IMMIGRANT JUSTICE CORPS

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Office of Information and Regulatory Affairs
Office of Management and Budget
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Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: Proposed Rule on "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review"

RIN 1125-AA94
EOIR Docket No. 18-0002
OMB Control Number 1615-0067

Dear Ms. Alder Reid:

On behalf of Immigrant Justice Corps ("IJC"), we write in response to the publication on June 15, 2020 of the above-referenced Notice of Proposed Rulemaking (the "proposed rule") in the Federal Register (85 Fed. Reg. 36264-36306). IJC opposes the rule jointly proposed by the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ"). The proposed rule guts the asylum system as we know it and would result in the United States sending multitudes of people back to persecution and torture in violation of our own laws and our international obligations.

IJC is a fellowship program wholly dedicated to meeting the need for high-quality legal assistance for immigrants seeking lawful status, pursuing U.S. citizenship and fighting deportation. Our mission is to recruit, train and populate the immigration field with the highest quality legal advocates to create a new generation of leaders with a lifelong commitment to justice for immigrants. IJC Community Fellows are recent college graduates for whom we apply for DOJ partial accreditation in the first year of their two-year fellowship, allowing them to practice immigration law before the Department of Homeland Security. IJC Justice Fellows are recent law graduates who represent noncitizens in removal proceedings, as well as complex affirmative immigration benefit applications. Our Fellows provide representation in 33 cities across 11 states.

Our Fellows represent individuals and families in various stages of the asylum process who seek safety in the United States after fleeing persecution in countries throughout the world. Some IJC Fellows work exclusively at the southwest border, specifically assisting individuals with the credible fear process. Many more IJC Fellows and staff have participated in rapid response initiatives at the border. Even more IJC Fellows and staff represent individuals and families in affirmative and defensive applications for asylum before USCIS, in immigration court, before the Board of Immigration Appeals and before federal circuit courts.

IJC's broad and deep understanding of the asylum system and the challenges asylum-seekers face positions us well to expose the myriad ways that this proposed rule would deny due process, harm individuals and families, and violate our commitment as a nation to provide refuge for those fleeing persecution. The proposed rule seeks, by regulation, to dismantle the asylum system Congress created. While disingenuously repeating that it would promote efficiency, the proposed rule actually would erect insurmountable barriers to fear-based relief and inevitably lead to *refoulement* -- forced return of asylum-seekers to a country where they are likely to be subjected to persecution. In the face of a callous and bureaucratic articulation of the reasoning for this proposed rule, we share stories from our Fellows and clients which highlight the disastrous impact that the proposed rule would have on human lives. The experiences recounted in this comment come directly from IJC Fellows' and staff work representing clients in the asylum system. All names have been anonymized to protect client confidentiality. The initials used have been randomly selected and do not correspond to actual names.

I. Thirty days is an insufficient comment period to respond to a rule of this scope and complexity.

We do not pretend to be able to address all of the substantive aspects of the proposed rule in this comment. The reduced, thirty day comment period is wholly insufficient for comment on the entirety of this rule which purports to change legal standards for asylum as well as

comprehensive procedures for how individuals fleeing persecution are treated. DHS and DOJ have provided no explanation for the urgency of this accelerated comment period. Furthermore, the reduced comment period is particularly inappropriate during this global pandemic. IJC joined with 501 organizations nationwide to request that the comment period be extended to at least the standard sixty days but have received no response.[1] Given this silence, we comment to the extent possible. The fact that we have not addressed a portion of the proposed rule does not indicate agreement with that portion; we oppose the proposed rule in its entirety.

II. Limiting asylum-seekers who pass their credible fear interview to asylum-and-withholding-only removal proceedings violates Congress' intent to protect vulnerable populations.

The proposed rule, if enacted, would deprive asylum-seekers of the opportunity to avail themselves fully of protections afforded by Congress under the Immigration and Nationality Act ("INA"). Certain protections in the INA are aimed at safeguarding the most vulnerable, including survivors of domestic violence, survivors of severe human trafficking, and survivors of certain crimes—populations whom our Fellows serve. Restricting those who pass their credible fear interview ("CFI") to asylum-and-withholding-only removal proceedings would disallow asylum-seekers from pursuing more stable and favorable forms of immigration relief, including but not limited to T nonimmigrant status for victims of severe forms of trafficking, Special Immigrant Juvenile Status, and protection under the Violence Against Women Act. Perhaps most perilously, asylum-and-withholding-only proceedings would strip immigration judges of discretion to either administratively close or terminate removal proceedings based on the pendency or successful adjudication, respectively, of the aforementioned forms of relief filed with the United States Citizenship and Immigration Services ("USCIS").[2]

A. The proposed rule would discourage survivors of severe forms of human trafficking from cooperating with U.S. law enforcement and in turn leave wrongdoers' illicit acts unchecked.

[1] The letter is available for review at https://www.aila.org/advo-media/aila-correspondence/2020/request-asylum-rule-comment-period-extension.

[2] "If the immigration judge does not grant the alien asylum, statutory withholding of removal, or protection under the CAT regulations, the alien will be removed, although the alien may submit an appeal of a denied application for asylum, statutory withholding of removal, or protection under the CAT regulations to the Board of Immigration Appeals ("BIA")." 85 Federal Register 36264 (proposed June 15, 2020).

The proposed rule directly contradicts domestic and international imperatives to combat severe forms of human trafficking.[3] [4] Specifically, the proposed rule ignores the reality that victims of human trafficking typically enter the U.S. without proper documentation and are frequently coerced into making misrepresentations by their traffickers.[5] Accordingly, thousands of trafficking victims are placed in expedited removal proceedings each year.[6] Congress recognized this when it enacted the Victims of Trafficking and Violence Protection Act of 2000 ("TVPA") and found that "[v]ictims of severe forms of trafficking should not be . . . penalized solely for unlawful acts committed as a direct result of being trafficked, such as *using false documents* . . . [or] *entering the country without documentation* . . . ."[7] Under the proposed rule, such trafficking victims—even if found to have a credible fear of persecution—may be barred from requesting termination of their removal proceedings if they qualify for or obtain T nonimmigrant status or continued presence. Individuals eligible for T nonimmigrant status, but who are unable to prove their asylum or withholding of removal claims, would be unable to assist U.S. law enforcement in important anti-trafficking operations. In contrast, T nonimmigrant status obtained during the pendency of standard removal proceedings under INA § 240 would allow trafficking victims to provide much-needed assistance in anti-trafficking investigations.[8] A recent case an IJC Fellow worked on proves illustrative.

Ms. A left El Salvador when a man she would later find out was a trafficker promised her a new apartment, a job, and a steady income if she travelled to the U.S. to work for a wealthy family. In El Salvador, Ms. A feared the many MS-13 gang members that roamed her neighborhood and had killed her eldest child five years ago so she was relieved to be able to leave the country and hoped to send money home so her husband and children could move to an area MS-13 did not control. Ms. A entered the U.S. in September 2016 and went to work for her new employer in El Paso, TX. The reality of her situation soon became clear as the trafficker locked Ms. A in her bedroom, did not allow her to leave the home without him, placed cameras throughout the house to monitor her, took her phone and forbid her to call her family in El Salvador. When Ms.

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[3] Federal law defines trafficking in persons as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age;" or "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, debt bondage, or slavery." 22 U.S.C. §7102(11).

[4] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1468 [hereinafter "TVPA"] ("Trafficking of persons is an evil requiring concerted and vigorous action by countries of origin, transit or destination, and by international organizations.")

[5] *Id*.

[6] *Id.* ("Approximately 50,000 women and children are trafficked into the United States every year.").

[7] TVPA at 1468 (emphasis added).

[8] Information for Law Enforcement Officials, Immigration Relief for Victims of Human Trafficking and Other Crimes, U.S. Dep't of Homeland Sec., available at https://www.dhs.gov/xlibrary/assets/blue-campaign/ht-information-for-law-enforcement-officials-immigration-relief-for-victims-of-human-trafficking.pdf.

A tried to call the police, her trafficker beat her. On another occasion, Ms. A's trafficker raped her.

Ms. A was apprehended and detained by CBP officials during a routine border stop and placed in expedited removal proceedings. After successfully demonstrating a fear of persecution, Ms. A was placed in removal proceedings under INA § 240, was able to secure legal counsel, discovered that she was eligible for T nonimmigrant status as a victim of a severe form of human trafficking, and pursued such relief. If, instead, Ms. A had been placed in asylum-and-withholding-only proceedings under the proposed rule, she would have been unable to remain safe in the U.S. while her T nonimmigrant status application remained pending unless she prevailed in her fear-based claim. Furthermore, the proposed rule would greatly diminish her chances of success in an asylum claim because she worked without authorization in the U.S. and was unable to pay taxes, which could lead to a negative discretionary finding. Moreover, Ms. A would have been unable to provide local law enforcement with the essential testimony and evidence to bring her trafficker to justice.

B. The proposed rule would fail to protect abused, abandoned, and neglected children.

Each year, thousands of children flee their countries of origin to seek refuge in the U.S.[9] A majority—but not all—of these children are deemed unaccompanied alien children ("UAC").[10] Under the Trafficking Victims Protection and Reauthorization Act ("TVPRA 2008"), UACs are defined as children who: "1) lack lawful immigration status in the United States, 2) are under the age of 18, and 3) are either without a parent or legal guardian in the United States, or without a parent or legal guardian in the United States who is available to provide care and physical custody."[11] Apprehended children of non-contiguous countries are then placed in the care of the Office of Refugee Resettlement ("ORR") and in standard INA § 240 proceedings.[12] Thus, UACs may apply for alternate forms of relief in removal proceedings, including Special Immigrant Juvenile Status ("SIJS"). SIJS provides humanitarian protection for *children* who cannot reunify with one or both parents because of abuse, neglect, abandonment, or a similar

[9] Unaccompanied Alien Children: An Overview, Congressional Research Service (updated October 9, 2019), https://fas.org/sgp/crs/homesec/R43599.pdf.
[10] *Id.*
[11] Trafficking Victims Protection and Reauthorization Act, Pub. L. 110-457, 122 Stat. 5044 [hereinafter "TVPRA 2008"].
[12] *See* 8 U.S.C. § 1232 (a)(5)(D).

basis under state law.[13] State—not federal—law controls whether a petitioner is considered a "child."[14] Thus, a "child" for purposes of SIJ classification, may be over the age of eighteen.[15]

In creating the SIJS classification, Congress made no distinction between UACs and those children over the age of eighteen who are placed in expedited removal proceedings upon either entry or apprehension by DHS officials—both are equally eligible for SIJS. The only age-related restriction Congress set forth under the SIJS statute is that a *child* must be under twenty-one years of age at the time of filing the SIJS petition with USCIS to qualify.[16] Because SIJS cannot be pursued in asylum-and-withholding-only proceedings, the proposed rule will potentially exclude thousands of SIJS-eligible children from relief from removal. B, client of an IJC Fellow, is one such child.

B, a child from Guatemala, applied for asylum at San Ysidro, CA when he was eighteen years old. In Guatemala, B's mother beat him every week, refused to feed him, and forced him to work instead of going to school starting at age 8. B was left alone and without care or protection when his father, the only person in B's life who provided some semblance of stability, unexpectedly died when B was 15. He fled to the United States in search of safety and hoping to locate his older sister who lived in California.

Because B was eighteen years old, he was detained in an adult detention facility rather than at an ORR-run shelter for UACs. B was placed in removal proceedings under INA § 240 following a positive credible fear determination which allowed Mr. B to explore other forms of relief in addition to his asylum claim. B's attorney determined that he was eligible for SIJS on account of his parents' inability to care for him, and filed a petition to make B's older sister his legal guardian. Thereafter, B's attorney filed an SIJS petition with USCIS and moved for B's case to be placed on the immigration court's status docket while USCIS adjudicated it. This would have been impossible had B instead been subjected to asylum-and-withholding-only proceedings created by the proposed rule. In such limited proceedings, B may have been able to succeed in his asylum claim, but would have been entirely unable to apply for relief that Congress specifically created for vulnerable children in his precise situation.

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[13] 8 U.S.C. § 1101(a)(27)(J).

[14] *See* 8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(a), (d)(2)(i); *see also* Matter of A-O-C-, Adopted Decision 2019-03 (AAO Oct. 11, 2019) ("[S]tate law, *not* federal law, governs the definition of 'juvenile,' '*child*,' 'infant,' 'minor,' 'youth,' or any other equivalent term for juvenile which applies to the dependency or custody proceedings before the juvenile court." (emphasis added) (quotations in original)).

[15] *See, e.g.*, Mass. Gen. Laws ch. 119, § 39M(a) (defining the term "child" as "an unmarried person under the age of 21").

[16] Trafficking Victims Protection and Reauthorization Act, Pub. L. 110-457, 122 Stat. 5044 [hereinafter "TVPRA 2008"].

C. The proposed rule would curtail protections for certain spouses and children of abusive U.S. citizens and lawful permanent residents.

The recent dramatic expansion of expedited removal means that undocumented individuals and those who have committed fraud or misrepresentation, located *anywhere* in the U.S., are subject to expedited removal if they cannot prove that they have been physically present in the U.S. for two years prior to apprehension.[17] This new initiative is sure to target many domestic violence survivors who have established family ties to U.S. citizens or lawful permanent residents. Under the current regulatory framework, after a positive credible fear determination, such survivors would be placed in removal proceedings under INA § 240 with its attendant due process protections and the ability to seek relief under the Violence Against Women Act ("VAWA"). Under the proposed rule, survivors would at best be placed in asylum-and-withholding-only proceedings.

By placing victims of domestic violence in asylum-and-withholding-only proceedings, the proposed rule would subvert Congressional intent to protect victims of domestic violence as reflected in the VAWA provisions of the INA.[18] Under the proposed rule, many domestic violence survivors will be removed without being afforded the opportunity to apply for relief under VAWA. Ms. C, client of an IJC Fellow, is one such survivor.

Ms. C fled Cameroon and sought refuge in the United States after receiving death threats from police officers working for the majority francophone-government in response to her public protest of government brutality against anglophone Cameroonians. Approximately three months after arrival in the U.S., Ms. C met her partner, a U.S. citizen, got married and became pregnant. Ms. C's partner filed a family petition on her behalf. After the birth of their child, Ms. C's partner began beating her, constantly humiliating her and imprisoning her in their home. Ms. C fled their home, but was apprehended by ICE near the U.S.- Mexico border.

ICE detained Ms. C and placed her in expedited removal proceedings. She asserted her fear of return based on her past political activism in Cameroon, and was placed in standard removal proceedings. There, Ms. C's attorney filed a VAWA self-petition based on her marriage to her abusive U.S. spouse. The immigration judge continued her case until Ms. C's VAWA petition was approved by USCIS and ultimately granted her adjustment of status--an impossibility in asylum-and-withholding-only removal proceedings to which Ms. C would have been subjected under the proposed rule. In such limited proceedings, the immigration judge would only have

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[17] U.S. Department of Homeland Security, Designating Aliens for Expedited Removal, Doc. Number 2019-15710 (July 22, 2019), https://www.federalregister.gov/documents/2019/07/23/2019-15710/designating-aliens-for-expedited-removal.

[18] The INA's VAWA provisions allow certain spouses, children, and parents of U.S. citizens and certain spouses and children of permanent residents to file a petition for themselves, without the abuser's knowledge. *See* INA § 204(a)(1)(A)(iii)-(vii).

the option to approve or deny her asylum application without being able to consider relief under VAWA which Congress created specifically for abused spouses of U.S. citizens or lawful permanent residents.

III. The proposed amendments to the credible fear screening process are incompatible with the applicable legal standard and the reality of credible fear interviews.

The proposed amendments to the credible fear screening process heighten the standard required to demonstrate a credible fear of persecution, contrary to Congress's intent. Under the current scheme, to obtain a positive determination of credible fear—a determination to which someone fleeing harm has a congressionally created right—the person need not show that they are, in fact, eligible for asylum.[19] Rather, they need only show that there is a "significant possibility" that they are eligible. [20] Thus, the credible fear inquiry is "a low screening standard for admission into the usual full asylum process."[21] This low bar was by design. Indeed, Congress intentionally set a low bar for demonstrating credible fear so that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution."[22]

If adopted, the proposed rule would frustrate this design by front-loading a wide array of fact-intensive, legal inquiries into the credible fear determination. Tasking asylum officers with determinations of internal relocation and statutory bars—determinations intended to be heard in the usual full asylum process—would effectively blur the line between credible fear and in-fact eligibility, contrary to Congress's intent.

As described below, the credible fear screening process is an inappropriate stage to address such aspects of in-fact eligibility for at least three reasons. First, given the circumstances surrounding these interviews, credible fear interviews are unlikely to elicit a comprehensive, dependable record of the person's asylum claim. Second, the proposed amendments require complex factual and legal analyses—for example, determinations of potential internal relocation—that far exceed the scope of a credible fear inquiry. Third, the proposal to reverse the presumption of immigration judge review will exacerbate the resulting deficiencies.

A. Records developed at the credible fear stage are likely to be incomplete and imperfect.

[19] *Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161, 2020 WL 3454809, at *2 (U.S. June 25, 2020).
[20] *Id.* at *4.
[21] 142 Cong. Rec. 25,347 (1996) (Senator Orrin Hatch, principal sponsor of IIRIRA, commenting on the provisions of the bill).
[22] H.R. Rep. No. 104-469, Pt. 1, at 158 (1996).

Records developed at the credible fear interview stage are not always representative of a person's complete asylum claim.[23] And for good reason: asylum seekers are expected to share some of their most personal experiences—many times secrets they have never shared with anyone—with an asylum officer they have never met before, while in detention, through an interpreter, unrepresented, as part of a legal process they are unlikely to understand, and after completing weeks or months-long strenuous journeys from their home countries. Under such conditions, an asylum officer is unlikely to elicit a comprehensive, dependable record from the asylum seeker during a credible fear interview. This is true for a variety of reasons.

For example, individuals with meritorious asylum claims are likely suffering from acute forms of trauma.[24] Trauma can impact an individual's ability to disclose various aspects of the events surrounding the traumatic experience.[25] Indeed, it is common for trauma survivors to persistently avoid anything that evokes a memory of the trauma.[26] Consequently, questions from asylum officers directly related to the individual's traumatic experiences—information that is key to an asylum claim—are unlikely to elicit all facts relevant to that claim.

For example, one IJC Fellow represented a Guatemalan teenager, D, who was physically and emotionally abused by her own family members throughout her childhood. D became anxious and withdrawn in the presence of male attorneys, and she was hesitant to describe the abuse she had endured for fear she would damage her family's reputation. At her asylum interview, D revealed for the first time that she had also been raped, a fact she had been too ashamed to disclose to the Fellow previously. D's case is representative of so many others. Fellows have repeatedly found that trauma stemming from protected characteristics or forms of persecution that are considered particularly "shameful" in an asylum seeker's society, such as LGBTQ status or sexual abuse, can prevent asylum seekers from revealing key aspects of their claims intially.

Likewise, asylum seekers may have faced prior coercive experiences with government officials in their own country. Unsurprisingly, this may impact their ability to be fully forthcoming with a government official such as a U.S. asylum officer.[27] When this is the case, the basis for an applicant's reticence is beyond the control and knowledge of the asylum officer. IJC Fellows have routinely found that asylum-seekers are wary of government actors, which makes them more reticent during the initial stages of the asylum process. For instance, former members of political parties and groups that were illegal in their home countries have deeply internalized

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[23] *See, e.g.*, *Ferreira v. Lynch*, 831 F.3d 803, 808-09 (7th Cir. 2016); *see also Moab v. Gonzales*, 500 F.3d 656, 661 (7th Cir. 2007); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004).
[24] Jane Herlihy et al., *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*, 26 Appl. Cognit. Psychol. 661, 664-65 (2012).
[25] *Id.* at 663-69.
[26] Stuart L. Lustig, MD, MPH, *Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled*, 31 Hastings Int'l & Comp. L. Rev. 725, 725–26 (2008).
[27] *Moab v. Gonzales*, 500 F.3d 656, 661 (7th Cir. 2007).

the values of suspicion and secrecy towards outsiders. Accordingly, many clients are reserved in the way in which they communicate, which leads them to present fragmented and unintentionally confusing stories. This also holds true for other refugees and minority groups who were either harmed by government actors or actively dismissed despite their cries for help.

Furthermore, asylum-seekers undertake the credible fear process while detained under appalling circumstances. Reports of disease outbreaks, overcrowded facilities, and unsanitary conditions are widespread.[28] Indeed, conditions are so precarious at certain stages of detention that some facilities are known as "hieleras" or "perreras"—Spanish for "iceboxes" and "dog pounds."[29] Additionally, families are seldomly detained together.[30] After being separated, asylum seekers often do not know the fate and location of their family members with whom they entered the U.S.[31] These circumstances can understandably impact an asylum seeker's ability to concentrate and to coherently communicate all aspects of their claim to an asylum officer during the credible fear interview.

Indeed, as immigration advocates, we spend months earning our clients' trust and establishing a sense of emotional safety before we can elicit all facts relevant to their asylum claims—a prerogative crucial for proper representation. Asylum officers during fear interviews have insufficient time and are in inappropriate circumstances to properly coax full information from asylum seekers and should not be expected to do so. Certainly, Congress did not intend them to do so when it crafted the low credible fear standard. The proposed amendments do not indicate any new developments that would warrant this change.

Access to legal representation before a credible fear interview is sparse. And when available, it is inhibited by temporal and logistical constraints. Additionally, orientation by government officials is minimal, and the standard forms provided by the government are unlikely to communicate the complexity of the process to most asylum seekers. As a result, asylum seekers go into credible fear interviews with a limited understanding of what the process entails.

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[28] Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. Times (July 9, 2019) https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html; Gretchen Frazee, *A look inside the facilities where migrant families are detained*, PBS (Aug. 26, 2019) https://www.pbs.org/newshour/nation/new-trump-rules-would-detain-families-longer-this-is-where-they-would-stay; Madeleine Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, Time (July 10, 2019) https://time.com/5623148/migrant-detention-centers-conditions/.

[29] Andrew Gumbel, *'They were laughing at us': immigrants tell of cruelty, illness and filth in US detention*, The Guardian (Sep. 12, 2018) https://www.theguardian.com/us-news/2018/sep/12/us-immigration-detention-facilities.

[30] Kathryn Shepherd et al., *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers*, American Immigration Council (2017) https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers.

[31] *Id.*

Language barriers are also rampant.[32] Even though translators are required during the credible fear interview,[33] noncitizens are regularly deprived of a qualified interpreter. This is especially likely to occur with indigenous clients from Central America. Our Fellows have found that when a qualified interpreter is unavailable, immigration officials will often require noncitizens to proceed in a language that they do now speak fluently, or require another noncitizen being processed to interpret. This not only fails to screen for inevitable errors, but also fails to provide a safe space for an asylum seeker to tell her story.

For instance, one Achi-speaking client had his credible fear interview conducted in the different Mayan language of K'iche. This led to a negative credibility determination because the asylum seeker was "unable to properly communicate his fear of return," despite the language error being known to the asylum officer at the time of the interview. Even when interpreters are available, the interpreter may fail to adequately translate idioms or cultural differences, which may in turn lead to enough inconsistencies to support a negative credibility finding. In another instance, a Haitian client fleeing severe domestic violence was provided with a French interpreter rather than one in her native Haitian Creole, because the asylum officer assumed the languages were nearly indistinguishable. However, the client received a negative credibility determination based largely on the fact that she used the word "jambe" for both "foot" and "leg," whereas in standard French, the word is used only for "leg." The failure to take the colloquialism and cultural differences into account had grave consequences.

B. Conclusive consideration of internal relocation at the credible fear stage is incompatible with the "significant possibility" threshold.

The proposed rule changes would weave the consideration of internal relocation into the credible fear determination. The credible fear interview, however, is not the appropriate context for this complex legal and factual analysis for two reasons.

First, asylum-seekers do not have the burden to demonstrate that relocation within the proposed country of removal is impossible because the analysis follows a totality of the circumstances approach— "no one factor is determinative."[34] Accordingly, consideration of internal relocation is appropriate at a stage where the asylum seeker has been given the opportunity to prepare all information relevant to his or her ability to relocate. In light of the fragmented nature of the information it elicits, the credible fear interview is not such a stage.

Second, the internal relocation determination involves instances of multi-level legal analysis. For example, the regulatory standard for asylum-seekers is different than the standard used for

[32] *Id.*

[33] 8 C.F.R. §§ 235.3(b)(2)(i), 208.30(d)(5).

[34] *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015).

applicants seeking protections under the Convention Against Torture.[35] Similarly, the party that carries the burden of proof turns on whether the applicant has demonstrated past persecution or a fear of future persecution, and on whether persecution is government-sponsored.[36] The agencies have presented no rationale to justify a burden shift towards the applicant. In any case, imposing this burden on the applicant at the credible fear stage would require the applicant to present evidence and make arguments that go well beyond Congress's "significant possibility" standard.

Given the dearth of evidence at the time of the credible fear screening, as well as the complex multi-level legal analysis involved in this inquiry, having asylum officers make these determinations will likely result in erroneous outcomes. This will result in an influx of requests for review, challenges, and requests for reconsideration—all counterproductive to the efficiency goals underlying the proposed amendments. And, more alarming, it will likely result in the return of applicants with valid asylum claims to persecution—exactly the type of outcome Congress intended to avoid by crafting a low credible fear standard.

C. Analysis of the applicability of asylum and statutory withholding bars is better suited for section 240 proceedings, as the current rules mandate.

Final assessments of asylum and statutory withholding bars at the credible fear stage contravene the "significant possibility" standard. As discussed above, all facts relevant to a claim—including those pertaining to the bars and their exceptions—are unlikely to surface during a credible fear interview. Additionally, an unrepresented applicant is unlikely to comprehend the bars and the exceptions available under each bar. Analyzing the applicability of a bar and the merits of any exceptions or defenses raised, therefore, is better suited for section 240 proceedings.

Insufficient legal analysis of asylum bars at the CFI would unfairly funnel asylum-seekers to lesser forms of relief (i.e. withholding of removal and CAT relief), when they would otherwise be found eligible for asylum if given the opportunity to disprove the existence of bars to their eligibility before an immigration judge. More dangerously, however, consideration of bars at this early stage will lead to *refoulement* because the initial screening standards for lesser forms of relief are unduly high under the proposed rule.

Furthermore, the proposed amendment's indication that an individual can nonetheless request an immigration judge's review of the determination does not cure this issue. Notably, because of the additional proposal to treat an individual's silence as indication that they do not want

[35] *See id.* at 1163.
[36] 8 C.F.R. § 208.13 (b)(1)(ii), (b)(3)(ii).

such review. This is especially true for people who, for the reasons discussed above, may be reluctant to disclose details about their claim to an asylum officer.

Moreover, final determinations of regulatory eligibility bars at the credible fear stage would likely run afoul of the efficiency goals underlying the proposed amendments. The Attorney General can implement or alter such regulatory bars at any moment. These regulatory changes can be, and indeed, frequently are, challenged in court.[37] The applicable regulations therefore can change from one day to the next one. Furthermore, courts can issue stays on, or vacate, the applicability of the regulations, and indeed, frequently do.[38] Tasking asylum officers—officers who are not required to be attorneys—with making final determinations on the applicability of ever-shifting regulations and stays requires continuous legal review and reassessment. This will likely result in a need to re-interview applicants and in an influx of challenges to those determinations, thereby *decreasing* the efficiency of the credible fear process, counter to the goals of the proposed changes. Furthermore, analysis of the bars at this stage is likely to result in the return to persecution of at least some applicants with valid asylum claims—the precise outcome Congress intended to avoid.

Mr. E, a Salvadoran asylum-seeker fleeing death threats and attacks on account of his sexual orientation, is but one example of why standard removal proceedings are the better venue to make these determinations. Gang members and neighbors threatened to kill Mr. E when they discovered he was gay. Mr. E finally decided to flee El Salvador when a group of ten gang members beat him as Mr. E left an underground gay bar with a group of friends. Mr. E's hand was so badly mangled from the attack that he was unable to write his first name on the police declaration. Mr. E fled north and obtained a temporary humanitarian visa in Mexico but had no intention of remaining in Mexico indefinitely. Mr. E saw Mexico as a temporary resting place on his way to the U.S. because he did not feel safe in Mexico.

Under the proposed rule, an asylum officer could easily determine that Mr. E had "firmly resettled" in Mexico and was thus barred from asylum. If asked whether he had a visa to reside in Mexico, Mr. E certainly would have answered in the affirmative. Though Mr. E only saw Mexico as a temporary respite in his long journey to the U.S., lacking more knowledge of asylum law, he would likely have been unable to articulate the legal nuance that despite his having legal status in Mexico, his visa conferred him limited *temporary* status. Our Fellows have found that immigration courts are split as to whether humanitarian visas—currently available in

[37] *See e.g.*, *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 934–35 (N.D. Cal.), *order reinstated*, 391 F. Supp. 3d 974 (N.D. Cal. 2019); *see also Capital Area Immigrants' Rights Coal. v. Trump*, No. CV 19-2117 (TJK), 2020 WL 3542481, at *1 (D.D.C. June 30, 2020).

[38] *See e.g.*, *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal.), *order reinstated*, 391 F. Supp. 3d 974 (N.D. Cal. 2019); *see also Capital Area Immigrants' Rights Coal. v. Trump*, No. CV 19-2117 (TJK), 2020 WL 3542481, at *1 (D.D.C. June 30, 2020) (vacating rule).

many countries, including Brazil, Mexico, and Chile—are true permanent legal statuses and thus support a finding of firm resettlement.

In fact, Mr. E's CFI transcript *does* mention his Mexican visa, but he successfully demonstrated in his full removal proceedings that he had not firmly resettled because his visa was temporary and subject to onerous restrictions. Under the proposed rule, there's a high likelihood that the asylum officer would have determined that Mr. E's humanitarian visa was a bar to asylum, making him eligible only for only lesser forms of relief which in turn would have required Mr. E to show a heightened reasonable possibility of persecution. This standard would prove extraordinarily difficult to meet immediately upon arriving at the border without the opportunity to obtain corroborating evidence, such as hospital records and police reports, and without the benefit of counsel.

D. Presuming waiver of immigration judge review from an applicant's silence is illogical and unfair.

The presumption of immigration judge review when an asylum officer issues a negative fear determination and the asylum seeker does not clearly decline or accept review should not be reversed. Under the current rule, when an asylum seeker receives notice of a negative fear determination, if they do not expressly indicate whether they would like the review, the asylum officer assumes from their non-answer that a review has been requested. The proposed rule flips that presumption, assuming that a lack of an affirmative yes means that they are declining immigration judge review.

It is hard to imagine a situation where an asylum seeker does *not* want immigration judge review of a negative credible fear determination—to which they are entitled— but cannot bring themselves to clearly express it. It is far more likely that the asylum seeker does not understand the question, is experiencing language barriers, is reticent about the process, and/or is suffering from the effects of the trauma that caused them to seek asylum in the first instance.

Allowing the change of presumption would exacerbate deficiencies resulting from the additional proposed regulations. By heightening the credible fear bar and by placing additional emphasis on findings made at this preliminary stage of the asylum process, a great many meritorious claims that ought to be heard in full will be essentially silenced. Although it may appear to be administratively expeditious or efficient to initiate the procedures contemplated by the proposed rule, doing so will remove safeguards intended to ensure fairness and justice are preserved for those seeking these vital statutory protections.

IV. The proposed rule's expansive definition of frivolousness and allowance of pretermission would violate applicants' due process rights and result in mass denials of meritorious claims.

A. The proposed rule unfairly expands the definition of frivolousness and encourages premature findings that asylum claims lack legal merit.

Under existing regulations, if the Attorney General -- the Immigration Court or Board of Immigration Appeals ("BIA") -- determines that an alien has knowingly made a frivolous application for asylum and the alien has received notice, the alien shall be permanently ineligible for any benefits under section 208 of the INA. Significantly, only the Immigration Judge or the BIA can make this determination. The proposed rule would expand the definition of "frivolous" to include applications that are not fraudulent, but simply "without legal merits." Moreover, it would allow asylum officers -- who are not required to be attorneys -- to make findings of frivolousness and to refer cases to an immigration judge on that basis.

This will disproportionately harm *pro se* asylum seekers who may be filling out the application with an English interpreter or with help from an English speaking notary, friend or acquaintance. There is a dearth of legal representation available for affirmative asylum matters. As such, applicants must frequently rely on large scale clinics or other short-term remedies for the first step of filing an asylum application. Our Fellows find that many times, once the applicant is able to secure counsel, much fuller detail of their legal claim is able to be fleshed out. As advocates we must frequently amend or replace wholesale applications that were not sufficiently prepared in order to articulate the full and complete claim.

Furthermore, the asylum law is in a state of constant flux. Findings with respect to "legal merits" in an area of law that is complex and constantly changing should not be made by asylum officers who may lack the legal background necessary to do so accurately. The proposed rule would also chill creative interpretations of the law. Under the proposed rule, an asylum seeker whose application would likely be denied under a restrictive interpretation of asylum by the BIA or attorney general precedent, but who intends to challenge that precedent in federal court, must risk a finding that would forever bar any relief if that appeal is unsuccessful.

B. The Pretermission of "Legally Insufficient Applications" Undermines Due Process By Depriving Respondents of Their Day in Court

DHS and DOJ have proposed adding a new paragraph to 8 CFR 1208.13 to clarify that an immigration judge may pretermit and deny an application for asylum, statutory withholding of removal, or protection under the CAT regulations if the alien has not established a *prima facie* claim for relief or protection under the applicable laws and regulations.

In so doing, both DOJ and DHS would significantly undermine an asylum applicant's due process rights as a way of dealing with the horrific structural failures that they themselves created and which have led to an overwhelming backlog of cases. As stated in a recent press release from the National Association of Immigration Judges, EOIR has significant leadership and structural failures that in turn place burdens on practitioners, court personnel, judges, and respondents.[39]

An IJC Fellow speaks to these truths in the following statement:

> "Pretermitting would essentially decimate asylum seekers' chances at a fair outcome. Over my last three years as an Immigrant Justice Corps Fellow, I have represented many asylum seekers who prepared their asylum application *pro se* and would be tremendously disadvantaged by this policy change. Asylum seekers preparing *pro se* applications struggle to understand the questions asked in the I-589. They also struggle in articulating answers, both due to translation issues and side-effects of trauma.
>
> A prime example of an individual who would suffer under this rule is my client F, a Honduran Garifuna woman and a young mother in her early 30's currently awaiting adjudication of her asylum application. Her *pro se* I-589 - filed with the aid of a church group - does not illustrate the gravity of the danger she would be in if she were deported to Honduras. At the time her application was prepared the events she endured had just recently occurred and her application therefore minimizes her fear and the seriousness of the threats and violence she suffered. We will have the benefit of representing F and fleshing out the merits of her case more fully.
>
> Individuals like F need the opportunity to testify in court to illustrate the depth of their claims, which they were unable to address in their I-589 due to structural inequalities, such as language barriers, and lack of access to counseling. Instead of alleviating these inequalities, the pretermitting rule would intensify them.

[39] *See* The National Association of Immigration Judges Statement on DOJ OIG Report on Executive Office for Immigration Review Fiscal Year 2019 Financial Management Practices, June 10, 2020, available at https://www.naij-usa.org/images/uploads/publications/2020.06.10.00.pdf.

Another emblematic example is that of our client, G, who filed a *pro se* I-589 with minimal details due to lack of translation and multiple health issues. On the I-589 application alone, her claim would most assuredly have been denied, as it did not illustrate the grave danger she faced in Bangladesh from gender-based violence. G's application was later supplemented with both a physical and psychological evaluation. However, it was through G's poignant testimony that the Immigration Judge was able to grant her asylum. Were the court to have based its decision solely on her I-589, G would most certainly have been summarily removed to Bangladesh.

Asylum seekers need in-person testimony to be able to articulate their fears, and have access to expert testimony to flesh out their claims. The proposed pretermission rule would not allow for the full development of an asylum seeker's claim and would cause dismissals that could amount to death sentences for deported asylum seekers."

Another IJC Fellow shares the following:

I have done numerous consults with individuals who are approaching their one year asylum deadline, and need to rush to complete a *pro se* asylum application. They either almost miss the deadline because nobody told them about it when they entered the US, or because they cannot afford an attorney. As a result, I have helped translate asylum applications into English for community members. These are bare bones applications that are filed for the purpose of presenting their claim to the court. Once they have filed an application, these individuals generally save money and hire an attorney. Mandating pretermission of such applications would cause undue hardship to people who are already vulnerable.

Even in instances where we take clients on for representation immediately prior to the one year filing deadline, there is an intense pressure to try to make a claim out in the application while also gaining a client's trust to share sensitive information. They understandably feel uncomfortable offering intimate details within a short time frame. It is only after we start to meet more that they open up and we can supplement the application with a detailed declaration. Allowing pretermission of an asylum application with a limited time to respond is a violation of an applicant's due process rights in that it deprives them of an ability to present all elements of their claim for relief. Pretermission will lead to many people being wrongfully deported and likely murdered in their home country."

V. The Proposed Standards for Consideration of Applications for Asylum or for Statutory Withholding of Removal Would Impermissibly Shred the Fabric Created by Years of Accumulated Case Law

A. The Proposed Changes to the *Particular* Social Group Analysis Are Incongruent With One Another and Existing Case Law

The proposed rule guts protections for individuals seeking asylum on the basis of their membership in a particular social group, which includes many of the clients our Fellows represent. The rule recognizes the fact-specific nature of the particular social group inquiry and notes that creating "general rules of particular social group definitions … run[s] 'contrary to the individualized analysis required by the INA' "—yet it proceeds to do exactly that by delineating entire categories of individuals who would generally be unable to establish a particular social group.

The proposed rule's approach is both confusing and misleading, as it codifies the three-pronged, fact-specific approach to particular social groups elaborated in *Matter of M-E-V-G-*and *Matter of W-G-R-* while simultaneously discounting massive categories of factual circumstances as "insufficient" to constitute a particular social group, in contravention of established BIA and circuit court caselaw.[40] The two contradicting approaches outlined in the proposed rule will neither "result[] in more uniform application" of the relevant legal standard nor "provid[e] clarity to the issue," as the rule purports to do. Instead, they will create confusion for adjudicators, legal representatives, and asylum seekers and will ultimately lead to erroneous denials of meritorious claims, particularly when the asylum seeker does not speak English, cannot read or write, suffers from the effects of trauma, or is unable to secure legal representation.

i. Presence in a Country with Generalized Violence or a High Crime Rate

The proposed rule eviscerates protections for individuals seeking asylum on the basis of a particular social group consisting of or defined by "presence in a country with generalized violence or a high crime rate." Under this stringent standard, any particular social group formulated by an asylum seeker hailing from an area of violence or crime—even if the group

[40] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251 (BIA 2014) ("[W]e emphasize that our [previous] holdings [regarding formulation of particular social groups] … should not be read as a blanket rejection of all factual scenarios involving gangs"); *Matter of W-G-R-*, 26 I&N Dec. 208, 214 (BIA 2014) ("[B]oth 'particularity' and 'social visibility' take account of the societal context specific to the claim for relief"). *See also*, *e.g.*, *De Pena Paniagua v. Barr*, 957 F.3d 88, 94 (1st Cir. 2020); *Rios v. Lynch*, 807 F.3d 1123, 1124 (9th Cir. 2015).

itself is not formulated on that basis—could arguably be struck down. The proposed rule ignores the fact that asylum claims, by their very nature, stem from the type of activity permitted most often in countries with generalized violence or a high crime rate; in other words, the conditions that give rise to violence and crime are the very same conditions that allow for the type of targeted persecution required for a viable asylum claim. These conditions include poverty and economic inequality, unavailability of social resources, disputes over territory, lack of a robust educational system, government inability or unwillingness to protect its citizens, religious or ethnic tensions, or a history of war—all conditions which IJC Fellows have regularly seen when conducting research into their clients' countries of origin.

For example, the majority of our Fellows' asylum-seeking clients have fled violence in Central America's Northern Triangle. The Northern Triangle faces "a serious security and forced displacement crisis" attributed largely to *maras* "[b]orn in the aftermath of civil war and boosted by mass deportations from the U.S."[41] However, violence and crime are not unique to the Northern Triangle, nor even to Latin America more broadly; our Fellows and their host organizations have represented clients seeking asylum from dozens of countries spanning nearly every continent, including Africa and Asia.[42] Yet under the proposed rule, nationals from dozens of countries in Latin America, Africa, Asia, and elsewhere battling violence or crime may be erroneously denied asylum if applying on the basis of a particular social group—even if that group is otherwise legally cognizable.

Moreover, practically speaking, evidence of generalized violence or a high crime rate is often the most convincing evidence of government inability or unwillingness to protect an asylum applicant and of the unreasonableness of the applicant's internal relocation, which puts asylum applicants in an impossible position: the evidence they need to prove other elements of their claim cannot be proffered for fear it will improperly contextualize their proposed particular social group, thus rendering it incognizable.[43]

ii. Interpersonal Disputes or Private Criminal Acts of which Governmental Authorities Were Unaware or Uninvolved

[41] International Crisis Group, "Mafia of the Poor: Gang Violence and Extortion in Central America," *Latin America Report No 62* (6 April 2017), pp. i, iii, 1.

[42] European Institute for Crime Prevention and Control and UN Office on Drugs and Crime (UNODC), *International Statistics on Crime and Justice* (2010), p. 12 ("WHO estimates of death by violence rates for the majority of countries on the continent [of Africa] ... are typically high, ranging from around 7 to 40 times that of averages in Western Europe").

[43] *See, e.g., Orellana v. AG United States*, 956 F.3d 171, 176, 180 (3rd Cir. 2020) (recognizing general violence and crime in El Salvador by noting "pervasive gang presence" and attacks on crime witnesses while holding that a proposed social group "consisting of witnesses who have publicly provided assistance to law enforcement against major Salvadoran gangs" is cognizable).

Similarly, the proposed rule bars asylum eligibility on the basis of a particular social group consisting of or defined by "interpersonal disputes or private criminal acts of which governmental authorities were unaware or uninvolved." The proposed rule improperly conflates distinct asylum elements requiring separate inquiries: 1) whether the harm the applicant suffered was on account of a protected ground, which could include the applicant's membership in a particular social group; and 2) if the applicant's persecutors were non-state actors, whether the government was unable or unwilling to control them. The government's knowledge of the "dispute" or "private criminal act" giving rise to the applicant's asylum claim has no bearing on the cognizability of the particular social group advanced—i.e., whether the members of the group share a common, immutable characteristic, whether the group is sufficiently particular, and whether the group is socially visible within the society in question.

Moreover, the proposed rule's categorical prohibition of particular social group formulations involving interpersonal disputes or criminal acts perpetrated by non-state actors would bar many of the most common asylum claims our Fellows see, including claims on the basis of gang violence, domestic violence, and child abuse. For example, one IJC Fellow assisted a Honduran woman, Ms. H, seeking asylum on the basis of particular social groups consisting of her status as a child and as a survivor of domestic violence. Ms. H suffered horrific abuse throughout her life. As a young child, Ms. H was raped by her sister's adult boyfriend. As an adult, Ms. H was regularly abused by the father of her children, who choked her, beat her with the side of a machete, and used his membership in the MS-13 to threaten and intimidate her—ultimately forcing her to flee. Under the proposed rule's prohibition on "interpersonal disputes or private criminal acts," Ms. H and all others similarly situated would be found ineligible for asylum or withholding of removal on the basis of their proffered social groups.

iii. Articulation of PSG on the Record

Under the proposed rule, asylum seekers in proceedings before an immigration judge will be ineligible for asylum or withholding of removal on the basis of a particular social group if they have not first articulated the group in their asylum application or elsewhere in the administrative record. The proposed rule further bars asylum seekers from filing any motion to reopen or reconsider an application related to their membership in a particular social group not previously advanced, even if they were unable to obtain legal representation or can present a valid claim for ineffective assistance of counsel. This not only violates asylum seekers' constitutional rights but also imposes an impossible burden on those who do not understand the intricacies of the U.S. legal system, cannot speak English, have limited education or literacy, are unable to secure legal representation, or battle trauma stemming from the events they have experienced.

For example, one of our Fellows worked with a Guatemalan survivor of a lifetime of physical and psychological abuse causing her to suffer extreme trauma. This survivor, Ms. J, applied for asylum based in part on particular social groups relating to her status as a child and a survivor of domestic violence. In Guatemala, Ms. J's parents and one of her siblings were murdered, and she was raped and abused by multiple relatives. At just 11 years old, Ms. J was forced into a relationship with a man 30 years her senior; at just 13 years old, she was forced into prostitution. Ms. J eventually fled Guatemala while suffering abuse at the hands of her second partner. Ms. J's severe trauma would have prevented her from successfully formulating a cognizable particular social group without the assistance of legal counsel. Although she secured our Fellow's assistance, many asylum seekers who have suffered comparable levels of trauma are forced to appear *pro se*.

Unrepresented asylum seekers battling severe trauma are virtually unable to formulate a cognizable particular social group; as a result, the proposed rule would effectively bar them from asylum eligibility on this basis. Moreover, asylum seekers obtain representation at different points in the adjudication process and must not be barred from asylum merely for an inability to secure legal assistance at an earlier point.

B. Political Opinion, As An Expression of Opposition to a Wide Range of Political Actors, Would No Longer Be Cognizable Under This Rule

The proposed rule impermissibly upends decades of circuit court case law defining the varied types of behavior that may constitute a political opinion for purposes of asylum and withholding of removal. Our current asylum framework recognizes that an asylum seeker's political opinion "encompasses more than electoral politics or formal political ideology"[44] and that an adjudicator must conduct a broad, fact-specific inquiry acknowledging the larger political context of the asylum seeker's country of origin.[45] Circuit courts have recognized that a wide range of topics may form the basis of a political opinion claim, including union participation, feminism, advocacy for minority ethnic groups, and opposition to guerrilla groups.[46] The proposed rule ignores this substantial body of case law, narrowly redefining a

[44] *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007).
[45] *Castro v. Holder*, 597 F.3d 93, 106 (2d Cir. 2010) (adjudicators must consider circumstances in the applicant's country to avoid an " 'impoverished view of what political opinions are, especially in [countries] ... where certain democratic rights have only a tenuous hold' ") (quoting *Osorio v. I.N.S.*, 18 F.3d 1017, 1030 (2d Cir. 1994)).
[46] *See, e.g., Bernal-Garcia v. I.N.S.*, 852 F.2d 144 (5th Cir. 1988) (participation in unions); *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993) (feminism); *Ahmed v. Keisler*, 504 F.3d 1183, 1193 (9th Cir. 2007) (rights of minority ethnic groups); *Del Pilar Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007) (opposition to anti-government terrorist organization).

political opinion as *only* 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 rule would bar individuals such as our Fellows' clients from seeking asylum on the basis of any political opinion manifesting "disapproval of, disagreement with, or opposition" to non-state actors—including criminals, terrorists, gangs, and guerrillas—absent "expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations" or that "opposes the ruling legal entity of the state or a legal sub-unit of the state."

i. Non-State Actors

The proposed rule fails to acknowledge that many asylum seekers flee countries where criminal, gang, guerilla, or other non-state actors are highly organized and powerful, constituting *de facto* ruling entities rather than mere neighborhood delinquents. The requirement that political opposition must be to a "ruling legal entity"—that is, one that holds *de jure* power—is arbitrary. The distinction should turn not on whether the group has established power *by law* but on whether the group, given the facts and circumstances of the country in question, constitutes a ruling entity *in fact*. Indeed, under the proposed rule's restrictive approach, many of our Fellows' clients who have sought or are seeking asylum on the basis of political opinion manifesting opposition to powerful non-state actors would now be ineligible, including: Colombian clients who opposed the FARC or other paramilitary groups, Middle Eastern clients who opposed ISIS, Central American clients who opposed the MS-13 and other gangs, Mexican clients who opposed drug cartels, and even Venezuelan clients who opposed pro-government collectives.

Even where asylum applicants cannot establish that the non-state actors they opposed were *de facto* ruling entities, circuit court caselaw widely permits political opinion-based asylum claims where the opinion threatens elements of society that the government is unable or unwilling to control.[47] One IJC Fellow recently represented an indigenous woman from Guatemala, Ms. K, who sought asylum in part on the basis of her political opinion in support of indigenous rights, which she expressed by testifying in court against her persecutors—*ladino* [non-indigenous] armed criminals—and organizing a march to protest impunity for crimes against indigenous people. Ms. K's *ladino* persecutors were non-state actors, and her indigenous activism did not "oppose[] the ruling legal entity … or a legal sub-unit" of Guatemala, yet her persecutors were permitted and even encouraged to target her as an indigenous woman in light of Guatemala's brutal civil war, in which indigenous communities were systemically exterminated and which

[47] *See, e.g., Hernandez-Chacon v. Barr*, 948 F.3d 94, 102-04 (2d Cir. 2020) (confirming possibility of political opinion opposing male domination); *Alvarez-Lagos v. Barr*, 927 F.3d 236, 251 (4th Cir. 2019) (confirming possibility of political opinion opposing gangs); *Delgado*, 508 F.3d at 707 (confirming possibility of political opinion opposing guerrilla group).

precipitated a legacy of violence against women. Ms. K ultimately won withholding of removal. The proposed rule's approach to political opinion claims would have resulted in denial of her claim.

ii. Expressive Behavior

The proposed rule also impermissibly restricts the types of behavior that may constitute expression of a political opinion, defining "expressive behavior" only as "public behavior commonly associated with political activism," such as attending a rally, organizing a demonstration, or printing political materials. The proposed formulation fails to account for the wide range of expressive speech and action recognized in circuit court caselaw[48] and in society more broadly. Speaking out against or acting in defiance of hegemonic norms such as gang violence or misogyny is at the heart of political action. Attending a rally against gang violence is no more "expressive" of a political opinion than intentionally defying a gang's orders to join their ranks or be killed. Indeed, the latter behavior is arguably *more* expressive as it makes the applicant a more obvious, immediate target. Attending a rally as one of dozens or hundreds of individuals draws less attention to the applicant than boldly defying a gang leader in the gang's own territory.

For example, one IJC fellow represents an asylum seeker from Bangladesh, Ms. L, who suffered years of abuse by her father, an Islamic extremist leader. Ms. L's father beat her, forced her to wear a niqab, and kept her locked inside their house at all times. Ms. L's father—influenced by his extreme religious beliefs and the larger culture of impunity in Bangladesh for male perpetrators of domestic violence—believed women should not study or work outside the home. Ms. L, by contrast, believed women should be independent and have the ability to decide their own futures. In defiance of her father's rule, Ms. L spoke back to him and clandestinely studied for and took nationwide school exams outside the home in anticipation of her eventual escape. Although Ms. L clearly defied hegemonic religious and gender norms, putting her own life in immediate danger, her actions would not constitute expression of a political opinion under the proposed rule merely because they were not actions "commonly associated with political activism."

iii. Imputed Political Opinion

Lastly, the proposed rule reaffirms the possibility that a political opinion may be imputed to an asylum seeker, yet it confusingly appears to maintain that where the imputed political

[48] *See, e.g., Yueqing Zhang v. Gonzales*, 426 F.3d 540 (2d Cir. 2005) (holding that Chinese applicant's refusal to pay extortion demands and subsequent letter of complaint constituted expression of political opinion).

opposition is to a non-state actor, the asylum seeker is still ineligible for asylum absent "expressive behavior." For the vast majority of our Fellows' asylum-seeking clients, this would abolish any real ability to demonstrate an imputed political opinion. It is difficult to conceive of many situations in which an asylum seeker engaged in "expressive" behavior in furtherance of a political opinion she did not actually hold but which persecutors imputed to her. This is because, under the proposed rule, the individuals most likely to engage in the types of activities constituting "expressive" behavior are those who actually hold such opinions, rendering the "imputed" prong meaningless.

For example, one IJC Fellow recently represented a Muslim gentleman from the Central African Republic, Mr. M, who lived in a bi-religious household in an area that had become a stronghold for majority-Muslim rebel militias. Because of the Mr. M's bi-religious family and refusal to take a side in the religious conflict, the mostly-Muslim militias imputed to him a political opinion of opposition to their goals. Mr. M did not actually hold this opinion and feared deeply for his life; as a result, he never attended a rally, circulated political materials, or engaged in any other action constituting "expressive behavior" as defined by the proposed rule. Thus, while his imputed political opinion claim was relatively straightforward under current asylum law, he would be unable to establish an imputed political opinion under the proposed changes.

C. The Proposed Re-Definition Of Persecution Represents A Per Se Bar For Most Asylum Seekers

Under the existing asylum framework, "persecution" has been interpreted broadly to mean a "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[49] The proposed rule seeks to redefine "persecution" as "an *extreme* concept involving a severe level of harm that includes actions *so severe* that they constitute an exigent threat" (emphasis added). While the term "exigent" is not explicitly defined in the proposed rule, it is used in common language to mean "requiring immediate aid or action."[50]

i. Exigency Requirement

The proposed rule's exigency requirement would produce absurd results, obligating asylum seekers who have received one or more death threats to wait around for their persecutors to act on the threats and harm them in a way that required "immediate aid or action" before they could attempt to seek asylum. Perversely, this would encourage survivors of discrimination and

[49] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).
[50]]Merriam-Webster (last accessed July 13, 2020), available at: https://www.merriam-webster.com/dictionary/exigent.

violence to gamble with their persecutors, and with their own lives, before daring to seek asylum in the United States.

The exigency requirement would also produce arbitrary distinctions between categories of conduct that, practically speaking, endanger an asylum seeker's life to the same degree. Persecutors who have demonstrated the capacity and willingness to kill an asylum seeker constitute no less of a danger if they threaten to kill the asylum seeker within a day's time than they do if they threaten to kill within a week's time, yet a single day is objectively more immediate than an entire week.

Similarly, certain classes of conduct that have historically constituted persecutory acts and that clearly rise above the level of "unfair, offensive, unjust, or even unlawful or unconstitutional" treatment would be unlikely to meet the exigency requirement. For example, it is unclear whether "immediate action or aid" is required in the event of a marital rape. The host organization of one IJC Fellow assisted an asylum applicant from Guinea, Ms. N, who suffered constant rape at the hands of her husband. Although the rapes Ms. N suffered were traumatizing and painful given her previous scarring from forced female genital mutilation, they did not require "immediate action or aid" and likely would not constitute an "exigent" threat under the proposed rule, barring Ms. N and others like her from asylum.

ii. Repeated Threats with No "Actual Effort" to Carry Out the Threats

The proposed rule also states that "repeated threats with no actual effort to carry out the threats" will generally be insufficient to establish persecution. The rule makes no attempt to define an "*actual* effort" to carry out a threat; it is unclear whether actions like brandishing a weapon or stalking an asylum seeker would suffice, or whether more serious physical harm would be required. One IJC Fellow conducted an intake of a Muslim asylum seeker from China who had been falsely accused of a crime, unlawfully arrested several times over the course of years, and detained in a "reeducation camp" with other Muslims, where her food and schedule were severely restricted and she was prohibited from speaking. Although the woman was never physically harmed during her arrests or detention, she became aware that other detainees were beaten. The woman was traumatized so thoroughly that she was unable to eat or sleep for an entire week after her release. The Chinese police repeatedly threatened that she would be harmed if she did not stop practicing Islam. Under the proposed rule, the Chinese government's actions likely would not constitute an "actual effort to carry out the[ir] threats" despite the terror and psychological trauma the woman endured because the government did not physically harm or attempt to harm the woman or her family.

In making sweeping claims about persecution and failing to take an individualized, case-by-case approach, the proposed rule discounts the reality that trauma is experienced differently by different categories of persons based on their backgrounds and lived experiences, which our Fellows have observed in their clients. Similarly, it fails to recognize that many applicants are severely traumatized by behavior that would not constitute an "exigent threat" to their life under the proposed definition[51] or to consider whether several incidents cumulatively rise to the level of persecution, which is essential when evaluating psychological torture over the course of many years or in the case of children—clients whom our Fellows regularly represent.

D. The Nexus Rule Proposed Excessively Narrows the Definition of this Vital Element In Contravention of Established Precedent

Under current law, eligibility for asylum requires a showing that persecution occurs "on account of" a protected ground, meaning that the persecution was or will be "*at least one* central reason for the feared persecution"[52] (emphasis added). Established circuit court case law has widely cautioned against taking an "excessively narrow" approach to the nexus requirement[14] and recognized the possibility of mixed motives for persecution.[53] The proposed rule guts the existing framework, purportedly in light of a desire for "expeditious consideration" of asylum and withholding claims. It offers a non-exhaustive list of situations rooted in case law which will generally "not [be] favorably adjudicate[d]."

i. Interpersonal Animus

The proposed rule proceeds categorically to deny claims in which persecution is based on interpersonal animus and in which the persecutor "has not targeted, or manifested an animus against, other members of an alleged particular social group" in addition to the asylum seeker. The rule's restrictive approach ignores sociocultural factors that influence a persecutor to act in ways that appear at first blush to constitute a mere "interpersonal" dispute but that, upon closer look, speak to the asylum seeker's unique vulnerability in the larger society in question.

For example, one IJC Fellow represented an asylum seeker from Haiti, Ms. P, who was severely physically and emotionally abused by her partner, the father of her daughters. Ms. P's partner locked her at home and cut her with a machete. Ms. P bravely reported her abuse to the police,

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[51] Stephen Paskey, "Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum." Santa Clara Law Review, 56 Santa Clara L. Rev. 457, 485 (2016) ("Research has shown that refugees are ten times more likely to suffer from PTSD than the general population in the countries where they've resettled. Before they were displaced, refugees often experienced prolonged detention, severe violence, torture, or the death of family, friends, or associates").

[52] 8 U.S.C. § 1158(b)(1)(B)(i).

[53] *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015).

who took no action despite seeing blood on her face. As the U.N. Office on Drugs and Crime notes—and as evidenced in Ms. P's story—intimate partner violence is "not usually the result of a random or spontaneous act" but rather "gender roles, social norms, the status of women in society, discrimination and gender equality."[54] Ms. P ultimately won asylum before an immigration judge, yet her claim would be improperly denied under the proposed rule for persecution on account of "interpersonal animus."

ii. Gender

The proposed rule also unlawfully denies asylum and withholding claims on the basis of gender, despite the longstanding recognition in BIA and circuit court caselaw that gender may indeed constitute a protected characteristic, particularly when combined with another limiting factor.[55] The rule's prohibition on gender-based asylum claims would deeply impact our Fellows, who have worked extensively with asylum seekers who identify as women and girls.

For example, one IJC Fellow represented a trans woman from Guatemala, Ms. Q, who had known herself to be, and identified as, a woman from a young age. When Ms. Q was around 15 years old, gang members began forcing her to traffic drugs for them, in part because they asserted that an outwardly presenting trans woman would be able to carry drugs and money in her purse without suspicion. Even after Ms. Q fled to another part of Guatemala, gang members located and continued to target her, shooting her on the shoulder and leaving her with a bullet wound that hospital staff refused to treat because she was a trans woman. Ms. Q won ultimately asylum on account of her status as a young trans woman in Guatemala. Her claim, like the claims of so many asylum seekers our Fellows represent, would be improperly denied under the proposed rule.

Confusingly, after the proposed rule denies entire categories of claims, such as the ones listed above, it notes that "such facts *could* be the basis for finding nexus, given the fact-specific nature of this determination" (emphasis added) while also asserting that the new nexus formulation will "provid[e] clarity to this issue" and "reduce the amount of time" required to adjudicate a claim. But the proposed rule fails to elaborate on the types of facts that would allow an asylum applicant to establish eligibility on the basis of one of the disapproved categories, which will confuse asylum seekers, their legal representatives, and overburdened adjudicators, who may preemptively deny a claim based on one of these categories rather than

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[54] *See*, *e.g.*, *Uwais v. U.S. Att'y Gen.*, 478 F.3d 513, 517 (2d Cir. 2007 (citing *Matter of S-P-*, 21 I&N Dec. 486, 494-95 (BIA 1996) (where a persecutor has "mixed motives," applicant is required to show only "that the harm was motivated, in part, by an actual or imputed protected ground").

55 *See, e.g.*, Acosta, 19 I&N Dec. at 233; *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093-94 (9th Cir. 2013); *N.L.A. v. Holder*, 744 F.3d 425, 438 (7th Cir. 2014).

comb through the record in an attempt to pinpoint salient facts that *may* salvage the claim. The new nexus formulation will produce a chilling effect on the asylum seekers our Fellows commonly represent—including women, children, survivors of gang or domestic violence, and members of the LGBTQ community—preventing innumerable individuals with valid asylum or withholding claims from ever seeking protection at all.

iii. Prohibition of Relevant Evidence

Finally, the proposed rule attempts to categorically prohibit "evidence promoting cultural stereotypes about an individual or country, including stereotypes based on race, religion, nationality, or gender," which would include evidence demonstrating that a country has a culture of, for example, misogyny or family violence. However, it is nearly impossible to establish a claim for asylum or withholding of removal where an asylum seeker is unable to introduce assertions of negative cultural stereotypes that created the very circumstances from which the asylum claim arose.

For example, to formulate a cognizable particular social group and to demonstrate that an asylum seeker was persecuted on account of that group, the asylum seeker would likely need to submit evidence "promoting cultural stereotypes" about the members forming part of the group. To establish sufficient particularity, an asylum seeker must demonstrate that the group is "defined by characteristics that provide a clear benchmark for determining who falls within the group" and that "the terms used to describe the group have commonly accepted definitions in the society of which the group is a part." Similarly, to establish "social distinction," the group "must be a meaningfully discrete group as the relevant society perceives it." Thus, for a proposed social group consisting of "Muslim Women in Country X," an asylum seeker would likely need to submit evidence illustrating cultural stereotypes about how women and Muslims are meaningfully distinguished in her society. Similarly, to establish that the asylum seeker suffered persecution on account of her status as a Muslim woman, she would need to submit evidence as to *why* her persecutor targeted a Muslim woman—again implicating stereotypes. The proposed rule's prohibition on this necessary evidence puts asylum seekers and their legal representatives, including our Fellows, in an impossible bind.

Moreover, in some instances, the proposed rule would confuse "stereotypes" with objective facts. Guatemala is one of the most dangerous countries in the world for children and women, evidenced by our own country's Department of State Human Rights Reports from at least the last three years. To illustrate, one of our Fellows has a client, Ms. R, who was severely beaten by her ex-partner and filed a police report. Ms. R received a call a few hours later that her report had been dropped and was no longer being investigated because this was a family dispute, and the ex-partner's uncle was part of the local government. Ms. R moved, continued

to feel unsafe, and ultimately fled the country. This is not an uncommon story given that Guatemalan authorities have an informal policy of not involving themselves in domestic violence matters. It is not a stereotype but a fact supported by our own Department of State's Human Rights Reports.

E. The Discretionary Factors Outlined Run Afoul of The INA and Logic In Limiting Large Segments from Seeking Relief and Essentially Removing Discretion From The Adjudicatory Analysis

The Departments propose three specific factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion. If one or more factors apply, the adjudicator "would consider such factors to be significantly adverse for purposes of the discretionary determination." One of the mandatory factors is unlawful entry, or unlawful attempted entry with an exception that it was made in immediate flight from persecution or torture in a contiguous country. The Departments offer that they are "concerned by the significant strain on their resources required to apprehend, process, and adjudicate the cases of the growing number of aliens who illegally enter the United States putatively in order to seek asylum." However, our obligations under international law may not be abridged simply because doing so would cause us to expend resources. The U.S. must provide a legitimate process for individuals to seek asylum in our country, whether or not they enter in a procedurally regular manner.

Furthermore, had Congress intended for one's manner of entry to be a significant factor in the adjudicatory analysis, they would have done so. On the contrary, the INA makes the opposite allowance. The Departments disingenuously state in footnote 34 that this proposed change does not conflict with the INA section 208(a)(1), which provides that "[a]ny 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." This provision is clear in honoring the premise that asylum seekers should not be punished for not entering at a port of arrival. Adding this as a discretionary factor is an impermissible end run around Congress's unambiguous language.

VI. Conclusion

For reasons including but not limited to those expressed in this comment, we vehemently oppose the proposed rule and request that it be withdrawn in its entirety.

Sincerely,

/s/

Shannon McKinnon
Managing Attorney
Immigrant Justice Corps