July 14, 2020

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

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

Dear Assistant Director Reid,

This collaborative comment is respectfully submitted by the Rocky Mountain Immigrant Advocacy Network ("RMIAN"); Professor Megan Hall of the University of Colorado Law School and former Managing Attorney of the Detention Program at RMIAN from 2014-2016; Professor Tania Valdez, Clinical Teaching Fellow in the Immigration Law & Policy Clinic at the University of Denver Sturm College of Law ("Denver Law"); Adjunct Professor Laura Lunn, Asylum Law & Policy Practicum at Denver Law; and Denver Law students Carly Hamilton, Scott C. Hammersley, Lauren Y. Jones, Becca Laughlin, and Mary Snover. We write to express our deep concerns regarding the Department of Homeland Security's Notice of proposed rulemaking – Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review, published on June 15, 2020.

To be clear, this comment will address only *some* of the sweeping and comprehensive changes to asylum law contained in the proposed regulations. Our failure to comment on all of the proposed changes is not indicative of agreement with those provisions on which we do not comment.

RMIAN is a nonprofit organization founded in 2000 that serves low-income men, women, and children in immigration matters. RMIAN promotes knowledge of legal rights, provides effective representation to ensure due process, works to improve detention conditions, and promotes a more humane immigration system, including alternatives to detention. In 2019, RMIAN served over 1,000 asylum seekers—individuals in ICE detention in Aurora, Colorado, as well as children and families across the state. RMIAN has successfully represented asylum-seekers in affirmative applications before U.S. Citizenship and Immigration Services—including many unaccompanied children—and in defensive applications before the Executive Office for Immigration Review, both in detained and non-detained courts, as well as with the Board of Immigration Appeals ("BIA"), the District Court for the District of Colorado, and Tenth Circuit Court of Appeals. We also rely on a large network of pro bono attorneys, most of whom are not immigration lawyers, to provide representation to asylum-seekers from the credible and reasonable fear process, to bond and parole, to merits and appeals. RMIAN believes that justice for immigrants means justice for all and we are committed to supporting asylum seekers and the integrity and preservation of the asylum process. All stories and quotes from RMIAN clients included in these comments are from actual clients represented by RMIAN in-house and pro-bono attorneys.

Professor Megan Hall submits this comment in her personal capacity. Professor Hall teaches legal writing and co-teaches Refugee and Asylum Law. Professor Hall became an immigration lawyer upon graduating from CU Law in 2005 and was one of the first staff members at the Rocky Mountain Immigrant Advocacy Network. During 10 years of law practice both at RMIAN and at small firms, Professor Hall worked with hundreds of people seeking humanitarian relief, including unaccompanied minors and detained adults in reasonable and credible fear proceedings.

Professor Tania Valdez submits this comment in her personal capacity. In her current position, as well as her prior experience as an immigration attorney, Professor Valdez has represented affirmative asylum seekers filing before the USCIS asylum office as well as individuals who are filing defensive asylum applications in immigration court. She also represents immigrant clients before the District Court for the District of Colorado, BIA, and the Tenth Circuit Court of Appeals. Many of Professor Valdez' clients have been asylum seekers, all of whom are survivors of torture or other trauma seeking protection in the United States. Professor Valdez supervised the five Denver Law students, who also provide this comment in their personal capacities, in the research and writing of portions of this comment.

Professor Laura Lunn submits this comment in her personal capacity. She is an adjunct professor of law at Denver Law and teaches an Asylum Law & Policy Practicum, where students learn how to assess claims; evaluate the strength of asylum, withholding of removal, and CAT cases; and compile evidence/testimony in support of fear-based claims seeking immigration relief. Moreover, Professor Lunn, along with Ashley Harrington, support this comment in their professional capacities as the Managing Attorneys for RMIAN's Detention and Children's Programs, respectively.

We Strongly Object to the Agencies Only Allowing 30 Days to Respond to Comment on the Notice of Proposed Rulemaking ("NPRM")

As thoroughly described in this comment, the proposed regulations, if implemented, will completely eviscerate asylum protections. These changes are the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act, the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"). The NPRM is over 160 pages long with 63 of those pages being the proposed rules themselves—dense, technical language which has the power to send the most vulnerable back to their countries where they may face persecution, torture, or death. Any one of the sections of these regulations, standing alone, would merit 60 days for the public to fully absorb the magnitude of the proposed changes, perform research on the existing rule and its interpretation, and respond thoughtfully. Instead, we have only 30 days to respond to multiple, unrelated changes to the asylum rules, issued as a single, mammoth document.

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this extensive, but the challenges to respond to this notice of proposed rulemaking now are magnified by the ongoing COVID-19 pandemic. If given more time, we have additional thoughts and objections to share on the remaining provisions not covered by this comment.

Absolutely no urgency exists for the rapid process surrounding these proposed regulations – few asylum interviews are even occurring, and our borders are currently effectively closed, thanks to the March 20, 2020 CDC order,[1] to asylum seekers coming from outside the United States. The agencies' focus on these regulations as a priority reflect the racial animus against Central Americans specifically, but also asylum seekers of color more broadly, and not any urgent need for administrative action.

I. Proposed 8 C.F.R. § 208.30 and 8 C.F.R. § 1208.30: Raising the standard of proof in credible fear proceedings is unlawful and will put bona fide asylum seekers at grave risk of erroneous removal to countries where they have a well-founded fear of persecution.

Raising the standard of proof in credible fear proceedings is unlawful and will put bona fide asylum seekers at grave risk of erroneous removal to countries where they have a well-founded fear of persecution.

A. The proposed "bifurcated system," which mandates different screening standards for asylum as opposed to withholding and CAT, is inconsistent with the law and is unworkable.

Requiring asylum officers to navigate an exceptionally confusing "bifurcated" standard of proof in credible fear proceedings is not only unlawful, but it also sets both asylum officers and asylum-seekers up for failure.

The proposed regulatory changes reflect a fundamental misunderstanding of how credible fear screenings, and asylum hearings, actually operate. The proposed rule imposes a "bifurcated screening process" in which noncitizens will be screened for asylum under a "significant possibility" standard and screened for statutory withholding or CAT protection under a heightened "reasonable possibility" standard.[2] The rule contemplates that noncitizens "expressing a fear of persecution" will be screened for asylum under a "significant possibility" standard and that noncitizens instead seeking withholding or CAT will be screened under the higher "reasonable possibility" standard.[3]

Yet determining whether a noncitizen qualifies for asylum is, of course, not as simple as asking the noncitizen whether she wants asylum. An asylum-seeker does not approach a U.S. official and say, "I have fear of persecution, and I would like to apply for asylum rather than statutory withholding of removal or for protection under the Convention Against Torture."

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[1] *See* Centers for Disease Control and Prevention, Interim Final Rule: Control of Communicable Diseases: Foreign Quarantine; Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes (Mar. 20, 2020, extended on April 20, and May 19, 2020), https://www.cdc.gov/quarantine/order-suspending-introduction-certain-persons.html*; see also* Nick Miroff, *Under Trump Border Rules, U.S. has Granted Refuge to Just Two People since Late March, Records Show,* Washington Post, (May 13, 2020) https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e_story.html.

[2] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36270 (proposed June 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235) (hereinafter "*Proposed Rule*").

[3] *Id.* at 36269.

Rather, the noncitizen simply expresses a *fear of return*, and from there, the screening interview is designed to determine whether the noncitizen may be able to establish eligibility for either asylum *or* for a "fallback" option such as withholding or CAT.

The Immigration and Nationality Act itself reflects this unitary approach, providing that "the term 'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the alien's claim and such other facts as are known to the officer, that the [noncitizen] *could establish eligibility for* ***asylum*** under section 208." INA § 235(b)(1)(B)(v) (emphasis supplied). The plain language of the statute thus requires that all people in credible fear proceedings must be screened for asylum, not just for withholding and CAT. The agencies note that "as a linguistic matter, it may seem strange to refer to a proceeding in which a reasonable possibility standard is applied as a 'credible fear' screening."[4] Yet this is more than just a matter of semantics: the inconsistencies between the proposed regulation and the statute demonstrate that the proposed regulation is ultra vires to the statute and is unlawful.

Moreover, a unified credible fear process appropriately recognizes that the analyses of risk-based forms of protection are inextricably intertwined, and that distinguishing among the various forms of relief rests on a series of complex legal determinations best left to an immigration judge. Indeed, the Convention Against Torture implementing regulations explicitly recognized this unified approach to risk-based forms of protection. First, the regulations specified that Form I-589 is used to apply for asylum, statutory withholding, and deferral of removal under CAT. The agencies recognized that "[u]se of the Form I-589 will avoid confusion by allowing aliens *who believe they are at risk of harm* to apply for asylum, as well as these other risk-based forms of protection, at the same time, using the same form. It will also help to ensure that these claims are presented at one time, thereby allowing resolution of these issues in the normal course of proceedings."[5]

Similarly, the agencies have in the past recognized that in fear proceedings, non-citizens should simultaneously be screened for asylum, withholding, and CAT using the same standard of proof. Screening for a "credible fear of torture" was added to the existing "credible fear of persecution" process, which encompassed both asylum and statutory withholding.[6] Those who passed the screening would be referred to section 240 proceedings to "assert a claim to withholding of removal under the Convention Against Torture or under section 241(b)(3) of the Act, or to deferral of removal in the case of an alien barred from withholding, or to asylum under section 208 of the Act."[7]

The fact that asylum, withholding, and CAT require different standards of proof at the merits stage is no justification for a "bifurcated" screening at the outset.[8] Credible fear proceedings were intended merely as a preliminary screening tool to exclude fraudulent or

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[4] *Id.* at n.15.
[5] Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb.19, 1999) (hereinafter "CAT Regulations").
[6] *Id.*
[7] *Id.*
[8] *See Proposed Rule* at 36269.

frivolous asylum claims. As noted in USCIS' own training materials, "[t]he credible fear determination is a screening process, not an adjudication."[9] The bar for passing such screenings was designed to be minimal. As the Department of Justice explained when expedited removal took effect, "[t]he credible fear standard sets a low threshold of proof of potential entitlement to asylum; many [noncitizens] who have passed the credible fear standard will not ultimately be granted asylum."[10]

The agencies now claim that raising the standard to "reasonable possibility" for "the screening of aliens seeking statutory withholding of removal and CAT protection would allow the Departments to better screen out non-meritorious claims and focus limited resources on claims much more likely to be determined to be meritorious by an immigration judge."[11] But because of the pressures inherent in the credible-fear system, coupled with the extremely confusing nature of the proposed "bifurcated" system, officers are very likely to apply the wrong standard of proof to an applicant's claim. If an officer wrongly decides that an applicant is ineligible for asylum; assesses the applicant's claim only under the heightened standard for withholding or CAT; and determines that the applicant does not meet the heightened standard – though she would have in fact met the lower asylum standard – this is a serious error that could result in the applicant's expedited removal into the hands of her persecutor.

The United States government should err on the side of giving asylum-seekers their day in court rather than "screening out" bona fide claims under the wrong legal standard. "Deportation is always a harsh measure; it is all the more replete with danger when the [noncitizen] makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

B. The proposed "reasonable possibility" standard is inconsistent with the United States' obligation of non-refoulement — the duty not to return a refugee to a country in which she fears persecution.

Simply because the "reasonable possibility" standard has "long" been used in reasonable fear proceedings does not mean that the standard is consistent with the United States' non-refoulement obligations.[12]

In fact, asylum experts have long argued that even the lower "significant possibility" standard is so onerous that it is inconsistent with international standards for refugee protection.[13]

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[9] USCIS, Affirmative Asylum, Credible Fear, and Reasonable Fear (March 2019), https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/USCIS_OLIA_March_2019_Hill_Conference_Asylum_Overview.pdf.

[10] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997).

[11] *Proposed Rule* at 36271.

[12] *See Proposed Rule* at 36270.

[13] Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 Stan. J. Int'l L. 117, 139 (2001) (hereinafter "Ramji"); Katherine Shattuck, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 Wash. L. Rev. 459, 465 and n. 27, n. 35 (2018) (hereinafter "Shattuck"), citing *Asylum Abuse: Is it Overwhelming Our Borders? Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 5 (2013) (statement of Leslie E. Vélez, Senior Protection Officer, United Nations High Commissioner for Refugees)

The Executive Committee of the U.N. High Commissioner for Refugees (UNHCR) has suggested that a screening mechanism should seek to cull out only "manifestly unfounded" or "abusive" asylum applications; the existing "significant possibility" threshold is already a higher standard of proof than that recommended by the UNCHR and that used by many other countries.[14]

Rather than seeking to raise the standard, then, the United States government should be seeking to *lower* the screening standard for asylum-seekers to bring it into conformity with international law.

C. A threshold credible-fear screening interview should not impose the same standard of proof as the ultimate adjudicatory process.

The proposed "reasonable possibility" standard would require an asylum-seeker, at the preliminary screening stage, to meet the same standard of proof that applies in a full asylum adjudication. Rather than evaluating whether the noncitizen may *later* be able to – in the course of full removal proceedings – establish eligibility for relief, the proposed regulation requires that the noncitizen, at the screening interview itself, demonstrate a "reasonable possibility that she would be persecuted" on account of a protected ground.[15] This regulation is ultra vires to the statute, which requires only that the applicant demonstrate that she could potentially establish eligibility for asylum, and is unlawful.

First, as discussed above, potential eligibility for asylum, withholding, and CAT should be screened in a unitary fashion using the lowest applicable standard of proof. "[S]ince we know that the asylum standard is low, requiring only a '10% chance' or a 'reasonable possibility' of persecution, we know intuitively that the credible fear screening hurdle must be even lower."[16] But the agencies themselves have acknowledged that "[a] 'reasonable possibility' standard is equivalent to the 'well-founded fear' standard . . . which is used to determine ultimate eligibility for asylum."[17]

Even assuming, though, that a "bifurcated" approach is viable, adopting the substantive standard for asylum as the threshold screening standard for withholding and CAT is wrong. Simply because the well-founded fear standard for asylum is lower than the substantive "more likely than not" standard for withholding and CAT does not mean it is an appropriate standard for credible-fear proceedings.

A higher "reasonable possibility" standard was adopted for *reasonable* fear screenings because at the time a noncitizen is appearing before an asylum officer for a reasonable fear

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(stating that the "significant possibility" standard for establishing credible fear under United States law is so onerous as to be inconsistent with international standards).

[14] Ramji at 139.

[15] *Proposed Rule* at 36268.

[16] Memorandum from Bill Ong Hing to John Lafferty, Chief of USCIS Asylum Div. 2 (Apr. 21, 2014), http://static.squarespace.com/static/50b1609de4b054abacd5ab6c/t/53558353e4b02071f74ee3c4/1398113107754/Response%20to%CC20USCIS%CC20Credible%CC20Fear%CC20Memo,%CC20Bill%CC20Hing,%2004.21.2014.pdf [https://perma.cc/34F9-Q6WQ] (hereinafter Bill Ong Hing Memorandum; *see also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.").

[17] *Proposed Rule* at 36271 (citations omitted).

screening, the agency has already determined that the noncitizen is statutorily ineligible for asylum due to a prior removal order or an aggravated felony conviction. "Unlike the broad class of arriving aliens who are subject to expedited removal, these two classes of aliens are ineligible for asylum."[18] Under the reasonable-fear regime, the asylum officer is not tasked with making this critical eligibility determination during a brief screening interview, and the administrative removal determination is also subject to federal-court review.[19]

Moreover, the proposed regulation requires the asylum seeker to demonstrate a reasonable possibility that she *would be persecuted*, rather than inquiring whether there is a significant possibility that the applicant could meet that standard *in the future*. "This effectively converts the credible fear determination from an inquiry into whether an asylum seeker could establish eligibility for relief in the future into an adjudication of whether the asylum seeker actually has established eligibility."[20] The proposed regulation is therefore ultra vires to the statute, which requires only that the applicant demonstrate that she *could establish eligibility for asylum,* and is unlawful. *See* INA § 235(b)(1)(B)(v).

Finally, at the credible-fear stage, the asylum-seeker is confronted with innumerable obstacles and is without the benefit of the procedural protections that apply in full adjudications. For this reason, too, applying substantive standards of proof at a threshold screening stage is inappropriate and unjust. For example:

- Officers conducting credible fear screenings routinely fail to comply with safeguards intended to protect asylum-seekers. Numerous nongovernmental organizations have documented pervasive problems including ineffective interview techniques; inaccuracies in the record of proceedings (interviews are not video or audio recorded, and the only "record" is the officer's transcription); misapplication of legal standards; and inadequate interpretation services.[21]
- Despite the diligent efforts of legal-services organizations, the vast majority of asylum-seekers in credible fear proceedings lack access to legal counsel during their credible fear interviews.[22]
- The conditions under which credible fear screenings are conducted often make it difficult or impossible for asylum-seekers to effectively tell their stories. Those in expedited removal/credible fear are subject to mandatory immigration detention.[23] At the time of their credible fear interviews, asylum-seekers are almost universally tired, hungry, cold,

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[18] CAT Regulations at 8485.
[19] 8 U.S.C. § 1228(b)(3); INA § 238(b)(3); 8 U.S.C. §§ 1252(a)(1), (b)(1); INA § 242(a)(1), (b)(1) (providing that a noncitizen ordered removed through administrative removal may seek judicial review by filing a petition to review (PFR) within 30 days of the Final Administrative Removal Order with the appropriate U.S. court of appeals).
[20] First Amended Compl. for Declaratory and Injunctive Relief, *Kiakombua v, McAleenan*, No. 1:2019cv01872, (D.D.C. June 25, 2019) (hereinafter "Kiakombua Complaint"), at ¶ 81.
[21] Shattuck at 481-85, citing American Civil Liberties Union, *American Exile: Rapid Deportations that Bypass the Courtroom* (2014), https://www.aclu.org/sites/default/files/assets/120214-expeditedremoval_0.pdf [https://perma.cc/VH4F-VNUW]; Elizabeth Cassidy & Tiffany Lynch, U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016), http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf [https://perma.cc/C8PJ-VMCE]; Human Rights First, How to Protect Refugees and Prevent Abuse at the Border; Blueprint for U.S. Government Policy (2014), http://www.humanrightsfirst.org/sites/default/files/Asylum-on-the-Border-final.pdf.
[22] *Id.* at 484.
[23] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019).

and disoriented.[24] And almost all are suffering from the effects of trauma, which further inhibits their ability to discuss the traumatic incidents of harm central to their claims with a stranger.[25]

- At the initial credible fear stage, an asylum seeker cannot be expected to proffer the evidence necessary to meet the full standards that apply at an individual hearing. Asylum-seekers have often fled with literally the clothes on their backs, and generally do not have in hand the documentary proof they will later obtain to support their claims.
- People in credible fear proceedings do not have access to federal court review, as the U.S. Supreme Court recently made clear.[26] Therefore, raising the threshold for credible fear interviews is even more problematic because asylum-seekers have no access to federal court review if the agency renders a negative credible-fear finding.

To illustrate the difficulties asylum-seekers face while in detention even under the current standards, we offer the words of RMIAN's clients who have been through this process themselves. A man from Jamaica fleeing persecution based on his sexual orientation states, "I fled because I was constantly in fear of my life. The government does not protect people like me. But going through the interview and asylum process was very difficult. I have been through really traumatic things in my life and it is difficult to talk about these things, especially to a government official and a stranger. On top of that, I was being asked to provide information and evidence for things dating back to when I was a child or records that I didn't have access to."

Similarly, a RMIAN client from Honduras that was granted asylum in 2019 explains, "It is unfair to change the law to make it more difficult for people to pass their credible fear interviews. My interview was the first time I had ever talked about all the things I had experienced. It was very difficult for me because there are things that hurt so much to talk about. I remember other people in detention who were sent back to their countries because they had too hard of a time talking about their past. Trauma affects our abilities to tell our stories, especially for the first time. The changes the government is trying to make to the law is unjust because people have suffered so much but will be sent back to their countries without an opportunity to be protected."

In the words of a Cameroonian who went on to win asylum with legal representation, "After waiting about 3 weeks in detention, I finally had my credible fear interview. I told my story to the asylum office but I didn't have much information that they asked me and the interview process was very confusing. I was very worried about what would happen next. A couple weeks later, I got my results and learned that I was allowed to see the judge. … If I hadn't been allowed to see the judge to ask for asylum and fight my case, I would have been sent back home and killed. It is hard for me to even imagine what would happen. I am heartbroken about

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[24] Shattuck at 487, n. 193, citing *Human Rights Watch, In the Freezer: Abusive Conditions for Women and Children in U.S. Immigration Holding Cells* (2018), https://www.hrw.org/sites/default/files/report_pdf/uscrd0218_web.pdf [https://perma.cc/9CG5-X3X9] (noting that "[u]ndocumented families taken into custody by US immigration agents at or near the US-Mexico border are generally placed in holding cells for several hours to several days, and sometimes a week or more"). The holding cells are often referred to as "hieleras ('freezers')," because they are "uncomfortably cold." *Id.* at 1-2. A 2015 "mental health assessment" found that "[t]ime in CBP holding cells" was "the most difficult and traumatic period of detention for women and children." *Id.* at 3 (quotation marks omitted).

[25] *Id.* at 486-87.

[26] *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

the new rules restricting asylum because a lot of people are going to lose their lives if they can't look to the US for protection."

While the credible fear and asylum process can be difficult for anyone to understand and follow, especially without representation, the process is even more confusing and daunting for individuals with intellectual disabilities or mental health conditions, such as one RMIAN client from Mexico who was granted asylum in 2019. He says, "When I was taken into immigration custody, I was so uneducated in the process and my rights and I thought I was going to be deported to where I knew I would be in danger. I tried to fight my immigration case on my own at first but it was very hard to understand what was going on. I have problems understanding and I would hear so many people in my dorm who said they weren't passing their interviews or winning their cases so I thought there was no hope for me."

In sum, given that the existing system is already rife with shortcomings, raising the threshold standard of proof for those seeking protection from harm is not only illegal; it is also exactly the wrong policy response. When in doubt, the United States should always err on the side of allowing asylum-seekers their day in court. "[A]s a matter of public policy, the application of the credible fear standard in a harsh manner that does not give the benefit of the doubt to imperfect yet reasonable claims will be something that our nation will regret in the not-too-distant future."[27]

II. Proposed 8 C.F.R. § 208.30(e)(1)(iii) and (e)(2)(iii); proposed 8 C.F.R. § 1003.42(d): Requiring adjudicators to make negative credible-fear determinations based on potential bars to protection is illegal, is ill-advised, and will overwhelm the system with erroneous determinations.

The current credible fear scheme, which recognizes the abbreviated and non-adversarial nature of credible fear interviews, requires officers to flag potential bars to asylum for future adjudication, but to nevertheless refer the applicant for full removal proceedings. The proposed rules would instead require adjudicators to make a negative credible-fear determination if the adjudicator determines the applicant could internally relocate or if the adjudicator determines the applicant is subject to any of the bars to asylum. The adjudicator is further required to determine "whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the CAT regulations."[28]

The first problem with the proposed rule is that requiring a negative credible-fear determination based solely on the potential applicability of an asylum bar contravenes the very purpose of a credible-fear screening. As discussed above, a credible-fear interview is intended as a preliminary screening device to identify fraudulent claims, not as a definitive adjudicative process to determine the merits of a claim. Requiring consideration of asylum bars transforms the screening into an adjudication, which contravenes domestic and international law.

Under the regulations, and consistent with longstanding practice, credible fear interviews must be conducted "in a nonadversarial manner," with the asylum officer required "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of

[27] Bill Ong Hing Memorandum.
[28] *Proposed Rule* at 36272.

persecution or torture." 8 C.F.R. § 208.30(d). Asking officers to probe all potential grounds for denial will transform the interview "into an adversarial process that is biased against the asylum seeker, with the asylum officer functioning at once as opponent and arbiter."[29]

Requiring issuance of a negative fear determination based solely on internal relocation or other bars also violates the United States' international-law obligations. The appropriate focus for a screening interview is on the applicant's fear of return, not on ancillary grounds of ineligibility. Furthermore, bars should be considered only after the asylum claim has been fully developed. For instance, "[b]ecause the viability of an 'internal protection alternative' can only be assessed with full knowledge of the risks in other regions of the state of origin . . . , internal protection analysis should never be included as a criterion for denial of refugee status under an accelerated or manifestly unfounded claims procedure" — the U.S. equivalent being credible fear.[30]

Furthermore, adjudicators conducting credible fear screenings are generally not attorneys, and it is both inappropriate and dangerous to increase even further the complexity of the legal determinations they are making under extreme time pressure. As described above, the credible-fear system is already rife with procedural errors. Requiring credible-fear screeners to make a whole host of new technical legal determinations will only exponentially increase the number of erroneous fear determinations. This is particularly true given that DHS has started using Customs and Border Protection officers, rather than specially trained Asylum Officers, to screen asylum applicants at their Credible Fear and Reasonable Fear interviews. Just a few of the legal determinations officers would be required to make at the credible fear stage include:

- Whether a criminal conviction is a "particularly serious crime." INA § 208(b)(2)(A)(ii); INA § 241(b)(3)(ii). This highly technical analysis requires an adjudicator to determine, under the categorical approach, whether a crime is an "aggravated felony." Application of the categorical approach is notoriously challenging. *See, e.g., United States v. Perez-Silvan*, 861 F.3d 935, 944 (9th Cir. 2017) (Owens, J., concurring) (lamenting that the approach leads to "frequent sentencing adventures more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls"). And while an aggravated felony is a *per se* bar to asylum, even a misdemeanor can be deemed "particularly serious crime" based on the underlying facts. Deputizing Asylum Officers and Customs and Border Protection Officers to make these types of nuanced criminal-immigration determinations under time pressure and with limited information is a recipe for disaster.
- Whether a so-called "terrorism bar" to asylum applies. *See* INA § 208(b)(2)(A)(v). This area of the law is also exceptionally convoluted and highly fact-specific.[31]

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[29] Kiakombua Complaint at ¶ 84.

[30] James C. Hathaway, *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative*, 21 Mich. J. Int'l L. 131, 140 (1999) [hereinafter Michigan Guidelines].

[31] *See, e.g.*, Roy Strom, *Shining a Light: Pro bono attorneys fight to expose how asylum seekers are labeled as terrorists*, Chicago Lawyer (August 2013); Lee, Tyler Anne, *When 'Material' Loses Meaning: Matter of A-C-M- and the Material Support Bar to Asylum* (March 1, 2019). Columbia Human Rights Law Review, Vol. 51 (available at SSRN: https://ssrn.com/abstract=3427472) (noting that victims of terrorism are often barred from asylum because they are deemed to have provided "material support" to the very groups whose persecution they have escaped).

- Whether the applicant is barred as a persecutor of others. *See* INA § 208(b)(2)(A)(i). This is yet another exceedingly complex legal determination. For instance, the question of whether there is a "duress" defense to this bar and what its parameters are has bounced between the U.S. Supreme Court, the Board of Immigration Appeals, and the Attorney General since 2009, still with no clear answers. *See Matter of Negusie*, 27 I&N Dec. 481 (A.G. 2018).

With respect to some of the bars to asylum and withholding, the applicable law varies widely from circuit to circuit. The proposed regulations do not specify which circuit's law officers should apply when assessing bars in during a fear screening.

Although noncitizens who receive negative fear determinations have the regulatory right to immigration judge review,[32] many of them do not have meaningful access to such review and do not seek it. Asylum seekers must request IJ review,[33] and many, confused about the process, decline review. Asylum applicants must remain detained pending IJ review,[34] which of course discourages many of them from pursuing this remedy. Finally, very few asylum-seekers are represented by attorneys at IJ fear review hearings,[35] and the prospect of having to represent oneself in court is another deterrent to seeking a fear hearing.

Yet despite the many disincentives to seeking immigration judge review of a negative fear determination, it is also inevitable that if more bona fide asylum-seekers fail their credible fear screenings, immigration judges will be called upon to conduct more reviews of those negative fear determinations.

In addition to increasing the sheer volume of fear hearings, increasing the complexity of the screening process will, in turn, increase the complexity of IJ review. IJs will have to wade through determinations under the "bifurcated" standard of proof, as discussed above, as well as to consider internal relocation and mandatory asylum bars, meaning hearings will necessarily be lengthier and more difficult to conduct. Further complicating fear review hearings, under the proposed regulations, an immigration judge will be required to consider all applicable legal precedent when reviewing a negative fear determination, including decisions of the federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits.[36] Under the current regulations, immigration judges are required to consider only the credibility of the noncitizen's statements and other facts of which the immigration judge is aware. The current standard makes sense, given that credible fear is simply a screening tool and

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[32] 8 C.F.R. § 1003.42.

[33] 8 C.F.R. § 208.30(g)(1)(i). As a safeguard, the current regulation provides that a noncitizen who affirmatively requests IJ review *or* who fails to indicate a preference about IJ review receives a fear hearing. Under proposed changes to this regulation, however, an asylum-seeker's failure to indicate whether he wishes to have an immigration judge review his negative fear finding will be treated as declining such a review. *Proposed Rule* at 36273. This is problematic, because recently arrived asylum-seekers very often lack an understanding of their rights during the fear screening process and most often do not have access to counsel during this time.

[34] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019).

[35] One study found that just 23% of asylum seekers in family detention centers had legal representation during IJ review of their negative credible or reasonable fear determinations. Shattuck at n. 45. (citing Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785 (2018) (manuscript at 101, 102) (on file with author)). The regulations are ambiguous about the role of counsel in fear review hearings, and the degree to which attorneys are permitted to participate varies widely from court to court. Shattuck at 497-98.

[36] Proposed 8 C.F.R. § 1003.42(f).

not an adjudication, and also considering that — due to custody transfers and in some cases release from detention — asylum cases are frequently heard in a jurisdiction other than the location of the fear hearing, where different legal standards apply.

The inevitable increase in the number of fear review hearings and in the length and complexity of those hearings will place significant strain on an immigration court system already stretched to the breaking point. Many negative fear determinations will be reversed,[37] meaning that an unnecessary step – the fear review – will have been added before the immigration judge reaches the merits-hearing stage.

Although a stated purpose of the regulatory changes is promoting efficiency, the proposed changes will simply create new inefficiencies in other parts of the system, while at the same time greatly increasing the chances that asylum-seekers will be erroneously deported to significant harm or death.

III. Proposed 8 C.F.R. § 1003.1; 8 C.F.R. § 1003.42(f); 8 C.F.R. § 1208.2; 8 C.F.R. § 1208.30 and 8 C.F.R. § 208.2(c); 8 C.F.R. §§ 208.30(e)(5) and (f); 8 C.F.R. § 235.6(a)(1): Limiting people with a credible fear of harm to restrictive "asylum-and-withholding-only proceedings" violates Congressional intent and will harm asylum-seekers and the immigration system.

Under current law, asylum-seekers who pass their credible fear screenings are entitled to full removal proceedings under INA § 240. The Proposed Rule seeks to eliminate section 240 proceedings for this class of asylum-seekers, instead pigeon-holing them into restrictive "asylum-and-withholding-only" proceedings under 8 C.F.R. § 208.2(c). We oppose this change because it violates the intent of Congress and will have detrimental effects on asylum-seekers and on the immigration system.

A. Eliminating full section 240 removal proceedings for those with positive credible-fear determinations violates Congressional intent.

First, Congress intended for people who have passed credible-fear screenings to be afforded full section 240 removal proceedings, and the proposed regulation funneling asylum-seekers into narrow "asylum-and-withholding-only" proceedings under 8 C.F.R. § 208.2(c) contravenes Congressional intent.

Although the Immigration and Nationality Act may not explicitly require that noncitizens with a credible fear of harm be placed in full section 240 removal proceedings, neither does it foreclose that option. INA § 235(b)(1)(B)(ii) provides that a noncitizen with a credible fear of persecution "shall be detained for further consideration of the application for asylum." But INA § 235(b)(1)(B)(ii) is silent as to the appropriate mechanism for consideration of relief.

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[37] In cases involving detained families, in fiscal years 2014 through 2016, immigration judges vacated 1,157 negative credible fear determinations. Shattuck at 465, n. 41. "These figures underscore both the deficiencies of the credible fear process and the bona fide nature of the vast majority of the claims for protection asserted by Central American families." *Id.* at 465.

At best, then, the statute is ambiguous[38] — but its legislative history leaves no doubt that Congress intended for asylum-seekers with positive credible-fear determinations to be afforded full section 240 proceedings. The conference report for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which enacted INA § 235(b)(1)(B)(ii), says plainly: "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***." H.R. Conf. Rep. No. 104-828, at 209 (1996) (emphasis added). And the conference report "is generally the most reliable evidence in legislative history of congressional intent because it represents the final statement of the terms agreed to by both houses."[39]

In enacting the current regulation mandating section 240 proceedings for those with credible fear, the agencies gave effect to Congress's intent. The agencies also explained the reason that section 240 proceedings are appropriate in these circumstances:

> Once an alien establishes a credible fear of persecution, ***the purpose behind the expedited removal provisions of section 235 of the Act to screen out arriving aliens with fraudulent documents or no documents and with no significant possibility of establishing a claim to asylum has been satisfied***. Therefore, the further consideration of the application for asylum by an alien who has established a credible fear of persecution will be provided for ***in the context of removal proceedings under section 240 of the Act***.[40]

Congress intended for people who have passed credible fear screenings to be afforded full section 240 proceedings, which makes sense given that the screening purpose of the credible-fear provisions has already been satisfied at the point court proceedings commence. The proposed regulation contravenes this intent.

B. Eliminating section 240 proceedings for those with a credible fear of persecution will have detrimental effects on asylum-seekers and on the immigration system.

In addition to violating Congressional intent, eliminating section 240 proceedings for those with a credible fear of persecution will have serious negative effects on both asylum-seekers and on the immigration system. It will prevent asylum-seekers from seeking release on bond and also from pursuing other avenues of immigration relief to which they are entitled.

- *Eliminating access to section 240 removal proceedings will preclude access to bond, meaning that more asylum-seekers will have to pursue their asylum claims while detained.*

Restricting those with a credible fear of harm to "asylum-and-withholding-only" proceedings forecloses their possibility of release on bond. Under current law, asylum-seekers

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[38] "In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress." *United States v. Great Northern Ry.*, 287 U.S. 144, 154-55 (1932).

[39] *Auburn Hous. Auth. v. Martinez,* 277 F.3d 138, 147 (2d Cir. 2002).

[40] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10314 (March 6, 1997) (emphasis supplied).

who entered the United States without inspection but have a credible fear of persecution are eligible for bond once they their expedited removal orders are vacated and they are placed in section 240 removal proceedings.[41] Precluding this class of asylum-seekers from section 240 proceedings may also preclude them from bond consideration.[42] Currently, asylum-seekers in section 235 proceedings are not eligible for bond, as stated in the mandatory detention portion of the statute. It is unclear whether people with positive credible fear determinations who nevertheless are restricted to asylum-only proceedings under section 235 could qualify for bond hearings, and clarification from the courts would be required to resolve the issue, which would undeniably result in lengthy and expensive litigation.

It should go without saying that detaining asylum-seekers is detrimental to their well-being and to the development of their claims for relief. Detained asylum-seekers face numerous barriers to accessing legal counsel; the vast majority of detained noncitizens are forced to represent themselves.[43] Not surprisingly, given the complexity of immigration law, pro se respondents struggle to present their legal and factual issues in a concise, organized manner.[44] Detained individuals are often unable to obtain evidence necessary to support their cases.[45] And beyond its impacts on case presentation, detention can also have terrible effects on the mental health of asylum-seekers.[46] RMIAN works with many detained asylum seekers, some of whom also struggle with mental health conditions that make prolonged detention all the more difficult

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[41] Under longstanding Board of Immigration Appeals precedent, asylum-seekers who entered the United States without inspection but were determined to have a credible fear of persecution were eligible for bond once they were placed in section 240 proceedings. *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). In 2019, Attorney General Barr, in *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), sought to overrule *Matter of X-K-*, eliminating bond hearings for this class of asylum-seekers. However, before *Matter of M-S-* took effect, the U.S. District Court for the Western District of Washington enjoined it, affirming its own prior ruling the government must provide qualifying individuals with bond hearings. *Padilla v. U.S. Immigration & Customs Enf't*, 387 F. Supp. 3d 1219, 1232 (W.D. Wash. 2019), *aff'd in part, vacated in part, remanded sub nom. Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134 (9th Cir. 2020). The government appealed the district court's decision to the Ninth Circuit Court of Appeals. The Ninth Circuit has determined that class members remain entitled to receive bond hearings while the decision is on appeal. *Padilla*, 953 F.3d at 1152 (9th Cir. 2020).

[42] The holding of *X-K-* that this subset of asylum-seekers is entitled to bond hearings turns on the fact that following their positive credible-fear determinations, their expedited removal orders are vacated and they are referred to full removal proceedings under section 240. *Matter of X-K-*, 23 I&N Dec. at 735-36. If the Ninth Circuit finds that *Matter of M-S-* violates due process and overrules it, *X-K-* would remain good law. But the proposed regulation eliminating section 240 proceedings for this subset of asylum-seekers would effectively eliminate the rationale of *X-K-*, gutting the decision.

[43] During the six-year period from 2007 to 2012, only 14 percent of detained immigrants were represented by counsel. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (September 2016) at 5 (available at: https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf).

[44] Brief for Amici Curiae Retired Immigration Judges and Board of Immigration Appeals Members in Support of Plaintiffs-Appellees, at 8-10, *Padilla v. U.S. Immigration & Customs Enf't*, 387 F. Supp. 3d 1219, 1232 (W.D. Wash. 2019) (available at: https://www.aclu.org/legal-document/brief-amici-curiae-retired-immigration-judges-and-board-immigration-appeals-members) (hereinafter "Retired Immigration Judges' Brief").

[45] *Id.* at 11-14.

[46] *See, e.g.*, Keller AS, Rosenfeld B, Trinh-Shevrin C, et al. Mental health of detained asylum seekers. *Lancet*. 2003;362(9397):1721-23. doi:10.1016/S0140-6736(03)14846-5 (available at: https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(03)14846-5/fulltext) (concluding that in asylum-seekers, symptoms of anxiety, depression and PTSD were correlated with the length of detention and that detention of asylum-seekers exacerbates psychological symptoms).

and painful. In the words of one Somali asylum-seeker who has been detained in Aurora, Colorado for over a year, "I have had some very dark moments while being in detention. I have felt stressed and hopeless and depressed. I have had panic attacks and trouble sleeping. I sometimes want to give up, but I cannot because I have known other Somalis deported from here and they were decapitated and killed."

Detaining asylum-seekers also burdens the immigration system. Hearing pro se cases is difficult and time-consuming for immigration judges.[47] In the case of an unrepresented respondent, an immigration judge's duty to guide the respondent through the proceedings and to develop the record may make hearings longer and may cause delays.[48] Moreover, when pro se asylum seekers cannot obtain the evidence they need, the "incomplete factual record makes an immigration judge's job more difficult and a fair outcome more difficult to achieve. And continuances may be necessary where a detained noncitizen is attempting to obtain a key piece of evidence."[49] Even those detained asylum-seekers who are fortunate enough to have access to counsel very frequently cannot communicate adequately with their attorneys, meaning that "extended proceedings and continuances are often necessary."[50] And, last but not least, reducing detention costs by releasing asylum-seekers could free up money to make the immigration court system more efficient — for example, by hiring additional judges and improving technology.[51]

Many of the asylum-seekers RMIAN works with have been able to prevail on their asylum cases once they are released from detention on bond. For example, after four months of being detained an asylum-seeking father from Pakistan was finally released on bond. Just over one year later, he celebrated winning his asylum claim and is now in the process of trying to bring his wife and children to safety to join him. His attorney states, "Winning asylum undoubtedly saved his life and hopefully soon the lives of his wife and children. He is now able to live safely and without fear. Asylum has made the pursuit of his dreams possible."

In sum, then, the rule will eliminate the possibility of bond for asylum-seekers who have received positive credible-fear determinations, creating often insurmountable barriers for them and also further overloading the immigration system.

- *In contravention of Congressional intent, eliminating section 240 proceedings will foreclose other avenues of immigration relief for people with a credible fear of harm.*

In addition to foreclosing eligibility for release from detention, placing asylum-seekers in "asylum-and-withholding-only proceedings" will prohibit them from seeking any form of relief other than asylum, withholding of removal, and protection under the Convention Against Torture (CAT). This would restrict access to many of the avenues of relief currently available under the INA, in violation of Congressional intent.

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[47] Retired Immigration Judges' Brief at 15.
[48] *Id.* at 7-8.
[49] *Id.* at 13.
[50] *Id.* at 15.
[51] *Id.* at 16.

Asylum-seekers who have passed credible fear interviews are distinguishable from the enumerated categories of noncitizens who are, by statute, explicitly foreclosed from all forms of relief except for asylum and related protections. For example, Visa Waiver Program entrants, because they have explicitly waived certain rights as a condition of their visa-less entry, are statutorily prohibited from "contest[ing], other than on the basis of an application for asylum, any action for removal."[52] By contrast, while INA § 235(b)(1)(B)(ii) references consideration of "the application for asylum," it does not provide that an asylum application is the *sole* basis on which the recipient of a positive credible-fear determination may contest her removal.

Indeed, by regulation, the agencies previously expanded the definition of "asylum" for purposes of INA § 235(b)(1)(B)(ii) to include withholding of removal and CAT protection.[53] This further indicates that restricting the avenues of relief available to noncitizens who have passed credible fear screenings violates both prior practice and the intent of Congress.

One particular area of concern for RMIAN's Children's Program is that the proposed regulations would unlawfully deprive accompanied immigrant children in proceedings of the ability to apply for lawful permanent residency based on approved petitions for Special Immigrant Juvenile Status (SIJS).

While the proposed rule correctly acknowledges that unaccompanied children (UAC) are exempt from expedited removal, the rule nevertheless forces *accompanied* migrant children into more limited "asylum-and-withholding-only" proceedings.[54] Yet many accompanied children encountered at the southern border qualify for Special Immigrant Juvenile Status (SIJS), a form of protection for children abused, abandoned, or neglected by a parent.[55] Because SIJS is available for every viable case in which *at least one parent* has abused, abandoned, or neglected the child, many accompanied children who arrive in the U.S. with one parent meet all the requirements for SIJS. SIJS is entirely separate from asylum.

For children who have passed credible-fear screenings and are thus eligible to seek asylum and related protections, SIJS rather than asylum is very often the more appropriate form of relief. Children can be traumatized by adversarial asylum proceedings in which they are required to testify in detail and to be cross-examined about past incidents of harm. And because of age or other factors, it can be particularly difficult for children to provide information to support their asylum claims.

To obtain SIJS, the child must first obtain a state-court order making certain findings of fact, including that the child cannot be reunified with one or both parents due to abuse, abandonment, neglect, or a similar basis under state law, and that it is not in the child's best interest to be returned to their or their parents' country of origin.[56] The child must then petition

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[52] INA § 217(b)(2).
[53] The 1999 CAT implementing regulations expanded the credible-fear process to include claims for withholding and CAT, and to clarify that people receiving positive credible-fear determinations can seek withholding and CAT protection in addition to asylum. *See* Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb.19, 1999).
[54] *Proposed Rule* at 36265, n. 5.
[55] *See* INA § 101(a)(27)(J).
[56] INA § 101(a)(27)(J).

United States Citizenship and Immigration Services (USCIS) for SIJS. But SIJS is not a form of legal status; it simply establishes eligibility for permanent resident status by deeming the child paroled for purposes of adjustment of status under INA §245(a). If USCIS grants an SIJS petition, the child is eligible to adjust status to that of Lawful Permanent Resident when a visa becomes available. If a child entered without inspection and is placed in removal proceedings, the immigration court and not USCIS has jurisdiction over the child's application for adjustment of status.[57] A child can only pursue adjustment of status with USCIS if the immigration court terminates removal proceedings first, a remedy that is increasingly rare and difficult because of a precedent decision issued by former Attorney General Jeff Sessions limiting the immigration judge's authority to terminate proceedings.[58]

If SIJS-eligible children are funneled into limited section 235 proceedings rather than section 240 proceedings, immigration judges will be precluded from adjudicating their SIJS adjustment applications; in asylum-and withholding-only proceedings, judges can only consider applications for asylum, withholding, and CAT.[59] As a result, many qualified children would be unable to adjust status based on SIJS and would remain vulnerable to removal from the United States despite their approved SIJS. This result would make USCIS's adjudication of SIJS petitions pointless, and is contrary to the statute establishing this Congressionally-mandated protection for children.

Congress created Special Immigrant Juvenile Status to provide *permanent protection* to abused, abandoned and neglected youth and to provide them with a pathway toward permanent residency and safety in the United States.[60] Congress specifically deemed SIJS approved children paroled *for the purpose of adjustment of status* under INA §245(a).[61] Further, Congress made SIJS approved children exempt from numerous grounds of inadmissibility that normally apply to prevent adjustment of status, and made them eligible for special waivers of other grounds, evidencing its intent to provide expanded access to adjustment of status for SIJS children.[62] Congress' entire purpose of creating Special Immigrant Juvenile Status would be circumvented if children with approved petitions are prevented from seeking permanent residency in the United States and are instead limited to asylum-only proceedings in which they may be ordered removed back to the abuse, abandonment and neglect they fled.

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[57] 8 CFR §1245.2(a).
[58] *Matter of S-O-G & F-D-B,* 27 I&N Dec. 462 (A.G. 2018) (holding the Immigration Judge has no inherent authority to terminate removal proceedings).
[59] 8 C.F.R. § 208.2(c)(3)(i).
[60] *See e.g.* TVPRA §235(d) (wherein SIJS is discussed under the title "Permanent Protection for Certain At-Risk Children;" 58 Fed. Reg. 42843, 43844 (Aug. 12, 1993) ("This rule alleviates hardships experienced by some dependents of United States juvenile courts by providing qualified aliens with the opportunity to apply for special immigrant classification and lawful permanent resident status, with [the] possibility of becoming citizens of the United States in the future."); *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011) (the SIJS provisions "show a congressional intent to assist a limited group of abused children to remain safely in the country with a means to apply for LPR status"); *accord Osorio-Martinez v. Attorney Gen. United States of Am*., 893 F.3d 153, 168 (3d Cir. 2018); *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 361 (S.D.N.Y. 2019) ("SIJ status is a form of immigration relief that provides a path to lawful permanent residence for young immigrants who have been victims of abuse, neglect, or abandonment.").
[61] INA §245(h)(1).
[62] INA §245(h)(2).

Case examples may help illustrate the type of child that would be immeasurably harmed by this proposed change. RMIAN client Lisa* came to the United States with her mother and entered without inspection, fleeing gang threats and extortion in Honduras. They were detained together in a family detention facility, then released once they passed a credible fear interview. Mother and child then reunified with the child's father, who had also fled to the United States. Sadly, months later, the little girl disclosed that she had been sexually assaulted by her own father. The mother called the police and the father fled, most likely back to Honduras. The mother sought full custody of her daughter and obtained the necessary findings establishing the child's eligibility for SIJS due to her father's abuse. The child's SIJS petition has been approved and she is awaiting her priority date to become current to seek adjustment of status in the immigration court. As explained above, she must file her application with the court because she entered without inspection (rather than as an "arriving alien") and the court's ability to terminate removal proceedings to give USCIS jurisdiction over her application has been limited. If she is forced into asylum-only proceedings, she will be unable to pursue adjustment of status. Instead she will be limited to her asylum claim and will be forced to either rely solely on her mother's application as a derivative, or testify about the threats and harm she endured in Honduras in court, including enduring cross-examination from an ICE attorney. She is already traumatized by her father's abuse. She has already established that she qualifies for Special Immigration Juvenile Status and she deserves to access the pathway to permanent residency Congress established for children like her.

Similarly, RMIAN represents Marta* and her now 16-year-old son, Juan* who fled the United States to escape severe domestic violence and child abuse by Juan's father. They were initially detained in a family detention center in Dilley, Texas, and with the help of the volunteer attorneys there, passed a credible fear interview based on the domestic violence. They came to Colorado and RMIAN represents them in their asylum proceedings. RMIAN also helped Marta obtain full custody and an order from the state-court establishing Juan's eligibility for Special Immigrant Juvenile Status. His SIJS petition has been approved and he is waiting for his priority date to become current for adjustment of status, while simultaneously awaiting their final hearing on their asylum case. Gender-based and domestic-violence-based asylum claims have already become more challenging to win following *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), and will be even more difficult if these proposed rules go into effect. Therefore, Juan's primary form of relief and protection from being returned to his abusive father may in fact be adjustment of status, rather than asylum. But this rule change would strip him of his right to pursue adjustment of status despite Congress's intent to make it broadly available for children like him.

Apart from these concerns about the continued availability of SIJS adjustment, RMIAN notes that fear-based relief may also overlap with other forms of relief, particularly for survivors of violence and human trafficking. Placing survivors in asylum-only removal proceedings may further impede their ability to obtain continuances to await collateral applications pending with USCIS, including U and T visas. Currently, survivors must demonstrate that their pending collateral relief is likely to be granted and likely to impact removal proceedings in order to obtain continuances to await the adjudication of petitions with USCIS.[63] It is likely that it will become even more difficult to obtain continuances if survivors are forced into asylum-only proceedings,

[63] *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

wherein ICE and the immigration judges may take the position that they are foreclosed from considering any other relief applications.

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

IV. Proposed 29 CFR § 1208.13(e): Encouraging the use of pretermission in asylum proceedings increases the likelihood of due process violations and will burden the judicial system, contrary to the intent of this proposed rule.

The proposed regulations amend Section 1208.13(e) and permit immigration judges to pretermit and deny an application for asylum, withholding, or CAT on motion by DHS, or *sua sponte*. Pretermission could occur if the asylum seeker has not established a *prima facie* claim for relief. The asylum applicant would have only ten (10) days to respond to the IJ's decision to pretermit.

If it were to be implemented, proposed 29 CFR § 1208.13(e) would negatively impact the lives of asylum seekers by depriving them of their day in court, which in turn would deny them procedural due process with respect to their asylum claims. The proposed rule is poor policy for four main reasons. First, these regulations create a system that will consistently violate the due process rights of asylum seekers, a problem consistently recognized by Immigration Judges ("IJs") and the BIA. Second, this proposed regulation is directly contrary to the plain language of the immigration statute that expresses Congress' intent. Third, this proposed regulation does not promote efficiency, contrary to the rationale provided for the rule. Fourth, those seeking asylum have significant obstacles to climb and this proposed regulation will make it incredibly difficult to avoid pretermission.

It is fundamental to our systems of justice that every person has the right to due process and equal protection before the law. Procedural due process "is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action."[64] The right for asylum seekers to have their applications heard by a court is a fundamental right and one the Supreme Court has, sought to expand the meaning of in the law.[65] Moreover, "[i]n immigration proceedings the Fifth Amendment entitles aliens to due process of law."[66] It is inherent within the Due Process clause that those in "removal proceedings [have] the right to a full and fair hearing."[67]

The proposed regulation heightens the possibility that due process violations will occur. Immigration Judges should fully hear the merits of a case *before* deciding the outcome.[68] As the BIA and federal courts have long been aware, pretermitting cases, and thereby cutting off the ability to even fully present highly relevant evidence, is "ill-founded and violative of fundamental

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[64] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 590 (1972) (Marshall, J., Dissenting).
[65] *Kerry v. Din*, 576 U.S. 86, 93 (2015).
[66] *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)).
[67] *Id.* (citing *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002) (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)).
[68] *See* Robert G. Rooney, Note, *The Power to Pretermit An Application for Asylum: Improper Policy for American Asylum Law*, 5 Geo. Immigr. L.J. 641, 662 (1991).

fairness."[69] The BIA in particular recognizes the crucial nature of examination of the asylum seeker in particular, referring to the taking of testimony as "an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself."[70] Thus, encouraging pretermission before the taking of testimony will likely block vital evidence from being heard and will result in miscarriages of justice.

Further, Congress has spoken on the importance of the right to a fair and reasonable hearing in removal proceedings. The legislature has unambiguously stated that noncitizens in removal proceedings "shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government[.]"[71] Congress could not have been clearer. The language explicitly states that a person subjected to removal proceedings shall have the opportunity to conduct each of these activities (examine evidence, present evidence, and cross-examine witnesses), all of which are events that occur during the final individual merits hearing. Allowing IJs to pretermit cases *sua sponte* or on filing of a motion by the Agency denies a person this fundamental right. It is plainly contrary to the intent of the legislature. Congress would not have guaranteed people a right for their evidence to be presented at a removal hearing with the intention of allowing for pretermitting of cases. The proposed rule seeks to dismantle the meaning and value of due process in the current system.

Additionally, by increasing the use of pretermission, the rule will backfire on its intended effects. It will not make the asylum process more efficient, but rather more burdensome on the agency and the federal judiciary, because it will increase legal challenges that will have to be adjudicated by the BIA and federal circuit courts. Moreover, given the seriousness of constitutional violations, as well as the fact that constitutional claims are reviewed de novo by the circuit courts,[72] it is likely that numerous of the cases pretermitted pursuant to proposed 29 CFR § 1208.13(e) will be remanded for further proceedings. The process will become longer and more drawn out than ever before, meaning decreased efficiency for the immigration agencies, federal courts, as well as asylum seekers, some of whom may be forced to remain detained during the pendency of their case.

Finally, particularly considering the fact that numerous asylum seekers are *pro se*, the ten-day deadline for them to respond to a decision to pretermit is plainly insufficient. According to a study of access to counsel in immigration court, approximately 37% of non-detained immigrants lack representation by counsel and around 86% of detained immigrants lack legal representation.[73] Even where asylum seekers are represented, often they are unable to secure counsel until prior to the final merits hearing. Thus, even more asylum seekers may be unrepresented at the point early on in proceedings when the application is pretermitted. When the ten-day clock starts, they will have to seek counsel immediately or find a way to respond themselves, where language and education-level barriers may prevent them from doing so effectively, if at all.

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[69] *Id.*
[70] *See Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).
[71] 8 U.S.C.A. § 1229a(b)(4)(B) (WEST 2020).
[72] *See, e.g.*, *Cinapian v. Holder*, 567 F.3d 1067, 1073 (9th Cir. 2009).
[73] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015) (studying data from 2007-2012).

The DOJ should not deny a person her right to procedural due process by implementing a rule that would, in effect, omit any portion of removal proceedings where the relief sought is on the basis of fear of persecution in her home country. Further, encouraging pretermittence burdens the courts and will certainly increase the number of appeals. Lastly, given that so many asylum seekers are unrepresented in immigration court, especially in early stages of the proceedings, there are numerous barriers they must overcome which would make it impossible in many cases to avoid pretermission.

Legal service providers like RMIAN work diligently to secure pro bono representation for as many asylum-seekers as possible. However, it takes time to find attorneys willing to take on cases, for them to learn complex asylum law, to develop rapport and trust with their clients, to fill out the application fully, and to gather supporting evidence and documentation. Many times, asylum-seekers have been forced to fill out the application themselves without representation, and because of language barriers, education, or fears about disclosing past persecution, the applications are incomplete or insufficient and would be subject to pretermission under the proposed regulation. Having only 10 days to challenge a pretermission decision will place an undue burden on legal service providers like RMIAN and will make it so many more asylum seekers are denied the ability to have representation and win their claims.

One RMIAN client from Honduras that was granted asylum poignantly explains the necessity of having his day in court to speak to the judge, rather than relying on his written application. He says, “The change to the law that would allow a judge to dismiss an asylum application without having a hearing is unfair. When I was in detention I had to rely on another detained person to help me fill out my asylum application because I did not read or write in English. I was afraid to tell him about the details of my past because I didn’t want people in my dorm to find out that I was gay and to attack me. I was uncomfortable having my application filled out and it wasn’t filled out well because I was too afraid to put all the details. There were other people from my country in my dorm and I knew how people who are gay are treated in Honduras. I was depressed when I was in detention but when I had the opportunity to have my hearing before a judge I felt calm and I had hope. A hearing before a judge is something that should not be denied to anyone. It is necessary for people to have hearings so that judges can understand their whole story.”

A RMIAN client from Mexico with intellectual disabilities that struggled to present his asylum claim initially but eventually won his asylum claim with representation explains, “I tried to fight my immigration case on my own at first but it was very hard to understand what was going on. I have problems understanding and I would hear so many people in my dorm who said they weren’t passing their interviews or winning their cases so I thought there was no hope for me. I was very surprised when I learned that I would be allowed to apply for asylum and even more surprised and grateful when I learned that I was going to get an attorney. With my attorneys help I won asylum, she helped me understand what was happening in my case she was my voice and helped me tell the judge my story, I couldn’t have done it without her.”

V. Proposed regulation 8 C.F.R. § 208.13(d): Discretion

In order to be granted asylum, asylum seekers must meet the legal definition of a "refugee," and additionally merit a favorable exercise of discretion.[74] Notably, the Board of Immigration Appeals recognizes that "the danger of persecution should generally outweigh *all but the most egregious* of adverse factors."[75]

The proposed regulations delineate three new "significantly adverse" discretionary factors that adjudicators must consider, as well as nine "adverse factors," which dictate that asylum will not be granted as a matter of discretion, unless the asylum seeker proves, by clear and convincing evidence, that the denial would result in exceptional and extremely unusual hardship to themselves.

These new discretionary factors undermine decades of legal precedent. The proposed regulations also severely limit adjudicators' ability to meaningfully exercise the broad discretion that they have. The Attorney General, asylum officers, and immigration judges are authorized to exercise discretion to grant asylum to eligible refugees.[76] Several of these adverse factors are discussed here, although all of the proposed adverse factors should be eliminated from the proposed regulations because they undermine adjudicators' discretionary power.

A. Proposed regulation 8 C.F.R. § 208.13(d)(1)(i), which provides that unlawful entry or attempted unlawful entry is a "significantly adverse factor" that shall be considered, violates international law obligations and will unreasonably affect asylum seekers under the current practices at the border.

Proposed regulation 8 C.F.R. § 208.13(d)(1)(i) conflicts with the United States' international law obligations. Article 31 of the United Nations Refugee Agency Convention and Protocol ("UNRACP") states:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."[77]

The proposed discretionary factors would allow government officials to deny a person asylum eligibility based on his illegal entry or presence in the United States, with no exceptions like the ones provided in the UNRACP. Thus, such a penalty for "unlawful entry or unlawful attempted entry" squarely violates the United States' human rights obligations under Article 31 of the UNRACP because there is no "good cause" exception for his illegal entry.[78] Rather, the

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[74] *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 423 (1987).
[75] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987) (emphasis added).
[76] 8 U.S.C. § 1159(a); 8 C.F.R. § 1208.13.
[77] The United Nations Refugee Agency, *Convention and Protocol Relating to the Status of Refugees*, https://www.unhcr.org/3b66c2aa10.
[78] *Proposed Rule* at 36283; The United Nations Refugee Agency, *Convention and Protocol Relating to the Status of Refugees*, https://www.unhcr.org/3b66c2aa10.

proposed regulation impermissibly narrows the exception by limiting it to "immediate flight from persecution in a contiguous country."[79]

Additionally, in practice, the present reality for asylum seekers at the border prevents many of them from being able to enter the United States lawfully in order to seek asylum in the first place. For example, the 'Migrant Protection Protocol' (MPP) forces thousands of asylum seekers to stay on the Mexican side of the Southern border for weeks or months while they await their turn to apply for asylum pursuant to the metering policy.[80] They often live in filthy and dangerous conditions and build large and compact encampments without access to shelter, running water, or bathrooms.[81] In these encampments, migrants are prey to drug cartels and other organized crime, exposed to the elements, and vulnerable to health problems due to poor sanitation.[82] They are kidnapped, raped, robbed, stabbed, and killed; people who identify as LGBTQ+ are especially targeted, and for many of them, this type of violence was the very reason they fled their home country for the United States.[83]

Commenter Denver Law student Carly Hamilton has volunteered at an encampment of migrants in Matamoros, México across the border from Brownsville, Texas. She spoke with adults there from El Salvador, Guatemala, and Honduras who were seeking asylum, and many of them noted that they were just as fearful to stay in Mexico as they were to return to their home countries. This fear forces asylum seekers to make the impossible decision: risk their lives waiting for weeks or months in the dangerous encampment, or cross the border unlawfully. Many are so desperate for safety that they choose to cross the river, and some tragically die doing so.[84] Under the current practices at the border, many asylum seekers are forced to enter the United States unlawfully. The proposal to make unlawful or attempted unlawful entry a "significant adverse factor" violates international human rights obligations and unreasonably affects asylum seekers waiting at the border pursuant to conditions the United States government has created through the implementation of the MPP.

Many of RMIAN's clients were forced to enter the United States without inspection because of the Migrant Protection Protocols, metering, danger in Mexico, lack of knowledge about how else to enter the US to seek protection, and being turned away at the border when trying to present themselves for inspection and admission. Some case examples highlight the myriad reasons asylum-seekers may enter without inspection. An unaccompanied child RMIAN client who was granted asylum by USCIS fled to the United States to escape severe child abuse by her parents. She explains that her parents would beat her with whips and cords, and throw objects at her. She was forced to begin working at the age of 8 and hand over all of her earnings to her alcoholic parents. Her mother attempted to sell her for sex and her father began touching

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[79] *Proposed Rule* 8 C.F.R. § 208.13(d)(1)(i).
[80] *Policies Affecting Asylum Seekers at the Border*, AMERICAN IMMIGRATION COUNCIL (Jan 29, 2020) https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border.
[81] Human Rights Watch, *US: Investigate 'Remain in Mexico' Program* (June 2, 2020), https://www.hrw.org/news/2020/06/02/us-investigate-remain-mexico-program.
[82] *Id.*
[83] *Id.*
[84] Christina Maxouris, *A woman watched her husband and daughter drown at the Mexican border, report says*, CNN (June 26, 2019), https://www.cnn.com/2019/06/26/politics/mexico-father-daughter-dead-rio-grande-wednesday/index.html.

her inappropriately at the age of 16. Remembering that her father had already sexually abused her older sister and her cousin, and knowing that the police in El Salvador would do nothing to protect her from her parents' abuse, she made the difficult and dangerous journey to the United States alone to seek safety and protection. As a 16-year-old child travelling alone, she had no idea how to "properly" seek admission in the United States, and instead followed a group led by a guide that crossed the Rio Grande river. The idea that this bright young woman, who is now in the process of applying to be a U.S. citizen and is raising two beautiful daughters of her own on a ranch in Colorado, would now be denied asylum solely because of her manner of entry is unconscionable.

A RMIAN client who fled Honduras fleeing persecution in the form of repeated rapes, threats to his life and torture on account of his transgender identity tried to present himself at a port of entry with his wife. A Customs and Border Patrol Officer ripped up the marriage certificate they presented and turned them back. Fearing more harm if forced to remain in the Mexican encampments overtaken by cartels, he felt his only choice was to cross the river to seek safety and protection. Similarly, a young girl RMIAN represents fled Guatemala with her father. They were forced to remain in Mexico for several months awaiting their asylum hearing. The young girl was approached by men who offered her money for sex and tried to kidnap her. Luckily, she was able to escape and make it back to the shelter where she and her father were staying. Just days later, her father went to work for a man that had offered him a job so he could afford food for his daughter, and he never returned. The young girl stayed alone in the shelter for several days before her desperation and fear finally led her to cross the border alone. Under this proposed regulation, her entry would be considered a "significantly adverse factor" weighing against her asylum eligibility.

Many, if not most, of RMIAN's clients who enter without inspection immediately turn themselves in to Customs and Border Patrol officers the second they can find one, in compliance with Article 31 of the United Nations Refugee Agency Convention and Protocol ("UNRACP"). Many are frightened, dehydrated, and suffering from heat exhaustion and are relieved when they are able to turn themselves in to officials and ask for protection.

Finally, note that for youth with approved SIJS who will be prevented from pursuing adjustment of status if the proposed change takes effect to limit all those who pass a credible fear screening to asylum-only proceedings, children like RMIAN's clients Lisa* and Juan* will be limited to pursuing asylum as their only form of relief. But if entry without inspection is considered a significant adverse factor, their asylum claims will also be more likely to be denied, resulting in more abused, abandoned and neglected children being returned to the abuse they fled, contravening Congressional intent.

B. Proposed regulation 8 C.F.R. § 208.13(d)(1)(iii), which provides that use of fraudulent documents to enter the US (unless arriving directly from their country of origin) is a "significantly adverse factor," will have disproportionate impacts and risks incorrect determinations by immigration officials

Asylum eligibility that is bound up in the nature of a person's travel documents is a blatant violation of the right to seek asylum.[85] The proposed rule states that government officials will "receive extensive training" on how to spot indicators of fraud and credibility concerns.[86] However, the proposed rule fails to address the parameters of such a training and will inevitably result in disproportionate effects upon Central and South American refugees and people from developing countries.

First, who determines whether the documents are fraudulent? If immigration officials, including asylum officers, are tasked with this determination, how will such determination be made? Are asylum officers going to be trained to identify authentic versus fraudulent birth certificates, driver's licenses, police reports, tax documents, and other identifying information for each country in the world, or just for those where asylum seekers commonly hail? Each country has its own seals and other verifying marks that are distinct from one another. Where will the Department of Homeland Security procure the funds to administer such a training? Will government officials send asylum seekers back to danger – citing proposed discretionary factor (d)(1)(iii) – because their signatures are not perfect? In some states, mail-in election ballots are subject to disqualification if a voter's signature is not identical to their voter registration signature.[87] Will the same be true for the documents asylum seekers bring to the United States with them? It is common for many Latin Americans to have two last names. What if there is no hyphen between a person's last names on one travel document and there is a hyphen on the other? What if she has a middle name that is included on their birth certificate, but not her other identification card? What if her name is spelled differently on one document versus another? What if she has no documents at all?

In many under-developed countries, government-issued documents are rudimentary, or the government does not issue any US-accepted documents at all, like in many indigenous communities where records are kept in accordance with the community's own practices. Tasking asylum officers, or any government official, with using discretion to determine whether these varying and distinct foreign documents are fraudulent or lack credibility is both impractical and dangerous. Moreover, basing asylum eligibility on the nature of a person's travel documents violates the right to seek asylum and the right to non-refoulment because it has nothing to do with a person's experience as a refugee. This discretionary factor, as written, leaves the door

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[85] *Proposed Rule* at 36283.
[86] *Id.* at 36275
[87] Lila Carpenter, *Signature Match Laws Disproportionately Impact Voters Already on the Margins*, ACLU Voting Rights Project (Nov. 2, 2018, 2:45 PM), https://www.aclu.org/blog/voting-rights/signature-match-laws-disproportionately-impact-voters-already-margins; Cybersecurity and Infrastructure Security Agency (CISA) Elections Infrastructure Government Coordinating Council and Sector Coordinating Council's Joint COVID Working Group, *Signature Verification and Cure Process* (2020), https://www.eac.gov/sites/default/files/electionofficials/vbm/Signature_Verification_Cure_Process.pdf; Grand County, Colo., *Signature Verification* (2020), https://co.grand.co.us/DocumentCenter/View/8534/02-Mini-Life-of-the-Ballot---Signature-Verification.

open for asylum officers, with their unfettered discretion, to deny asylum based on some arbitrary inconsistency, because something merely appears "unofficial," or worse, for no reason at all.

C. The proposed regulations at 8 C.F.R. § 208.13(d)(2)(i), listing circumstances where adjudicators shall not grant relief unless there are "extraordinary circumstances" or the asylum seeker proves "exceptional and extremely unusual hardship" strips adjudicators of their discretion and imposes a high bar that will be nearly impossible to overcome, creating disparate outcomes.

If the adjudicator determines that one of a laundry list of adverse factors applies, the adjudicator may favorably exercise discretion only if: (1) the applicant demonstrates by clear and convincing evidence that the denial of asylum would result in an exceptional and extremely unusual hardship to the alien, or (2) there are national security or foreign policy interests implicated.

Because asylum is a discretionary form of relief, forcing adjudicators to negatively consider the above factors undermines the purpose of such discretion.

Moreover, the "exceptional and extremely unusual hardship" standard is an unreasonably high bar, considering that the affected population here are people who are fleeing persecution. The "exceptional and extremely unusual hardship" is a standard that applies in cancellation of removal cases, and is such a high bar that those cases are often unsuccessful. For example, "poor economic conditions and reduced employment and educational opportunities in the country of origin, standing alone, do not generally meet the statutory standard."[88] This means that a single mother of five children who holds steady employment in the United States likely would not meet the stringent "exceptional and extremely unusual hardship" criteria, even if she demonstrated that she could not earn enough money to feed her children if she was sent back to her home country.

Additionally, asylum grant rates already vary widely by jurisdiction, which would be exacerbated by imposing additional factors to consider. For example, an immigration judge in San Antonio, Texas grants relief just about 2.8% of the time, while an immigration judge in San Francisco, California grants relief about 89.5% of the time.[89] Between the years 2010-2014, the Department of Homeland Security's own analysis shows that During that timeframe, the San Francisco Asylum Office had the highest grant rate at 69 percent of all applications, and the New York Asylum Office had the lowest grant rate at 20 percent of all applications.[90]

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[88] Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & Pol. 527, 531 (2015).
[89] TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2014-19*, (2019) https://trac.syr.edu/immigration/reports/judge2019/denialrates.html
[90] Department of Homeland Security U.S. Citizenship and Immigration Services, *Quinquennial Report on asylum Decision Trends and Factors*, Fiscal Year 2016 Report to Congress (Oct. 23, 2017) *https*://www.dhs.gov/sites/default/files/publications/USCIS%20-%20Quinquennial%20Report%20on%20Asylum%20Decision%20Trends%20and%20Factors_0.pdf.

The imposition of an extra layer of consideration on discretionary grants—particularly a bar as high as the "exceptional and extremely unusual hardship" standard—will undoubtedly result in greater disparities in grant rates according to jurisdiction. Because asylum is already a discretionary form of relief, adding more discretionary factors that adjudicators must consider will justify adjudicators with already low grant rates to deny even more applications, while some adjudicators with high grant rates may remain somewhat consistent – creating an even larger disparity among jurisdictions.

D. Proposed 8 C.F.R. § 208.13(d)(1)(ii) and (d)(2)(i)(A), which affects people who passed through other countries before arriving in the United States, discriminate based on country of origin and otherwise violates the United Nations Refugee Agency's Protocol to the Convention Relating to the Status of Refugees

While international human rights law provides some latitude for countries to implement their own immigration policies, it nevertheless mandates that countries respect international human rights agreements. The United States Department of Homeland Security's proposed restrictions to asylum law – particularly the new discretionary factors that the decision maker may consider when choosing whether to grant or deny asylum – squarely contradict the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees Article 3 and 31 by which the United States is bound.[91]

Chapter I Article 3 of the Protocol simply states that contracting countries "shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."[92] The proposed discretionary factors include restrictions on eligibility that will inevitably result in the denial of asylum applications based on country of origin:

> (d)(1)(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States;
>
> (d)(2)(1)(i)(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country[93]

The asylum eligibility discretionary factors allow for discrimination based on country of origin by virtue of the fact that individuals traveling on land from any country that is non-contiguous to the United States, or individuals traveling by boat or air who stay in another country for 14 days or more prior to arriving to the United States can be denied asylum solely on that basis. Mexican nationals, for example, can travel on land directly to the United States' southern border without traveling through another country, thus eliminating the potential to disqualify them under the scenario listed in sections (d)(1)(ii) and (d)(2)(1)(i)(A) of the proposed

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[91] *Proposed Rule* at 36264, 36282-85; Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, http://www.unhcr.org/3b66c2aa10.html; UN Protocol relating to the Status of Refugees, 606 U.N.T.S. 268, entered into force October 4, 1967. The United States acceded to the 1967 Protocol in 1968 at 17, 29.
[92] *Id.* at 17.
[93] *Proposed Rule* at 36302.

discretionary factors. On the contrary, a person traveling on the ground from El Salvador – or any country south of Mexico for that matter – has no other option but to pass through other countries before arriving to the United States' southern border. With respect to section (d)(2)(1)(i)(A), it is not uncommon for asylum seekers to spend several days in other countries on their way to the United States, especially if they or another person with whom they are traveling becomes ill, injured, or simply because they need to garner the funds to continue traveling. While asylum seekers traveling through those countries may not prefer to stay there, for the reasons listed above it may be their only choice. Additionally, with respect to section (d)(1)(ii), countries through which many asylum seekers travel – El Salvador, Honduras, and Guatemala to name a few – are just as unsafe if not more unsafe than their home country, and seeking asylum there would be both impracticable, unreasonable, and unsafe.

The exception listed under section (d)(1)(ii), which states that a person may be granted asylum despite having failed to apply for protection in another country if she can prove that she is "a victim of a severe form of trafficking in persons" provided in 8 C.F.R. § 214.11, remains intensely narrow.[94] Not only is the definition for "severe form of trafficking in persons" extremely narrow, but the exception would be difficult to prove because of the lack of a paper trail, available witnesses, and other evidence.[95] It is nearly impossible for a person involved in commercial sex acts to prove that she was induced through coercion, or that an adult was coerced into providing labor or services for the purpose of involuntary servitude, for example. Furthermore, these restrictions are essentially a bar to asylum for many people whose home country is non-contiguous to the United States and who cannot afford air or boat travel. Thus, the proposed restrictions in sections (d)(1)(ii) and (d)(2)(1)(i)(A) discriminate against asylum seekers based on country of origin.

Moreover, the proposed discretionary factor allowing adjudicators to deny a person asylum if she spent more than 14 days in another country immediately before arriving to the United States strips the qualifications Congress specifically imposed to ensure a refugee's safety and replaces them with a wholesale ban on asylum if a person merely passed through another country on her way to the United States.[96] 8 U.S.C. § 1158 grants "[*a*]*ny* alien" the right to apply for asylum.[97] The statue also enumerates several carefully circumscribed exceptions to that right, including people who may be removed to a "[s]afe third country" where she would have access to a "full and fair procedure" to apply for asylum, or a person who was "firmly resettled" in another country prior to arriving to the United States.[98]

By placing a blanket ban on asylum for anyone who passed through another country and stayed for 14 days or more, The Department of Homeland Security is re-writing the above sections of the statute. The difference between a two-week stay in another country and firm resettlement is significant. Moreover, it would be nearly impossible to complete ground travel from a country in the Northern Triangle to the United States in under two weeks. According to Google Maps, driving from Guatemala City, which is located just 180 miles south of the

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[94] 8 C.F.R. § 214.11.
[95] *Id.*
[96] 8 U.S.C. § 1158(a)(2)(A); 8 U.S.C. § (b)(2)(A)(vi).
[97] *Id.* § 1158(a)(1).
[98] *Id.* § 1158(a)(2)(A); *Id.* § (b)(2)(A)(vi).

Guatemala-Mexican Border, to Brownsville, Texas, takes about 27 hours without any stops. That does not account for walking to different transit stops between cities, stopping to sleep or rest or eat, bathroom breaks, fuel stops, mechanical issues with the vehicle(s), border checkpoint stops, etc. For refugees traveling from countries even farther south, it is unreasonable to expect that they would not stop and spend several days – or even weeks – in another country before arriving to the United States. By proposing this wholesale ban on asylum for anyone who does so, DHS is re-writing the definition of "firmly resettled" as enumerated in 8 U.S.C. § (b)(2)(A)(vi) to include any stay of 14 days or more in another country, significantly changing what Congress already carefully implemented. The United States District Court for the District of Columbia has already struck down a similar asylum ban which barred asylum for any person who crossed the southern border without first seeking protection from a third country while en route to the United States.[99]

Many of RMIAN's clients would be severely impacted by this proposed ban. Indeed, we have already seen the impact of this ban prior to the United States District Court for the District of Columbia striking it down. One RMIAN client was barred from asylum because he travelled from Cameroon to Mexico, and was then forced to wait on the Mexican side of the border for three months before being allowed to enter the United States. He says, "In July 2019, I arrived at the border between Mexico and the United States to ask for asylum. Instead, they gave me a number and told me I had to wait before I could request asylum in the United States. I had to stay in Mexico for three months before my number was called. I didn't have anyone to help me and I had to beg for food. Eventually, an older woman let me stay in her house. After 3 months, they called my number and let us enter the United States. For 3 days, I slept in front of the immigration office before they let us enter. When it was my turn, I met with the immigration officials and told them I was terrified to go back home. They put me in detention… I applied for asylum but at that time I wasn't eligible because of the ban at the border and so the judge gave me withholding of removal instead. The judge said that the ban was the only reason I didn't win asylum. I was released on the same day—I was very very happy. Detention was extremely difficult and I was often very frustrated. I was in one room for five months; it was not easy. Most of us in detention have been through so much back home and we come here and we are locked up. Detention increased our desperation. My family still lives in Cameroon and I heard that they are in danger. I am constantly worried about them. If I had won asylum, I could help protect them and apply to bring them to the United States, but unfortunately I can't help them by winning withholding of removal instead of asylum, only because I was forced to stay in Mexico."

In another case, RMIAN represents a family of five from Venezuela, a husband and wife and their three children. The father fled to the United States first by plane, and was thus not subjected to the ban. His wife and children followed by land, crossing through several countries on their way to the United States and then having to wait in Mexico to be allowed to enter months later. Although the entire family fled the exact same persecution and should have the same chances to win asylum, the mother and children would be subject to this ban while the

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[99] Rafael Carranza, *Federal Court Strikes Down Trump's 'Third Country' Asylum Ban at The U.S.-Mexico Border*, Arizona Republic (Jul. 1, 2020) https://www.azcentral.com/story/news/politics/immigration/2020/07/01/federal-court-strikes-down-trumps-third-country-asylum-ban/5356705002/.

father's will not. Such a result based only on whether one arrived by plane or land defies congressional intent.

As a final example, RMIAN represents three Christian Pakistani fathers who served the U.S. military as translators in Afghanistan. They were all targeted for their religious faith, and accused of being spies for the U.S. government. They were beaten brutally, causing permanent injuries, and their lives and the lives of their families were threatened. They fled first to Brazil where they stayed for several months until their lives were again threatened and they decided to make their way to the United States for safety. One of the fathers has already been granted asylum and is currently in the process of applying for his wife and children to join him. The other two could be banned from asylum under this proposed rule, despite the fact that they and their families suffered the exact same persecution as their friend who was already granted asylum.

E. Proposed 8 C.F.R. § 208.13(d) as a whole violates the right to seek asylum and the right to non-refoulment under the United States' international human rights obligations to the Inter-American Commission on Human Rights

Imposing the proposed discretionary factors violates the principle of non-refoulment because it would allow asylum officers to return people to countries where they fear persecution on grounds completely unrelated to their ability to establish their fear of such persecution.[100] According to the Inter-American Commission on Human Rights, the right to non-refoulement prohibits expelling or returning people to situation where their rights to life, personal integrity, and other human rights are at risk.[101] With regard to the right to non-refoulment, The United Nations Executive Committee of the High Commissioner has stated:

> the principle of *non-refoulement*, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.[102]

The United States Supreme Court has recognized that the words "expel or return" in Article 33 enumerated above are "an obvious parallel" to the words "deport or return."[103] The proposed rule, which allows officers in their unfettered discretion to return people to countries where they

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[100] Press Release, Inter-American Commission on Human Rights, *IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America* (Jul. 23, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/180.asp.
[101] *Id.*
[102] Executive Committee (EXCOM) Conclusion No. 82 (1997), para. D, (iii).
[103] *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 180, (1993).

fear persecution – on grounds completely unrelated to their ability to establish their fear of such persecution – squarely contradicts the principle of non-refoulment.[104]

VI. Proposed 8 C.F.R. § 208.1(d); 8 C.F.R. § 1208.1(d): These Regulations Inaccurately and Inappropriately Rewrites the Definition of Political Opinion.

The proposed rule eviscerates the current definition of "political opinion," under the guise of clarifying the law for the purpose of smooth adjudication of asylum cases. The proposed regulations change existing law by stating that such claims are limited to circumstances where the person seeks "furtherance of a discrete cause related to political control of a state or a unit thereof."[105] The proposed rule also specifically rejects claims "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations."[106]

The proposed rule contravenes established law and undermines international obligations by excluding non-government entities as persecutors under political opinion. The agencies assert that the proposed rule provides "additional clarity" to avoid further strain on the INA's definition of refugee and to provide "additional clarity for adjudicators."[107] However, this is unquestionably misleading because the proposed regulations are not a mere clarification, but rather an entire re-write of the definition of political opinion.

This new language essentially creates a new political opinion standard that the opinion must be directly related to a formal government entity. This redefines "political opinion" in a way that excludes wide swaths of claims previously recognized as valid such as women who hold a feminist political opinion that men do not have a right to rape them, against the USCIS Asylum Office's longstanding guidance for asylum officers, making clear that feminism is indeed a political opinion.[108]

The new definition of political opinion would contravene extensive established law recognizing that many asylum seekers flee their countries of origin because their governments are unwilling or unable to control non-state actors.[109] For example, in *Elias-Zacarias v. I.N.S*, the U.S. Supreme Court stated that the applicant needed to "establish the conclusion that he has a 'well-founded fear' that the guerrillas will persecute him *because of* that political opinion, rather

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[104] Press Release, Inter-Am. Ct. H.R. (Jul. 23, 2019).
[105] *Proposed Rule* § 208.1(d).
[106] *Id.*
[107] *Proposed Rule* at 36280.
[108] *USCIS Asylum Officer Basic Training Course: Female Asylum Applicants and Gender-Related Claims* (Mar. 12, 2009) (This guidance made clear that "[f]eminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions." Further, "opposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion." USCIS also recognized that a persecutor may attribute a political opinion "to a woman who refuses to comply with social norms or laws governing behavior based on gender.").
[109] *See Hernandez-Chacon v. Barr*, 948 F.3d 94, 103 (2d Cir. 2020) ("resisting corruption and abuse of power—including non-governmental abuse of power—can be an expression of political opinion."); *Siong v. INS*, 376 F.3d 1030, 1039 (9th Cir. 2004).

than because of his refusal to fight with them."[110] This statement by the Supreme Court made clear that persecution from a non-government entity, like a guerrilla group, would have established a viable asylum claim. Similarly, in *Borja v. I.N.S*, the applicant suffered past persecution and showed a well-founded fear of future political persecution.[111] In Borja, the fear of persecution was related to a non-government entity and this claim for asylum was valid. The clear intent of this proposed regulation is to eviscerate precedent that is favorable for asylum seekers.

RMIAN represents many asylum-seekers whose claims are based on their political opinion and who would have been or will be negatively impacted by these changes. For example, one RMIAN client spoke out publicly against female genital mutilation in her native Burkina Faso. She expressed her deeply-held opinion that girls, including her own daughter, should not be subjected to this harmful practice. She won asylum in part because of the persecution she suffered on account of her political opinion, one that would not be considered a "political opinion" under this new definition. Another RMIAN client spoke out about women's right to choose whether or not to have babies and their right to refuse rape by their husband's. She was beaten more severely by her partner whenever she tried to assert these beliefs about her rights and value as a woman--her feminist opinions. Such a claim would fail to be considered persecution on account of political opinion under the re-written and narrow definition of political opinion.

Additionally, the new definition of political opinion encompassed in the proposed rule is inappropriate and inaccurate because it redefines "authority" to exclude non-government entities which is not supported by the United Nations High Commissioner for Refugees ("UNHCR") Handbook, contrary to the Departments' claims. The Departments claim that the UNHCR only considers "political opinion" in terms of holding an opinion different from the Government or not tolerated by the relevant governmental authorities.[112] However, the UNHCR Handbook most often refers to "authorities" rather than Government Authorities.[113] Thus, the Departments should look to the common meaning of the word, "authority" which is defined as "persons in command." [114] The proposed rule eliminates the consideration of all authorities and groups in command" who are non-government entities, even when the non-government authority is the source an asylum seeker's fear based on a political opinion. The Departments also disregarded the UNHCR Handbook's reference to "ruling power" which indicates inclusion of persecution by ruling groups where the agent of persecution is not the government, but instead a ruling power without formal government authority.[115] Therefore, the changes suggested by the proposed rule are inappropriate because the changes narrow "authority" related political opinion persecution to exclude non-government entities.

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[110] *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).
[111] *Borja v. I.N.S*, 175 F.3d 732 (9th Cir. 1999).
[112] *Proposed Rule* at 36279.
[113] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, ch. II(B)(3)(f), ¶¶ 80–83 (Feb. 2019).
[114] *Authority*, Merriam-Webster Dictionary (2020), https://www.merriam-webster.com/dictionary/authority.
[115] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, ch. II(B)(3)(f), ¶ 81 (Feb. 2019).

U.S. Citizenship and Immigration Services ("USCIS Training Manual") has also explicitly recognized in its Officer Training manual that political opinion protections should be available to asylum seekers who oppose human rights abuses and gang violence. The USCIS Training Manual reads "Persecution based on political opinion can encompass a much broader array of actions beyond political party membership, including whistleblowing, refusal to follow orders to commit human rights abuses, and, in some instances, opposition to gang violence or recruitment."[116] The proposed rule would eliminate these valid claims spelled out in USCIS' own training manual.

If the agency were to adopt this new definition of political opinion, the U.S. would be in violation of its obligations under the 1951 Convention relating to the Status of Refugees (the Refugee Convention") and the 1967 Protocol.[117] The United States is obligated to uphold the central provisions of the Refugee Convention by its accession to the 1967 Protocol. [118] These obligations were codified in the Refugee Act of 1980 and the proposed rule seeks to undo intentions set forth by the Refugee Convention and later adopted by the U.S. Congress. The U.S. is obligated to provide protections for refugees who fear persecution based on political opinion. The U.S. accession to the 1967 Protocol specifically created a legal obligation to the principle of non-return, which prohibits the return of people whose lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[119] By drastically changing the definition of political opinion, the U.S. would shirk the duty to which the United States committed itself. The U.S. is obligated not only to help the persecuted legitimately seeking asylum, but to do its duty, as committed, as a member of the international community. The new definition of political opinion would inappropriately exclude people this country has historically protected, people who the international community intended to protect dating back to 1951.

VII. Proposed 8 CFR § 208.1(c); 8 CFR § 1208.1(c) Will Make It Virtually Impossible to Articulate a Particular Social Group

Applicants for asylum and withholding of removal are legally required to demonstrate that the persecution they fear is on account of one or more of the following protected grounds: race, religion, nationality, membership in a particular social group (PSG), or political opinion.[120] Membership in a particular social group was designed to capture those who do not fall within the

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[116] USCIS Training Module "RAIO Combined Training Program- Nexus and the Protected Grounds" (published December 20, 2019) (available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf).

[117] Convention relating to the Status of Refugees (Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954, http://www.unhcr.org/3b66c2aa10.html; UN Protocol relating to the Status of Refugees (1967 Protocol), 606 U.N.T.S. 268, entered into force October 4, 1967. The United States acceded to the 1967 Protocol in 1968.

[118] UN Protocol relating to the Status of Refugees (1967 Protocol),606 U.N.T.S. 268, entered into force October 4, 1967. The United States acceded to the 1967 Protocol in 1968.

[119] The US incorporated the provisions of the 1967 Protocol into domestic law through the Refugee Act of 1980, Pub. L. No. 96- 212, 94 Stat. 102 (1980). As the US Supreme Court has confirmed, a primary purpose of Congress in passing the Refugee Act "was to bring United States refugee law into conformance with the 1967 United Nations Protocol." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 426 (1987); see also *INS v. Stevic*, 467 U.S. 407, 416-24 (1984) (providing a history of the incorporation of the Refugee Convention standards into US law through the 1967 Protocol and the Refugee Act of 1980).

[120] INA § 101(a)(42).

other listed characteristics, and is meant to be read "in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[121]

A. The proposed rule unjustly targets asylum seekers from Central America and Mexico.

The proposed rule carves out several explicit bases on which to deny asylum, including "the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups; interpersonal disputes of which government authorities were unaware or uninvolved; private criminal acts of which government authorities were unaware or uninvolved," among others.[122] The rule prohibits a favorable adjudication of a PSG asylum claim based on issues such as "presence in a country with generalized violence or a high crime rate"—restrictions that appear calculated to target individuals from Central America and Mexico.

A multitude of factors contribute to driving people from the Northern Triangle of Central America (Guatemala, Honduras and El Salvador) to the United States, including chronic violence, corruption and gender-based violence.[123] Gang violence and gang recruitment, explicitly mentioned in the proposed rule,[124] plague poor and vulnerable families within the Northern Triangle. In El Salvador, where approximately 65,000 active gang members roam the streets and children as young as 12 years old are common targets for gang recruitment.[125] The overwhelming violence in Latin America includes state-sanctioned deaths by armed forces, murder of women by their partners, and the relentless exchange of drugs and guns with the United States.[126] Further, in a climate of impunity, more than 95 percent of homicide cases in the region are left unsolved.[127]

The proposed regulations prohibiting asylum seekers from crafting a PSG asylum claim based off of these types of violence, recruitment by criminal groups, or private acts of which the government is not aware (amongst others) unjustly target migrants from Central America and Mexico fleeing violence.

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[121] United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html.
[122] *Proposed Rule* at 36264.
[123] Amelia Cheatham, *Central America's Turbulent Northern Triangle*, Council on Foreign Relations, 1, 2 (Oct. 2019), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle.
[124] *Proposed Rule* at 36279.
[125] Sofia Martinez, *Today's Migrant Flow is Different*, The Atlantic (June 2018), https://www.theatlantic.com/international/archive/2018/06/central-america-border-immigration/563744/.
[126] Azam Ahmed, *'Either They Kill Us or We Kill Them,'* The New York Times (May 2019), https://www.nytimes.com/interactive/2019/05/04/world/americas/honduras-gang-violence.html.
[127] *Id.*

B. PSG is a case-by-case, individualized determination. Restricting what can and cannot be a PSG is in direct contradiction to international asylum law and the INA.

To flatly deny asylum seekers belonging to these particular social groups would violate the long-accepted understanding that particular social groups are highly fact-dependent and should be adjudicated on a case-by-case basis.[128]

First, the exclusion of recruitment cases will return large numbers of youth to life-threatening situations who are seeking asylum on that basis. Moreover, the BIA has recognized that gang-related claims can successfully form the basis of a PSG in some circumstances. In *Matter of M-E-V-G*, the Board emphasized that its holdings in *Matter of S-E-G* and *Matter of E-A-G* "should not be read as a blanket statement of all factual scenarios regarding gangs."[129]

Second, the proposed rule will disproportionately harm victims of domestic violence because it identifies "interpersonal disputes" and "private acts of which the government is not aware" as bases to deny asylum.[130] Interpersonal disputes and private acts, like domestic violence, have previously been successful particular social groups for asylum seekers.

The proposed regulations cite *Matter of A-B-* in support of the ban on "private criminal acts," ostensibly to say that this reason to deny a domestic violence-related claim is supported by case law.[131] However, *Matter of A-B-*'s restrictions on victims of domestic violence qualifying for asylum was found to be arbitrary and capricious in the DC District Court case, *Grace v. Whitaker*.[132] The Court found the rule to be arbitrary and capricious because "there is no legal basis for an effective categorical ban on domestic violence and gang-related claims," and such claims are ultimately inconsistent with United Nations Protocol Relating to the Status of Refugees.[133] Additionally, the Court decided that the effective categorical ban on domestic violence and gang-related claims provided in *Matter of A-B* ran contrary to the INA itself, stating that "each credible fear interviewer must prepare a case-specific factually intensive analysis for each alien."[134] Circuit courts have similarly rejected *Matter of A-B-*.[135]

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[128] *See, e.g.*, *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.").
[129] Matter of M-E-V-G, 26 I&N Dec. 227, 251 (BIA 2014); *see Matter of S-E-G*, 24 I&N Dec. 579 (BIA 2008) (finding that the PSG "Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth," did not satisfy the standards of "particularity" or "social visibility"); *see also Matter of E-A-G*, 24 I&N Dec. 591 (BIA 2008) (finding that the PSG "persons resistant to gang membership (refusing to join when recruited)," lacks the social visibility that would allow others to identify its members as part of such group).
[130] *Proposed Rule* at 36279.
[131] *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018).
[132] *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.C. 2018).
[133] *Id.*; *see* 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967.
[134] *Id.*; *see* 8 C.F.R. § 208.30(e) (requiring individual analysis including material facts stated by the applicant, and additional facts relied upon by the officer).
[135] *See Juan Antonio v. Barr*, No. 18-3500, ___ F.3d ___ (6th Cir. May 19, 2020) (finding Petitioner cannot "reasonably expect the assistance of the government" in controlling her abusive husband and declining to follow the A.G.'s ruling in *Matter of A-B-*); *De Pena Paniagua v. Barr*, No. 18-2100, ___ F. 3d ___ (1st Cir. Apr. 24, 2020) (holding that *Matter of A-B-* did not categorically preclude the granting of domestic violence based asylum claims, and gender alone can constitute a particular social group, which can be defined by the feared harm without being deemed impermissibly circular).

RMIAN represents many victims of domestic violence that would be negatively impacted by this proposed change and risk return to abusers that will harm and kill them with impunity. One mother from Honduras was married to her husband for over twenty years and birthed five children that were the result of rape. She was constantly beaten, insulted, threatened, and raped. When she tried to escape, the abuse only got worse and he would punish her by beating the children in front of her. The police did nothing to protect her, and as her children grew bigger, she feared he would harm them irreparably. She fled to the United States in search of safety for her children. Since she arrived, *Matter of A-B-* has already made her asylum case more challenging. This proposed rule would all but eviscerate the chance of survival and protection for her and her children who would be forced to return to a man that would only punish them more harshly for believing they could escape him.

RMIAN also represents a mother and child who were held captive and raped for years by the leader of a powerful gang in El Salvador. She was threatened that if she ever tried to report him or leave him, he would kill her daughter. Finally, when he was briefly detained by authorities for an unrelated gang murder, she saw her opportunity and fled the country for the protection of the United States. This proposed rule change would misclassify the gender-based persecution she and her daughter endured as a "private" or "interpersonal" dispute. She knows this man is capable of murder as he was already convicted and briefly detained on one occasion. She saw him torture people who defied him or his gang with her own eyes. If she is denied asylum protection, she rightfully fears that she and her daughter will be tortured and killed by this individual.

Ultimately, this proposed rule uses determinations made from bad case law, is unlawful, and would incite further legal challenges on behalf of asylum seekers entitled to craft a PSG in conformance with the standard.

C. The proposed rule is particularly harmful to pro se asylum seekers because it violates their due process rights.

One of the most unfair aspects of this proposed rule is its requirement that an asylum seeker state with exactness every PSG before the immigration judge or forever lose the opportunity to present the PSG. This proposed rule requires asylum seekers to clearly indicate the PSG within the initial application for asylum, often when most asylum seekers have not yet procured legal representation. Also troubling is that the regulations seek to bar asylum seekers from being able to seek recourse after their ineffective counsel has prejudiced their case:

> 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.

This provision is exceptionally troubling due to the unfortunately high rate of ineffective assistance of counsel in immigration proceedings.[136] Denying an asylum claim based on the deficiencies of prior counsel would violate an asylum seeker's Fifth Amendment right to due process, as there is no way that the asylum seeker could be found to have had a full and fair hearing if their legal representation was deficient.[137]

Asylum seekers should not be required to expertly craft their PSGs, where (1) many asylum seekers do not read or write, and others do not have English fluency, (2) immigration judges and asylum officers are charged with the duty of developing the record for pro se individuals,[138] and (3) PSG definitions are constantly changing. With respect to this third point, an applicant with a claim based on family membership would have had a very strong claim on July 28, 2019 under the BIA's decision in *Matter of L-E-A-* 27 I&N Dec. 40 (BIA 2017), but the next day may have seen the identical claim denied under the attorney general's decision on the same case *Matter of L-E-A-* 27 I&N Dec. 581 (A.G. 2019).

The BIA has previously considered PSG characterizations that differed from those presented to the IJ (either from the initial application or the initial hearing).[139] In a Sixth Circuit case, the appellate court noted that the BIA had reformulated the PSG from "individuals enrolled in school in Guatemala who are tall or have a muscular build so as to command respect resulting in their recruitment by gangs for their capacity to sell drugs" to "young male evangelicals," a significant difference from the PSG initially presented.[140] Since the question of whether a PSG is cognizable is indeed a legal question, the BIA may and should address it, even beyond the applicant's initial asylum application. This is particularly important, given that years may pass in between the initial filing of the asylum application and the final hearing, and that more years may pass before an appeal is heard and decided. Given the "diverse and changing nature of groups in various societies and evolving international human rights norms," not allowing asylum seekers' PSGs to develop throughout the years a case is pending would be reprehensible.[141]

Lastly, proposed rule 1208.1(c) addressing particular social group interacts directly with Section 1208.13(e) regarding pretermission of asylum claims, in a way that will severely

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[136] *See* New York Immigrant Representation Study, Accessing Justice, *The Availability and Adequacy of Counsel in Immigration Proceedings* (Dec. 2011), https://www.ils.ny.gov/files/Accessing%20Justice.pdf.
[137] *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011).
[138] *See Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000) ("immigration judges are obligated to *fully* develop the record in those circumstances where applicants appear without counsel"); *see also Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464-65 (8th Cir. 2004); *Toure v. Att'y Gen.*, 443 F.3d 310, 325 (3d Cir. 2006) ("[A]n IJ has a duty to develop an applicant's testimony, especially regarding an issue that she may find dispositive."); *Tabaku v. Gonzales*, 425 F.3d 417, 422 (7th Cir. 2005); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 130, n.14 (1st Cir. 2004); *Abdurakhmanov v. Holder*, 735 F.3d 341, 346, n.4 (6th Cir. 2012) ("An IJ has . . . an obligation to ask questions of the [noncitizen] during the hearing to establish a full record.. . . . [The questioning] should be designed to elicit testimony relevant to the fair resolution of the alien's applications.").
[139] Fatma Marouf, *Becoming Unconventional: Constricting the 'Particular Social Group' Ground for Asylum*, 44 N.C.J. Int'l L. 487, 504 (2019), https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=2311&context=facscholar.
[140] *Hernandez-Morales v. Sessions*, 729 F. App'x 443, 444-45 (6th Cir. 2018).
[141] United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html.

prejudice asylum seekers—particularly those who are not represented by an attorney. Asylum seekers will be forced to define their particular social group from the outset of a case, and be bound to it, and failure to do so will lead to pretermission of their asylum application before ever having an evidentiary hearing or being able to give testimony. This will severely undermine this country's obligation to protect those fleeing persecution and threats to their life or freedom under Article 33 of the Refugee Convention[142] and the 1967 Protocol.[143]

In the direct experience of an asylum seeker RMIAN represented from Honduras, "When I was in detention I had to rely on another detained person to help me fill out my asylum application because I did not read or write in English. I was afraid to tell him about the details of my past because I didn't want people in my dorm to find out that I was gay and to attack me. I was uncomfortable having my application filled out and it wasn't filled out well because I was too afraid to put all the details. There were other people from my country in my dorm and I knew how people who are gay are treated in Honduras." To have denied this man who was unable to read or write and terrified to disclose the details of his identity for fear of continued abuse asylum because he failed to articulate his exact particular social group in his asylum application would be unconscionable.

Thus, applying this proposed regulation to asylum seekers, including unrepresented individuals, would raise serious due process issues and undermine the United States' obligation to provide meaningful process to protect refugees.

VIII. Proposed 8 C.F.R. § 208.1(f); 8 C.F.R. § 1208.1(f) List Broad Anti-Asylum Restrictions for the Nexus Finding

The proposed rule lists eight situations in which persecution would not be considered "on account of" the protected grounds.[144] The stated purpose for the eight restrictions is to expedite the processing of asylum claims.[145] Following the eight restrictions, the regulation claims that it does not foreclose "rare circumstances" in which adjudicators may evaluate facts similar to the eight situations which satisfy the nexus finding.[146]

These proposed restrictions run afoul of INA § 208(b)(1)(B)(i), which states that an asylum applicant must demonstrate that one of the five protected grounds "was or will be at least one central reason" for the persecution of the applicant.[147] Federal courts and the Board of Immigration Appeals (BIA) have held the "one central reason" language allows adjudicators to

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[142] The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954.
[143] The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967. Article I(1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.
[144] *Proposed Rule* at 36263, 36281.
[145] *Id.* (stating that "This proposal would further the expeditious consideration of asylum and statutory withholding claims").
[146] *Id.* at 36282.
[147] 8 U.S.C. § 1158; INA § 208(b)(1)(B)(i) (2018).

consider mixed motives for persecution.[148] Rather than following the language of the statute regarding nexus, and related legal precedent, the proposed regulations undercut an adjudicator's discretion to consider on a case-by-case basis the often-complex connection between persecution and the protected grounds.

While we believe that all of the eight proposed unfavorable grounds should be eliminated, we focus here on a select few.

A. Denying an asylum claim due to the presence of personal animus or retribution without regard to mixed motive persecution breaks with case law and jeopardizes the rights of asylum-seekers.

First, the proposed regulations state that "personal animus or retribution" is not sufficient to establish nexus.[149] However, persecution necessarily–and inherently– involves animus or retribution toward the individual because of the individual's personal and protected characteristics. Case law supports the definition of persecution as an attempt to overcome an individual's characteristic.[150]

Additionally, the proposed rule would allow adjudicators to reject asylum claims in which there is evidence of a personal dispute, despite additional evidence of persecution on account of a protected ground. The proposed rule's Supplementary Information cites to *Zoarab v. Mukasey*, a case in which the Sixth Circuit found the applicant's fear was merely based on personal matters because the applicant had acted as an "angry investor" when he confronted a political figure in his country, rather than as a politically motivated dissident.[151] Thus, the immigration judge and reviewing federal court determined that persecution was on account of a personal business dispute, rather than the applicant's political opinion. However, the proposed rule ignores that persecution may be on account of a protected ground *and* a personal dispute, as the INA explicitly provides that nexus to a protected ground only need be "one central reason" for the persecution.[152]

Courts have upheld this standard articulated in the INA. For example, following the plain language of the statute, in *Antonyan v. Holder*, the United States Court of Appeals for the Ninth Circuit found that a whistleblower's complaints were not rendered any less political by the fact that initial reports were partially motivated by a personal dispute.[153] The rule may be especially

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[148] *Uwais v. Att'y Gen.*, 478 F.3d 513, 517 (2d. Cir. 2007) (holding that where there are mixed motives for a persecutor's actions, an applicant need only show that the harm was motivated, in part, by an actual or imputed protected ground); *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007).
[149] *Proposed Rule* at 36281.
[150] *See Matter of Kasinga*, 21 I. & N. Dec. 357, 374 (BIA 1996); *see also Pitcherskaia v. I.N.S.*, 118 F.3d 641, 647 (9th Cir. 1997) (finding that the "seeking to overcome" definition of persecution predates the Refugee Act of 1980).
[151] 524 F.3d 777, 781 (6th Cir. 2008).
[152] INA § 208(b)(1)(B)(i).
[153] 642 F.3d 1250, 1255 (9th Cir. 2011). *See Zhu v. Mukasey*, 537 F.3d 1034, 1043 (9th Cir. 2008) (quoting "where a persecutor has both personal and political motives for retaliating against a political opponent, the persecutor's mixed motives do not render the opposition any less political, or the opponent any less deserving of asylum.").

detrimental for political dissidents seeking asylum, who may have been persecuted for their political opinions as well as personal animus from employers, colleagues, or neighbors.[154]

B. The proposed regulations instruct adjudicators to improperly deny asylum applications unless applicants prove that their persecutors seek to harm *additional* members of the particular social group.

The second situation the proposed rule lists as a situation in which adjudicators would deny asylum involves "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."[155]

This proposed regulation fails to account for the many legitimate asylum claims in which a persecutor targets an individual for their membership in a particular social group, despite not having engaged in a "generalized campaign" to persecute everyone who belongs to that group.[156] In *Perez-Morales v. Barr*, the Court of the Appeals for the Fourth Circuit found that the BIA incorrectly relied on decisions establishing that asylum eligibility cannot solely be based on a personal dispute, rather than correctly evaluating the motive for persecution.[157] The applicant in the case was attacked by Zetas, a dangerous cartel, because he was a witness to a crime carried out by the cartel.[158] The court analyzed the central question of whether the persecutor targeted the individual due to his membership in a particular social group (witnesses against the cartel), but not whether the persecutor targeted the whole group.[159] In this case, the court found that their conclusion was "not altered by the fact that the Zetas sought to cover up a particular crime, rather than to systematically persecute crime witnesses."[160] Limiting asylum to claims in which persecutors have broad campaigns to harm protected groups, or where the applicant has direct evidence of a persecutor's efforts to harm other people, would unduly restrict protection and undermine the goal of individualized adjudication of claims.

These regulations will be especially harmful in cases involving gang recruitment, persecution of LGBTQ individuals, domestic violence, and other particular social group (PSG) cases.[161] For example, the proper question when evaluating nexus is not whether a persecutor

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[154] *See Fedunkyak v. Gonzales*, 477 F.3d 1126, 1130 (9th Cir. 2007) (holding that nexus was established where persecution was motivated by both personal greed and petitioner's complaints about government extortion*); Zhu v. Mukasy*, 537 F.3d 1034, 1045 (9th Cir. 2008) (holding nexus was established in case where a Chinese woman was harmed because of a personal dispute with a governmental official and the political act of whistleblowing).
[155] *Proposed Rule* at 36281.
[156] *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949–50 (finding that an asylum applicant who refused to let her son to join a gang was persecuted by the gang, despite the gang's lack of a generalized campaign to persecute the families of potential recruits).
[157] 781 Fed. App'x 192, 196-97 (4th Cir. 2019).
[158] *Id.* at 196.
[159] *Id.*
[160] *Id.*
[161] *See Velasquez v. Sessions*, 866 F.3d 188, 195 (4th Cir. 2017) (distinguishing private disputes from cases involving "outside or non-familial actors engaged in persecution for non-personal reasons, such as gang recruitment or revenge."); *See also Doe v. Attorney General of the United States*, 956 F.3d 135, 142 (3d. Cir. 2020) (affirming that LGBTQ individuals in Ghana are members of a particular social group and persecution of the applicant was harmed on account of his sexual orientation).

targets all LGBTQ individuals, but whether the specific applicant was persecuted *on account of* their sexual orientation or gender identity. The proposed rule fails to account for the case law establishing the proper analysis of asylum claims based on membership in a particular social group.[162]

Many of RMIAN's clients, past and current, would be negatively impacted by this proposed change. One transgender man fled to the United States after multiple beatings and rapes his persecutors said was to "see if he was a man or a woman" and "make him a woman by force." His persecutors were clearly motivated by his transgender identity when they assaulted and persecuted him. But he may have been the only transgender person these particular men assaulted and beat in this way. That fact should have no bearing on his asylum claim. Similarly, many of RMIAN's clients are women fleeing horrific violence at the hands of their abusive partners. Their partners should not need to abuse other women in order to demonstrate eligibility for asylum. Take for example, a mother and child from El Salvador held captive and raped for years by a powerful gang leader represented by RMIAN. Why should she need to demonstrate that her persecutor similarly tortured other women and children to prevail on her own asylum claim? One RMIAN client that fled El Salvador as a child was granted asylum based on the severe abuse she endured at the hands of her parents and her government's unwillingness to protect her. Her parents targeted her for persecution precisely because she was their child, and thus viewed as their property, and the government wouldn't intervene because it was viewed as a private family matter. The fact that her parents did not abuse other children that did not "belong" to them actually bolstered her family-based particular social group. This rule would have made her claim impossible.

C. Listing "criminal activity" as a situation in which an adjudicator would deny an asylum claim is an attempt to eliminate asylum.

The sixth situation in which adjudicators would be instructed to deny an asylum claim involves "criminal activity." The broad and undefined nature of this situation could be read to eliminate asylum, as nearly all persecution is in the form of criminal activity, including rape, murder, assault, and kidnapping.

Presumably, the proposed rule would deny asylum claims where the applicant was the victim of a crime and likely where the criminal persecutor acted upon mixed motives. The proposed regulation cites to a case that held that, "An alien's desire to be free from harassment by criminals motivated by theft or random violence (…) bears no nexus to a protected ground."[163] However, fear of criminal violence or criminal activity is at the heart of the "well-founded fear of persecution" required for asylum.[164] In the case of *Sarhan v. Holder*, a woman from Jordan feared being killed by her family in an "honor killing" based on false accusations of immoral actions.[165] A case such as this involves criminal activity, an unlawful killing, but also involves persecution on a protected ground.[166] The Court of Appeals for the Seventh Circuit

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[162] *See Perez-Morales v. Barr*, 781 Fed. App'x 192, 196-97 (4th Cir. 2019).
[163] *Proposed Rule* at 36281; *Zetino v. Holder*, 622 F.3d 1007, 1016 (9th Cir. 2010).
[164] INA § 101(a)(42)(A).
[165] 658 F.3d 649, 651 (7th Cir. 2011).
[166] *Id.* at 655.

found that the woman belonged to the particular social group of Jordanian women who allegedly flouted moral norms and that she had a well-founded fear of future persecution.[167]

Nearly all asylum claims involve past criminal activity or the fear of future criminal activity. The USCIS training manual for asylum officers acknowledges mixed motive persecution, such that "One motive may be a protected belief or characteristic that the applicant possesses or that the persecutor imputes to the applicant and one may be a personal or criminal reason."[168]

While the proposed rule may be attempting to establish that solely criminal activity is insufficient to establish the elements of asylum, this is an unnecessary regulation that risks improper denials of valid asylum claims. Case law has clearly established that mere criminal activity or random acts of violence without evidence that the criminal activity was on account of a protected ground would not establish an asylum claim.[169]

For example, asylum-seekers fleeing domestic violence do not merely have to show that they suffered the crime of domestic violence to qualify for asylum. Rather, RMIAN clients like Marta* who fled years of beatings and rape will have to show that they suffered domestic violence rising to the level of persecution, that was inflicted upon them because of their membership in a particular social group, political opinion, or other protected ground, **and** that the government would be unable or unwilling to protect them.

D. The proposed regulations list "gender" as a blanket type of claim to deny, counter to established asylum and international law.

The eighth situation in which an adjudicator would be instructed to deny an asylum application is listed as "gender."[170] The proposed regulations do not elaborate on why "gender" is listed under the nexus element, rather than with the definition of particular social group. One possible explanation of not discussing gender in the section of the regulations regarding particular social groups is that case law has firmly established that gender is immutable, particular, and has social distinction.[171] Many courts have found that gender plus one other

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[167] *Id.*
[168] USCIS Training Module "RAIO Combined Training Program- Nexus and the Protected Grounds" (published December 20, 2019) (available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf).
[169] *Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d. Cir. 2001) (holding that "ordinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum"); *Singh v. I.N.S.*, 134 F.3d 962, 967 (9th Cir. 1998) ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum…").
[170] *Proposed Rule* at 36281.
[171] *See Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (holding unmarried women living alone in Albania constitute a particular social group); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (holding Somali females constitute a particular social group); *See also Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) ("Thus, we clearly acknowledges that women in a particular country, regardless of ethnicity or clan membership, could form a particular social group").

narrowing characteristic can constitute a particular social group.[172] Instructing adjudicators to ignore or dismiss gender goes against the value of case-by-case adjudication of asylum claims.

Gender is often intertwined with persecution. Examples include cases where rape and female genital mutilation are methods of persecution. The United Nations High Commissioner for Refugees recognized in 1985 that women asylum seekers who fear harm for gender-based reasons may be considered part of a particular social group.[173] The proposed rule's attempt to divorce gender from consideration of asylum claims runs counter to established asylum law within the United States and international human rights law.

RMIAN represents many asylum seekers fleeing gender-based persecution and strongly decries this attempt to eviscerate protections for women and LGBTQ+ individuals. One mother RMIAN represented from Burkina Faso won asylum based on persecution in the form of female genital mutilation on account of her membership in the particular social group "females from Burkina Faso." Female genital mutilation was done to her because of her gender. There was no other reason for the persecution. It is only because the Asylum Office recognized her gender-based persecution and social group that she was able to save her daughter from suffering the same horrific, painful, barbaric, gender-motivated practice that she did. Circuit courts and the Attorney General have recognized similar gender-based claims.[174] No woman should be denied protection who has suffered female genital mutilation on account of her gender and nationality.

Similarly, RMIAN represents many women fleeing horrific gender-based persecution in the form of extreme physical, sexual, and psychological violence by their male partners. This rule proposes to completely gut asylum protections for women fleeing such gender-based violence. One client describes over twenty years of enduring multiple rapes, associated forced pregnancies, beatings, burnings, threats to her life and her children's lives, and being forced to watch as her partner beat her children as punishment for her speaking up for her rights as a woman. This rule threatens to send her and her children back to a man that will punish, torture, and kill them for daring to believe they could leave him.

RMIAN also represents many LGBTQ+ asylum seekers who are persecuted because they fail to comply with society's gender norms and expectations. For example, one transgender client describes being beaten and harassed for dressing in men's clothing, defying the societal expectation that he dress in congruence with the sex he was assigned at birth, female. Other clients were persecuted for their sexual orientation—being a male who has relationships with other males—in defiance of societal norms and expectations. This rule threatens to return many LGBTQ+ asylum seekers back to severe persecution in countries that refuse to protect them, and some that condone the violence.

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[172] 733 F.3d at 676 (7th Cir. 2013).

[173] UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender* (published October 2016) (available at https://www.unhcr.org/en-us/580a6b9f4.pdf).

[174] *Matter of A-T-*, 25 I & N Dec. 4, 10-11 (BIA 2009); *See also Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Benyamin v. Holder*, 579 F. 3d 970 (9th Cir. 2009); *Bah v. Mukasey*, 281 F. App'x 26, 2008 (2d Cir. 2008); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005).

IX. Proposed 8 C.F.R. § 208.13(b)(3): The revised internal relocation "reasonableness" factors fail to consider either the availability of meaningful state protection or humanitarian concerns, and are designed solely to justify asylum denials.

The proposed revisions to the internal-relocation regulation impermissibly collapse two critical inquiries related to relocation. The current regulatory scheme requires "a two-part inquiry: whether relocation would be *successful* and whether it would be *reasonable*." *Gambashidze v. Ashcroft*, 381 F.3d 187, 192 (3d Cir. 2004) (emphasis in original). The first part of the inquiry is concerned with whether the applicant could successfully avoid persecution by relocating internally, and the second part is concerned with whether it would be reasonable, under all of the circumstances, for the applicant to do so. *Id.*

The proposed regulation, although it is entitled "Reasonableness of internal relocation," codifies a list of factors related neither to the possibility of safe relocation nor to the reasonableness of relocation. Rather, the new factors are deemed pertinent to "an applicant's *prospects for* relocation." This is not the correct legal standard. The focus of the proposed rule is plainly neither on safe relocation nor on humanitarian considerations; the new factors, including the "size, reach, and numerosity of the alleged persecutor," are designed quite blatantly to justify the denial of certain categories of bona fide asylum claims – i.e. claims based on gang violence and domestic violence.

The agencies attempt to explain the elimination of the current relocation factors by positing that some factors, such as administrative, economic, or judicial infrastructure, have no "clear relevance" to relocation.[175] But as a matter of international law, this is patently untrue.

Critical to the idea of a safe relocation alternative is the concept that the asylum-seeker would be able to access state protection in the proposed site of internal relocation. Thus, "internal protection requires not only protection against the risk of persecution, but also the assimilation of the asylum-seeker with others in the site of internal protection for purposes of access to, for example, employment, public welfare, and education."[176] The present reasonableness factors — including consideration of infrastructure in the place of relocation as well as the applicant's social and cultural constraints — address whether the asylum-seeker would have access to meaningful state protection in the site of proposed relocation.

The proposed regulation also eliminates the crucial considerations of whether there is ongoing civil strife within the country and whether the applicant would face "other serious harm" in the place of suggested relocation. But "[a] meaningful understanding of internal protection from the risk of persecution requires consideration of more than just the existence of an 'antidote' to the risk identified in one part of the country of origin. If a distinct risk of even generalized serious harm exists in the proposed site of internal protection, the request for recognition of refugee status may not be denied on internal protection grounds."[177]

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[175] *Proposed Rule* at 36282.
[176] Michigan Guidelines at 139.
[177] *Id.* at 138-39.

While considerations of reasonableness overlap with questions of meaningful access to state protection, "reasonableness" also has a humanitarian dimension. The "reasonableness" standard is adopted from the United Nations High Commissioner for Refugees (UNHCR).[178] In one case addressing the reasonableness requirement, the Court of Appeals for the Ninth Circuit found that an elderly couple would have been able to safely relocate within Bosnia-Herzegovina to avoid persecution, but that to expect them "to start their lives over again in a new town, with no property, no home, no family, and no means of earning a living is not only unreasonable, but exceptionally harsh."[179] The proposed regulation, however, eliminates any such consideration of reasonableness and provides no pathway for an adjudicator to avoid exceptionally harsh outcomes such as this one.

Finally, the inclusion as a factor of "the applicant's demonstrated ability to relocate to the United States in order to apply for asylum" is evidence of the true intent of these regulatory amendments: eliminating asylum altogether. The implication that an applicant's ability to travel to the United States in order to seek asylum makes internal relocation presumptively reasonable is, quite frankly, absurd. In *all* asylum cases, the applicant has fled the country of claimed persecution in order to seek protection in a third country. Furthermore, the internal relocation inquiry, like the overall asylum analysis, is forward-looking; the question is whether the applicant would presently be at risk of persecution in her home country, regardless of the circumstances at the time of her departure.[180] Thus, the inquiry is not whether the applicant *could have or should have* relocated internally to avoid flight to a third country. The relevant question is instead whether she could now find meaningful protection through internal relocation.

X. Proposed 8 C.F.R. § 208.13(b)(3)(ii): The revised internal-relocation standards impose an unjust burden on asylum-seekers who have already established past persecution; violate international law; and undermine case-by-case adjudication.

Asylum law is replete with burden-shifting tests, and therefore it is no answer to say that just because the applicant must establish a prima facie asylum claim the applicant should also bear the initial burden on all other issues such as internal relocation. To impose on an asylum applicant who has already established all elements of a past-persecution claim the additional burden of proving the absence of a relocation option is manifestly unfair, particularly considering that most asylum applicants must represent themselves in their asylum proceedings.

Imposing this burden on an asylum applicant also violates the core principles of international law from which the concept of the "internal protection alternative" flows. "Because this inquiry into the existence of an 'internal protection alternative' is predicated on the existence

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[178] *See* United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 91 (1979, reissued 2019) (hereinafter UNHCR Handbook) ("[A] person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.").

[179] *Knezevic v. Ashcroft,* 367 F.3d 1206, 1214 (9th Cir. 2004).

[180] "There is no justification in international law to refuse recognition of refugee status on the basis of a purely retrospective assessment of conditions at the time of an asylum-seeker's departure from the home state. The duty of protection under the Refugee Convention is explicitly premised on a prospective evaluation of risk. That is, an individual is a Convention refugee only if she or he would presently be at risk of persecution in the state of origin, whatever the circumstances at the time of departure from the home state. Internal protection analysis informs this inquiry only if directed to the identification of a present possibility of meaningful protection within the boundaries of the home state." Michigan Guidelines at 136.

of a well-founded fear of persecution for a Convention reason in at least one region of the asylum-seeker's state of origin, and hence on a presumptive entitlement to Convention refugee status, ***the burden of proof to establish the existence of countervailing internal protection . . . should in all cases be on the government of the putative asylum state***."[181]

Finally, the Departments' proposal to provide "examples of the types of individuals or entities who are private actors,"[182] contravenes the bedrock principle that asylum claims must be adjudicated on a case-by-case basis. Whether an individual or entity in any given situation is acting in a governmental or quasi-governmental capacity is a question of fact that will necessarily depend on country conditions at the moment of adjudication.

XI. Proposed 8 C.F.R. § 208.18: Requiring "actual knowledge" to prove acquiescence will condemn more people to torture, subjecting them to suffer in their respective countries ignoring their credible claims.

The proposed changes to the Convention Against Torture ("CAT") in 8 C.F.R. § 208.18 create an undue burden on those seeking relief under CAT in the United States. The current guidelines already set a high bar to be granted CAT relief.[183] The new proposed changes should not be adopted because, first, the proposed regulations are contrary to Congress' intent when passing CAT, which have been explained and interpreted by the courts. Second, the proposed regulations would be contrary to developing standards of torture globally.

A. Congress Clearly Intended that "Acquiescence" Does Not Require Actual Knowledge

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[184] The agencies' new proposed CAT definition requiring knowledge or willful blindness will not withstand legal challenges, foretold by the fact that circuit courts have already considered Congress' intent and rejected an "actual knowledge" standard.

The United Nations originally drafted the CAT, and it was reviewed and adopted by the United States government.[185] During Congress's debates over whether or not to ratify and implement CAT, there were nineteen proposed conditions the United States suggested, many of which "concerned the human rights community."[186] Of these nineteen suggestions one of them required that "acquiescence" should "require that the public official, prior to the activity constituting torture, have *knowledge* of such activity."[187] Upon review by the Senate's Foreign Relations committee however they stated that the conditions "created the impression that the United States was *not serious in its commitment to end torture worldwide.*"[188] Due to this error

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[181] *Id.* at 137.
[182] *Proposed Rule* at 36282.
[183] Currently the guidelines are set out in § 208.18 Implementation of the Convention Against Torture.
[184] *Murillo-Espinoza v. INS*, 261 F.3d 771, 773 (9th Cir. 2001) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).
[185] *Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003). The following legislative history is recounted in *Zheng*.
[186] *Id.* (citing American Bar Association, and other groups, 136 Cong. Rec. 36, 193 (1990) (statement of Sen. Pell)).
[187] *Id.* (citing S. Exec. Rep. 101-30, at 15 (emphasis in original)).
[188] *Id.* (citing S. Exec. Rep. 101-30, at 4 (emphasis added)).

and lapse in judgment, in January of 1990 the George H.W. Bush administration revised the list of proposed conditions.[189] These revised conditions no longer required actual knowledge for torture in order for the official or government to acquiesce to torture.[190] When the vote for ratification came before the committee it found that, without the requirement of "actual knowledge" then the United States could now continue its "active role . . . [in its] efforts to promote and protect basic human rights and fundamental freedoms throughout the world."[191]

The agencies now attempt to contradict Congressional intent. Thus, Congress promoted the idea that requiring "actual knowledge" was improper to prove acquiescence in part because the higher standard would in effect condone and condemn people to torture. Simply put, if the proposed regulation goes into effect, the United States can no longer argue that it is "serious in its commitment to end torture worldwide."[192]

The Ninth Circuit considered this legislative history in depth. It reviewed a Board of Immigration Appeals ("BIA") decision, in which the BIA denied an application for relief under CAT on the grounds that the applicant had to prove that government officials were "willfully accepting" of torture.[193]

On appeal, the Ninth Circuit held that the BIA's interpretation of CAT was improper and misconstrued the intent of Congress by creating a standard that was more stringent than Congress had intended.[194] The Ninth Circuit stated that the BIA had improperly supplanted its own, over-restrictive definition of acquiescence.[195] Moreover, the Ninth Circuit specified that, considering the legislative history, Congress had not intended to impose a "knowledge" or "willful acceptance" standard, and instead only intended to require "awareness."[196] Most of the circuit courts have followed suit in holding that there is no need for "actual knowledge" in CAT matters.[197]

The Tenth Circuit, where the drafters of this comment practice, has also agreed that the CAT standard "does not require actual knowledge, or willful acceptance by the government. Rather willful blindness suffices to prove acquiescence."[198] Moreover, the Tenth Circuit stated that an applicant for CAT protection "does not need to present evidence that the government knows of the specific threat against him in order to show that the government would likely turn a blind eye to his torture."[199]

The proposed regulation does not effectively resolve this issue, as the proposed regulations contradict Congress' clear intent and would not survive legal challenges.

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[189] *Id.*
[190] *Id.* at 1193.
[191] *Id.* (citing S. Exec. Rep. 101-30, at 3.6)).
[192] *Id.* at 1192 (citing S. Exec. Rep. 101-30, at 4).
[193] *Zheng v. Ashcroft*, 332 F.3d 1186, 1192 (9th Cir. 2003).
[194] *Id.* at 1195.
[195] *Id.* at 1196.
[196] *Id.*
[197] Deborah E. Anker, *Law of Asylum in the United States*, § 7:33 U.S. Understanding of Acquiescence (Paul Lufkin, et. al., eds., 1984 & Supp. 2020) (explaining that the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits all agree with the "willful blindness" test outlined by the Ninth Circuit in *Zheng*).
[198] *See Karki v. Holder*, 715 F.3d 792, 806 (10th Cir. 2013).
[199] *Id.* at 807.

B. CAT Protections Should Reflect Present Realities

As the world progresses into a more modern era, modern forms of torture must be recognized and protected against. For example, situations involving domestic violence, abuse (either child or spousal), violence from non-state actors who reign as a *de facto* government, and others are increasingly recognized on the international stage as forms of torture. The United States should be a leader in this arena and not turn against progress.

Given the narrow scope of asylum applicants eligible for relief due to gender-based violence, many courts are pivoting and affording relief to this population under the CAT.[200] The "legal landscape has changed considerably with regard to women's human rights since the drafting of the Torture Convention."[201] Both the European Convention on Human Rights and the European Court have called for this more modern interpretation of torture "in light of present-day conditions."[202] Women and girls are viewed as property within societies across the world and are at heightened risk for harm both within their homes as well as from outside actors and unfortunately lack of government protection is common.

Domestic violence, particularly targeting women, is a pervasive problem across the globe. According to the World Health Organization ("WHO") 35%, or 1 in 3 women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.[203] This has led the WHO to refer to violence against women as a "major public health problem."[204] Women who are subjected to interpersonal violence face serious health consequences, including death, severe physical harm, headaches, limited mobility, depression, post-traumatic stress disorder (PTSD), and others.[205]

Because women's bodies are viewed as property, they are also frequently pawns in broader societal violence. This truth was profoundly evident during the dissolution of the former Yugoslavia where tens of thousands of non-Serbian women were raped by Serbian men with the purpose of conducting a type of ethnic cleansing.[206] Similarly, in Latin America transnational criminal organizations prey on women and girls, who "are particularly vulnerable to rape and other forms of sexual violence, exploitation, trafficking and slavery."[207] Thus, the CAT offers a means of protection from future torture for women who may otherwise not be able to meet the nexus threshold required in asylum claims but nevertheless are extremely likely to face severe harm or death should they be forced to return to their home countries.

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[200] Lori A. Nessel, *"Willful Blindness" To Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 Minn. L. Rev. 71 (2004).
[201] *Id.* at 147.
[202] *Id.*at 148 (citing *Tyler v. Kingdom*, 26 Eur. Ct. H.R. (ser. A) para. 31 (1978)).
[203] World Health Organization, *Violence Against Women*, (2017).
[204] *Id.* (emphasis added).
[205] *Id.*
[206] Stephen Schwartz, *Rape as a Weapon of War in the Former Yugoslavia*, 5 Hastings Women's L.J. 69 (1994).
[207] United Nations Human Rights, Office of the High Commissioner, *Gender-based Crimes Through the Lens of Torture International women's Day – Tuesday 8 March 2016*, United Nations Human Rights (Mar. 3, 2016) (available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17152&).

The Convention Against Torture is important to the prevention of torture around the world. The United States as a nation condemns the use of torture globally. Congress has shown its clear intent to condemn, and protect people against, torture. The "willful blindness" test, which the proposed regulation seeks to eliminate, is in tune with the expanding international definition of torture.[208] Moreover, the proposed rules would add an unduly high burden of "actual knowledge" to the current CAT process and should therefore be eliminated.

XII. Retroactivity

Finally, although it is not clear whether the Proposed Rule is intended to operate and apply retroactively, we strongly oppose retroactivity.

In addition to concerns about the legality of retroactive application, which we will allow other commenters to address, the application of the proposed rule to already-pending asylum, withholding, and CAT cases would have a devastating practical effect on RMIAN's clients and on the organization's ability to carry out its mission. Given the lengthy backlog of affirmative cases at the Asylum Office and the equally lengthy court dockets for defensive cases, many of RMIAN's clients been waiting years for the adjudication of their applications for asylum and related protections. While some cases of recent-arrival family units have been prioritized and expedited under recent policy,[209] those cases that are not prioritized can take years to resolve. Unaccompanied Children's applications have been subjected to policies by both USCIS and the immigration court that have delayed their asylum cases for years. USCIS Asylum Office recently adopted a "last-in-first-out" policy, meaning that cases that are the most recently filed are prioritized for adjudication while those filed prior are pushed further and further into the backlog. RMIAN Children's Program has dozens of clients still awaiting an interview with the asylum office that were filed over three years ago. If those cases are denied, they are then referred to the immigration court for a de novo review. Because their cases are not prioritized, it may take more than three additional years to get a final hearing on their asylum application. If the proposed regulations become law, RMIAN would have to review *all* of its pending asylum cases and would almost certainly have to supplement the evidence and briefing in most of these long-pending cases to meet the newly created standards. This would impose a significant hardship for RMIAN attorneys and their clients.

The impact on RMIAN's pro bono attorneys who are handling asylum, withholding, and CAT cases would be particularly severe. Most of these pro bono attorneys are not immigration attorneys. They have had to learn the existing law of asylum in order to zealously represent their clients. For example, RMIAN recently referred the case of a young woman sexually abused by her brother and physically abused by her parents in Guatemala to a team of attorneys at a large corporate law firm in Denver. RMIAN has mentored these attorneys, providing them with detained referral memoranda, country conditions research, and numerous calls and meetings to assist with developing the asylum claim under current law, and to prepare their young, traumatized client for detailed questioning by the Asylum Office. If the proposed rule is adopted, the entire asylum case will change, and these attorneys will have to become familiar with the

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[208] Nessel at 144.

[209] Memorandum from James R. McHenry III, Director, to Executive Office for Immigration Review, *Tracking and Expedition of "Family Unit" Cases* (Nov. 16, 2018) (available at https://www.justice.gov/eoir/page/file/1112036/download).

myriad changes imposed and would have to basically start from scratch to learn "new" asylum law and all the new standards applicable to the case. Worse, they would have to explain to their young client that the rules have changed mid-game and they now need to prepare her for questioning on entirely different standards and issues, further traumatizing their client.

RMIAN's clients have a substantial reliance interest in the state of the law as it stands, as do thousands of other asylum-seekers with pending applications and their representatives. Given the sweeping scope of the Proposed Rule, and the short timeframe allotted for comment, we emphatically urge the Departments against retroactive application.

Final Concerns & Perspectives from Asylees

The importance of preserving asylum protection for people fleeing persecution in countries that cannot—and will not—protect them cannot be overstated. Those who win asylum time and time again express that their lives have quite literally been saved. We offer these words from several of RMIAN's clients that have suffered immeasurably in their lives, but at least had the opportunity to pursue asylum under the law as international law and Congress intended, before any of these disastrous proposed regulations take effect. These are mothers and fathers, children and individuals who now have hope to live in peace and safety only because they were granted asylum in the United States. They are hard-working, law-abiding people who are forever grateful and loyal to the United States.

"My asylum means everything to me. I feel a tremendous relief because no one is chasing me. I am not hearing gunshots. I am not being arrested and tortured as I was in Cameroon. I feel like I have a home, and I can live to see tomorrow. Since I won asylum, I have been getting my life started here. I am researching college programs to become a registered nurse so that I can care for people. If you see a Cameroonian here, they have gone through hell. You cannot imagine what we are going through. We need asylum protection."

"Now that I have asylum, I feel happy, free, and not threatened. They can't deny me my identity here. I am living in my own home in Denver and working in a job in a factory cleaning parts for hospitals. I am a member of an LGBT community organization where many LGBT people from all of the world gather. My dream is to be a spokesperson for the LGBT community and to change opinions in Guatemala. I know I can never go back in person, but maybe I can advocate over the internet. I want to be a leader who can advance rights and educate people that being gay is normal, that we are not crazy or sick. Thank you for reading my message. God bless you, and God bless the United States."

"Asylum is a necessary protection. A lot of people are experiencing things in their home countries, very traumatic and difficult things, and there is no way for them to find safety except to seek asylum. Since I have been granted asylum, it's been a better life for me because I am now surrounded by people who support me and show me love. It feels very nice. I have never had that before. My dream is to own a food truck. I love to cook, and I cook often for my friends here. I am also in the process of getting my GED. I was never able to finish school in Jamaica, but I want to work hard to have a fresh start here and make more opportunities for myself."

"When I was granted asylum, I felt relieved and happy. The day I was granted asylum was also the birthday of my three-year-old daughter who is still in Cameroon. So that day I had her in my heart when I heard the news that I would finally be safe. Growing up, I studied U.S. history and I knew the U.S. was a country that respected human rights and I am proud to be here. I know I will finally be safe. My dream in the U.S. would be to continue my education so that I can one day be a guidance counselor."

"If I wasn't able to fight my case or to ask for asylum, I might have been sent back home and killed. It is hard for me to even imagine what would happen. I am heartbroken about the new rules restricting asylum because a lot of people are going to lose their lives if they can't look to the US for protection. If I hadn't won my case, I don't think I would be living today. Now that I am safe in the United States, I want to go back to school. I know it is expensive and I will have to work hard to support myself in school. I want to study medicine because I want to save lives. After going through what I've been through, I just want to help other people."

"It took over six years, but thankfully I was finally granted asylum. Later I became a lawful permanent resident and I am now applying to be a U.S. citizen. I am married and my husband is a lawful permanent resident as well. He is now the lead worker on the large ranch where we live. I stay home right now to raise our little girls, but I would like to work once they are both in school. As a young, poor, abused child in Guatemala, I could never have dreamed to have the life I have now. There are many other children still suffering the way I did. They also deserve a chance to apply for asylum and to live a life of safety and happiness in the United States."

"The day I won I couldn't believe it; I was in shock and so happy. It was a great feeling to learn that I would not be deported and it relieved so much pressure off my shoulders and my family's. I am very thankful that I was able to be successful in my case, I now live in peace, happily with my father, my sister and her family. My dream is to soon get my green card, find a good stable job doing landscaping, which I really enjoy, and one day be able to buy my own home. I am very thankful for all that I have especially with all the changes that are happening. Everyone should be given the opportunity to fight their case and feel safe."

"Here in the United States I feel safer because I do not worry about being kidnapped, jailed, held hostage, or killed, like I would be in Somalia. The United States is the only place that I can call home. It is the only place where I feel safe and it is where I have family. I have people who take care of me and I am allowed to be alive here. In Somalia I have no one. Everyone I had there has either left or been killed. I believe this system and the decision the judge gave me saved my life. Asylum and related protections are lifesaving protections. They save people who would otherwise be killed if they were deported."

"Asylum is necessary because it helps people like me to feel safe from harm. I wanted a second chance at life. I wanted to show the judge the good in me. I am now free. I can start fresh. I can live a life free from any threats to my life. Since I won my asylum, I went on vacation with my new family. Now I am social distancing at home, watching television and playing x-box at home with my new family. I have dreams of getting my GED and finding a job. I want to buy a house and start a family here in the U.S. I want to help others too. I want to help kids in foster

care and groups homes. I want them to know that they are not alone, and they can make good decisions too."

"Having asylum has changed my life in every aspect. I have the right to be the person that I am, and I try to help others. I was able to get a social security card and a job. I am so happy to have transformed my life here and to live without fear of anything because it is calm and safe for me here. My dreams are to be with my family, to have my own construction company, to move ahead in life, and to be happy."

"I am so very thankful for the help I received in arguing my case for protection under the Convention against Torture before the immigration judge. It is because of their help, and the protections granted under CAT that I am able to continue with this life. Had the proposed changes to the rules related to CAT been in affect at the time of my case, I don't know whether I could have won, but I have no doubt that if I had been returned to Mexico, I would have suffered torture and been killed. I am still afraid that those people will find me. I now have the freedom to work and build a life. I work hard in a roofing company to support my daughter. I was separated from my daughter for many years and now I am so happy to be reunited with her. I'm excited to have her living with me again in a place where we can be safe. She is in high school.
Before being granted CAT, I could never feel safe. Now I feel much safer. Before fleeing from Mexico, I lived each day in terror. Had I stayed, I know that I would have been tortured and killed. I considered it a blessing to having my papers and be able to work and support my family in safety now."

"It has been marvelous to have asylum in the United States. It has changed my life. I don't even know what would have happened if the circumstances had been different here and if I had been returned to my country. I think I would be either imprisoned or dead… It is something very hard for me to hear…for the government to try and make it more difficult to request asylum. The people have a right to be here to ask for asylum - what else are the people supposed to do if they cannot go back to their home country?"

Indeed, what are people supposed to do when they are being tortured and persecuted in their own countries and their governments will not protect them? What would you do if it were you and your children?

We implore the agencies to fully consider the dire consequences that these regulations will cause to individuals who came to the United States to seek protection from persecution and torture. If further information would be useful, please contact Tania Valdez at tvaldez@law.du.edu, Megan Hall at megan.hall@colorado.edu, or Ashley Harrington at aharrington@rmian.org.

Sincerely,

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