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By Electronic Submission

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Re: Comments in Opposition to "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" (RIN 1125-AA94, 1615-AC42 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020)

Dear Assistant Director Reid:

The Transgender Legal Defense & Education Fund ("TLDEF"), Casa Anandrea, Colectivo Intercultural Transgrediendo, the Sylvia Rivera Law Project, GMHC, and Translatinx Network appreciate the opportunity to comment on the Joint Notice of Proposed Rulemaking entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" issued by the Department of Homeland Security ("DHS")/U.S. Citizenship and Immigration Services ("USCIS") and Department of Justice ("DOJ")/Executive Office of Immigration ("EOIR," and collectively the "Agencies") and published at 85 Fed. Reg. 36264 on June 15, 2020 ("NPRM" or "Proposed Rule").

We strongly oppose the Proposed Rule and urge the Department of Homeland Security (DHS) and Executive Office of Immigration to withdraw the rule in its entirety. Transgender asylum seekers rely on a functioning, fair, and reasonable asylum process to escape

horrendous conditions in their countries of origin. The United States has long respected the rights of asylum seekers and refugees to seek safety in the United States. It should continue to do so.

The Executive branch is required faithfully to execute the law—not rewrite it. The Proposed Rule would unjustly and unlawfully gut the U.S. asylum system. The Proposed Rule will harm transgender refugees by leaving many of them without a viable path to obtain asylum. The Proposed Rule's many rollbacks and deprivations of due process would strip transgender immigrants of vital protections. The Proposed Rule is inconsistent with existing U.S. law, and flouts the United States' obligations under international law. The Proposed Rule will violate the United States' basic obligations to the rights of immigrants and will needlessly cause viable asylum claims to go unheard and ultimately rejected. The Proposed Rule puts the lives of transgender people and other asylum seekers in danger. It should be withdrawn.

1. OUR ORGANIZATIONS HAVE DEEP EXPERIENCE WORKING WITH TRANSGENDER PEOPLE, INCLUDING THOSE SEEKING ASYLUM

The **Transgender Legal Defense & Education Fund** (TLDEF) is a 501(c)(3) nonprofit whose mission is to end discrimination and achieve equality for transgender and nonbinary people, particularly those in our most vulnerable communities. TLDEF provides legal representation to transgender individuals who have been subject to discrimination, focusing on the key issues of employment, education, public accommodations, and healthcare. TLDEF also provides public education on transgender rights.

The Name Change Project at TLDEF provides pro bono legal name change services to hundreds of low-income transgender, gender nonconforming and nonbinary people annually through partnerships with dozens of the nation's most prestigious law firms and corporate law departments. TLDEF's Name Change Project regularly assists transgender asylum seekers, asylees, refugees, and immigrants with obtaining legal name changes.

Casa Anandrea is an inclusive, diverse, and safe space for Houston's LGBTQ+ population, providing essential resources to transgender people who are often unable to obtain necessary assistance due to discrimination. It operates a shelter that offers temporary housing

and safety to homeless transgender people in Houston, Texas, many of whom are seeking asylum and were recently released from immigration detention. Along with its sister organization Organización Latina Trans en Texas, Casa Anandrea helps transgender people with issues such as immigration, name, and gender-marker changes on government-issued IDs, HIV prevention, and English classes.

Colectivo Intercultural Transgrediendo is recognized nationally as a bilingual and multicultural movement that defends and upholds the human rights of Trans* people and those with gender-diverse identities. Colectivo Intercultural Transgrediendo promotes the development of comprehensive, cultural, and social health of trans people and with those gender-diverse identities; and trans-specific, trans-inclusive and trans-directed initiatives aimed at strengthening, empowering, and fully exercising the rights of transgender people. It works to transform the world in which we live and reduce all forms of discrimination. It provides immigrants with immigration legal services by partnering with affiliated organizations and pro-bono attorneys who have extensive experience in the areas of Asylum, U Visas, T Visas.

Translatinx Network increases the capacity of all transgender community members through advocacy, education, and social support. Translatinx Network has both a local and national focus, with a mission to promote the healthy development of transgender people through the delivery of a wide range of information. Through promotion, outreach in education, and capacity building, we encourage and strengthen the creation of safe and productive environments for transgender women. Translatinx Network has served as a lifeline to transgender asylum seekers by providing direct services to those recently released from detention. In addition, Translatinx Network has operated a Community Clothing Closet for over two years that has provided clothing, hygiene kits, and other essential needs to individuals in need.

The Sylvia Rivera Law Project works to guarantee that all people are free to self-determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination, or violence. SRLP is a collective organization founded on the understanding that gender self-determination is inextricably intertwined with racial, social, and economic justice. SRLP seeks to increase the political voice and visibility of low-income people and

people of color who are transgender, intersex, or gender non-conforming (TGNCI). SRLP works to improve access to respectful and affirming social, health, and legal services for our communities. SRLP believes that in order to create meaningful political participation and leadership, TGNCI people must have access to basic means of survival and safety from violence.

Since its founding in 2002, SRLP has directly served thousands of TGNCI people who are low-income, of color, or both. Over the course of any given year, SRLP works on over 300 cases involving TGNCI individuals in New York City and New York State, including in affirmative immigration proceedings for individuals applying for asylum, T-Visas, U-Visas, Adjustment of Status, and ancillary matters.

GMHC is the world's first and leading provider of HIV/AIDS prevention, care, and advocacy. Building on decades of dedication and expertise, GMHC understands the reality of HIV/AIDS and empowers a healthy life for all. GMHC's mission is to fight to end the AIDS epidemic and uplift the lives of all affected. GMHC assists asylum seekers by assessing their claims and navigating them through the asylum process which includes preparation and filing of applications and affidavits, research on country condition and representation at interviews and hearings. Potential clients are also assessed for other needs such as housing, connection to medical care, and mental health, and are connected to care.

2. ACCESS TO A FUNCTIONING AND FAIR ASYLUM PROCESS IS CRITICAL FOR TRANSGENDER PEOPLE, WHO FACE PERSECUTION IN MANY COUNTRIES AROUND THE WORLD

2.1. LGBTQ+ Asylum Seekers Face Widespread Persecution Because of Their Transgender Status, Sexual Orientation and HIV Status

In over eighty countries, it is illegal or fundamentally unsafe to be LGBTQ, and in particular, transgender. LGBTQ+ and HIV-positive asylum seekers[1] experience persecution across the globe. Such

[1] We use the term "asylum seeker" to refer to those who express fear of return to their country of origin or an intent to apply for asylum. *See* 8 U.S.C. § 1225(b)(1)(A)(ii). Such individuals may be eligible for asylum, entitled to withholding of removal, and/or entitled to relief from removal under the United States' implementation of the Convention Against

persecution takes many forms, including:

- **Criminal punishment**. Same-sex activity between consenting adults is subject to criminal punishment in approximately 70 countries.[2,3] Of those, 31 carry a sentence of ten years or more in prison, and twelve countries allow the death penalty as a sentence. Transgender people are particularly vulnerable as they are targeted under laws against same-sex sexual activity by cultures that refuse to recognize the validity of their transgender status, and further singled out because of that status. Twelve countries additionally target gender identity through "cross-dressing" or "impersonation" laws.[4]

- **Abuse and violence**. LGBTQ+ people are frequently subjected to abuse and violence throughout the world, including rape and sexual assault, physical abuse, and murder. For example, according to UNHCR, "88 percent of LGBTI asylum seekers from the Northern Triangle [*i.e.*, El Salvador, Gautama, and Honduras] interviewed [] reported having suffered sexual and gender-based violence in their countries of origin."[5] This violence is often

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Torture.

[2] Where this comment includes linked material, we respectfully request that the Agencies review the linked material in its entirety and consider it part of the administrative record.

[3] *See* International Lesbian Gay, Bisexual, Trans and Intersex Association ("ILGA"), *State-Sponsored Homophobia: Global Legislation Overview*, at 48–52 (Dec. 2019), https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf.

[4] Human Dignity Trust, *Map of Countries That Criminalise LGBT People* (last accessed July 9, 2020) https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/; Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa* (Apr. 16, 2018) ("In Kuwait, a 2007 law criminalizes 'imitating the opposite sex.' Under this provision, transgender people have been subjected to arbitrary arrests, accompanied by degrading treatment and torture while in police custody."), https://www.hrw.org/report/2018/04/16/audacity-adversity/lgbt-activism-middle-east-and-north-africa.

[5] *See* Amnesty International, *No Safe Place* at 7 (2017), https://www.amnesty.org/download/Documents/AMR0172582017ENGLISH.PDF.

perpetrated by private actors, such as family and community members. In Iraq, for example, gay men report severe beatings and death threats at the hands of their own family members.[6] Moreover, such persecution routinely goes underreported. In Jamaica, attacks by mobs and the police target low-income LGBTQ+ people, producing homelessness.[7] As the State Department has noted, "[r]eluctance to report abuse—by women, children, lesbian, gay, bisexual, transgender, or intersex persons (LGBTI), and members of other groups—is, of course, often a factor in the underreporting of abuses."[8] Violence is sometimes outside the reach of the state, and sometimes takes place where weak governments depend on allied armed groups to provide security.[9] Alternatively, anti-LGBTQ+ violence often occurs at the direction of the police, as in Chechnya, where since 2017 the police have reportedly detained and tortured hundreds of individuals suspected to be LGBTQ+.[10]

- **Social stigma**. Many countries have a pervasive culture of systemic anti-LGBTQ+ bias. In those countries, LGBTQ+ status carries extreme social stigma. Many nations punish LGBTQ+ people by preventing them from participating in everyday life. LGBTQ+ people are shunned as vile, prevented from obtaining an

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[6] *See* Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa* (Apr. 16, 2018), https://www.hrw.org/report/2018/04/16/audacity-adversity/lgbt-activism-middle-east-and-north-africa.

[7] *See* Rebekah Kebede, *Jamaican LGBTQ youths escape persecution in city storm drains*, Reuters (Mar. 1, 2017), https://www.reuters.com/article/us-jamaica-lgbt-homeless/jamaican-lgbtq-youths-escape-persecution-in-city-storm-drains-idUSKBN1685AY.

[8] *See* U.S. Dep't of State, *2019 Country Reports on Human Rights Practices*, Appendix A (Mar. 2020), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/.

[9] *See* Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa* (Apr. 16, 2018), https://www.hrw.org/report/2018/04/16/audacity-adversity/lgbt-activism-middle-east-and-north-africa

[10] Andrew E. Kramer, *Chechnya Renews Crackdown on Gay People, Rights Group Says*, N.Y. Times (Jan. 14, 2019), https://www.nytimes.com/2019/01/14/world/europe/chechnya-gay-people-russia.html.

education, refused employment, refused housing and healthcare, stripped of family or parental rights,[11] and denied access to politics or power. Such remarkable exclusion rises to the level of persecution.[12] To take just one example, a Bolivian study found that intense discrimination forced 72 percent of transgender individuals to abandon their secondary school studies.[13]

- **No legal recourse**. LGBTQ+ people frequently cannot report private violence to the police in the countries where they experience persecution. Police officers and other authority figures are often the agents of persecution themselves, and LGBTQ+ people are terrified that going to the police will result in retaliation in the form of rape, beatings, or murder.[14] Even if the

[11] United Nations General Assembly, *Report of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity*, 3-4 (July 17, 2019), https://undocs.org/A/74/181?fbclid=IwAR3xrYojctnW46K2HAFgf4ju4C_Wd-4xEzezVG_cyD3_foUOILbhjuO3538 (LGBTQ+ students and the children of LGBTQ+ parents face taunts, physical and sexual violence, social isolation, and death threats).

[12] In Brunei, for example, a woman was outed as a lesbian and then ostracized by her community. She lost everything. She was fired from her job, and an influential man blackmailed her into sex work. She stated to *The Telegraph* that she was "already living a prison sentence." Chloe Govan, *Brunei LGBT community living in fear despite sultan's death penalty reprieve*, The Telegraph (May 10, 2019), https://www.telegraph.co.uk/news/2019/05/10/brunei-lgbt-community-living-fear-despite-sultans-death-penalty.

[13] Advocates for Youth, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth in the Global South*, at 2 (last accessed July 9, 2020), https://advocatesforyouth.org/wp-content/uploads/storage//advfy/documents/Factsheets/lesbian-gay-bisexual-and-transgender-youth-in-the-global-south.pdf.

[14] *See* Ivette Feliciano & Zachary Green, *LGBTQ asylum seekers persecuted at home and in US custody*, PBS News Hour (Aug. 10, 2019) ("[O]ne night while doing outreach with sex workers in . . . San Salvador, she was beaten and shot in the shoulder by a group of gang members. . . . Police detained but eventually released the men with no charges. Castro says they knew she was the one who had complained, so they began to follow her and threaten her with death.") https://www.pbs.org/newshour/show/lgbtq-asylum-seekers-persecuted-at-home-and-in-u-s-custody.

police are not themselves the agents of persecution, they often harbor the same intolerant attitudes, viewing violence against LGBTQ+ people as justified. For this reason, for example, in Russia, police faced with reports of anti-LGBTQ+ violence are "dismissive and reluctant to investigate effectively, often blaming victims for the attacks."[15] In El Salvador, "[o]nly 12 out of 109 LGBTQ+ murders recorded between December 2014 and March 2017 went to trial . . . and there has never been a successful conviction."[16] Last March, Uganda used the COVID-19 outbreak as a pretext to arrest 23 people living at an LGBTQ+ shelter.[17] In October 2019, a mob in Uganda attacked sixteen LGBTQ+ activists. After dispersing the mob, the police arrested the sixteen LGBTQ+ individuals and subjected them to homophobic insults and forced anal examinations.[18]

- **Corrective rape and conversion therapy**. In many countries, LGBTQ+ people are subject to "corrective rape." For example, in Jamaica, lesbians are raped under the belief that intercourse with a man will "cure" them of their sexual orientation.[19]

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[15] *See* Human Rights Watch, *License to Harm: Violence and Harassment against LGBT People and Activists in Russia* (Dec. 15, 2014), https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia.

[16] *See* Oscar Lopez, *Pressure mounts for El Salvador to investigate wave of LGBT+ killings*, Reuters (Nov. 21, 2019), https://www.reuters.com/article/us-el-salvador-lgbt-murder-trfn/pressure-mounts-for-el-salvador-to-investigate-wave-of-lgbt-killings-idUSKBN1XW01G.

[17] *See* Neela Ghoshal, *Uganda LGBT Shelter Residents Arrested on COVID-19 Pretext*, Human Rights Watch (Apr. 3, 2020), https://www.hrw.org/news/2020/04/03/uganda-lgbt-shelter-residents-arrested-covid-19-pretext.

[18] *See* Human Rights Watch, *Uganda: Stop Police Harassment of LGBT People* (Nov. 17, 2019), https://www.hrw.org/news/2019/11/17/uganda-stop-police-harassment-lgbt-people.

[19] *See Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report*, submitted at 118th Session of Human Rights Committee in Geneva, at 5 (Sept. 2016), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JAM/INT_CCPR_CSS_JAM_25269_E.pdf.

Likewise, many countries impose rape and torture under the guise of pseudoscientific "therapy." In Ecuador, LGBTQ+ individuals are involuntarily detained in "corrective therapy" clinics, where they are beaten, locked in solitary confinement, and force-fed psychoactive drugs.[20] The International Rehabilitation Council for Torture Victims reports that in Tunisia, Tajikistan, and Ukraine, conversion therapy or "corrective violence" is ordered by the state or the police.[21]

- **Abuse against HIV-positive individuals perceived to be LGBTQ**. Many countries impute LGBTQ+ status to HIV-positive individuals, assuming that HIV is a "gay disease." This results in severe stigma and a lack of privacy, subjecting individuals to abuse. In addition to the types of abuse described above, individuals perceived to be LGBTQ+ are often subject to HIV tests as conditions for employment. This leads to serious public health concerns: research shows that perceptions and experiences of sexual stigma are associated with less access to HIV services and lower odds of viral suppression.[22]

In sum, many people who seek asylum in the United States are subjected to horrific persecution because of their transgender status, sexual orientation, and, in some cases, HIV status. Tragically, LGBTQ+ refugees living in homophobic and transphobic countries sometimes internalize feelings of shame and stigma about who they are, compounding their suffering. Thus, when they arrive in the United States, some are still learning to embrace their identity and may not be able to express it to immigration officials. Many also fear trusting authority figures with their deeply personal identities, especially if they experienced persecution at the hands of government actors in

[20] Anastasia Moloney, *Gays in Ecuador raped and beaten in rehab clinics to "cure" them*, Reuters (Feb. 8, 2018), https://www.reuters.com/article/ecuador-lgbt-rights/feature-gays-in-ecuador-raped-and-beaten-in-rehab-clinics-to-cure-them-idUSL8N1P03QO.

[21] International Rehabilitation Council for Torture Victims, *It's Torture Not Therapy: A Global Overview of Conversion Therapy*, at 15 (2020), https://irct.org/assets/uploads/pdf_20200513134339.pdf.

[22] Avert, *Homophobia and HIV* (last accessed July 2, 2020), https://www.avert.org/professionals/hiv-social-issues/homophobia.

the past.

2.2. Conditions for Transgender and LGBTQ+ Communities in Latin American Countries

The experiences of LGBTQ+ persons in Latin America warrant particular attention. According to recent data from DHS, five out of the top ten countries of nationality for 2018 asylum-grantees were Central or South American nations, collectively accounting for 38 percent of all asylum grants:[23]

Individuals Granted Asylum Affirmatively or Defensively by Country of Nationality: FY 2016 to 2018

(Ranked by 2018 country of nationality)

Country	2016		2017		2018	
	Number	Percent	Number	Percent	Number	Percent
Total	20,362	100.0	26,509	100.0	38,687	100.0
China, People's Republic	4,495	22.1	5,615	21.2	6,905	17.8
Venezuela	343	1.7	549	2.1	6,087	15.7
El Salvador	2,144	10.5	3,476	13.1	2,963	7.7
Guatemala	1,921	9.4	2,949	11.1	2,358	6.1
Honduras	1,474	7.2	2,045	7.7	2,029	5.2
Egypt	827	4.1	1,161	4.4	1,591	4.1
Mexico	904	4.4	1,042	3.9	1,361	3.5
India	479	2.4	685	2.6	1,327	3.4
Russia	284	1.4	344	1.3	906	2.3
Syria	724	3.6	758	2.9	714	1.8
All other countries, including unknown	6,767	33.2	7,885	29.7	12,446	32.2

Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Homeland Security and U.S. Department of Justice.

[23] Nadwa Mossaad, U.S. Dep't of Homeland Security, *Annual Flow Report on Refugees and Asylees: 2018* at 8 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf.

Additionally, nine of the top fifteen countries of origin for those given credible fear interviews in 2018 were Latin American countries, and credible fear was found in 84 percent of those cases:[24]

NATIONALITY	2018			
	Credible Fear Cases			
	Completed	CF Found	CF Not Found	Closed
TOTAL	**96,761**	**74,287**	**9,176**	**13,298**
Honduras	25,585	21,424	2,409	1,752
Guatemala	24,402	14,177	2,323	7,902
El Salvador	13,424	11,023	1,720	681
India	7,709	7,165	460	84
Mexico	6,850	4,261	987	1,602
Cuba	5,816	5,515	247	54
Brazil	1,741	1,416	184	141
Nicaragua	1,548	1,346	152	50
China, People's Republic	1,385	1,256	98	31
Ecuador	1,204	852	177	175
Bangladesh	745	679	43	23
Nepal	704	634	50	20
Venezuela	548	459	23	66
Cameroon	528	502	D	D
Eritrea	454	447	D	D
All Other Nations	4,118	3,131	299	688

Given the scale at which Latin American nationals seek *and are granted* asylum in the United States, the Agencies should understand the impact that the Proposed Rule would have on this population generally, and transgender Latin Americans in particular. Because the rule disproportionately affects transgender asylum-seekers, the following discussion compares attitudes towards transgender and other LGBTQ+ persons in seven Latin American nations and demonstrates the dangerous conditions that these individuals face in their home countries.

2.2.1. Venezuela

In 2018, Venezuelans accounted for 23.5 percent of individuals granted affirmative asylum in the United States.[25] Over the past

[24] *See* U.S. Dep't of Homeland Security, Top Fifteen Nationalities Referred for a Credible Fear Interview, Fiscal Years 2016-2018 (2018), https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview.

[25] Nadwa Mossaad, U.S. Dep't of Homeland Security, Annual Flow Report on Refugees and Asylees: 2018 8 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-

decade, Venezuela has faced political, economic, and societal upheaval under the regime of authoritarian leader Nicolás Maduro,[26] and the LGBTQ+ population has proven uniquely vulnerable. Because Venezuelan law does not prohibit discrimination based on sexual orientation or gender identity, there is no legal recourse for acts of bias or violence against transgender individuals; protections against sexual orientation discrimination are rarely enforced.[27] As a result, transgender and other LGBTQ+ persons are often refused entry at parks and other public spaces, and the national police force does not investigate these or other denials of civil rights. The Maduro regime has also notably stifled efforts by transgender individuals to obtain proper identification documents that would afford them access to employment, housing, and health care.[28] This lack of legal legitimization, compounded by dire economic conditions, forces many transgender people to rely on sex work as a means of survival.[29] It is often only by fleeing the country that transgender Venezuelans are able to live without fear of violence or discrimination.

2.2.2. El Salvador

In 2018, individuals from El Salvador constituted 13.5 percent of defensive asylum-grantees in the United States, making Salvadorans the second-largest defensive asylee population in the country.[30]

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statistics/yearbook/2018/refugees_asylees_2018.pdf.

[26] *See* U.S. Dep't of State, Venezuela 2019 Human Rights Report 1 (2020), https://www.state.gov/wp-content/uploads/2020/03/VENEZUELA-2019-HUMAN-RIGHTS-REPORT.pdf; *see also* Anatoly Kurmanaev, *Venezuela's Maduro, Used to Crises, Faces His Toughest One Yet*, N.Y. Times (April 13, 2020), https://www.nytimes.com/2020/04/13/world/americas/venezuela-maduro-oil.html.

[27] U.S. Dep't of State, Venezuela 2019 Human Rights Report 32 (2020), https://www.state.gov/wp-content/uploads/2020/03/VENEZUELA-2019-HUMAN-RIGHTS-REPORT.pdf.

[28] *Id.*

[29] *Id.*

[30] Nadwa Mossaad, U.S. Dep't of Homeland Security, Annual Flow Report on Refugees and Asylees: 2018 8 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf.

While this statistic testifies to the overall severity of human rights conditions in El Salvador, transgender and other LGBTQ+ individuals face heightened danger. Although Salvadoran law nominally prohibits discrimination based on sexual orientation and gender identity, these laws are illusory. Instead, the National Civil Police ("PNC"), charged with maintaining public safety, often targets transgender and gay individuals with harassment, invasive strip searches, and life-threatening violence.[31] In January 2019, a transgender woman named Camila Díaz Córdova was detained and murdered by PNC officers who threw her from a moving vehicle.[32] Córdova had previously attempted to escape this state-sanctioned violence by fleeing to the United States, but in August 2017, U.S. immigration authorities apprehended and deported her back to the country where she would be murdered a year later.[33] A Salvadoran court refused to classify Córdova's murder as a hate crime.[34]

Transgender persons in El Salvador also face violence at the hands of neighbors and fellow citizens. At least seven transgender women were murdered in the latter half of 2019, and the Office of the Human Rights Ombudsman received numerous additional complaints of torture, death threats, and physical abuse.[35] In October 2019, a 27-year-old transgender woman named Anahy Rivas was killed by being dragged behind a moving vehicle, and the beaten body of a transgender woman named Victoria was left on the streets of San Francisco Menéndez the following month.[36] The media often circulates uncensored photos of these grisly killings, normalizing the population to violence towards transgender people. The United

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[31] U.S. Dep't of State, El Salvador 2019 Human Rights Report 22 (2020), https://www.state.gov/wp-content/uploads/2020/02/EL-SALVADOR-2019-HUMAN-RIGHTS-REPORT.pdf.

[32] Cristian González Cabrera, *Murder Trial for El Salvador Transgender Woman to Proceed*, Human Rights Watch (Mar. 11, 2020), https://www.hrw.org/news/2020/03/11/murder-trial-el-salvador-transgender-woman-proceed.

[33] *Id.*

[34] *Id.*

[35] U.S. Dep't of State, El Salvador 2019 Human Rights Report 23 (2020), https://www.state.gov/wp-content/uploads/2020/02/EL-SALVADOR-2019-HUMAN-RIGHTS-REPORT.pdf.

[36] *Id*.

Nations ("UN") has recognized the heightened physical danger faced by transgender and other LGBTQ+ individuals in El Salvador, and in 2019, a sub-regional task force under the UN Free & Equal campaign was established there to combat discrimination and violence against the LGBTQ+ community.[37]

2.2.3. Guatemala

DHS 2018 data indicates that Guatemala is among the top five countries for both affirmative and defensive grants of asylum in the United States.[38] LGBTQ+ people are particularly vulnerable to human rights abuses in Guatemala. Guatemalan laws do not protect against discrimination based on sexual orientation or gender identity, and legislators have demonstrated their resistance to enacting these protections.

Along with discrimination and lack of legal protections, transgender persons regularly face physical harassment and violence at the hands of both public officials and fellow Guatemalans. The National Civil Police ("PNC") is known to target and harass transgender and other LGBTQ+ individuals, as well as NGOs and other organizations that support the LGBTQ+ community.[39] In one notable incident from August 2019, PNC officers waited outside a local NGO office for hours in an effort to intimidate victims of homophobic and transphobic violence who sought shelter inside.[40] As of October 2019, the NGO

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[37] U.N. Human Rights Office of the High Comm'n, U.N. Human Rights Report 2019 268 (May 2020), https://www.ohchr.org/Documents/Publications/OHCHRreport2019.pdf; *see also generally* Immigration Equality, Index To Documentation Of Country Conditions Regarding Persecution Of LGBTQ Individuals And HIV Positive Individuals In El Salvador (2019), https://immigrationequality.org/wp-content/uploads/2020/06/EL-SALVADOR-2019-LGBT-Index-and-Compiled-articles.pdf (extensively documenting persecution of LGBTQ+ people in El Salvador).

[38] Nadwa Mossaad, U.S. Dep't of Homeland Security, Annual Flow Report on Refugees and Asylees: 2018 8 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf.

[39] U.S. Dep't of State, Guatemala 2019 Human Rights Report 22 (2020), https://www.state.gov/wp-content/uploads/2020/02/GUATEMALA-2019-HUMAN-RIGHTS-REPORT.pdf.

[40] *Id.*

National Network for Sexual Diversity in Guatemala reported that at least twenty LGBTQ+ individuals, several of whom were transgender, had been murdered in their homes and public spaces during the year.[41]

2.2.4. Honduras

In 2018, Honduras ranked among the top ten countries for both affirmative and defensive asylum grants in the United States.[42] In recent years, transgender and other LGBTQ+ Hondurans have faced escalating levels of physical violence and harassment, with at least fifty-one LGBTQ+ individuals, including twelve transgender women, murdered in 2018 and 2019 alone.[43] Lack of government data veils the true measure of violence against the transgender and LGBTQ+ community, but media coverage of the murders demonstrates how cruel and targeted these acts can be. In 2018, the burned and beaten body of Lorenza Alexis Alvarado Hernández, a 23-year-old transgender woman, was found in a ditch in Comyagüela, Honduras.[44] The condition of her body suggested that she had been both stoned and raped prior to her death.[45] On June 9, 2019, a transgender woman named Shakira was brutally murdered and mutilated by unknown killers, who left a note by her body starting,

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[41] *Id.*

[42] Nadwa Mossaad, U.S. Dep't of Homeland Security, *Annual Flow Report on Refugees and Asylees: 2018* 8 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf; *see also generally* Immigration Equality, Index To Documentation Of Country Conditions Regarding Persecution Of LGBTQ Individuals And HIV Positive Individuals In Guatemala (2017), https://immigrationequality.org/guatemala-2017-lgbt-index-and-compiled-articles-copy-2/ (extensively documenting persecution of LGBTQ+ people in Guatemala).

[43] Mirte Postema, Human Rights Watch, *Amidst Violence, Hondurans March for Pride* (Sept. 9, 2019), https://www.hrw.org/news/2019/09/09/amidst-violence-hondurans-march-pride.

[44] U.N. Human Rights Office of the High Comm'n, *Free & Equal Campaign: Violence against Lesbian, Gay, Bisexual or Transgender People*, UNFE.org (2018), https://www.unfe.org/wp-content/uploads/2018/10/Violence-English.pdf.

[45] *Id.*

"This is the first one, two more to go."[46] Within a three-day span in July 2019, three other transgender women, including a television host and an LGBTQ+ activist, were shot and murdered in Puerto Cortés.[47] In a subsequent 2019 statement addressing the heightened rates of violence in Honduras, the Inter-American Commission on Human Rights noted that these were not "isolated acts of violence" and that LGBTQ+ Hondurans lived in constant terror of physical and psychological abuse that often goes unpunished.[48]

Discrimination in hiring practices also presents obstacles for transgender individuals in Honduras. As numerous LGBTQ+ rights groups within the country have observed, government agencies and private actors often refuse to hire members of the LGBTQ+ community.[49] As in other Latin American countries, the inability to update identification documents makes employment and education opportunities particularly rare for transgender individuals. As a result, transgender people are often compelled to rely on sex work to survive, which only heightens the risk of physical harassment and abuse.[50]

2.2.5. Mexico

Although its federal law prohibits discrimination based on sexual orientation or gender identity, Mexico is currently the second

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[46] Mirte Postema, Human Rights Watch, *Amidst Violence, Hondurans March for Pride* (Sept. 9, 2019), https://www.hrw.org/news/2019/09/09/amidst-violence-hondurans-march-pride.

[47] Inter-Am. Comm'n H.R., *IACHR Condemns Violence against Trans Persons in Honduras*, Oas.org (July 18, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/176.asp.

[48] *Id.*

[49] U.S. Dep't of State, Honduras 2019 Human Rights Report 19 (2020), https://www.state.gov/wp-content/uploads/2020/02/HONDURAS-2019-HUMAN-RIGHTS-REPORT.pdf.

[50] *Id.*; *see also generally* Immigration Equality, Index to Documentation of Country Conditions Regarding Persecution of LGBTQ Individuals and HIV Positive Individuals in Honduras (2019), https://immigrationequality.org/honduras-2019-lgbt-index-and-compiled-articles-2/ (extensively documenting persecution of LGBTQ+ people in Honduras).

deadliest country in the world for transgender and other LGBTQ+ persons.[51] In 2019, the National Guard and police recorded 117 murders of LGBTQ+ individuals, over half of whom were transgender.[52] In 2018, 53 transgender women were killed, many in gruesome manners that involved mutilation, rape, or torture.[53] Most of these murders go uninvestigated and unpunished.[54] In 2016, transgender woman Kenya Cuevas became an LGBTQ+ activist after the man who brutally shot her friend, a fellow transgender woman, was released from police custody with no punishment, despite video evidence of the shooting.[55] Cuevas now runs a transgender rights organization called Casa de Muñecas ("House of Dolls") and still receives death threats for her role in speaking out about her friend's murder.[56] In late 2019, the Human Rights Committee of the UN International Covenant on Civil and Political Rights issued a report highlighting the need for stronger efforts on behalf of the Mexican government to prevent violence towards LGBTQ+ persons.[57]

The increase in violence has occurred even as Mexico continues to

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[51] U.S. Dep't of State, Mexico 2019 Human Rights Report 27 (2020), https://www.state.gov/wp-content/uploads/2020/02/MEXICO-2019-HUMAN-RIGHTS-REPORT.pdf\.

[52] Oscar Lopez, *Mexico Sees Deadliest Year for LGBT+ People in Five Years*, Reuters.com (May 15, 2020), https://www.reuters.com/article/us-mexico-lgbt-murders-trfn/mexico-sees-deadliest-year-for-lgbt-people-in-five-years-idUSKBN22R37Y.

[53] Associated Press, *Mexico Trans Women Fight for Justice as Killings Go Unpunished*, L. A. Times (Sept. 9, 2019), https://www.latimes.com/world-nation/story/2019-09-09/mexico-trans-women-murders.

[54] U.S. Dep't of State, Mexico 2019 Human Rights Report 27 (2020), https://www.state.gov/wp-content/uploads/2020/02/MEXICO-2019-HUMAN-RIGHTS-REPORT.pdf\.

[55] *Id.*

[56] *Id.*

[57] U.N. Int'l Covenant on Civil and Political Rights, Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Mexico 3 (Dec. 4, 2019), http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnn3otTjgQWftWGGStAtK%2fC%2fYaADRZzF%2fUt%2f29mCSBqslnJw9k2ZuWX1QQBsnw8x%2feraJ6T8nBuzoAp%2fTyuwBkqC%2bmRcTj6Uq%2f2D2Vb7dnZ3.

see significant advances in LGBTQ+ legal and political rights, including recognition of gay marriage in over sixteen states and the right of transgender people to change their gender identity on government documents.[58] Despite these victories, transgender and other LGBTQ+ people battle deeply entrenched homo- and transphobia within their communities—forces that often erupt into violence. To navigate this fearful reality, many transgender individuals who live and work across the U.S.-Mexico border juggle dual gender identities. Jess Enriquez Taylor, a transgender woman forced to live as a man while among family in Mexico, has spoken out about the harmful psychological effects of these frequent transitions in gender expression.[59] Taylor must live as a man while with her family members, who still insist that she use separate dishes out of fear of sexually transmitted diseases. It is only when she travels to California that she is able to dress and live in a way that makes her feel comfortable, but as a result, she must seek shelter with friends how and when she can.[60] Homelessness in exchange for freedom of gender identity is a trade-off many transgender women in Mexico must make, which perpetuates the cycle of stigma and violence.

2.2.6. Brazil

In 2018 and 2019, Brazil had the highest number of transgender killings in the world, with at least 167 in 2018 and 130 as of September 2019.[61] Homophobic and transphobic sentiments have

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[58] Oscar Lopez, *Mexico Sees Deadliest Year for LGBT+ People in Five Years*, Reuters.com (May 15, 2020), https://www.reuters.com/article/us-mexico-lgbt-murders-trfn/mexico-sees-deadliest-year-for-lgbt-people-in-five-years-idUSKBN22R37Y.

[59] Jose A. Del Real, *'I Can't Be Myself Here': At the Border, Transgender Women Navigate 2 Worlds*, N.Y. Times (Mar. 23, 2019), https://www.nytimes.com/2019/03/23/us/transgender-women-border-mexico.html.

[60] *Id.*

[61] *See* Terrence McCoy, *'Anyone Could Be a Threat': In Bolsonaro's Brazil, LGBT People Take Personal Defense into Their Own Hands*, Washington Post (July 22, 2019), https://www.washingtonpost.com/world/the_americas/anyone-could-be-a-threat-in-bolsonaros-brazil-lgbt-people-are-taking-personal-defense-into-their-own-hands/2019/07/21/5aaa7578-a716-11e9-a3a6-ab670962db05_story.html; Oscar Lopez, *Brazil Issues New Rules, Lowers Age for Gender Reassignment Surgery*, Reuters (Jan. 9, 2020),

flourished under the administration of President Jair Bolsonaro, who is openly anti-LGBTQ+. In 2019, President Bolsonaro publicly vowed that he would not allow Brazil to become a "gay tourism paradise" and repeatedly discredited nontraditional views of marriage and gender identity.[62] Within this repressive environment, transgender and other LGBTQ+ persons face daily fear of physical and sexual violence. In March 2019, Iasmyn Souza and her transgender partner Caio Dantas were stabbed to death by a neighbor who made sexual advances towards Iasmyn.[63] Although the police arrested the perpetrator in this killing, the National Association of Transvestites and Transsexuals in Brazil reported in 2019 that police only investigate 9 percent of harassment and assault cases.[64]

Along with violence, employment discrimination and lack of economic mobility presents serious problems for transgender and other LGBTQ+ Brazilians. In June 2019, Brazil's Supreme Court criminalized discrimination based on sexual orientation or gender identity, but evidence suggests this has been a primarily symbolic victory. NGO Grupo Gay da Bahia reported that 33 percent of companies avoid hiring LGBTQ+ employees and that 90 percent of transgender women rely on survival sex work as a result.[65]

2.2.7. Panama

Panama's laws do not prohibit discrimination based on sexual orientation or transgender status, and government actors like the Panama National Police have stated that same-sex relationships or alternative gender expression are potential grounds for dismissal from employment.[66] This form of discrimination against LGBTQ+

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https://www.reuters.com/article/brazil-lgbt-surgery/brazil-issues-new-rules-lowers-age-for-gender-reassignment-surgery-idUSL8N29E622.

[62] Human Rights Watch, World Report 2020: Brazil (2020), https://www.hrw.org/world-report/2020/country-chapters/brazil.

[63] U.S. Dep't of State, Brazil 2019 Human Rights Report 26 (2020), https://www.state.gov/wp-content/uploads/2020/02/BRAZIL-2019-HUMAN-RIGHTS-REPORT.pdf.

[64] *Id*.

[65] *Id.*

[66] U.S. Dep't of State, Panama 2019 Human Rights Report 17 (2020), https://www.state.gov/wp-content/uploads/2020/02/PANAMA-2019-

persons is accompanied by physical harassment and abuse. In 2019, a transgender individual was denied medical treatment at a Changuinola public hospital because of their gender identity, and later in the year, a young LGBTQ+ man was raped by two men after they saw a rainbow flag on his backpack.[67] In 2019, the UN intervened and established a Free & Equal campaign sub-regional task force to advocate for the rights of transgender and other LGBTQ+ Panamanians.[68]

In Panama and several other Latin American countries, COVID-19 mitigation measures have disproportionately affected and harmed transgender individuals. On April 1, 2020, Panama's Ministry of Health announced a gender-based quarantine schedule that alternates the days on which men and women can leave their homes.[69] Since implemented, this measure has left transgender individuals vulnerable to harassment and scrutiny. Bárbara Delgado, a transgender woman, was taken in custody after leaving her home on a day assigned to women in order to volunteer at a local health clinic. Because her appearance did not match the gender on her identification documents, the police detained and fined her.[70] In another instance, a transgender woman named Mónica was arrested after entering a supermarket on a day designated for men. Even though this day matched the sex marker on her identification documents, the police took her to their station, inappropriately groped her, and threatened to place her in a cell with hundreds of men before demanding that she pay a fine to be released.[71] Because

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HUMAN-RIGHTS-REPORT.pdf.

[67] *Id.*

[68] U.N. Human Rights Office of the High Comm'n, U.N. Human Rights Report 2019 268 (May 2020), https://www.ohchr.org/Documents/Publications/OHCHRreport2019.pdf.

[69] Cristian González Cabrera, *Panama's Gender-Based Quarantine Ensnares Trans Woman*, Human Rights Watch (April 2, 2020), https://www.hrw.org/news/2020/04/02/panamas-gender-based-quarantine-ensnares-trans-woman.

[70] *Id*.

[71] Human Rights Watch, *Panama: Set Transgender-Sensitive Quarantine Guidelines*, Human Rights Watch (April 23, 2020), https://www.hrw.org/news/2020/04/23/panama-set-transgender-sensitive-quarantine-guidelines.

of this gender-based quarantine and discrimination, many transgender individuals are forced to forego essential trips and service, even as the pandemic rages on.

2.2.8. Colombia

Murder and other forms of gender-based violence are pervasive in Colombia, and while measures have been taken to combat the issue in recent years, transgender and other LGBTQ+ individuals remain vulnerable.[72] In 2015, the brutal rape and murder of Colombian woman Rosa Elvira Cely prompted the passage of a law, named in her honor, which officially criminalized femicide for the first time in the country's history.[73] Although the law defines femicide as "the killing of a person because of their status as a woman or as a result of their gender identity," it also fails to protect transgender women due to widespread cultural misunderstanding and refusal to accept of their transgender status.[74] As a result, homicides of LGBTQ+ persons—including 107 in 2017 (the most recent official data)—are not deemed femicide and typically go unpunished.[75] In addition to this concerning homicide rate, transgender individuals in Colombia also face daily fear of other physical abuse at the hands of their family and immediate community. In a 2018 report by local nonprofit Caribe Afirmativo, an anonymous transgender woman recalls the horrendous mistreatment she suffered before fleeing her home and family. One of her uncles cracked her skull, demanding that she "walk like a man," while another beat her with stinging nettle.[76]

Like Panama, Colombia has implemented gender-based COVID-19

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[72] *See* U.N. High Comm'n for Human Rights, Situation of Human Rights in Colombia 3-4 (Feb. 4, 2019), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/025/43/PDF/G1902543.pdf?OpenElement.

[73] Ethan Jacobs, *Femicide Laws Fail to Protect Transgender Women*, The Bogota Post (Mar. 31, 2020), https://thebogotapost.com/femicide-laws-fail-to-protect-transgender-women/45099/.

[74] *Id*.

[75] U.S. Dep't of State, Colombia 2019 Human Rights Report 30-31 (2020), https://www.state.gov/wp-content/uploads/2020/02/COLOMBIA-2019-HUMAN-RIGHTS-REPORT.pdf.

[76] Ethan Jacobs, *Femicide Laws Fail to Protect Transgender Women: Transgender Women in Colombia Face a Level of Persecution That's Often*

quarantine measures that exacerbate uncertainty and fear within the transgender community. Although the mayor of Bogotá has publicly stated that transgender individuals may select the day that aligns with their gender identity, LGBTQ+ rights group Red Comunitaria Trans has received eighteen discrimination complaints since the system began.[77] In one instance, a transgender woman was stabbed by a stranger who claimed that she left her home on the wrong day.[78] It is likely that many additional acts of violence discrimination go unreported due to fear of retribution or previous police abuse.[79]

2.3. The Proposed Rule Will Deny Asylum to Eligible LGBTQ+ Applicants

The Agencies assert that they "expect that the aliens most likely to be impacted by this rule's provisions are those who are already unlikely to receive a grant of asylum under existing law."[80] This is incorrect. In fact, the Proposed Rule will deny asylum and other immigration relief to eligible refugees who will be persecuted, tortured, or even killed if forced to return to their native countries. TLDEF Name Change Project clients Camilla G. and Juliana M. are transgender women who applied for and received asylum in the United States because they feared persecution on account of their transgender status. As discussed in more detail below,[81] under the Proposed Rule, each likely would have been denied asylum and deported to a country where they would face unconscionable levels

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Hard to Fathom, The Bogota Post (Mar. 31, 2020), https://thebogotapost.com/femicide-laws-fail-to-protect-transgender-women/45099/.

[77] Julie Turkewitz, *To Beat the Virus, Colombia Tries Separating Men and Women*, N.Y. Times (April 15, 2020), https://www.nytimes.com/2020/04/15/world/americas/virus-colombia-bogota-men-women.html.

[78] Reuters, *Transgender People Face Discrimination, Violence Amid Latin American Quarantines*, NBC News (May 6, 2020), https://www.nbcnews.com/feature/nbc-out/transgender-people-face-discrimination-violence-amid-latin-american-quarantines-n1201376.

[79] *Id*.

[80] NPRM, 85 Fed. Reg. at 36289.

[81] *See infra* at §§ 7.4, 10.2.

of discrimination and violence simply because of who they are.

3. THE CREDIBLE FEAR SCREENING PROCESS

Credible Fear Interviews ("CFI") are preliminary screenings for individuals subject to expedited removal proceedings at or near the border.[82] Those who pass can proceed with their claim to asylum.[83] Under the current system, anyone subject to expedited removal is removable without further review unless they show that they have a "credible fear" of persecution in their country of origin; only those who make the required showing to an asylum officer are referred to an immigration judge for "full" removal proceedings pursuant to INA Section 240 (8 U.S.C. § 1229a).[84] In Section 240 removal proceedings, the applicant can apply for any relevant form of relief from removal—including, for example, relief available to victims of human trafficking (T visa), victims of certain other serious crimes (U visa), or the eligible spouses of U.S. citizens (green card).

The Proposed Rule would dramatically change the CFI process. These are arbitrary and capricious changes that violate the Administrative Procedure Act ("APA") by dramatically changing applicable regulations without justification. They also put transgender people and other refugees at risk of refoulement in violation of U.S. law and treaty obligations.

3.1. Heightened standards

The Proposed Rule would unlawfully further heighten the burden of proof required of asylum seekers at the CFI stage by requiring them to show a "significant possibility" (defined as "a substantial and realistic possibility") of succeeding in demonstrating their eligibility for asylum,[85] and also empowering asylum officers to deny applicants at the CFI stage if an officer believes the noncitizen could relocate within their country or one of the complex bars to asylum may apply.[86] The Proposed Rule is contrary to the purpose of CFIs,

[82] 8 U.S.C. § 1225(b)(1)(B).

[83] 8 U.S.C. § 1225(b)(1)(B)(ii).

[84] 8 U.S.C. § 1225(b)(1)(B)(ii)-(Iii); 8 C.F.R. §§ 208.30(f), 235.6(a)(1)(ii), 1235.6(a)(1)(i).

[85] NPRM, 85 Fed. Reg. 36268, 36296 (amending 8 C.F.R. § 208.30(e)).

[86] *Id*.; *see also infra* §§ 10 (discussing bars), 12 (discussing internal

which are threshold screenings intended to preserve the ability of arriving asylum seekers to develop and present their claims to a judge. As courts have recognized, the relevant legislative history confirms that the credible fear standard was intended to be "a low one."[87] An asylum officer's sole role should be to establish whether there is credible fear, not to conduct an impromptu field immigration hearing.

The Rule adds insult to injury by requiring asylum seekers to show they are likely to meet this higher burden in a screening interview that would occur within hours or days of entry to the United States and generally without access to counsel. Many LGBTQ+ asylum seekers are profoundly traumatized, exhausted, terrified, unaware of the legal process, and subject to language and cultural barriers when they arrive at the border. They are often living with physical and psychological effects of their trauma. Such individuals will not have time to collect their thoughts, let alone engage in the deliberate process of gathering corroborative evidence to support highly fact-specific inquiries at an interview screening. LGBTQ+ asylum seekers already face unique obstacles in disclosing their status.[88] This heightened standard will increase the already present risk and result of refoulement where they face severe harm and death.

3.2. The Lack of Counsel During the CFI Process Exacerbates the Danger That the Proposed Rule Will Lead to the Refoulement of Refugees

In addition, the vast majority of asylum seekers in credible fear interviews are detained and unrepresented, which risks asylum seekers' ability to properly prepare for their CFI. "The right to counsel is a particularly important procedural safeguard because of

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relocation).

[87] *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018), *appeal pending*, No. 19-5013 (filed Jan. 30, 2019); *see also* 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Hatch) ("The standard . . . is intended to be a low screening standard for admission into the usual full asylum process."); 142 Cong. Rec. H11066-67 (Sept. 25, 1996) (statement of Rep. Smith) ("It is also important, however, that the process be fair—and particularly that it not result in sending genuine refugees back to persecution. . . . [O]ur asylum officers will need to be very careful in applying the 'credible fear' standard.").

[88] *See, e.g., infra* at 4.2.1 & 4.2.2.

the grave consequences of [deportation of a non-citizen]."[89] Even as expedited removal procedures have been enacted in response to needs for greater efficiency—Congress has expressly ensured that asylum seekers have a right to counsel prior to and during proceedings before immigration officials. Congress put these safeguards in place to ensure that "there should be *no danger* that an alien with a genuine asylum claim will be returned to persecution."[90] In the words of Senator Patrick Leahy, "We want to make sure that we do not create barriers to true refugees and those deserving asylum, and prevent them from making an application for asylum."[91]

As particularly relevant here, Congress expressly provided that asylum seekers under the expedited removal process "may consult with a person or persons of [their] choosing prior to the [credible fear] interview or any review thereof."[92] The right to counsel in administrative proceedings also has been guaranteed more broadly by the APA since 1946, which currently mandates that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel."[93]

Credible fear interviews are often conducted telephonically while the asylum seeker is in detention, and without the presence of counsel. By transforming the CFI into a substantive determination at a time when very few asylum seekers are represented, the Proposed Rule violates such individual's right to due process and a meaningful opportunity to apply for asylum, withholding of removal, and

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[89] *Leslie v. Att'y Gen. of U.S.*, 611 F.3d 171, 181 (3d Cir. 2010). From the inception of this Nation's efforts to institute a formal immigration and asylum process, the law plainly has provided that in any exclusion or deportation proceedings before the implementing agencies, "the person concerned *shall have the privilege of being represented . . . by such counsel*, authorized to practice in such proceedings, *as he shall choose*." Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 292, 66 Stat. 163 (1952) (emphasis added).

[90] H.R. Rep. No. 104-469, pt. 1, at 158 (1996) (emphasis added).

[91] 142 Cong. Rec. S4459 (May 1, 1996).

[92] 8 U.S.C. § 1225(b)(1)(B)(iv) (1996) (emphasis added).

[93] 5 U.S.C. § 555(b) (1966) (amending APA § 6(a) (1946)).

protection under the Convention Against Torture.

In short, CFIs are not a substitute for merits hearings before Immigration Judges where asylum seekers have an opportunity to develop the record, present their claims, and cite to supportive case law upon their release from detention. As the Third Circuit has observed in interpreting Refugee Act of 1980, "[w]hen Congress directs an agency to establish a procedure . . . it can be assumed that Congress intends that procedure to be a fair one."[94] The Proposed Rule's attempt to transform the CFI process is arbitrary, capricious, and contrary to law.

3.3. The Proposed Rule Would Violate the INA by Preventing Those Who Establish a Credible Fear from Seeking All Forms of Immigration Relief for Which They May Be Eligible

Under the Proposed Rule, noncitizens who pass their CFI will be referred not to Section 240 removal proceedings, but rather to asylum/withholding-only proceedings under INA Section 235(b)[95] in which they would be barred from raising a claim of admissibility or right to other forms of immigration relief.[96]

The Proposed Rule does not provide a reasoned justification for this significant change, and its discussion does not address any reason for disallowing claims for other forms of immigration relief except to say that doing so will expedite removal.[97] Removal of persons who are admissible or who raise bona fide claims to immigration relief is not a legitimate governmental interest.

There is *no* governmental interest that justifies denying LGBTQ+ asylum seekers due process or statutorily available pathways to safety. As the Board of Immigration Appeals ("BIA") itself has recognized, the legislative history indicates Congress's intent that noncitizens with a credible fear determination would be placed in full Section 240 removal proceedings—legislative history the

[94] *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996).

[95] 8 U.S.C. § 1225(b)(1).

[96] NPRM, 85 Fed. Reg. at 36266-67.

[97] NPRM, 85 Fed. Reg. at 36266-67.

Proposed Rule arbitrarily ignores.[98] Congress has provided for numerous forms of immigration relief besides asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). There is no justification for making other forms of relief available to those who qualify at the time of the CFI or who become eligible while waiting for a determination of their asylum claim (*e.g.*, an asylum seeker who marries a U.S. citizen while waiting for a decision in their asylum case and becomes eligible for a green card).

U.S. immigration law should be implemented in a manner that makes relief accessible to those who are eligible, yet the Proposed Rule operates in exactly the opposite manner, arbitrarily and unnecessarily excluding those who meet the statutory guidelines for relief.

4. CHANGES TO THE DEFINITION OF PARTICULAR SOCIAL GROUP, AND PROCESS FOR ASSERTING PSG-BASED CLAIMS, WILL EXCLUDE BONA FIDE ASYLUM SEEKERS

Asylum is available to noncitizens who establish a well-founded fear of persecution on account of their "race, religion, nationality, membership in a particular social group, or political opinion."[99] A particular social group (or "PSG") is—and was intended to be—a flexible concept capable of extending protection to those who are not described by one of the other categories, including new or newly understood groups properly protectable as refugees.

The BIA first defined the term "particular social group" in *Matter of Acosta*,[100] requiring an immutable characteristic. For approximately two decades, Circuit Courts of Appeal and the BIA applied *Acosta*'s immutable characteristics test to determine whether proposed social groups were cognizable for asylum purposes. Courts and the United States Citizenship and Immigration Services have long held

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[98] *Matter of X–K–*, 23 I&N Dec. 731, 734 (BIA 2005) (citing H.R. Rep. No. 104–828, at 209 (1996) (Conf. Rep.) ("If the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under normal non-expedited removal proceedings.")).

[99] 8 U.S.C. § 1158(b)(1)(B); *see also* 8 U.S.C. § 1101(a)(42)(A) (defining "refugee").

[100] 19 I&N Dec. 211 (BIA 1985).

that independent bases on which to establish membership in a PSG include sexual orientation, transgender status, and HIV status. [101]

The Proposed Rule, however, would arbitrarily and unlawfully constrain the scope of the statutory term "particular social group," and subject asylum seekers to a draconian requirement to immediately articulate, or forever waive, a PSG-based claim.

4.1. The Proposed Rule seeks to codify nine exceptions to the PSG analysis that have no relationship to whether a PSG is cognizable

The Agencies propose a "nonexhaustive" list of characteristics that would generally be insufficient to establish a PSG, thus resulting in the denial of the asylum application: "(1) [p]ast or present criminal activity or associations"; "(2) past or present terrorist activity or association; (3) past or present persecutory activity or association; (4) presence in a country with generalized violence or a high crime rate"; "(5) the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups"; "(6) the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence"; "(7) interpersonal disputes of which governmental authorities were unaware or uninvolved"; "(8) private criminal acts of which governmental authorities were unaware or uninvolved"; and "(9) status as an alien returning from the United States."[102]

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[101] *See, e.g.*, *Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (recognizing that transgender individuals are members of a particular social group); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (same for lesbians); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (same for "*all* alien homosexuals"); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (same for men imputed to be gay); *Matter of Toboso–Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (same for gay men); USCIS, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module*, at 15-17 (noting that HIV may also be a PSG); *see also generally* U.S. Citizenship and Immigration Services, *Guidance for Adjudication Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* (Dec. 28, 2011), 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.

[102] NPRM, 85 Fed. Reg. at 36279, 36291 (amending 8 C.F.R. § 208.1(c)),

The Agencies' proposed list of groups that are *per se* not PSGs eviscerate the case-by-case development of the PSG category, instead instructing adjudicators to categorically deny claims without engaging in the required analysis. This is contrary to law as courts have found that, for example, individuals with past criminal behavior can qualify for asylum, as can individuals subject to private acts of violence and individuals returned from the United States.[103] It also unlawfully reads PSG out of the statute and improperly conflates the asylum elements.[104] The Agencies cannot, by regulation, issue blanket orders indicating whole classes of people are not eligible for asylum and ordering the BIA and immigration judges not to exercise their discretion and judgment in a given case.[105]

Moreover, the Agencies' new list of categories specifically excluded from the PSG definition undermines congressional intent. In the INA, Congress has included numerous specific categories of people barred from asylum, including those who have formerly persecuted others on protected grounds and those who have committed particularly serious crimes.[106] The Proposed Rules exclusions are therefore duplicative as to certain categories, while at the same time contradicting the INA by creating new bars through the regulatory process that Congress chose not to include in the statute.

4.2. The Proposed Rule's particular social group provisions impose an unrealistic disclosure requirement on transgender applicants

In addition, the Proposed Rule would require applicants to

36300 (amending 8 C.F.R. § 1208.1(c)).

[103] *See, e.g.*, *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2016).

[104] As noted above, about 70 countries criminalize sex activity between consenting adults. *See supra* at § 2.1. The Proposed Rule's blanket statement that asylum will not be granted for noncitizens "who claim membership in a purported particular social group consisting of or defined, in substance, by [p]ast or present criminal activity or associations" could be misconstrued as denying asylum to LGBTQ+ people *because* they are singled out for persecution in other countries.

[105] *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

[106] 8 U.S.C. § 1158(b)(2)

immediately and clearly articulate every cognizable PSG before the Immigration Judge or forever lose the opportunity to present it:

> A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.[107]

This unprecedented bar would apply, even in light of changed circumstances, or even on a motion to reopen where an applicant relied on bad advice from ineffective counsel.

While this arbitrary requirement would raise serious due process concerns for all asylum applicants, it poses particular barriers to transgender and other LGBTQ+ asylum seekers and would disproportionally harm them. The Proposed Rule essentially gives an applicant a single, momentary opportunity to declare themselves. This provision is fundamentally at odds with how LGBTQ+ identity works for a remarkably large number of asylum seekers.

4.2.1. Coming to terms with transgender identity is a process

Many refugees come from repressive countries with governments and nongovernmental institutions that ostracize and harm transgender and other LGBTQ+ people. In these countries, even talking about LGBTQ+ lives can be life threatening. Because of this, LGBTQ+ people may initially deny their own identity, and internalize anti-LGBTQ+ stigma. Often, it can take years to break through the shame and self-loathing that severe stigma causes.

The effect of this stigma is that individuals do not have the opportunity to develop the ability to express it as a particular social group. Often, the asylum process is the first time applicants *ever* discuss their experiences.[108] And even then, often only after

[107] NPRM, 85 Fed. Reg. at 36291 (amending 8 C.F.R. § 208.1), 36300 (amending 8 C.F.R. § 1208.1(c)).

[108] Marshall K. Cheney et al., *Living Outside the Gender Box in Mexico: Testimony of Transgender Mexican Asylum Seekers*, 107(10) Am. J. Public

spending a substantial amount of time in the U.S., where they have had a much more positive and supportive experience.

Differences in cultural expression and language can serve as enormous barriers towards sexual minorities expressing their claims. Many cultures and languages have different conceptions of gender identity and it may not easily translate to English or be properly grasped by Asylum Officers or Immigration Judges. For instance, many anti-homosexual laws are applied to transgender people as sexual orientation and gender identity are conflated. Therefore, many asylum seekers may not adequately assert a claim initially and would be permanently barred from doing so.

Furthermore, understanding one's sexual orientation or gender identity is a process that may take place over a period of time. For example, a person assigned female at birth may first interpret their masculine attributes as an indication that they are lesbian or bisexual and may only later come to understand that they are a transgender man. This does not mean that a person's identity is mutable—rather, it shows how difficult it can be for people with an evolving self-awareness to label themselves in a way that places them in a particular social group at the moment they arrive in the United States. This is an unrealistic and untenable burden for many transgender asylum seekers, including particularly those who transition after arriving in the United States.

To take another example, the Proposed Rule would prejudice a transgender immigrant who initially files as an HIV+ gay man but later seeks to add gender identity. Under the current system, the asylum applicant is free to assert the new PSG. Under the proposed system, a judge may hold that the claim could have been brought initially and therefore it cannot be added. Thus, the wrong PSG will be adjudicated.

4.2.2. Lack of trust

In addition, many transgender or other LGBTQ+ refugees fleeing hostile countries may not feel comfortable immediately disclosing their status to authority figures. Disclosing one's LGBTQ+ status may be fraught with denial and shame, particularly in a climate of social

Health 1646 (Oct. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5607674/.

stigma and violence. In a hostile country, every single disclosure to an additional person—whether a family member, a doctor, a police officer, or an immigration official—poses the real possibility of further violence. Often, authority figures are themselves agents of persecution based on sexual orientation or transgender status. Given the trauma and shame associated with persecution on account of sexual orientation or gender identity,[109] an applicant may be unable or unwilling to immediately reveal LGBTQ+ status.

5. THE PROPOSED RULE UNLAWFULLY RESTRICTS LGBTQ+ POLITICAL OPINION CLAIMS

The Rules propose to redefine "political opinion" as "an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof."[110] Going even further, the Agencies propose that the definition of political opinion be *explicitly defined* to almost categorically exclude those fleeing gang-related violence and other harms by non-state actors. Toward this end, the Proposed Rule proposes that immigration adjudicators be admonished against the favorable adjudication of asylum claims brought by those fleeing persecution on account of a political opinion "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations…."[111] These specific instructions clash directly with UNHCR guidance and constitute a retrogressive and inaccurate view of political opinion.[112] In today's reality, non-state actors often

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[109] *See supra* at § 2.

[110] NPRM, 85 Fed. Reg. at 36280, 36291 (amending 8 C.F.R. § 208.1), 36300 (amending 8 C.F.R. § 1208.1).

[111] NPRM 36280, 36291 (amending 8 C.F.R. § 208.1), 36300 (amending 8 C.F.R. § 1208.1).

[112] *See, e.g.*, UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (March 2010) (affirming that a wide variety of opinions and beliefs running contrary to organized criminal networks could constitute a valid "political opinion" in the context of the refugee definition), https://www.refworld.org/docid/4bb21fa02.html; UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (May 7, 2002), https://www.refworld.org/pdfid/3d36f1c64.pdf; Catherine Dauvergne, *Toward a New Framework for Understanding Political Opinion*, 37 Mich. J.

have significant control over communities, even to the point of taking on many attributes of the state, and state actors are often unable or unwilling to intervene. The geopolitical landscape often renders distinctions between opposition to the state and views regarding non-state actors meaningless.

The Proposed Rule could ostensibly eliminate all political opinion claims by transgender or other LGBTQ+ asylum seekers who do not accept their oppression or persecution. This is contrary to the INA and ignores decades of precedent, which does not limit the scope of cognizable political opinions.[113]

As noted above, being openly LGBTQ+ is a criminal offense in approximately 70 countries.[114] It is fundamentally unsafe in many more. Some countries impose the death penalty for engaging in same-sex relationships. These laws are unjust and inhumane. Accordingly, the United Nations has recognized that living in defiance of an unjust or inhumane law can be a political act, "particularly in countries where such nonconformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values."[115] Any persecution that a person in such a case experiences is on account of political opinion.[116]

Yet under the Proposed Rule, an adjudicator may conclude that a refugee defying an anti LGBTQ+ law merely by living openly is not a "discrete cause related to political control." This is despite the fact that in many circumstances, being openly LGBTQ+ is inherently

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of Int'l L. 243, 245 (2016).

[113] *See, e.g.*, *Manzur v. U.S. Dep't of Homeland Sec.*, 494 F.3d 281, 294 (2d Cir. 2007) ("This Court has rejected an 'impoverished view of what political opinions are[].'") (citations omitted).

[114] *See supra* at § 2.1.

[115] UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ¶¶ 40, 50 (HCR/GIP/12/09) (Oct. 23, 2012), http://www.unhcr.org/509136ca9.pdf.

[116] *See Pitcherskaia v. I.N.S.*, 118 F.3d 641, 648 (9th Cir. 1997) (Russian lesbian woman underwent electroshock "therapy" as punishment for protesting against state mistreatment of LGBT people).

political, even though it should not be.

This restriction in the Proposed Rule of the definition of political opinion would even extend to LGBTQ+ activism—conduct that is clearly understood as political in the United States. Should an adjudicator find such activity object only to "generalized disapproval" of LGBTQ+ people, the applicants would be unable to show that their "expressive behavior" is "related to efforts by the state to control" a nongovernmental organization.[117] The confusing reference to "culture" could result in adjudicators conflating concepts and failing to recognize LGBTQ+ activism as political speech.

The result is that transgender people who are attacked for their "defiant" conduct of living openly, or who are activists who are persecuted for publicly advocating for LGBTQ+ rights, would not be considered to have a political opinion and would be denied relief on this ground.

6. IGNORING THE WAYS MANY TRANSGENDER AND OTHER REFUGEES ARE HARMED, THE RULE CRUELLY REDEFINES PERSECUTION TO EXCLUDE MANY SERIOUS HARMS

Asylum law obligates the U.S. to protect individuals with a well-founded fear of persecution from being returned to harm.[118] The Proposed Rule, however, attempts to restrict asylum eligibility by establishing, for the first time ever, a regulatory definition of "persecution" that excludes fact-specific analysis. Under the new definition, "persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization the government was unable or unwilling to control."[119] The Proposed Rule further defines persecution as needing to include "actions so severe that they constitute an exigent threat," but not

[117] The Proposed Rule's footnote explaining that "expressive behavior" is "political activism" but not "acts of personal civic responsibility" is not reflected in the text of the proposed regulations. *Compare* Notice at 58 n.30, with Proposed Rule 208.1(d).

[118] *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

[119] NPRM, 85 Fed. Reg. at 36291 (amending 8 C.F.R. § 208.1 to add (e)), 36300 (amending 8 C.F.R. § 1208.1 to add (e)).

including "generalized harm that arises out of civil, criminal or military strife . . . intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; of non-severe economic harm or property damage."[120] Finally, the Proposed Rule asserts that "the existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally."[121]

Asylum cases are inherently fact-specific and perhaps no part of an asylum claim is more individualized than the analysis of the specific way in which one person has been or may be harmed by another. By establishing an overly narrow, regulatory definition of persecution, the Proposed Rule significantly undercuts the flexibility necessary to carry the Agencies' duties under the INA and will ultimately result in the erroneous denial of protection to bona fide asylum seekers. The Proposed Rule provides no rationale for such a significant departure from the current manner of interpreting the term "persecution."

The Proposed Rule does not give due consideration to the ways harm is experienced by different asylum seekers, such as LGBTQ+ people. Many of the circumstances the Proposed Rule seeks to exclude are the very ways in which LGBTQ+ people experience persecution.

6.1. Refugees should not have to wait until a persecutor carries out a threat

As the Sixth Circuit recently stated, "it cannot be that an applicant must wait until she is dead to show her government's inability to control her persecutor."[122] Yet the Proposed Rule nonsensically states that "repeated threats with no actual effort to carry out the threats" would not qualify as persecution.[123] On the face of the

[120] NPRM, 85 Fed. Reg. at 36280-81, 36291 (amending 8 C.F.R. § 208.1 to add (e)), 36300 (amending 8 C.F.R. § 1208.1 to add (e)).

[121] NPRM, 85 Fed. Reg. at 36280-81, 36292 (amending 8 C.F.R. § 208.1 to add (e)), 36300 (amending 8 C.F.R. § 1208.1 to add (e)).

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

[123] NPRM, 85 Fed. Reg. at 36280-81, 36291 (amending 8 C.F.R. § 208.1 to add (e)), 36300 (amending 8 C.F.R. § 1208.1 to add (e)).

Proposed Rule, applicants must expose themselves to risk of violence—up to and including death—in order to show they were persecuted. After being threatened, an asylum seeker should not be incentivized to wait until someone tries to murder them before fleeing for their life. This is an absurd result that undermines the very purpose of refugee protections. Moreover, LGBTQ+ claimants regularly face threats that amount to persistent and conscious terror campaigns, which alone rise to the level of persecution.[124]

6.2. Intermittent harassment and brief detentions can rise to the level of persecution

The Proposed Rule also states that persecution "does not include intermittent harassment, including brief detention."[125] However, detention itself can rise to the level of persecution.[126] Moreover, "intermittent" incidents can quickly become cumulative, amounting to persecution.[127] There is nothing in the Proposed Rule acknowledging the clear rule that adjudicators must consider the cumulative effect of any such incidents.

Indeed, as discussed above, LGBTQ+ claimants are regularly terrorized and detained as a punishment for their sexual orientation and gender identity. Many are forced to stay closeted or risk retaliation, imprisonment, and abuse, up to and including rape and

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[124] *See supra* §§ 2.1-2.2.

[125] NPRM, 85 Fed. Reg. at 36280-81, 36291 (amending 8 C.F.R. § 208.1 to add (e)), 36300 (amending 8 C.F.R. § 1208.1 to add (e)).

[126] *See Haider v. Holder*, 595 F.3d 276, 286 (6th Cir. 2010) ("[T]he types of actions that might cross the line from harassments to persecution include [] detention []."); *Beskovic v. Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006) ("The circumstances surrounding a petitioner's arrest or detention require a case-by-case adjudication by the BIA."); *Shi v. U.S. Atty. Gen.*, 707 F.3d 1131, 1237 (11th Cir. 2013) (detention rose to level of persecution); *Choezom v. Mukasey*, 300 F. App'x 79, 80 (2d Cir. 2008).

[127] *See Herrera-Reyes v. Atty. Gen.*, 952 F.3d 101, 107 (3d Cir. 2020) (holding threats constitute persecution when "the cumulative effect of the threat and its corroboration presents a real threat to a petitioner's life or freedom"). *Mejia v. U.S. Atty. Gen.*, 498 F.3d 1253, 1258 (11th Cir. 2007) ("In assessing past persecution we are required to consider the *cumulative* effect of the mistreatment the petitioners suffered.") (emphasis added).

homicide.

6.3. Applicants should not have to wait until persecutory laws are enforced against them to flee

The Proposed Rule asserts that persecution does not include "laws or government policies that are unenforced or infrequently enforced" without "credible evidence that those laws or policies have been or would be applied to an applicant personally."[128]

The Proposed Rule inaccurately states that "the mere existence of potentially persecutory laws or policies is not enough to establish a well-founded fear of persecution."[129] Under this reasoning, in countries where same-sex relationships carry the death penalty, the fact that LGBTQ+ people are "infrequently" stoned to death would disqualify these laws as persecutory. Such a result is morally reprehensible and makes a mockery of the U.S.'s commitment to humanitarian protection. If any nation is prosecuting LGBTQ+ identity as a crime, regardless of the frequency of such actions, it is *per se* persecution.

In addition, the Proposed Rule ignores the well-recognized effect that persecutory laws have merely by being on the books. Transgender refugees understand this acutely: as discussed above, many countries have harsh anti-LGBTQ+ laws and policies. Persecutory laws dictate the scope of acceptable and unacceptable political and social behavior, and act as official endorsement for persecution against transgender people, increasing the frequency and severity of mistreatment.[130] Persecutory laws create opportunities for persecutors to prey on a person the law proclaims to be a criminal, knowing that the law will not intervene. Thus, even

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[128] NPRM, 85 Fed. Reg. at 36292 (amending 8 C.F.R. § 208.1 to add (e)), 36300 (amending 8 C.F.R. § 1208.1 to add (e)).

[129] NPRM, 85 Fed. Reg. at 36280.

[130] *See, e.g.*, Human Rights Watch, *Not Safe at Home*, at 10 (2014) ("Criminalizing sexual intimacy between men offers legal sanction to discrimination against sexual and gender minorities, and in the context of widespread homophobia, gives social sanction to prejudice and helps create a context in which hostility and violence is directed against LGBT people."), https://www.hrw.org/sites/default/files/reports/jamaica1014_ForUpload_1.pdf.

when the government does not overtly enforce such laws, LGBTQ+ people are subject to violence, sexual abuse, and murder, not to mention, extortion, job loss, denial of access to healthcare, and loss of parental rights. Finally, such laws permanently disenfranchise groups that the state views as disfavored, reducing their overall safety and stability in society.

Further, among other restrictions, the Proposed Rule explicitly directs adjudicators to not consider laws on the books that are "unenforced or infrequently enforced" unless the applicant can demonstrate the laws will specifically be enforced against them.[131] This provision fails to take into account the chilling effect that such laws have. For example, an LGBTQ+ applicant may fear reporting a hate crime to the police because there are laws prohibiting LGBTQ+ activity in the country of origin. Whether or not the applicant can prove that the government is likely to enforce the law is beside the point; applicants would not be able to avail themselves of their country's protection if they fear their own arrest in going to the police.[132]

7. THE PROPOSED RULE MISAPPLIES THE NEXUS REQUIREMENT TO CREATE ADDITIONAL SUBSTANTIVE BARS TO ASYLUM

In asylum law, "nexus" refers to the requirement that an asylum applicant's persecution be on account of one or more protected grounds. The Proposed Rule, however, includes a list of eight specific types of claims that would categorically preclude a finding of nexus.

Contrary to the INA, the Proposed Rule advances eight blanket circumstances that the government would find insufficient to establish persecution on account of a protected ground:

- "Interpersonal animus or retribution";
- "Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue";

[131] NPRM, 85 Fed. Reg. at 36280-81, 36292 (amending 8 C.F.R. § 208.1 to add (e)), 36300 (amending 8 C.F.R. § 1208.1 to add (e)).

[132] 8 U.S.C. § 1101(a)(42).

- "Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state";

- "Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations";

- "The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence";

- "Criminal activity";

- "Perceived, past or present, gang affiliation"; and

- "Gender."[133]

As a threshold matter, the Proposed Rule arbitrarily conflates the nexus requirement with the definition of the protected grounds. Nexus concerns whether a person is persecuted "on account of" their group—not the group itself.[134] The context in which persecution occurs is the central question adjudicators must consider when determining whether the persecution is on account of a protected ground, entirely separate from the ground itself.[135] The Agencies may not redefine the PSG requirement in a way that defies the statutory text, and certainly may not do so under the guise

[133] NPRM, 85 Fed. Reg. at 36281, 36292 (amending 8 C.F.R. § 208.1 to add (f)), 36300 (amending 8 C.F.R. § 1208.1 to add (f)).

[134] 8 U.S.C. § 1101(a)(42)(A); *Navas v. INS*, 217 F.3d 646, 655-656 (9th Cir. 2000); *Chen Yun Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002); *Matter of S-A-*, 22 I&N Dec. 1328, 1334-35 (BIA 2000); *see also INS v. EliasZacarias*, 502 U.S. 478, 482-83 (1992) (a showing of nexus requires evidence that the persecutor is motivated at least in part by a statutory ground in inflicting the harm).

[135] *See Sarhan v. Holder*, 658 F.3d 649, 656 (7th Cir. 2007) (looking to widely held social norms in Jordan to determine whether a threatened honor killing was connected to a protected ground); *Ndonyi v. Mukasey*, 541 F.3d 702, 711 (7th Cir. 2008); *De Brenner v. Ashcroft*, 388 F.3d 629, 638 (8th Cir. 2004); *Osorio v. INS*, 18 F.3d 1017, 1029 (2d Cir. 1994).

of the separate nexus requirement.

Substantively, these proposed "nexus" exclusions are so broadly drawn that they would radically and unlawfully limit the scope of "particular social group."

7.1. Personal animus or retribution

The Proposed Rule provides that "personal animus or retribution" would be an insufficient nexus to establish an act of persecution against an applicant.[136] Yet an action motivated by anti-LGBTQ+ sentiment often turns on, and manifests as, personal animus. Personal animus is a contributing factor in many cases of persecution, and contempt for a particular social group often manifests as contempt for an individual member of the social group. Significantly, the Proposed Rule does not provide guidance on distinguishing "personal animus" from persecution on the basis of a protected characteristic. Transgender people should not be confronted with the task of untangling the Gordian knot of "personal animus" and acts of persecution. Transgender people may be reviled because they are transgender *and also* subjected to focused, personal violence, but that does not mean that the persecution is "merely" personal, or outside the scope of U.S. asylum protections.

7.2. Interpersonal animus where others not targeted

The Proposed Rule would also exclude "interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue."[137] There is no basis in law to require a survivor of persecution show that *others* have been persecuted in order to show that they have been persecuted.

The persecution of LGBTQ+ people is frequently and acutely personal, and regularly committed by private actors close to the applicant. Indeed, the applicant may be the first LGBTQ+ individual such persecutors believe they have ever encountered. An anti-LGBTQ+ family member who has never manifested animus against

[136] NPRM, 85 Fed. Reg. at 36281, 36292 (amending 8 C.F.R. § 208.1 to add (f)), 36300 (amending 8 C.F.R. § 1208.1 to add (f)).

[137] NPRM, 85 Fed. Reg. at 36281, 36292 (amending 8 C.F.R. § 208.1 to add (f)), 36300 (amending 8 C.F.R. § 1208.1 to add (f)).

other LGBTQ+ individuals—again, *because they think they have never met another one*—may specifically target the applicant with violence as a stand-in for animus against LGBTQ+ people in general. The Proposed Rule creates the perverse result in which a persecutor targeting one LGBTQ+ individual on account of that individual's sexual orientation or gender identity is not enough on its own to establish an asylum claim.

Requiring a survivor of persecution to know how a persecutor has treated other LGBTQ+ people would operate as an effective bar. It would be manifestly unreasonable to require an individual applicant to prove that a persecutor has targeted or manifested animus against other LGBTQ+ individuals in order to show that the individual's own persecution was attributable to animus against their sexual orientation or gender identity. As a practical matter, it would often be impossible for such a survivor to know the history of their persecutor, such that the applicant could ever prove this requirement.

7.3. Gender

The Proposed Rule's exclusion of "gender" as a nexus is particularly troubling.[138] Gender clearly meets the elements of a PSG under the standards of immutability, particularly, and social distinction accepted by the courts and as codified under the new Proposed Rule. The Proposed Rule does not deny that LGBTQ+ people constitute protected PSGs, and transgender people can be defined as a distinct social group rather than one defined solely by reference to gender. However, the Proposed Rule creates a real risk that adjudicators will misconstrue the gender bar to preclude gender identity and sexual orientation claims.

Such a result would be contrary to long established law and violate the U.S.'s non-refoulement obligations. The result would be devastating for LGBTQ+ refugees who, as discussed above, face severe persecution around the world.

7.4. The Proposed Rule Would Arbitrarily Exclude Relevant Evidence

In addition, the Proposed Rule would deem inadmissible "evidence promoting cultural stereotypes about an individual or a country,

[138] Proposed Rule § 208.1(f)(1)(viii); Notice at 64–65.

including stereotypes based on race, religion, nationality, or gender."[139] The only explanation for this dramatic restriction on relevant evidence is the assertion that "pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim."[140] The Proposed Rule quotes a footnote in Attorney General's *Matter of A-B-* opinion in which he "note[d] that *conclusory assertions* of countrywide negative cultural stereotypes, such as A–R–C–G–'s *broad charge* that Guatemala has a 'culture of machismo and family violence' based on an *unsourced partial quotation from a news article eight years earlier*, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations."[141]

This insidious provision, cloaked in broadminded-sounding language, is actually a dangerous restriction on asylum adjudicators' ability to consider some of the most important evidence in any asylum claim—the societal norms informing a persecutor's intent. It is both unworkable and unwise.

This provision is impossibly vague and unworkable, even on its own terms. The Proposed Rule does not define "cultural stereotypes," and makes no effort to distinguish between a "cultural stereotype" and a description of cultural norms. There can be no *categorical* distinction between a "stereotype" (much less a "pernicious" one) and evidence of broadly and genuinely held cultural attitudes, common conduct, or social trends. Nor does the Proposed Rule define "promoting." Asylum adjudicators are rightly empowered to and capable of disregarding unsupported and offensive stereotypes, such as those about Guatemala quoted in *Matter of A-B-*. The Proposed Rule nevertheless threatens to exclude accurate and well-supported evidence, such as Guatemala's high rate of transgender murders and its police persecution of LGBTQ+ advocates and organizations, on the ground that it is consistent with and thereby "promotes" a "stereotype" about Guatemala.

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[139] NPRM, 85 Fed. Reg. at 36292 (amending 8 C.F.R. § 208.1), 36300 (amending 8 C.F.R. § 1208.1).

[140] NPRM, 85 Fed. Reg. at 36282.

[141] NPRM, 85 Fed. Reg. at 36282 (quoting *Matter of A–B–*, 27 I&N Dec. at 336 n.9 (emphasis added)).

Notably, *Matter of A-B-*[142] cannot support this broad exclusion of evidence. The Attorney General's footnoted observation criticized reliance on a "conclusory assertion[]" based on unreliable and stale evidence.[143] Immigration Judges are perfectly capable of evaluating and giving proper weight to unsupported claims and unreliable evidence, and a central purpose of an immigration hearing is for them to do just that. This provision of the Proposed Rule is entirely unrelated to the Attorney General's actual concerns in *Matter of A-B-*. It would instead categorically exclude "evidence promoting cultural stereotypes," no matter how accurately the evidence might describe relevant individual, group, or societal beliefs, and no matter how well supported by reliable sources. This is baseless, contrary to due process, and would impermissibly lead to the refoulement of transgender and other refugees with bona fide asylum claims.

Virtually all asylum applications filed by LGBTQ+ persons rely on evidence of cultural attitudes toward LGBTQ+ people in their country of origin. This evidence is probative, relevant, and widely accepted as reliable by adjudicators. It is difficult to imagine how evidence about cultural attitudes towards LGBTQ+ people would not include some material that potentially runs afoul of the vaguely worded evidentiary prohibition, especially where an LGBTQ+ asylum seeker must establish that their PSG meets the definitions of particularity and social distinction.[144] This provision of the Proposed Rule would likely prevent LGBTQ+ asylum seekers from submitting crucial country conditions evidence necessary to establish their claim and to show why they cannot safely relocate to another part of their country. As a result, asylum seekers will be precluded from submitting materials that have long been accepted, and considered to be essential, by adjudicators.

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[142] 27 I&N Dec. 316 (A.G. 2018).

[143] NPRM, 85 Fed. Reg. at 36282 (quoting *Matter of A–B–*, 27 I&N Dec. 316, 336 n.9 (A.G. 2018)).

[144] *See generally* Immigration Equality, Country Conditions Materials, https://immigrationequality.org/legal/legal-help/resources/country-conditions-index/ (extensively documenting persecution of LGBTQ+ people in Antigua and Barbuda, Cuba, El Salvador, Equatorial Guinea, Gambia, Ghana, Grenada, Guatemala, Guinea, Honduras, India, Jamaica, Nicaragua, Russia, Sri Lanka, St. Vincent and the Grenadines, Trinidad and Tobago, and Zimbabwe).

To take one recent example, in *Orellana v. Attorney General of the United States*, the Third Circuit recently reversed a BIA decision denying withholding of removal to a gay El Salvadoran man who—with the acquiescence of Salvadoran government—had been repeatedly raped, sexually assaulted, and extorted by gang members on account of his sexual orientation.[145] The *Orellana* court emphasized the relevance of cultural evidence:

> The record also contains evidence that MS-13 prohibits gay members and kills those suspected of being gay, a practice that is rooted in the gang's "deeply misogynistic, macho and homophobic" culture. That assessment was based on a "report written by several non-governmental organizations," titled "Violent and Violated: Gender Relations in the Mara Salvatrucha and Barrio 18." It states: "[H]omosexuality is unthinkable for gangs and their members, unless it occurs within the framework of rape as a form of punishment." The Amnesty International report confirms that gangs "are governed by highly sexist codes of conduct, and they often attack LGBTI people for [their] real or perceived [ ] gender identity or sexual orientation, subjecting them to acts of physical and sexual abuse, as well as blackmail." None of this evidence features in the IJ's or the BIA's decision, and that was error.[146]

The above-quoted reports from widely-respected NGOs would likely be excluded—and would certainly be attacked by government counsel—under the Proposed Rule as reflecting "cultural stereotypes." There is no legitimate basis for categorically excluding highly probative evidence of country conditions.

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[145] *Orellana v. Attorney General of the United States*, 806 Fed. Appx. 119, 121 (3d Cir. 2020).

[146] *Id*. (citations to administrative record omitted); *see also, e.g., Grijalva v. Gonzales*, 212 Fed. Appx. 541, 544 (6th Cir 2007) (noting evidence that "effeminate" and "obviously homosexual" man was "cursed and threatened" by his employer "for being queer," and eventually fired, his manager "telling him that he only wanted 'machos' working for him and not 'faggots'").

TLDEF Name Change Project client Camilla G. is another example of a successful asylum applicant who likely would have been denied asylum under the new Proposed Rule. Camilla is a transgender woman originally from Colombia. Her hometown in Colombia was extremely homophobic and transphobic, and flyers were handed out in her hometown claiming threatening to "clean" the LGBTQ+ community out of the area. Fearing for her safety, she fled Colombia for the United States four years ago, when she was twenty-three years old. Camilla entered lawfully on a student visa but stayed in the United States after her visa expired because she feared persecution in Colombia on account of her transgender status. When threatened with deportation, Camilla petitioned for asylum due to the persecution she would face as a transgender woman. She was quickly granted asylum. Camilla's evidence showing conditions in her native Colombia for transgender people could well have been excluded by an immigration Judge who believed they promoted a "stereotype" that people in Camilla's hometown are transphobic. In fact, the evidence was both reliable, accurate, and a key aspect of Camila's claim. Had Camilla been forced to return to Columbia, she faced the prospect of persecution in many forms including extreme violence.[147] Because she was able to obtain asylum, Camilla is now able to live openly and as a productive and hardworking member of society without fear of persecution.

By excluding highly relevant country conditions evidence, the Proposed Rule threatens cut off access for LGBTQ+ and other people who are persecuted because they defy, and are targeted because of, cultural norms. There is no basis in the INA for the exclusion of such evidence, and this provision of the Proposed Rule is both invidious and arbitrary.

8. "PRIVATE" VIOLENCE

The Proposed Rule would amend the regulations implementing the Convention Against Torture and severely limit relief. Under the Proposed Rule, in order to show that a public official inflicted, instigated, consented to, or acquiesced to torture, an applicant must show that the public official was acting "under color of law."[148]

[147] See generally supra at § 2.2.8.

[148] NPRM, 85 Fed. Reg. at 36287, 36294 (amending 8 C.F.R. § 208.18(a)(1)), 36303 (amending 8 C.F.R. § 1208.18(a)(1)).

Moreover, under the Proposed Rule, a public official will not be found to have acquiesced to torture unless the applicant shows that the public official deliberately avoided learning the truth and was "charged with preventing the activity as part of his or her legal duties and have failed to intervene."

These are prejudicial requirements that would require an applicant submit evidence of (1) whether a public official was on the job during the persecution, (2) the public official's mental state, and (3) the public official's job description. Any one of these would be insurmountable for a CAT applicant. But together, they effectively close off CAT relief altogether. To do so defies the clear intent of Congress when it made CAT available as a form of relief.

9. CHANGES TO STANDARDS FOR PROTECTION UNDER THE CONVENTION AGAINST TORTURE (CAT) WILL RETURN SURVIVORS TO FURTHER TORTURE

The Convention Against Torture (CAT) provides critical protections for individuals who face torture in their country of origin and would be otherwise barred from protections against removal. The Proposed Rule would modify the standard for protection under CAT to limit the accountability of foreign governments for torture inflicted either by so-called "rogue" government actors or by private individuals, acting with the government's acquiescence.

Under current regulation, CAT protects those likely to suffer torture "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[149] Public officials acquiesce to torture when they engage in "willful blindness" or "turn a blind eye to torture."[150]

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[149] 8 C.F.R. § 1208.18(a)(1) (2012).

[150] Suarez-Valenzuela v. Holder, 714 F.3d 241, 245 (4th Cir. 2013) (also noting that under the willful blindness standard the applicant need not demonstrate that government officials had actual knowledge of his or her torture); *Silvas-Rengifo v. Att'y Gen.*, 473 F.3d 58, 69-70 (3d Cir. 2007) ("[R]elief under the CAT does not require consent or approval to torturous conduct, but instead requires only that government officials know of *or remain willfully blind* to an act and thereafter breach their legal responsibility to prevent it.") (internal quotation marks and citation omitted) (rejecting BIA's erroneous en banc decision "requiring 'consent' or 'actual acquiescence' rather than willful blindness as set out in the

Under the Proposed Rule, pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (*i.e.*, under "color of law").[151] Additionally, the Rule provides that only a government actor who is acting "under color of law" can acquiesce in torturous conduct by private actors.[152]

The definition of "acquiescence" currently requires a finding of actual knowledge or willful blindness; the Proposed Rule redefines "willful blindness" to require that the official be "aware of a high probability of activity constituting torture and deliberately avoided learning the truth."[153] A reckless or negligent disregard for the truth is not enough.

The Proposed Rule is contrary to years of circuit court precedent. Nearly every circuit to address the concept of "willful blindness" in the CAT context has settled on an approach that is more permissive than the one in this Proposed Rule.[154] And circuit courts have expressly rejected a "rogue official" exception to torture in the CAT context.[155] And for good reason. A "rogue actor" or "bad apple" exception to protection under CAT gives asylum adjudicators cover to find that police officers and military officials who rape, extort, or severely beat private citizens are not acting under color of state law, reasoning that these sorts of actions can have no legitimate purpose, so the only explanation is that the officer was "rogue" in their

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Convention's implementing regulations").

[151] NPRM, 85 Fed. Reg. at 36286-88, 36293 (amending 8 C.F.R. § 208.13(b)(3)(iv)).

[152] NPRM, 85 Fed. Reg. at 36287.

[153] NPRM, 85 Fed. Reg. at 36287, 36294 (amending 8 C.F.R. § 208.18(a)(7)), 36303 (amending 8 C.F.R. § 1208.18(a)(7)).

[154] *See Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2003); *Khouzam v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004); *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006); *Silva-Rengifo v. Attorney General*, 473 F.3d 58, 69 (3d Cir. 2007); *Hakim v. Holder*, 628 F.3d 151, 157 (5th Cir. 2010).

[155] *See Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017); *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004); *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014); *Ramirez-Peyrov v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009); *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017).

conduct. The result would be that transgender people and others who are tortured by government officials will have little or no protection no matter how systematic the torture because the violence will be deemed a private action by a "rogue" official.

10. THE PROPOSED "DISCRETIONARY" FACTORS ARE PREJUDICIAL AND NOT DISCRETIONARY

In addition to meeting the legal standard, asylum seekers must merit a favorable exercise of discretion.[156] Because "the danger of persecution should generally outweigh all but the most egregious of adverse factors," discretionary factors "should not be considered in a way that the practical effect is to deny relief in virtually all cases."[157] The BIA has long emphasized that the discretionary determination in an asylum case requires an examination of "the totality of the circumstances," both positive and negative; the BIA held that within this "totality of the circumstances" analysis, "the danger of persecution should generally outweigh all but the most egregious of adverse factors."[158]

Without reasoned explanation, the Proposed Rule breaks with over thirty years of case law and seeks to turn discretion into a *de facto* bar.

The Proposed Rule first lists three factors that, if present, adjudicators are required to consider as "significantly adverse" for purposes of the discretionary determination: 1) unauthorized entry or attempted unauthorized entry, unless "made in immediate flight from persecution or torture in a contiguous country"; 2) failure to seek asylum in a country through which the applicant transited, and

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[156] 8 U.S.C. § 1158(b)(1)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

[157] *In re Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987).

[158] *Id*.; *see also Hussam F. v. Sessions*, 97 F.3d 707, 718 (6th Cir. 2018) (relying on *In re Pula* and stating "Although the BIA may consider an alien's failure to comply with established immigration procedures, it may not do so to the practical exclusion of all other factors"); *Awoleye v. U.S. Atty. Gen*, 608 Fed. Appx. 868, 877 (11th Cir. 2015) (relying on *In re Pula* and stating, "In exercising its discretion, the BIA must ... 'consider all evidence in support of the alien's request' and in particular "must evaluate the nature and underlying circumstances of the [adverse factor] in order to determine the weight it should accord to this adverse factor.").

3) the use of fraudulent documents to enter the United States, unless the person arrived in the United States without transiting through another country.[159] This three-factor test sets asylum seekers up to be denied protection and deported back to harm *because* they were able to successfully navigate an escape route from persecution to the United States. It flips *Matter of Pula* on its head and contravenes Article 33 of the 1951 Convention and Protocol Relating to the Status of Refugees ("the Refugee Convention"), which prohibits states from penalizing asylum seekers for their manner of entry.[160]

As egregious as the first list is, the Proposed Rule goes on to even more audaciously propose a list of ten factors that entirely preclude the adjudicator from favorably exercising asylum. These de facto bars would eliminate access to asylum for asylum seekers who: 1) spent more than 14 days in any one country immediately prior to their arrival in the United States or en route to the United States; 2) transited through more than one country en route to the United States; 3) would otherwise be subject to one of the criminal conviction-based asylum bars at 8 C.F.R. § 208.13(c) but for the reversal, vacatur, expungement, or modification of the conviction or sentence; 4) accrued more than one year of unlawful presence prior to applying for asylum; 5) failed to timely file or request an extension of the time to file any required income tax returns, 6) failed to satisfy any outstanding tax obligations, or has failed to report income that would result in a tax liability; 7) has had two or more asylum applications denied for any reason; 8) has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application; 9) failed to attend an asylum interview, with limited exceptions; or 10) did not file a motion to reopen of a final order of removal based on changed country conditions within one year of those changes.[161]

Many of these factors have nothing to do with the merits of a claim

[159] NPRM, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13(d)(1)(i)), 36301-02 (amending 8 C.F.R. § 1208.13(d)(1)(i)).

[160] *See infra* at 10.1.1; UNHCR, *Convention and Protocol Relating to the Status of Refugees*, available at https://www.unhcr.org/en-us/3b66c2aa10.

[161] NPRM, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13(d)(1)(i)), 36301-02 (amending 8 C.F.R. § 208.13(d)(1)(i)).

and would result in the denial of asylum for LGBTQ+ applicants with meritorious cases. Several of these factors would disproportionally affect transgender asylum seekers, including those who transited through a third country that was not safe for them. The Proposed Rule also strips the exercise of discretion out of the hands of adjudicators, who are best equipped to weigh the totality of a person's equities. And the Proposed Rule undermines congressional intent by creating de facto bars that are inconsistent with the extensive list of conduct-based bars to asylum that Congress included in the INA.[162]

10.1. Entry without inspection

The Proposed Rule instructs adjudicators to deny asylum to an applicant who enters or attempts to enter the United States without inspection.[163] This is in blatant violation of the INA, 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* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum."[164] The statute's plain and unambiguous language means what it says. Section 1158(a)(1) reflects Congress's specific, bipartisan intent to ensure that an applicant's manner of arrival is not a bar to a meritorious asylum claim.

10.1.1. The Entry Without Inspection Factor Directly Contradicts the INA

Since Congress first adopted § 1158 in 1980, it has amended the INA more than forty times. Throughout those thirty-eight years, Congress has never wavered from the bipartisan consensus that the manner by which an individual arrives in the United States should not, and does not, prevent that individual's asylum claim from being considered on the merits.[165]

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[162] *See* 8 U.S.C. § 1158(b)(2).

[163] NPRM, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13(d)(1)(i)), 36301-02 (amending 8 C.F.R. § 208.13(d)(1)(i)).

[164] 8 U.S.C. § 1158(a)(1) (emphasis added).

[165] The INA is consistent with the 1951 Refugee Convention, which was adopted following the Holocaust and other humanitarian crises during

Following the Holocaust and other humanitarian crises during and in the immediate aftermath of World War II, the international community resolved that future refugees would not be abandoned to their fate.[166] The 1951 Refugee Convention codified in international law the principal that refugees present in a country of refuge without authorization would not be penalized "on account of their illegal entry or presence."[167]

In 1968, the United States ratified the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("1967 Protocol"), which included the provisions of the 1951 Refugee Convention, and officially acceded to the 1967 Protocol on November 1, 1968.[168]

Congress substantially amended the INA in the Refugee Act of 1980, including changes to U.S. asylum law to implement the United States' treaty obligations under the 1967 Protocol. The Refugee Act also codified our Nation's commitment, consistent with Article 31(1) of the 1951 Refugee Convention, as adopted by the 1967 Protocol, that refugees would not be penalized "on account of their illegal entry or presence" in the United States.[169] Key here, Congress added

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and in the immediate aftermath of World War II. The 1951 Convention codified in international law the principal that refugees present in a country of refuge without authorization would not be penalized "on account of their illegal entry or presence." 1951 Refugee Convention, art. 31, ¶1, https://www.unhcr.org/en-us/3b66c2aa10.

[166] *See* Dr. Paul Weis, U.N. High Commissioner for Refugees, The Refugee Convention, 1951: The Travaux Préparatoires Analyzed with a Commentary by Dr. Paul Weis 5 (1990), https://www.refworld.org/docid/53e1dd114.html (explaining that the UN Convention Relating to the Status of Refugees originally was adopted to address the WWII refugee issue in Europe).

[167] 1951 Refugee Convention, art. 31, ¶1, https://www.unhcr.org/en-us/3b66c2aa10.

[168] *See* U.N. Protocol Relating to the Status of Refugees, *adopted* Nov. 1, 1968, 606 U.N.T.S. 267.

[169] 1967 Protocol art. 1, ¶1. *See also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (the Act is intended "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees").

section INA § 208, which provided:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C. § 1101(a)(42)(A)].[170]

In addition 1996, Congress clarified a number of provisions relating to asylum,[171] and ensured that the asylum process was available to all aliens with a credible fear of persecution—regardless of the manner of entry.[172] Congress revised § 1158(a)(1) to provide its current language:

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[170] Pub. L. No. 96-212, § 201(b), 94 Stat. 105 (codified at 8 U.S.C. § 1158(a) (1980)) (emphasis added); *see also* H.R. Conf. Rep. No. 96-781, at 161 (1980) (explaining that this text was "based directly upon the language of the [1967 Protocol] and it [was] intended that the provision be construed *consistent with the Protocol"—i.e.*, consistent with the commitment that refugees would not be penalized "on account of their illegal entry or presence" here) (emphasis added).

[171] *See, e.g.*, 8 U.S.C. § 1225(a)(1) ("An alien present in the United States who has not been admitted or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission."); *id.* at § 1225(a)(2) ("An arriving alien *who is a stowaway* is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection . . . [but] if the alien indicates an *intention to apply for asylum under section 208* or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B).").

[172] *See* H. R. Conf. Rep. No. 104-828, at 209 (1996) (explaining that aliens could be subject to the new expedited removal process under § 1225(b) would have an "opportunity . . . *[to] claim[] asylum [and] to have the merits of his or her claim promptly assessed*[,]" and if credible, to transfer their case to the normal (non-expedited removal) proceedings); *see also* H. Rep. No. 104-469, at 107-08 (1996).

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.[173]

Section 1158(a)(1) could not be any clearer: any alien present in the United States may seek asylum, regardless of where or how that alien entered the country. The Proposed Rule runs directly counter to § 1158(a)(1) and is unlawful.[174]

Although Congress authorized the Attorney General to "by regulation establish additional limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum," the Attorney General's rulemaking authority does not permit him to hold up the failure to enter through a designated port of entry as a categorical bar to asylum. 8 U.S.C. § 1158(b)(2)(C) (emphasis added). Congress, by statute, expressly provided that such conduct would *not* make an individual ineligible for asylum.

Not everyone who seeks asylum will be successful, but every person who seeks asylum is entitled to a fair hearing, regardless of where and how they enter our country. This is the unambiguous dictate of U.S. law. The Administration has made no secret of its disagreement with the policy choices codified in § 1158(a)(1). But in our democratic system, laws may not be overturned by administrative *fiat*.

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[173] Pub. L. No. 104-208, § 604(a), Div. C., 110 Stat. 3690 (codified at 8 U.S.C. § 1158(a)(1)).

[174] *East Bay Sanctuary Covenant. v. Trump*, 349 F. Supp. 3d 838, 857-58 (N.D. Cal. 2018); *see also Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("As we have held on prior occasions, [an agency's] 'interpretation' of the statute cannot supersede the language chosen by Congress.").

10.1.1. The Entry Without Inspection Factor Puts Transgender People in Danger

The Proposed Rule would force transgender refugees coming to the United States to seek asylum at a port of entry, or not at all. This is profoundly dangerous, as the so-called "Remain in Mexico" policy clearly illustrates. Studies show that LGBTQ+ migrants are among the most vulnerable.[175] "According to UNHCR, 88 percent of LGBTI asylum seekers and refugees from the Northern Triangle interviewed in the context of a study reported having suffered sexual and gender-based violence in their countries of origin."[176]

> In Mexico, high levels of crime and human rights violations are reported against migrants generally, including attacks, robberies and kidnappings perpetrated by organized criminal gangs, sometimes in collusion with different government authorities, as well as different kinds of abuse of authority by the security forces and other Mexican migration services, which go unpunished in 99 percent of the cases reported. Faced not only with these kinds of attack, LGBTI people also find themselves exposed to acts of violence due to their real or perceived gender identity and/or sexual orientation.
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> According to UNHCR, two-thirds of LGBTI asylum seekers and refugees coming from the Northern Triangle and interviewed in 2016 as part of a study reported suffering sexual and gender-based

[175] *See* Amnesty International, *No Safe Place* at 7 (2017), https://www.amnesty.org/download/Documents/AMR0172582017ENGLISH.PDF ("[D]ifferent non-governmental organizations (NGOs) and international organizations have documented that they are particularly affected by the widespread climate of violence and insecurity in the Northern Triangle of Central America. LGBTI people are frequently the target of different forms of violence due to their real or perceived sexual orientation and/or gender identity, such as, for example, intimidation, threats, physical aggression, sexual violence and even murder.").

[176] *Id*. (citing UNHCR, Población LGBTI en México y Centro América (LGBTI Population in Mexico and Central America), 2017, available at: http://www.acnur.org/donde-trabaja/america/mexico/poblacion-lgbti-en-mexico-ycentroamerica/ [in Spanish only]).

> violence in Mexico after crossing the border at blind spots.[177]

Transit through Mexico—much less being forced to wait in Mexico for weeks or months in order to be inspected at a port of entry—is profoundly dangerous, and especially so for transgender people. "Violent crime – such as homicide, kidnapping, carjacking, and robbery – is widespread" in Mexico.[178] Of the six Mexican states that border the United States, the U.S. State Department has issued a Level 4 "Do Not Travel" warning for one (Tamaulipas) due to crime and kidnapping, and issued a "Reconsider Travel" warning for four others, also due to crime.[179] In 2019, Mexico reported more than 35,000 homicides, a record high, and more than 5,000 additional disappearances.[180] "Mexico occupies the second place in the world, behind Brazil, as the country with the largest number of murders on account of gender identity or expression of gender[.]"[181] Transgender refugees are particularly vulnerable to violence and other crime. ""Trans women in particular encounter persistent

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[177] *Id*. at 20 (citations omitted); *see also* Aviva Stahl, *Shelter for LGBT migrants in Tijuana robbed and set on fire*, Women's Media Center (May 11, 2018), https://www.womensmediacenter.com/news-features/shelter-for-lgbt-migrants-in-tijuana-robbed-and-set-on-fire (armed men robbed and burned a shelter for transgender people from Central America who were waiting for permission to enter the U.S. to file asylum claims).

[178] U.S. Dept. of State, *Mexico Travel Advisory*, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last visited July 14, 2020).

[179] *See* U.S. Dept. of State, *Mexico Travel Advisory*, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last visited July 14, 2020). (This these crime-related travel advisories are unrelated to the State Department's separate advisory to avoid international travel due to the COIVD-19 pandemic.)

[180] Mary Beth Sheridan, *Mexico's homicide count in 2019 among its highest*, Wash. Post (Jan. 21, 2020), https://www.washingtonpost.com/world/the_americas/homicides-in-mexico-hit-record-highs-in-2019/2020/01/21/a9c5276a-3c5e-11ea-afe2-090eb37b60b1_story.html.

[181] Inter-American Commission on Human Rights, Situation of Human Rights in Mexico 122 (Dec. 31, 2015) (citing Notiese, Registran 1218 homicidios por homofobia en Mexico, May 12, 2015), http://www.oas.org/en/iachr/reports/pdfs/mexico2016-en.pdf.

abuse and harassment in Mexico at the hands of drug traffickers, rogue immigration agents and other migrants, according to lawyers and activists."[182] one example, UNHCR reported that two-thirds of interviewed LGBTI asylum seekers and refugees coming from the Northern Triangle reported suffering sexual and gender-based violence in Mexico.[183]

10.2. Failure to seek protection in country of transit

The Proposed Rule enforces three "layover rules" that punish refugees for traveling to the United States in search of asylum. Adjudicators are essentially instructed to deny cases if an asylum seeker passed through another country on the way to the U.S. and did not seek protection there, or if an applicant has stayed in a single country for more than 14 days. Even if other nations had the capacity and resources to process asylum cases, which many do not, these rules make transgender and other LGBTQ+ refugees unsafe. Many countries that are commonly transited are as dangerous for LGBTQ+ asylum seekers as their country of origin. For example, LGBTQ+

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[182] Jose A. Del Real, *'They Were Abusing Us the Whole Way': A Tough Path for Gay and Trans Migrants*, N.Y. Times (July 11, 2018), https://www.nytimes.com/2018/07/11/us/lgbt-migrants-abuse.html; see also Molly Hennessy-Fiske, For transgender migrants fleeing death threats, asylum in the U.S. is a crapshoot, L.A. Times (Oct. 29, 2019), https://www.latimes.com/world-nation/story/2019-10-29/trump-administration-returns-vulnerable-lgbt-asylum-seekers-to-mexico (discussing Mayela Villegas, a transgender woman from El Salvador, was deported from the United States "by a judge who didn't believe she was Salvadoran or transgender" only to be "kidnapped in the southern Mexican city of Tapachula by men who stripped and raped [her] repeatedly"); Wendy Fry & Molly Hennessy-Fisk, *Vulnerable LGBTQ Migrants left to wait in Mexico*, San Diego Tribune (Nov. 3, 2019), ("In May 2018, six armed men robbed the Tijuana shelter where transgender women and other members of LGBTQ community were staying. Days later, someone barred the door shut with a mattress and lit it on fire.") https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-11-03/trump-administration-leaving-vulnerable-lgbt-migrants-to-wait-in-mexico.

[183] *See* Amnesty International, *No Safe Place* at 7 (2017), https://www.amnesty.org/download/Documents/AMR0172582017ENGLISH.PDF (citing UNHCR, Población LGBTI en México y Centro América (LGBTI Population in Mexico and Central America), 2017. Available at: https://www.unhcr.org/en-us/5a2ee5a14.pdf [only in Spanish]).

asylum seekers from South America often pass through many Central American nations on their way to the U.S. The trip through Mexico often takes more than 14 days and is not safe for transgender people for all of the reasons discussed in this comment and the cited resources. At the same time, the State Department reports that LGBTQ+ individuals in El Salvador,[184] Guatemala,[185] and Honduras[186] face social hostility,[187] employment and education discrimination,

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[184] Department of State, *2019 Country Reports on Human Rights Practices: El Salvador* § 6 https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/el-salvador/ ("Media reported killings of LGBTI community members in October and November. On October 27, Anahy Rivas, a 27-year-old transwoman, was killed after being assaulted and dragged behind a car. Jade Diaz, a transwoman who disappeared on November 6, was assaulted prior to her killing. Her body was found submerged in a river. On November 16, Manuel Pineda, known as Victoria, was beaten to death and her body left naked in the street in Francisco Menendez, Ahuachapan Department. Uncensored photographs of the body were circulated on social media.").

[185] *See* Department of State, *2019 Country Reports on Human Rights Practices: Guatemala* § 6 https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/guatemala/ ("According to LGBTI activists, gay and transgender individuals often experienced police abuse. The local NGO National Network for Sexual Diversity and HIV and the Lambda Association reported that as of October, a total of 20 LGBTI persons had been killed, including several transgender individuals the NGOs believed were targeted due to their sexual orientation. Several were killed in their homes or at LGBTI spaces in Guatemala City. LGBTI groups claimed women experienced specific forms of discrimination, such as forced marriages and forced pregnancies through 'corrective rape,' although these incidents were rarely, if ever, reported to authorities. In addition, transgender individuals faced severe discrimination.").

[186] Department of State, *2019 Country Reports on Human Rights Practices: Honduras* § 6 https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/honduras/ ("[S]ocial discrimination against LGBTI persons persisted, as did physical violence. Local media and LGBTI human rights NGOs reported an increase in the number of killings of LGBTI persons during the year. Impunity for such crimes was a problem, as was the impunity rate for all types of crime. According to the Violence Observatory, of the 317 cases since 2009 of hate crimes and violence against members of the LGBTI population, 92 percent had gone unpunished.").

[187] Antonia Zapulla, *Forgotten twice: the untold story of LGBT refugees*, World Economic Forum (Jan. 19, 2018),

extortion, police and immigration agent abuse,[188] corrective rape, and murder.[189] Most LGBTQ+ refugees cannot file for asylum in transit nations, nor is the length of their stay in such countries relevant to whether they are deserving of asylum in the U.S.

For example, TLDEF Name Change Project Client Juliana M. is a native of Colombia who fled that country with her parents when she was just four years old. The family traveled through Mexico on their way to the United States, where Juliana's parents were able to find refuge and obtain work permits. Juliana was raised in New Jersey, where she has now lived for thirty-five years, and became a lawful permanent resident in the mid-1990s. Juliana's childhood was difficult. She was raised in a strict religious environment, and regularly bullied for being effeminate. Even her parents were abusive, and often kept her from going out because they disapproved of her effeminacy. As a teenager, Juliana came to understand her transgender identity and ran away from home to escape the abuse. She became homeless and was a victim of sex trafficking. Juliana was forced to rely on sex work as a means of survival and was eventually arrested for crimes related to sex work. Years later, ICE instigated removal proceedings against Juliana on the grounds of her criminal record, threatening to deport her to Colombia—a country she had not been to since she was a small child. Juliana sought, and was granted, U.S. asylum because she reasonably feared persecution in Colombia on account of her transgender status.

Under the Proposed Rules, Juliana could have been denied asylum merely because more than thirty years ago her family transited through Mexico on their way to the United States without seeking asylum. That is an absurd result that would result in Juliana's deportation to Colombia—a country she has not been to since she was a preschooler—where transgender people are subjected to

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https://www.weforum.org/agenda/2018/01/forgotten-twice-lgbt-refugees/.

[188] Jose A. Del Real, *'They Were Abusing Us the Whole Way': A Tough Path for Gay and Trans Migrants*, N.Y. Times (July 11, 2018), https://www.nytimes.com/2018/07/11/us/lgbt-migrants-abuse.html.

[189] *See supra* at § 2.2.

horrifying levels of violence and persecution.[190]

10.3. One year of unlawful presence—no exceptions

The Proposed Rule instructs adjudicators to deny asylum for an applicant who has accrued "more than one year of unlawful presence in the United States prior to filing an application for asylum."[191] This unlawfully attempts to rewrite the INA, which explicitly provides explicit exceptions to the one-year filing deadline for changed or extraordinary circumstances.[192] The Agencies would be in radical contradiction to the INA if they issued a one-year discretionary denial of asylum seekers who met a one-year filing deadline exception.

Deadline exceptions are particularly important to LGBTQ+ asylum seekers, many of whom struggle to find acceptance in their identity for years after arriving in the United States. Many are terrified of coming out or have fled violence because they were outed. Many others live with severe psychological trauma manifesting as post-traumatic stress disorder, anxiety, or severe depression. An applicant who enters the United States identifying as cisgender may begin to transition, and then develop a well-founded fear of persecution on the basis of their transgender identity. The process of transitioning can take years,[193] and constitutes "changed circumstances" justifying an exception to the one-year bar. The same is true for refugees who discover they are HIV-positive after being in the United States. It would be absurd for these refugees to incur a discretionary denial because they did not seek asylum on the basis of an identity that they could not express during their first year in the United States.

10.4. Taxes

The Proposed Rule would deny an asylum seeker protection for

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[190] *See generally supra* at § 2.2.8.

[191] NPRM, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13), 36302 (amending 8 C.F.R. § 1208.13).

[192] *See* 8 U.S.C. 1158(a)(2)(D).

[193] Stefan Vogler, *LGBTQ caravan migrants may have to prove their gender or sexual identity at US border*, The Conversation (Nov. 30, 2018), https://theconversation.com/lgbtq-caravan-migrants-may-have-to-prove-their-gender-or-sexual-identity-at-us-border-107868.

being a day late, or a dollar short, on paying taxes. Whether an asylum seeker has invariably filed timely tax returns, paid every tax in full, or failed—perhaps even inadvertently—to report taxable income is utterly irrelevant to their status as a refugee or the urgent need for asylum protection. To deny an otherwise bona fide asylum claim on this—or any other—of the discretionary grounds listed in the Proposed Rule risks sending people back to violence or death.[194] This provision is the definition of arbitrary and capricious.

10.5. Fraudulent documents

With limited exceptions, the Proposed Rule instructs adjudicators to deny asylum on the basis that a refugee used fraudulent documents to enter the U.S. However, if a refugee is fleeing for their life, obtaining official documents may not be possible. As such, case law for decades has understood the difference between a refugee who presents false documents to escape persecution and one who presents false documents to make a fake claim.[195] This provision would substantially restrict refugees' ability to leave an unsafe situation, and result in the denial of many deserving asylum seekers without serving any legitimate government interest.

11. THE PROPOSED RULE WOULD EXPAND THE FIRM RESETTLEMENT BAR IN WAYS THAT ARE CONTRARY TO THE STATUTE, CONGRESSIONAL INTENT, AND BASIC COMMON SENSE

Asylum is not available to a noncitizen who was "firmly resettled in another country prior to arriving in the United States."[196] Current regulations define "firm resettlement" as "an offer of permanent resident status, citizenship, or some other type of permanent

[194] *See* Sarah Stillman, *When Deportation is a Death Sentence*, The New Yorker (Jan. 15, 2018).

[195] *See In re Pula*, 19 I&N Dec. at 474; *see also Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007) ("When a petitioner who fears deportation to his country of origin uses false documentation or makes false statements to gain entry to a safe haven, that deception 'does not detract from but supports his claim of fear of persecution.'") (quoting *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)).

[196] 8 U.S.C. § 1158(b)(2)(A)(vi).

resettlement."[197]

Under the current system, the burden rests on DHS to prove that an offer of permanent status exists. If DHS meets that burden, the asylum seeker can rebut the evidence by showing that they did not receive an offer of firm resettlement or did not qualify for the status. If the Immigration Judge concludes that the asylum seeker resettled, asylum seekers can appeal to two exceptions to ensure that *bona fide* applicants are not improperly barred from asylum.[198] Specifically, asylum seekers have not resettled if they either remained in the third country only as long as was necessary without establishing significant ties or faced "substantially and consciously restricted" conditions in that country. These exceptions are consistent with Congress' desire to welcome refugees who have faced long journeys and hardships on their way to seeking safety and permanent shelter in the United States.

The Proposed Rule would dramatically expand the firm resettlement bar and convert a narrow exception to asylum eligibility to a bar that could be applied to nearly all applicants. The Proposed Rule would deem a noncitizen to be "firmly resettled"—and thus ineligible for asylum—if they could, at least in theory, have sought protection in another country, even if they did not do so. In a sharp and wholly unjustified departure from current regulations, the Proposed Rule would bar a noncitizen from asylum if they "either resided *or could have resided* in any permanent legal immigration status or any nonpermanent but potentially indefinitely renewable legal immigration status ... in a country through which the alien transited prior to arriving in or entering the United States, *regardless of whether the alien applied for or was offered such status*."[199]

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[197] 8 C.F.R. § 208.15 (also noting exceptions where the noncitizen establishes that their "entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country" or "[t]hat the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled").

[198] 8 C.F.R. § 1208.15(a-b).

[199] NPRM, 85 Fed. Reg. at 36286 (emphasis added).

This provision threatens to render almost any transit through a third country a bar to asylum. It turns the statutory text on its head—"*could have resided*" is the opposite of "firmly resettled"[200]—and Congressional intent. This provision also fails to take into account whether the third country is safe, as the law requires.[201] It is an arbitrary and capricious departure from long-standing agency practice.

11.1. The Proposed Rule Would Bar Asylum Based on Nonpermanent, Even Fleeting, Presence in a Third Country

The Proposed rule goes far beyond the type of permanent status indicated by the statutory term "resettled,"[202] and underscored by Congress's use of the modifier "firmly."[203] Instead it conflates the permanent status required by the INA with a nonpermanent status. Even worse, the Proposed Rule bar an asylum seeker based on a series of hypotheticals that may be entirely divorced from real-world considerations, refusing asylum to those who merely might have sought protection elsewhere because they "could have" resided elsewhere in a nonpermanent (albeit potentially renewable) status even if the noncitizen did not seek, much less obtain, that theoretical protection.

The Proposed Rule's attempt to bar asylum for anyone who "could have applied" for permanent or "nonpermanent" status in the third country sets virtually no reasonable limits on the firm resettlement bar. For this reason, it is arbitrary, capricious, and an abuse of discretion.

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[200] 8 U.S.C. § 1158(b)(2)(A)(vi).

[201] *See Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015).

[202] *See* "Resettle," Oxford English Dict. (1.a "To settle (a thing or person) again in a place."), available at https://www.oed.com/view/Entry/163528; cf. "Settle," Oxford English Dict. ("To be installed in a residence, to have completed one's arrangements for residing."), available at https://www.oed.com/view/Entry/176867.

[203] *See* "Firmly," Oxford English Dict. ("With little possibility of movement; so as not easily to be shaken or dislodged; fixedly, securely, strongly; steadily, immovably."), available at https://www.oed.com/view/Entry/70601.

A refugee who travels to the United States through Mexico, even if only to change planes, could be deemed ineligible for asylum under the firm resettlement bar. As discussed above,[204] and as documented widely, transgender men and women are subject to horrific levels of abuse and violence in Mexico. This provision would defy the INA by denying transgender people and other refuges asylum merely because they transited through Mexico or other third countries.

11.2. The Proposed Rule Would Impute Firm Resettlement to Minors

In addition, the Proposed Rule would impute the firm resettlement of a parent to any minor children living with them. This, too, would endanger transgender asylum seekers. For example, large numbers of families fleeing violence and persecution in Central America resettle in Mexico. A family who fled Honduras, for example, and resettled in Mexico may have avoided certain forms of persecution, only to find that a child who comes out as transgender as an adult is not safe at all. Transgender people are routinely subjected to persecution in both Honduras[205] and Mexico.[206] But in that situation, the Proposed Rule would purport to entirely bar that now-adult transgender person from seeking asylum in the United States even if it is undisputed that he or she faces persecution in Mexico, and regardless of how persistent, pervasive, or cruel that persecution might be.

12. THE PROPOSED RULE IMPOSES A STANDARD FOR ASSESSING THE REASONABLENESS OF INTERNAL RELOCATION THAT ALMOST NO ASYLUM SEEKER CAN MEET

The Proposed Rule imposes an arbitrary standard for assessing the reasonableness of internal relocation that virtually no refugee, including transgender asylum seekers, can meet. Under existing regulations, adjudicators determine whether "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country" and if so, whether "under all the circumstances,

[204] *See, e.g.*, *supra* at §§ 2.2.5 & 10.1.2.

[205] *See, e.g.*, *supra* at § 2.2.4.

[206] *See, e.g.*, *supra* at § 2.2.5.

it would be reasonable to expect the applicant to do so."[207] A finding that internal relocation could be reasonably expected is fatal to an asylum claim, but current regulations presume that relocation is not reasonable if an asylum seeker has experienced past persecution or where the government is the persecutor.

The Proposed Rule would essentially convert the internal relocation rule into a nearly universal bar to asylum for anyone fleeing non-state actors by presuming that relocation is reasonable for those fleeing persecutors who are not state or state-sponsored. The Proposed Rule also excludes gangs, "rogue officials," family members, and neighbors from the category of government-sponsored persecutors and revises the list of factors for reasonableness determinations.

These changes are confusing, inconsistent with binding precedent, and tailored to harm a large category of asylum seekers. The internal relocation bar already serves as a challenging hurdle for many applicants who struggle to find evidence to prove that they could not safely relocate elsewhere in their country, even as they know it to be true. Expanding the bar places a cruel burden on asylum applicants to prove more than they could reasonably be expected to prove with regard to a hypothetical relocation.

Disturbingly, the Proposed Rule further modifies the current regulations by requiring adjudicators to consider "the applicant's demonstrated ability to relocate to the United States in order to apply for asylum,"[208] when determining the asylum seeker's ability to relocate within his or her home country. This is simply not relevant; the INA addresses whether the applicant can relocate within their own country, not whether they can relocate to the United States. An asylum seeker's ability to travel to the U.S. has no bearing on whether internal relocation in their country of origin was reasonable. Critically, this provision ignores the fact that refugees flee their countries of origin because they do not believe that their government will protect them and believe they will be safe in the U.S. In reality, this could operate as a blanket ban on all asylum

[207] 8 C.F.R. § 208.13(b)(1)(i)(B) and (b)(2)(ii).

[208] NPRM, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13(b)(3)), 36294 (amending 8 C.F.R. § 1208.13(b)(3)).

seekers.

The Proposed Rule also assumes that internal relocation is reasonable if the asylum seeker comes from a large country, or if the persecutor lacks "numerosity."[209] This ignores the requirement that asylum adjudications be performed on a case-by-case basis. Moreover, it is patently wrong in the context of transgender asylum seekers who routinely face persecution nationwide in the largest countries in the world.[210]

Further, the Proposed Rule would require asylum seekers who have already survived persecution to prove that they cannot reasonably relocate if the persecutor is deemed "nongovernmental."[211] The Proposed Rule then severely limits the definition of government officials to exclude actions performed by non-officials "absent evidence that the government sponsored the persecution."[212] This ignores the reality that LGBTQ+ asylum seekers do not have the luxury of investigating whether a particular government actor's violent acts were "sponsored by the government" or not. It also ignores the fact that many nations exist with systemic anti-LGBTQ+ bias. When anti-LGBTQ+ violence is the norm, evidence of official government sponsorship of persecution is unlikely to exist.

At the same time, the Proposed Rule categorically *excludes* forms of evidence necessary to show why internal relocation would be unreasonable.[213] As mentioned above, the Proposed Rule includes provisions excluding evidence "promoting cultural stereotypes of countries or individuals,"[214] a vague provision that threatens to exclude well-established and reliable forms of evidence including

[209] NPRM, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13(b)(3)), 36294 (amending 8 C.F.R. § 1208.13(b)(3)), 36301 (amending 8 C.F.R. § 1208.16(b)(3)).

[210] *See supra* at §§ 2.1 & 2.2.

[211] 8 C.F.R. § 208.13(3)(iv); 8 C.F.R. § 1208.13(3)(iv).

[212] NPRM, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13(b)(3)(iv)), 36294 (amending 8 C.F.R. § 208.16(b)(3)(iv)), 36301 (amending 8 C.F.R. § 1208.13(b)(3)(iv)), 36303 (amending 8 C.F.R. § 1208.16).

[213] *See supra* at § 7.4.

[214] 85 Fed. Reg. at 36282.

social science and country conditions reports.[215]

For transgender applicants fleeing private actor persecution, it creates an impossible scenario. They would need to prove why no other part of the country was safe, *without* using evidence of cultural norms and persistent abuse, *and* without referencing their own individual experience. It is hard to conceive of any other evidence that would meet this burden.

What's more, if the government or adjudicator raises the issue of firm resettlement—without having to present any proof that firm resettlement is possible—the burden of proof then falls to the applicant to demonstrate that they could not obtain some immigration status in the third country. This would require transgender asylum seekers to conduct research on the law in countries about which they may be completely ignorant and with which they do not share a common language. While this would pose an unreasonable burden on any asylum seeker, it will likely be an insurmountable burden on unrepresented and detained people resulting in wrongful asylum denials.

13. THE PROPOSED RULE WOULD ALLOW IMMIGRATION JUDGES TO DENY RELIEF WITHOUT A HEARING

13.1. Frivolousness

The Immigration and Nationality Act (INA) has long imposed grave consequences when an Immigration Judge determines an asylum application is "frivolous": not only is the instant application automatically denied, the individual is rendered permanently ineligible for asylum benefits.[216] More than ten years ago, the Board of Immigration Appeals (BIA) laid down a four-part test in *Matter of Y-L-* that requires that a finding of frivolity be entered only if: 1) the applicant has received notice of the consequences of the finding; 2) the Judge has found the frivolity was knowing; 3) a material element of the claim was deliberately fabricated; and 4) the applicant has

[215] *Id*.

[216] 8 U.S.C. § 1158(d)(6).

been given a sufficient opportunity to account for discrepancies or implausibilities in the claim.[217]

The Proposed Rule would dramatically lower the bar for deeming an application "frivolous," thereby subjecting a wide array of asylum seekers to summary denials, including if the adjudicator simply determines the claim is without merit. In particular, the Proposed Rule would remove the existing requirements that a fabrication be "deliberate" and "material," and would add a vague substitute that may confound adjudicators and spur legal battles; encourage adjudicators to enter a finding of frivolity for applications submitted "without regards to the merit" or "clearly foreclosed by applicable law"; and strike the requirement that asylum seekers be provided with the opportunity to explain any discrepancy or inconsistency in their submissions or arguments.[218]

In essence, the Proposed Rule overturns the safeguards provided by the Board in *Matter of Y-L-* and adds vague, irrelevant, and punitive grounds for frivolity findings, made all the more dangerous by the complex and rapidly evolving nature of U.S. asylum law. The proposal will inevitably result in findings of frivolity for asylum seekers regardless of the validity or truthfulness of their claims, raising considerable concerns under the Due Process Clause.

This lowered threshold is unfair and cruel. Applicants for asylum protection are often detained, indigent, and without access to counsel. U.S. immigration law is complex, evolving, and differs materially across the circuits. A pro se applicant will be challenged to properly navigate the legal issues, much less the practical hurdles created by language barriers, hearings via videoconference, and vastly different levels of education and experience as compared to every other participant in the asylum process. Those difficulties will be compounded in the case of minors, persons suffering PTSD, or persons with other disabilities that might impair their ability to understand the requirements for asylum or to articulate the necessary legal and factual arguments. Under the Proposed Rule, any error, creative legal theory, or misunderstanding of asylum law requirements may be construed as making frivolous claims, barring

[217] *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007).

[218] NPRM, 85 Fed. Reg. at 36304, 36295 (amending 8 C.F.R. § 208.20), 36303-04 (amending 8 C.F.R. § 1208.20).

applicants permanently from relief.

13.2. Pretermission

The Proposed Rule also would enable immigration judges to fast track the denial of an application for asylum, withholding of removal, or Convention Against Torture relief based solely on the I-589 application and the supporting evidence.[219] They will be able to do this on their own initiative or at the request of a DHS attorney, with limited opportunity from the applicant to rebut such a finding.

This Proposed Rule is profoundly harmful to the integrity of the U.S. asylum system. "Pretermission" will certainly be used, early and often. The DOJ has imposed performance quotas on immigration judges, tying their job security to how many claims they process.[220] As a result, Immigration Judges will be strongly incentivized to pretermit as many cases as possible.

Fair and thorough adjudication of a humanitarian claim takes time, and every asylum seeker is entitled to their day in court. As the BIA itself has stated, "In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to the fairness and to the integrity of the asylum process itself."[221] Refugees often suffer severe harm against insurmountable odds to travel to U.S. for safety. Denying human rights claims on the papers is a radical approach that would result in unprecedented refoulement.

Pretermission will fall most heavily upon unrepresented or detained claimants and will affect transgender individuals in particular. As discussed above, LGBTQ+ individuals fleeing persecution may not (1) immediately identify as LGBTQ+, (2) feel safe disclosing that they are LGBTQ+, or (3) understand that their LGBTQ+ status provides a claim for asylum.[222] Indeed, it is often after a thorough examination that

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[219] NPRM, 85 Fed. Reg. at 36277, 36302 (proposed new paragraph (e) to 8 C.F.R. § 1208.13).

[220] *See* DOJ, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026721/download.

[221] *See In re Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).

[222] *See supra at* § 4.2.1.

many LGBTQ+ refugees understand they have a claim at all. Dismissing these claims without any factual investigation is unconscionable.

14. THE PROPOSED RULE UNJUSTIFIABLY ALLOWS THE DISCLOSURE OF HIGHLY SENSITIVE CONFIDENTIAL INFORMATION

Credible fear, asylum, and withholding proceedings necessarily require an asylum adjudicator to elicit, and an applicant to provide, extremely sensitive and often private information about painful and traumatic experiences. Strict safeguards against disclosure of an asylum applicant's confidences is critical to the functioning of the asylum system. The Proposed Rule, however, would eliminate these safeguards and permit disclosure of information that is currently protected as confidential.[223]

The Proposed Rule sets forth a new set of vaguely worded circumstances that would allow for the disclosure of asylum records, without any clear limitations as to whom it may be disclosed. In particular, the Proposed Rule would allow the disclosure of information in an asylum application "as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the asylum seeker's immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse."[224]

Without any valid justification, the Proposed Rule would allow the government to use evidence of a person's fear-based claim against them. These weakened confidentiality protections would undermine the integrity of the asylum system, and particularly discourage LGBTQ+ people from seeking asylum due to fear of reprisal.

Release of information can put LGBTQ+ asylum seekers at grave risk of harm. Matters such as gender identity, sexual orientation, and HIV status are deeply personal and often difficult to disclose and discuss. Indeed, many transgender people seek asylum in the United States

[223] 8 C.F.R. § 208.6; 8 C.F.R. § 1208.6.

[224] NPRM, 85 Fed. Reg. at 36288, 36292 (amending 8 C.F.R. § 208.6) & 36301 (amending 8 C.F.R. § 1208.6).

specifically because they could not disclose their transgender status in their native country without being subjected to persecution, or their transgender status became known (either with or without the applicant's consent) and they were subject to reprisals and persecution.

15. THE RULEMAKING PROCESS

Finally, we must note that the 30-day comment period for the Proposed Rule is insufficient, unlawful, and violates at least Executive Order 12866.[225] The Agencies concede that the Proposed Rule is a "significant regulatory action" that "raises novel legal or policy issues."[226] In fact, the Proposed Rule is a significant and complex regulatory change that would radically rewrite asylum law without authorization from Congress and runs contrary to the U.S.'s non-refoulement obligations under domestic and international law to refrain from returning refugees to places where their lives or freedom would be threatened on account of their protected status.

The abbreviated comment period—which occurs in the middle of a dramatically expanding pandemic—is far too short to allow the public full and fair opportunity to scrutinize the Proposed Rule's complete overhaul of the U.S. asylum system.

Given the scope of the Proposed Rule, this truncated comment period fails to serve its intended purpose under the Administrative Procedures Act, namely: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[227]

Rewriting decades of legal precedent and upending the entire U.S. asylum system – where the consequences are literally life and death

[225] Executive Order 12866 § 6(a) ("[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.").

[226] NPRM, 85 Fed. Reg. at 36289.

[227] *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72, 24-25 (D.D.C. June 30, 2020) (internal citations omitted).

for refugees the U.S. is obligated to protect – is patently unfair and at the very least will result in an incomplete record.

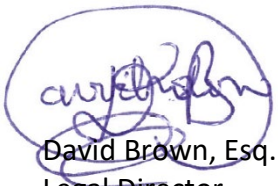
For this reason alone, the government should rescind the Proposed Rule. Should the Agencies reissue the proposed regulations, they should grant the public at least 60 days to provide comprehensive comments. Because of the prejudicial 30-day public comment period, our comments cannot address every problematic provision of the Proposed Rule. But silence is not consent: the fact that we do not discuss a particular change does not mean we agree with it.

16. CONCLUSION

We strongly oppose the proposed rule because it violates the existing statutory framework and mandate of the Agencies to provide a lawful and fair asylum process. The proposed rule will harm transgender individuals by arbitrarily closing the door to asylum for those with bona fide claims, depriving them of basic due process, and violating their rights under the INA. The Proposed Rule puts the lives of transgender people and other asylum seekers in danger. We respectfully request that the Proposed Rule be withdrawn in its entirety.

Thank you for considering these comments in response and opposition to the Proposed Rule. We welcome the opportunity to meet with relevant staff and agency leadership to discuss our concerns. Please feel free to contact David Brown, TLDEF Legal Director, at dbrown@transgenderlegal.org if you have any questions.

Sincerely,



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