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Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS  
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**RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067**

July 15, 2020

Innovation Law Lab respectfully submits this comment on the proposed amendments to the regulations governing asylum eligibility, published on June 15, 2020. The implementation of these amendments would wreak unnecessary havoc on our nation's asylum system, and severely punish many individuals who face danger, violence, and death in their home countries absent the protection that asylum promises. We urge the agencies to reject the proposed changes in their entirety.

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country. Innovation Law Lab works directly with low-income immigrants and the pro bono attorneys who serve them, providing legal services, direct representation, and tactical support before U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR).

We describe below how the proposed amendments to the asylum eligibility regulations will impact our organization and our clients, and the reasons for our opposition. Omission of any proposed change from this comment should not be interpreted as tacit approval. We oppose all aspects of the proposed implementation.

## **A. The Proposed Revisions to the Credible Fear Process Violate Individuals' Rights to Protection Under U.S. and International Law**

The government proposes several significant changes to the credible fear process that would significantly increase barriers to asylum access for people fleeing persecution. No reasonable justification exists for doing so, and the proposed changes to the Credible Fear Interview process contravene long-standing precedent confirming that asylum seekers merit both Constitutional due process protections.

### **1. The Proposed Regulations Improperly Heighten the Standard for Passing a Credible Fear Interview**

Any noncitizen apprehended at the border or within 100 miles of the United States who cannot prove they have been here for the last 14 days is subject to expedited removal within minutes or hours of apprehension.<sup>1</sup> However, according to INA §208(a), the U.S. cannot deport people who will be persecuted in their homeland. Therefore, noncitizens who lack proper documentation are deemed inadmissible and removed from the United States without any further hearings or review unless he or she indicates an intent to apply for asylum or a fear of persecution.<sup>2</sup> The current credible fear interview process allows all applicants with a “significant possibility” of establishing asylum eligibility the chance to present their claims before an Immigration Judge, where they can be more fully developed.<sup>3</sup> Congress intentionally created a low standard for credible fear passage to ensure that people fleeing harm would have the chance to fully litigate their claims for relief before an Immigration Judge, instead of merely in an abbreviated interview setting.

The proposed regulations would reinterpret this “significant possibility” standard to mean “a substantial and realistic possibility of succeeding.” This change contradicts the clear statutory language of 8 U.S.C. § 1225(b)(1)(B)(v) and is therefore unlawful. Moreover, the proposed regulations would make “reasonable possibility” the standard of proof for statutory withholding of removal and torture-related-fear-determinations.<sup>4</sup> These heightened standards will lead to the wrongful deportation of many people who have valid claims to asylum, withholding of removal, and relief under the Convention Against Torture (CAT).

### **2. The Proposed Regulations Would Allow Interviewers to Consider Potential Bars to Asylum that Should be Fully Considered by an Immigration Judge in Removal Proceedings**

The proposed regulations would require asylum officers to consider complicated legal bars to

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<sup>1</sup> Stephen W. Manning, Immigrant Law Group PC, The Artesia Report, available at <https://perma.cc/4CU6-WBWY>.

<sup>2</sup> Michelle N. Mendez, Chapter 9: Asylum, Withholding of Removal, and Protection Under the Convention Against Torture, in *Representing Clients In Immigration Court* 319 (4<sup>th</sup> Ed. 2016).

<sup>3</sup> 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

<sup>4</sup> *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. at 36266.

asylum eligibility at the credible fear stage.<sup>5</sup> A non-citizen who would initially merit a positive credible fear determination, but is subject to one of the bars to asylum or statutory withholding of removal, will receive a negative determination unless he or she can establish a reasonable possibility of torture.<sup>6</sup> Given the complexity of the factual and legal analysis required in each of these possible bars, each is more properly considered by an Immigration Judge in removal proceedings. It is unjust to require adjudication of these issues during a brief credible fear interview, where the asylum seeker is often unrepresented and has had little chance to gather facts and arguments relevant to their case. This change, coupled with the addition of several significant bars to asylum eligibility (discussed *infra*) will prevent countless numbers of people fleeing persecution from receiving humanitarian protection to which they are entitled.

### **3. The Proposed Regulations Would Prevent Asylum Seekers from Receiving the Benefit of Favorable Precedent in Circuits Where They Would Ultimately Litigate Their Cases**

By limiting the law applied to credible fear reviews to circuit-specific precedent, the regulations arbitrarily limit individuals' eligibility for relief. Currently, asylum officers may not disregard contrary circuit law and may not limit their analysis to the law of the circuit court where the alien is located during the credible fear process.<sup>7</sup> Section 1003.42(f) of the proposed regulations attempts to overrule this precedent by instructing the immigration judge to apply only cases issued by "the Board of Immigration Appeals, the Attorney General, the federal circuit court of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court" when reviewing a negative credible fear determination.

Such limitation is both unfair to asylum seekers and entirely inconsistent with the often circuit-specific nature of asylum eligibility. Nearly all credible fear interviews happen at the border, where parties are placed in expedited removal proceedings, but many asylum applicants will ultimately pursue their cases before immigration judges in different circuits throughout the country. Logically, the law where a claim will ultimately be heard should be the law that applies from the beginning of the case. Therefore, the most favorable circuit precedent should continue to apply in credible fear interviews. The proposed change is both unjust and illogical.

### **4. Limiting the Opportunity to Challenge a Negative Fear Determination Will Remove Crucial Safeguards From the Credible Fear Interview Process**

The proposed changes would also require asylum seekers to affirmatively request that an Immigration Judge review a negative credible fear finding. If the noncitizen fails to make such an indication, this would be seen as a decision to decline review.<sup>8</sup> This change would unfairly punish the many asylum seekers who are unaware that an affirmative request is required in order to receive additional review. This restriction is particularly harsh in the credible fear process

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<sup>5</sup> Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36272.

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

<sup>7</sup> USCIS Guidance on *Grace v. Whitaker* (last visited July 2, 2020), <https://immigrantjustice.org/for-attorneys/legal-resources/file/uscis-guidance-grace-v-whitaker>.

<sup>8</sup> Webinar: The End of Asylum, Immigration Justice Campaign (Jun, 25, 2020).

when individuals are detained and rarely have access to legal assistance. Review by an Immigration Judge is an important safeguard in the credible fear process and should not be limited by this proposed regulation.

### **B. Proposed Revisions to Asylum-and-Withholding-Only Proceedings Foreclose Relief Contrary to Congressional Intent**

The regulations also propose to channel all noncitizens who receive a positive credible fear determination after being subject to expedited removal proceedings out of section 240 removal proceedings and into a more limited forum where applicants could seek only asylum and withholding of removal. This change would foreclose eligibility for relief contrary to Congressional intent. The express language of the INA does not create a separate set of proceedings for noncitizens in this category. Congress already decided to exclude a limited group of noncitizens- including those in the visa waiver program, stowaways, and noncitizen crewmembers- from section 240 proceedings; excluding nearly all asylum applicants, as the regulation proposes, would go far beyond what Congress intended.

Restricting applicants to “asylum-and-withholding-only” proceedings would prevent many victims of violent crime, human trafficking, domestic violence, and child abuse, abandonment, and neglect from seeking other forms of humanitarian relief. Congress intended these forms of relief to be available to those who are eligible; unreasonably closing off these avenues of immigration relief to asylum-seeking persons is unjust, arbitrary, and contrary to Congressional intent. Moreover, two of these forms of relief- U- visas, for crime victims, and T-visas, for trafficking victims- mean to encourage the reporting of crimes and cooperation with law enforcement.<sup>9</sup> Removing a major incentive for noncitizen cooperation with law enforcement would undermine public safety in communities throughout the U.S. and would fray the relationship between state and local law enforcement agencies and immigrant communities throughout the country.

### **C. Pretermission of Asylum Applications Violates Individuals’ Rights to a Full and Fair Hearing**

The proposed changes to 8 C.F.R. § 1208.13(e) would allow an Immigration Judge to deny an asylum application only on the basis of the written application itself, depriving the applicant of the right to present testimony and have a full hearing on their claim. To allow pretermission of claims in this manner would violate the rights of respondents under both the Due Process Clause and the INA.

#### **1. Individuals seeking protection are entitled to a full and fair hearing under the Due Process Clause**

“It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.”<sup>10</sup> Indeed, relief from deportation is among the strongest of private

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<sup>9</sup> See 8 U.S.C. § 1101(a)(15)(U)-(T).

<sup>10</sup> *Reno v. Flores*, 507 U.S. 292, 306 (1993).

interests.<sup>11</sup> This is especially so in cases of asylum, which are “all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.”<sup>12</sup> Asylum cases, by their very nature, implicate matters of life or death for applicants, and any process designed around their needs and their safety should recognize the seriousness of their claims. At a minimum, constitutional due process requires that respondents in immigration proceedings receive a full and fair hearing by an impartial adjudicator.<sup>13</sup>

Allowing pretermission will substantially undermine the due process rights of asylum seekers and increase the risk of improper asylum denials. Many asylum applicants are unrepresented and do not speak English, making it exceedingly difficult to establish entitlement to relief in a written application alone. Moreover, most asylum applicants are unfamiliar with the complexities of U.S. immigration law and cannot reasonably be expected to cohesively articulate all elements of their claim without an additional opportunity to develop the record. As the Board of Immigration Appeals has recognized, “the full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum system itself.”<sup>14</sup>

## **2. Pretermission of asylum applications violates individuals’ procedural rights and severely prejudices their likelihood of winning relief**

In addition to the constitutional right to due process, all respondents are entitled to an array of procedural rights in immigration proceedings, as enshrined in the INA and related federal regulations. 8 U.S.C. § 1230(b)(4)(B) guarantees respondents the right to “a reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government.” 8 C.F.R. § 1240.1 further requires that immigration judges “shall receive and consider material and relevant evidence.” The proposed regulation would, without justification, entirely do away with these longstanding and Congressionally-guaranteed procedural protections, and lead to erroneous and unjust denials of asylum.

### **D. The Proposed Revisions Seek to Punitively Expand the Definition of “Frivolous” Asylum Applications**

Under current regulations, an applicant who “knowingly” makes “a frivolous application for asylum” after receiving the required notice becomes ineligible for not only asylum but also any other immigration benefit.<sup>15</sup> We find especially troubling the move to consider arguments “foreclosed by applicable law” fraudulent, especially when they need only to have been made

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<sup>11</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010). *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

<sup>12</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

<sup>13</sup> See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (stating that deportation proceedings must abide by “essential standards of fairness”); *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quotation omitted).

<sup>14</sup> *Matter of Fefe*, 20 I&N Dec. 115, 118 (BIA 1989).

<sup>15</sup> 8 U.S.C. § 1158(d)(6).

with willful blindness. Asylum seekers do not have a right to counsel. During fiscal year 2019, 15.3 percent of asylum cases with decisions had applicants with no legal representation, with little access to the legal knowledge that would be necessary to represent themselves *pro se*.<sup>16</sup> Applicants for asylum do not flee persecution with well-formed legal theories or a knowledge of case law. Asking applicants, many of whom have little to no proficiency in English, to have the sort of robust knowledge of the constantly changing case law precedent to be able to determine when a claim is “foreclosed by applicable law” is an impossibility. To criminally prosecute those who fail to meet an impossible standard is in effect a criminalization of the act of applying for asylum without an attorney. This expansion of the definition of frivolous would completely deny meaningful access to asylum for any of the thousands of eligible applicants who are not able to access legal representation.

Even if an asylum seeker or their legal representative possessed the near omniscience of case law that this regulation would require, it is still important that applicants be able to challenge applicable precedent. Under the proposed regulation, an applicant who asks the court to reconsider its decision, or who applies for asylum with the intent to appeal to higher federal courts so they may determine and resolve issues of law, will be subject to possible criminal sanction if they lose. A system which requires one to risk imprisonment to access the courts denies meaningful access to the courts.

It is untrue that the bulk of unsuccessful asylum applications are entered with fraudulent intent, or that fraudulent asylum claims are on the rise in a meaningful way. Increases in denied asylum claims have come as a natural and predictable result of increased overall asylum claims from increased global violence.<sup>17</sup> Further, it is unlikely that all or most denied asylum claims are fraudulent. First, it is a plain reality that people routinely enter into civil adjudication without a guarantee of achieving their desired legal result. The ability to argue novel legal theories is one of the defining features of the Anglo-American common law system and the source of much of its innovation and exceptionalism. Asylum seekers should be able to argue their own novel theories in front of the court, and in fact many failed asylum cases are the result not of bad faith attempts to game the system, but of attempts to engage with one of the most celebrated aspects of our system of law, of which a natural consequence is uncertainty in outcome.

Second, we also know that many asylum seekers get denied asylum despite being eligible, often because they are not able to access the resources needed to adequately argue their claim. Legal representation is a near necessity for obtaining asylum. In Fiscal Year 2016 immigration judges denied unrepresented asylum seekers claims 90 percent of the time while only denying 48 percent of claims from asylum seekers with legal representation in the same year.<sup>18</sup> The simplest and most likely reason for this disparity is that a large number of asylum denials come from cases where the applicant should have been eligible but was unable to adequately represent themselves. While it is possible that a greater proportion of unrepresented asylum applicants

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<https://trac.syr.edu/immigration/reports/588/#:~:text=During%20FY%202019%2C%2084.7%20percent,up%20for%20every%20court%20hearing>

<sup>17</sup> <https://www.unhcr.org/uk/figures-at-a-glance.html>

<sup>18</sup> <https://trac.syr.edu/immigration/reports/448/>

really are ineligible, that may be because ineligible asylum seekers with representation decide against applying for asylum only after being informed that they are ineligible with the help of counsel, and that many unrepresented asylum seekers would not apply if they were truly made aware that they were not eligible.

If this regulation is successful in reducing application denials, it will not be because of a reduction in fraudulent applications but because the chilling effect of this regulation will result in an across the board drop among all applicants. Any asylum seeker that is personally unsure of the legal validity of their claim will be too afraid to engage with the system that is supposed to make that determination. The regulation so radically redefines the criteria for frivolous applications that for many the fears of being prosecuted if they apply for asylum despite a lack of fraudulent intent will be valid.

### **E. Proposed Revisions to the Asylum and Withholding Standards Undermine Non-Refoulement Protections Under U.S. and International Law**

#### **1. The Proposed Revisions to the Refugee Definition are Contrary to the INA and the 1951 Refugee Convention**

The proposed revisions to the asylum and withholding standards are contrary to both the INA and the 1951 Refugee Convention. The proposed changes will put legitimate asylum seekers in real, life-threatening danger and will subject thousands of asylum seekers who would previously have been granted asylum to deportation and almost certain persecution in their countries of origin. These proposed changes contravene our commitment to protecting asylum seekers and refugees under the Refugee Act and the 1951 UN Refugee Convention, as they will lead to the deportation of legitimate asylum-seekers to countries where they will undoubtedly suffer persecution and torture. Rather than harmonize U.S. asylum law with international law, these proposed revisions will create even further discord between U.S. and international law.

#### **2. The Proposed Changes to the Particular Social Group Standard Would Deny Asylum to Thousands of Eligible Asylum Seekers**

The proposed changes to the asylum regulations governing membership in a particular social group claim to “codify the longstanding requirements” for recognition as a particular social group and provide clarity to the particular social group standard through examples of “nonexhaustive bases that would generally be insufficient to establish a particular social group.” Instead, these proposed revisions to the particular social group standard confuse the elements of asylum and provide less, not more, clarity to adjudicators, legal advocates, and individual asylum seekers. Under these proposed changes, thousands of asylum-eligible individuals who would have been eligible for asylum under the current regulations will be unlawfully denied asylum protections.

The purpose of the particular social group protected ground is to provide an avenue for asylum relief for individuals who experience or fear persecution because of a protected characteristic but who may not fit within the other four enumerated protected grounds. The particular social group category is meant to be flexible, so that asylum seekers who would otherwise face persecution or

torture in their home countries would have access to asylum protections. Indeed, the U.N. High Commissioner on Refugees (UNHCR) Guidelines clarify that “[t]he term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>19</sup> The proposed revisions to the particular social group standard improperly narrow this well-established protected ground in an attempt to unlawfully foreclose asylum claims for individuals who would otherwise be eligible for asylum protection.

The enumeration of presumptively insufficient bases for certain types of protected characteristics targets a certain subset of asylum-seekers who have suffered past persecution and who would otherwise merit asylum protection under domestic and international laws due to their well-founded fear of persecution. This proposed change to the regulations directly targets asylum seekers who come from certain geographic locations, namely, Central and South America, and targets those who are fleeing persecution from organized crime, gender-based, and sexual orientation-based persecution. In creating this non-exhaustive list of individual examples that would “generally be insufficient to establish a particular social group,” the Departments are attempting to do away with long-established U.S. and international case law interpreting and articulating what does and does not constitute a cognizable particular social group. It is clear from the examples on this list that the Departments seek to foreclose asylum claims for certain types of asylum seekers who would otherwise fit within the requirements for a valid particular social group.

**a. Binding individuals to their initial particular social group formulation undermines their procedural rights**

While the proposed revisions to the asylum regulations governing membership in a particular social group purport to “encourage the efficient litigation of all claims,” in reality, the proposed changes would undermine asylum seekers’ statutory and procedural due process rights. The proposed revisions would require an asylum seeker to articulate all proposed particular social group formulations before the Immigration Judge, would automatically preclude an asylum seeker who failed to do so from bringing any future claim based on a particular social group formulation that was not presented before the Immigration Judge, and would effectively bar an asylum seeker from filing a motion to reopen or reconsider based on a particular social group formulation that could have been brought at the prior hearing. These proposed changes would obliterate asylum seekers’ due process rights and the statutory rights afforded to them by the INA.

The proposed regulation seeks to achieve “efficiency” at the cost of due process. It disregards both the notoriously complicated nature of the immigration system and the extreme vulnerability of asylum seekers, assuming that it would be impossible for one with a genuine claim for asylum to fail to articulate their particular social group at an initial hearing. This is wholly inappropriate, given that even practiced attorneys can fail to articulate relevant claims at first instance. Asylum seekers, who are often *pro se*, have limited English proficiency, lack a formal education, and

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<sup>19</sup> United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, available at <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>



lack a means through which to familiarize themselves with opaque particular social group parameters that have only been defined via extensive case law and indecipherable regulations. This proposed change unfairly targets unrepresented asylum seekers who, through no fault of their own, are unable to afford private counsel and who are unversed in the complicated intricacies of U.S. asylum jurisprudence. This proposed revision to the regulations would unnecessarily penalize unrepresented asylum seekers who are unable to articulate the protected characteristics in their cases.

These proposed changes to the regulations penalize and exclude from asylum relief even those with viable asylum claims simply because they lacked the knowledge or ability to articulate a particular social group. Excluding asylum seekers from asylum protection is completely contrary to the principles of due process and non-refoulement that are the backbone of our asylum laws and our legal system more broadly.

### **3. The Proposed Rule Unlawfully Redefine Political Opinion in Contravention of Long-Established Principles**

The proposed regulation seeks to unlawfully redefine what constitutes a political opinion for purposes of asylum and withholding of removal and directly contradicts well-established legal precedent defining what constitutes a political opinion. The proposed changes to the political opinion definition appear to be an attempt by the Departments to foreclose asylum relief to individuals fleeing political persecution from non-state actors where their governments are unable or unwilling to protect them. To alter the regulations to foreclose these claims directly conflicts with both U.S. and international laws.

The INA explicitly defines political opinion to include forced abortion and involuntary sterilization, yet this proposed revision would preclude asylum seekers who have suffered or will suffer forced abortion and involuntary sterilization from qualifying for asylum. The proposed new definition of political opinion fails to encompass the range of claims that the Refugee Act and INA intended to include and is in direct conflict with the language of the INA and by extension, the will of Congress. Similarly, the proposed revisions attempt to limit political opinion claims to only those opinions that are “in opposition to the ruling governmental entity,” a definition that would be inconsistent with the purpose of the Refugee Act and will subject countless asylum seekers with viable claims to deportation and persecution.

Adopting this proposed revision to the definition of a political opinion will create confusion as the proposed new definition conflates whether an asylum seeker has a political opinion with a separate and distinct element of asylum: government inability or unwillingness to control a persecutor. The regulation’s purported purpose is to improve clarity and uniformity between circuits, but the regulation itself is unclear and whose interpretation will lead to confusion and inconsistency in the application of asylum law.

### **4. The Proposed Rule Impermissibly Alters the Accepted Definition of Persecution**

The proposed regulation is framed in the negative, effectively warning adjudicators to tread carefully when finding persecution and encouraging a liberal definition of the many harms the Departments believe should be ignored. The regulation does not provide adjudicators with

guidance on what persecution is beyond to say that it is “severe” and would include an “exigent threat.” Instead, the regulation provides a “nonexhaustive” list of what the Departments would exclude from the definition of persecution. This list includes “generalized harm” from “civil, criminal or military strife in a country,” “intermittent harassment,” “brief detentions,” “threats with no actual effort to carry out the threats,” and existing “laws or gov’t policies that are unenforced or infrequently enforced.” The proposed revisions to the definition of persecution are at odds with decades of legal precedent.

Persecution can be established without physical harm to the applicant<sup>20</sup> and it is well established that even when no single incident rises to the level of persecution alone, an adjudicator must consider whether the cumulative effect of the incidents constitutes a severe threat to life or freedom.<sup>21</sup> The U.N. Handbook, recognized by the U.S. Supreme Court as persuasive guidance for interpreting the Refugee Convention and therefore the Refugee Act implementing the Refugee Convention, explains that “[t]he subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological makeup of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.”<sup>22</sup> The proposed regulation would thus have adjudicators disregard this longstanding guidance and deny asylum protection to those facing what has long been recognized as persecution under both the INA and Refugee Convention.

Again, this proposed revision to the regulations conflates whether the harm an asylum applicant suffered rises to the level of persecution with whether the applicant’s government is unable or unwilling to protect the applicant from the persecution the applicant fears. If adopted, this proposed regulation will sow confusion and discord among the various immigration courts, the BIA and the circuit courts. Moreover, the proposed regulation’s failure to recognize the contextual and cumulative nature of the persecution analysis would have life and death consequences if implemented. Asylum seekers who would otherwise qualify for asylum under the law will be denied asylum and face deportation to a country where they will suffer harm rising to the level of persecution.

In addition to excluding a specific subset of lawful asylum seekers from protection, this proposed revision to the definition of persecution will cause actual harm to asylum seekers by forcing them to recount traumatic details of their past persecution without providing them an opportunity to develop their case in a trauma-informed way. This proposed revision will unnecessarily pressure asylum seekers to recount their traumatic experiences before the Immigration Judge in a master calendar hearing setting, where they lack the privacy and confidentiality they are entitled to. This retraumatization will be magnified for children asylum seekers and those asylum seekers who are actively suffering from Post-Traumatic Stress Disorder (PTSD) or other trauma-related

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<sup>20</sup> See, e.g., *Herrera-Reyes v. Att’y Gen. of United States*, 952 F.3d 101, 110 (3d Cir. 2020); *Rios v. Mukasey*, 268 Fed.Appx. 51 (2d Cir 2008).

<sup>21</sup> See e.g. *Herrera-Reyes v. Att’y Gen. of United States*, 952 F.3d 101, 109 (3d Cir. 2020); *Manzur v. U.S. Dep’t of Homeland Sec.*, 494 F.3d 281, 290 (2d Cir. 2007); *Chand v. I.N.S.*, 222 F.3d 1066, 1074 (9th Cir. 2000).

<sup>22</sup> UN Handbook, ¶52

mental health conditions and has the potential to cause severe and long lasting psychological harm.

#### **5. The Proposed Rule Unlawfully Alters the Definition of Nexus and Attempts to Foreclose Asylum Relief to Certain Groups of Asylum Seekers that Are Eligible For Asylum Under Current Law.**

The INA recognizes that an individual may be persecuted for multiple reasons, and that a protected ground need only be one reason for persecution (for withholding of removal) and one central reason (for asylum).<sup>23</sup> Yet, the proposed regulations would fundamentally alter these well-established legal standards by dictating that certain situations can never meet the nexus standard. Again, this proposed change to the regulations is at odds with decades of well-established legal precedent and at odds with international law. For example, the regulation purports to reject all claims of persecution based on gender and yet international and U.S. law has long recognized the viability of gender-based asylum claims and the UNHCR’s Guidelines on Gender-Related Persecution emphatically states that “women are a clear example of a social subset defined by innate and immutable characteristics ... who are frequently treated differently by men.”<sup>24</sup> This proposed change reflects the Departments’ desire to foreclose asylum protections to specific classes of asylum seekers that are eligible for asylum relief under our current laws.

Indeed, the regulations dismiss evidence of entrenched power structures and systemic violence within countries as mere “cultural stereotypes.” The effect of this regulation is to delegitimize evidence of systemic gender-based violence and is contrary to the long-recognized definition of refugee in the INA and the Refugee Convention. The proposed regulations attempt to invalidate evidence of systemic gender-based violence in an attempt to foreclose asylum relief to a particular group of asylum seekers: women. Denying asylum to a class of immigrants based on the very protected characteristic for which they are seeking asylum flies in the face of the Refugee Act and the Refugee Convention, yet this is precisely what this proposed revision seeks to do.

Not only do these proposed revisions seek to foreclose asylum relief to specific classes of asylum seekers but they will create confusion among adjudicators, attorneys, and individual asylum seekers as they conflate and confuse numerous elements of the asylum statute. For instance, the proposed changes to the nexus standard seek to eliminate gender-based asylum claims entirely, conflating nexus with membership in a cognizable particular social group and a government’s unwillingness or inability to control gender-based persecution.

#### **6. The Proposed Revisions to the Torture Definition Undermine Non-Refoulement Protections under U.S. and International Law**

The Departments’ proposed revisions to the definition of torture are contrary to the INA and the Convention Against Torture (“CAT”) and would thereby undermine the United States’

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<sup>23</sup> *Barajas-Romero v. Lynch*, 846 F.3d 351, 359 (9th Cir. 2017).

<sup>24</sup> UNHCR, *Guidelines on 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*, Paragraph 30.

obligations of non-refoulement under Article 3 of CAT. Specifically, appending the agencies' understanding of a "rogue official" to the definition of torture in 8 C.F.R. § 208.18(a)(1), (7), 8 C.F.R. § 1208.18(a)(1), (7) runs counter to US precedent and international law and would frustrate the object and purpose of the CAT.

Through these proposed revisions, the agency attempts to create a "rogue official" exception to the CAT's definition of torture and in doing so, stretches the terminology that has long been used to interpret the CAT for domestic purposes. The agency applies an overly narrow conception of "color of law" in its attempt to redefine who constitutes a public official acting in their official capacity for the purpose of the CAT's definition of torture. The classic understanding of what constitutes acts carried out under "color of law" encompasses acts that are "fairly attributable to the State,"<sup>25</sup> including acts made "under 'pretense' of law."<sup>26</sup> "Color of law" excludes acts of officers taken in their purely private capacities, but includes acts taken in the performance of official duties that overstep the authority of that particular officer.<sup>27</sup> Thus, under U.S. precedent, acts carried out under color of law can include those committed by officials overstepping their authority, but not by officials who are acting in their private capacity. The Senate imported this understanding into its interpretation of the CAT, excluding from the instrument's ambit torturous conduct that "occurs as a wholly private act" and equating conduct not within that category as torture "inflicted under 'color of law'."<sup>28</sup> The proposed regulation appears to be redundant at best by adding the exclusion for acts carried out by rogue officials, given that the U.S. statutes and regulations implementing the CAT already exclude from the definition of torture wholly private acts that may be carried out by public officials. At its worst, the proposed revision threatens to muddy the waters as to what constitutes an act carried out by a public official and could lead to the conflation of wholly private acts with actions carried out by public officers in their official capacity that may overstep the bound of their authority. Indeed, U.S. law recognizes that low-level public officials may still act under color of law when they use their official capacity to advance their personal interests.<sup>29</sup> By categorizing such actors as "rogue," the regulation would excuse official conduct that violates the CAT, including abuse of authority.<sup>30</sup> This would have the effect of denying relief to individuals protected by the CAT and thereby cause the U.S. to violate its obligations of non-refoulement under Article 3.

Furthermore, the proposed addition of a "rogue official" exception to the definition of torture is

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<sup>25</sup> *West v. Atkins*, 487 U.S. 42, 58 (1988)

<sup>26</sup> *Screws v. United States*, 325 U.S. 91, 111 (1945) (citation omitted).

<sup>27</sup> *Id.* ("[A]cts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.")

<sup>28</sup> S. Exe. Rep. No. 101-30, at 14 (1990).

<sup>29</sup> *Garcia v. Holder*, 756 F.3d 885, 892 (5th Cir. 2014) ("We have recognized on numerous occasions that acts motivated by an officer's personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives").

<sup>30</sup> *See, e.g., Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009) ("the rule does not require that the public official be executing official state policy or that the public official be the nation's president or some other official at the upper echelons of power. Rather, as we and the Supreme Court have repeatedly held, the use of official authority by low-level officials, such as police officers, can work to place actions under the color of law even where they act without state sanction").

invalid because it would contravene international law principles of state attribution. States will be liable for torture by its officials even if such acts do not have specific approval of the authorities.<sup>31</sup> Under international law, failure of a state address breaches of anti-torture provisions have historically been enough for responsibility for the act to be imputed to the state; indifference to torture may be found where allegations of the practice are not challenged by “proper enquiry.”<sup>32</sup> Indeed, the European Commission on Human Rights has ruled that higher officials are strictly liable for torturous conduct by subordinates and that a superior’s inability to enforce their will on a subordinate is no defense.<sup>33</sup> The proposed “rogue official” exception to the CAT definition would allow the U.S. to excuse the indifference of higher officials to acts carried out by their subordinates acting outside of the scope of their authority or outside of the chain of command. This contradicts established international law understandings of the liability of superior officials for torture carried out by those under their nominal control.

The precedent relied upon by the agencies for the proposed “rogue official” exception, *Matter of O-F-A-S-*, illustrates the problematic nature of the concept and shows how it is incongruous with U.S. and international law precedent. In that case, it was not clear whether the individuals who threatened the applicant with torture were merely private individuals wearing police insignia or police officers acting outside of the bounds of their authority.<sup>34</sup> In upholding the Immigration Judge’s determination that, even if the individuals making the threats were police officers, they were acting without “color of law”, the BIA failed to address whether the potential abuse of power by lower-level officers would constitute official acts; it merely found that possible fear of sanctions was enough to declare the potential officers “rogue.”<sup>35</sup>

The proposed regulation’s addition of “willful blindness” to the definition of “acquiescence” in 8 CFR 208.18(a)(7) would create a working definition of “acquiescence” that is too narrow and that, if applied, would cause the U.S. to violate its obligations under the CAT. Precedent and the

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<sup>31</sup> Law of Asylum in the United States § 7:31 (2020 ed.) (“ It is well established that a state will be responsible for the torturous acts of its officials even if such conduct did not have the specific approval of the authorities”); *The Greek Case* Y.B. Eur. Conv. on H.R. 1, 186, Appl. No. 3321/67, ¶ 196 (Eur. Comm’n on H.R.) (1969) (“By official tolerance [it] is meant that, though acts of torture or ill treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible are cognizant of such acts but take no action to punish them or prevent their repetition; or that higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity; or that courts deny a fair hearing of complaints of torture by state agents is denied.”). While *The Greek Case* deals with Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”), the almost-identical language of the European Convention to CAT Article 3 and the caselaw stemming from the European Convention make these sources of law important tools for the interpretation of CAT. Law of Asylum in the United States § 7:8 (2020 ed.).

<sup>32</sup> *The Greek Case*, ¶ 502.

<sup>33</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) Appl. No. 5310/71, ¶ 159 (1978) (“under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.”).

<sup>34</sup> *Matter of O-F-A-S*, 27 I&N Dec. 709, 719-20 (BIA 2019).

<sup>35</sup> Compare *Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (“ the use of official authority by low-level officials, such as police officers, can work to place actions under the color of law even where they act without state sanction”) with *Matter of O-F-A-S*, 27 I&N Dec. 709, 719-20 (finding that the individuals acted outside color of law because they left applicant’s premises when learning of approaching police vehicle and threatening applicant if they reported to the police).

ratification history of the CAT indicate that “willful blindness” is a sufficient, but not necessary, condition for acquiescence, which is meant to encompass a broader array of behavior from higher government officials towards torture.<sup>36</sup> According to one commentator, the concept of “acquiescence” was added to the definition of torture by the UN working group so as to include a “whole range” of “complacent ‘hand-washing’ and ‘do-nothing’ attitudes.”<sup>37</sup> International law bodies have found “acquiescence” to torture by nonstate actors in situations where the government response fell below the notion of “willful blindness,” especially in the realm of domestic violence cases. For example, official “complacency” in the face of domestic violence complaints has been held to violate Article 3.<sup>38</sup> The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has found that a state is internationally responsible for torture when it fails to “exercise due diligence to protect against such violence or when they legitimize domestic violence.”<sup>39</sup> State acquiescence to domestic violence as a form of torture can be “subtly disguised” and that it can include failure to exercise due diligence to protect private individuals against such violence, legitimizing such violence, or condoning such violence through “discriminatory judicial ineffectiveness.”<sup>40</sup> The Special Rapporteur’s language suggests that, in at least some instances, states have an duty under the Convention to take preventative measures against certain forms of conduct that constitute torture and that failure to take those affirmative steps in itself constitutes acquiescence. This stands in stark contrast to the agencies’ notion of “willful blindness,” which suggests states only violate their duties under the CAT to the extent that they take affirmative steps to avoid addressing potentially torturous conduct within their jurisdictions. While the concept of “willful blindness” may be applicable in other areas of U.S. law, it has no basis in the language, ratification history, or interpretation of the CAT.

The proposed clarification of the definition of “acquiescence” to require omission of an act that an official had a duty and was able to do in addition to prior knowledge of the act would frustrate the object and purpose of the CAT and cause the U.S. to breach its responsibilities under Article

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<sup>36</sup> See *Zheng v. Ashcroft*, 332 F.3d 1186, 1194–95 (9th Cir. 2003) (“The Senate did not in its understandings to the Convention modify the terms awareness and acquiescence with the adjective “knowing” as the INS does in their briefs to the BIA and this court. Nor did the Senate require willful acceptance. Rather, the Senate ratified a version of the Convention that eliminated an understanding that acquiescence required a public official's knowledge and replaced it with an understanding that acquiescence required only a public official's awareness. The Senate Committee on Foreign Relations expressly stated that the purpose of requiring awareness, and not knowledge, “is to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence.’”) (citing S. Exec. Rep. 101–30, at 9).

<sup>37</sup> Maxime E. Tardu, *The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 56 *Nordic J. Int'l L.* 303 (1987) (“The concept of ‘acquiescence’ was added to reach a whole range of complacent ‘hand-washing’ and ‘do-nothing’ attitudes towards vigilante and ‘death squad’ groups”).

<sup>38</sup> *Talpis v. Italy*, Eur. Ct. H.R., Appl. No. 41237/14, ¶ 131 (2017) (“the manner in which the domestic authorities prosecuted the case is also a manifestation of that judicial complacency and cannot be deemed to satisfy the requirements of Article 3 of the Convention”).

<sup>39</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, Report to the Human Rights Council, A/HRC/31/57 ¶ 55 (Jan. 5, 2016).

<sup>40</sup> This can include, but is not limited to, “a failure to investigate, prosecute and punish perpetrators.” *Id.* at ¶ 56 (Jan. 5, 2016).

3 if implemented. At best, the proposed revision would create a redundant step in analysis in determining acquiescence. The Convention creates an obligation for all state parties to take steps to prevent torture their respective jurisdictions; therefore, it follows that states and their agents have a duty to prevent torture that is independent of any domestic legal duty to do so or any domestic legal structure (e.g., chain of command, limitations on jurisdiction) that might restrain an agent of the state from preventing torture by another state agent.<sup>41</sup> In other words, the CAT can be said to create a duty for officials to intervene of its own force; if an official has prior awareness and then does not act, then he has breached his duty under the CAT regardless of domestic law restrictions on his jurisdiction.<sup>42</sup> The language of the Senate's understanding of the CAT implies that there is a preexisting legal duty on the part of public officials to intervene to prevent acts of torture of which they have prior awareness; nowhere does the understanding indicate that the duty must be particular to that official or arise under a law or regulation separate from those created by the Convention itself (i.e., a prior official has prior awareness and then "breach[es] his legal responsibility to intervene").<sup>43</sup> The Senate understanding does not make intervention contingent on the existence of some additional duty; rather, the duty exists and is triggered by an official's assumption of prior knowledge. This aligns with the object and purpose of the Convention, which in part is meant to compel state parties into suppressing the practice of torture, which would imply the creation of a legal duty upon all public officials.

Additionally, the proposed revision would allow for the U.S. to ignore acts or policies of "hand washing" that the inclusion of "acquiescence" in the definition of torture was supposed to push back against.<sup>44</sup> The strict two-step inquiry into acquiescence would allow the U.S. to refool individuals to countries where they are likely to be tortured at the acquiescence of public officials or the state, in contravention of the U.S.'s obligations under the CAT.

Taken together, the revisions to the regulations implementing the CAT would significantly weaken the United States' adherence to its obligations under the treaty by erroneously classifying acts of torture as outside of the instrument's protection. This would lead to the U.S. removing individuals to states where they are likely to be tortured either by public officials acting under the color of law or at the acquiescence of public officials.

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<sup>41</sup> See Convention Against Torture art. 2(1), Jun. 26, 1987, 1465 UNTS 85 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.").

<sup>42</sup> Kristen B. Rosati, *The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers*, 74 NO. 45 Interpreter Releases 1773, 1775 n.11 ("The Torture Convention's requirement that State Parties criminalize torture and train government officials to recognize torture may provide such a legal duty to intervene.").

<sup>43</sup> U.S. Reservations, Declarations, and Understandings to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990) ("That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.") [Understanding (1)(d)].

<sup>44</sup> Tardu, *supra* note 37.

## **7. The Proposed Rule Unlawfully Impedes Individuals Fleeing Persecution from Receiving Asylum Protection**

### **a. The Proposed Revisions Impermissibly Heighten the Internal Relocation Standard**

This proposed regulation seeks to rewrite the internal relocation prong of the requirements for asylum. The current suggested factors for consideration, which encourage adjudicators to think beyond physical limitations to relocation and consider the actual real circumstances of each individual, are completely gone. Instead, they have been replaced with factors that speak exclusively to persecution-related factors affecting relocation and, furthermore, suggest that judges consider as relevant “the applicant’s demonstrated ability to relocate to the United States.”

This addition clearly seeks to imply that because a person has reached the United States, they could have relocated internally. There is no clarification as to what the “demonstrated ability” should speak to, whether it be financial, safety, physical ability, or practical factors – all of which have been specifically removed from consideration outside of this context. This proposed regulation is naïve to the realities of asylum seekers that the current regulation seeks to acknowledge: that beyond geographical distance, many physical and logistical factors affect one’s ability to move and relocate. Instead, it is a blatant attempt to put judges in a position to deny virtually all asylum applications, based literally on the fact that the applicant has physically made it to the U.S. to apply for asylum.

Procedurally, the proposed regulation heightens the burden for the applicant, who must prove by a preponderance of the evidence that in any case where a non-governmental actor is the persecutor, internal relocation is unreasonable. It states that for non-governmental persecutors, there should be a presumption that the threat of persecution could not occur nationwide. First, this presumption makes no sense and contradicts long standing legal precedent. For example, there is extensive documentation of the fact that many criminal organizations operating in Central American countries are transnational organizations that exert power over regions that encompass - and transcend - entire countries.<sup>45</sup> Furthermore, it is unreasonable to heighten the burden of proof for asylum applicants, who already face severe disadvantages in fighting their cases. The government has superior access to proof, such as country reports and news articles – much more access than do indigent asylum seekers navigating a foreign legal system in a different language.

### **b. The Proposed Revisions Impermissibly Change the Firm Resettlement Bar so That it Applies to Those Who Are Not Firmly Resettled.**

By expanding the firm resettlement bar to include “any non-permanent, potentially indefinitely renewable legal immigration status” and further applying this ban to anyone who “either resided or could have resided,” the proposed regulation transforms the bar into a categorical bar to

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<sup>45</sup> See, e.g., *MS 13 in the Americas: How the World’s Most Notorious Gang Defies Logic, Resists Destruction*, INSIGHT CRIME (Feb. 16, 2018), <https://globalinitiative.net/wp-content/uploads/2018/04/MS13-in-the-Americas-How-the-World%E2%80%99s-Most-Notorious-Gang-Defies-Logic-Resists-Destruction-InSight-Crim.pdf>.



eligibility for asylum for almost everyone who has traveled through any third country on their way to the United States, regardless of how long they have been in a country. Put differently, the proposed regulations impermissibly change the firm resettlement bar so that it applies to those who are not, and have not, firmly resettled. Functionally, it would operate as an asylum ban.

This aspect of the proposed regulations would have a disparate impact on migrants from Central and South America, the Caribbean, and Africa. It effectively reinstates the so-called Third-Country Transit Ban, which has been enjoined by the federal courts for operating as a functional ban on asylum at the southern border, regardless of how meritorious a person's asylum claim was.

The proposed regulation also changes the procedure for applying for the firm resettlement bar in a manner that contravenes long-standing agency and regulatory practice. That procedure has been in place since its adoption, and places the burden on DHS to establish "documentation of firm resettlement." The proposed regulations would allow either DHS or the judge to raise the issue of firm resettlement whenever "the evidence of record indicates that firm resettlement may apply." The burden then would fall on the asylum seeker to prove that the bar does not apply, but the regulations do not specify how, or under what standard, the individual can make such a showing. In that respect, the regulation again would lead to unfair and inconsistent results and erroneous outcomes--individual asylum seekers are often not familiar with the complexities of U.S. immigration law, face language barriers, and many do not have access to legal representation. Imposing the burden on the asylum seeker to prove that they are not eligible for every type of status or relief made available to those passing through every country in which they have transited is wholly unreasonable.

### **c. The Proposed Revisions Effectively Transform Discretion Into a Catch-All Bar to Asylum**

Congress enacted the asylum provision to conform with Article 34 of the Refugee Convention, which commits the United States to "as far as possible facilitate the assimilation and naturalization of refugees."<sup>46</sup> The discretion afforded the Attorney General by statute was therefore intended to parallel the discretion in the Convention's instruction. Discretionary denials of asylum are extremely rare because asylum "serves a vital role in the American system for protecting refugees," carrying out American treaty obligations.<sup>47</sup> Yet, the proposed regulations seek to functionally impose categorical bans on asylum that far exceed Congress's intent and the guidance provided under the Refugee Convention. The proposed regulations impede, rather than facilitate, access to immigration benefits necessary for refugees to establish new homes in the United States.

Under the proposed rules, any asylum seeker who enters or attempts to enter the United States without inspection could be denied asylum as a matter of discretion. Additionally, the rule would add another bar, preventing most refugees who spent 14 days in any country en route to the United States from qualifying for asylum. This change would conflict with the concept of firm

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<sup>46</sup> *INS v. Cardoza-Fonseca*, 480 US 421, 441 (1987); *see also* Article 34 of the Refugee Convention.

<sup>47</sup> *Marouf v. Lynch*, 811 F.3d 174, 180 (6th Cir. 2016); *see also id.* at 189 ("discretionary denials of asylum to otherwise eligible applicants are rare and appropriate only in narrow circumstances").

resettlement, and would disqualify most asylum seekers who travel through Mexico where the administration blocks asylum seekers, forcing them to wait for months to request protection at ports of entry. These rules place asylum seekers in an impossible position where they will be denied asylum if they wait on the “metering” lists at a ports of entry but will also be denied asylum if they cross the border in order to make their requests for protection.

For decades, the United States has recognized the unique situation of asylum seekers and found that “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”<sup>48</sup> The proposed regulations impermissibly limit the discretionary factors that an adjudicator may consider to only two categories: “significant adverse discretionary factors,” and factors that result in a mandatory denial of discretion in the absence of “extraordinary circumstances” such as national security or foreign policy concerns. Guidance on positive discretionary considerations is noticeably absent from the proposed regulation. In other words, the proposed regulations do not afford discretion at all, rather, they are merely an administrative attempt to expand statutory bars to asylum in ways that already have been rejected by both Congress and the Refugee Convention.

The proposed regulations create a new framework for the exercise of discretion, including as factors unlawful entry, failure to apply for asylum in a different country, and use of fraudulent documents. As noted above, they also *require* denial, outside of extreme circumstances, for travel for more than 14 days through another country, transit through more than one country to reach the United States, individuals with certain criminal convictions that have been reversed, vacated, expunged or modified, individuals unlawfully present a year or more before applying for asylum, and individuals who fail to file required taxes.

In this respect, the proposed regulations effectively override Congressional intent and import into the exercise of discretion factors that courts already have rejected as unlawful.<sup>49</sup> They contradict the plain wording of INA § 208(a)(2)(d), which allows an exceptions to the one year filing deadline for asylum based on changed or extraordinary circumstances by barring any asylum seeker who has been in the United States for more than one year without lawful status. The regulations ignore the fact that some individuals are in the United States for many years with no need to seek asylum until there is a changed circumstance in their country of origin or personal circumstances. Likewise, many asylum seekers are prevented by extraordinary circumstances, including mental health issues such as post-traumatic stress disorder often as a result of the persecution they have fled, from filing for asylum within one year of arriving in the United States. The administration cannot eliminate these vital exceptions to the one-year-filing deadline in the guise of “discretion.”

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<sup>48</sup> *Matter of Pula*, 19 I & N Dec. 467, 475 (BIA 1987)

<sup>49</sup> See, e.g., *East Bay Covenant Sanctuary v. Trump*, 950 F.3d 1242 (2020); *Huang v. I.N.S.* (“If illegal manner of flight and entry were enough independently to support a denial of asylum, ... virtually no persecuted refugee would obtain asylum.”); *Ali v. Ashcroft*, 394 F.3d 780, 790 (9th Cir. 2005) (A “narrow interpretation of the firm resettlement bar would limit asylum to refugees from nations contiguous to the United States or to those wealthy enough to afford to fly here in search of refuge. The international obligation our nation agreed to share when we enacted the Refugee Convention into law knows no such limits.”).

The government makes many of these “discretionary” bars practically mandatory allowing for the possibility of a positive exercise of discretion only in narrow circumstances for reasons of national security or foreign policy interests, or, if the asylum seeker can show by a preponderance of the evidence that they would suffer exceptional and extremely unusual hardship if denied asylum. Even this extremely limited exception only applies to some of the “discretionary” factors. The combination of the heightened evidentiary standard and the intentionally onerous legal standard will mean that virtually no asylum seeker will be able to qualify for asylum as a matter of discretion.

#### **F. The Proposed Changes Would Cause Significant Harm to Law Lab and Its Clients**

The proposed rule would cause significant harm to Law Lab’s organizational mission and programming, and to the clients we serve. Law Lab was founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families. Since 2014, Law Lab has built several massive collaborative representation projects centered around preventing unjust deportations, many of which focus on intervention and representation during credible fear interviews, as well as direct representation before EOIR on claims for asylum, withholding of removal and CAT relief.

Currently, many of Law Lab’s projects advocate for asylum seekers in the time period following passage of the credible fear interview and through the BIA and Circuit Court appeals process. Law Lab’s Border X project uses remote volunteers to advocate for the release of asylum seekers on bond and parole. The Defending Asylum program runs pro se workshops to help unrepresented asylum seekers pursue their claims before hostile immigration courts. Equity Corps of Oregon provides universal representation to low-income persons in removal proceedings before the Portland Immigration Court. Many of the asylum seekers Law Lab serves in these programs have been removed from expedited removal after passing a credible fear interview and are fleeing widespread and systemic persecution in their home countries. If the proposed changes are enacted, Law Lab will have many fewer clients to serve because far fewer asylum seekers will pass their credible fear interviews and move forward with their asylum cases in immigration court. Moreover, Law Lab will have to divert significant resources in order to provide meaningful representation and pro bono services to the populations that it serves. Many of Law Lab’s clients are disproportionately targeted by this proposed rule, as Law Lab serves a large number of migrants from Central and South America who are fleeing gender-based, gang-based, or sexual orientation-based persecution.

More importantly, the clients Law Lab and other similar organizations serve will suffer greatly from the proposed changes. Many people with strong claims to asylum- including families and young children- will be unlawfully and unjustly denied the right to seek the protection to which they are entitled, meaning that they will be sent back to countries where they face harm, persecution, and even death. The consequences of these proposed changes would be devastating for tens of thousands of refugees that the United States has committed to protecting.

#### **G. Conclusion**

The individuals Innovation Law Lab serves will be heavily impacted by this proposed regulations and the agreements. Innovation Law Lab routinely assists people fleeing violence and persecution in their home countries who arrive to the United States’ southern border to seek

safety. The regulation and agreements would send many of these people back to the very same region from which they have fled, exposing them to further violence at the hands of their persecutors and, at the very least, extreme instability and danger in countries unequipped to handle an influx of asylum seekers.

The agencies should withdraw the proposed regulation in its entirety. Moving forward with these proposed changes will effectively eviscerate the opportunity to seek asylum in the United States, in contravention of existing law, Congressional intent, our international obligations, and our moral duty.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact us should you have any questions about our comments or require further information.



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