Lauren Alder Reid
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Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: RIN 1125-AA94; EOIR Docket No.18-0002

Dear Assistant Director Reid,

We are a group of legal and mental health academic, researchers, and practitioners collaborating on a research project titled Building Bridges: Narrowing the Legal-Scientific Divide in Immigration Forensic Assessments at UC Davis. Combined, we have decades of experience with U.S. immigration laws, policies and practices and with trauma-informed mental health research and practices as it pertains to immigrants. We respectfully submit this comment to the Department of Homeland Security's Notice of proposed rulemaking – Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review, published on June 15, 2020.

In general, we believe that the new rule regressively turns back the clock to pre-1980 when the U.S. had not yet adopted laws that brought us into compliance with our international legal obligations toward refugees and asylum seekers. Moreover, this regulation is sought when there already have been dramatic changes to asylum law and practices that have essentially shut down the border to new asylum seekers, or have made it unduly difficult for those awaiting adjudication to fairly complete their claims. We view the proposed rule as defying the rule of law by seeking to undo not only Congressional intent when it enacted the Refugee Act of 1980, but also carefully developed interpretation of the law through judicial precedent and rule-making. In contrast, this rule—which provides only 30 days for public comment—seeks to undo in merely three years since President Trump took office these decades-long efforts that tried, through legislation and the coordination of the three branches of government, to honor our moral and legal obligations not to turn our backs once more to the most vulnerable immigrants who desperately seek our protection from persecution.

We share several deep concerns about the proposed rule as we detail below. Our list is not exhaustive but instead prioritizes our largest concerns. Broadly categorized, our concern is that the proposed rule is an attempt to construct procedural hurdles and substantive bars, and to elevate to center-state peripheral issues such as permanent settlement, third country safe harbor, and relocation, over what should be a focus on the actual merits of a given asylum case in ways that cumulatively are intended to negate protection to the vast majority of asylum seekers.

The Proposed Rule Significantly Undermines Due Process for Immigrants who have Passed the Credible Fear Threshold

Subsection IIA1 of the proposed rule would disallow asylum seekers or those who seek protection from torture who have already established a credible fear of persecution from being able to access a full hearing before an immigration judge under INA §240. Establishing credible fear is already a substantial requirement that has lacked oversight and consistency in application.[1] Yet, the Trump administration has expressed misgivings that the process is too porous and is leading to too many asylum seekers accessing the courts.[2] Already, this claim has led to higher rates of denial of credible fear by the immigration agencies.[3] And yet this rule essentially seeks to create an intermediate process for the first time that would allow judges to pre-determine the merits of asylum petitions based solely on paper review without the full benefit of a hearing. During this cursory process, the asylum seeker will bear the extremely difficult burden for the standards of withholding of deportation, Convention against Torture, or Asylum with even less time to develop the evidentiary support or seek counsel to help them prepare a strong case. Already the policies and practices enacted by the Trump administration at the U.S. Mexico border have significantly curtailed the ability of persons who fear persecution, torture or death to secure lawyers to help them prepare for their credible fear interview.[4] This rule essentially forces individuals without legal representation, much less access to mental health practitioners, to endure a cursory process in a highly complex area of the law without opportunity to secure the help necessary to present their case.

Specifically, the proposed regulations amend Section 1208.13(e) and permit immigration judges to pretermit and deny an application for asylum, withholding, or CAT if the asylum seeker has not established a *prima facie* claim for relief under the applicable laws and regulations. The IJ could pretermit in two circumstances: 1) upon motion by DHS or 2) *sua sponte* on IJ's own authority. The proposed regulation gives the asylum applicant ten days to respond to this decision to pretermit. The proposed regulation will dramatically affect asylum seekers who are not represented in the early stages of their immigration proceedings.

This revised regulation contemplates immigration judges pretermitting an asylum claim before an asylum hearing. This raises significant due process concerns when the written asylum application process is already deeply flawed. The asylum application itself is available only in English and is currently 12 pages

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[1] *See generally* Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 ***Duke L. J. On.*** 48 (2020).
[2] *See id*. at 53-54.
[3] *Id.*
[4] Alejandro Lazo, *Fewer Asylum Seekers Have Lawyers Under Trump Administration Policy*, ***The Wall Street J***., Jan. 31, 2020, https://www.wsj.com/articles/fewer-asylum-seekers-have-lawyers-under-trump-administration-policy-11580472003.

long.[5] Most persons who are unrepresented have no idea how to complete this form without making substantial mistakes, even when they have highly meritorious claims. Asylum law is complex, difficult even for trained lawyers to understand. It is simply unfair to place asylum seekers in a situation where their cases will be decided at a stage when few have had the opportunity for legal counsel.

Section 1208.1(c) is similarly problematic. For *pro se* individuals, again many of whom will be detained, to have to articulate their precise particular social group formulation or else waive the ability to raise that group upon appeal, is unreasonable and undermines our obligation to protect those fleeing persecution and threats to their life or freedom under Article 33 of the Refugee Convention[6] and the 1967 Protocol.[7] Given the constantly evolving state of the jurisprudence around particular social group, too, it is simply unreasonable for an asylum applicant to have to state at the outset all possible groups that may be potentially valid for a claim.

Finally, the lack of consistent access to counsel for asylum seekers in detention, but also for those not detained, particularly at the early stages of the removal proceedings in master calendar hearings is extremely problematic. This means that an Immigration Judge could pretermit a claim without ever getting to an individual asylum hearing. This completely undermines due process and an asylum seeker's right to a day in court. Also problematic is the inevitability that these conversations around pretermission and asylum eligibility, if not within an individual hearing, would take place at master calendar hearings in front of other asylum seekers and members of the public. Pretermission of the asylum claim at an early stage in the proceeding undermines our obligation to provide adequate process for asylum seekers under domestic and international law.

The Proposed Rule Distorts the Credible Fear Process Away from Its Intended Purpose—A Flexible Screening Mechanism to Ensure that those who Fear Persecution are Presented before an Immigration Judge—into an Ill-Suited Process for adjudicating Decisions that Require More Due Process

Examples of this abound Sections IIA.2 -- II.A.5. Section IIA.2 would require immigration judges reviewing denials of credible fear to apply "all applicable law, including administrative precedent from the BIA, decisions of the Attorney General, decisions of the federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits, and decisions of the Supreme Court."

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[5] https://www.uscis.gov/i-589

[6] The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereinafter "1951 Convention"].

[7] The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967 [hereinafter "1967 Protocol"]. Article I(1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

Presumably, this means substantial deference to the findings of asylum officers and the application of Real ID standards of credibility that call for, *inter alia*, consistency in the narrative, corroborating evidence, and evaluation of demeanor. Yet, credible fear interviews, when they resume,[8] will likely occur conducted by Customs and Border Patrol Officers who lack the training and who are predisposed to a culture of enforcement, not service.[9] Even when trained asylum officers conduct these interviews, studies have shown that due to trauma, lack of trust in government officials, and the circumstances of the interview, immigrants with legitimate claims do not fare well in these processes.[10] It is, thus, important to have these processes retain flexible standards while also granting immigrants the opportunity to procure legal representation and mental health services that can allow them to better prepare and present their cases.

Another troubling aspect is how Section IA5 expands the scope of, and thus the barriers of overcoming, the credible fear process by including the determination of internal relocation as part of this process. Currently, the determination occurs at a full immigration hearing and it is the government that bears the burden of establishing that there is a specific area of the country where the risk of persecution to the applicant falls below the well-founded fear of persecution level. The second part of the internal relocation issue is whether "under all the circumstances, it would be reasonable to expect" that the asylum applicant would go live in the supposedly safer region of the home country. The immigration judge is to first presume that internal relocation would not be reasonable, unless DHS first establishes by preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. Moreover, the proposed regulation, as we discuss in more detail below, shifts the burden to demonstrate by a preponderance of the evidence that internal relocation is not reasonable to the applicant in private actor persecution cases. As this discussion suggest, defeating an asylum claim based on an internal relocation claim is complex and is supposed to be hard since the individual seeking asylum has already established their well-founded fear of persecution and protection should only be died if, in fact, a viable alternative is available. Thus, the assessment of internal relocation should not adjudicated as part of an informal process whose sole purpose should be to facilitate, rather than create undue barriers for, asylum seekers' access to a hearing.

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[8] President Trump has suspended indefinitely all asylum credible fear interviews in response to COVID-19. Arelis R. Hernández and Nick Miroff, Facing Coronavirus Pandemic, *Trump Suspends Immigration Laws and Showcases Vision for Locked-Down Border*, ***The Wash. Post.,*** April 3, 2020, https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html.

[9] Human Rights First, *Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguards to Protect Refugees*, Fact Sheet: April 2019, https://www.humanrightsfirst.org/sites/default/files/CBP_Credible_Fear.pdf.

[10] *See generally id.*

The Proposed Rule Will Unfairly Lower the Standard for Determining Frivolous Claims to Asylum and Simultaneously Become a Tool for Discouraging Immigrants from Seeking Relief

First, the need for this rule is grounded in three unsubstantiated claims: that fraud is rampant in asylum claims; that the law does not already attempt to regulate asylum fraud; and that the best way to regulate asylum fraud is by punishing asylum seekers for seeking relief even in the absence of fraud. Asylum remains extremely difficult to get—not only are the standards that have to be met difficult, but the process long and complex; and while not necessarily conclusive evidence that fraud does not occur, it is important to note that about half of all claims are already denied asylum.[11] Existing asylum law attempts to detect or deter fraudulent claims in ways that still preserve due process and do not unduly punish the bona fide asylum seeker.[12] More could be done to improve asylum fraud detention with sound practices, such as doing more to corroborate overseas evidence.[13] However, attempting to deter alleged asylum fraud by unfairly punishing asylum seekers for filing broadly defined frivolous claims is not only misguided but dangerous. Asylum seekers are already harshly punished for the commission of fraud. A person who is found to have committed asylum fraud is barred for life from ever seeking an immigration benefit, in addition to potentially facing harsh criminal sanctions. Due to its harshness, the requirement for asylum fraud has been that the petitioner knowingly make a material misrepresentation in the asylum application. This makes sense given the complexity of asylum law that could easily lead many asylum seekers, many of whom must file without lawyers or mental health professionals to support them, to make unwitting mistakes in the process.

Section IB1 of the Proposed Rule, however, would expand the cases regulated as frivolous to include not only those that involve immigration fraud but "applications that are clearly unfounded or abusive." Even well-trained asylum lawyers will have a difficult time discerning when an asylum case is at risk of being deemed unfounded or abusive, especially as asylum laws and practices continue to shift under the Trump administration though executive orders, administrative actions, and hastily adopted regulations. Moreover, asylum officers who conduct credible fear interviews will be asked to document which cases fall into this category, detracting them from the already difficult task of establishing credible fear, and orienting them to pre-judge the potential merits of a case. Similarly Immigration Judges would be encouraged to flag

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[11] Kristie de Peña, Asylum Fraud Isn't What You Think It Is, Niskanen Center, Aug. 14, 2018, https://www.niskanencenter.org/asylum-fraud-isnt-what-you-think-it-is/.

[12] *See generally* Diane Uchimiya, *A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers*, ***26 Penn. St. Int'l L. Rev.*** 383 (2007).

[13] *See, e.g.,* Note, Emily Michelle Papp, *Just Take My Word For It: Creating a Workable Test to Ensure Reliability in Oversees Document Verification Reports for Asylum Proceedings*, 101 ***Iowa L. Rev.*** 2141 (2016).

potential frivolousness and encourage applicants to withdraw their cases without prejudice. This approach creates the dangerous conditions of judges attempting to discourage asylum seekers, many who will not have lawyers to advise them, from moving forward in their asylum cases before the case is fully and sufficiently adjudicated.

The Proposed Rule Forecloses Many of the Common Bases for Asylum Developed Over Decades of Carefully Considered and Coordinated Development of Asylum Law Through the Agencies and the Courts in Response to the Actual Reality of Persecution that Includes Gender Violence and Other Violence Committed by Non-State Actors with the Acquiescence of or Free Rein from the State

The Proposed Regulation Eviscerates Asylum Protection under Particular Social Group

Applicants for asylum and withholding of removal must demonstrate that the persecution they fear is on account of a protected characteristic: race, religion, nationality, membership in a particular social group, or political opinion.[14] Membership in a particular social group in this list was designed to build flexibility into the refugee definition and to capture those who do not fall within the other listed characteristics. The definition of who is a refugee and what is a particular social group should not (and has not) remained frozen at the drafting of the Refugee Convention in 1951 or the U.S. adoption of the 1967 Protocol to the Convention in 1968. Indeed, as the UN High Commission for Refugees has explained: "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."[15]

For over two decades, federal courts and immigration agencies have carefully constructed definitions of social group vetted through emblematic cases that show patterns of persecution around the world and reveal the evolving face of asylum seekers today. Yet, over the past three years, the Administration has systematically altered the established definition of particular social group, using decisions by the Attorney General and Board of Immigration Appeals to eliminate particular social groups. Specifically, these decisions have undercut asylum seekers' ability to pursue asylum based on domestic violence,[16] family membership,[17] and status as a

[14] INA § 101(a)(42).

[15] United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html.

[16] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

[17] *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

landowner.[18] Through these decisions, the Attorney General has tried to erase social groups that had previously been accepted as established under precedent. The proposed regulations would further eviscerate membership in a particular social group, making it difficult to imagine *any* proposed particular social group that would be recognized under the regulations, especially in cases involving harm by non-state actors. This would include the long established particular social groups recognizing those fleeing female genital cutting[19] and those targeted based on sexual orientation[20] as asylees.

Another highly concerning aspect of the changes to particular social group are the provisions attempting to make clear that particular social group cannot be based on "interpersonal disputes" and/or "private criminal acts" "of which governmental authorities were unaware or uninvolved" with exceptions in "rare circumstances." This framing reverts us back several decades in the women's rights movement (which is perhaps the intention), prior to passage of the Family Violence Prevention and Services Act and the Violence Against Women Act (VAWA). The rule's retrogressive framing of family violence as a "personal dispute," even when an asylum seeker can document that it is severe, pervasive, and widely tolerated by authorities and others in her country, runs afoul of the U.S.' own domestic laws and policies. Indeed, a core function of the government is to protect individuals from gender-based violence.

The Proposed Regulations Undermine Long-Established Notions of Political Opinion

The proposed regulations attempt to define political opinion as one expressed by or imputed to an applicant, in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. The proposed regulations make clear that the Attorney General will not favorably adjudicate claims of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations, absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations, or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. The proposed regulations also state that political opinion is against a state or entity and not a "culture."

This redefinition of political opinion contravenes established and existing law. The proposed regulations completely neglect to understand that many asylum seekers flee their country of origin because the government is unable or unwilling to control non-state actors, including transnational criminal organizations and other private actors. In many instances, small acts of resistance by asylum seekers against

[18] *Matter of E-R-A-L-*, 27 I&N Dec. 767 (BIA 2020).

[19] *Matter of Kasinga*, (1996)

[20] *Matter of Toboso-Alfonso* (A.G. 1994).

persecutors are interpreted as expressing an opinion by the persecutor, and may place the applicant's life at risk.[21] The proposed rule's redefinition of political opinion in the narrowest possible way contradicts existing case law, and will send many bona fide asylum seekers back to harm's way. For example, women holding feminist political opinions that men do not have the right to rape them, or indigenous people who oppose gangs' taking their land would be barred from meeting the political opinion definition under this rule. This contradicts the USCIS Asylum Office's long standing guidance for asylum officers, making clear that feminism is indeed a political opinion.[22] Rather than following precedent that recognizes political opinion in such circumstances, the agencies seek to erase all precedent that is favorable to asylum seekers through this rule.

The Proposed Regulations Outline Eight Non-exhaustive Situations—Including Gender—where the Adjudicator Will Not Grant Asylum or Withholding Because these Circumstances Will Generally be Insufficient to Demonstrate Persecution on Account of a Protected Ground

While we take issue with all of the eight grounds precluded from the nexus requirements, we are especially worried about the effect of this rule on undermining protection to individuals fleeing targeting based on their gender. Gender has long been established as a protected characteristic, found to be immutable under the seminal case interpreting particular social group back in 1985, *Matter of Acosta.*[23] Since then, time and time again the Board of Immigration Appeals[24] and the federal courts of appeal have recognized gender as a protected characteristic.[25] Despite the attempt by Attorney General Sessions to undermine protection for survivors of

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[21] Political opinion is often proven by actions or overt expressions of opinion, but, not necessarily – "[l]ess overtly symbolic acts may also reflect political opinion." *Saldarriaga v. Gonzalez*, 402 F.3d 461, 466 (4th Cir. 2005). *See Hernandez-Chacon v. Barr*, 948 F.3d 94, 103 (2d Cir. 2020) ("resisting corruption and abuse of power—including non-governmental abuse of power—can be an expression of political opinion."); *Siong v. INS*, 376 F.3d 1030, 1039 (9th Cir. 2004).

[22] *USCIS Asylum Officer Basic Training Course: Female Asylum Applicants and Gender-Related Claims* (Mar. 12, 2009) (This guidance made clear that "[f]eminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions." Further, "opposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion." USCIS also recognized that a persecutor may attribute a political opinion "to a woman who refuses to comply with social norms or laws governing behavior based on gender.").

[23] *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

[24] *See Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *see also Matter of D-V*, 21 I&N Dec 77, 79-80 (BIA 1993); *Matter of S-A-K- & H-A-H-*, 24 I & N Dec (BIA 2008); *Matter of A-T*, 25 I&N Dec 4 (BIA 2009).

[25] *Fatin v. INS*, 12 F.3d 1233, (3d. Cir. 1993)*; Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999); *Fiadjoe v. AG*, 411 F.3d 135 (3d Cir. 2005); *Ngengwe v. Mukasey*, 543 F. 3d 1029 (8th Cir. 2008).

gender-based violence in his 2018 *Matter of A-B-* decision, women are granted asylum in courts and asylum offices throughout the country every day.

The Proposed Rule Redefines the Internal Relocation Standard for Those Persecuted by Non-State Actors

The proposed regulation shifts the burden to demonstrate by a preponderance of the evidence that internal relocation is not reasonable to the applicant in private actor persecution cases. This presumption appears to apply regardless of whether an applicant has established past persecution. The amendment also provides "examples of the types of individuals or entities who are private actors." This new standard is one that almost no applicant for asylum, withholding of removal or Convention against Torture (CAT) protection, will be able to meet. Under the new rule, the adjudicator must take into consideration "the applicant's demonstrated ability to relocate to the United States in order to apply for asylum."[26] This seems to suggest that the very fact that an asylum seeker was able to leave their country undermines their argument that they would not be safe within that country. It is a very different thing to leave, often secretly, often under cover of darkness, and make one's way across a border, than to live permanently within the country without fear of future persecution. Indeed, federal circuit courts have recognized that it is not a reasonable relocation alternative if the asylum seeker must live in hiding to avoid persecution.[27] The fact of relocating to the United States, and often undertaking a perilous journey to do so, in no way undermines an asylum seeker's claim that she is not safe within her country of origin. The asylum seeker seeks protection in the United States precisely because she believes that the U.S. government can offer something that her country has failed to provide – protection from persecution.

Under the current regulations, adjudicators must perform nearly the totality of the circumstances analysis, including considering "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties."[28] The proposed change to the regulations concerning internal relocation would force adjudicators to make decisions in a vacuum ignoring the overall context of an applicant's plight.

The proposed rule also shifts the burden and requires the asylum seeker to prove that she cannot reasonably relocate—even if she has already suffered persecution—if the persecutor is considered a non-state actor.[29] The asylum

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[26] 8 CFR § 208.13(3); 8 CFR § 1208.13(3).

[27] *Essohou v. Gonzales*, 471 F.3d 518, 522 (4th Cir. 2006); *see also N.L.A. v. Holder*, 744 F.3d 425,435-36 (7th Cir. 2014).

[28] 8 CFR § 208.13(3); 8 CFR § 1208.13(3).

[29] 8 CFR § 208.13(3)(iv); 8 CFR § 1208.13(3)(iv).

definition already requires each asylum seeker to establish that her government is unable or unwilling to protect her from harm. There is no reason to impose this greater evidentiary burden on those fleeing harm from non-state actors.

The proposed rule here is also problematic because other changes severely limit the definition of government officials, including stating that "rogue officials" would not be considered government actors, nor would any action "absent evidence that the government sponsored the persecution." The proposed rule defies common sense. If a government official persecutes an individual or threatens persecution, that individual will usually flee and not stay behind to understand whether or not the harm or threatened harm was officially "sponsored" by their government. Regardless of whether a persecutor is a "rogue official" within the government or truly acting at the behest of other government officials as part of a clear, coordinated plan, as a government employee that persecutor would still have the resources of the state at their disposal in any attempts to find an asylum seeker who attempts to relocate elsewhere within the country.

The Proposed Rule Narrowly Defines Persecution, Impermissibly Altering the Accepted Definition

The most fundamental aspect of asylum law is the obligation of countries to protect individuals with well-founded fears of persecution from being returned to harm.[30] The proposed rule would, for the first time in over 40 years of adjudication under the 1980 Refugee Act, provide a regulatory definition of persecution—a definition that would dramatically restrict what qualifies as persecution. The rule emphasizes that the harm must be "extreme" and that threats must be "exigent." But as the 6th Circuit recently stated, "it cannot be that an applicant must wait until she is dead to show her government's inability to control her perpetrator."[31] Further, among other restrictions, the rule explicitly directs adjudicators not to consider laws on the books that are "unenforced or infrequently enforced" unless the applicant can demonstrate the laws will specifically be enforced against them. This provision fails to take into account the chilling effect that such laws have. For example, an LGBT applicant may fear reporting a hate crime to the police because laws prohibit LGBT activity in the home country. Likewise, a woman who suffered sexual assault in her home country may fear reporting the abuse to the authorities because she knows that laws against rape are not adequately enforced and she may fear retribution from her persecutor(s). The proposed rule also does not require adjudicators to analyze harm cumulatively. Thus adjudicators would likely deny claims by asylum seekers who have been repeatedly detained for their political or religious views if those detentions are considered "brief." The Board of Immigration Appeals, along with the Circuit Courts have long held that even if individual acts of harm might not rise to the level of persecution, adjudicators must consider them in

[30] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428, (1987).

[31] *Juan Antonio v. Barr*, 959 F.3d 778, 794 (6th Cir. 2020).

the aggregate.[32] This omission is troubling and will have adverse effects, again, often on claims for women and children fleeing gender-based violence, which often tends to span a prolonged period of time and increase in severity over that time.

The Proposed Rule Significantly Expands the Factors that an Adjudicator May Rely on To Deny Asylum, Even to Persons who Have Established a Clear Case for Protection from Persecution. This Will Encourage Arbitrary Denials of Asylum and Push Applicants into Withholding of Deportation without a Path to Social Integration

In addition to meeting the legal standard for a refugee, asylum seekers must merit a favorable exercise of discretion.[33] The new discretionary factors proposed by the regulations undermine decades of jurisprudence to deny most asylum applications on discretionary grounds and severely limit an adjudicator's ability to meaningfully exercise discretion. On these grounds, it must be eliminated from the proposed regulations.

The rule proposes about a dozen adverse and significantly adverse factors that an adjudicator must consider in determining whether an applicant merits asylum as a matter of discretion. If one of these adverse factors applies, the adjudicator may favorably exercise discretion *only*: (1) if the applicant demonstrates by clear and convincing evidence that the denial of asylum would result in an exceptional and extremely unusual hardship to the alien, or (2) for reasons of national security or foreign policy interests. This rule is vastly overly restrictive and will result in the denial of asylum protection to genuine refugees, and, as discussed earlier in this comment, the further creation of a subclass of persons with withholding of removal combined with de facto family separation. In our comment, we discuss only some the adverse factors, although we disagree with the imposition of each one of them.

"Significantly Adverse" Factors Unfairly Target Conduct that is Necessary to Escape from Persecution and Seek Asylum

The regulations propose three specific but non-exhaustive "significantly adverse" factors that adjudicators must consider when determining whether an applicant merits asylum as a matter of discretion. The first is an asylum seeker's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or

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[32] *See*, *Matter of O-Z- &I-Z-*, 22 I&N Dec. 23 (BIA 1998); *Herrera-Reyes v. Attorney Gen. of United States*, 952 F.3d 101, 109 (3d Cir. 2020) ("Even if the IJ was correct that no single incident in isolation rose to the level of past persecution, he was still required to analyze whether the cumulative effect of these incidents constituted a severe 'threat to life or freedom.'"); *Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009).

[33] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423, (1987).

torture in a contiguous country. This regulation attempts to achieve through a regulation what this Administration has tried to impose through Executive Order, which is specifically to make it impossible for Central Americans to seek asylum in the U.S.

The attempt to bar asylum for individuals who have crossed the border in between ports of entry contravenes domestic case law, as well as an international legal obligation not to penalize refugees for using irregular means to enter the country. Further, the Trump Administration policies, including metering, the Migrant Protection Protocols, and others, have served to drive asylum seekers to enter in between ports of entry. An asylum seeker, fleeing for her life and to protect her family, does not necessarily know the "proper" way to seek asylum. As the agencies are well aware, there is no way to seek asylum outside the United States and an individual must be within the United States to file a claim. When individuals do appear at the ports of entry to claim asylum, Customs and Border Protection officers frequently turn them away.[34] Thousands of asylum seekers wait for months, in perilous conditions, on the Mexican side of the border. This problem has been exacerbated by the implementation of the Migrant Protection Protocols announced at the end of January 2019, which have created a population of more than 62,000 asylum seekers awaiting adjudication of their claims in Mexico. The various push factors for genuine asylum seekers to enter between ports of entry to seek asylum in the United States include: 1) lack of access to counsel in Mexico, with only 4% of those in the MPP program receiving representation,[35] and 2) dangerous conditions living in Mexico. Human Rights First has documented more than 1001 violent attacks against asylum seekers living in Mexico in a short period of time.[36] In addition, there are serious due

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[34] Sara Campos & Joan Friedland, Am. Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims* (2014) https://www.americanimmigrationcouncil.org/research/mexican-and-central-american-asylum-and-credible-fear-claims-background-and-context ; U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 59 (2007), http://www.uscirf.gov/sites/default/files/resources/AR_2007/annualreport2007.pdf; Clara Long, HUMAN RIGHTS WATCH, "YOU DON'T HAVE RIGHTS HERE:" US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM (2014)

[35] TRAC Immigration, *Contrasting Experiences: MPP v. Non-MPP Court Cases*, (Dec. 19 2019), https://trac.syr.edu/immigration/reports/587/ ("Immigrants who were allowed to wait in the U.S. were over seven times more likely to find an attorney to represent them than those diverted to the MPP program…[A]ccess to attorneys is extremely limited for those required to remain in Mexico. Representation rates do generally increase over time the longer individuals have to obtain attorneys. So far only 4 percent of immigrants in MPP cases have been able to find representation. In contrast, nearly a third (32%) of those who were allowed to remain in the U.S. have obtained counsel over the same time period.")

[36] Human Rights First Fact Sheet, *Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico* (January 2020); *see also* Delivered to Danger, *https://www.humanrightsfirst.org/campaign/remain-mexico* (recounting 1001 cases of murder, rape, kidnapping, torture, and other violent assaults of MPP asylum seekers as of Feb. 28, 2020);

process concerns surrounding the "tent courts" and "port courts" set up to adjudicate MPP asylum claims.[37]

The proposed regulations also treat as a "significant adverse" factor "an alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country." This punitive rule change would deny many legitimate asylum seekers the ability to seek protection. Often those fleeing harm are unable to obtain travel documents because they fear their government. In some countries women cannot apply for passports unless a male family member signs off on the application. Under these proposed regulations, the safety of these asylum seekers would now depend on whether the individual was able to obtain a direct flight to the United States.

"*Significantly Adverse" Factors Unfairly Target Persons Who Must Travel on Foot—Generally the Poor without Access to U.S. Visas -- to Reach to U.S. to Apply for Asylum*

The proposed rule will consider it an adverse factor if an asylum seeker stayed for 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States. This is another attempt at the transit ban in regulatory form, currently being litigated through a challenge in the Ninth Circuit Court of Appeals,[38] and recently struck down by a D.C. Circuit Court of Appeals.[39] Similarly, transit through more than one country prior to arrival to the United States would be another adverse factor. Yet, the countries through which asylum seekers travel often lack a robust and meaningful asylum protection system. Often the countries through which asylum seekers are traveling are themselves producers of some of the highest numbers of asylum seekers, given the humanitarian crisis to our Southern Border in Honduras, Guatemala, and El Salvador.

The adverse factor considering asylum seekers who spend 14 days or more in another country completely undermines the well-established case law surrounding the firm resettlement bar – which was created by Congress.[40] In combination with the Migrant Protection Protocols, which require asylum seekers to remain in Mexico for months on end, this adverse factor would end up barring almost all asylum seekers from ever being granted asylum protection in the United States. The ways in which these regulations intersect with one another and with existing policies and

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[37] Am. Immigration Lawyers Ass'n., *AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum*, Doc. No. 18060102 3 (2018), https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border

[38] *Innovation Law Lab v. Wolf*, 951 F.3d 1073, (9th Cir. 2020).

[39] *See CAIR Coalition et al v. Trump*, Case 1:19-cv-02117-TJK (D.C. Dist. Ct June 30, 2020)

[40] *See* Matter of A-G-G-

procedures put in place by the Trump Administration will create the reality in which *no* asylum seekers will be granted protection.

The Cumulative Effect of the Described Erasure of Asylum Law's Protections Will Also Affect the Most Vulnerable among Us, Children, Over Whom We Have a Special Duty to Protect

The proposed rule would jeopardize the safety and well-being of children by increasing barriers to their right to seek and win asylum. Children are different from adults. They face threats to their safety that are particular to their status as children. Trauma impacts their ability to recall and recount their experiences in a manner specific to their age and developmental stage. Federal law recognizes these differences and affords special protections to children seeking asylum. But the proposed rule abandons these protections. It would eliminate consideration of children's asylum cases with a child-sensitive lens, particularly when examining the elements of persecution and the ground of "particular social group." The rule would deny protection to children seeking safety from gang recruitment or gang violence, gender-based violence, and violence targeted at LGBTQ youth. It would redefine "political opinion" in a manner that would exclude children's legitimate claims. It would redefine persecution and firm resettlement without consideration of how children experience violence and migration. The rule mandates consideration of sweeping, adverse factors that deny the realities of childhood. It would strip children of access to adjudicators through pretermission and it would invite accusations of "frivolous" claims by children—many of whom remain unrepresented. In short, it would return children to danger rather than ensuring full and fair consideration of their experiences of or fear of persecution. Because the proposed rule undermines the best interests of immigrant children, it should be rescinded in its entirety.

The Unfairness and Impossibility of the Above Proposed Changes to Asylum Law will Push Applicants into Withholding of Removal and Create a Permanent Underclass of Refugees Separated From Family and without Hope for Social Integration in the US

The new bars and barriers to asylum protections in this rule, if promulgated, would serve to create a permanent underclass of refugees. These asylum seekers would not be granted asylum—because they may be deemed subject to any number of the changes to asylum law proposed in the regulations—but they would very likely often still be eligible for withholding of removal – a mandatory form of relief tied to our international obligation, under the 1967 Protocol to the Refugee Convention, *withholding Protection.* Yet, withholding status is problematic in a number of ways.[41] In contrast to asylum, withholding does not provide for adjustment of status, family reunification, travel overseas, access to limited public benefits,[42] or a path to citizenship. These critical distinctions between asylum and withholding protection

[41] *See, e.g.*, Lindsay M. Harris, *Withholding Protection*, 50.3 Colum. Hum. Rts. L. Rev. 1 (2019)

[42] *See, e.g.*, Lindsay M. Harris, *From Surviving to Thriving? An Examination of Asylee Integration in the United States*, Vol. 40:29, N.Y.U. Rev. of Law & Social Change (2016).

mean that a withholding grantee lives in permanent limbo, unable to fully integrate, and unable to reunify with family members overseas. An asylum seeker may include their spouse and children under age 21 at the time of filing in their application for asylum, and the whole family is granted if the primary applicant is granted asylum. If the primary applicant is granted withholding, the rest of the family does not benefit. This means that, in the case of an asylum seeker, the grantee's immediate family within the U.S. also receive asylum status, or, if the asylum seeker fled their country of origin without their spouse and/or children, then the asylum seeker may file a follow to join I-730 petition and the family members will eventually be processed and join the asylee with asylum status in the United States. In contrast, an increase in withholding, rather than asylum grants, will result in 1) asylum seekers who are granted withholding with family already in the United States being permanently separated from those family members, with the children and spouse deported while the asylum seeker remains, and 2) asylum seekers granted withholding who had to flee without family members never being able to see those family members again. The psychological harm inflicted by the family separation already instituted by the Trump Administration is well-documented and has been repeatedly decried by mental health professionals[43] and trauma researchers.[44] The proposed rule will further codify this cruel and inhumane policy.

Conclusion

For the above reasons, we are deeply concerned that the proposed rules turn back the clock on significant gains we have made as a nation during the last four decades to comply with our moral and legal obligation to offer protection to migrants who are risking their lives trying to save their lives. Nothing in the rules currently explicitly say that the rule does not apply to "pending" cases, which could potentially affect every case that is still being adjudicated and is not yet final. We urge that you reject the proposed rules in their entirety. This is not who we are as a nation or who we want to be. We are better than this.

Respectfully Submitted,

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[43] Heather Stringer, Psychologists respond to the mental health crisis at the border, APA Monitor, September 2018, Vol. 49, No. *.
https://www.apa.org/monitor/2018/09/crisis-border
[44] Jessica Henderson Daniel and Arthur C. Evans Jr., "Letter to Donald Trump"
https://www.apa.org/advocacy/immigration/separating-families-letter.pdf

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