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Via Federal e-Rulemaking Portal

**RE: Notice of Proposed Rulemaking, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” 85 Fed. Reg. 36264 (June 15, 2020)**

To Whom It May Concern:

**I. Statement of Interest**

The Harvard Immigration & Refugee Clinical Program (“HIRC”) and the HLS Immigration Project (“HIP”) submit this comment on the proposed rules issued by the U.S. Department of Homeland Security (“DHS”) and the U.S. Department of Justice (“DOJ”) (collectively, the “Agencies”), entitled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (the “Proposed Rules”).

HIRC is one of the oldest clinical programs in the country that focuses on the advancement of immigrants’ rights while teaching students critical lawyering skills. HIRC includes two distinct clinics: (1) the Immigration & Refugee Advocacy Clinic, which represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts and (2) the Crimmigration Clinic, which focuses on the growing intersection of criminal law and immigration law. HIRC faculty and staff also teach a range of courses concerning immigration policy, refugees and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. HIRC faculty and staff regularly publish scholarship concerning asylum adjudication, due process protections in removal proceedings, working with traumatized refugees, crimmigration, and immigration detention.

HIRC has worked with thousands of immigrants and refugees since its founding in 1984. Its advocacy includes representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants’ rights. HIRC has an interest in the proper application and development of U.S. asylum law to ensure that the claims of individuals seeking asylum and related relief receive fair and proper consideration under standards consistent with U.S. law and treaty obligations.

HIP is a student-practice organization under the supervision of HIRC, which provides law students with the opportunity to gain practical, hands-on legal experience. HIP represents clients seeking release from detention in Massachusetts, promotes policy reform, and provides representation to refugees and asylees who are seeking family reunification and legal residency.

HIRC and HIP regard the Proposed Rules as arbitrary and capricious and contrary to law. If implemented, the Proposed Rules would contravene the protections the United States is required to provide under domestic and international law to individuals who fear return to persecution or

torture. Stated plainly, the Proposed Rules would jeopardize the lives and safety of countless refugees and asylum seekers eligible for protection. We urge DHS and DOJ to withdraw their current proposal immediately.

In addition to our concerns about the substance of the Proposed Rules, HIRC and HIP also object to the 30-day timeframe for commenting on them. Thirty days is an insufficient period of time for the public to have a meaningful opportunity to comment on the Proposed Rules, particularly in light of their scope and complexity. With more time, HIRC and HIP would have been able to collect data about the likely effect of the Proposed Rules on our clients and/or similarly-situated refugees and asylum seekers. The Agencies have not identified any reason for departing from the more typical comment period of 60 days. If the Agencies do not withdraw the Proposed Rules in their entirety, HIRC and HIP would request that the Agencies extend the comment period or establish a second comment period. Additionally, in light of the thirty-day comment window as regards the substance of the Proposed Rules, HIRC and HIP reserve the right and intend to comment separately within the 60-day period regarding the “information collection” provisions of the proposed rulemaking.

## **II. The Proposed Modifications to the Expedited Removal Process Are Arbitrary and Capricious and Contrary to Law.**

The credible fear interview (“CFI”) is an “initial screening” designed to protect individuals against return to persecution or torture in the expedited removal process in accordance with U.S. obligations under domestic and international law.<sup>1</sup> Congress intended the credible fear interview to involve “a low screening standard for admission into the usual full asylum process,”<sup>2</sup> in order to prevent the return to persecution of individuals with “genuine asylum claim[s].”<sup>3</sup> The Proposed Rules would unlawfully impose additional requirements on asylum seekers to prove their fears of return and eviscerate the safeguards Congress intended the credible fear process to provide. In so doing, the Proposed Rules all but guarantee that bona fide refugees will fail their CFIs and be summarily returned to their home countries without ever having an opportunity to fully present their claims.

When CFIs are conducted, many asylum seekers are detained, have no access to counsel, and are still suffering from significant trauma due to the harm they suffered in their home countries.<sup>4</sup> As a result, it is often very difficult for asylum seekers to recount their past experiences

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<sup>1</sup> H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

<sup>2</sup> See 142 CONG. REC. S11491-02 (“The credible fear standard . . . is intended to be a low screening standard for admission into the usual full asylum process[.]”); see also *Grace v. Whitaker*, 344 F. Supp. 3d 96, 107 (D.D.C. 2018).

<sup>3</sup> H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

<sup>4</sup> See *id.*; Giulia Turrini et al., *Common mental disorders in asylum seekers and refugees: umbrella review of prevalence and intervention studies*, 11 INT’L J. OF MENTAL HEALTH SYSTEMS 51 (Aug. 25, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5571637/> (finding that at least one out of every three asylum seekers struggles with post-traumatic stress disorder, depression, and/or anxiety); Megan Brooks, *Refugees have high burden of mental health problems*, Psychiatry and Behavioral Health Learning Network, (June 19, 2019) <https://www.psychcongress.com/article/refugees-have-high-burden-mental-health-problems>. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 2 (2015) (finding that only “only 37% of all immigrants, and a mere 14% of detained immigrants” were represented by counsel in removal proceedings).

and fears during the CFI process.<sup>5</sup> Language barriers exacerbate these challenges.<sup>6</sup> Qualified interpreters in a particular language may not be available, and asylum seekers may be required to proceed in a language they do not speak fluently. CFIs are frequently conducted telephonically,<sup>7</sup> which may negatively affect the quality of communication. Moreover, not all interpreters are able to correctly interpret idioms or account for cultural variances in languages, which may result in erroneous negative credible fear determinations. Furthermore, DHS has reportedly engaged Customs and Border Protection (“CBP”) officers, who unlike asylum officers do not receive substantive legal training, to conduct CFIs—a task for which they are altogether unequipped.<sup>8</sup>

In line with the “initial screening” purpose and the above-described practical limitations, under current regulation, asylum officers conducting CFIs do not analyze or reach determinations relating to internal relocation or the statutory bars listed in 8 U.S.C. § 1158(b)(2).<sup>9</sup> But the Proposed Rules would require asylum officers to do just that. CFIs are, however, not the proper forum for these determinations, which involve detailed fact-finding and complex legal analysis that can only be carried out in a full adjudication, not in a cursory screening.

For example, in compiling and reviewing the facts and applying the law to reach a determination on a statutory bar, an adjudicator may need to evaluate the relationship between state criminal codes and the INA, take evidence including written and oral testimony from multiple witnesses, review human rights reporting, newspapers articles, and primary documents, and gain a broader, evidence-based understanding of the individual’s circumstances. Importantly, under the current regulations, the government must make a showing that internal relocation is both possible and reasonable to rebut a finding of past persecution.<sup>10</sup> And with respect to statutory bars, it is the government that has the initial burden of showing that the asylum seeker is subject to a bar.<sup>11</sup>

The Proposed Rules, in contrast, would improperly place the burden of proof on asylum seekers (even those who have experienced past persecution) to demonstrate that internal relocation is not reasonable and that they are not subject to a statutory bar—*without any showing by the government at all*. And all of this would be determined while detained, without a hearing, without counsel, and without a reasonable opportunity to present evidence. Such a process would patently contravene Congress’s intent because it would be impossible to ensure under those circumstances,

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<sup>5</sup> See generally *Dep’t of Homeland Security, et al. v. Thuraissigiam*, Brief of Asylum Law Professors Amici Curiae, Jan. 2020, [https://www.supremecourt.gov/DocketPDF/19/19-161/129571/20200122164055218\\_Refugee%20Scholars%20Amicus%20Brief\\_FINAL%20TO%20BE%20FILED.pdf](https://www.supremecourt.gov/DocketPDF/19/19-161/129571/20200122164055218_Refugee%20Scholars%20Amicus%20Brief_FINAL%20TO%20BE%20FILED.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> See U.S. Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 36 (2014) (“59 percent of [credible fear] interviews were conducted” telephonically in FY2014, with “[t]he greatest use of telephonic interviews . . . for asylum seekers in Expedited Removal who crossed the southern border.”).

<sup>8</sup> See Memorandum of Agreement Between U.S. Customs and Border Protection (CBP) and U.S. Citizenship & Immigration Services (USCIS) (July 10, 2019), *available at* <https://www.documentcloud.org/documents/6798341-Signed-MOA-by-Morgan-INTC-1647-Redactions-Applied.html> (providing for CBP officers to begin conducting CFIs).

<sup>9</sup> USCIS-RAIO Asylum Division Officer Training Course Lesson Plan Overview, Credible Fear of Persecution and Torture Determinations 17 (Feb. 13, 2017), *available at* <https://www.aila.org/infonet/raio-and-asylum-division-officer-training-course>.

<sup>10</sup> See 8 C.F.R. §§ 208.13(b)(1)(ii) (establishing regulatory burden-shifting scheme); 1208.13(b)(1)(ii) (same).

<sup>11</sup> *Maharaj v. Gonzales*, 450 F.3d 961, 972 (9th Cir. 2006) (en banc) (explaining that the government bears the initial burden of proof that the firm resettlement bar applies).

that there is “no danger that an [individual] with a genuine asylum claim will be returned to persecution.”<sup>12</sup>

Additionally, the “significant possibility” standard ought to remain the only statutory standard applicable to the CFI; any other standard would be arbitrary and capricious, and contrary to law. The Proposed Rules would unlawfully ratchet up this threshold screening standard, requiring that individuals under consideration for statutory withholding of removal or relief under the Convention Against Torture (“CAT”) demonstrate that they face a “reasonable possibility of persecution” or a “reasonable possibility of torture,” respectively. Yet, in our clinic’s experience, establishing a “reasonable possibility” of persecution often requires assistance of counsel and detailed evidentiary submissions, including multiple declarations, evidence from the home country, and country conditions research—all of which is typically unavailable to asylum seekers in expedited removal at the border.

The Proposed Rules acknowledge that “[i]n some cases, asylum officers would need to spend additional time eliciting more detailed testimony from aliens to account for the higher standard of proof.” Nevertheless, the Proposed Rules assert that “the overall impact on the time asylum officers spend making determinations would be minimal” because “the procedural aspects of making screening determinations regarding fear of persecution and of torture would remain largely the same.” However, the Agencies provide no data or evidence to support the assertion that the overall impact on time will be minimal. We therefore request that the Agencies provide any empirical evidence that underlies this claim. When taken together with the other changes proposed in the Rules, substantial delays in the expedited removal process are inevitable.

### **III. The Proposed Rules’ Misguided Attempt to Re-Write the Definition of Refugee is Unlawful.**

#### **A. The Proposed Rules’ Definition of “Persecution” Flies in the Face of Decades of Precedent, Discounts the Severity of Cumulative Harms and Nonphysical Harms, and Ignores that Child Refugees Require a Differentiated Analysis When Considering the Seriousness of Harm.**

The Proposed Rules would unlawfully impose a rigid and narrow definition on persecution—a term intentionally left undefined in both the Refugee Convention and U.S. statute.<sup>13</sup> In doing so, the Proposed Rules would deviate from the well-settled understanding that persecution is a flexible concept that encompass evolving types of harm.<sup>14</sup> More specifically, the Proposed Rules would unlawfully limit the type of harm that constitutes persecution, restricting it to “actions so severe that they constitute an exigent threat.” As such, the Proposed Rules would fail to account for the cumulative effect of harm and the psychological harm that can be caused by repeated threats, even when “there is no actual effort to carry out the threats.”

Indeed, courts have repeatedly recognized that “[c]redible, specific threats can amount to persecution if they are severe enough,” and “[t]hreats of murder[] fit squarely within this rubric.”<sup>15</sup>

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<sup>12</sup> H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

<sup>13</sup> See Sabrineh Ardalan & Palmer Lawrence, *The Importance of Nonphysical Harm: Psychological Harm and Violations of Economic, Social, and Cultural Rights in U.S. Asylum Law*, 14-09 IMMIGRATION BRIEFINGS 1, 3 (Sept. 2014).

<sup>14</sup> See Deborah Anker, LAW OF ASYLUM § 4:4 (2020).

<sup>15</sup> See, e.g., *Javed v. Holder*, 715 F.3d 391, 395-96 (1st Cir. 2013) (internal citations omitted).

In a recent case, for example, HIRC represented a Central American asylum seeker who experienced increasingly violent, credible, and graphic threats, which an immigration judge recognized as persecution. Another example is *N.L.A. v. Holder*, where the Revolutionary Armed Forces of Colombia killed the asylum seeker's uncle, kidnapped her father, and delivered a threat to the asylum seeker through her father.<sup>16</sup> The immigration judge and Board concluded the asylum seeker had not been persecuted because she was never directly harmed or threatened, and the unfulfilled threat was insufficient to constitute persecution.<sup>17</sup> The Seventh Circuit reversed, describing the harm to the asylum seeker's uncle and father as part of the threat to the applicant and noting that "[i]n many instances, watching a loved one suffer is more harmful than suffering oneself."<sup>18</sup> The Proposed Rules conflict with this well-settled statutory interpretation.

HIRC has also represented many LGBTQI refugees in asylum applications, and the Proposed Rules could lead to significant adverse results for members of the LGBTQI community who also frequently experience severe nonphysical harm.<sup>19</sup> For example, HIRC recently successfully represented a gay couple from the Middle East in affirmative asylum proceedings. Their claims for protection were granted based, *inter alia*, on the cumulative psychological harm suffered, including severe mental distress and even suicide attempts. Yet, under the Proposed Rules, such severe harm would no longer rise to the level of persecution in direct contravention of long-standing precedent.

Additionally, the Proposed Rules fail to provide any guidance whatsoever on adjudicating claims by children who may experience harm differently from adults. Federal courts have consistently recognized that "age can be a critical factor" in determining past persecution or a well-founded fear of persecution and "the harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution."<sup>20</sup> The rigid and narrow definition of persecution under the Proposed Rules, however, fails to incorporate the child-sensitive approach to assessing whether harm rises to the level of persecution required under U.S. law.

## **B. The Proposed Rules Regarding Nexus Impermissibly Establish Categorical Barriers to Asylum Claims Based on Gender and/or Domestic Violence, and Violate the REAL ID Act's "At Least One Central Reason" Standard for Nexus in Asylum Claims.**

Under the REAL ID Act of 2005, Congress specified that for asylum claims persecution is "on account of" a protected ground whenever a protected ground "was or will be at least one central reason" for the persecution.<sup>21</sup> The plain, unambiguous language of the statute recognizes that

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<sup>16</sup> 744 F.3d 425, 429-30 (7th Cir. 2014).

<sup>17</sup> *Id.* at 431-32.

<sup>18</sup> *Id.* at 432.

<sup>19</sup> See USCIS-RAIO Guidance for adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims, § 4.1 (Mar. 2012), available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>. ("Being compelled to abandon or conceal one's sexual orientation or gender identity, where this is instigated or condoned by the state, may amount to persecution. LGBTI persons who live in fear of being publicly identified often conceal their sexual orientation in order to avoid the severe consequences of such exposure").

<sup>20</sup> *Ordonez-Quino v. Holder*, 760 F.3d 80, 84 (1st Cir. 2014); *Kholavskiy v. Mukasey*, 540 F.3d 555, 569 (7th Cir. 2008) ("In assessing whether incidents cross the line from harassment to persecution, we look not only at the nature of the abuse that the individual endured, but also the age of the petitioner at the time the events took place.").

<sup>21</sup> 8 U.S.C. § 1158(b)(1)(B)(i).

persecutors may have multiple reasons for inflicting harm and that merely identifying some other, non-protected reason cannot foreclose relief.<sup>22</sup> Consistent with this unambiguous statutory language, the Board and courts have explicitly held that persecutors may have mixed motives and that a protected characteristic need not be the *only* reason for persecution.<sup>23</sup> Courts have thus held that if a nexus exists between the persecution and a protected ground, “the simultaneous existence of a personal dispute doesn’t eliminate that nexus.”<sup>24</sup> Yet, the Proposed Rules contravene this Congressionally-mandated mixed-motives approach, and instead declare by unexplained fiat that nexus to a protected ground will not exist in a variety of factual circumstances.<sup>25</sup>

Most notably, the Proposed Rules state that, in general, asylum claims will not be successful where the persecution is based on: (1) personal animus or retribution; (2) interpersonal animus where the persecutor has not targeted or manifested an animus against other members of the particular social group; or (3) gender. If published in their current form, these Proposed Rules would encourage adjudicators to improperly deny bona fide asylum claims as facially invalid without substantively assessing whether at least one protected ground constitutes a central reason for the persecution suffered or feared.

This is especially true in the case of survivors of domestic violence or other forms of gendered violence, because the regulations encourage adjudicators to dismiss their persecution as based on “interpersonal animus,” rather than on account of a protected ground. But this notion flies in the face of social science research,<sup>26</sup> which demonstrates that gender is at least one central reason for so-called “interpersonal violence.”<sup>27</sup> Moreover, nexus is a factual question and categorically denying all cases where gender is part of the nexus is antithetical to the case-by-case analysis required by asylum law.<sup>28</sup> The Proposed Rules undermine protection whenever gender is at least one central reason for persecution, and in so doing improperly conflate the particular social group and nexus elements of the refugee definition. Specifically, the Proposed Rules nonsensically identify “gender” as a “situation” in which the Agencies will not favorably adjudicate asylum or withholding claims.

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<sup>22</sup> See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) (characterizing the nexus inquiry as a question of fact); *Cruz v. Sessions*, 853 F.3d 122, 129 (4th Cir. 2017) (same); *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012) (same); *Pulisir v. Mukasey*, 524 F.3d 302, 309 (1st Cir. 2008) (same).

<sup>23</sup> See, e.g., *Parussimova v. Mukasey*, 555 F.3d 734, 740 (9th Cir. 2009); *Ndayshimiye v. Att’y Gen.*, 557 F.3d 124, 129 (3d Cir. 2009); *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012); *Acharya v. Holder*, 761 F.3d 289, 297-98 (2d Cir. 2014); *Matter of S-P-*, 21 I. & N. Dec. 486, 492-95 (B.I.A. 1996).

<sup>24</sup> See *Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) (“[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus.”); see also *Ndayshimiye v. Att’y Gen. of U.S.*, 557 F.3d 124, 129 (3d Cir. 2009) (“[T]he mixed-motives analysis should not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate.”); *Oliva v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015) (rejecting as unreasoned the BIA’s distinction between an applicant’s “status as a former gang member” and the gang’s “personal” desire to punish him for leaving the gang).

<sup>25</sup> Cf. *De Pena-Paniagua v. Barr*, 957 F.3d 88, 91-94 (1st Cir. 2020) (analyzing Attorney General’s decision in *Matter of A-B-* and finding lack of “any basis other than arbitrary and unexamined fiat for categorically decreeing without examination that there are no women in Guatemala who reasonably feel unable to leave domestic relationships as a result of forces other than physical abuse”).

<sup>26</sup> See, e.g., American Psychological Association, *Violence and the Family: Report of the APA Presidential Task Force on Violence and the Family—Executive Summary* (2005), available at [http://www.nnflp.org/apa/APA\\_task\\_force.htm](http://www.nnflp.org/apa/APA_task_force.htm).

<sup>27</sup> *Kamar v. Sessions*, 875 F.3d 811, 818 (6th Cir. 2017).

<sup>28</sup> *Valdiviezo-Galdamez v. Att’y Gen.*, 502 F.3d 285 (3d Cir. 2007).

The Proposed Rule erroneously asserts that this exclusion of gender-based claims is “rooted in case law.” Yet the very case the Proposed Rules cite, *Niang v. Gonzales*,<sup>29</sup> stands for the exact opposite legal proposition. In *Niang*, the Tenth Circuit explained “that the focus [of analysis] with respect to [gender-based asylum] claims should not be on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.”<sup>30</sup> The Proposed Rules seem to suggest that gender cannot form a basis for asylum because it would permit too many people to claim protection. But this unsupported assertion, which itself appears to conflate the nexus and protected ground analyses, is contradicted by well-reasoned court decisions.<sup>31</sup> As the *en banc* Seventh Circuit explained in *Cece v. Holder*, “[i]t would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.”<sup>32</sup>

Additionally, the Proposed Rules’ unsupported assertion fails to acknowledge that denying asylum based on gender is a dramatic departure from well-established law that will have profound effects on some of the most vulnerable people. For example, female genital mutilation or cutting (“FGM/C”) is a well-established basis for asylum and various apparatuses of the U.S. government have recognized the gendered character of the severe harm caused by FGM/C. Indeed, USCIS has identified FGM/C as both a “serious human rights abuse” and “gender-based violence.”<sup>33</sup> The U.S. Department of Health & Human Services lists “severe pain,” “serious bleeding,” “infection,” “trauma,” and “death” as among the immediate medical problems that can accompany FGM/C.<sup>34</sup> The long-term effects can include higher risk of HIV and other STI/STD transmissions, vaginal scarring and pain during sex, depression and anxiety, painful and prolonged menstrual periods, urinary problems, and more.<sup>35</sup> Further, the World Health Organization describes the practice as

<sup>29</sup> *Niang*, 422 F.3d 1187, 1199-200 (10th Cir. 2005).

<sup>30</sup> *Id.* at 1199-200 (emphasis added).

<sup>31</sup> See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (“Thus, we clearly acknowledged that women in a particular country, regardless of ethnicity or clan membership, could form a particular social group”); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (“Somali females” constitute a particular social group); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Iranian women meet the social group definition). See also *Matter of A-T-*, 24 I. & N. Dec. 296, 304 (B.I.A. 2007) (“gender is an immutable trait that is generally recognizable”), *vacated and remanded*, 24 I. & N. Dec. 617 (A.G. 2008).

Recently, in *De Pena-Paniagua v. Barr*, the First Circuit considered whether gender alone might constitute a PSG in the context of a domestic violence case. See 957 F.3d 88, 95 (1st Cir. 2020) The First Circuit noted that the Board applied the doctrine of *eiusdem generis* to the statute to develop its test in *Matter of Acosta*, which concluded that the shared characteristic of gender is comparable to the other protected grounds in the INA. See *id.* at 94. Noting that some case law gave rise to a fear that “women” or “women in country X” might be too large or too indistinct to serve as a PSG, the First Circuit concluded that “it is not clear why a larger group defined as ‘women’, or ‘women in country X’—without reference to additional limited terms—fails either the ‘particularity’ or ‘social distinction’ requirement. See *id.* at 96. The First Circuit explained that “gender serves as a principal, basic differentiation for assigning social and political status” in some countries. See *id.* The First Circuit further found it would be “unsurprising [] that if race, religion, and nationality typically refer to large classes of persons, particular social groups—which are equally based on innate characteristics—may sometimes do so as well.” See *id.*

<sup>32</sup> See 733 F.3d 662, 675 (7th Cir. 2013) (*en banc*).

<sup>33</sup> *Female Genital Mutilation or Cutting (FGM/C)*, USCIS, available at <https://www.uscis.gov/fgmc> (last modified June 15, 2018).

<sup>34</sup> *Female genital mutilation or cutting*, U.S. Dep’t of Human Serv., available at <https://www.womenshealth.gov/a-z-topics/female-genital-cutting> (last updated Apr. 1, 2019).

<sup>35</sup> *Id.*

having “[n]o health benefits, only harm.”<sup>36</sup> Yet, under the Proposed Rules, a girl could be denied safety in the United States and subjected to this practice against her will.

Finally, the Proposed Rules seek to exclude evidence that can be critical to demonstrating gender is “at least one central reason,” by prohibiting “consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender.”<sup>37</sup> For example, the Proposed Rules characterize evidence of societal machismo as resting on “pernicious cultural stereotypes” that “have no place in the adjudication of applications for asylum.”<sup>38</sup> This provision would severely limit submission of key evidence needed to support gender-based claims, including documentation that violence against women in a particular society is committed with impunity and that gender is “at least one central” reason for their harm.

### **C. The Proposed Rules Misapprehend Fundamental Law Regarding “Particular Social Group.”**

As with nexus, the Proposed Rules would preclude, without explanation, entire categories of “particular social groups” (“PSGs”),<sup>39</sup> including those based on “past . . . criminal . . . associations.”<sup>40</sup> However, by categorically excluding certain classes of people from asylum protection, the Agencies demonstrate a fundamental misunderstanding of their own doctrine.

The Board of Immigration Appeals (“BIA” or “Board”) explained in its 1987 decision in *Matter of Acosta* that a “particular social group” is one united by a common immutable characteristic or fundamental trait and that the cognizability of a PSG is determined over a series of case-by-case adjudications.<sup>41</sup> The Board reiterated the case-by-case analysis in *Matter of M-E-V-G-*, wherein it further specified a valid particular social group exists when (1) group members share an immutable characteristic, (2) the group is defined with particularity, and (3) the group is socially distinct within the society in question.<sup>42</sup> Yet the Proposed Rules never explain why the listed groups do not satisfy these requirements, instead declaring conclusively that they would “generally be insufficient.”<sup>43</sup>

Courts have, however, made clear that the government cannot simply declare that a social group is not cognizable without analysis. For example, in a July 2020 published opinion, the Second Circuit vacated a BIA decision, holding that an asylum seeker’s articulated social group, which was based on former criminal membership, was as a categorical rule non-cognizable because “the BIA’s own precedential decisions require the agency to determine on a case-by-case basis whether a group is a particular social group for the purposes of an asylum claim.”<sup>44</sup> Similarly, the First Circuit recently “reject[ed] as arbitrary and unexamined the BIA holding . . . that [petitioner’s] claim necessarily fails because the groups to which she claims to belong are

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<sup>36</sup> *Female genital mutilation*, World Health Organization (Feb. 3, 2020), available at <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

<sup>37</sup> 85 Fed. Reg. at 36282.

<sup>38</sup> *Id.*

<sup>39</sup> 85 Fed. Reg. at 36279.

<sup>40</sup> *Id.*

<sup>41</sup> 19 I. & N. Dec. 211, 233 (B.I.A. 1987).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 53.

<sup>44</sup> See *Ordonez-Azmen v. Barr*, \_\_\_ F.3d\_\_\_ (2d Cir. 2020) (Slip Op.) at 13.



necessarily deficient.”<sup>45</sup> The stated intent of the Proposed Rules—to “reduce the amount of time the adjudicators must spend evaluating such claims”—defies the Board’s mandate for a careful, case-by-case review.<sup>46</sup>

In addition to short-circuiting case-by-case PSG analysis, the Proposed Rules also state that asylum seekers will “waive the ability to file any motion to reopen or reconsider an asylum application related to the alien’s membership in a particular social group that could have been brought at the prior hearing.” The effect of this change will be to unfairly force asylum seekers—including those proceeding without counsel—to perfectly anticipate, and make strategic litigation choices based upon, frequently morphing administrative and judicial standards for cognizable PSGs.<sup>47</sup> This is particularly unreasonable in light of the fact that “[d]efining a PSG is unspeakably complex and the requirements ever-changing.”<sup>48</sup> And, as adjudicators have emphasized, a refugee is “no less deserving of asylum’s protections because of her inability to exactly delineate a convoluted legal concept.”<sup>49</sup>

#### D. Political Opinion

The Proposed Rules similarly attempt to rewrite the definition of political opinion as a protected ground in direct contravention of U.S. obligations under domestic and international law. Under the Proposed Rules, the meaning of political opinion would be limited to “an ideal or conviction in support of a discrete cause related to political control of a state or a unit thereof.” This change would dramatically narrow the definition of political opinion to those related to a formal political ideology or party. The Proposed Rules also appear to unlawfully narrow political opinion claims to those involving formal state institutions. The proposal thus flies in the face of decades of precedent establishing that political opinion should be interpreted much more broadly and would eliminate the possibility of protection for many vulnerable refugees.<sup>50</sup>

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<sup>45</sup> *De Pena-Paniagua*, 957 F.3d at 94.

<sup>46</sup> See, e.g., *Ordonez-Azmen v. Barr*, \_\_\_ F.3d \_\_\_ (2d Cir. 2020) (Slip Op.) at 13 (“[T]he BIA’s own precedential decisions require the agency to determine on a case-by-case basis whether a group is a particular social group for the purposes of an asylum claim.”); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (“To be consistent with its own precedent, the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity.”); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014) (“[S]ocial group determination[s] must be made on a case-by-case basis[.]”).

<sup>47</sup> Compare *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42 (B.I.A. 2017) (recognizing an applicant’s nuclear family is a cognizable PSG) with 27 I. & N. Dec. 581, 594–95 (A.G. 2019) (ruling on the same record the same applicant’s family is not a cognizable PSG); also compare *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014) (recognizing “married women in Guatemala who are unable to leave their relationship” as a cognizable PSG) with *Matter of A-B-*, 27 I. & N. Dec. 316, 333 (ruling “A-R-C-G- was wrongly decided”) and *Juan Antonio v. Barr*, 959 F.3d 778, 790-91 n. 3 (6th Cir. 2020) (holding *Matter of A-B-* has been abrogated and the *Matter of A-R-C-G-* formulation may be cognizable).

<sup>48</sup> *Cantarero-Lagos v. Barr*, 924 F.3d 145, 154 (5th Cir. 2019) (Dennis, J., concurring).

<sup>49</sup> *Id.*; *Cece*, 733 F.3d at 670 (“Both the parties and the immigration courts were inconsistent [in articulating the contours of the relevant social group], and the description of her social group varied from one iteration to the next. The inconsistencies, however, do not upset the claim.”).

<sup>50</sup> See, e.g., *Zhiqiang Hu v. Holder*, 652 F.3d 1011, 1017 (9th Cir. 2011) (“[A] political opinion encompasses more than just participation in electoral politics or holding a formal political ideology.” (citation omitted)); *Hasan v. Ashcroft*, 380 F.3d 1114, 1120 (9th Cir. 2004) (*overruled on other grounds by*, *Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015)) (holding that the reporter’s “article was a political statement despite the fact that she did not espouse a political theory”). See also United Nations High Commissioner for Refugees, UNHCR Guidelines on International Protection No. 10, ¶ 51, HCR/GIP/13/10 (Nov. 12, 2014), available at

Adjudicators have long agreed that political opinion claims are not limited to those related to formal state institutions.<sup>51</sup> For example, in one HIRC case, a children’s rights activist was found to have a well-founded fear of future persecution based on her political opinion because of her work to prevent local children from being recruited by gangs.<sup>52</sup> The court rightfully concluded that her anti-gang and pro-community welfare activism qualified as a political opinion.<sup>53</sup> Yet under the Proposed Rules, opposition to gangs would not qualify as a political opinion because gangs are not formal state actors—even though, in some countries, violent gangs overpower state actors and assume control over certain territories.<sup>54</sup> Although these gangs may not legally have “control of a state or unit thereof,”<sup>55</sup> they are nonetheless powerful political entities, and in many areas, usurp the power of the state. The Proposed Rules thus ignore the reality that many asylum seekers are forced to flee *because* the gangs are more powerful than the state itself.

Moreover, courts have long understood that feminist opinions and opinions related to basic human rights constitute political opinions for asylum purposes, even though they are not directly related to party politics.<sup>56</sup> In addition, the Department of Justice itself has recognized that violations of gender-discriminatory norms can be considered expressions of feminist political opinions.<sup>57</sup> The Proposed Rules would, however, defy this precedent by excluding belief in

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<http://www.refworld.org/docid/529ee33b4.html> [perma.cc/F588-MNZH] (“The political opinion ground is broader than affiliation with a particular political movement or ideology[.]”).

<sup>51</sup> See, e.g., *Matter of —*, Hartford Immigration Court (Jan. 14, 2015), available at perma.cc/U4JP-LE3Y (granting asylum on the basis of anti-gang political opinion claim “[i]n light of the gangs’ political agendas and effective control over large areas of Guatemalan territory”).

<sup>52</sup> —, Boston Immigration Court, at 9 (Sept. 18, 2019) (unpublished) (on file with author).

<sup>53</sup> *Id.*

<sup>54</sup> See Alexandra Grayner, *Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum After Matter of S-E-G-*, 63 HASTINGS L.J. 1417, 1425 (2012) (explaining that gangs are so powerful in certain areas that police officers must ask permission before entering).

<sup>55</sup> 85 Fed. Reg. at 36280.

<sup>56</sup> See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993); *Zavala Meza v. Barr*, 773 Fed. Appx. 977, 977 (9th Cir. 2019) (holding that “rejecting a job offer from a police commander” constituted “an anti-corruption political opinion”) (citing *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010)); *Osorio v. I.N.S.*, 18 F.3d 1017, 1029-30 (2d Cir. 1994) (criticizing the Board for “ignor[ing] the political context” of a union dispute in Guatemala and stating that, “in a country where the government suppresses civil liberties and commits widespread human rights violations, unions (and student organizations) are often the only vehicles for political expression”). See also *Hernandez-Chacon v. Barr*, 948 F.3d 94, 102-05 (2d Cir. 2020) (finding that the BIA failed to adequately consider whether petitioner’s “opposition to the male-dominated social norms in El Salvador and taking a stance against a culture that perpetuates female subordination and the brutal treatment of women” constituted an expression of political opinion); *Fatin*, 12 F.3d at 1241-42; *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994); *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1435-36 (9th Cir. 1987) *overruled in part on other grounds by Fisher v. I.N.S.*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (finding that resistance to rape and beating constituted political opinion opposing male domination); — (B.I.A., July 3, 2019) (unpublished) (remanding because immigration judge “does not adequately explain why the respondent’s belief in women’s equality, as expressed to her former partner, does not constitute a political opinion”), available at <https://perma.cc/3L3R-NTXR>; — (Arlington Immigration Court, July 29, 2019) (unpublished) (finding respondent’s “belief in women’s rights and equality constitutes a political opinion”) (on file with author); see also USCIS, RAIO Combined Training Course: Female Asylum Applicants 36 (Oct. 16, 2012), available at perma.cc/D3YU-RHCP (“[E]xpressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior . . . may all be expressions of political opinion.”).

<sup>57</sup> See INS, *Considerations for Asylum officers Adjudicating Asylum Claims from Women* 8 (May 26, 1995), available at <https://www.state.gov/s/l/65633.htm> (emphasizing that an applicant can assert fear of persecution “on account of a political or religious belief concerning gender” and that adjudicators should give such claims “proper consideration”); see also UNHCR, *Guidelines on International Protection: Gender-Related Persecution* ¶ 26 (2002),

women's rights as a political opinion. The Proposed Rules would thus likely have particularly harmful effects on women and girls fleeing persecution based on their beliefs in gender equality.<sup>58</sup>

#### **IV. The Proposed Rules Place Additional Unreasonable and Unlawful Burdens upon Asylum Seekers.**

##### **A. Firm Resettlement**

The Proposed Rules would change the definition of firm resettlement due to “increased availability of resettlement opportunities,” because forty-three countries have signed the Refugee Convention since 1990. But ratification of the Refugee Convention or Protocol in no way guarantees an effective asylum or resettlement process.<sup>59</sup> Many countries that are party to the Refugee Convention and Protocol do not have fair or accessible asylum processes, and asylum seekers who travel through transit countries often face persecution similar to what they experienced in their home country.<sup>60</sup> Indeed, the Agencies provide no evidence that would reflect the increased availability of adequate resettlement opportunities in those countries. We therefore request that the Agencies provide empirical evidence for the time period of fiscal years 2010 to 2020 that reflects (1) the number of refugees who were given permanent resident status, citizenship, or some other type of permanent resettlement in each country that is party to the Refugee Convention and Protocol, (2) the laws and procedures adopted by each country to incorporate the Convention and Protocol into its domestic legal system, as well as actual practice of implementation, and (3) the number of U.S. asylum seekers who were denied protection based on the firm resettlement bar.

The legislative history of the Refugee Act makes clear that statutory bars included in the legislation were based on, and intended to be interpreted consistently with, the Refugee Convention and Protocol's exclusion from refugee status of “a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”<sup>61</sup> Thus, Congress, when including a “firm resettlement” bar in U.S. law, understood it to be equivalent to

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<https://www.unhcr.org/3d58ddef4.pdf> (“[C]ontrary behavior . . . or failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows.”).

<sup>58</sup> See Nancy Kelly, *Gender-Related Persecution: Assessing Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 642 (1993) (“The existing refugee definition contained in the Convention and the Immigration and Nationality Act can accommodate the majority of gender-related cases of women, formulated as persecution based on membership in a particular social group, *political opinion or imputed political opinion*.”) (emphasis added).

<sup>59</sup> The fact that a third country has ratified the Refugee Convention or Refugee Protocol is *not sufficient* to validate a transfer of an applicant's asylum claim to that country. UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, 4 ¶ 10 (Apr. 2018), available at <https://www.refworld.org/docid/5acb33ad4.html>.

<sup>60</sup> See *East Bay Sanctuary Covenant*, No. 19-16487, 2020 WL 3637585, at \*11 (9th Cir. July 6, 2020) (describing that signatories to the Convention and Protocol merely submit an instrument to the U.N. Secretary General and need not submit to any meaningful procedure to ensure that its obligations are actually discharged, and that many asylum seekers flee Guatemala, Honduras, and El Salvador, which are all signatories).

<sup>61</sup> See Refugee Convention, Art. 1(E); *Matter of A-G-G-*, 25 I. & N. Dec. 486, 489-94 (B.I.A. 2011) (discussing the history of the firm resettlement bar); see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) (Blackmun, J., concurring) (“[I]n the 1980 Act, Congress was attempting to bring this country's refugee laws into conformity with the United Nations Protocol”).

Article I.E of the Refugee Convention, which requires both that the individual has actually “taken residence” in the country in question and has been accorded “rights and obligations” comparable to “national[s] of that country.”<sup>62</sup>

Current implementing regulations require that a person have, or have been offered, “permanent resident status, citizenship, or some other type of permanent resettlement.”<sup>63</sup> An asylum seeker can rebut the contention that she was firmly resettled when entry was a necessary consequence of flight from persecution and she established no significant ties in the country and when the authorities in the country of refuge substantially and consciously restricted conditions of residence with respect to housing, employment opportunities, education, or travel documentation.<sup>64</sup>

The Proposed Rules would greatly exacerbate the divergence of U.S. firm resettlement standards from international law and would radically change the framework. Under the Proposed Rules, an asylum seeker would be considered “firmly resettled” if (1) she resided with or could have obtained permanent legal immigration status or indefinitely renewable legal immigration status in a country through which she transited prior to arriving in or entering the United States; (2) she resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing her home country; or (3) she had citizenship in a country other than the one where she alleged a fear of persecution and was present in that other country prior to arriving in the United States.<sup>65</sup>

This unwarranted expansion of the firm resettlement bar unfairly penalizes asylum seekers whose journey to safety inside the United States can be treacherous and long, and may involve transit across multiple countries. The Proposed Rules ignore the fact that those with temporary or renewable status are still in a liminal state, subject to a country’s changing laws and policies.<sup>66</sup> In many countries, refugees or persons granted some other humanitarian status are given one- or two-year residence permits, with no assurance whatsoever of renewal. Their status can be terminated at any time, and they do not acquire rights of permanent residence. In no way can they be said to be “firmly resettled.” With no permanent right to remain, they lack the most basic attribute of firm resettlement, which, as the Refugee Convention makes clear, is holding rights comparable to those of nationals.

A “critical component” of the statutory firm resettlement bar is that an asylum seeker “be genuinely safe” in another country, based on an assessment of her facts.<sup>67</sup> As the Ninth Circuit explained in *East Bay Covenant Sanctuary*, “[t]he safe-place requirements embedded in the third-country and firm-resettlement bars ‘ensure that if [the United States] denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution’—an outcome which ‘would totally undermine the humanitarian policy underlying the regulation.’”<sup>68</sup>

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<sup>62</sup> See Refugee Convention, Art. 1(E).

<sup>63</sup> See 8 C.F.R. §§ 208.15, 1208.15.

<sup>64</sup> *Id.*

<sup>65</sup> 85 Fed. Reg. at 36286.

<sup>66</sup> See, e.g., *Maharaj*, 450 F.3d at 969 (en banc); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 819-20 (9th Cir. 2004) (determining that an offer of temporary residence does not compel a finding of firm resettlement). See also *Masihi v. Holder*, 519 F. App’x 963, 963 (9th Cir. 2013) (finding that the applicant’s possession of a renewable visa and work permit in a third country was insufficient for firm resettlement).

<sup>67</sup> *East Bay Sanctuary Covenant*, 2020 WL 3637585 at \*11.

<sup>68</sup> *Id.*

Here, as was the case with the transit rule at issue in *East Bay Covenant Sanctuary*, “[t]he rule does not even superficially resemble the firm-resettlement bar” and fails to consider whether the asylum seeker “either truly resettled in a third country, or . . . received an actual offer of firm resettlement in a country where they have ties and will be provided appropriate status.” Instead, the Proposed Rules would deny protection to an asylum seeker if she could have resided in any non-permanent, potentially indefinitely renewable legal immigration status in any country through which she transited, even if she did not apply for such status. The Proposed Rules would also deny protection to an asylum seeker if she resided for one year in another country, without regard to her legal status in that country. As such, the Proposed Rules are not in accordance with law and are in excess of statutory limitations.

## **B. Internal Relocation**

The Proposed Rules presume, without explanation, that internal relocation is reasonable when an asylum seeker faces persecution by a non-state actor. Yet, the Agencies offer no evidence or analysis to support this unfounded contention. Indeed, in many countries, violence at the hands of non-state actors is widespread, and the state cannot or will not provide protection. Organized crime groups, for example, have networks and use them to continue to persecute those who relocate.

Moreover, the Proposed Rules would place the burden on the asylum seeker, regardless of whether she has established past persecution, to demonstrate by a “preponderance of the evidence” that internal relocation is *not* reasonable.<sup>69</sup> In doing so, the Proposed Rules impose a burden that goes well beyond the well-founded fear standard for asylum eligibility established by the Supreme Court in *INS v. Cardoza-Fonseca*.<sup>70</sup> Under Supreme Court precedent, an asylum seeker may establish eligibility for protection if she shows a one in ten chance of persecution if returned to her home country.<sup>71</sup> To the extent that the Proposed Rules require an asylum applicant in this scenario to prove anything more than a well-founded fear, they are ultra vires and violate *INS v. Cardoza-Fonseca* and the Refugee Convention.

## **C. Discretion**

The Proposed Rules break with over 30 years of case law regarding the use of discretion in asylum adjudications. In its 1987 decision in *Matter of Pula*, the BIA emphasized that “danger of persecution should outweigh all but the most egregious of adverse factors.”<sup>72</sup> Since that time, federal courts reviewing discretionary denials have required adjudicators to fully consider both positive and adverse factors in making a determination. Courts have maintained, for example, that

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<sup>69</sup> 85 Fed. Reg. at 36282 (“[T]he Departments propose to amend the regulations to presume that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be.”).

<sup>70</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (“That the fear must be ‘well founded’ does not alter the obvious focus on the individual’s subjective beliefs, nor does it transform the standard into a ‘more likely than not’ one.”)

<sup>71</sup> *Id.* at 440; *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (“[E]ven a ten percent chance of persecution may establish a well-founded fear.”).

<sup>72</sup> *Matter of Pula*, 19 I. & N. Dec. 467, 474 (B.I.A. 1987). This case was not overturned by *Matter of A-B-* in 2018. While *Matter of A-B-* relied on dicta and did not state the central holding of *Pula*, it nonetheless confirmed the Board’s precedent in *Matter of Pula*, citing it for the governing standard on discretion.

the use of false documents and transit through safe third countries do not bar asylum seekers from relief.<sup>73</sup> As one court has noted, “[i]f illegal manner of flight and entry were enough independently to support a denial of asylum . . . virtually no persecuted refugee would obtain asylum.”<sup>74</sup> Indeed, in a recent decision striking down a joint interim final rule that the DOJ and DHS published without notice and comment, the Ninth Circuit commented on the Attorney General’s “misunderstanding of . . . discretion to deny asylum under § 1158(b)(1)(A).”<sup>75</sup> In that decision, the Ninth Circuit clarified the distinction between the “[d]iscretion to deny asylum to eligible aliens” and “discretion to prescribe criteria for asylum eligibility,” and emphasized that any exercise of discretion must be consistent with the statute.<sup>76</sup>

Instead, the Proposed Rules posit a broad list of adverse factors, which encompass nearly all unlawful entries, nearly all transit through third countries, and even any extended period of unlawful presence in the United States and any failure to report income, that would likely cover the vast majority of asylum seekers. And for that vast majority, the Proposed Rules would create a heavy presumption *against* granting asylum. The Proposed Rules are thus designed to overturn the well-established principle that the danger of persecution weighs heavily in favor of a discretionary grant of asylum, in direct contravention of U.S. protection obligations.<sup>77</sup>

#### **a. Unlawful Entry and Use of Fraudulent Documents to Enter**

The Proposed Rules would make unlawful entry a significant adverse discretionary factor unless the entry “was made in immediate flight from persecution in a contiguous country.”<sup>78</sup> Yet, any consideration of the manner of entry is generally inconsistent with the Refugee Convention as well as with the plain language of Immigration and Nationality Act.<sup>79</sup> The Proposed Rules contradict Congress’s clear dictum in 8 U.S.C. §1158(a)(1) that “*any* alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival...*), *irrespective of such alien’s status*, may apply for asylum.”<sup>80</sup> The plain language of the statute thus demonstrates Congress’ clear intent that a person’s ability to seek refuge in the United States should not be undermined by her manner of entry. The Proposed Rules contravene this unambiguous statutory language.

The Proposed Rules would also deem use of fraudulent documents to enter the United States a significant adverse discretionary factor unless the asylum seeker “arrived in the United States by air, sea, or land directly from the applicant’s home country without transiting through any other country.”<sup>81</sup> Yet, in our experience representing asylum seekers for decades, people

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<sup>73</sup> See LAW OF ASYLUM § 6:42.

<sup>74</sup> *Huang v. I.N.S.*, 436 F.3d 89, 100 (2d Cir. 2006); *Fisenko v. Lynch*, 826 F.3d 287, 292 (6th Cir. 2016) (ultimately denying the petitioner’s application but affirming the holding in *Huang* that family reunification is a crucial factor in weighing asylum as a discretionary matter).

<sup>75</sup> *East Bay Sanctuary Covenant v. Barr*, 2020 WL 3637585, at \*12.

<sup>76</sup> *Id.* (“Unlike the broad discretion to deny asylum to aliens who are eligible for asylum, the discretion to prescribe criteria for eligibility is constrained by § 1158(b)(2)(C), which allows the Attorney General to ‘establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum’ only so long as those limitations and conditions are ‘consistent with’ § 1158.”).

<sup>77</sup> See Refugee Convention, Art. 34 (“[T]he Contracting states shall as far as possible facilitate the assimilation and naturalization of refugees.”).

<sup>78</sup> 85 Fed. Reg. at 36301-02.

<sup>79</sup> See Refugee Convention, Art. 31 (prohibiting penalizing refugees for irregular manner of entry).

<sup>80</sup> 8 U.S.C. § 1158(a)(1) (emphasis added).

<sup>81</sup> 85 Fed. Reg. at 36302.

fleeing persecution often do not have documents and sometimes have to acquire documents under other names or through extra-legal means in order to flee. And, as noted above, adjudicators have maintained that such use of false documents does not bar asylum seekers from relief, given that the “danger of persecution should outweigh all but the most egregious of adverse factors.”<sup>82</sup>

## **b. Transit**

The Proposed Rules mirror the transit rule promulgated on July 16, 2019,<sup>83</sup> and broaden its scope in order to block all asylum seekers, not just those who attempt to enter or arrive at the southern border. Yet, as noted, the July 16, 2019 transit rule is illegal on substantive and procedural grounds, and the Ninth Circuit recently struck it down.<sup>84</sup> The Proposed Rules, like the July 16 transit rule, do not adequately consider whether asylum seekers have been safely resettled elsewhere. Accordingly, we ask the Agencies to withdraw these Proposed Rules, based on that same reasoning.

The Proposed Rules would require a decision-maker to consider whether an asylum seeker has spent more than 14 days in any one country that permitted applications for refugee status, asylum, or similar protections before entering or arriving in the United States. They would also make transit through more than one country a significant adverse factor weighing against an asylum application. The Proposed Rules acknowledge only three limited exceptions to these considerations: (1) where an asylum seeker’s application for protection in the relevant third country has been denied; (2) where an asylum seeker is a victim of a severe form of human trafficking; or (3) where an asylum seeker was present in or transited through *only* countries that were, at the relevant time, not parties to the Refugee Convention, Refugee Protocol, or CAT. These exceptions are, however, wholly inadequate, and the proposals themselves violate the right to seek asylum and the principle of *non-refoulement*, or non-return to persecution or torture, guaranteed under U.S. and international law.

As the Ninth Circuit recognized, conditions in countries asylum seekers transit through are often dangerous, making it impossible for asylum seekers to find safe haven there.<sup>85</sup> Many face harm in transit countries, similar to the persecution suffered or feared in their home countries, and many transit countries do not provide fair, clear, and accessible asylum processes. Denying asylum seekers the right to seek asylum based on transit through third countries thus places the lives of asylum seekers at risk. Under the Proposed Rules, asylum seekers would thus be in danger of both *refoulement* and “chain *refoulement*,” or removal to a third country where there is a “readily ascertainable risk of subsequent *refoulement*.”<sup>86</sup>

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<sup>82</sup> *Pula*, 19 I. & N. Dec. at 474; LAW OF ASYLUM § 6:42.

<sup>83</sup> Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829.

<sup>84</sup> *See East Bay Sanctuary Covenant*, 2020 WL 3637585, at \*11, \*15 (“The fact that an alien might prefer to seek asylum in the United States rather than Mexico or Guatemala may be reflective of the relative desirability of asylum in these countries, but it has no bearing on the validity of the alien’s underlying asylum claim.”).

<sup>85</sup> *Id.* at \*16 (criticizing the government for “ignor[ing] extensive evidence in the record documenting the dangerous conditions in Mexico and Guatemala that would lead aliens with valid asylum claims to pursue those claims in the United States rather than in those countries”).

<sup>86</sup> James C. Hathaway, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 325 (2005).

## V. The Proposed Rules Penalize Pro Se Asylum Seekers and Violate Due Process.

### A. Pretermission of Claims Would Impermissibly and Inevitably Result in the *Refoulement* of Bona Fide Refugees.

Among the most harmful aspects of the Proposed Rules are the changes relating to pretermission of claims. The Rules would allow immigration judges to “pretermite,” or summarily deny, asylum applications without a hearing or testimony. Immigration judges would be permitted to make these denials based solely on the Form I-589 application for asylum, withholding of removal and protection under CAT if they find it legally insufficient in any way. These pretermission rules would contradict precedent and prevent bona fide asylum seekers from gaining protection.

To begin, the pretermission rules contravene years of precedent in immigration court. In *Matter of Fefe*, the Board explicitly ruled that immigration judges should not “proceed to adjudicate a written application for asylum if no oral testimony has been offered in support of that application.”<sup>87</sup> The Proposed Rules dismiss this decision completely, noting only that the regulations at the time of the decision are no longer in effect. But the Board’s insistence on a hearing was not based only on specific regulations; rather, drawing from prior agency precedent and the UNHCR Handbook, the Board explained in *Fefe* that “the full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.”<sup>88</sup> Drawing upon this principle, the Board of Immigration Appeals held in *Matter of E-F-H-L-* that “an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of the applications, including an opportunity to provide oral testimony and other evidence[.]”<sup>89</sup> The regulations acknowledge that Attorney General Jeff Sessions in 2018 vacated *Matter of E-F-H-L-* on a technicality, but offer no explanation as to why the decision was substantively incorrect.<sup>90</sup>

By mandating pretermission of claims, the Proposed Rules completely ignore the circumstances under which many asylum seekers first file their applications for protection. For one, many asylum seekers fill out their Form I-589 while detained and/or without the assistance of counsel and without a full understanding of the complex legal requirements of asylum. Many do not speak English and cannot fully convey the details of their past experiences or feared persecution.<sup>91</sup> This is particularly difficult considering the trauma that many asylum seekers have faced in their home countries and on their journey to the United States.<sup>92</sup> It is unreasonable to expect asylum seekers to precisely explain every legal element of their asylum cases in one document under these circumstances. Indeed, as the Board recognized in *Fefe*, “there are cases where an alien establishes eligibility for asylum by means of his oral testimony *when such*

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<sup>87</sup> 20 I. & N. Dec. 116, 118 (B.I.A. 1989).

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> 26 I. & N. Dec. 319, 324 (B.I.A. 2014).

<sup>90</sup> 27 I. & N. Dec. 226 (A.G. 2018).

<sup>91</sup> See Sabrineh Ardalán, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J. L. REF. 1001, 1004 (2015) (“Along with trauma, language barriers and cross-cultural differences can affect asylum seekers’ abilities to recount their past experiences, as can a lack of understanding of the legal framework for asylum claims.”).

<sup>92</sup> See *id.*



*eligibility would not have been established by the documents alone.*”<sup>93</sup> In light of these challenges, the prepermission rules will inevitably lead to asylum seekers with valid claims being denied.

The prepermission rule is also contrary to Board precedent and the INA, which expressly provide that the testimony of an asylum seeker alone may be sufficient to sustain her burden.<sup>94</sup> Premitting claims without hearing an asylum seeker’s testimony would also violate the Board’s long-standing recognition that asylum seekers are to be given the benefit of the doubt.<sup>95</sup> The prepermission rule thus “runs counter to the [government’s] responsibility to ensure that refugee protection is provided where the circumstances warrant it.”<sup>96</sup>

Troublingly, despite the above, the Proposed Rules assert that prepermission of asylum applications without a hearing is “*consistent with current practice*, applicable law, and due process.”<sup>97</sup> In light of this representation, HIRC and HIP request empirical data in the form of the total number of asylum, statutory withholding of removal, and/or CAT protection applications premitted in removal proceedings following the vacatur of the Board’s precedential decision in *Matter of E-F-H-L*.<sup>98</sup> This data will allow HIRC and HIP to assess the validity of the Agencies’ representation that prepermission is “consistent with current practice.”<sup>99</sup>

## **B. The Proposed Rules’ Definition of “Frivolous” is Punitive and Untenable.**

Under current law, an asylum seeker who knowingly makes a “frivolous” claim after being advised of the consequences “shall be permanently ineligible for any benefits.”<sup>100</sup> Current regulations state that an asylum application “is frivolous if any of its material elements is fabricated.”<sup>101</sup> The Proposed Rules, however, seek to dramatically broaden the current definition of frivolous to include applications that lack “merit” or are “clearly foreclosed by applicable law.”

This proposal is squarely at odds with controlling law and precedent. The Supreme Court itself has recognized “the complexity of immigration procedures, and the enormity of the interests at stake.”<sup>102</sup> Finding any application “clearly foreclosed by law” to be frivolous could result in vast numbers of claims being deemed frivolous, and is especially detrimental for survivors of gender-based violence and gang violence, in light of the Proposed Rules’ unreasoned fiats concerning such protection claims.

The Proposed Rules further erode asylum seekers’ rights to due process by eliminating the requirement that an immigration judge provide an additional opportunity to account for discrepancies in an application before determining the application to be frivolous, as long as the statutorily required notice is provided.<sup>103</sup> The administration asserts, without basis, that there is “no legal or operational reason to require a second warning” before sanctions apply.<sup>104</sup> Yet this

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<sup>93</sup> 20 I. & N. Dec. 116, 118 (B.I.A. 1989) (emphasis added).

<sup>94</sup> 8 U.S.C. § 1158(b)(1)(B); *Matter of S-M-J*-, 21 I. & N. Dec. 722, 724 (B.I.A. 1997).

<sup>95</sup> 21 I. & N. Dec. at 735.

<sup>96</sup> *Cantarero-Lagos*, 924 F.3d at 154 (Dennis, J., concurring).

<sup>97</sup> 85 Fed. Reg. at 36277 (emphasis added).

<sup>98</sup> See *Matter of E-F-H-L*-, 27 I. & N. Dec. 226 (A.G. 2018).

<sup>99</sup> See, e.g., *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (“[T]he failure to disclose to interested persons the . . . data upon which the [Agency] relied was procedurally erroneous. Moreover, the burden was upon the agency to articulate rationally why the rule should apply to a large and diverse class.”).

<sup>100</sup> 8 U.S.C. § 1158(d)(5)-(6).

<sup>101</sup> 8 C.F.R. §§ 208.20; 1208.20.

<sup>102</sup> *Ardestani v. INS*, 502 U.S. 129, 138 (1991).

<sup>103</sup> Overruling *Matter of Y-L*-, 24 I. & N. Dec. 151, 157-58 (B.I.A. 2007).

<sup>104</sup> 85 Fed. Reg. at 36276.

truncated procedure would be incredibly damaging, especially for unrepresented applicants who do not have a strong understanding of asylum law. Allowing an asylum seeker the opportunity to address any discrepancies is essential given the severe consequences of filing a frivolous application—consequences that result in one of the harshest bars in immigration law.<sup>105</sup>

Moreover, under the Proposed Rules, asylum seekers may only be able to avoid a frivolousness finding if they “wholly disclaim” and withdraw their application *with prejudice*, accept a voluntary 30-day departure, withdraw with prejudice all other applications for relief, and waive any right to appeal, motion to reopen or motion to reconsider. This is a strong-arm provision that could be used to threaten applicants into agreeing to voluntarily leave the country or else have their applications deemed frivolous and be permanently banned from seeking relief or protection.

Finally, the Agencies assert that the Proposed Rules’ changes regarding frivolousness would “minimize abuse of the system—and allow for meritorious claims to be heard more efficiently.” To understand the Agencies’ basis for this contention, HIRC and HIP request empirical data in the form of the total number of asylum applications deemed by an immigration judge to be frivolous between fiscal years 2010 and 2020.<sup>106</sup>

### **Conclusion**

In sum, we urge the Agencies to rescind the current proposals and instead promote greater compliance with U.S. obligations under domestic and international law to safeguard the rights of asylum seekers and provide protection to refugees who seek freedom and safety in the United States.

We appreciate the opportunity to provide comments on this proposed rule. If you have questions, please contact us by phone at 617-384-8165 or by email at [hirc@law.harvard.edu](mailto:hirc@law.harvard.edu).

Sincerely,

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<sup>105</sup> LAW OF ASYLUM § 6:46; *see Matter of B-Y-*, 25 I. & N. Dec. 236, 240 (B.I.A. 2010) (holding that a frivolousness determination requires separate analysis of explanations for inconsistencies and explicit findings as to materiality and deliberate fabrication).

<sup>106</sup> *See, e.g., United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (“[T]he failure to disclose to interested persons the . . . data upon which the [Agency] relied was procedurally erroneous.”).