CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
212-614-6464
ccrjustice.org

July 15, 2020

Submitted via www.regulations.gov

Assistant Director Lauren Alder Reid
Office of Policy
U.S. Department of Justice, Executive Office for Immigration Review ("DOJ/EOIR")
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Attention: Desk Officer, U.S. Citizenship and Immigration Services, Department of Homeland Security ("DHS/USCIS")
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: Comments in Opposition to the DHS/USCIS and DOJ/EOIR Joint Notice of Proposed Rulemaking entitled *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

Dear Assistant Director Reid:

The Center for Constitutional Rights is a national, not-for-profit legal advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution, federal statutes, and local and international law. Since our founding in 1966, the Center for Constitutional Rights has litigated landmark civil rights and human rights cases before the U.S. Supreme Court and other tribunals concerning government overreach and discriminatory state policies.

The Center for Constitutional Rights writes today in our capacity as civil rights leaders to express our grave concern and opposition to the DHS/USCIS and DOJ/EOIR Joint Proposed Rule entitled *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, issued by your agencies on June 15, 2020. 85 Fed. Reg. 36264.

The Proposed Rule issued by DHS/USCIS and DOJ/EOIR (collectively "your Agencies") ravages the system of immigration and asylum as it presently exists and leaves countless individuals fleeing persecution and torture without refuge in the middle of a pandemic, in flagrant violation of the Administrative Procedure Act, Immigration and Nationality Act, and the United States' own treaty-obligations, among others. The Proposed Rule also continues the Trump Administration's relentless and virulent assault on immigrants—an effort that was rebuked by the

Supreme Court as recently as June 18, 2020 and decried as arbitrary, capricious, and unlawful by the Chief Justice of the Court. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. ___, 140 S. Ct. 1891 (2020).

As an organization dedicated to seeking justice for victims of torture and groups that have traditionally faced bias and exclusion—including immigrants, racial minorities, religious minorities, lesbian, gay, bisexual, transgender, queer, intersex, and asexual ("LGBTQIA+") persons—the Center for Constitutional Rights has a strong interest in ensuring that the United States is a safe haven for individuals fleeing persecution.

Given the unprecedented negative effects the Proposed Rule will have on vulnerable communities, and because the Proposed Rule violates federal statutes and the U.S. Constitution, and fails to comply with numerous regulatory and procedural requirements, we respectfully ask that you give due consideration to the comments and objections summarized below and withdraw the Proposed Rule in its entirety.

COMMENTS AND OBJECTIONS TO RIN 1125-AA94 BY THE CENTER FOR CONSTITUTIONAL RIGHTS

I. The Proposed Rule Violates the Administrative Procedure Act Because the Notice and Comment Period Provided by DHS/USCIS and DOJ/EOIR Is Inadequate

The Center for Constitutional Rights objects to the Proposed Rule as a preliminary matter because DHS/USCIS and DOJ/EOIR have denied the public a meaningful opportunity to comment pursuant to the Administrative Procedure Act. The Administrative Procedure Act ("APA") prohibits federal agency action that affects substantive rights "without observance of procedure required by law." 5 U.S.C. §§ 553 and 706(2)(D). It also requires that agencies provide "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *See* 5 U.S.C. § 553(c).

Contrary to these provisions of the APA, DHS/USCIS and DOJ/EOIR issued the Proposed Rule with an unjustifiably short notice and comment period *of a mere 30 days.* Your Agencies also did so during the middle of an *unprecedented global pandemic*, even though DHS/USCIS and DOJ/EOIR concedes that the Proposed Rule is a significant regulatory action that changes the legal regime applicable to asylum seekers. By doing so, your Agencies shortchanged the ability of the American public to participate in the rulemaking process.

Given the importance of the Proposed Rule and the exigent circumstances that have been occasioned by the COVID-19 pandemic, DHS/USCIS and DOJ/EOIR's notice and comment period should have run for a minimum of 60 days as agency precedents dictate. For instance, Executive Order 13563 establishes that comment periods for proposed agency rules "should generally be *at least 60 days*." Exec. Order No. 13563, Improving Regulation and Regulatory Review § 2(b), 76 Fed. Reg. 3821-22 (Jan. 18, 2011) (emphasis added). Likewise, Executive Order 12866 directs federal agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, *which in most cases should include a comment period of not less than 60 days*." *See* Exec. Order No. 12866, Regulatory Planning and Review § 6(a), 58 Fed. Reg. 51735 (Sept. 30, 1993) (emphasis added).

Here, the DHS/USCIS and DOJ/EOIR have failed to provide any justification for its unusually short comment period or its decision to disregard the impediments to public participation unleashed by the pandemic. Accordingly, the Proposed Rule is void under the Administrative Procedure Act, 5 U.S.C. § 553(c), because DHS/USCIS and DOJ/EOIR failed to provide the public a meaningful opportunity to participate in its rulemaking, and they were promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

II. The Proposed Rule Dismantles Federal Immigration Protections Adopted by Congress in a Manner that is Arbitrary, Capricious, and Contrary to Law

The Proposed Rule also violates the Administrative Procedure Act by effectuating a series of arbitrary and capricious changes to the existing framework for asylum, contrary to federal law—exposing people fleeing persecution to wrongful deportation.

A. The Proposed Rule Redefines the Concept of Persecution and "Nexus to Persecution" to Exclude Many Serious Harms

The Proposed Rule attempts to restrict asylum eligibility by establishing, for the first time ever, a regulatory definition of "persecution" that excludes fact-specific analysis. Under the new definition, "persecution requires an intent to target a belief, characteristic or group, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government is unable or unwilling to control." 85 Fed. Reg. 36280.

The Proposed Rule further defines persecution as needing to include "actions so severe that they constitute an exigent threat," but not including "generalized harm that arises out of civil, criminal or military strife . . . intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage." *Id.* at 36291-92. The Proposed Rule also asserts that "[t]he existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally." *Id.* at 36292.

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

The Proposed Rule thus flouts a wide-spread consensus that adjudicators must examine harm cumulatively when determining whether an applicant experienced persecution: *Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008); *Poradisova v. Gonzales*, 420 F.3d 70, 79-80 (2d Cir. 2005); *Korablina v. Immigration & Naturalization Serv.*, 158 F.3d 1038, 1044 (9th Cir. 1998); *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (B.I.A. 1998). *See also* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 201, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) ("The cumulative effect of the applicant's experience must be taken into account.").

The Proposed Rule also obliterates existing law concerning when a "nexus" to persecution exists in a manner that is nonsensical and dangerous. In effect, the Proposed Rule precludes asylum seekers from accessing protection based on eight types of harm that have long-formed the basis of asylum claims. This includes claims involving: 1) "[p]ersonal animus or retribution;" 2) "interpersonal animus;" 3) "generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;" 4) "resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations"; 5) "the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;" 6) "criminal activity;" 7) "perceived, past or present, gang affiliation;" and 8) *"gender."* 85 Fed. Reg. 36281.

The Proposed Rule further undermine the meaning of the nexus requirement by stating that "machismo" and "pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim." *Id.* at 36282. This provision imposes a dangerous and sweeping restriction on the ability of victims of persecution to present some of the evidence most germane to a successful asylum claim—the societal norms informing a persecutor's intent.

The Proposed Rule's attempt to exclude a broad-range of persecution from the scope of asylum protection is cruel, arbitrary, and nonsensical. It also conflates the concept of "nexus" to persecution generally with membership based on a social group in a manner that is wholly illogical.

B. B. The Proposed Rule Openly Discriminates on the Basis of Sex by Erecting a Near-Absolute Bar to Claims Brought by LGBTQIA+ People and People Experiencing Gender-Based Persecution

The Proposed Rule also makes claims brought by LGBTQIA+ persons and survivors of gender-based violence virtually unwinnable, notwithstanding the pervasive persecution and abuse these groups suffer worldwide.

1. The Proposed Rule Excludes from the Orbit of Protection LGBTQIA+ People Who Face Persecution Worldwide

First, the Proposed Rule strips protections from LGBTQIA+ people escaping persecution on account of their sexual orientation, gender identity, and/or HIV status, even though living openly as an LGBTQIA+ person is illegal in more than 70 countries, and penalties include being sentenced to death or imprisonment for ten years or more.[1]

LGBTQIA+ people also seek asylum to flee communal gender-based violence—including wanton murder, corrective rape, severe beatings and death threats at the hands of mobs—and

[1] *See, e.g.*, International Lesbian Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia: Global Legislation Overview*, at 48–52 (Dec. 2019), Human Dignity Trust, *Map of Countries That Criminalise LGBT People* (2020) (noting LGBTQIA+ people face the death penalty in 12 countries and terms of incarceration in excess of ten years in 31 others) .

pervasive social exclusion that places their lives in jeopardy without any legal recourse.[2] For instance, LGBTQIA+ people worldwide face death and sexual assault, are routinely shunned as vile, are prevented from obtaining an education or participating in public life, are refused housing and healthcare, are denied familiar or parental rights, and are denied political power. Courts have repeatedly affirmed that these profound and remarkable forms of exclusion meet the INA definition of persecution.[3] However, the Proposed Rule all but eviscerates the ability of LGBTQIA+ people to enjoy continued sanctuary under U.S. asylum law.

For example, the Proposed Rule declares that asylum seekers who do provide a definite formulation of their identity and status upon entry will waive all claims of persecution in perpetuity, without the ability to lodge an appeal. This unprecedented bar would require terrified individual applicants who have never been given the freedom to live outwardly as members of the LGBTQIA+ community to overcome their fear and internalized shame, and to describe their identities using a highly specialized vocabulary. Here, the Proposed Rule callously ignores the realities of the "coming out" process and dooms LGBTQIA+ persons living in fear of their lives to near certain failure.

Rule alterations discussed elsewhere—including the recategorization of "gender," "cultural stereotypes," and state inaction as largely irrelevant to asylum claims—also throw the claims of LGBTIA+ asylum seekers into peril. Furthermore, by greenlighting the dismissal of claims involving "personal or interpersonal animus," the Proposed Rule ignores the ways that communal and familial violence form a cruel but important dimension of anti-LGBTQIA+ persecution.[4]

Disturbingly, the Proposed Rule also requires LGBTQIA+ applicants to expose themselves to risk of violence, up to and including death, in order to prevail on their claims of persecution. Against the backdrop of countless attempted murders of LGBTQIA+ individuals each year, this

---

[2] *See, e.g.*, Jamie Wareham, Murdered, Hanged And Lynched: 331 Trans People Killed This Year, FORBES (Nov. 18, 2019); Andrew E. Kramer, Chechnya Renews Crackdown on Gay People, Rights Group Says, N.Y. TIMES (Jan. 14, 2019); Anastasia Moloney, *Gays in Ecuador Raped and Beaten in Rehab Clinics to "Cure" Them*, REUTERS (Feb. 8, 2018); Amnesty International, *No Safe Place: Salvadorans, Guatemalans, and Hondurans Seeking Asylum in Mexico Based on Their Sexual Orientation and/or Gender Identity (*2017); *Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report* (2016).

[3] *See* Section III.D., *infra*, for an extended discussion of legal decisions. *See also* United Nations General Assembly, *Report of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity*, 3-4 (July 17, 2019) (noting the ways that LGBQTIA+ people face physical and sexual violence, social isolation, and death threats); Advocates for Youth, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth in the Global South*, at 2 (2020) (noting that 72% of transgender individuals surveyed from one nation experienced disruptions to their education due to anti-LGBTQIA+ bias).

In many countries, HIV-positive people are also swept up in this virulent pattern of abuse because they are assumed to be LGBTQIA+ due to stigma and the perception that HIV is a "gay disease."

[4] *See, e.g.*, Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa* (2018); Human Rights Watch, *Not Safe at Home: Violence and Discrimination against LGBT People in Jamaica* (2014).

new requirement shocks the conscience and flies in the face of existing law. *See, e.g., Juan Antonio v. Barr*, 959 F.3d 778, 794 (6th Cir. 2020) (stating that "it cannot be that an applicant must wait until she is dead to show her government's inability to control her persecutor [under asylum laws]").

Because the Proposed Rule callously discriminates on the basis of sex by denying refuge to LGBTQIA+ people escaping violence and persecution, it must be withdrawn. *See Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020) (affirming that discrimination against LGBTQIA+ persons is an actionable form of sex discrimination).

2. The Proposed Rule Bars Asylum Claims Brought by Many Survivors of Gender-Based Violence

The Proposed Rule erects an equally-pernicious bar to asylum claims brought by survivors of gender-based violence—including those fleeing rape, intimate partner violence, human trafficking, forced marriage, female genital mutilation/cutting, and "honor" killings—whose governments cannot or will not protect them. The Proposed Rule effectuates this sea change to existing law by striking gender-based violence as a form of persecution based on social group membership, and reclassifying it as mere "interpersonal dispute" or "private criminal act" that is non-cognizable under asylum law. Not only does this blanket ban on claims show callous indifference to survivors, but it ignores the lived experiences of thousands of asylum seekers who experience gender-based violence as a daily form of state-sanctioned torture—including in countries where laws do not exist to protect them.[5]

C. The Proposed Rule Denies Protections to Countless Others Seeking Refuge Based on Their Membership in a Particular Social Group

The Proposed Rule is also improper because it upends three decades of precedent applying a uniform test to determine whether an individual can demonstrate a well-founded fear of persecution on account of "…membership in a *particular social group*." INA, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(42). The decades-old test, set forth in *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), asks whether the group to which an asylum seeker belongs share a common an immutable characteristic. Yet here, the Proposed Rule seeks to codify two additional requirements—social distinction and particularity—whose purpose and effect is to disqualify people fleeing anti-LGBTQIA+ bias and exclusion, gender-based violence, and gang-related violence from the entire scope of asylum protections.

The Proposed Rule further proposes a wide-ranging yet "nonexhaustive" list of characteristics that going forward will be deemed insufficient to establish membership in a particular social group—flouting decades of past precedent and agency practice. 85 Fed. Reg. 36279. These characteristics include past or present criminal activity or associations; past or present terrorist activity or association; past or present persecutory activity or association; presence in a country with generalized violence or a high crime rate; the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal

[5] *See, e.g.*, World Health Organization, *Violence Against Women* (Nov. 17, 2019); Paula Tavares & Quentin Wodon, *Ending Violence Against Women and Girls Global And Regional Trends In Women's Legal Protection Against Domestic Violence and Sexual Harassment* (2018).

activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; and status as an immigrant returning from the United States. *Id.*

The Departments' proposed list of groups that are per se not particular social groups unlawfully reads particular social group out of the statute and improperly conflates the asylum elements. The Departments cannot, by regulation, issue blanket orders indicating whole classes of people are not eligible for asylum and ordering the Board of Immigration Appeals ("BIA") and immigration judges not to exercise their discretion and judgment in a given case. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

Given the enduring strength of the *Acosta* test, and the specific harms the proposed redefinition will have on asylum seekers, the Proposed Rule is improper and should be withdrawn.

D. The Proposed Rule Strips Away Protections for Victims of Torture and Individuals Persecuted Based on Their "Political Opinion"

1. The Proposed Rule Explodes the Longstanding Definition of Persecution Based on "Political Opinion"

The Proposed Rule proposes to redefine "political opinion" as "an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof." 85 Fed. Reg. 36280. Your Agencies propose that the definition of political opinion be defined to almost categorically exclude those fleeing gang-related violence and other harms by non-state actors, such as intimate partners who commit violence that goes unpunished. To facilitate this end, the Rule proposes that asylum claims be denied whereever their basis relates to a political opinion "defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations…." *Id*. This redefinition is nothing more than a naked attempt to cripple the United States asylum system by shutting off asylum access for women, survivors of gender-based harm, and victims of gang violence.

Despite DHS/USCIS and DOJ/EOIR's assertion that denying refuge to asylum seekers along these lines is consistent with BIA precedent as well as guidance from the United Nations High Commissioner for Refugees ("UNHCR"), this contention is facially inaccurate. The definitions and instructions about political opinion persecution contained in the Proposed Rule directly conflict with the UNHCR's guidance and ignore the lived realities of political persecution. Non-state actors often have significant control over neighborhoods, state actors are often unable or unwilling to intervene, and the geopolitical landscape often renders distinctions between opposition to the state and views regarding culture meaningless. Therefore, the Proposed Rule changes the definition of political opinion in a manner that is arbitrary, capricious, and will cause irreparable and long-lasting harm to people facing persecution who are desperately seeking refuge.

2. The Proposed Rule Turns a Blind Eye to Torture Victims

The Proposed Rule turns its back on victims of torture by departing from the longstanding definitions contained in the Convention Against Torture (CAT) to limit the accountability of

foreign governments as to the torturous conduct inflicted either at the hand of government actors directly or by private individuals, acting with the government's acquiescence.

Specifically, the Rule seeks to eliminate accountability for torture inflicted by "rogue" government actors and curtail accountability for torture inflicted by private actors. Under the Proposed Rule, pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (i.e. under "color of law"). 85 Fed. Reg. 36287. Additionally, the Rule provides that only a government actor who is acting "under color of law" can acquiesce in torturous conduct by private actors.

Contrary to the Convention's definition of "acquiescence" which requires a finding of actual knowledge or willful blindness, the Proposed Rule also redefines "willful blindness" to require that the official be "aware of a high probability of activity constituting torture and deliberately avoided learning the truth." *Id*. This substantially heightens the standard people need to meet by declaring that evidence of reckless or negligent disregard is not enough.

E. The Proposed Rule Adopts Countless New Arbitrary Bars to Asylum that Make Bona Fide Asylum Seekers Deportable at Random

1. The Proposed Rule Adopts Pernicious New Exclusionary Factors

The Proposed Rule introduces a sweeping new set of exclusionary factors that are utterly unrelated to the merits of an individual asylum claim, but serve as a complete bar to a favorable determination. These factors would bar the claims of any individual who: 1) spent more than 14 days in any one country immediately prior to her arrival in the United States or en route to the United States; 2) transited through more than one country en route to the United States; 3) would otherwise be subject to one of the criminal conviction-based asylum bars at 8 C.F.R. § 208.13(c) but for the reversal, vacatur, expungement, or modification of the conviction or sentence; 4) accrued more than one year of unlawful presence prior to applying for asylum; 5) failed to timely file or request an extension of the time to file any required income tax returns, 6) failed to satisfy any outstanding tax obligations, or has failed to report income that would result in a tax liability; 7) has had two or more asylum applications denied for any reason; 8) has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application; 9) failed to attend an asylum interview, with limited exceptions; or 10) did not file a motion to reopen of a final order of removal based on changed country conditions within one year of those changes.

Not only do these new discretionary bars constitute a dramatic and unjustified departure from the INA statute, existing case law, and past agency practice, your Agencies have not proffered a reasoned explanation for your actions as required by law. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal*., 140 S. Ct. 1891 (2020) (failure to provide sufficient rationales renders agency action invalid under the Administrative Procedure Act).

2. The Proposed Rule Upends the Concept of "Firm Resettlement" and International Relocation and Transforms Them to a Sweeping Bar

The Proposed Rule also alters the "internal relocation" and "firm settlement" rule without a valid justification. First, the Proposed Rule perverts the internal relocation rule by turning it into

a nearly universal asylum bar for anyone fleeing non-state actors by presuming that relocation is reasonable for those fleeing persecutors who are not state or state-sponsored.[6] The Proposed Rule also excludes gangs, "rogue officials", family members, and neighbors from the category of government-sponsored persecutors and revises the list of factors for reasonableness determinations. The Proposed Rule further modifies the current regulations by requiring adjudicators to consider the asylum seeker's ability to flee to the United States to seek asylum when determining the asylum seeker's ability to relocate within his or her home country.

Not only do these actions lack a valid justification, but they flip the burdens of proof that apply under existing law. Under the current system, the burden rests on DHS to prove that an offer of permanent status exists. If DHS meets that burden, the asylum seeker can rebut the evidence by showing that they did not receive an offer of firm resettlement or did not qualify for the status. If the Immigration Judge concludes that the asylum seeker resettled, asylum seekers can appeal to two exceptions to ensure that bona fide applicants are not improperly barred from asylum. In contrast, the Proposed Rule both relieves DHS of its burden and strips asylum seekers of these two defenses, without justification. The Proposed Rule's attempt to bar asylum for anyone who "could have" applied for permanent or "nonpermanent" status makes the concept of firm resettlement utterly meaningless, and creates a sweeping asylum bar.

Next, the Proposed Rule dispenses with the existing firm settlement rule[7] by declaring that any transit through a country other than the United States can serve as a bar to asylum—regardless of whether the country was one where they would be safe from persecution or where permanent immigration status was available to them. The Proposed Rule also harms child immigrants by imputing their parents' so-called "firm resettlement" on them irrespective of their own facts and circumstances.

Not only are these changes confusing and inconsistent with binding precedent, the Proposed Rule serves to harm countless asylum seekers who have a well-founded fear of persecution in their home countries.

F. The Proposed Rule Unjustifiably Restricts the Ability of Asylum Seekers to Access a Hearing

The Proposed Rule also vastly expands the circumstances under which asylum seekers may be subject to summary or expedited removal before they have had the chance to present the merits of their asylum claim in court. Taken together, these restrictions transform the asylum application process into a terrifying quagmire even for individuals with the strongest asylum claims.

[6] The internal relocation rule as currently drafted asks adjudicators to determine whether "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country" and if so, whether "under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 208.13(b)(1)(i)(B) and (b)(2)(ii).

[7] Pursuant to the "firm settlement rule," it is well settled that asylum seekers who have resettled and received permanent immigration status in a country deemed to be safe are not eligible to receive asylum in the United States. 8 C.F.R. § 208.15 and § 1208.15.

1. The Proposed Rule Vastly Channels Asylum Seekers into Expedited Removal Proceedings and Limits their Eligibility for Immigration Relief

First, the Proposed Rule arbitrarily strips away the rights of individuals with bona fide fear of persecution from accessing anything beyond threadbare immigration relief by dramatically expanding the use of expedited removal proceedings.

Contrary to the existing statutory scheme, the Proposed Rule limits the forms of immigration relief that people who have affirmatively been deemed to have a credible fear of persecution are able to seek. The proposed rule funnels asylum seekers with bona fide claims into limited-scope "asylum-and-withholding-only proceedings," where they are prohibited from seeking any form of relief other than asylum, withholding of removal, and protection under the Convention Against Torture (CAT). 85 Fed. Reg. 36265.

This serves as a dramatic and substantial limitation on the ability of asylum seekers to seek meaningful immigration relief in court, as it makes available to them the subset of immigration protections that offer limited-scope relief, or impose a high bar, such as withholding of removal, which requires applicants to demonstrate a "clear probability" of persecution or torture. *Id.* at 36269.

The Proposed Rule also prevents asylum seekers who present at court from seeking other forms of immigration relief—such as Trafficking Victim Protection, U Visas, and green cards—to which they are otherwise entitled. There is no governmental interest that justifies denying asylum seekers additional pathways to safety, or requiring a wholly separate, subsequent court process. Rather, by bifurcating the immigration relief that asylees can receive, the Proposed Rule imposes tremendous costs on taxpayers, as it vastly expands the time and resources that will be needed to fully adjudicate their immigration claims. It also will needlessly add to the backlogs plaguing immigration courts across the country.

2. The Proposed Rule Paves the Way for Summary Dismissal of Asylum Claims

The Proposed Rule also allows Immigration Judges to "pretermit"—or summarily dismiss—an application for asylum, withholding of removal, or relief under the Convention Against Torture (CAT) upon finding that the asylum seeker failed to establish a *prima facie* claim for relief based solely on what is alleged in their short form asylum application—without the benefit of legal counsel or the opportunity to supplement with evidence or live testimony from the applicant or any witnesses.

Contrary to your contention that limiting the ability of asylum seekers to receive meaningful process extension is permissible because current regulations only require hearings to resolve disputed factual issues, the examples provided in the Proposed Rule itself demonstrate that asylum applications inherently involve mixed questions of fact and law that require credibility determinations and detailed fact finding only permissible in full-fledged asylum hearings.

Accordingly, the lack of an opportunity to present live testimony and witnesses to address these mixed questions of law and fact raises significant due process concerns and will almost certainly lead to deportations that violate the United States' international treaty obligations, which

prohibit individuals from being returned to countries where they will face harm on the basis of a protected ground.

G. The Proposed Rule Denies Confidentiality to Asylum Seekers in a Manner that is Harmful and Dangerous

The Proposed Rule also denies confidentiality protections to asylum seekers by authorizing the release of information contained in their asylum applications—including personal identifying information—to third parties without valid justification. As such, the Proposed Rule upends existing laws which deem information on an asylum application as protected from disclosure. 8 C.F.R. § 208.6; 8 C.F.R. § 1208.6.

The Proposed Rule's dismantling of confidentiality protections will have an especially pronounced effect on LGBTQIA+ asylum seekers, particularly since the careless release of information concerning an applicant's gender identity, sexual orientation, and HIV status can put LGBTQIA+ asylum seekers at grave risk of harm. Accordingly, the Rule will hinder many from seeking immigration relief they are otherwise entitled to out of fear, while also exposing them to violent reprisal.

III. The Proposed Rule Exceeds the Agencies' Authority and Is Contrary to Law Because It Conflicts with Federal Laws

The Proposed Rule is also improper because it conflicts with the Immigration Nationality Act and other duly-enacted federal statutes, regulations and principles of law.

A. The Proposed Rule is Contrary to the INA's Scheme for Adjudicating Asylum Claims

The Immigration and Nationality Act ("INA") and its implementing regulations set forth a variety of ways in which such individuals may seek protection in the United States. *See, e.g.*, 8 U.S.C. § 1157 (admission of refugees processed overseas); 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1231(b)(3) (restriction of removal to a country where individual's life or freedom would be threatened); 8 C.F.R. §§ 208.16-18 (protection under the Convention Against Torture). Specifically, the INA provides that any noncitizen "who is physically present in the United States or who arrives in the United States" has a statutory right to apply for asylum, irrespective of such individual's status. 8 U.S.C. § 1158(a)(1).

The INA also specifies processes that must be followed when individuals state their desire to seek asylum or express a fear of returning to their home country. *See* 8 U.S.C. § 1158(d)(1) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed [by individuals physically present in the United States or who arrive in the United States]."). Pertinent here, the INA requires that asylum seekers be (1) referred for a credible fear interview (*see* 8 U.S.C. § 1225(b)(1)); (2) issued a Notice to Appear ("NTA") so they can pursue asylum claims before an immigration judge prior to removal (*see* 8 U.S.C. §§ 1225(b)(2), 1229, 1229a); or (3) temporarily paroled into the United States where humanitarian reasons or a significant public benefit exists (see 8 U.S.C. § 1182(d)(5)(A). Other provisions of the INA make clear that immigration officers are legally bound to create a pathway for individuals to seek asylum. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(A)(ii): "[i]f an immigration officer determines that an alien . . . who *is arriving in* the United States . . . is inadmissible . . . and the alien indicates either an intention to

apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer" (emphasis added); (2) 8 U.S.C. § 1225(a)(3): "[a]ll aliens . . . who are *applicants for admission* or *otherwise seeking admission* . . . shall be inspected by immigration officers" (emphasis added); and (3) 8 U.S.C. § 1158(a)(1): "[a]ny alien who is physically present in the United States or who *arrives in* the United States . . . may apply for asylum" (emphasis added).

Independently and construed together, these provisions of the INA create an affirmative duty to process and adjudicate asylum claims. By inviting summary rejection of claims for asylum and summary deportation of people fleeing persecution, the Proposed Rule flies in the face of the INA's scheme. The U.S. government has even recognized that the duty to allow a noncitizen access to the asylum process is "not discretionary" under existing law. *See, e.g.*, Federal Defendant's Reply Brief in Support of Motion for Summary Judgment and Dismissal for Lack of Jurisdiction, cited in *Munyua v. United States*, No. C-03-04538 EDL, 2005 U.S. Dist. LEXIS 11499, at *16-19 (N.D. Cal. Jan. 10, 2005) ("[D]efendant acknowledges that [the immigration officers] did not have the discretion to ignore a clear expression of fear of return or to coerce an alien into withdrawing an application for admission").

By dismantling the statutory asylum scheme that Congress carefully enacted, DOJ/EOIR and DHS/USCIS exceed their authority and act in violation of federal law.

B. The Proposed Rule Abandons the Totality of Circumstances Test Long Established by Courts

The Proposed Rule also seeks to subvert decades worth of precedents including *Matter of Pula*, 19 I. & N. Dec. 467 (B.I.A. 1987), which hold that asylum determinations should be based on "the totality of the circumstances," by creating two categories of discretionary factors that serve to limit or preclude granting asylum to persons otherwise eligible based on their fear of persecution.

The Proposed Rule first lists three factors that, if present, adjudicators are required to consider as "significantly adverse" for purposes of the discretionary determination: 1) unauthorized entry or attempted unauthorized entry, unless "made in immediate flight from persecution or torture in a contiguous country"; 2) failure to seek asylum in a country through which the applicant transited, and 3) the use of fraudulent documents to enter the United States, unless the person arrived in the United States without transiting through another country. 85 Fed. Reg. 36283. This three-factor test quite simply sets asylum seekers up to be denied protection and deported back to harm because they were able to successfully navigate an escape route from persecution to the United States. Accordingly, the Proposed Rule flips precedents like *Matter of Pula* on their heads and contravenes the United States' own treaty-obligations by penalizing asylum seekers for their manner of entry.[8]

C. The Proposed Rule Substitutes the INA Standard for Frivolousness in a Manner that Denies Asylum Seekers Their Day in Court

The Proposed Rule also abandons the longstanding scheme for determining when asylum applications are frivolous–replacing the decade-old test set forth by the BIA in *Matter of Y-L-*, 24

[8] The United States' treaty violations are discussions in depth in Section VI, *infra*.

I. & N. Dec. 151 (B.I.A. 2007) with a set of vague and irrational standards.[9] For instance, the Proposed Rule dramatically lowers the bar for findings of frivolous applications and exposes asylum seekers to life and death summary denials, including in cases where the adjudicator simply determines the claim is without merit, while denying them the opportunity to explain any discrepancy or inconsistency in their submissions or arguments. The Proposed Rule also eviscerates the existing requirements that a fabrication be "deliberate" and "material" in a matter that is certain to sow confusion and lead to faulty adjudications.

D. The Proposed Rule Departs from Well-Settled Law on the Scope of Asylum Protections and the Convention Against Torture

Courts and the United States Citizenship and Immigration Services have long held that independent bases on which to establish membership in a particular social group include sexual orientation, gender identity, and HIV status. *See, e.g., Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (recognizing that transgender individuals are members of a particular social group); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (same for lesbians); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (same for "all alien homosexuals"); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (same for men imputed to be gay); *Matter of Toboso–Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (same for gay men); USCIS, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module, at 15-17 (noting that HIV may also be a PSG). The Proposed Rule, however, discards these understandings by stating, inter alia, that asylum claims based on "gender" are non-cognizable.

Likewise, federal circuit courts across the country have affirmed that the Convention Against Torture protects individuals who endure torture at the hands of so-called "rogue officials." *See, e.g., Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017); *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004); *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014); *Ramirez-Peyrov v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009); *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017). Therefore, the Agencies' attempt to disregard or rewrite the definition of torture contained in international treaty law is *ultra vires* and must fail.

IV. The Proposed Rule Violates the Administrative Procedure Act and Federal Law because it Imposes Costs on the American Public that DHS/USCIS and DOJ/EOIR Failed to Properly Consider

The Center for Constitutional Rights also objects to the Proposed Rule because DHS/USCIS and DOJ/EOIR failed to conduct a proper analysis of costs as mandated by federal law including the Administrative Procedure Act and various Executive Orders. *See, e.g.*, Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993). Exec. Order No. 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011). These rules collectively require agencies to adequately assess all the potential costs of a rule and adopt it only where it has been shown it will produce the least burden while maximizing the

[9] The BIA Test requires that a finding of frivolity be entered only if: 1) the applicant has received notice of the consequences of the finding; 2) the Judge has found the frivolity was knowing; 3) a material element of the claim was deliberately fabricated; and 4) the applicant has been given a sufficient opportunity to account for discrepancies or implausibilities in the claim.

benefits to society. *See* Exec. Order 12866 (requiring agencies to "assess *all* costs and benefits" and "select those approaches that maximize *net* benefits") (emphasis added).

The Supreme Court has repeatedly held that agencies "must examine the relevant data" in adopting a regulation, and emphasized that failing to "consider an important aspect of the problem" can render agency action arbitrary and capricious. *Motor Vehicles Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983). Yet, the Agencies fail to consider the cost in the form of loss of life for the countless victims of persecution that the Proposed Rule seeks to deny a legal remedy and return to harms' way. They also fail to account for costs to the public with respect to the talent, diversity, and innovation brought to us every day by asylees that we stand to lose from draconian asylum rollbacks. Accordingly, the Proposed Rule imposes repugnant social costs that DHS/USCIS and DOJ/EOIR failed to meaningfully consider in violation of their responsibilities under federal law.

V. The Proposed Rule Violates the United States Constitution and Customary International Law

A. The Proposed Rule Violates the Equal Protection Clause

The Proposed Rule also violates the Equal Protection Clause of the U.S. Constitution, which prohibits the federal government from denying people—including women, immigrants, and LGBTQIA+ persons—equal protection under the law. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954) (explaining that the guarantee of equal protection applies to the federal government Due Process Clause of the Fifth Amendment); *Plyler v. Doe*, 457 U.S. 202 (1982) (confirming that equal protection applies to immigrants regardless of their legal status); *Romer v. Evans*, 517 U.S. 620 (1996) (one of a series of cases confirming that LGBTQIA+ people enjoy protection under the Equal Protection Clause).

The Proposed Rule is improper because it is motivated by animus against LGBTQIA+ people and immigrants of color and will have a heavily disparate impact on non-white immigrants**.** The Proposed Rule is just the latest effort by the Trump Administration to institute hostile and repressive policies aimed at LGBTIA+ persons and non-white immigrants.

With respect to immigrants, these include virulent attacks on DACA recipients that were expressly rebuffed by the U.S. Supreme Court, the cynical Public Charge rule (depriving immigrants access to healthcare and public benefits in the middle of a pandemic); and complete stoppage of family and employment-based immigration based on false, inflammatory, and racist rhetoric. The changes the Administration has proposed and in many cases implemented represent not neutral policy choices, but rather a radical reimagining of the nation's immigration laws. The purpose and effect of this reimagining is to exclude from lawful status immigrants from predominately non-white countries and "Make America *White* Again—in violation of Constitutional and Congressional mandates.

Similarly, the Trump Administration has lashed out and targeted LGBTQIA+ community members in recent months by (unsuccessfully) petitioning the Supreme Court to strip LGBTQIA+ employees and job applicants of anti-discrimination protections, issuing a final rule purporting to legalize healthcare discrimination against LGBTQIA+ people in the middle of a global pandemic, and issuing a bevy of rules providing federal agencies and their grantees a license to discriminate against LGBTQIA+ people when it comes to the provision of tax-payer funded services.

Because the Proposed Rule was motivated, in whole or in part, by a discriminatory motive and/or a desire to harm non-white immigrants, racial and ethnic minorities, and LGBTQIA+ people, who make up the disproportionate number of asylum seekers in this country, and because these groups stand to be disproportionately harmed by this agency action, the Proposed Rule violates the equal protection guarantees of the U.S. Constitution and constitutes unlawful agency action.

B. The Proposed Rule Violates the Guarantees of the Due Process Clause of the U.S. Constitution

The Proposed Rule also violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution, which prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. Amend. V. Because Congress has granted asylum seekers a statutory right to apply for and adjudicate claims of asylum, the Due Process Clause mandates that the United States abide by its procedures and guarantee free and fair access to the asylum system without abridgement. *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(1)(B), 1225(b)(2); *see also* 8 C.F.R. § 235.3(b)(4) (collectively bestowing upon asylum seekers the right to be processed at a point of entry and granted meaningful access to the asylum process.). *See also United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 544 (1950) (immigrants seeking entry at the border receive due process when the procedures authorized by Congress are adhered to).

Additional due process concerns are posed by the Proposed Rule because as written it is unclear whether it operates only prospectively, or applies retroactively as well. In the event retroactive application is intended, hundreds of thousands of asylum applications already pending before adjudicators will be thrown in jeopardy.

By denying asylum seekers access to a clear and transparent process and their statutorily-mandated procedural rights, the Proposed Rule violates the Due Process Clause and will cause irreparable forms of harm. *See Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (citation omitted); *Abdi v. Duke*, 280 F. Supp. 3d 373, 404–06 (W.D.N.Y. 2017) (irreparable harm established where "full and fair process afforded to them under the law" was denied); *cf. Kirwa v. Dep't of Def.*, 285 F. Supp. 3d 21, 43 (D.D.C. 2007) (irreparable harm where government "block[s] access to an existing legal avenue for avoiding removal"); *Apotex, Inc. v. Food & Drug Admin.*, No. Civ.A 06-0627 JDB, 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006) (irreparable harm where government takes away "a statutory entitlement").

C. The Proposed Rule Violates International Law and the Jus Cogens Principle of Non-Refoulement

The Proposed Rule also violates U.S. treaty mandates and international law by subjecting asylum seekers to deportation contrary to the principle of "non-refoulement."

As set forth in treaty law, the principle of non-refoulement affirmatively prohibits the United States from returning individuals to countries where they fear persecution or torture. *See, e.g.*, Article 33 of the Convention on the Status of Refugees and its Protocol ("Refugee Treaty"), Article 13 of the International Covenant on Civil and Political Rights ("ICCPR"), and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100- 20, 1465 U.N.T.S. 85 ("Convention against Torture"). *See*

also the 1967 Protocol Relating to the Status of Refugees, to which the United States is a signatory, incorporating Articles 2-34 of the Refugee Treaty.

The duty of non-refoulement prohibits deportation and removal of individuals not only to a person's country of origin, "but also to any other place where a person has reason to fear threats to his or her life or freedom . . . or from where he or she risks being sent to such a risk." Refugee Treaty at 3 (citing UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977 ¶ 4). Accordingly, a state must not only prevent return to danger, it must take affirmative measures to prevent a risk of harm by "adopt[ing] a course that does not result in [asylum seekers] removal, directly or indirectly, to a place where their lives or freedom would be in danger." *Id.* at ¶ 8.

The principle of non-refoulement also applies to all persons without distinction, and is not subject to limitations based on national security concerns or the character of the individual seeking refuge from persecution. *See, e.g.*, Article 2(2), Convention Against Torture; Chahal v. United Kingdom, Application No. 22414/93 (Grand Chamber Eur. Ct. H. R. 1996) at ¶¶ 74, 79; Dadar v. Canada, U.N. Committee Against Torture, CAT/C/35/D/258/2004 (2005) at ¶ 8.8; HRC General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.1 (1994) at § 9; HRC General Comment 29, Article 4, Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11. at 1 ¶ 7 (2001); Saadi v. Italy, Application No. 37201/06 (Eur. Ct. H. R. 2008) at ¶¶ 138 and 141.

The principle of non-refoulement is "the cornerstone of international refugee protection," Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UNHCR (Jan. 26, 2007), and even compelled the original passage of the United States Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102 (1980). The duty of non-refoulement is also considered to be jus cogens, or customary international law "not subject to derogation" that imposes affirmative duties upon the United States without exception. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992); Refugee Treaty, Art. 33; Executive Committee Conclusion No. 79, General Conclusion on International Protection (1996).

Complying with the principle of non-refoulement requires the United States to maintain and ensure a fair and robust process of granting asylum to individuals in need. *See, e.g.*, Refugee Treaty, Art. 33 ¶ 8. By stripping away protections against deportation for countless individuals fleeing persecution in their home countries, the Proposed Rule flagrantly violates the U.S.'s treaty obligations and international law norms.

VI. The Proposed Rule Callously Places Asylum Seekers at Risk for Death or Serious Injury from COVID-19 by Broadening Detention

Finally, the Proposed Rule exposes asylum seekers to a grave and substantial risk of serious harm by needlessly making immigration detention mandatory for many despite the risks posed by the COVID-19 pandemic. The Departments' proposed changes to the expedited removal process would also have the consequence of eliminating entirely the ability of asylum seekers to seek release from detention on bond during their court proceedings. Particularly during the COVID-19 pandemic, being placed in detention centers and jails where social distancing is impossible can be tantamount to a death sentence.

CONCLUSION

Given these infirmities, the Center for Constitutional Rights respectfully asks DHS/USCIS and DOJ/EOIR to withdraw the Proposed Rule in its entirety to ensure that individuals fleeing persecution and seeking refuge in the United States are able to access a free and fair asylum process, consistent with domestic and international law.

If DHS/USCIS and DOJ/EOIR ultimately decide to propose a new rule that gives due consideration to the regulatory impacts, DHS/USCIS and DOJ/EOIR should ensure that the public receives **a new 60-day notice and comment period** to provide adequate time for feedback.

Respectfully submitted,

A. Chinyere Ezie
Senior Staff Attorney
Center for Constitutional Rights