



11 DUPONT CIRCLE NW
SUITE 800
WASHINGTON, DC 20036
202-588-5180
NWLC.ORG

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

Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW
Washington, DC 20503
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: Comments in Response to the United States Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (the Departments) Joint Notice of Proposed Rulemaking (NPRM or “proposed rule”): [Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002/ A.G. Order No. 4714-2020](#)

To Whom It May Concern:

The National Women’s Law Center (“the Center”) respectfully submits this comment in response to the Department of Homeland Security (“DHS”) and the Department of Justice’s (“DOJ,” collectively with DHS, the “Agencies”) Notice of Proposed Rulemaking (“Proposed Rule”) on the Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94 / EOIR Dkt. No. 18-0002; A.G. Order No. 4714-2020, published in the Federal Register at 85 F.R. 36264 on June 15, 2020 (“Notice”).¹

The Center fights for gender justice—in the courts, in public policy, and in society—working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone—especially

¹ Where this comment includes linked material in footnotes, the Center requests that the Agencies review the linked material in its entirety and consider it part of the record.

those who face multiple forms of discrimination. For more than 45 years, the Center has been on the leading edge of every major legal and policy victory for women.

Because of this work, the Center strongly opposes the Proposed Rule that will likely have a harmful impact on women, survivors of gender-based violence, LGBTQ people, people living with HIV, and other immigrants fleeing persecution.

Asylum is a lifeline for tens of thousands of refugees. This Proposed Rule is part of a larger pattern of attacks from the administration upon the well-being of immigrant families.² The Proposed Rule would eviscerate the U.S. asylum system and violates our nation's duties under domestic and international law. Moreover, the Proposed Rule will subject asylum seekers to unclear, and sometimes unlawful, standards with virtually no due process protections. This will result in chaos for asylum seekers. While stakeholders will unquestionably challenge the Rule, once finalized, in federal court, asylum seekers will be wrongfully returned to countries where their lives will be in grave danger in the meantime. Moreover, if published as written, the United States will cease to be a leader in providing humanitarian protection to those most in need. Accordingly, the Center urges the Agencies to withdraw the Proposed Rule in its entirety and stop attacking immigrants.

Because of the vast scope of this Proposed Rule and the limited comment period in the middle of a pandemic and recession, the Center cannot comment on every proposed change to which it objects. The fact that the Center has not discussed a particular change to the law in this comment does not mean that the Center agrees with it—the Center opposes this joint Proposed Rule in its entirety and calls upon the Agencies to withdraw it. For substantive reasons including but not limited to the following, the Agencies should rescind the Proposed Rule and instead implement policies that provide meaningful access to protection for refugees and asylum seekers in compliance with domestic U.S. asylum laws³ and our obligations under the 1951 United Nations Convention Relating to the Status of Refugees (the Convention).⁴

I. DOJ and DHS have not provided sufficient time for the public to comment on this harmful joint proposed rule.

The Administrative Procedures Act (APA) requires agencies to provide the public with a meaningful opportunity to comment on proposed regulations.⁵ The 30 days DOJ and DHS provided for this comment period fails to provide this meaningful opportunity for several reasons.

² These include, but certainly are not limited to, U.S. Citizenship & Immigration Services proposals to create or increase fees for immigrants, family separation, increased ICE raids in communities, the Department of Homeland Security public charge rule, the unlawful attempt to eliminate the DACA program, and the U.S. Census Bureau's effort to place a citizenship question on the 2020 Census questionnaire.

³ 8 U.S.C. § 1158 (2018).

⁴ UNITED NATIONS HIGH COMM'R FOR REFUGEES, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES (Dec. 2010), *available at* <https://www.unhcr.org/1951-refugee-convention.html>.

⁵ 5 U.S.C. § 553(c) (2018).

First, multiple executive orders recommend providing at least 60 days for comment periods.⁶ In addition, the Regulatory Timeline factsheet on Regulations.gov states, “Generally, agencies will allow 60 days for public comment. Sometimes they provide much longer periods.”⁷

The Proposed Rule certainly warrants a comment period longer than 60 days, both because its subject matter is of significant public interest and because it is highly technical and complex. As discussed below, the Proposed Rule would completely eviscerate asylum protections, which would result in sending persecuted immigrants back to their countries where they may face persecution, torture, or death. These regulatory changes would be the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act (INA) and Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).

In addition, the Proposed Rule is lengthy with dense, technical regulatory language. 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, the agencies have allowed a mere 30 days to respond to multiple, significant changes to the asylum rules, issued in a single, mammoth document. This is clearly insufficient given the scope and subject matter of the Proposed Rule.

Furthermore, a longer comment period is appropriate because of the public health emergency that the country is currently experiencing. The President made a Declaration of a National Emergency the Novel Coronavirus Disease (COVID-19) Outbreak on March 13, 2020. The Center, along with millions of other stakeholders with interests in this Proposed Rule, have been focusing on identifying and advocating for measures responsive to the impact of the health pandemic and recession on families with the lowest incomes. Furthermore, our staff’s capacity is reduced by health and caregiving needs. In mid-March, about 170 public interest, labor, and grassroots organizations requested an extension of all active comment periods for pending rulemakings, as well as future rulemakings during the national emergency, because of the COVID-19 national emergency.⁸ Associations representing U.S. states, cities, and counties, as well as 14 House Committee Chairs, made similar requests for rulemaking and non-rulemaking.⁹

⁶ See, e.g., Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (comment periods “should generally be at least 60 days”); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (same recommendation for comment periods for proposed rules specifically).

⁷ U.S. GEN. SERVS. ADMIN., ERULEMAKING: REGULATORY TIMELINE, *available at* https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf (last visited Jul. 14, 2020).

⁸ Letter from Alaska Cmty. Action on Toxics et al. to Russell Vought, Acting Dir., Office of Mgmt. & Budget (Mar. 19, 2020), *available at* https://cpr-assets.s3.amazonaws.com/documents/PublicInterest_JtLtr_Comment_Extension_COVID_031920.pdf.

⁹ Letter from the Nat’l Governors Ass’n et al. to President Donald J. Trump (Mar. 20, 2020), <https://www.nga.org/letters-nga/state-and-local-government-organizations-seek-pause-on-public-comments-on-rulemaking-processes/>; Letter from Frank Pallone, Jr., Chairman of the House Comm. on Energy and Commerce et al. to Russell Vought, Acting Dir., Office of Mgmt. and Budget (Apr. 1, 2020), *available at*

For this reason alone, the Center urges the administration to rescind the Proposed Rule. If it wishes to reissue the Rule once the national emergency is over, then it should reopen the comment period for a period of at least 60 days so the public can have a meaningful opportunity to comment under the APA.

II. The U.S. asylum system provides life-saving relief for individuals fleeing persecution, including survivors of gender-based violence, LGBTQ people, and HIV-positive people.

Survivors of gender-based violence (GBV), who predominantly identify as women and girls, seek asylum to escape persecution such as female genital mutilation/cutting, so-called “honor” crimes, forced marriage, rape, domestic violence, femicide, human trafficking, and other types of persecution on account of “gender.” About one in three (35 percent) of women globally have experienced violence in their lifetime.¹⁰ Common characteristics of GBV include, but are not limited to:

- persecution perpetrated by non-state actors (NSAs) such as intimate partners,¹¹ family, or community members;¹²
- extreme social stigmas, ostracization, blame, disbelief of, and additional violence and punishment of survivors for their victimhood and/or for reporting and seeking redress against abuse;
- forced dependence, *e.g.*, through economic isolation and denial of education and literacy access;
- forced caretaking of dependents/unequal caretaking responsibilities;
- barriers to medical or mental health treatment for GBV; and
- near insurmountable obstacles to escape and lack of access to corroborating evidence of persecution due to these and other factors.

Survivors may internalize blame and stigma after experiencing GBV and may fear discussing GBV with cisgender male family members or fear reporting GBV to cis male authority figures (such as community members and faith leaders) or state actors such

<https://edlabor.house.gov/imo/media/doc/Committee%20Chairs%20Letter%20re%20Comment%20Period%20Extension.pdf>.

¹⁰ WORLD HEALTH ORG., VIOLENCE AGAINST WOMEN (Nov. 29, 2017), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

¹¹ The World Health Organization notes that 30 percent of women worldwide “who have been in a relationship report that they have experienced some form of physical and/or sexual violence by their intimate partner in their lifetime.” *Id.* See also NICKOLE MILLER, JEFF SESSIONS’S CLAIMS ABOUT ASYLUM SEEKERS WERE WILDLY INACCURATE, WASH. POST (Oct. 15, 2017), https://www.washingtonpost.com/opinions/jeff-sessions-claims-about-asylum-seekers-were-wildly-inaccurate/2017/10/15/23dd83c6-b020-11e7-9b93-b97043e57a22_story.html; LIZ ROBBINS, SHE WAS RAPED AND THREATENED WITH DEATH. NOW SHE HAS LOST HOPE OF ASYLUM, N.Y. TIMES (Jun. 12, 2018), <https://www.nytimes.com/2018/06/12/nyregion/sessions-asylum-gang-domestic-violence.html>.

¹² For example, criminal groups in Central America often target women and children. See, *e.g.*, MAUREEN MEYER & ELYSSA PACHICO, U.S. IMMIGRATION AND CENTRAL AMERICAN ASYLUM SEEKERS, WASH. OFFICE ON LATIN AM. (FEB. 1, 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers/>; CHIARA CARDOLETTI-CARROLL ET AL., WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO, UNITED NATIONS HIGH COMM’R FOR REFUGEES, *available at* <https://www.unhcr.org/5630f24c6.pdf>.

as police. Survivors may fear increased risk of harm and escalated violence if they go to the authorities in their country. For example, survivors may fear that the authorities will alert their perpetrator/persecutor that the survivor is trying to escape abuse, and then the abuser perpetrator/persecutor will close off her escape route. Laws against domestic and sexual violence and other forms of gender-based violence are limited or non-existent in many countries.¹³ In some countries, especially within cultures that broadly tolerate GBV, law enforcement officers ignore or dismiss reports of gender-based violence, and at times, may even be complicit in harming survivors. A law enforcement officer may be a perpetrator, and fellow or supervising officers may ignore or help cover up violence. Or officers may have a family or personal relationship with perpetrators. Prosecutors may likewise fail to bring charges on GBV, and judges and juries may render weak verdicts or acquittals. Because of this persecution and lack of legal recourse in the countries where they experience violence, asylum is a lifesaving escape for survivors of GBV.

In addition, LGBTQ people also seek asylum for violence and ostracization perpetrated against them in the over eighty countries where it is illegal or fundamentally unsafe to be LGBTQ. Courts and the U.S. Citizenship and Immigration Services have recognized this by holding that persecution on account of membership in a particular social group (“PSG”) includes sexual orientation, gender identity, and HIV status.¹⁴ Such persecution takes many forms, including:

- **Criminal punishment:** Same-sex activity between consenting adults is subject to criminal punishment, which can include a sentence of 10 years or even death, in approximately 70 countries.¹⁵ Twelve countries target gender identity through “cross-dressing” or “impersonation” laws.¹⁶

¹³ PAULA TAVARES & QUENTIN WODON, CHILDREN’S INVESTMENT FUND FOUND., GLOBAL PARTNERSHIP FOR EDUC. & THE WORLD BANK, ENDING VIOLENCE AGAINST WOMEN AND GIRLS: GLOBAL AND REGIONAL TRENDS IN WOMEN’S LEGAL PROTECTION AGAINST DOMESTIC VIOLENCE AND SEXUAL HARASSMENT (Mar. 2018), *available at* <http://pubdocs.worldbank.org/en/679221517425064052/EndingViolenceAgainstWomenandGirls-GBVLaws-Feb2018.pdf>.

¹⁴ See, e.g., *Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (recognizing that transgender individuals are members of a particular social group); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (same for lesbians); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (same for “all alien homosexuals”); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (same for men imputed to be gay); *Toboso–Alfonso*, 20 I&N Dec. 819, 822 (1990) (same for gay men); U.S. CITIZENSHIP AND IMMIGR. SERVS., GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 15, 17 (Dec. 28, 2011), *available at* <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> (noting that HIV may also be a PSG).

¹⁵ See LUCAS RAMON MENDOS, STATE-SPONSORED HOMOPHOBIA: GLOBAL LEGISLATION OVERVIEW, NT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N 48, 52 (Dec. 2019), *available at* https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf. Twelve countries allow the death penalty as a sentence and 31 carry a sentence of ten years. *Id.* These laws are not historical artifacts: for example, in 2019, Gabon adopted a new penal code that criminalizes consensual same-sex sexual acts. *Id.* at 10.

¹⁶ HUMAN DIGNITY TRUST, MAP OF COUNTRIES THAT CRIMINALISE LGBT PEOPLE, <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation> (last visited July 2, 2020).

- **Social stigma:** In many countries, LGBTQ people are shunned as vile and face persecution such as being prevented from obtaining an education;¹⁷ refused or terminated from employment,¹⁸ housing, and healthcare; bullying and social isolation;¹⁹ and denied access to politics or power.
- **Abuse and violence:** LGBTQ people face abuse and violence throughout the world, including rape, sexual assault, physical abuse, and murder.²⁰ Private actors, such as family and community members,²¹ as well as government actors, such as police, often perpetrate this violence.²² Violence is sometimes outside the reach of the state and can happen where weak governments depend on allied armed groups to provide security.²³
- **No legal recourse:** LGBTQ people frequently cannot report private violence to the police in the countries where they experience persecution. Police officers and other

¹⁷ See M.A. KEIFER & UROOJ ARSHAD, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) YOUTH IN THE GLOBAL SOUTH, ADVOCATES FOR YOUTH 2 (2016), *available at* <https://advocatesforyouth.org/wp-content/uploads/storage/advfy/documents/Factsheets/lesbian-gay-bisexual-and-transgender-youth-in-the-global-south.pdf> (citing that a study in Bolivia found that 72 percent of transgender individuals abandoned their secondary school studies due to intense discrimination).

¹⁸ For example, a woman in Brunei was outed as a lesbian, ostracized, fired from her job, and blackmailed into sex work. She told *The Telegraph* that she was “already living a prison sentence.” CHLOE GOVAN, BRUNEI LGBT COMMUNITY LIVING IN FEAR DESPITE SULTAN’S DEATH PENALTY REPRIEVE, THE TELEGRAPH (May 10, 2019), <https://www.telegraph.co.uk/news/2019/05/10/brunei-lgbt-community-living-fear-despite-sultans-death-penalty>.

¹⁹ VICTOR MADRIGAL-BORLOZ, REPORT TO THE UNITED NATIONS GENERAL ASSEMBLY: PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, at 3-4 (July 17, 2019), *available at* https://undocs.org/A/74/181?fbclid=IwAR3xrYojctnW46K2HAFgf4ju4C_Wd-4xEzezVG_cyD3_foUOILbhjuO3538 (finding that LGBT students and the children of LGBT parents face taunts and social isolation).

²⁰ For example, according to the United Nations High Commissioner for Refugees, “88 percent of LGBTI asylum seekers from the Northern Triangle interviewed reported having suffered sexual and gender-based violence in their countries of origin.” AMNESTY INT’L, NO SAFE PLACE: SALVADORANS, GUATEMALANS, AND HONDURANS SEEKING ASYLUM IN MEXICO BASED ON THEIR SEXUAL ORIENTATION AND/OR GENDER IDENTITY 7 (Nov. 2017), *available at* <https://www.amnesty.org/download/Documents/AMR0172582017ENGLISH.PDF>. See also MADRIGAL-BORLOZ, *supra* note 19, at 3-4 (finding that LGBT students and the children of LGBT parents also face physical and sexual violence and death threats).

²¹ See, e.g., NEELA GHOSHAL, AUDACITY IN ADVERSITY: LGBT ACTIVISM IN THE MIDDLE EAST AND NORTH AFRICA, HUMAN RIGHTS WATCH (Apr. 16, 2018), <https://www.hrw.org/report/2018/04/16/audacity-adversity/lgbt-activism-middle-east-and-north-africa> (describing gay men in Iraq reporting severe beatings and death threats at the hands of their own family members).

²² See, e.g., REBEKAH KEBEDE, JAMAICAN LGBTQ YOUTHS ESCAPE PERSECUTION IN CITY STORM DRAINS, REUTERS (Mar. 1, 2017), <https://www.reuters.com/article/us-jamaica-lgbt-homeless/jamaican-lgbtq-youths-escape-persecution-in-city-storm-drains-idUSKBN1685AY> (describing attacks by mobs and the police in Jamaica targeting low-income LGBTQ people and producing homelessness); ANDREW E. KRAMER, CHECHNYA RENEWS CRACKDOWN ON GAY PEOPLE, RIGHTS GROUP SAYS, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/world/europe/chechnya-gay-people-russia.html> (describing how hundreds of individuals suspected to be LGBTQ have reportedly been detained and tortured by the police in Chechnya since 2017); NEELA GHOSHAL, UGANDA LGBT SHELTER RESIDENTS ARRESTED ON COVID-19 PRETEXT, HUMAN RIGHTS WATCH (Apr. 3, 2020), <https://www.hrw.org/news/2020/04/03/uganda-lgbt-shelter-residents-arrested-covid-19-pretext>; HUMAN RIGHTS WATCH, UGANDA: STOP POLICE HARASSMENT OF LGBT PEOPLE (Nov. 17, 2019), <https://www.hrw.org/news/2019/11/17/uganda-stop-police-harassment-lgbt-people> (describing how after dispersing a mob in Uganda that attacked 16 LGBTQ activists, the police arrested the 16 LGBTQ individuals and subjected them to homophobic insults and forced anal examinations).

²³ GHOSHAL, *supra* note 21.

authority figures are often the agents of persecution themselves or believe violence committed by others against LGBTQ people is justified.²⁴ LGBTQ people are terrified of brutal and sometimes deadly retaliation for going to the police.²⁵ Reporting rarely, if ever, results in legal accountability.²⁶

- **Corrective rape and conversion therapy:** In many countries, LGBTQ people are subject to “corrective rape,”²⁷ “corrective violence,”²⁸ or other forms of torture under the guise of pseudoscientific “therapy.”²⁹

Furthermore, many countries impute LGBTQ status to HIV-positive individuals, assuming that HIV is a “gay disease.” This results in severe stigma, lack of privacy, and abuse. In addition to the abuses described above, individuals perceived to be LGBTQ are often subject to HIV tests as conditions for employment. This leads to serious public health concerns: research shows that perceptions and experiences of sexual stigma are associated with less access to HIV services and lower odds of viral suppression.³⁰

In sum, many people who seek asylum in the United States have experienced horrific persecution because of their gender, sexual orientation, gender identity, and HIV status. Survivors of GBV already struggle through the asylum system, especially survivors without legal representation to help them navigate the process. Tragically, refugees living in LGBTQ-phobic countries sometimes internalize feelings of shame and stigma about who they are, which compounds their suffering and presents an obstacle to

²⁴ See, e.g., TANYA COOPER, LICENSE TO HARM: VIOLENCE AND HARASSMENT AGAINST LGBT PEOPLE AND ACTIVISTS IN RUSSIA, HUMAN RIGHTS WATCH (Dec. 15, 2014), <https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia> (describing how Russian police facing LGBTQ violence are “dismissive and reluctant to investigate effectively, often blaming victims for the attacks”).

²⁵ See IVETTE FELICIANO & ZACHARY GREEN, LGBTQ ASYLUM SEEKERS PERSECUTED AND HOME AND IN US CUSTODY, PBS NEWS HOUR (Aug. 10, 2019), <https://www.pbs.org/newshour/show/lgbtq-asylum-seekers-persecuted-at-home-and-in-u-s-custody> (“[O]ne night while doing outreach with sex workers in . . . San Salvador, she was beaten and shot in the shoulder by a group of gang members. . . . Police detained but eventually released the men with no charges. Castro says they knew she was the one who had complained, so they began to follow her and threaten her with death.”).

²⁶ See, e.g., OSCAR LOPEZ, PRESSURE MOUNTS FOR EL SALVADOR TO INVESTIGATE WAVE OF LGBT+ KILLINGS, REUTERS (Nov. 21, 2019), <https://www.reuters.com/article/us-el-salvador-lgbt-murder-trfn/pressure-mounts-for-el-salvador-to-investigate-wave-of-lgbt-killings-idUSKBN1XW01G> (noting how a mere “12 out of 109 LGBT+ murders” in El Salvador “recorded between December 2014 and March 2017 went to trial . . . and there has never been a successful conviction”).

²⁷ See, e.g., J-FLAG ET AL., HUMAN RIGHTS VIOLATIONS AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) PEOPLE IN JAMAICA: A SHADOW REPORT 5 (Sept. 2016), available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JAM/INT_CCPR_CSS_JAM_25269_E.pdf (describing lesbians in Jamaica who are raped under the belief that intercourse with a man will “cure” them of their sexual orientation).

²⁸ See, e.g., JOSINA BOTHE, INT’L REHAB. COUNCIL FOR TORTURE VICTIMS, IT’S TORTURE NOT THERAPY: A GLOBAL OVERVIEW OF CONVERSION THERAPY, 15 (2020), available at https://irct.org/assets/uploads/pdf_20200513134339.pdf.

²⁹ See, e.g., ANASTASIA MOLONEY, GAYS IN ECUADOR RAPED AND BEATEN IN REHAB CLINICS TO “CURE” THEM, REUTERS (Feb. 8, 2018), <https://www.reuters.com/article/ecuador-lgbt-rights/feature-gays-in-ecuador-raped-and-beaten-in-rehab-clinics-to-cure-them-idUSL8N1P03QQ> (describing how LGBTQ individuals in Ecuador are involuntarily detained in “corrective therapy” clinics, where they are beaten, locked in solitary confinement, and force-fed psychoactive drugs).

³⁰ AVERT, HOMOPHOBIA AND HIV (Oct. 10, 2019), <https://www.avert.org/professionals/hiv-social-issues/homophobia>.

expressing their need for asylum to U.S. immigration officials. Many also fear trusting authority figures with their deeply personal identities, especially if they experienced persecution at the hands of government actors in the past.

III. The Proposed Rule would permit blanket denials of asylum claims and virtually eliminate gender as a ground for asylum.

The Proposed Rule states that “[t]o establish eligibility for asylum under the INA..., the applicant must demonstrate, among other things, that at least one central reason for his or her persecution or well-founded fear of persecution was on account of a protected ground: Race, religion, nationality, membership in a particular social group, or political opinion.”³¹ However, the Proposed Rule then contains a “Nexus” section that instructs adjudicators to deny claims with one of eight circumstances. The Proposed Rule’s “Nexus” section is essentially an anti-asylum wish list, directing adjudicators to deny most asylum claims.

A. The blanket circumstances for adjudicators to deny asylum claims goes against caselaw.

The “Nexus” section would allow eight blanket circumstances to deny claims,³² even though courts have long held that each asylum application should be adjudicated on a case-by-case basis. It is, moreover, troubling that the rule flouts longstanding caselaw holding that these circumstances meet the standard for asylum. The Center comments specifically on four of these circumstances but urges the Agencies to withdraw the Proposed Rule in its entirety.

Personal Animus or Retribution

This section states that in general, asylum claims should be denied where there is “personal animus or retribution.”³³ If finalized, this provision of the Proposed Rule would lead to significant confusion with the potential to cause many asylum claims based on gender or LGBTQ status to be rejected. For example, an action motivated by anti-LGBTQ sentiment often turns on, and manifests as, personal animus. Significantly, the Proposed Rule does not provide guidance on distinguishing “personal animus” from persecution on the basis of a protected characteristic, nor could it.

Interpersonal Animus Without Targeting Others

The Proposed Rule would also exclude “interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group (PSG) in addition to the member who has raised the claim at issue.”³⁴ This is especially problematic in light of the fact that domestic violence

³¹ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,281 (proposed June 15, 2020) (to be codified at 8 C.F.R. pt. 208, 235).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

in the United States was long dismissed as a private matter between family members, rather than an expression of gender-based animus. The persecution of LGBTQ people is likewise frequently and acutely personal, and regularly committed by private actors close to the applicant. Under the Proposed Rule, perversely enough, a persecutor targeting one individual on account of that individual's PSG would be insufficient to establish an asylum claim.

There is no basis in law to require a survivor of persecution show that *others* have been persecuted in order to satisfy that individual's asylum application. Requiring a survivor of persecution to know how a persecutor has treated other people with the same PSG would operate as an effective bar. It would be manifestly unreasonable to require an individual applicant to prove that a persecutor has, for example, targeted or manifested animus against other LGBTQ individuals in order to show that the individual's own persecution was attributable to animus against their sexual orientation or gender identity. Perpetrators of GBV against family members, such as "honor" crimes, may not have targeted women other than the applicant. As a practical matter, it would often be impossible for such a survivor to know the past history of their persecutor or obtain evidence of intimate partner violence (IPV) specifically, such that the applicant could ever prove this requirement.

Gender

The Proposed Rule's designation of "gender" as a nexus exclusion³⁵ is particularly troubling and would virtually categorically eliminate gender as a ground for asylum. Gender-based persecution is well-established and affects millions of women around the globe. Denying asylum on the basis of gender would leave survivors of GBV without an avenue to safety and devalues the atrocities they experience. Women fleeing other forms of persecution, such as on account of political opinion, are also likely to have experienced GBV and/or gender-based discrimination in some form that limits their access to safety.

While the Proposed Rule's prohibition on "gender" as a nexus between persecution and a protected ground to seek asylum does contain an exception for "rare circumstances," that term is undefined. Women fleeing abusive family members often cannot leverage family and community resources to retain a lawyer to advise them, which imposes a barrier under existing asylum laws and policies and will impose an even greater barrier under this Proposed Rule. Traumatized and isolated, survivors are often in no position to learn about their legal rights or access lawyers to help them frame their claim under this amorphous "rare circumstances" exception or any other potential avenue for preserving their right to seek relief. Furthermore, as discussed in more detail later in this comment, the Proposed Rule's paragraph about "pretermission" for failing to establish a *prima facie claim* will likely leave the parameters of the undefined "rare circumstances" exception untested.

Meanwhile, the Proposed Rule proposes harsh consequences if an applicant submits a "frivolous" claim for asylum, using a broad definition of "frivolous," that may deter and

³⁵ *Id.*

discourage an applicant from successfully arguing that their case meets the “rare circumstances” exception. It is also notable that a survivor whose case is deemed frivolous under the rule will be permanently ineligible for any relief (other than withholding of removal), including VAWA cancellation of removal, or a VAWA, U, or T visa petition.

The NPRM’s inclusion of “gender” as a nexus exclusion is also unreasonable because gender clearly satisfies the three-prong test for PSG of immutability, defined with particularity, and social distinction. The Proposed Rule admits that LGBTQ people constitute protected PSGs. The Supreme Court’s recent decision in *Bostock* confirmed and underscored the close ties between gender discrimination and LGBTQ-related discrimination.³⁶ Other immutable characteristics like race and nationality also constitute protected PSGs. Consequently, claims based on gender should similarly constitute PSGs and not fall under this nexus exclusion.³⁷

Criminal Activity

The Proposed Rule’s list of harms that adjudicators generally should not consider in their nexus analysis also includes “criminal activity.” Virtually all harm that rises to the level of persecution could be characterized as “criminal activity,” since in virtually every country beatings, rape, and threatened murder constitute crimes. And as described earlier, in some countries, being LGBTQ can be a crime. This blanket rule essentially would eliminate the ability to grant asylum based on private actor harm.

B. The Proposed Rule’s “Nexus” section with blanket circumstances to deny asylum claims runs contrary to caselaw permitting mixed motive analysis.

The Proposed Rule in its current form runs contrary to the INA by instructing adjudicators to deny claims with one of the eight blanket circumstances. INA § 208(b)(1)(B)(i) specifically states that a protected ground must be “at least one central reason” for the harm. Federal courts have explicitly held that the “one central reason” continues to allow for a mixed motive analysis. Prohibiting adjudicators from engaging in case-by-case analysis with claims that have two or more of the blanket circumstances would also directly violate the INA. Consequently, the Proposed Rule’s enumeration of circumstances that will result in blanket denials, without consideration of whether that circumstance is only one of many circumstances for seeking asylum, is an unreasonable interpretation of the INA.

IV. The Proposed Rule would remove critical due process protections, make longstanding legal standards more restrictive, and impose new bars, resulting in the denial of virtually all asylum applications.

³⁶ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

³⁷ See, e.g., Br. of the National Immigrant Justice Center as Amicus Curiae in Support of the Resp’t, Lesly Yajayra Perdomo, B.I.A. (May 23, 2011), available at https://immigrantjustice.org/sites/immigrantjustice.org/files/2011%205%2023%20Perdomo%20NIJC%20Amicus%20Brief_0.pdf (arguing that gender constitutes a PSG).

The Proposed Rule would gut existing asylum protections and drastically change asylum law in ways that would detrimentally impact virtually all asylum applications for GBV survivors and LGBTQ individuals. The Center's specific comments below are illustrative rather than exhaustive and the failure to comment on all provisions of the Proposed Rule does not indicate lack of objections thereto. The Center reiterates its view that the Proposed Rule should be withdrawn in its entirety.

Removing Due Process Protections

Section 8 CFR § 1208.13(e) would allow immigration judges to deny asylum to asylum seekers without even allowing them a hearing or chance to testify, if judges determine, on their initiative or at the request of a DHS attorney, that the application form does not adequately make a claim. This radical change would allow judges to "pretermite" asylum claims.

Many asylum seekers do not speak English fluently and cannot obtain assistance in filling out the 12-page asylum application form. Many have limited resources and are unable to obtain lawyers to help them lay out every element of their asylum claims in the application before arriving in court. The circumstances surrounding LGBTQ asylum seekers, for example, especially those who experienced government violence and who therefore do not trust government officials, can make it hard for them to fully articulate their asylum claim based on their LGBTQ status. Allowing judges to "pretermite" claims and deprive asylum seekers at the same time that the Agencies again change and further restrict the eligibility criteria for asylum through this Proposed Rule, would be an abrupt change from decades of precedent and practice and would undermine due process.³⁸

Moreover, under this provision of the Proposed Rule, GBV survivors who simultaneously have pending VAWA or U visa petitions would likely be deported, before decisions on their petitions have been rendered. Upon deportation, petitioners will not only face challenges in responding to Requests for Evidence and other critical correspondence about these petitions, but also will be at risk of life-threatening violence and other harm. In addition, T visa petitioners who are deported would eventually have their petitions denied outright for failure to maintain presence in the United States. Foreclosing these avenues of relief would undoubtedly undermine the bipartisan will and express intent of Congress in enacting these remedies for survivors.

Unlawfully Restricting Political Opinion Claims

The Proposed Rule unduly narrows the scope of cognizable "political opinion" in a way that is inconsistent with existing law. The Proposed Rule would limit political opinions to ideals or convictions in support of a "discrete cause related to political control of a state

³⁸ See *Fefe*, 20 I&N Dec. 116, 118 (BIA 1989), *available at* <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3121.pdf> ("In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself").

or a unit thereof.”³⁹ This exceptionally narrowed definition would exclude asylum seekers persecuted for trying to advance equal access to education, employment, marriage, property ownership and inheritance, legal systems, and even the political process. Persecution on account of “feminism” as a political opinion—the right to equality under the law for women and men—would not be accepted, no matter how extreme the harm inflicted on activists. The Proposed Rule could likewise ostensibly eliminate all political opinion claims for LGBTQ asylum seekers. Such a result is not supported by the statute and ignores decades of precedent, which does not limit the scope of cognizable political opinions.⁴⁰

Furthermore, the United Nations has recognized that living in defiance of an unjust or inhumane law, such as laws criminalizing being LGBTQ, can be a political act, “particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values.”⁴¹ Any persecution that a person in such a case experiences is on account of political opinion.⁴² Yet under the Proposed Rule, an adjudicator may conclude that a refugee defying an anti-LGBTQ law by living openly is not a “discrete cause related to political control” and could likewise deny a claim based on LGBTQ activism.

Narrowly Defining Persecution

Asylum law obligates the United States to protect individuals with a well-founded fear of persecution from being returned to harm.⁴³ The Proposed Rule would, for the first time, provide a regulatory definition of persecution—a definition that would unduly restrict what qualifies as persecution. The Rule emphasizes that the harm must be “extreme” and that threats must be “exigent.” But the Proposed Rule fails to provide any guidance on adjudicating claims by children who may experience harm differently from adults, how harm against LGBTQ people differs from straight, cisgender people, etc. It also does not require adjudicators to consider cumulative harm. For survivors of IPV, for example, persecution may consist of relentless cumulative harassment, intimidation, threats, or acts of violence to oneself or one’s children, resulting in chronic, extreme, and debilitating Post-Traumatic Stress Disorder or other impacts. Under this provision, such harm will be arbitrarily dismissed regardless of the devastating impact on the individual who must endure it.

Barring Relevant and Probative Evidence

The Proposed Rule also notes that “pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal,” and uses a

³⁹ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36280 (to be codified at 8 C.F.R. § 208.1(d)).

⁴⁰ See *Manzur v. U.S. Dep’t of Homeland Sec.*, 494 F.3d 281, 294 (2d Cir. 2007) (“This Court has rejected an impoverished view of what political opinions are”) (citations omitted).

⁴¹ UNITED NATIONS HIGH COMM’R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: CLAIMS TO REFUGEE STATUS BASED ON SEXUAL ORIENTATION AND/OR GENDER IDENTITY paras. 40, 50 (Oct. 23, 2012), available at <http://www.unhcr.org/509136ca9.pdf>.

⁴² See, e.g., *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 648 (9th Cir. 1997) (Russian lesbian woman underwent electroshock “therapy” as punishment for protesting against state mistreatment of LGBT people).

⁴³ See, e.g., *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

culture of machismo as an example.⁴⁴ The Proposed Rule offers no rationale for why such evidence should be excluded, however, and fails to define this term. This provision conflates allegations of negative stereotypes with objective country conditions information. In doing so, it risks discouraging the submission of key corroborative evidence in support of gender-based claims—including documentation of the prevalence of so-called “honor crimes,” the practice of forced marriage, tolerance or encouragement within a society of punishing women through IPV, rape, and femicide. Similarly, virtually all LGBTQ asylum applications rely on evidence of cultural attitudes toward LGBTQ people in their country of origin. Indeed, this provision of the Proposed Rule would require Asylum Officers to selectively ignore significant content in the very country conditions reports they are mandated to consult and apply.

Redefining the Internal Relocation Standard

The Proposed Rule lays out a standard for analyzing the reasonableness of internal relocation that almost no applicant for asylum, withholding of removal, or Convention Against Torture (CAT) protection will be able to meet. If the Proposed Rule is finalized, the adjudicator must take into consideration “the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.”⁴⁵ The clear implication of this language is that if an asylum seeker is able to travel to reach the United States, any testimony about the unreasonableness of relocating within their country of origin can be discounted. But the Proposed Rule ignores the fact that asylum seekers make the journey to the United States because they believe they will be safe here and do not trust their own government to protect them.

In addition, the Proposed Rule would remove important considerations that adjudicators must currently take into account. Currently adjudicators must consider numerous factors, including, “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.”⁴⁶ The Proposed Rule would force adjudicators to make decisions in a vacuum, ignoring the overall context of an applicant’s plight.

Additional Anti-Asylum “Discretionary” Bars

The Center opposes the proposal to deny asylum as a matter of discretion to any asylum seeker who enters or attempts to enter the United States without inspection and the proposal to prevent most refugees who spent 14 days in any country en route to the United States from qualifying for asylum (which would disqualify most asylum seekers who travel through Mexico where the administration forces them to wait for months to request protection at ports of entry).

⁴⁴ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36,282.

⁴⁵ *Id.* at 36,293 (to be codified at 8 C.F.R. § 208.13(3)); *Id.* at 36,294 (to be codified at 8 C.F.R. § 208.16); *Id.* at 36301 (to be codified at 8 C.F.R. § 1208.13(3)); *Id.* at 36,303 (to be codified at 8 C.F.R. § 1208.16).

⁴⁶ 8 C.F.R. § 208.13(3).

Furthermore, the proposal to deny asylum to a refugee who uses or attempts to use fraudulent documents to enter the United States, unless they are arriving to the United States directly from their country of origin, would deny asylum to people fleeing harm who cannot obtain travel documents because they fear their government (such as LGBTQ people in a hostile country), women who are in a country that will not permit them to apply for passports unless a male family member signs the application, and survivors whose abusers are withholding their documents.

Moreover, the Proposed Rule's attempt to eliminate vital exceptions to the one-year filing deadline, such as mental health issues resulting from the persecution they fled, in the guise of "discretion" contradicts the plain language of INA § 208(a)(2)(d) that allows exceptions. The Center also opposes the proposed denial of applications if an asylum seeker did not file taxes prior to applying for asylum—paying taxes is not correlated to facing persecution in their home country.

Damaging Disclosures Will Be Permitted

The Proposed Rule expressly allows disclosure of information in an asylum application "as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien's immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse."⁴⁷ Abusers frequently lodge false accusations against victims to retaliate if they report abuse, or to manipulate and wreak havoc on their lives to reinforce control. Asylum seekers simultaneously experiencing GBV and IPV in the United States will be at the mercy of abusers who report them to law enforcement or DHS for fabricated allegations of crime, child abuse, immigration violations, etc.

Asylum seekers might be deterred from disclosing critical details of their claims if they fear disclosure of personal information. Release of information can put LGBTQ asylum seekers at grave risk of harm, in particular: gender identity, sexual orientation, and HIV status are deeply personal and often difficult to disclose and discuss. Yet, withholding any information about their fear of harm will damage their claim and could potentially—unjustly—impact a determination as to their credibility. Confidentiality is critical to full disclosures, and full disclosures are critical to applicants' chances for protection. The disclosure provisions in the Proposed Rule may discourage many asylum seekers from seeking relief to which they are entitled.

V. The Agencies should withdraw this Proposed Rule in its entirety.

This Proposed Rule represents a radical rewriting of the U.S. asylum system. Each section of these monumental proposed changes merits a full 60-day, or longer, comment period for the public to adequately prepare comments. Taken together, the

⁴⁷ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36,292 (to be codified at 8 C.F.R. § 208.6).

proposals would eviscerate asylum protections that have been in place in the United States for decades. The vast majority of asylum seekers, including many survivors of GBV, LGBTQ people, and HIV-positive people, are likely to be denied asylum under these proposed rules even if they have well-founded fears of persecution.

Since World War II, the United States has been a beacon of hope for those fleeing danger and harm. This Proposed Rule would require immigration officials to slam the door on those seeking safety. The Center calls upon the Agencies to withdraw this Proposed Rule in its entirety.

Sincerely,



Amy K. Matsui
Senior Counsel & Director of Income Security
National Women's Law Center



Sarah Hassmer
Senior Counsel for Income Security
National Women's Law Center