (2020) https://www.internal-displacement.org. The International Organization on Migration found that "[IDPs] often face discrimination, exploitation and severe deprivation, which may additionally increase their vulnerability to trafficking and the risk of recruitment by armed groups. They can also face insecurity, increased levels of domestic and community violence, and sexual and gender-based violence." International Organization on Migration, *Framework for Addressing Internal Displacement 2017,* (29 August 2017).

We urge the Department to review such studies on the increased risk of persecution for internally displaced vulnerable populations. In particular, the Latin America Working Group notes that women, youth, LGBTQ+ IDPs in El Salvador and Honduras typically have very limited networks outside of their hometowns, and that after relocating are frequently at high risk of being targeted for further abuse, trafficking, and other forms of violent persecution. Latin America Working Group, *Nowhere to Call Home: Internally Displaced in El Salvador and Honduras* (2017), https://www.lawg.org/nowhere-to-call-home-internally-displaced-in-honduras-and-el-salvador/. Placing vulnerable asylum seekers in increased danger of violence or death - especially on account of trafficking as reported in these reports - is contrary to the efforts of our U.S. government in recent years to provide additional safeguards for those at risk of trafficking. This additional burden which would create an unsurmountable threshold for seeking safety in the United States should be removed.

Proposing a shift in burden of proving reasonableness is unfairly burdensome upon the asylum seeker

Furthermore, the Government's proposal to shift the burden of proving reasonableness of internal relocation from the government to the applicant is unreasonable and unduly burdensome, and it will often be impossible for a bona fide refugee to meet. The current regulation, which was implemented in 2001, added a burden-shifting element, such that once

an applicant proves past persecution, the burden shifts to DHS to prove that relocation would allow an applicant to avoid persecution and that relocation was reasonable. The Federal Register publication for the 2001 amendment notes that this "burden-shifting fits well within the context of immigration court proceedings, with separate litigants appearing before an independent decision maker." 63 Fed. Reg. 31946.

Asylum seekers across the board suffer emotional and psychological trauma leaving their home countries, often leaving friends and family behind, and the added burden regarding internally relocation ignores the reality that they likely would if they could and will necessitate longer interviews, lengthier hearings and further retraumatization of leaving their countries and the fear that forced them to make such a drastic decision. Retelling trauma narratives and migration challenges through interviews, preparation, and trials cause asylum seekers to relive their trauma, and cause emotional damage increasing further psychological or mental health problems, such as post-traumatic stress disorder, anxiety, and depression. European Journal of Psychotraumatology, *Impact of asylum interviews on the mental health of traumatized asylum seekers*, (1 September 2015) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4558273/.

The burden shift also will heightens the need for asylum seekers to find and obtain counsel, whether paid or pro bono and imposes upon limited resources. Studies uniformly show that immigrants in removal proceedings lack adequate access to counsel, especially those who are detained and in remote detention facilities. Los Angeles Times*,* Kyle Kim, *Immigrants held in remote ICE facilities struggle to find legal aid before they're deported*, (28 September 2017) https://www.latimes.com/projects/la-na-access-to-counsel-deportation/. The lack of access to counsel is already a due process challenge for the immigratino courts, and it should not be further complicated by this new stringent burden regarding relocation. This country-analysis will also likely necessitate the hiring of expert witnesses to testify as to the country conditions and an asylum seeker's inability to relocate, adding great financial burdens to asylum seekers and time and resources during the process. Another consequence of increased burdens of proof such as this is the strain on immigration advocates, which would decrease the number of meritorious claims they can assist with and decrease the efficiency of the process, contrary to metrics and goals set forth by the Departments to be efficient.

8 CFR 208.13 (2) (i) <u>Discretion</u>

Under the guise of "discretion" the Proposed Rule impermissibly creates new bars to asylum

It is highly objectionable that the proposed three (3) "significant adverse factors" and the nine (9) other factors will act as procedural bars to asylum and will disproportionately negatively affect refugees depending on which factor is present for an asylum seeker - none of which have much bearing, if at all, on the severity or form of persecution that the asylum seekers faced, the reasons why they were persecuted, or the credibility of their testimony. Similar to the misleading title section of nexus this title section of discretion states the opposite: there is

no discretion if any of the 9 factors are present unless a narrow exception provided in paragraph (d)(2)(ii) can be met - effectively creating new bars to asylum.

Stating that the presence of any of the factors will "ordinarily result in the denial of asylum" is impermissible. 85 Fed. Reg. 36283. An agency action must be "'set aside' if it is 'not in accordance with law,' or 'in excess of statutory jurisdiction, authority, or limitations.'" *East Bay Sanctuary Covenant v. Barr*, 2020 WL 3637585 (2020) (quoting 5 U.S.C. § 706(2)(A), (C)). Since the Proposed Rule attempts to create additional categories of factors that bar asylum, beyond the bars enumerated by Congress in the statute, they must be set aside as *ultra vires* to the statute.

The proposed three (3) adverse significant discretionary factors and nine (9) factors which would act as bars, are arbitrary with no connection to the substance of the claims of persecution. Providing a narrow exception for reasons of national security or foreign policy interests, or, if the applicant can show by a preponderance of the evidence that they would suffer exceptional and extremely unusual hardship if denied asylum, provide little to no relief from the wide sweep of the factors. *Id.* These factors will disproportionately harm unrepresented asylum seekers and women, youth and Latino minorities. See *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum ("Rejecting Refugees")*, 52 Wm. & Mary L. Rev. 651, Schoenholtz, A., Schrag, P., Ramji-Nogale, J., Dombach, J. (2010) (analyzing USCIS database of recorded regarding asylum adjudications filed between October 1, 1996**,** and June 8, 2009) https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2915&context=facpub.

The arbitrary outcomes of discretion and procedural bars will be compounded by the vast disparity in how discretion will be applied based on the adjudicator, as revealed in an in-depth study of the four levels in the process of adjudication asylum in the study "Refugee Roulette: Disparities in Asylum Application and Proposals for Reform (2009) ["Refugee Roulette"], Jaya Ramji-Nogales, A. Schoenholtz & P. Schrag, 60 STAN. L. REV. 295 (2007). The statistical analysis by the three same authors in Rejecting Refugees examined the impact of the procedural one year deadline bar and found that it was a "blunt" and "inaccurate and inappropriate tool(s) for weeding out weak asylum claims." Rejecting Refugees at 701.

The Rejecting Refugees' analysis found that more than 30 percent of asylum applications submitted from April 16, 1998, through June 8, 2009 - about 93,000 of the approximately 304,000 claims - were determined to have been filed late. The largest identifiable late group, about 28,000 people, filed within one year after the deadline had passed, constituting 30 percent of all late filers. *Id.* at 688. A significant percentage filed many years after entering the United States with 22,000 - nearly 24 percent of all late filers – filing four years or more after entering the United States with 7 percent of all late filers filing more than ten years after entry. *Id.* at 689. The analysis found that those who were represented fared better, and that women and young persons fared worse in their outcomes: Among applicants who filed late, those who were represented were less often rejected - 55 percent compared with 62 percent. *Id.* at 724.

Women filed about 41 percent of the claims in this database with a rate of untimely filing 13 percent higher than men- 32.7 percent, in contrast with 29 percent. *Id.* at 702. Women filed *very* late claims at a rate more than 50 percent higher than men with almost 10 percent of female asylum seekers filed at least four years after entry. *Id*. at 702. The study surmised the difference may be "due to the particular nature of the persecution inflicted upon these women" and that "[w]omen are more likely to have suffered sexual violence than men and therefore may be more reluctant to reveal to government officials-or anyone else-what happened to them in their home countries. *Id*. at 702 (quoting Diana Bogner, Jane Herlihy & Chris R. Brewin, *Impact of Sexual Violence* on *DisclosureDuringHome Office Interviews,* 191 BRIT. J.PSYCHIATRY 75 (2007)).

> It may take many years before they are psychologically prepared to present an asylum claim. Moreover, women claiming asylum based on gendered grounds, such as domestic violence and female genital mutilation, may not be aware that they are eligible for asylum when they first arrive in the United States, and as a result might not file within a year of entry."

Id. at 702. Younger adult asylum seekers as a whole missed the deadline more frequently than older adult asylum seekers with more than one in three applicants between the ages of eighteen and twenty-nine filing late, compared to one in four for aged fifty and older, a 20 percent difference. *Id*. at 705. The study examines factors which may force asylum seekers to file late such as the need for more than a year to gather information and financial resources to retain a lawyer. The study also reveals the lie in proposing pretermission of an asylum application contrary to the goal of protecting refugees: "asylum seekers might not understand that the mistreatment they suffered in their home countries could make them eligible for asylum, and might apply only after they meet with lawyers who can explain the potential grounds for their claims." *Id.* at 695.

The most startling and perhaps most important finding of the study was that grant rates of timely applications versus late but "accepted" application had similar grant rates, and using an out of sample prediction for the third group of rejected applications due to the one year deadline, the study found that 44 percent of rejected asylum cases, an additional 15,792 claims, would likely had been granted, which also impacted an additional 5,843 refugees whose asylum claims were subsumed under parents or spouses. *Id*. at 761. Procedural bars should not operate to bar genuine refugees: "When Congress first adopted the deadline, Senator Orrin Hatch, the floor manager of the legislation in which the provision was included, pledged that "if the time limit and its exceptions do not provide adequate protection to those with legitimate claims of asylum, I will remain committed to revisiting this issue in a later Congress." *Id*. at 765, fn. 231 (Sen. Hatch, 142 Congressional Record 25,348 (1996)). In contrast to that pledge and the statistical implications of a procedural rule such as the one year deadline acting as a bar to genuine asylum claims, more procedural hurdles are proposed with 3 factors being deemed "significant" and 9 others which will act as bars.

Certainly to the extent any of these factors or bars are to be applied retroactively, we strongly

object. Given the highly complex legal nature of the asylum process, no **retroactive** application of these ineligibility bars should be implemented. Predictability in the legal process is fundamental and applying complicated rules after an individual has filed a claim is unlawful.

- **An alien's use of fraudulent documents to enter the U.S. unless the alien arrived in the U.S. by air, sea, or land directly from the applicant's home country without transiting through any other country**

Penalizing an asylum seeker's use of fraudulent documents is in direct contradiction to a large body of case law that has developed over decades which recognizes that refugees fleeing persecution have historically and understandably had to use false documents to leave the country where they faced persecution, and courts have long recognized the use of false documents in transit arrangements of escape as a factor to consider. In fact, manner of entry is a factor which is weighed in the determination of a refugee's claim, often supporting the veracity of a claim when someone cannot obtain a valid travel document from a government which is persecuting them, rather than being construed against an asylum seeker and certainly not being construed as a bar. Courts have wisely noted that if illegal entry were a reason to deny asylum, "virtually no persecuted refugees would obtain asylum." *Wu Zheng Huang v. INS*, 436 F.3d 89, 100 (2d Cir. 2006); *see also Lin v. Gonzales*, 445 F.3d 127, 133-34 (2d Cir. 2006).

Suspiciously, this regulation allows for fraudulent documents if an immigrant arrives by air, sea or land directly from the applicant's home country without transiting through many other countries. The narrow scenarios in which that will apply provides little relief to the grave consequences for most asylum seekers when the circumstances don't fit squarely within that "exception". Imposing a per se categorical bar use of fraudulent documents for those seeking asylum is contrary to the fundamental basis for asylum protection, and Congressional intent to narrowly define the actions which are considered so grave that they would bar an asylum seeker's meritorious case.

The bar would also upend the important policy of encouraging truth telling and veracity of testimony as an asylum seeker explains the means by which they fled and entered the U.S., and now seek a more permanent residence in safety as asylee. Asylum seekers fleeing to the U.S. often rely on "coyotes", or "skinheads" for the journey to the U.S., and while in the U.S. during the pendency of their asylum proceedings, they are often exploited by unscrupulous intermediaries, "notarios", who offer advice and documentation that may turn out to be fraudulent. *See* American Bar Association, *About Notario Fraud*, (July 19, 2018) https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/. Many of the details of asylum seekers ultimately assist the government in understanding the changing migration patterns and actors and methods involved along with the increasing range of tools used by law enforcement and border patrol to address such fraud. Human Rights First, *Human Rights First Congressional Testimony: Asylum Fraud: Abusing America's Compassion,* (Feb. 11, 2014)

https://www.humanrightsfirst.org/resource/human-rights-first-congressional-testimony-asylum-fraud-abusing-america's-compassion.

Substantial authority recognizes that the prompt admission to fraudulent documents or lack of legal basis to enter or remain in the U.S. mitigates any negative impact of the manner of entry. *See,* 436 F.3d at 100, citing *In re Fauziya Kasinga,* 21 I. & N. Dec. 357, 368 (BIA 1996) (reversing a discretionary denial of asylum where the applicant had purchased a fraudulent passport to enter the U.S., but admitted its falsity to an immigration inspector at the border). The vulnerability and precarious position of asylum seekers fleeing for their lives, freedom and safety and facing the complex process of navigating a journey to a safe place and through a foreign legal system is a critical consideration in rejecting this devastating hurdle to asylum.

- **Transit and asylum in other countries before entering the U.S.**

Barring an asylum seeker based on whether they have spent more than 14 days in any one country which permits similar asylum protections and barring asylum claims for refugees who do not seek protection in transit countries is contrary to the plain language of Section 208. The INA ensures that asylum seekers can apply for protection regardless of their nationality, *travel route*, or place of entry or arrival to the United States. *See* U.S.C. § 1158(a)(1). Congress intentionally created very limited exceptions in cases involving safe third country agreements or firm resettlement issues. 8 U.S.C. § 1158(a)(2)(A). Creating penalties for unlawful entry or presence violates Article 31 of the Convention which forbids the imposition of penalties on refugees based upon their unlawful entry or presence. The restrictions which would be imposed by the Proposed Rule go to the heart of refugees' ability to seek protection from the harm they are trying to escape - in effect, punishing them for being refugees.

The third country transit bar in the Proposed Rule undermines Congress and is just a warmed-over version of the third country transit ban promulgated last year on July 16, 2019, which has been struck down by two separate courts. *See East Bay Sanctuary Covenant v. Barr,* No. 19-16487 (9th Cir. Jul. 6, 2020) and *Capital Area Immigrants' Rights Coalition v. Trump,* No. 1:19-cv-02117-TJK (D. D.C. June 30, 2020). It would make ineligible for asylum nearly every asylum seeker who has transited through a third country on their way to safety. If this portion of the rule is finalized, all asylum seekers, excepting Mexican nationals and those arriving directly by air or sea, would be ineligible for asylum. Simply transiting through a third country does nothing to undermine an asylum seeker's claims. There are many reasons why asylum seekers may pass through multiple countries while searching for refuge but continue on to the United States, including that they often cannot find safety in the transited countries or may need to reunite with family in the United States.

UNHCR has made clear that "[t]he primary responsibility to provide protection rests with the State where asylum is sought." UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (May 2013), http://www.refworld.org/docid/51af82794.html. While there is no "unfettered right to choose one's country of asylum," UNHCR explains that "[t]here is no obligation for asylum-seekers to seek asylum at the first effective opportunity." *Id*. The third country transit ban was

blocked in the case of *East Bay Sanctuary v. Barr*, in which the Ninth Circuit ruled that "the agencies have not justified the Rule's assumption that an [asylum seeker] who has failed to apply for asylum in a third country is, for that reason, not likely to have a meritorious asylum claim." No. 19-16487 (9th Cir. 2020) at 36. The Departments have not given any further justification for a third country transit bar in this Proposed Rule, and simply ignore precedent holding that asylum seekers are not required to apply in third countries through which they transit.

UNHCR opposed the July 2019 transit ban, arguing that it violates the right to seek asylum and the principle of non-refoulement. The third country provisions in this rule are similar to last year's transit ban in that they do not require a third country agreement, nor do they provide for a way to assess the third country's asylum system. Without these provisions, the UNHCR argues that the Transit Bar "may lead to refoulement, by returning a refugee to a country of persecution without ever having afforded him or her a fair opportunity to demonstrate his or her need for protection." UNHCR, *Brief of the Office of the United Nations High Commissioner For Refugees as Amicus Curiae in Support of Plaintiffs and Affirmance,* (October 2019) at 29, https://www.refworld.org/type,AMICUS,,,5dcc03354,0.html. The countries through which asylum seekers transit to reach our southern border are not safe for many asylum seekers. They are also not set up to process asylum claims. Forcing asylum seekers to seek asylum in transited countries "ignores extensive evidence…documenting the dangerous conditions in Mexico and Guatemala that would lead [asylum seekers] with valid asylum claims to pursue those claims in the United States rather than in those countries." *East Bay Sanctuary v. Barr,* No. 19-16487 (9th Cir. 2020) at 44.

Adding to the absurdity of the third country transit bar included in the Proposed Rule, the rule also attempts to deny asylum to anyone who has simply transited through more than one country prior to arrival. This means someone fleeing persecution in the Democratic Republic of Congo would have to take a direct flight to the United States, which simply does not exist. This third country transit bar is discriminatory by excluding any non-Mexican fleeing persecution if they are unable to enter by direct flight or by sea. Article 3 of the Refugee Convention.

This regulation will disparately affect women as changing demographics of migrants into the U.S. reflects the world's highest levels of violent crime, homicide and femicide in Central America, particularly El Salvador, Guatemala and Honduras, bringing an increase in female migrants : From FY 1995 to FY 2017, female Mexican migrants averaged about 13% of all Mexican migrants and today migrants from Central America are more likely to be female than in previous years, with women accounting for 48% of all Salvadoran migrants and 43% of all Honduran migrants in FY 2017. *See* United States Commission on Civil Rights, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies* https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf (citing Lawfare,Stephanie Leutert, *Who's Really Crossing the U.S. Border, and Why They're Coming*, (June 23, 2018) https://www.lawfareblog.com/whos-really-crossing-us-border-and-why-theyre-coming. The largest recent growth in asylum seekers are those fleeing from Central and South America. *See* D'Vera Cohn et al., "Rise in U.S. Immigrants from El Salvador, Guatemala and Honduras

Outpaces Growth from Elsewhere," Pew Research Center (Dec. 7, 2017) https://www.pewresearch.org/his panic/wpcontent/uploads/sites/5/2017/12/Pew-Research-Center_Central_American-migration-to-U.S._12.7.17.pdf.

- ***Criminal convictions***

Another factor which would act as a bar is a criminal conviction contrary to long-recognized balancing that "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987). The special nature of asylum cases has led the appellate courts to limit the grounds for discretionarily denials of otherwise-eligible applicants to cases of "egregious conduct by the applicant," *Zuh v. Mukasey,* 547 F.3d 504, 507 (4th Cir.2008). Moreover, in 1990 Congress delineated clearly which crimes can be a bar and Congress limited the bar to "particularly serious crime". *See* INA § 208(b)(2)(A)(ii).

For asylum purposes, Congress defined an aggravated felony as automatically a particularly serious crime. *See* INA § 208(b)(2)(B)(i). A "mandated" denial due to a crime of lesser nature and labeling it "discretion" is contrary to what Congress plainly expressed. While the Attorney General has authority to establish additional limitations and conditions under which an alien shall be ineligible for asylum, that power can be exercised 'consistent with' asylum statute". *East Bay Sanctuary Covenant v. Barr*, 2020 WL 3637585 (2020). An agency action must be "'set aside' if it is 'not in accordance with law,' or 'in excess of statutory jurisdiction, authority, or limitations.'" *Id.* (quoting 5 U.S.C. § 706(2)(A), (C)). Since the Proposed Rule attempts to create additional categories of crimes that bar asylum, beyond thus offenses that are not particularly serious crimes ("convictions that remain valid for immigration purposes), it must be set aside as it places the Proposed Rule *ultra vires* to the statute.

The reliance on *Matter of Jean* and on 8 § CFR 212.7(d), § 1212.7(d), which "codified" *Matter of Jean,* 23 I&N Dec. 373, 385 (A.G. 2002) in the context of INA §212(h) relief, is misplaced. First, the heightened standard the Departments seek to impose on <u>discretionary considerations</u> in the asylum context, has previously only been applied in the context of a waiver of inadmissibility, involving a "violent or dangerous crime," where the applicant is statutorily barred and otherwise ineligible for the relief sought <u>but for</u> the waiver of inadmissibility which carries a heightened standard for a positive exercise of discretion. *See Matter of Jean*, 23 I&N Dec. at 385 (involving the application of a INA §209(c) waiver - a waiver available to refugees and asylees adjusting status who would be otherwise inadmissible); *see also* 8 § CFR 212.7(d) ("codifying" the AG's decision in *Matter of Jean*, requiring applicants seeking a waiver of inadmissibility under INA §212(h) to meet a heightened standard for a favorable exercise of discretion in cases involving "violent or dangerous crimes."). The imposition of this heightened standard which, when triggered, generally will not allow for a favorable exercise of discretion, is more appropriately applied in the limited circumstances described below, when an applicant is attempting to use a waiver to overcome an existing statutory bar, not here where an applicant faces no bars to eligibility and where the Proposed Rule is trying to make discretion a bar.

Particularly egregious here is the Departments' willingness to apply the extremely prohibitive heightened standard in *Matter of Jean*, to all the nine "factors" – completely contrary to the AG decision and with complete disregard to hardship imposed. The application of this heightened standard has been reserved for serious, felonious and violent criminal conduct involving homicide or the threat or use of a weapon to inflict grievous physical harm, and the imposition of a substantial prison sentence. *See* Matter of Jean, 23 I&N at 383 (applying heightened standard in case of felony homicide of a nineteen-month old child). Under the existing framework, *Matter of Jean*'s heightened waiver standard is limited to convictions for "dangerous or violent crimes." *See Jean v. Gonzales*, 453 F.3d 392 (5th Cir. 2006); *Mejia v. Gonzalez*, 499 F.3d 991, 999 (9th Cir. 2007) (similar application to "violent and dangerous" in the context of INA §212(h)) Furthermore, an adjudicator cannot simply assume that a conviction triggers the "exceptional and extremely unusual hardship" standard; they must first make "a determination based on the facts underlying [the applicant's] conviction that [the applicant's] crime was violent or dangerous." *Rivas-Gomez v. Gonzales*, Fed Appx. 680, 683 (9th Cir. Mar. 22, 2007)

The Departments seek to apply this heightened standard to an applicant who is eligible for asylum (and facing no criminal bars) who has "convictions" that are not aggravated felonies and are also insufficient to constitute a "particularly serious crime," so that he "constitutes a danger to the community of the United States." INA § 208(b)(2)(A)(ii). The Proposed Rule does not make any attempts, contrary to what has been done in the past in the context of 209(c) and 212(h) waivers, to carve out or specify what "convictions" would trigger the application of a heightened standard. Given the other factors listed and given that this would only apply to individuals who had no criminally barring offenses, this is undoubtedly purposeful. Under the Proposed Rule, any conviction - regardless of the seriousness of the underlying charge, regardless of time sentenced and/or served, with no distinction between violent and non-violent crimes, or crimes against persons vs. crimes against property- would trigger *Matter of Jean*'s heightened standard, completely contrary to the existing framework and body of law. Highlighting the absurdity, under the Proposed Rule, one standalone conviction for driving without a license, a misdemeanor, punishable by a fine but no jail time, that happened more than 10 years prior, would result in a denial of asylum as a negative exercise of "discretion" except if the applicant can show circumstances for reasons of national security or foreign policy interests, or, if the applicant can show by a preponderance of the evidence that they would suffer exceptional and extremely unusual hardship if denied asylum. Under *Pula*, adjudicators currently have broad discretion to consider this incident and others in making a negative exercise of discretion, yet it is the Proposed Rule's categorical bar and imposition of a heightened standard, that is impermissible. 19 I&N Dec. at 474. The Proposed Rule endangers asylum-seekers for "convictions" for unascertainable minor convictions.

The expansive reach of the criminal bar, penalizing convictions even in cases involving "reversal, vacatur, expungement or modification", runs contrary to public policy of second-chance remedies for individuals, especially in cases when due process rights are involved. Creating a negative inference for post-conviction proceedings ignores the important

legal tenent that many states will only award post-conviction relief based on substantive matters, such as failure of defense counsel to provide constitutionally required advice regarding the immigration consequences of criminal convictions. Vacaturs have been established to restore unfairly denied due process and reduce impediments to reentry into society for individuals, especially people of color, who have historically suffered without such second chances. Looking beyond state orders is not the role of immigration officers and creating new "mini trials" on these issues by immigration officers is contrary to *res judicata* and double jeopardy. Where criminal court documents reflect vacatur based on substantive or procedural defects, mandates to look beyond the state court order undermines the authority of state court judges and violates the full faith and credit to which state court decisions are entitled.

In Massachusetts, for example, the basis of the post-conviction motion is based on a failure of defense counsel to provide the constitutionally required advice regarding the immigration consequences of the criminal conviction (*Padilla v. Kentucky*, 559 U.S. 356 (2010) and *Commonwealth v. Clarke*, 460 Mass. 30 (2011), or the failure of the state court judge to provide the immigration warnings, as required by M.G.L.C. 278, § 29D, during the plea colloquy (*Commonwealth v. Grannum*, 457 Mass 128 (2010); *Commonwealth v. Valdez*, 475 Mass. 178 (2017)). Even the U.S. Supreme Court has found that immigration consequences of a conviction are sufficiently serious that accurate advice is required before a plea of guilty. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Increasing the negative consequences for convictions, immigration-related or otherwise, disproportionately affects black and latinx populations because they are more likely to be stopped, arrested, and incarcerated than their white counterpart, and are therefore disproportionately vulnerable to deportation. *See* Jeffrey Fagan, et al., "An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports," Columbia, Rutgers and the University of Massachusetts (Jun. 15, 2015), https://s3.amazonaws.com/s3.documentcloud.org/documents/2158964/full-boston-police-analysis-on-race-and-ethnicity.pdf.

Across the county in 2016, black Americans comprised 27% of all individuals arrested—double their share of the total population. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely. As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos—compared to one of every seventeen white boys. "Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System," The Sentencing Project (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/. Thus, racial bias present in the criminal-justice system creates disparate consequences in the immigration context. A 2016 report found that although black immigrants represent about 7 percent of the non-citizen population, 1) black immigrants make up more than 10 percent of immigrants in removal proceedings and 2) 20 percent of immigrants facing deportation on criminal grounds are black. "The State of Black Immigrants," NYU Law Immigrant Rights Clinic and Black Alliance for Just Immigration (2016), http://www.stateofblackimmigrants .com/assets/sobi-fullreport-jan22.pdf. All of this occurs

despite strong evidence that immigrants are less likely to commit serious crimes, and high rates of immigration are associated with lower rates of violent crime and property crime. Walter Ewing et al., "The Criminalization of Immigration in the United States," American Immigration Council (July 13, 2015), https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states.

A similar pattern emerges when considering the criminalization of poverty and the immigration consequences that result from wealth disparities in the criminal justice system. A 2015 report published by the Prison Policy Initiative found that incarcerated people ages 27-42 had a median annual income of $19,185 prior to incarceration, a figure that is 41 percent less than non-incarcerated people of a similar age, and that incarcerated individuals of "all gender, race and ethnicity groups earned substantially less prior to their incarceration than their non-incarcerated counterparts of similar age." Daniel Kopf and Bernadette Rabuy, "Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned," Prison Policy Initiative ((July 9, 2015)), https://www.prisonpolicy.org/reports/income.html. The disproportionate representation of low-income individuals in our criminal justice system -even when accounting for other differences - reflets that low-income individuals are more likely than high-income individuals to be targeted for enforcement related purposes. K. Dolan and J.Carr, "The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty," Institute for Policy Studies (2015), https://ips-dc.org/the-poor-get-prison-the-alarming-spread-of-the-criminalization-of-poverty/.

- **Accrued more than one year of unlawful presence**

Excluding asylum seekers who are in the U.S. for more than a year in unlawful status, and likely have missed the one-year deadline *(*OYD) for filing an asylum application which would otherwise give them a lawful status of residing under color of law while their application is adjudicated, ignores the unique needs of asylum seekers - and the most vulnerable among them, unaccompanied minor children - and the very considerations which motivated Congress to provide two broad exceptions to the OYD. Asylum seekers are victims of harm and often include victims and witnesses of violence, torture, and persecution. They have had to flee for their lives and often have significant trauma induced mental and physical health conditions which impede their ability to apply for asylum within the one-year deadline. Under the current law, asylum seekers who have missed their deadline can request an exemption to the one-year deadline to apply for asylum based on extraordinary or changed circumstances which prevented them from applying within the statutory deadline.

Asylum seekers are often diagnosed with Post Traumatic Stress-Disorder (PTSD) or Depression which impacts their ability to apply for asylum within the deadline. For example, a person with PTSD can exhibit symptoms such as withdrawal, numbing and avoidance. A person with depression often is unable to engage in functions of daily life. Some individuals who have experienced head trauma have cognitive deficits which limit their abilities to pursue complex legal processes such as asylum, and other individuals who have suffered sexual trauma consequently face medical conditions such as syphilis or HIV or AIDS (often undiagnosed) which can cause a temporary alteration of cognitive abilities or present medical

and life threatening crisis that requires immediate attention prioritized over legal processes.

Additionally, torture survivors, victims of sexual trauma, and members of the LGBTQ+ community are often severely reluctant and reveal to reveal personal details, such as sexual orientation and traumas relating to that, and often are unable to express their fear of return to anyone and gain access to information about the right to apply for asylum before their filing deadline. A myriad of other life situations often cause failure to apply within the deadline as well, including but not limited to, difficulty obtaining counsel, illiteracy, homelessness, hospitalization, child illness or child care challenges, a complicated pregnancy, social isolation, peonage or exploitation, or language barriers,

The second exception of changed circumstances must be considered as well. If an individual applies for asylum after the one-year deadline because he or she has experienced changed circumstances a situation that they could not have predicted or over which they have any control, such as a war in their country or the onset or growth of ethnic or religious tensions in their country of origin, these circumstances cannot cause penalty to the individual. The valid reasons carved out for deadline exceptions cannot be circumvented by this Proposed Rule.

Given the complexity of the circumstances surrounding an individual meeting the one-year deadline and its exceptions, it is highly objectionable that these ineligibility bars would in any way apply retroactively to applications pending at the time these regulations go into effect.

- **Tax filings as a bar**

The proposed ban on asylum in cases where a person has failed to file or improperly filed taxes or worked without authorization is a blunt tool with no corresponding reasoning and with disproportionate draconian consequences. A missed deadline or an error in the complex area of tax law held up against the opportunity to plead for one's life is almost impossible to remark upon other to say it is outrageous and has no rational basis whatsoever. The proscription of disallowing an otherwise meritorious claim to go forward balanced against possible death and persecution of returning a refugee to a land of persecution is unthinkable and perverted.

- **Prior or withdrawn applications and failure to attend an asylum interview**

The various factors that could cause an asylum applicant to miss an interview, including technical glitches such as misdirected mail, stand in stark contrast to the penalty such a missed interview would trigger in the form of a bar. Many circumstances for failure to appear should be excusable, especially those caused by the Departments themselves, and in which cases the government unquestionably should be estopped from penalizing the asylum applicant.

For example, USCIS may not have updated the applicant's address after receiving an AR-11 (Alien's Change of Address Form) or might send a notice to an incorrect representative. USCIS sometimes sends notices of biometrics appointments to derivative beneficiaries who are not in the United States. The date and place of an appointment may be incomplete or

incorrect. These occurrences are not at all rare. It should not be left to the discretion of USCIS as to whether to excuse its own material errors or allowing "errors" to bar someone from their claim. The government's own track record of procedural failings in notices, especially after implementing "fast-track docketing" has been assailed for producing widespread notice failures and undermining the procedural integrity of the removal process. Kristina Cooke and Mica Rosenberg, *No 'day in court': U.S. deportation orders blindside some families*, Reuters (July 26, 2019), https://www.reuters.com/article/us-usa-immigration-deportations/no-day-in-court-us-deportation-orders-blindside-some-families-idUSKCN1UL16I; *see also* Jayashri Srikantiah and Lisa Weissman-Ward, *The Immigration "Rocket Docket": Understanding the Due Process Implications*, Immigrants' Rights Clinic Stanford Law School (Aug. 15, 2014), https://law.stanford.edu/2014/08/15/the-immigration-rocket-docket-understanding-the-due-process-implications/.

Under these circumstances particularly, it would be fundamentally unfair to penalize the asylum seeker given the unclean hands of the agencies. *See Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942) (unclean hands doctrine not limited to fraud but encompasses inequitable behavior that makes recourse to equitable remedies unfair); *Sahkawati v Lynch*, 839 F.3d. 476 (6th Cir. 2016) ("unclean hands" allows denial of equitable relief to party who acted inequitably); *SEC v. Gulf & Western,* 502 F.Supp. 343 (D.D.C. 1980) (the government, like other litigants, must come into court with clean hands); *See also, Earnhardt v. Puerto Rico*, 582 F.Supp. 25 (D.P.R. 1983), on remand from 691 F.2d 69 (1st Cir. 1982) (governmental failure to post required notices created equitable bar to time-bar defense.) There are also more serious substantive circumstances which might make an applicant unavailable such as illness, hospitalization, mental incapacity or other urgent or unexpected life events.

Similar consideration must be given for individuals who do not file a motion to reopen within a year, as well as consideration of the reasons stated preventing traumatized asylum seekers from meeting one year deadlines for various mental health and resource reasons. Also, similar to the myriad of factors which might cause one to miss an interview, there is a latitude of valid reasons why an application might be withdrawn, and a penalty for doing so is fundamentally unfair and disproportional. Just like Congressional recognition that there are often "changed circumstances " for asylum seekers which might cause a refugee to miss a OYD, there are also many changed circumstances which would merit the withdrawal or prior filing of an asylum application. Changed circumstances often cannot be predicted or controlled by asylum seekers, and such circumstances which might lead to withdrawing a prior application should not cause irreversible penalty to a refugee. For example, as explained, *supra*, in the section on fraud, asylum seekers often are exploited by unscrupulous intermediaries or "notarios", who offer advice that may turn out to be fraudulent or incorrect, and which may cause the need for an asylum seeker to withdraw an application. There are numerous other circumstances that can cause the need for a withdrawal as well, such as other remedies that become available, but might not work out, and an asylum seeker may return to the route of asylum to obtain residence.

8 C.F.R. 208.15 Redefining Firmly Resettled

The Proposed Rule would completely rewrite the "firm resettlement" by removing the current definition and inserting in its place three provisions which would define firm resettlement. The Proposed Rule unfairly places the burden on the applicant to show the bar does not apply, and provides that firm resettlement of the applicant's parents will be imputed to an applicant if the firm resettlement factors were present when the application was under age 18 and resided with the parents.

1. The Proposed Rule contravenes forty years of asylum law, violates U.S. obligations under the Refugee Convention, and will result in the denial of protection to a large number of *bona fide* refugees

Firm resettlement is one of six "statutory bars" listed in 8 U.S.C. 1158(b)(2)(A)(i)–(vi), and is the only one of the six that is not based on the applicant's prior criminal acts or potential danger to the United States. As a bar, a finding of firm resettlement prevents asylum status being granted to people who otherwise would be eligible for asylum, even if they have committed no bad acts, and regardless of their potential contribution to the United States.

The Proposed Rule effectively requires that a person fleeing their home country should remain in the first available country seemingly regardless of other factors. That is not the law. The refugee should be able to settle in a country where they can become a permanent fully participating member of that society.

The Refugee Convention states that the Convention ceases to apply to an individual who "has acquired a new nationality, and enjoys the protection of the country of his new nationality" and excludes from protection an individual "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." Convention at Article 1E. This standard has been incorporated into U.S. law and set forth as follows in the the USCIS training materials on firm resettlement, which reiterate that the firm resettlement bar was designed narrowly to exclude from refugee status those people who had already acquired citizen-like rights in another country:

> Firm resettlement … ***excluded from the refugee definition individuals who had acquired a new nationality*** or who had become "firmly established" in another country. … The Refugee Convention states that the Convention ceases to apply to an individual who "***has acquired a new nationality, and enjoys the protection of the country of his new nationality***." The Convention also excludes from protection an individual "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***. (emphasis added; footnotes omitted).

RAIO, Combined Training Program, Firm Resettlement at 8 (December 20, 2019).

Thus, the firm resettlement bar is not based on thee first place of shelter or the fastest route out of the applicant's original country, but is about ensuring that the person seeking refuge would be treated as a fully participating member of the country to which they escaped – that they "acquired a new nationality."

The Proposed Rule changes the definition of "firm resettlement" with little explanation for the proposed changes, despite the fact that the Proposed Rulemaking acknowledges that (a) the definition of firm resettlement in asylum law is similar to that used in the context of refugees (which is not proposed to be changed); *see* 85 Fed. Reg. Vol. 36285; and (b) with minor exceptions, "the definition of firm resettlement has remained the same for nearly 30 years." 85 Fed. Reg. 36285. These changes would create uncertainty and confusion in the interpretation of a longstanding legal principle which has a consistently applied definition, and undercut the intent to exclude only those who had "acquired a new nationality," despite having an otherwise worthy asylum claim.

As interpreted by case law, the current firm resettlement definition requires that there be an *offer* of permanent residence or citizenship, and the bar applies to an applicant even if the applicant did not accept the offer or take minor steps to secure the permanent resident status. *See, e.g., Matter of K-S-E*, 27 I&N Dec. 818 (Decided April 10, 2020). Thus, the law already prevents an individual from simply foregoing a viable offer.

The current definition also provides an opportunity for an applicant to show that an offer is inadequate, i.e., showing that "conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled." 8 C.F.R. § 208.15(b). Thus, offers of permanent residence that significantly restrict employment or otherwise treat one in a significantly second-class manner do not meet the standard. This exception reflects the goal that an offer must be comparable to an opportunity to gain a "new nationality". These exceptions, which are for the asylum office or the immigration court to weigh, are inexplicably absent in the Proposed Rule.

(a) The Proposed Rule undermines the long-standing principle that an applicant will be denied asylum based on the firm resettlement bar if they have *received an offer of permanent resident status, citizenship, or some other type of permanent resettlement* and that conditions within that country are not so substantially restricted that they were not in fact resettled

Proposed Subsection (1)

The Proposed Rule has three main subsections defining when an applicant would be considered to have firmly resettled. The first states that the "alien either resided *or could have resided* in any permanent legal immigration status *or any nonpermanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding a status such as a tourist)* in a country through which the alien transited prior to arriving in or entering the United States, *regardless of whether the alien applied for or was offered such status*." Proposed 8 C.F.R. § 208.15(a)(1).

This proposal thus creates two scenarios that conflict with the existing definition (and removes the exceptions):

(1) Compared to the existing rule, it envisions a scenario where one "*could have*" obtained status, even if they were not *offered* any status. The document does not describe what problem this attempts to address or why. Is the person supposed to have been an expert in the foreign law, or how many steps would the applicant have been expected to take, and over what period of time to try to gain some status? If this is a way of saying that individuals must apply for asylum in any country they pass through, then that is contrary to the statute, which places no such restriction, except in the context of a Safe Third Country agreement. There are many reasons a person might choose not to apply for asylum in the first available country – risk of refoulement, inability to practice a profession, desire to be united with family in the United States, etc.

(2) The bar would apply to a "nonpermanent but potentially indefinitely renewable legal immigration status", and the rule provides as examples asylee or refugee status, and "tourist" status which clearly would be inadequate. In some countries, it is possible to continue to renew a visitor visa, or to leave the country temporarily and renew it. But that is far from being firmly resettled. The language is vague, and it is unclear how an adjudicator is to evaluate the term "potentially indefinitely renewable."

Proposed Subsection (2)

The second provision would apply if "the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States." Proposed 8 C.F.R. § 208.15(a)(2). This description bears no relation to whether the individual would be allowed to remain in the third country.. Under this provision, if the applicant lived in an undocumented status, as a visitor, or as a student in a third country, despite the fact that these are not statuses that would lead to permanent residence and firmly resettle a person, they would be considered to be firmly resettled. In that case, the applicant would only be eligible for asylum if she could establish that she would be *persecuted* in that third country. In effect, she would be treated as though she were a citizen or national of that country although she had no right to remain in or to return to that country. This is in complete contradiction to both the letter and the spirit of the Refugee Act and the Convention.

This provision also discourages individuals from remaining for a period of time in a neighboring country in hopes that conditions would improve and they would be able to return home and would instead encourage people to travel to the United States as quickly as possible for fear that they would lose their chance for permanent protection.

Proposed Subsection (3)

The third section would state that "(i) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or (ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to

arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States."

Under current case law, a person who has citizenship in a third country would already be restricted from seeking asylum in the United States, whether or not they had passed through that country. See *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013).

(b) The Proposed Rule improperly shifts the burden of proof to the applicant to prove that the listed conditions for a finding of firm resettlement do not apply. This places an unreasonable burden on the applicant and will result in the wrongful denial of protection to refugees

The Proposed Rule includes the following: "The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the **alien shall bear the burden of proving the bar does not apply**. Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record." Current practice requires the asylum officer or the immigration court to make a *prima facie* case that the firm resettlement bar applies. It is only after this *prima facie* showing has been made that the burden shifts to the applicant to show that the firm resettlement provision does not apply. *See Matter of K-S-E-*, 27 I&N Dec. 818. In *K-S-E-* the BIA put forth a 4-part test, the first part of which requires the government to show that the applicant has been firmly resettled. In that case the government established that the applicant had received an offer for residence in a third country but had not taken advantage of the offer.

Under the Proposed Rule, an applicant would have the burden to show that there was no offer of resettlement either permanent or renewable in any country transited. This burden will be insurmountable for many unrepresented asylum applicants. Given that an asylum seeker is fleeing persecution, it is not likely or even reasonable to expect him/her to know the rules of each country transited. Every country has its own unique set of immigration and citizenship rules. The country transited may be one which would return the asylum seeker to the country of origin without providing an opportunity to apply for a legal status. The country transited may be one bordering the home country and would not be a safe place for an asylum seeker to request legal status because of proximity to the persecutor.

Viewed as a whole, the Proposed Rule will have the effect of making asylum protection inaccessible to anyone except those fleeing Mexico and those who are able to obtain visas and fly directly from their country of persecution to the U.S. The Proposed Rule amending the firm resettlement bar conflicts with the statute and the Convention, contravenes long-standing interpretations of the law, and places an insurmountable burden on many asylum seekers. It should be stricken in its entirety.

III. §208.16 THE CONVENTION AGAINST TORTURE

The Proposed Rule seeks to amend the requirements an applicant must meet to establish eligibility for protection under the Convention Against Torture in the following ways:

1. Inserting a requirement that pain or suffering inflicted by a public official who is not acting under color of law ("rogue official") shall not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity; and

2. Inserting a provision stating that "acquiescence of a public official" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. While conceding that acquiescence can be established by actual knowledge or "willful blindness," to establish "willful blindness" the Proposed Rule would require probable awareness and deliberate avoidance of learning the truth

1. The Proposed Rule privileges the rights of government officials and potential torturers over the rights of individuals seeking protection from torture, thereby violating the duty of the U.S. under the Convention Against Torture

The Departments' reasoning in favor of the proposed redefinition of government "acquiescence" to torture focuses on the rights of government officials rather than the protection needs of torture victims. The Departments cite concern about "due process notice" to government officials of their obligations and state that the Proposed Rule "is meant to supersede any judicial decisions that could be read to hold that an official actor could acquiesce in torturous activities that he or she is unable to prevent." 85 FR 36264, 36287-88. This focus on the rights of government officials in the context of Article 3 of the Convention Against Torture is completely misplaced. Article 3 does not bear on criminal or civil liability of government officials. Rather, the sole purpose of Article 3 is protective, providing that: "No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, Art. 3(1), 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988).

In implementing Article 3, the Departments' concern should be the protection of individuals at risk of torture. The concern cited by the Departments for the due process rights of government officials, as expressed during the Senate's consideration of the Convention, relates to criminal liability for acts of torture addressed in other articles of the Convention. With respect to the *non-refoulement* obligations of the Convention, the Department of Justice testimony before the Senate Foreign Relations Committee made clear the Administration's intention: "The United States does not and, we trust, never would extradite or deport a person to a country where it is known that he would be subject to torture…. Article 3 places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured." Convention Against Torture: Hearing Before the S. Foreign Relations Comm., S. Hrg. No. 101-718, 101st Cong., 2d Sess. 14-15 (1990)

(testimony of Mark Richard, Deputy Assistant Att'y Gen., Criminal Division, U.S. Department of Justice).

By focusing on the rights and perspective of government officials rather than the protective needs of torture victims, the Departments' Proposed Rule would result in the return of individuals to be tortured in contravention of the United States' obligations under the Convention. As a practical matter, it may be impossible for a torture victim to prove whether government officials are unable to prevent the torture, have chosen at an individual or systemic level not to prevent the torture, or both – but such a distinction is ultimately irrelevant to the victim's need for protection. For example, a woman at risk of honor killing by her family or subjected to rape and torture by a local gang leader might seek protection from government officials only to be told they "cannot" help her. A deeper acceptance of or acquiescence to the practice of honor killing or the activities of the gang leader often underlies such expressions of inability to help, but it may be impossible for the victim to show whether the government officials failed to help her due to such acquiescence rather than a genuine inability to take protective action. We strongly urge the Departments to remove the proposed regulatory language which disturbingly denies protection to victims based on their very need for such protection – the inability of foreign governments to stop the torture to which they will be subjected upon deportation.

2. The Proposed Rule places an insurmountable burden on individuals seeking protection against torture and will result in the return of many individuals to torture

Under the Proposed Rule, 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," essentially codifying the holding in *Matter of O-F-A-S-,* 27 I & N Dec. 709, 717 (BIA 2019). In combination with the proposed regulatory change declaring mutually exclusive a government's inability to protect victims and its acquiescence to their torture, this Proposed Rule would leave many victims unprotected. We urge the Departments to instead adopt an interpretation of the Convention that recognizes the legitimate protection needs of victims who are likely to be tortured by "rogue" officials without recourse to state protection. See, e.g., *Barajas-Romero v. Lynch*, 846 F.3d 351, 362–63 (9th Cir. 2017) (finding torturous conduct may be inflicted by a public official acting in a private capacity and be covered by the Convention Against Torture); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d. Cir. 2004) (finding that protection should be provided even where the police will not be acting with the consent or approval of authoritative government officials).

By excluding victims of "rogue" officials from protection, the Departments again prioritize the perspective of foreign government officials over the protection needs of victims and place a burden which will often be insurmountable, particularly for unrepresented individuals. In addition to denying protection to victims of truly rogue officials, the Proposed Rule will almost certainly result in the deportation of victims of officials acting under color of law who cannot provide proof of the scope of their torturers' authority. A victim may have no way to ascertain whether a government official who tortured her was acting within his official capacity or as a rogue individual. The power and information lies with the torturer, not with

the victim. Requiring an applicant to demonstrate that the official who tortured her was acting within his official capacity will in many cases prove an impossible barrier.

The purpose of Article 3 of the Convention Against Torture it is to protect individuals from being returned to countries where they are at risk of being tortured. If the regulation is adopted as proposed, there is no doubt that our government will be responsible for sending people back to countries where they are likely to be tortured with no recourse for protection. Such a result would be in direct contravention of our responsibilities under the Convention.

IV. PROCEDURAL ISSUES

8 CFR 208.20 Frivolous Applications

The Proposed Rule Radically Redefines the Definition of Frivolous, Erodes Due Process, and Could Prevent Asylum Seekers from Pursuing Meritorious Claims

a. Impermissibly Radical Redefinition of "Frivolous" under INA § 208(d)(6)

Of particular concern is the Proposed Rule's unreasonable and baseless expansion of the definition of "frivolous" under INA § 208(d)(6) (8 U.S.C. 1158(d)(6)). The proposed expanded definition at 8 CFR § 208.20 (8 CFR § 1208.20) is unconstitutional, in violation of the statutory language, counter to established Board and Federal Circuit precedent, and is arbitrary and capricious as an unexplained and unreasonable departure from the Departments' prior interpretations. *Davila Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) ("If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable."); *Mendez Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010) ("[a]n administrative agency must respect its own precedent, and cannot change it arbitrarily and without explanation."); *see also* Administrative Procedure Act, 5 U.S.C. § 706(2). The Departments' attempt to provide a rationale for this unprecedented expansion by assuming rampant abuse and fraud in the asylum system and making dangerous sweeping generalizations. However, such assumptions and generalizations are unfounded since the administration itself makes plain that it does not collect data on frivolous or fraudulent asylum applications.*See* Immigration Impact, *DHS Suggests Asylum Seekers Should Get Used to 'Homelessness' After Stripping Work Permits,* (July 2020) https://immigrationimpact.com/2020/06/24/asylum-seeker-work-permit/#.Xw8uNZNKijD.

First, the Departments' claim that the proposed expansion of the frivolous definition under INA § 208(d)(6) is to "bring it more in line with prior understandings of frivolous applications." 85 Fed. Reg. 36274. Even assuming this was true, the Departments ignore the uniquely dire consequences of a frivolously finding under INA § 208(d)(6) and how, for this reason, the statute, the implementing regulation, as well as Board and Circuit precedent have purposefully sought to *distinguish* a frivolous finding under INA § 208(d)(6).

In 1996 Congress amended the INA to add that, if a "frivolous" asylum application is filed, the noncitizen "shall be permanently ineligible for any benefits" under U.S. immigration laws. *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-694 (1996); INA § 208(d)(6). This applies regardless of any future developments in a noncitizen's home country or personal life that would otherwise serve as a basis for additional immigration relief. *Id.* Because of the uniquely severe consequences, Courts have characterized this provision as the "death sentence" of immigration proceedings. *Alexandrov v. Gonzales*, 442 F.3d 395, 397 n.1 (6th Cir. 2006); *Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2005) (INA § 208(d)(6) is "[o]ne of the "most extreme provisions" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the bar once imposed may not be waived under any circumstances" (quotiting Austin T. Fragomen, Jr., et al, *Immigration Legislation Handbook* § 8:96 [database updated April 2004]) (internal quotations omitted)); *Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 117 (2d Cir. 2006) ("A finding of frivolousness is a potential 'death sentence' for an alien's immigration prospects.");

Thus, because a finding that an asylum application is frivolous renders the applicant permanently ineligible for any benefits under the INA, Courts have held that such a finding should be applied cautiously and have long recognized procedural due process rights, specifically in the context of INA § 208(d)(6). *See Yousif v. Lynch*, 796 F.3d 622, 627 (6th Cir. 2015) ("Because a finding of frivolousness is the veritable "'death sentence' of immigration proceedings," an IJ is permitted to make such a finding only after complying with several procedural safeguards."); *Cham v. U.S. Att'y Gen.*, 445 F.3d 683, n. 5 (3d Cir. 2006) ("We take this opportunity to observe that a finding of frivolousness must not be made lightly, for it renders the alien permanently ineligible for any benefits under the immigration laws.") (internal citations omitted); *see also*:

> [r]equiring 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 alien and the government. . . . [W]hat qualifies as a "sufficient opportunity" for the purposes of satisfying the agency regulations governing frivolousness findings would, we would think, have to be more ample than what suffices in the ordinary course of asylum proceedings.

Liu, 455 F.3d at 114 n.3.

The Proposed Rule's radically more expansive definition of "frivolous", does the exact opposite- it ignores the uniquely harsh consequences of INA § 208(d)(6), attempts to penalize more conduct, while eroding away the procedural safeguards long held essential to a fundamentally fair finding of frivolousness under this provision. *See Matter of Y-L-*, 24 I&N Dec. 151, 155 (BIA 2007) ("Given the serious consequences of a frivolousness finding, the regulation provides a number of procedural safeguards.") The Proposed Rule's reliance on "frivolous" definitions used prior to the enactment of INA § 208(d)(6) are misguided since, at

the time, the relevant "serious consequences", which dictate caution and mandate heightened procedural safeguards, did not attach to a frivolous finding. 85 Fed. Reg. 36274.

Second, the Proposed Rule seeks to impermissibly expand the definition to include applications where the adjudicator determines that it lacks "merit" or is "foreclosed by applicable law". *Id.* at 36295. As a threshold matter, this expansion does nothing to further the purpose of INA § 208(d)(6) and the existing implementing regulation at 8 C.F.R. § 1208.2. *See Matter of Y-L-*, 24 I&N at 154 ("In preparing this regulation, the Attorney General stated that the Department of Justice was carrying out one of the central principles of the asylum reform process begun in 1993; to discourage applicants from making patently false claims." (quoting *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 444, 447 (Jan. 3, 1997)).

Such a definition of frivolousness demands an understanding of not just asylum law, but of how the American legal system operates. Because case law differs depending on the Circuit in which an application for asylum is adjudicated, and because asylum law is constantly in flux, under the proposed definition, what may be deemed to be "frivolous" could change from day-to-day or vary from jurisdiction-to-jurisdiction. Such a rule would be unconstitutional and impermissibly vague as due process requires "that ordinary people have "fair notice" of the conduct a statute proscribes." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

Importantly, the written warning provided on the Form I-589 "Application for Asylum and Withholding of Removal" does not comply with the constitutional requirement "that ordinary people have 'fair notice' of the conduct a statute proscribes." *Id.* On the contrary, in light of the expanded definition, they are misleading because the form states (immediately following the frivolous warnings) that "[y]ou may not avoid a frivolous finding simply because somebody advised you to provide false information in your asylum application." *See* Form I-589, Pg. 9. This strongly implies that a frivolous application is one based on false claims, and fails to account for the fact that under the Departments' expanded definition, an applicant could easily submit an entirely truthful application and still have it be deemed in violation of INA § 208(d)(6).

Also, in demanding an expanded definition of frivolousness to include claims that lack "merit" or are "foreclosed by applicable law", which require a nuanced understanding of asylum law, the Proposed Rule runs counter to Congress' intent that the initial asylum application be short and straightforward, and further violates Congress' intent to allow the applicants to subsequently retain and proceed with legal counsel. The March 1996 House Report on the creation of IIRIRA, and thus INA § 208(d)(6), makes clear that Congress strongly supported the government developing and implementing a simple initial asylum application, accessible to *pro se* applicants with minimal assistance, fact-based in nature, that could be completed relatively quickly presenting only a brief statement of the asylum claim, which would then be amended to provide a more detailed claim. *See* H.R. REP. 104-469, 259. "In applying the time deadline in section 208(a), the Committee expects that the Attorney General will promulgate a form of application for asylum in which the applicant will be required to present only a brief statement of his or her claim, and which can be completed by

the applicant in a brief period of time, with minimal assistance. Further presentation of the details of the applicant's claim would be presented prior to or at the time of the interview by the asylum officer." *Id.* Furthermore, the House Report mentions the term frivolous only once, in the same sentence requiring that the applicant be provided a list of *pro bono* attorneys, implying Congress' expectation that in preparing and submitting the initial asylum application, the applicant was not already assisted by counsel. *See* H.R. REP. 104-469, 260.

However, under the Proposed Rule change, if a non-citizen presented an initial asylum application that was factually correct, but did not conform to the Departments' most recent interpretation of applicable asylum law, the application could be deemed frivolous- a result that would run contrary to the intent of the statute and be highly confusing in practice with grave consequences.

Third, the Proposed Rule seeks to impermissibly expand the definition of "frivolous" to include applications "premised upon false or fabricated evidence unless the application would have been granted without [this evidence]". 85 Fed. Reg. 36295. In demanding this expansion, the Departments adopt a definition that is in violation of the statutory language of INA § 208(d)(6). Ordinarily, "the minimum qualification of a "frivolous" filing is that it lack [ ] an arguable basis either in law or in fact." *Yousif v. Lynch*, 796 F.3d 622, 630 (6th Cir. 2015) (quoting *Neitzke v. Williams,* 490 U.S. 319, 325, (1989)). In fact, it would be "difficult to discern how [a] plainly meritorious application could be considered "frivolous" under the language of the statute, regardless of how many additional lies it contained." *Id.*). Similar to what the Circuit Court held to be impermissible in *Yousif,* the Proposed Rule here attempts to automatically equate a claim where false or fabricated evidence was introduced to a claim that is frivolous. This proposed expanded definition is not a permissible interpretation INA § 208(d)(6) because it is overbroad and would improperly mandate a finding of frivolousness in claims that have an "arguable basis either in law or in fact" (thus are "meritorious"), but include the submission of fabricated or false evidence. The Proposed Rule's narrow exception to a frivolous finding in cases where the applicant can establish that "the application would have been granted without [the false or fabricated evidence]", 85 Fed. Reg. 36295, does not remedy the statutory violation because a claim could nevertheless still be meritorious even where an applicant cannot show that they would have been granted without the evidence. Such an interpretation, contrary to the statutory language, would not be entitled agency deference. *Yousif,* 796 F.3d at 630.

Fourth, this proposed expansion will disproportionately affect the most vulnerable asylum seekers who are indigent, not able to hire counsel, and/or are detained with limited access to services. In impermissibly expanding the frivolous definition, the Departments ignore the harsh circumstances confronted by many asylum seekers at the early stages of seeking asylum, particularly those without legal advice and those who are detained with limited access to any resources. Under the proposed system, an asylum seeker would risk a frivolous finding and the attendant consequences by putting forth a claim not acceptable under the law of their jurisdiction, or a claim seeking to establish new law or modify or distinguish or reversing existing law. Since its inception, the asylum legal framework has evolved through case law. Readily-accepted principles of asylum have been shaped through advocacy and legal

argumentation. It is unjust to force an individual to choose between reasonably challenging existing law or expanding law and risking a frivolous finding and its attendant consequences.

The rule disregards that many asylum seekers, especially those non-native English speakers, struggle to complete the asylum application form at all. Many cannot afford or even access an immigration attorney to elicit the most relevant information and present it effectively. This is especially true for those in immigration detention, where asylum timeframes are compressed and access to attorneys is sharply curtailed. Importantly, there are myriad reasons why an asylum seeker may not be willing or able to sufficiently discuss and describe their past experiences. Many have undergone horrific events and struggle with resultant mental health challenges. Others harbor concerns about confidentiality or feelings of shame associated with past experiences and ongoing fears for their safety.

By expanding what is deemed to be frivolous, the Proposed Rule will have a substantial chilling effect for potential asylum applicants. Many individuals with meritorious claims would understandably be reluctant to submit an application for fear of the dire consequences of a frivolousness finding. The threat of a frivolous finding under the Proposed Rule and the resultant ban from any future immigration benefit would unduly influence many meritorious claims to be withdrawn. Disparities between represented and *pro se* applicants are already stark, and outlined herein, and the Proposed Rule will widen that gap. The Proposed Rule serves to erode the principles of protection and human rights upon which asylum law is built.

b. Inappropriate Empowerment of Asylum Officers to Make Frivolous Findings & Erosion of Due Process Protections in the context of INA § 208(d)(6)

Under the current regulation, only an Immigration Judge or the Board of Immigration Appeals can determine whether or not a claim is frivolous. 8 C.F.R. § 1208.2. The Proposed Rule would "allow asylum officers adjudicating affirmative asylum applications to make findings that aliens have knowingly filed frivolous asylum applications and to refer the cases on that basis to immigration judges (for aliens not in lawful status) or to deny the applications (for aliens in lawful status)." 85 Fed. Reg. 36274-36275. Empowering asylum officers with this authority is inappropriate given the lack of procedural safeguards in the asylum office context. *See* Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 ADMIN. L. REV. 253, 257 (Winter 2000) at 277 ("The informal [asylum office] interview has been accused of weakening procedural safeguards and insulating the asylum officers from due process requirements."), at 277 n.102 ("For example, there is no meaningful role for the asylum applicant's counsel and no record of the proceedings. This lack of transparency in the decision making process may prove to be an impediment to administrative or judicial review.") In contrast, Immigration Judges have statutory and regulatory obligations that require them to fully develop the record for judicial review. *See Jacinto v. INS*, 208 F.3d 725, 737 (9th Cir. 2000). It is well established that non-citizens are entitled to due process in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). The "full and fair hearing" required by due process requires that the respondent in such a proceeding have a reasonable opportunity to present and rebut evidence and to cross-examine witnesses. *Morales v. INS,* 208 F. 3d 323, 326-27 (1st Cir. 2000).

While expanding what constitutes a "frivolous" application and who can make frivolous findings, the Proposed Rule reduces procedural due process protections available to asylum applicants in the context of INA § 208(d)(6) findings. The Proposed Rule states:

> As this Proposed Rule would overrule *Matter of Y-L-,* and revise the definition of "frivolous," USCIS would not be required to provide opportunities for applicants to address discrepancies or implausible aspects of their claims in all cases when the asylum officer determines that sufficient opportunity was afforded to the alien.

85 Fed. Reg. 36275, and "[u]nder the proposed regulation, an immigration judge would not need to provide an additional opportunity to an alien to account for issues of frivolousness with the claim before determining that the application is frivolous, as long as the required notice was provided." *Id.* at 36276. "Given the serious consequences of a frivolousness finding, the [existing] regulation provides a number of procedural safeguard....[Including]: (1) notice to the alien of the consequences of filing a frivolous application; (2) a specific finding by the Immigration Judge or the Board that the alien knowingly filed a frivolous application; (3) sufficient evidence in the record to support the finding that a material element of the asylum application was deliberately fabricated; and (4) an indication that the alien has been afforded sufficient opportunity to account for any discrepancies or implausible aspects of the claim." *Matter of Y–L–*, 24 I & N Dec. at 155.

The Proposed Rule's abolishment of procedural due process rights in the context of INA § 208(d)(6) is an unprecedented and unreasonable departure from long standing agency and Circuit Court precedent, ignores Congressional intent, is contrary to the statute, and is unconstitutional.

The Departments base this unconstitutional eradication of procedural due process rights on their claim that INA § 208(d)(6) "is clear on its face that the only procedural requirement for finding a frivolous asylum application to be knowingly made is the provision of notice under section 208(d)(4)(A) of the INA." 85 Fed. Reg. 36276. In doing so, the Departments erroneously conflate the two statutory requirements under INA § 208(d)(6) - (1) that the applicant receive notice of the consequences of filing a frivolous asylum application and (2) that such a filing be done "knowingly". This error is clear from the plain language of the statute:

> If the Attorney General determines that an alien has knowingly made a frivolous application for asylum **and** the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

INA § 208(d)(6) (emphasis added).

The Proposed Rule erroneously concludes that warning pursuant to INA § 208(d)(4)(A) (thus satisfying the notice requirement) would also satisfy the "knowing" requirement of the statute and thus abrogate the need for an "additional opportunity to an [appliant] to account for issues of frivolousness" 85 Fed. Reg. 36276. This is simply wrong. The opportunity to address, in full, any discrepancies or implausibilities is not an issue of notice, but rather an issue of whether the applicant "knowingly" filed the frivolous application, a separate and distinct statutory requirement. By knowing that an applicant received frivolous warnings under INA § 208(d)(4)(A), we can only know that they knew the consequences of filing a frivolous application, not whether they knowingly submitted one.

Courts have long recognized procedural due process rights in the context of INA § 208(d)(6), (*Liu*, 455 F.3d at 114 n.3; *Alexandrov*, 442 F.3d at 404-05, 407; *Muhanna*, 399 F.3d at 589), and have long recognized the opportunity to account for issues of frivolousness with the claim as part of those procedural due process rights. *Farah v. Ashcroft*, 348 F.3d 1153, 1153 (9th Cir. 2003) (IJ improperly concluded that alien knowingly filed a frivolous asylum application so as to warrant a permanent bar to relief under the immigration laws where alien was not given a proper opportunity to explain all discrepancies in the record.); *Liu*, 455 F.3d at 114 n.3 ("Giving aliens a meaningful opportunity to address an IJ's concerns is part of guarantying due process[]", "[w]hat qualifies as a "sufficient opportunity" for the purposes of satisfying the agency regulations governing frivolousness findings would, we would think, have to be more ample than what suffices in the ordinary course of asylum proceedings"). Removing such an important procedural due process protection renders the statutory requirement of "knowingly" superfluous.

Congress has previously already taken express action to combat fraudulent asylum applications by instituting the high hurdle of a one year bar and a 180 day delay for work authorization, and DHS presents no research to suggest that there is fraud or that the fraud or work bear any relation to individuals' decisions to migrate to the United States or to apply for asylum after entering the United States. 84 Fed. Reg. 220, 62375 (Nov. 14, 2019). While DHS acknowledges that many migrants arrive fleeing violence in their home countries, it seems to continue to believe that erecting morer hurdles in the form of more stringent requirements will disincentivize refugees from seeking safety in the U.S. The agency conflates migration driven at least in part by a need to escape violence with migration driven solely by a desire to live and work in the U.S. and using the asylum system as a fraudulent means to do so: "[T]he Trump administration wants the public to believe that because claims for asylum are up and the rate of denial of asylum claims are also up, ... that people claiming asylum are making up or exaggerating their stories. .. What is commonly overlooked is that it is extraordinarily difficult for someone to qualify for asylum in the United States." Kristie De Peña, Niskanen Center, *Asylum Fraud isn't What you Think it Is*, (2018) https://www.niskanencenter.org/asylum-fraud-isnt-what-you-think-it-is*/; See also Asylum Decisions and Denials Jump in 2018*, https://trac.syr.edu/whatsnew/email.181129.html; Latin American Research Review, *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, (2018) https://larrlasa.org/articles/10.25222/larr.147/; National Immigrant Justice Center, *The Trump*

Administration's Manipulation of Data to Perpetuate Anti-Immigrant Policies, (Jan. 2019) https://immigrantjustice.org/research-items/policy-brief-trump-administrations-manipulation-data-perpetuate-anti-immigrant.

But there is no need for the agency to rely on assumptions and logic when researchers have examined the actual impacts of deterrence-based policies on recent migration from Central America. Research shows that U.S. deterrence strategies based on making asylum less accessible to migrants and/or communicating to migrants the dangers of migration and the likelihood of detention and swift deportation upon arrival, have little, if any, impact on migration decisions of Central Americans. As one study of Honduran migrants concluded, "Simply put, respondents' views of the dangers of migration to the United States, or the likelihood of deportation, do not seem to influence their emigration plans in any meaningful way.... What our results clearly demonstrate is that perceptions of the US immigration climate have no significant impact on the emigration decision, at least among Hondurans. Hondurans are far more driven by a desire to leave the devil they know than they are dissuaded to leave by the possible risks that may await them." *Id.* at 440.

Over the past two years, the government has issued executive orders, precedential decisions by the attorney general, regulations, and informal policy changes amid unfounded statements painting asylum seekers as liars with meritless claims to thwart asylum seekers from exercising their rights under U.S. law, S*ee*, National Immigrant Justice Center, A *Timeline of the Trump Administration's Efforts to End Asylum, (*Aug. 27, 2019), https://www.immigrantjustice.org/staff/blog/timeline-trump-administrations-efforts-end-asylum. The continued allegations of widespread fraud are completely lacking in evidentiary support, and given that the agency's Proposed Rule is unlikely to have any impact on underlying migration decisions, it is also unlikely to have any significant impact on total numbers of asylum applications filed. After having arrived in the U.S. and initiating proceedings before the Immigration Courts, individuals have a strong incentive to pursue applications for asylum if they potentially qualify for this form of relief, regardless of whether or not they will receive temporary employment authorization as a result of filing the application. Changing the rules governing the issuance of temporary employment authorization for asylum seekers would seem very unlikely to have any significant impact on the filing of asylum applications by individuals in Immigration Court proceedings.

V. SPECIAL ASYLUM SEEKER PROCEDURES

8 CFR 208.30 Credible Fear

- **Jurisdiction and Process and Authority**

The already controversial scheme of "expedited removal," which gives low-level immigration officials the authority to deport people with little to no judicial review, (Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302(b)(1)(A)(i), 110 Stat. 3009-546, 3009-580 (codified as amended at 8 U.S.C. § 1225(b)(1)(A)(i) (2012)))presents even more heightened concerns with the proposed

amendments to jurisdiction and authority. Robust judicial review is the basis for rule of law, and courts over the years have repeatedly affirmed the importance of judicial review in immigration cases. In fact, our constitutional framework relies upon judicial review to serve as a bulwark against impingement of the rule of law. "The 'check' the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review." *DOT v. Association of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring).

Not only does judicial review serve to make government officials, such as asylum officers at our border and ports of entry accountable, but also serves to "secure individual liberty". See *Loving v. United States,* 517 U.S. 748, 756 (1996) (noting that "[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty.").

Further, expanding the use of "Asylum-and-Withholding Only Proceedings" and funneling asylum seekers who successfully establish a credible fear of return to limited relief options of "asylum-and-withholding-only" proceedings under 8 CFR § 208.2(c)(1), instead of § 240 proceedings under the INA, is a monumental change that runs contrary to statute, Congressional intent and long standing practice. Created by regulation, "asylum-and-withholding-only" proceedings are currently applied in limited cases where an individual is explicitly excluded by the INA from "full" proceedings, such as a "crewman," "stowaways," or individuals who have entered the country under the Visa Waiver Program. 8 CFR § 208.2(c)(1); INA § 235(b)(2)(B); INA§ 235(a)(2) ("A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section [240] of this title.").

"Asylum-and-withholding-only" proceedings is a regulatory creation to address limited scenarios for specific arrivals, and the rule's broad expansion to to anyone who has undergone the credible fear interview process pursuant to INA § 235(b)(1)(B) is based on an erroneous statutory interpretation argument. Relying on the fact that "aliens in expedited removal are expressly excluded from the class of aliens entitled to section 240 proceedings under section 235(b)(2)(A), the Departments seek to limit access to 208 proceedings. However, the courts have firmly held that asylum seekers who have passed a credible fear interview are no longer in expedited removal, and cannot be summarily removed as in expedited processing. *Grace v. Whitaker,* 344 F.Supp.3d 96, 107 (2018) ("If, after a credible fear interview, the asylum officer finds that the alien does have a "credible fear of persecution" the alien is taken out of the expedited removal process and referred to a standard removal hearing before an immigration judge. *See* 8 U.S.C. § 1225(b)(1)(B)(ii), (v). At that hearing, the alien has the opportunity to develop a full record with respect to his or her asylum claim, and may appeal an adverse decision to the BIA, 8 C.F.R. § 208.30(f), as well as to a federal court of appeals as needed. 8 U.S.C. § 1252(a)-(b).

While acknowledging Congressional intent to provide asylum seekers consideration of an application for asylum under non-expedited removal proceedings, 85 Fed. Reg. 36267

quoting H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.), the rule nonetheless seeks to limit those hearings and the relief which can be obtained to withholding only. The Proposed Rule contrasts with express regulations providing the scope of review to determine whether an alien is eligible for asylum or withholding or deferral of removal, and whether asylum shall be granted in the exercise of discretion," leaving issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief to a hearing. 8 C.F.R. §§ 208.2(c)(3)(i), 1208.2(c)(3)(i); *see also Matter of A-W-*, 25 I&N Dec. 45, 46 n.1, 47−48 (BIA 2009). Under the new scheme, asylum seekers who are statutorily eligible to seek other relief after establishing a credible fear of persecution would be forced to forfeit such protection and limit options to any other relief as well, including victims of serious crimes who may be eligible for protection based upon a U-Visa *See* Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. Law. No. 106-386, § 1513(a)(2). Such a vast expansion of expedited removal proceedings does not secure the protections of asylum which Congress intended when passing the regulatory scheme aligning the U.S. with our international treaty obligations.

- **Heightened standard for Credible Fear and Reasonable Fear**

The standard established by Congress in INA for Credible Fear Interviews (CFI) requires an applicant to establish that there is a "significant possibility" that he or she has been persecuted or fears future persecution on the basis of a protected ground if returned to his or her country of origin. This standard was intentionally set by Congress in order to guard against refoulement of those seeking protection from persecution. Under the Proposed Rule, this standard would be heightened in contradiction of the clear language of the INA.

The proposed heightened standard would be especially burdensome for asylum seekers who are detained as well as *pro se* applicants. *Pro se* applicants are often unfamiliar with the asylum process and may struggle to recount the past history of trauma that forms the basis of their claim in the manner that is required as part of the credible fear process. Those applicants who are detained during the course of their immigration proceedings face similar hurdles in being able to adequately prepare for their credible fear interview.

The Proposed Rule would also heighten the standard for those applicants only eligible for withholding of removal and protection under the Convention Against Torture (CAT). Applicants who are barred from applying for asylum already must meet a narrower standard in order to proceed with their claim and have their case heard by an immigration judge. Adopting a new, narrower standard would serve to make it even more difficult for these applicants to meet their burden and would erode asylum protections for an especially vulnerable population.

- **Consideration of 'internal relocation' as part of the credible fear process**

The Proposed Rule would allow officials conducting a credible fear or reasonable fear interview to make a determination regarding whether the applicant could relocate internally within their country of origin. This would serve no other purpose except to further restrict the number of applicants who are given a credible or reasonable fear finding and allowed to

continue the process for applying for asylum, withholding of removal, or protection under the CAT. DHS itself acknowledges that the regulatory standard that governs consideration of internal relocation in the context of asylum and withholding of removal adjudications is different from the standard that considers internal relocation in the context of protection under the CAT regulations. Officials conducting credible fear and reasonable fear interviews are not qualified to make this kind of legal determination nor should internal relocation be a component of a determination made in the preliminary stages of the asylum process on the basis of an applicant's limited testimony.

Circuit Courts and the BIA have consistently held that if an applicant is able to establish past persecution on account of a protected ground, the burden is on DHS to rebut the presumption that the applicant has a well-founded fear of future persecution. It is contrary to binding case law and to the language of the INA to shift this burden onto applicants.

- **Officials have authority to determine eligibility bar in the credible fear interview**

As stated previously, Congress intentionally established a low threshold of establishing credible fear in credible fear interviews ("CFIs"), understanding that non-citizens who fear returning to their home country are not in a position early in the process to provide proof or present a legal claim. In recent years the Trump Administration has greatly increased the actions that would trigger an eligibility bar to asylum and/ or withholding. Understanding what constitutes an eligibility bar has become an increasingly complex legal exercise. Allowing officials (generally non-attorneys) to make a determination of whether a non-citizen's actions fall into a category that makes them ineligible for asylum and/ or withholding presents a significant legal barrier to many asylum seekers with meritorious claims.

Additionally, on April 30, 2019 the Trump Administration issued a new set of instructions to officials that have the responsibility of conducting credible fear interviews and screening out baseless claims for humanitarian protection. On September 24, 2019, the administration amended those instructions entitled "Credible Fear of Persecution and Torture Determinations" and issued them on September 20, 2019 (together, the two sets of guidelines "The Lesson Plans"). The Lesson Plans significantly increase the legal burden on those seeking humanitarian relief and make erroneous findings in the CFI process more likely. For example, on page 11 of the April 2019 instructions to asylum officers, the guidance states that "the applicant must provide evidence that corroborates the applicant's testimony." This requires asylum seekers with no knowledge of our complex immigration laws and generally without legal representation to, in this context, provide evidence that their actions don't legally preclude them from seeking asylum.

In our work with asylum applicants, we have represented many clients who have had concerns about an eligibility bar raised during their credible fear interview that was later determined *not* to apply. Asylum seekers are most often in detention and without legal counsel at the time of their CFI. For example, one of our clients had been the victim of severe abuse and torture and had cooperated with her persecutors under severe distress. In the CFI process, the asylum officer had stated that she might have committed a serious non-political crime outside of the

United States, and therefore be ineligible for asylum. However, under the current regulations, this did not result in a negative credible fear finding and she was released into the United States to prepare her claim. When she was later able to present her case at a full merits hearing with counsel, the immigration judge determined she was not subject to a bar and granted her asylum, an outcome that would have been much less likely had she needed to overcome an erroneous negative fear finding early in the process.

It is very troubling that substantive bars to asylum will be adjudicated at such a perfunctory stage and by officials who can expectedly inject arbitrary personal evaluations into the process and negatively affect refugees differently depending on the factors presented and the evaluation of an officer. The arbitrariness that is injected into asylum adjudication by these bars will be compounded by how these will be evaluated by individual officers. *See* Refugee Roulette, infra in Section I.

- **Removal of IJ review of negative credible fear finding**

In our work with clients and credible fear interviews, we sometimes have the opportunity to inform them as to what to expect at the interview, or we meet them after a CFI report has been written. Often, these clients are traumatized from recent persecution they have fled - physically and emotionally drained from the conditions of their journey or in detention centers - and most are overwhelmed by language barriers in articulating their experiences. A particular challenge at the early stage of these interviews is lack of appropriate and accurate interpreters, especially for less common languages. Material errors are made in translation and oftentimes the questions in this setting fail to elicit material facts supporting the asylum seekers claims. When clients have received negative fear findings, they can be reluctant to seek an IJ review, but often after being informed of their right and the possibility of a different result with the judge, they often wish to take a second chance to plead their case.

Again, most detained asylum seekers do not have access to legal representation. DHS / DOJ officials do not have the time nor language skills to adequately explain to asylum seekers what an IJ review entails or why it is in their interest to pursue their claim. Often, an asylum seeker does not understand the questions or fear answering incorrectly and simply refuse to answer. Under those circumstances particularly, it is important to have IJ review. Denying such review absent affirmative action is yet another procedural barrier that will have a consequence of substance in denying humanitarian relief in a meritorious claims.

CONCLUSION

We strongly object to and oppose the substance of the Proposed Rule in its entirety. To the extent that this action is part of a broader effort by the Administration to deter asylum seekers from seeking refuge in the United States, a fundamental legal right in the U.S. and core to our nation's principles, we are alarmed and concerned. Individuals fleeing persecution in their home countries and seeking asylum in the U.S. must overcome countless hurdles to achieve safety and security, and further restrictions by this Administration to limit the ability of individuals fleeing persecution to enter and remain in the U.S. in safety and security is

highly objectionable. Already dozens of policies, such as metering asylum seekers at the Southern border, implementing a ban on persons from predominantly Muslim countries, and implementing the "Zero Tolerance" policy separating children from parents, convey the policy position that this administration does not prioritize or is unwilling to protect the safety and well-being of asylum seekers.The tremendous vulnerability of the asylum-seeker population cannot be understated, and the opportunity to seek safety in the U.S. in accordance with our laws of asylum is a fundmental human right that should be honored, not denied.

Respectfully submitted,

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On behalf of the MLRI Immigration Coalition

Appendix *attached* of individual signatory organizations:

Ascentria Care Alliance - Immigration Legal Assistance Program
Asian Task Force Against Domestic Violence
The Boston College Law School Legal Services LAB Immigration Clinic
Boston University School of Law Immigrants' Rights and Human Trafficking Program
Catholic Charities Archdiocese of Boston
Central West Justice Center
Children's Law Center of Massachusetts
DeNovo Center for Justice and Healing
DOVE, Inc. (Domestic Violence Ended)
Greater Boston Legal Services (GBLS)
HarborCOV (Communities Overcoming Violence)
Health Law Advocates
Immigrant Legal Advocacy Project (ILAP)
Jewish Family & Children's Service of Greater Boston
Jewish Vocational Services (JVS Boston)
Justice Center of Southeast Massachusetts
Kids in Need of Defense (KIND)
MetroWest Legal Services
Massachusetts Immigrant & Refugee Advocacy Coalition (MIRA)
Northeast Justice Center
Northeastern University School of Law, Immigrant Justice Clinic
Political Asylum/Immigration Representation (PAIR) Project
RIAN Immigrant Center
SomerViva: Office of Immigrant Affairs for the City of Somerville, MA
University of Massachusetts School of Law - Dartmouth Immigration Law Clinic

APPENDIX OF SIGNATORY ORGANIZATIONS

The Massachusetts Law Reform Institute (MLRI) is a nonprofit statewide poverty law and policy center that provides advocacy and leadership in advancing laws, policies, and practices that secure economic, racial, and social justice for low-income people and communities. Ensuring access to justice is one of the three fundamental frameworks guiding MLRI's mission, along with addressing chronic poverty and advancing racial equity.

Greater Boston Legal Services, a nonprofit legal aid organization, is the primary provider of legal aid in Massachusetts in matters ranging from the need to escape a domestic abuser, to stopping no-fault eviction from affordable housing, to rectifying the wrongful withholding of disability benefits or the unlawful exploitation of workers in low-paying jobs. Each year GBLS provides assistance to more than 10,000 working-class families and individuals in the Greater Boston area. GBLS works closely with a wide network of community partners and social service agencies to establish comprehensive solutions to social issues. Its work ranges from brief service to full representation, impact advocacy, policy education, and community legal education. The GBLS Immigration Unit serves approximately 1,000 individual immigrants each year, providing individual representation in immigration matters, including appellate litigation; engaging in impact advocacy on critical immigration issues affecting our clients; and working with numerous community organizations to provide policy education and community legal education.

Ascentria Immigration Legal Assistance Program provides free and low-cost legal services to immigrants in Massachusetts. Ascentria's ILAP serves a wide range of new Americans and survivors of violent crime, including asylum seekers, immigrants & refugees, unaccompanied minors, and survivors of violent crime, domestic violence, rape, sexual violence, and human trafficking.

The Asian Task Force Against Domestic Violence (ATASK) is a nonprofit, community organization serving pan-Asian survivors of domestic and intimate partner violence. Since 1994, ATASK has operated New England's only multilingual emergency shelter, as well as providing advocacy services, education programs, and outreach for Asian domestic violence survivors.

The Boston University School of Law Immigrants' Rights and Human Trafficking Program ("the Clinic") advocates on behalf vulnerable immigrants and survivors of human trafficking in a broad range of complex legal proceedings before the immigration courts, state, local and federal courts and before immigration agencies. The Clinic also collaborates with local, state and national immigrants' rights and human rights groups to advance protections for vulnerable immigrants and survivors of human trafficking. Under the direction of law school professors and instructors who practice and teach in the field of immigration and human trafficking law, law students represent children and adults seeking protection in the United

States. This includes survivors of torture and trauma, survivors of domestic violence, abandoned and abused children, and the mentally ill and incompetent, as well as the representation of detained and non-detained individuals in removal proceedings before the Boston Immigration Court.

The Boston College Law School Legal Services LAB Immigration Clinic ("the Clinic") provides an opportunity to second and third-year law students to gain experience and develop skills in the field of immigration law. Originally founded in 1968, LAB was a pioneer in the field and has served as a model for programs around the country. Within the LAB Immigration Clinic, students represent noncitizens in the Immigration Court of Boston for the following types of cases: asylum and other relief based on fear of persecution, deportation waivers for long-term U.S. residents, adjustment of status for noncitizens with family members who are U.S. citizens or permanent residents, and visas and relief for victims of violent crimes. The Immigration Clinic also works at the intersection of immigration and juvenile legal matters, collaborating with the Juvenile Rights Advocacy Program.

Catholic Charities of the Archdiocese of Boston (CCAB) Refugee and Immigration Services provides free and low-cost immigration legal services to low-income immigrants, including asylum seekers fleeing persecution from their home countries. Their services include Refugee Resettlement, Community Interpreter Services, Immigration Legal Services, Employment Services, and ESOL classes.

The Central West Justice Center (CWJC), a wholly-owned subsidiary of Community Legal Aid, provides free legal help to low-income residents of Central and Western Massachusetts. CWJC advocates focus on cases involving humanitarian-based immigration law, employment rights, housing and homelessness issues, and access to public benefits. CWJC provides free consultations on immigration law questions to low-income residents and free representation before the U.S. Citizenship and Immigration Services or the EOIR/Immigration Court to individuals applying for humanitarian immigration relief, such as asylum.

The Children's Law Center of Massachusetts (CLCM) is a non-profit legal services agency that provides direct representation to children in immigration, school discipline, and juvenile justice matters. CLCM attorneys represent immigrant youth in removal proceedings before the Immigration Courts, U.S. Citizenship and Immigration Services of the Department of Homeland Security, and in Massachusetts juvenile, family, and probate courts.

DeNovo Center for Justice and Healing ("De Novo") (formerly Community Legal Services and Counseling Center/Cambridgeport Problem Center) provides free civil legal assistance and affordable psychological counseling to low-income people and is listed on the EOIR Boston Immigration Court referral list of providers. De Novo's services combat the effects of poverty and violence by helping clients and their children meet basic human needs for safety, income, health and housing. De Novo draws on the expertise of hundreds of dedicated volunteer professionals to serve the community's most vulnerable members and help protect the rights of immigrants and refugees through passionate legal representation, education and advocacy. De Novo provides high-quality, free legal assistance to low-income immigrants,

refugees and asylum seekers statewide in Massachusetts in cases involving: Asylum, Violence Against Women Act, T-Visa, U-Visa and Special Immigrant Juveniles.

Domestic Violence Ended (DOVE), founded in 1978, is a multi-service organization providing comprehensive direct services and support for victims of dating and domestic violence, as well as their children in Norfolk County and the South Shore of Massachusetts. Working with adults, teens, and children who have been abused (physically, sexually, emotionally and/or financially), DOVE's services include crisis intervention, danger assessment and safety planning, supportive counseling, emergency shelter, legal advocacy and representation, and community outreach, education, and training.

HarborCOV provides free safety and support services, along with housing and economic opportunities that promote long-term stability for people affected by violence and abuse. Founded in 1998, HarborCOV specializes in serving survivors who face additional barriers, such as language, culture and economic, by working to create connections to the supports survivors need to rebuild their lives through a continuum of options. HarborCOV is committed to social and economic justice and takes a comprehensive approach to addressing violence within the context of family, culture and community.

Health Law Advocates (HLA) is a 501(c)(3) public interest law firm whose mission is to provide pro bono legal representation to low-income residents experiencing difficulty accessing or paying for needed medical services. HLA is committed to ensuring universal access to quality health care in Massachusetts, particularly for those who are most at risk due to such factors as race, gender, disability, age, or geographic location. With its partner organization, Health Care For All, HLA combines legal expertise with grassroots organizing and policy reform to advance the statewide movement for universal health care access.

The Immigrant Legal Advocacy Project (ILAP) is Maine's only statewide immigration legal services organization, and is listed on the EOIR Boston Immigration Court referral list of providers. ILAP's mission is to help low-income immigrants improve their legal status and to work for more just and humane laws and policies affecting immigrants. With offices in Portland and Lewiston, each year ILAP provides direct legal services to about 3,000 clients, conducts education and outreach events for over 1,000 immigrants and service providers, and participates in systemic advocacy to protect and advance the rights of Maine's immigrant communities.

Jewish Family & Children's Service (JF&CS), founded in 1864, helps individuals and families build a strong foundation for resilience and well-being across the lifespan. Through an integrated portfolio of more than 40 programs reaching communities throughout Eastern and Central Massachusetts, JF&CS focuses on meeting the needs of new parents and their children, older adults and family caregivers, children and adults with disabilities, and people experiencing poverty, hunger, or domestic abuse.

Jewish Vocational Services (JVS Boston) empowers individuals from diverse communities to find employment and build careers, while partnering with employers to hire, develop, and retain productive workforces. Founded in 1938 to assist Jewish immigrants struggling in the

Great Depression, JVS is now among the oldest and largest providers of adult education and workforce development services in Greater Boston. JVS offers over 35 different programs to help people from all backgrounds secure financial independence.

The Justice Center of Southeast Massachusetts is a subsidiary of South Coastal Counties Legal Services, Inc. (SCCLS), a non-profit corporation which provides free civil legal services to low-income residents in Barnstable, Bristol, Dukes, Nantucket, and Plymouth Counties, and surrounding towns. SCCLS's mission is to achieve equal justice for the poor and disadvantaged through community based legal advocacy, and provide representation in housing, family, immigration, elder, benefits, and education.

Kids in Need of Defense (KIND) is a leading national organization advocating for the rights of unaccompanied migrant and refugee children in the U.S. In 2008, KIND was founded by the Microsoft Corporation and UNHCR Special Envoy Angelina Jolie to address the gap in legal services for unaccompanied minors. Through strategic partnerships, KIND provides pro bono legal representation for refugee and migrant children across the country.

The Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA) is the largest coalition in New England promoting the rights and integration of immigrants and refugees. With offices in Massachusetts and New Hampshire, MIRA advances their mission through education and training, leadership development, institutional organizing, strategic communications, policy analysis and advocacy. MIRA is a respected leader on immigrant issues at the state and national levels, and an authoritative source of information and policy analysis for policy-makers, advocates, immigrant communities and the media.

MetroWest Legal Services' (MWLS) mission is to provide legal advocacy to protect and advance the rights of the poor, elderly, disabled and other disenfranchised people in MWLS' service area and to assist them in obtaining legal, social and economic justice. MWLS helps their clients secure access to basic needs and challenge institutional barriers in order to achieve equal justice for all. MWLS provides free immigration legal services to immigrants with a low income, and full representation for immigration matters including, primarily, Applications for Asylum, Petitions for Special Immigrant Juvenile Status, VAWA Self Petitions, and U visa petitions. MWLS's Immigration Assistance for Victims of Domestic Violence Project represents both documented and undocumented battered immigrants. MWLS also provides free civil legal aid in matters related to housing, public benefits, family law, special education, and wage and hour disputes.

The Northeast Justice Center (NJC) assists immigrant survivors of domestic violence and other crimes as well as unaccompanied children in immigration matters. NJC also provides general immigration advice for low-income callers from their service area, as well as limited detention, bond and removal defense work.

The Northeastern University School of Law Immigrant Justice Clinic (IJC) is a clinic program in which law students, working in teams under the supervision of clinical faculty, represent noncitizen clients in a variety of immigration matters; engage in immigrant rights' advocacy projects; and conduct intakes at immigration detention centers in conjunction with attorneys

from the PAIR Project. The types of cases that IJC students handle include applications for asylum, U-visas, T-visas, and other forms of relief, as well as bond hearings in Immigration Court. Students manage all aspects of their cases, including interviewing, fact development, legal research, drafting and oral advocacy.

The Political Asylum/Immigration Representation Project (PAIR) is a nonprofit organization and the leading provider of *pro bono* legal services to indigent asylum-seekers in Massachusetts and immigrants detained in Massachusetts. PAIR's Pro Bono Asylum Program recruits, mentors and trains over 1,100 active volunteer attorneys from private law firms to represent, without charge, low-income asylum-seekers who have fled from persecution throughout the world, from over 90 countries worldwide. All of PAIR clients are low-income, and face a significant barrier in affording counsel, and often must rely on pro bono counsel to seek protection from the persecution they have suffered or fear.

The Rian Immigrant Center (Rian) empowers immigrant and refugee families on the path to opportunity, safety, and a better future for all. Rian provides legal, wellness and education services; advocates for just and humane immigration policies; and builds community through inclusion, civic engagement, and international exchange programs. The expert legal staff and pro bono attorneys at Rian Immigrant Center offer free legal consultations at weekly legal clinics to over 2,000 immigrants, refugees, and asylees, and provide full case representation before U.S. Citizenship and Immigration Services (USCIS) for over 600 families.

SomerViva, the Office of Immigrant Affairs for the City of Somerville, MA, provides translation and assistance services for immigrant residents of Somerville, Massachusetts.

The University of Massachusetts School of Law - Dartmouth Immigration Law Clinic (ILC) is a clinic program for UMass law students, supervised by a professor or practicing attorney, providing legal services to immigrants in the SouthCoast area of Massachusetts, and receiving client referrals from several local agencies and through the EOIR Immigration Court's referral list. Cases encompass a broad range of immigration issues, including political asylum, deportation defense, juvenile assistance, representation of victims of violence.

-END-