Comments Submitted by American Gateways RE: Joint Notice of Proposed Rulemaking (NPRM) by the Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1125-AA94 / 1615-AC42 / EOIR Docket No. 18-0002/ A.G. Order No. 4714-2020 (published in the Federal Register on June 15, 2020).

American Gateways provides much needed legal representation for indigent immigrants in Central Texas. Our mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking through exceptional legal services at low or no cost, education, and advocacy. Our agency began in 1987 as the Political Asylum Project of Austin and was founded to provide legal representation to Central American immigrants fleeing persecution and seeking asylum in the U.S. Over the past thirty-three years, American Gateways has become an indispensable legal services provider for low-income asylum seekers and immigrants in Central Texas.

American Gateways opposes the joint notice of proposed rulemaking regarding Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (the "Proposed Rule"), published by the Department of Homeland Security (DHS) and Department of Justice (DOJ) (collectively, the "Departments") on June 15, 2020, and requests that the Departments promptly withdraw the Proposed Rule. American Gateways describes below how some of the proposed changes will impact our organization and our clients, and the reasons for our opposition. Omission of any proposed change from these comments should not be interpreted as tacit approval. American Gateways opposes all aspects of the Proposed Rule that would erode the due process rights of asylum seekers or otherwise impede—in any way—the ability of individuals who have suffered persecution to access humanitarian protection in the United States. At the same time, American Gateways expresses heightened concern regarding the disproportionate harms that will befall certain refugees if the Proposed Rule is not withdrawn. The Departments propose to implement a complex vetting scheme that will make it virtually impossible for any *pro se* applicant to obtain asylum (or lesser form of humanitarian protection). Moreover, given that only 30% of detained immigrants are represented by counsel, detention will, in most instances, guarantee rapid deportation. Where applicable, American Gateways highlights the particularly devastating impact the Proposed Rule would have on *pro se* applicants and other particularly vulnerable asylum seekers, including but not limited to women, LGBTQ persons, and children.

I. INTRODUCTION

As a signatory to the 1967 Protocol of the 1951 Convention Relating to the Status of Refugees (the "1967 Protocol"),[1] the United States has obligations under international law to afford protections

[1] The 1967 Protocol incorporates Articles 2 through 34 of the 1951 Refugee Convention, making those provisions binding on countries that have acceded to the 1967 Protocol, including countries like the United States that have not acceded to the Convention itself. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, https://www.refworld.org/docid/3ae6b3ae4.html (hereinafter the *1967 Protocol*); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, https://www.refworld.org/docid/3be01b964.html (hereinafter the *1951 Refugee Convention*).

to individuals who have a well-founded fear of being persecuted in their home country. Furthermore, when Congress passed the Refugee Act in 1980, thereby incorporating those obligations into domestic law, it made its intentions abundantly clear: The purpose was to enforce the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[2] The Proposed Rule, in its totality, contravenes this congressional intent. In an opening salvo, the Departments describe the "laws and policies surrounding asylum" as "an assertion of a government's right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm." 85 Fed. Reg. 36264, 36265 (proposed June 15, 2020). In purporting to protect the United States *from* asylum seekers, who are not-so-impliedly likened to "foreign encroachments and dangers," the Proposed Rule turns the presumption in favor of extending protections to asylum seekers on its head. *Id.* (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)).[3] The Departments' bald attempt to dismantle the asylum system is unlawful and indefensible.

II. GENERAL COMMENTS

A. The Proposed Rule, if made final, would violate the Administrative Procedure Act.

Under the Administrative Procedure Act (APA) (5 U.S.C. §§ 551-559), courts are authorized to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 5 U.S.C. § 706(2)(A)-(C). The Proposed Rule contravenes or is otherwise inconsistent with several provisions of the governing statute, infringes upon due process rights, is not the product of reasoned decision-making, and is otherwise arbitrary and capricious. The Proposed Rule, therefore, will be subject to judicial invalidation.

First, several provisions of the Proposed Rule exceed the Departments' statutory authority and are contrary to existing law.[4] For example, the Departments propose that an alien's unlawful entry or attempted unlawful entry into the United States shall be a "significant adverse discretionary factor" that a decision maker *must* consider in determining whether an individual merits a grant of asylum. 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13 (d)(1)(i)), 36302 (proposed 8 C.F.R. §

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[2] Refugee Act of 1980, § 101(a), Pub. L. No. 96–212, 94 Stat. 102 (1980) (hereinafter the *1980 Refugee Act*).

[3] The anti-immigrant sentiment animating the Proposed Rule is underscored by the Departments' reliance on case law that embodies the ideological and exclusionary provisions of the INA that pre-dated passage of the 1980 Refugee Act. *Kleindienst* involved a challenge to the denial of a non-immigrant visa to a Belgian socialist newspaper editor under section 212(a)(28) of the Immigration and Nationality Act of 1952—a repressive holdover of the McCarthy era that barred admission to those who advocated or published "the economic, international, and governmental doctrines of world communism." Moreover, the specific language quoted in the Proposed Rule traces back to The Chinese Exclusion Case and its progeny. *See Kleindienst*, 408 U.S. at 765 (citing *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889)).

[4] When a challenger asserts that agency action conflicts with the language of a statute, the reviewing court generally applies the *Chevron* framework, giving unambiguous statutes their full effect, but deferring to the "the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) (citing *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)). As discussed in these comments, no deference is due where agency judgments are unreasonable.

1208.13 (d)(1)(i)).[5] The Immigration and Nationality Act (INA), however, plainly states: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival. . .), irrespective of such alien's status, may apply for asylum . . . ." 8 U.S.C. § 1158(a)(1). Because the Proposed Rule *requires* decision makers to deem a method of entry explicitly authorized by Congress in 8 U.S.C. § 1158(a) to be significantly adverse to a grant of asylum, the Proposed Rule cannot be reconciled with the INA. As American Gateways further explains in its comments regarding specific provisions, *see infra* Part III, several other proposed changes are so onerous that they run afoul of existing law, thereby violating the APA.

Second, several provisions of the Proposed Rule are contrary to constitutional rights because they infringe upon the due process rights of asylum seekers. The Proposed Rule, for instance, would substantially interfere with asylum seekers' right to a full and fair hearing and so restrict access to the asylum process itself so as to render the entire process fundamentally unfair. Throughout its comments, American Gateways highlights some of the constitutional violations that would flow from the Proposed Rule.

Third, the Proposed Rule, as well as the separate provisions thereof, is arbitrary and capricious. The arbitrary-and-capricious standard requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). When reviewing an agency's proffered explanation, courts "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). Further, courts require that an agency provide the "essential facts upon which the administrative decision was based," *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)), and explain the justification for its determinations with actual evidence beyond a "conclusory statement," *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993). In general, an agency decision is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. In other words, agency actions are subject to invalidation where an agency fails to adequately explain its decision, fails to consider relevant factors, including the policy effects of its decisions,

[5] To the extent the proposed changes to 8 C.F.R. Part 208 and 8 C.F.R. Part 1208 are identical across multiple provisions, objections citing to 8 C.F.R. Part 208 apply equally to 8 C.F.R. Part 1208. Where applicable and not otherwise indicated, a citation of a proposed provision of 8 C.F.R. Part 208 incorporates a citation of the parallel provision of 8 C.F.R. Part 1208. Similarly, where the Departments propose to modify or "clarify" a statutory term or scheme that affects multiple provisions, any objection to the proposed change applies equally to all such provisions.

fails to adequately explain illogical actions, or reaches a conclusion that contradicts the underlying record. What counts as "relevant" is context specific, but the U.S. Supreme Court has previously instructed that agency decision-making on immigration matters "must use an approach that is tied to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang v. Holder*, 565 U.S. 42, 132 S. Ct. 476, 478 (2011).

Here, the Departments propose a rule that is so plainly contrary to the "purposes of the immigration laws" and "the appropriate operation of the immigration system," that it is necessarily arbitrary and capricious. Furthermore, the Departments claim that the Proposed Rule is designed to promote efficiency and consistency in decision-making, root out fraud, and redirect resources to the adjudication of meritorious asylum claims. The Departments do not sufficiently explain how any of the proposed changes—which will largely vet out *meritorious* claims and *harm* refugees without resulting in any greater efficiency—support these stated purposes (which are, at best, conclusory). Moreover, the Departments entirely fail to consider several important aspects of the problems they claim to address, and they do not balance concerns of adjudicatory efficiency and deterrence against the rights of individuals seeking humanitarian protection or the country's international obligations to afford such protection. For example, the Departments propose a new procedural rule whereby immigration judges may deny applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT) without a hearing. *See* 85 Fed. Reg. 36264, 36302 (proposed 8 C.F.R. § 1208.13(e)). Although the Departments loosely suggest that this procedure would be both desirable and necessary in order to more effectively screen out unmeritorious (*i.e.*, frivolous) claims and alleviate burdens on immigration court dockets, they do not actually pinpoint any interests that would be furthered by denying asylum applicants the right to a hearing. Even assuming that pretermission would enhance efficiency (which it will not), the Departments also completely fail to consider that allowing the summary denial of asylum applications will result in the deportation of thousands of refugees entitled to protection under domestic and international law. The Departments also assert that "allowing the pretermission of legally deficient asylum applications is consistent with current practice, applicable law, and due process," 85 Fed. Reg. 36264, 36277, but they make no attempt to explain how the proposed process comports with fundamental notions of fairness or the constitutional and statutory right to a hearing. The Departments also fail to adequately evaluate the impacts of this provision on *pro se* applicants, detained applicants, and other particularly vulnerable groups, such as unaccompanied minors. Similarly, the Departments propose an expansive definition of "frivolous" that encompasses applications "filed without regard to the merits of the claim" or "clearly foreclosed by applicable law." *Id.* at 36295 (proposed 8 C.F.R. § 208.20(c)(3),(4)), 36304 (proposed 8 C.F.R. § 1208.20(c)(3),(4)). Without referencing any data that would shed light on the scope of just how many frivolous applications are filed or the amount of resources allegedly "wasted" on their adjudication, *id.* at 36273, the Departments propose to penalize asylum seekers for their lack of familiarity with U.S. immigration law. There is no basis in U.S. tradition or law for imposing such harsh sanctions absent evidence of knowingly fraudulent conduct. The Departments offer no explanation for this change in policy, no explanation for how the policy will conserve resources, and no assessment of its devastating implications, particularly for asylum seekers who could be rendered permanently ineligible for any benefits under the INA simply because they cannot afford to retain an attorney to help them articulate their claim.

The foregoing are but a few examples of proposed changes that are arbitrary and capricious and, therefore, violate the APA. In its comments regarding specific provisions (*see* Part III herein), American Gateways identifies several other proposed changes that violate the APA because the Departments have failed to articulate and assess all relevant factors, have relied on factors that Congress did not intend for them to consider, have failed to consider the implications of the changes on individuals seeking humanitarian protection, have offered irrational explanations that are unsupported by any facts and would, as applied, lead to absurd results, or have offered no explanation whatsoever for their actions. The violations are so numerous that American Gateways incorporates by reference its comments in Part III rather than restating them in full here.

B. The Proposed Rule would not be due any deference under *Chevron*.

Invoking *Chevron* and *Brand X*, the Departments readily acknowledge that the Proposed Rule runs contrary to several decades of case law interpreting the 1980 Refugee Act. *See* 85 Fed. Reg. 36264, 36265 n.1. The Departments seem to have lost sight of both judicial primacy in statutory construction and the fact that the agency construction of a statute is not due any deference unless it is "a *reasonable policy choice* for the agency to make." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (emphasis added) (quoting *Chevron*, 467 U.S. at 845). Moreover, the Departments ignore that they do not have unfettered discretion to interpret purportedly ambiguous statutory terms in a manner that does not comport with the 1967 Protocol, to which the United States has been bound since 1968 and which motivated Congress's enactment of the 1980 Refugee Act. Several portions of the Proposed Rule run afoul of the INA's plain terms; other portions offer unsupportable formulations of statutory terms that cannot be squared with international treaty obligations; and no portion of the Proposed Rule reflects reasoned decision-making based on an adequate evaluation of the rule's impact on asylum seekers and others fleeing persecution and torture in their home countries. It thus follows that the Proposed Rule is not entitled to any deference.

The current administration's antipathy for the asylum and refugee system is no secret. By way of example, former attorney general Jeff Sessions described the asylum system as "subject to rampant abuse and fraud"—a system being "gamed" by "dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process."[6] The President has openly advocated to "bring [refugees] back from where they came" "with no Judges, or Court cases."[7] Echoing these very sentiments, the Departments' fervent assertion of their own authority to disregard and supersede prior judicial constructions of the INA—without any regard to congressional intent—calls into question whether the *Chevron* framework should even apply to regulations promulgated by executive agencies so deeply invested in immigration enforcement (which has become largely synonymous with detention and deportation).

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[6] Attorney General Jeff Sessions, Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

[7] Alana Abramson, *President Trump Calls for Immediate Deportation of Undocumented Immigrations with 'No Judges or Court Cases,'* N.Y Times (June 24, 2018), https://time.com/5320551/trump-immediate-deportation-no-court-hearing/ (quoting Donald Trump (@realDonaldTrump), Twitter (June 24, 2018, 10:02 AM)).

Indeed, the Proposed Rule is so obviously contrary to fundamental constitutional rights (*e.g.*, due process), statutory rights (*e.g.*, the right to apply for asylum regardless of unauthorized entry), and international treaty obligations (*e.g.*, non-refoulement) that it should not be afforded any presumption of deference. It is well-settled that courts may refuse to defer to agency interpretations of statutes that raise serious constitutional concerns. *See, e.g.*, *Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (a court will not defer to agency interpretations that raise "grave constitutional doubts"). Moreover, in applying *Chevron*, the U.S. Supreme Court has repeatedly expressed separation of powers concerns and interrogated whether Congress actually intended to delegate unfettered authority over particular issues to particular agencies. *See, e.g.*, *Guitierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); *id.* at 2120 (warning that the lower court's lackadaisical review in *Pereira* "suggests an abdication of the Judiciary's proper role in interpreting federal statutes"). The Court's growing skepticism regarding the application of *Chevron* deference in the first instance is particularly warranted here because INA provisions relating to refugees and asylum seekers incorporate the nation's *non-negotiable* obligations as a signatory to the 1967 Protocol. Furthermore, even if *Chevron* were to be applied, the Proposed Rule is so arbitrary, capricious, and/or manifestly inconsistent with the INA that it will be due no deference. *See, e.g.*, *Grace v. Whitaker*, 344 F. Supp. 3d 96, 125 (D.D.C. 2018) ("[E]ven though arbitrary and capricious review is fundamentally deferential—especially with respect to matters relating to an agency's areas of technical expertise—no deference is owed to an agency action that is based on an agency's purported expertise where the agency's explanation for its action lacks any coherence.") (citation omitted), *appeal docketed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019). Rather than hang their hat on *Chevron* deference, the Departments should abandon their impudent and unprecedented attempt to construe—and in several instances rewrite—the Refugee Act in open defiance of asylum seekers' fundamental rights to humanitarian protection.

C. The Proposed Rule is an attempted "end run" around existing injunctions and would improperly interfere with pending litigation.

The Proposed Rule implicates several issues that are subject to pending litigation, including some policies that are currently enjoined. The Departments' attempt to circumvent their court losses constitutes a flagrant abuse of the rule-making process. Furthermore, it would be imprudent to implement rules that would codify, and in several instances expand, unlawful practices already subject to judicial challenge. American Gateways describes below just a few provisions of the Proposed Rule that relate to pending litigation. Other legal challenges to policies implicated by the Proposed Rule are noted throughout these comments.

1. Transit bans

The Proposed Rule contains three separate third-country "transit bans":

(1) proposed 8 C.F.R. § 208.13(d)(2)(i)(A) provides that, absent extraordinary circumstances, asylum shall be denied to an individual who spends more than fourteen days in any one country that is a party to the 1951 Refugee Convention, 1967 Protocol, and Convention Against Torture en route to the United States unless he applied for protection from persecution or torture in such country and was denied protection or satisfies the definition of "victim of a severe form of trafficking in persons," 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)(A)), 36302 (proposed 8 C.F.R. § 1208.13(d)(2)(i)(A));

(2) proposed 8 C.F.R. § 208.13(d)(2)(i)(B) provides that, absent extraordinary circumstances, asylum shall be denied to an individual who transits through more than one country between his home country and the United States unless he applied for protection from persecution or torture in at least one of those countries and was denied protection, satisfies the definition of "victim of a severe form of trafficking in persons," or all countries through which he transited were not parties to the 1951 Refugee Convention, 1967 Protocol, and Convention Against Torture, *id.* at 36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)(B)), 36302 (proposed 8 C.F.R. § 1208.13(d)(2)(i)(B)); and

(3) proposed 8 C.F.R. § 208.15(a)(1) provides that an individual is subject to the firm resettlement bar to asylum if he "either resided or could have resided in any permanent . . . [] or non-permanent, potentially indefinitely renewable legal immigration status . . . in a country through which [he] transited prior to arriving in or entering the United States, regardless of whether [he] applied for or was offered such status," *id.* at 36294 (proposed 8 C.F.R. § 208.15(a)(1)), 36303 (proposed 8 C.F.R. § 1208.15(a)(1)).

The Proposed Rule also designates third-country transit a "significant adverse discretionary factor" for purposes of determining whether asylum should be granted. *See* 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(1)(ii)), 36301 (proposed 8 C.F.R. § 1208.13(d)(1)(ii)). There is no basis in domestic or international law for bans (or lesser restrictions) based on third-country transit. Instead, the law has invariably provided that individuals fleeing persecution *qualify* for protection unless the evidence shows that they have firmly resettled in a third country.

The administration has tried and failed to implement a strikingly similar asylum transit ban. On July 16, 2019, the administration published a joint interim final rule, without notice and comment, that categorically denied asylum to migrants arriving at the U.S.-Mexico border unless they have applied for and been denied asylum in Mexico or another country through which they transited.[8] Nonprofit organizations that represent asylum seekers immediately brought suit in two separate cases: (1) *Capital Area Immigrants' Rights Coalition v. Trump* and (2) *East Bay Sanctuary Covenant v. Barr*. In both cases, federal courts have strongly admonished the administration. On July 1, 2020, a federal district court for the District of Columbia vacated the rule because the administration "unlawfully dispensed" with the APA's notice-and-comment procedure, issuing the "Rule 'without observance of procedure required by law.'" *See Capital Area Immigrants' Rights*

[8] *See* Asylum Eligibility and Procedural Modifications, Interim Final Rule, 84 Fed. Reg. 33829 (July 16, 2019).

Coal. v. Trump, No. CV 19-2117 (TJK), 2020 WL 3542481, at *21 (D.D.C. June 30, 2020) (quoting 5 U.S.C. § 706). Then, on July 6, 2020, a panel of the Ninth Circuit affirmed a lower court injunction, holding that the rule is unlawful under the APA for several substantive reasons. *See E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2020 WL 3637585, at *11 (9th Cir. July 6, 2020). First, the court concluded that the rule is inconsistent with 8 U.S.C. § 1158 because it fails to ensure that a third country is a safe option, explaining that (1) the requirement that a transit country be a signatory to the Refugee Convention and the 1967 Protocol does not provide sufficient protection; (2) the rule lacks requirements of the safe-third-country bar that there be a formal agreement between the United States and a third country, as well as a "full and fair" procedure for applying for asylum in that country; and (3) persons subject to the rule cannot conceivably be regarded as firmly resettled in Mexico. *Id.* at *11 (quoting 8 U.S.C. § 1158(a)(2)(A)). Second, the court concluded that the rule is also arbitrary and capricious because (1) the record of evidence contradicted that migrants have safe options in Mexico; (2) the government did not justify the rule's assumption that a person who has failed to apply for asylum in a third country does not have a meritorious asylum claim; and (3) the government did not adequately consider the effect of the rule on unaccompanied minors. *Id.* at *13.

In light of Ninth Circuit's ruling in *East Bay Sanctuary Covenant*, the Departments should abandon their efforts to implement a third-country transit ban or otherwise mandate consideration of third-country transit as categorically "adverse" factors in all cases. The Departments' attempt to (a) further expand an illegal and currently enjoined policy that is the subject of pending litigation and (b) prospectively insulate the administration's loss by crafting a less stringent version of the very same rule without adequate justification constitutes a blatant misuse of the rule-making process.

2. Credible fear screenings

The Proposed Rule seeks to implement several changes that would empower asylum officers to take on a more robust role in executing the administration's insidious immigration agenda. For example, at the credible fear stage, asylum officers would take into consideration bars to asylum and the viability of internal relocation and, unless individuals who are deemed to be ineligible for asylum can meet a higher "reasonable possibility" screening standard and thereby establish their eligibility for statutory withholding of removal or protection under the Convention Against Torture, asylum officers must enter a negative credible fear finding. The Departments insist that expanding the role of asylum officers in credible fear determinations is appropriate because of the officers' training and experience. The prospect of asylum officers making fact-intensive determinations regarding asylum eligibility at the credible fear stage is itself concerning. Credible fear interviews are rarely conducted in person. More often than not, they are conducted via telephone with an interpreter who calls in on another line. In many instances, the interviews are not conducted in confidential areas such that other individuals can see the applicant and hear the statements that she makes, which furthers adds to the stress an individual experiences presenting her claim of fear. Even more troubling is the Departments' complete silence regarding the role of United States Customs and Border Protection (CBP) officers and agents to whom the United States Citizenship and Immigration Services (USCIS) has delegated some of its credible fear screening duties. This silence must be addressed.

The INA provides that if an individual subject to expedited removal indicates a fear of returning to her home country or an intention to apply for asylum, the immigration officer *must* refer the individual for an interview with an asylum officer. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B); 8 C.F.R. § 235.3(b)(4). Asylum officers also screen for eligibility for statutory withholding of removal and withholding and deferral of removal under the CAT regulations. *See* 8 C.F.R. §§ 208.30(e)(2)-(e)(3). Asylum officers who conduct credible fear interviews are required by statute to complete "professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators" of asylum applications. 8 U.S.C. § 1225(b)(1)(E).

Notwithstanding that Congress delegated the credible fear screening function to USCIS, USCIS has entered into a Memorandum of Understanding (MOU) with CBP that allows CBP agents and officers rather than trained USCIS asylum officers to conduct credible fear interviews and make credible fear determinations.[9] Trained purely in law enforcement, CBP personnel lack sufficient knowledge of asylum laws and country conditions, as well as basic competency to interview asylum seekers and make fear determinations.[10] CBP agents and officers are also categorically ill-suited to conduct non-adversarial interviews because their law enforcement function places them in an adversarial role to the individuals they police and detain.

On October 29, 2019, immigrant advocacy groups filed a Freedom of Information Act lawsuit seeking to compel the government to release records regarding the practice of allowing CBP officers to handle credible fear screenings. *See American Immigration Council v. U.S. Customs and Border Protection, et al.*, No. 1:19-cv-02965 (D.D.C. filed Oct. 2, 2019). On March 27, 2020, several immigrant families filed suit challenging the MOU on statutory and constitutional grounds and requesting preliminary injunctive relief. *See A.B.-B. v. Morgan*, No. 1:20-cv-00846-RJL (D.D.C. filed Mar. 27, 2020). In light of these pending legal challenges, the administration should withdraw all provisions of the Proposed Rule concerning the role of asylum officers in making credible fear determinations.

3. Standards for adjudicating claims

The Proposed Rule contains several new standards for consideration during review of an application for asylum or statutory withholding of removal. Among those new standards is a non-exhaustive list of several bases that would "generally be insufficient to establish a particular social group." 85 Fed. Reg. 36264, 36279. Also among those standards is a non-exhaustive list of circumstances that would generally not suffice to satisfy the "nexus" requirement. *Id.* at 36281-82. This proposed categorical approach to the adjudication of claims for asylum and withholding of removal—an approach that would largely eliminate entire classes

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[9] *See, e.g.*, Office of U.S. Senator Jeff Merkley, *Shattered Refuge: A U.S. Senate Investigation into the Trump Administration's Gutting of Asylum* (Nov. 2019), https://www.aila.org/File/Related/19032731b.pdf. Despite the MOU, CBP's website continues to state that "[a]ll claims of credible fear are referred to Asylum Officers of [USCIS]" and "CBP Agents and Officers do not make any determination on the validity of such claims." U.S. Customs and Border Protection, *Claims of Fear*, https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear (last visited July 15, 2020).

[10] *See, e.g.*, Julie Veroff, *Asylum Officers are being Replaced by CBP Agents*, ACLU (May 6, 2019), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/asylum-officers-are-being-replaced-cbp-agents;

of claims—is not only contrary to current practice but flies in the face of the district court's ruling in *Grace v. Whitaker*, 344 F. Supp. 3d 96, 125 (D.D.C. 2018). As it concerns the credible fear stage, the court in *Grace* squarely held that "a general rule 'that effectively bars [asylum] claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress' intent to bring 'United States refugee law into conformance with the [1967 Protocol].'" *Id.* at 126. Disregarding the well-established principle that asylum and withholding claims must be adjudicated on a case-by-case basis, the Departments propose to side-step *Grace* by simply shifting the categorical vetting process from the credible fear stage to the application stage. The administration's appeal of the *Grace* decision,[11] however improvident—not the informal rule-making process—is the vehicle through which the administration should challenge its loss. Given the pendency of the administration's appeal, the Departments should withdraw all provisions of the Proposed Rule that would incentivize or require decision makers to deny claims based on certain identified (yet ill-defined) factors like "interpersonal animus" or "gender."

D. If the Proposed Rule is not withdrawn, it should not have any retroactive applicability.

The Proposed Rule is (almost[12]) wholly silent on the issue of retroactive applicability. If the Proposed Rule becomes final and effective, it should not apply to anyone whose latest entry into the United States was prior to the effective date(s).[13] Alternatively, any final rule should specifically identify the individuals and claims to which the Proposed Rule, and any provisions thereof, would apply.

Section 551 of the APA sets forth clear standards for rulemaking. According to subsection 5, "'rule making' means agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5), which is what the Departments seek to do. Subsection 4, however, requires that any such rulemaking have a future effect. The APA defines a "rule" to mean "the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (emphasis added). "The only plausible reading of the italicized phrase is that rules have legal consequences only for the future." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988). This meaning is bolstered by the remainder of the definition, which goes on to say that a rule "includes the approval or prescription *for the future* of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or

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11 *Grace, et al. v. William Barr, et al.*, Case No. 19-5013, (D.C. Cir., appeal docketed Jan. 30, 2019).

12 American Gateways staunchly opposes the proposed changes to 8 C.F.R. §§ 208.20 and 1208.20 regarding frivolous asylum applications but nevertheless agrees that, if any such changes become effective, they should be applied only prospectively.

13 This includes individuals who were returned to Mexico under the Migrant Protection Protocols (MPP) before the effective date but enter the U.S. for their hearing(s) after the effective date. *See* U.S. Immigration and Customs Enforcement, Memorandum for Field Office Directors, Enforcement and Removal Operations RE: Migrant Protection Protocols Guidance (Feb. 12, 2019), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf ("Aliens returned to Mexico under the MPP pursuant to section 235(b)(2)(C) of the INA will be required to report to a designated POE on their scheduled hearing dates and will be paroled into the United States by CBP for purposes of their hearings.").

accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4) (emphasis added). Indeed, the government's own authority on interpretation of the APA—the *Attorney General's Manual on the Administrative Procedure Act*[14] (a guide given great weight by courts and used by agencies in adjusting their procedures to the requirements of the APA)—notes that "'rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect*, implementing or prescribing future law."[15]

Simply put, "[r]etroactivity is not favored in the law." *Bowen*, 488 U.S. at 208. "Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.*; *see also Criger v. Becton*, 902 F.2d 1348, 1353 (8th Cir. 1990) ("[L]aws are to have prospective effect only, unless the law-making entity has indicated otherwise."). Retroactivity is disfavored because the due process clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); *Hem v. Maurer*, 458 F.3d 1185, 1190 (10th Cir. 2006). "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292 (1993) (citing *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) ("[T]his Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.")). "[A]liens who have once passed through our gates, *even illegally*, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *F.L.B. v. Lynch*, 180 F. Supp. 3d 811, 819 (W.D. Wash. 2016) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

Retroactivity will necessarily infringe upon due process rights if the Proposed Rule, or any provision thereof, is applied to claims of asylum seekers whose latest entry into the United States was before the effective date(s) of the proposed changes. The Supreme Court has repeatedly warned against retroactive legislation, because it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If the result of legislation "attaches new legal consequences to events completed before its enactment[,]" courts should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 269-70. This same principle must be followed here.

Consistent with due process concerns, the Departments should specify that *the Proposed Rule does not have any retroactive effect*. Applying the Proposed Rule to pending claims would jeopardize the safety and security of more than 800,000 people, whose cases would be thrown into a state of uncertainty.[16] Such uncertainty will, without doubt, increase the burden on

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14 Tom C. Clark, U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (photo. reprint 1973) (1947), https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947.

15 *Id.* at 13.

16 At the end of September 2019, there were 339,836 affirmative asylum applications pending with USCIS. USCIS, *Asylum Office Workload* (Sept. 2019), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PEDAffir

immigration officials as applicants and their representatives attempt to reconcile the effects of the new rules on their own cases. Moreover, applying the Proposed Rule to those who last entered the United States prior to the effective date(s) would undermine reliance interests and add to the uncertainty while the inevitable litigation pends. At the very least, the Departments should specify to whom each of the new provisions would apply so that all individuals who might be impacted by the Proposed Rule are on notice of the Departments' intentions and can, as appropriate, challenge any attempt at retroactive application.

III. COMMENTS REGARDING SPECIFIC PROVISIONS

A. Expedited Removal and Credible Fear Screenings

1. Placing individuals with a positive credible fear determination into asylum-and-withholding-only proceedings rather than Section 240 proceedings is contrary to congressional intent and robs applicants of the opportunity to assert all avenues of relief to which they might be entitled.

As an initial matter, the Departments' proposal to place individuals in asylum-and-withholding-only proceedings is contrary to the documented congressional intent to place individuals who have established a credible fear of persecution into full Section 240 proceedings. The legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) reflects an unambiguous intent on the part of Congress to conduct full Section 240 proceedings where there has been a positive credible fear finding.[17] In proposing that individuals with a credible fear of persecution instead be funneled into asylum-and-withholding-only proceedings, the rule openly flouts congressional intent. In an apparent effort to demonstrate that they considered Congress's clearly expressed intent, the Departments acknowledge the House Conference Report in their prefatory remarks but quickly dismiss it as irrelevant, asserting that "the statute certainly does not compel the current policy." 85 Fed. Reg. 36264, 36267 n.9. The Departments' irrational suggestion that they can act with boundless authority—in direct contravention of expressed congressional intent—so long as Congress did not codify its intentions in a statute simply underscores that the Departments' proposal is arbitrary and capricious.

Nothing in Section 235 of the INA limits an individual with a positive credible fear determination to asylum-and-withholding-only claims. *See generally* 8 U.S.C. § 1225. Section 235 states that "an alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this chapter an applicant for admission." *Id.* § 1225 (a)(1). An immigration officer must, if an applicant for admission indicates an intention to apply for asylum or a fear of persecution, refer the applicant for an interview by an asylum officer. *Id.* § 1225(b)(1)(A)(ii). An asylum officer determines whether there is a credible fear of persecution, and if so, an applicant is detained for "further consideration of the application for asylum." *Id.*

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mativeAsylumStatisticsFY2019.pdf. As of October 11, 2019, there were more than 476,000 asylum cases pending before immigration courts. *See* Andrew R. Arthur, *Statistics Reveal the Scope of the Asylum Backlog*, Center for Immigration Studies (Nov. 25, 2019), https://cis.org/Arthur/Statistics-Reveal-Scope-Asylum-Backlog.

[17] *See* H.R. Rep. No. 104-828, at 209 (1996) ("If the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum *under normal non-expedited removal proceedings.*") (emphasis added).

§ 1225 (b)(1)(B)(ii). Nothing in this procedure bars an applicant from later asserting other grounds for admission into the United States. Further, nothing in the procedure, or the INA for that matter, indicates that asserting a claim to asylum or credible fear of persecution is an absolute bar to other claims for admission under U.S. immigration laws. By contrary, the Proposed Rule robs respondents of the opportunity to assert other grounds for relief. This restriction is designed to unfairly limit the availability of immigration relief and is contrary to the purpose of existing immigration laws. If Congress had intended for an applicant's indication of an intention to apply for asylum or a fear of persecution to restrict his ability to seek other forms of relief, it was perfectly well suited to draft its legislation in such a manner.[18] It did not.

Limiting the opportunity to apply for other forms of relief before an immigration judge has real-world impact upon the clients that American Gateways serves. For example, American Gateways represented P.M.O. who entered the United States with a visa and subsequently affirmatively applied for asylum. Her case was referred to an immigration judge, but the court backlogs meant that her case remained pending for a number of years without a hearing. During this time, P.M.O. met a U.S. citizen, got married, and had a child. P.M.O. was able to adjust her status, in front of the immigration judge, to that of Lawful Permanent Resident based upon her marriage to her U.S. citizen spouse. This would not have been possible had P.M.O. been placed into asylum-and-withholding-only proceedings. Foreclosing the ability of asylum applicants to apply for other forms of relief for which they are eligible is neither supported by the law, nor in line with its purpose.

Finally, although the Proposed Rule does not wholly foreclose an applicant from seeking alternative forms of relief with USCIS, it will nonetheless further tie the hands of immigration judges with respect to granting continuances or administratively closing or terminating proceedings—tools that have (until recently) afforded judges the flexibility to pause or terminate proceedings where an applicant is pursuing relief through alternate channels.[19] Consider the case of B.Z., a transgender asylum seeker and victim of human trafficking who filed an application for asylum and represented herself *pro se* while detained. A native Spanish speaker, she relied on an abusive former partner of limited English proficiency to assist with the preparation of her I-589. Her asylum claim was denied on credibility grounds. She filed a *pro se* appeal, and the Board of Immigration Appeals (BIA) reversed and remanded. While her appeal was pending, she was released on bond and filed an application for a Trafficking Visa (T-Visa) with the assistance of pro bono counsel. The immigration judge continued the removal proceedings so that USCIS could adjudicate her T-Visa application. Upon issuance of the T-Visa, and with the agreement of the Office of Chief Counsel, the immigration judge terminated the removal proceedings for good cause shown. If B.Z. had, instead, been placed in "streamlined" asylum-and-withholding-only proceedings pursuant to the Departments' new proposal, it is unlikely an immigration judge would

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[18] Certain classes of individuals are, by statute, not entitled to full Section 240 proceedings. *See* 8 C.F.R. § 208.2(c)(1)(i)-(viii). Had Congress wished to include individuals who receive a positive credible fear finding among the classes of individuals not entitled to full Section 240 proceedings it could have done so itself.

[19] As more fully discussed in Part III.D.2.a, the current administration has been engaged in a sustained campaign to eviscerate the independence of immigration judges. *See infra* at 55-57. The proposed asylum-and-withholding-only proceedings are objectionable not only because of their negative impact on asylum applicants, but also their deleterious impact on immigration judges (who will most certainly be expected to meet higher annual case quotas to keep their jobs if the Proposed Rule becomes effective).

have structured the proceedings so that B.Z. could pursue a T-Visa—relief that Congress specifically created for victims of severe forms of human trafficking like B.Z.

2. Requiring the consideration of certain precedent when making credible-fear determinations is contrary to established law and congressional intent.

In creating the expedited removal process, Congress understood the risk that individuals who are potentially eligible for asylum could be sent "to their respective home countries where they face a real threat, or have a credible fear of persecution." *Grace*, 344 F. Supp. 3d at 107. In acknowledgement of that risk, "Congress intended the credible fear determinations to be governed by a low screening standard." *Id.* (citing 142 Cong. Rec. S11491-02 ("The credible fear standard . . . is intended to be a low screening standard for admission into the usual full asylum process.")). "A credible fear is defined as a "'significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility of asylum.'" *Id.* (citing 8 U.S.C. § 1225(b)(1)(B)(v)). As the *Grace* court found, "the statute does not speak to which law should be applied during credible fear interviews" and as such, it is more consistent with the low screening standard to "afford [the applicant] the benefit of the circuit law most favorable to his or her claim because there is a possibility that the eventual asylum hearing could take place in that circuit." *Id.* at 139.

The Proposed Rule attempts to shoehorn an already-failed approach into established U.S. immigration law by stating that, when reviewing negative fear determinations, immigration judges "shall apply relevant precedent issued by the Board of Immigration Appeals, the Attorney General, the federal circuit court of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court." 85 Fed. Reg. 36264, 36299 (proposed 8 C.F.R. § 1003.42(f)). This transparent attempt to sidestep established practice is contrary to the intent of Congress that the "credible fear standard" be a low screening standard. Furthermore, there is an inherent dissonance between requiring an immigration judge who reviews a negative credible-fear finding to apply the precedent of the circuit in which he sits and the reality that an applicant's removal proceedings could take place anywhere in the country. The mandatory application of circuit precedent in reviewing credible fear findings means that applicants will be held to different standards based on their points of entry, a result that is not appropriate at the initial screening stage. Moreover, the government controls the movement of refugees and other migrants in its custody and could therefore easily manipulate the applicable law by shipping them to states like Texas (which has the dubious distinction of caging, on average, more than triple the number of immigrants detained in any other state) or Louisiana (which ranked second in the number of immigrants detained per day in FY 2019), both of which are located in the conservative Fifth Circuit.[20]

[20] According to federal government data from April 2019, the top five states with the largest number of people in immigration detention per day are: Texas (14,481), Louisiana (4,415), Arizona (4,405), California (4,353), and Georgia (3,719). *See* Freedom for Immigrants, *Detention by the Numbers: Where are People Detained in the United States?* (Apr. 2019), https://www.freedomforimmigrants.org/detention-statistics.

3. Applying a higher "reasonable possibility" standard of proof more expansively in determining eligibility for statutory withholding of removal and protection under the Convention Against Torture is unduly harsh and undermines the "credible fear" process.

As noted above, the "credible fear" screening standard was purposefully established by Congress as a low bar so that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution" without first having had the opportunity to be heard by an asylum officer.[21] This stated intent underscores that the screening tool was designed to avoid situations in which a person seeking immigration relief in the United States on the grounds that such person has a fear of persecution would be returned to the persecution from whence she came. Additionally, at least one court already has determined that imposing a heightened standard at the credible fear stage is inappropriate. As the court in *Grace* held, a "general rule [that effectively bars claims based on certain categories of persecutors] is also arbitrary and capricious because it impermissibly heightens the standard at the credible fear stage." *Grace*, 344 F. Supp. 3d at 126. The court further explained that "[t]he Attorney General's directive to broadly exclude groups of aliens based on a sweeping policy applied indiscriminately at the credible fear stage[] was [not] supported by agency precedent." *Id.* at 127.

In derogation of the congressional directive that a low standard apply to credible fear screenings, the Departments propose to expand the application of a higher "reasonable possibility" standard when assessing potential eligibility for statutory withholding of removal and withholding or deferral of removal under the Convention Against Torture (CAT). Specifically, the Departments propose amending 8 C.F.R. §§ 208.30 and 1208.30 to raise the standard of proof in credible fear screenings from (1) a significant possibility that an individual can establish eligibility for statutory withholding of removal to a reasonable possibility that the alien would be persecuted on account of a protected ground in the country of removal, and (2) a significant possibility that an individual is eligible for withholding or deferral of removal under the CAT regulations to a reasonable possibility that the alien would be tortured in the country of removal. 85 Fed. Reg. 36264, 36268, 36296 (proposed 8 C.F.R. § 208.30(e)(1)), 36296 (proposed 8 C.F.R. § 208.30(e)(3)). The application of a higher standard to assess the fear of *all* individuals who may not be eligible for asylum means that several thousands of refugees would be "deliver[ed] into the hands of their persecutors." *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (per curiam). Such a result violates congressional intent, as well as the country's commitment to avoid refouling individuals to countries where their lives or freedom would be threatened.[22]

The Departments defend their proposal to expand the higher "reasonable possibility" standard for statutory withholding of removal and protection under the CAT regulations on the basis that those claims have a higher merits burden than do asylum claims. 85 Fed. Reg. 36264, 36269. This justification is wholly illogical. The evidentiary burden of proof that an individual must satisfy to

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[21] H.R. Rep. No. 104-469, at 158 (1996).

[22] 1951 Refugee Convention, art. 33(1) ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.").

obtain statutory withholding or CAT protection—a "clear probability" of persecution or torture—has no bearing on the appropriateness of the *screening* standard. In fact, the heightened standards of proof for statutory withholding of removal and withholding or deferral of removal under CAT are embedded in 8 C.F.R. § 208.30. Showing a significant possibility of eligibility for statutory withholding of removal or withholding or deferral under CAT is *already more difficult* than showing a significant possibility of eligibility for asylum. Raising the threshold screening standard even further is unduly harsh and fundamentally at odds with existing law and practice.

Next, the Departments urge that a higher standard is both permissible and appropriate because the "reasonable possibility" standard has "long been used for fear determinations made under 8 C.F.R. [§§] 208.31 and 1208.31." *Id.* at 36270. American Gateways acknowledges that the "reasonable possibility" standard has been applied (often unfairly) to individuals subject to reinstatement of a final removal order, *see* 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8, (and the administration has more recently applied it to individuals who are barred from asylum pursuant to 8 C.F.R. § 208.13(c)(3)-(4)). However, that does not justify expanding the "reasonable possibility" standard to all refugees who *may* be ineligible for asylum. As is the current practice, the "reasonable possibility" standard should be reserved for individuals with prior orders of removal. The underlying rationale for the reinstatement statute and its short-circuited procedures is that individuals who previously were deported have had their day in court (an assumption that is often untrue, particularly as it concerns *in absentia* removal orders).[23] Under the Proposed Rule, many individuals will not even be given a "first bite at justice."[24]

Additionally, the Departments' conclusory assertion that utilizing the "reasonable possibility" standard to determine eligibility for statutory withholding of removal and withholding or deferral of removal under CAT would "provide numerous benefits" is unsupported. *See* 85 Fed. Reg. 36264, 36271. The Departments claim that the procedure would allow them to "better screen out non-meritorious claims" and "focus limited resources" on claims more likely to be meritorious. *Id.* The Departments not only fail to substantiate their own purported interests; they do not even consider the impact of their proposal on *meritorious* claim—many of which will be improperly vetted out without any meaningful procedural protections. The vast majority of detained individuals with whom American Gateways works navigate the credible fear process without an attorney and sometimes without having received any information on asylum law or the credible fear process. Several individuals do not even have a basic understanding of the type of proceedings in which they have been placed or the type of information an asylum officer may deem relevant in assessing their claim.

The unlawfulness of the heightened screening standard and illogic of the Departments' reasoning is laid bare when considered in connection with other provisions of the Proposed Rule. The Departments propose that asylum officers shall make the initial determination as to whether an individual can establish eligibility for asylum, taking into consideration the applicability of any mandatory bars and the feasibility of internal relocation. *See* 85 Fed. Reg. 36264, 36296 (proposed 8 C.F.R. § 208.30(e)(1)(iii), (e)(2)(iii)). If an asylum officer determines that an individual is

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[23] American Civil Liberties Union, *American Exile: Rapid Deportations that Bypass the Courtroom* (Dec. 2014), at 21, https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf.

[24] *Id.*

subject to a mandatory bar[25] or that internal relocation is a viable alternative, the officer must enter a negative credible fear finding. *Id.* at 36296 (proposed 8 C.F.R. § 208.30(e)(5)(i)(A)). Moreover, an individual with a negative finding will not be placed in *any* further proceedings—not even "streamlined" asylum-and-withholding-only proceedings—unless she can satisfy the higher "reasonability possibility" standard (or an immigration judge reverses a mandatory bar finding upon review of the negative fear finding). *Id.* (proposed 8 C.F.R. § 208.30(e)(5)(i)(A)-(B)). This is not only unnecessary and unduly harsh but also contrary to current practice whereby asylum officers identify asylum bars for consideration by immigration judges but do not apply them at the credible fear stage. The consequences of this draconian regulatory scheme are quite obvious: More asylum seekers will be improperly subjected to a heightened screening standard and more asylum seekers will be rapidly deported without any regard for due process rights and in violation of international treaty obligations.

The Departments also propose to amend 8 C.F.R. § 1208.30 to provide that immigration judges shall review screening determinations for eligibility for statutory withholding of removal and protection under the CAT regulations under a "reasonable possibility" standard. *Id.* at 36304 (proposed 8 C.F.R. § 1208.30(g)(1)). This proposal to heighten the standard of review is also objectionable. Many individuals are not represented at credible fear review hearings. And, although they are permitted to consult with an attorney prior to a credible fear review hearing and have an attorney present at the hearing, they are not entitled to be represented at the hearing, which means that most immigration judges do not permit attorneys to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments at credible fear review hearings.[26]

The Departments' proposal is particularly egregious in light of the fact that the administration is currently enjoined for implementing certain mandatory asylum bars (*i.e.* unlawful entry and third-country transit bans) and has been chided for its attempts to impose a higher "reasonable possibility" screening standard on individuals who would be subject to those bars.[27] *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (upholding injunction that blocks the implementation of a rule that would make individuals who enter the country unlawfully at the southern border ineligible for asylum); *E. Bay Sanctuary Covenant v. Barr*, 2020 WL 3637585 (upholding injunction that blocks the implementation of a rule that, with certain exceptions, would make individuals who travel through third countries before reaching the southern border ineligible for asylum). As one federal district court explained:

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[25] The Proposed Rule provides that asylum officers are to consider not only the bars to applying for asylum or to eligibility for asylum set forth at INA § 208(a)(2)(B)-(C) and (b)(2), but also "any bars established by regulation under Section 208(b)(2)(C) of the Act," 85 Fed. Reg. 36264, 36296 (proposed 8 C.F.R. § 208.30(e)(1)(iii)), which leaves open the door to the Departments' establishing even more mandatory bars that would be applicable at the credible fear stage.

[26] *See* Jeffrey S. Chase, *Attorneys and Credible Fear Review* (July 22, 2018), https://www.jeffreyschase.com/blog/2018/7/22/attorneys-and-credible-fear-review.

[27] American Gateways further objects to proposed 8 C.F.R. § 208.30 (e)(5)(ii)-(iii), 85 Fed. Reg. 36264, 36297, on the grounds that 8 C.F.R. § 208.13(c)(3)-(4) are currently enjoined and subject to pending litigation. *See E. Bay Sanctuary Covenant*, 950 F.3d 1242; *E. Bay Sanctuary Covenant*, 2020 WL 3637585.

> As a logical consequence of applying the higher reasonable-fear standard to [the 70,000 aliens per year who cross between ports of entry], the Rule [rendering an individual who enters between ports of entry ineligible for asylum] recognizes that some "aliens who would have previously received a positive credible-fear determination [will] now receive . . . a negative credible-fear and reasonable-fear determination," not because they have no credible fear, but because they did not comply with the Rule. 83 Fed. Reg. at 55,947. Those aliens will be removed, regardless whether they have otherwise meritorious asylum claims. The administrative record underscore the dangers of returning those aliens to the country of persecution.

E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094, 1117 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020).

In short, imposing a heightened standard would completely undermine the "credible fear" process. The existing law's first step in seeking asylum at the border or port of entry is to present a preliminary claim of credible fear of persecution before an asylum officer who determines whether there is a significant possibility of eligibility. If approved, the applicant moves to the second step and is provided an opportunity to have a full hearing and prepare a case with the necessary evidence required under the law. Under the Proposed Rule, the entire credible fear process would be undercut. If asylum seekers cannot provide enough evidence at the first step to prove their claim—as little as 24 hours after an arduous journey to the border—they would be barred from the next step—*i.e.*, having a hearing where they gather and present evidence—and ultimately stripped of the right to appeal. By making it nearly impossible for anyone to pass the credible fear stage, the Proposed Rule prematurely limits applicants' ability to prepare and establish their case and forces applicants to extra-judicially prove their case—a requirement not imposed in recent history.

4. Permitting consideration of internal relocation and asylum and withholding bars at the credible fear stage unfairly restricts access to immigration courts.

The Proposed Rule not only expands the application of a heightened standard of proof when determining eligibility for statutory withholding of removal and protection under CAT but also provides that asylum officers shall consider asylum and withholding bars and internal relocation when making fear determinations—a proposal that is *not* consistent with current policy or practice. *See* 85 Fed. Reg. 36264, 36296-97 (proposed 8 C.F.R. §§ 208.30(e)(1)(ii)-(iii), (e)(2)(ii)-(iii)). Determinations regarding asylum eligibility should be made by immigration judges in full Section 240 proceedings. Furthermore, the frightening (yet very real) prospect of CBP officers—who are particularly ill-suited to conduct credible fear interviews (even under the current regulations)—making these determinations renders this proposal even more unfair and irrational. *See supra* at Part II.C.2 (discussing litigation challenging the MOU between USCIS and CBP by which USCIS has improperly delegated its credible fear screening duties to CBP).

Under the current regulations, if an individual is able to establish a credible fear of persecution or torture, but also appears to be subject to one or more of the mandatory eligibility bars, the

individual *must* be placed in Section 240 proceedings. *See* 8 C.F.R. § 208.30(e)(5)(i) (providing that "if an alien is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory bars to apply for, or being granted, asylum . . . [DHS] *shall* nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim") (emphasis added). Section 240 proceedings allow both the government and the respondent to present claims regarding the respondent's eligibility for relief. Under the Proposed Rule, an individual "who would be able to establish a credible fear of persecution" but for the application of a mandatory bar will instead receive a "negative credible fear of persecution determination" and will not be placed into any further proceedings unless she can establish a "reasonable probability" of persecution or torture, in which event she will be placed into asylum-and-withholding-only proceedings. *See* 85 Fed. Reg. 36264, 36296 (proposed 8 C.F.R. § 208.30(e)(5)(i)(A)-(C)). The only method of challenging an asylum officer's mandatory bar finding (which may also result in a negative fear finding under the higher "reasonable possibility" standard) will be through a credible fear review hearing, *id.* at 36304 (proposed 8 C.F.R. § 1208.30(g)(1)). A credible fear review hearing is not a full evidentiary hearing and therefore does not provide a respondent with a full and fair opportunity to present her claim. In short, being deemed barred from asylum at the initial screening stage will have devastating consequences. Allowing asylum officers to make cursory eligibility determinations—such as whether an applicant has committed certain types of crimes or was firmly resettled in a third country—at the screening stage serves only the purpose of limiting access to the asylum system and eroding due process rights. Asylum officers are typically not even present in interview rooms, and individuals have no way to submit evidence. Inherently fact-intensive determinations regarding asylum eligibility require the presentation of evidence and careful consideration of all relevant facts. Such determinations cannot be adequately made—and should not be made—during the credible fear process.

The Departments' proposal to permit the consideration of internal relocation at the credible fear stage is similarly unreasonable. *See* Proposed Rule at 85 Fed. Reg. 36264, 36296 (proposed 8 C.F.R. § 208.30(e)(1)(ii), (e)(2)(ii), (e)(3)(ii)). Whether an individual could avoid future persecution, a future threat to his life or freedom, or future torture by relocating to another part of the proposed country of removal, and it would be reasonable to expect him to do so, involves a fact-intensive analysis that cannot be fairly performed without giving the applicant an opportunity to gather and present documentary and testimonial evidence. Additionally, this proposal is fundamentally at odds with existing regulations, congressional intent, and international guidance, all of which concur that considerations of internal relocation should *not* place additional burdens on asylum seekers at any stage of the proceedings, much less at the screening stage. *See infra* at Part III.E.1 (discussing internal relocation).

5. Requiring an individual to affirmatively request review of a negative credible fear determination is deliberately exclusionary and unreasonable.

The Departments state that their proposed review process "would retain a mechanism for immigration judge review of the determination that the alien is not eligible for asylum," as the INA unambiguously requires. 85 Fed. Reg. 36264, 36272 (citing 8 U.S.C. § 1225(b)(1)(B)(iii)). Quite expectedly, this review mechanism would itself be severely compromised under the Proposed Rule, which would treat the failure to affirmatively request review of a negative credible fear finding as declining to request review. *Id.* at 36297-98 (proposed 8 C.F.R. § 208.30(g)(1)), 36298

(proposed 8 C.F.R. § 208.31(g)), 36305 (proposed 8 C.F.R. § 1208.30(g)(2)), 36305 (proposed 8 C.F.R. § 1208.31(f)). This patently unfair process, allegedly designed to further "the expeditious resolution of fear claims" while alleviating "unnecessary and undue burdens on the immigration courts," cannot be saved by the Departments' unsubstantiated (and untrue) claim that individuals would first be "informed of [their] right to seek further review and given an opportunity to exercise that right." *Id.* at 36273.

It is inherently unreasonable to require an individual, often speaking a different language and having recently completed a long and dangerous journey to the United States, to affirmatively request review of a negative credible fear determination or suffer waiver of that right. In many cases, the person asserting fear of persecution may not understand the complexities of the U.S. immigration system in sufficient detail to know that seeking review of a determination is an option. This is particularly true of *pro se* applicants. Clearly, this addition is intended to create a default exclusionary rule intended to deprive individuals of a full opportunity to assert and defend their cases. This is a deprivation of due process rights, which apply to all people present in the United States: "Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001). Such an outright rejection of due process standards is unlawful.

Further, it is a deportation officer who serves a negative credible fear determination on the individual asserting fear of persecution. The interests of the deportation officer are not aligned with those of the detainee, and thus, such deportation officer is not the proper authority to communicate the right of the detainee to seek review of the determination. Moreover, the lengthy documents setting forth a negative credible fear determination and an individual's right to review that determination are written in English. Deportation offices regularly state that it is not their responsibility to translate credible fear documents for detainees. Oftentimes, American Gateways meets with detainees who have not requested a review hearing because they did not understand that they had the right to do so or did not understand the consequences of their not exercising that right. After having the consequences explained to them, many individuals decide to exercise their right to a review hearing. In those situations, American Gateways communicates with the local asylum office, which then sends the detainee's information directly to the Executive Office for Immigration Review (EOIR) for the review hearing. The local asylum office has never denied such a request, thereby demonstrating the importance of access to basic legal information in guaranteeing that the rights of all individuals, including those seeking immigration relief without the benefit of an attorney, are protected.

The following examples highlight the divisiveness of the Proposed Rule, particularly as it concerns *pro se* applicants:

- A woman from Honduras with a claim for withholding of removal based on her political opinion and relief under CAT failed her reasonable fear interview. She initially stated she did not want an immigration judge review hearing, but changed her mind after speaking with American Gateways, who subsequently sent a request to the Houston asylum office to send her information to EOIR to schedule a review hearing. The review hearing was scheduled, and the immigration judge vacated the negative reasonable fear finding, and the

woman was placed into withholding-only proceedings. Under the Proposed Rule, this applicant—who did not fully understand the consequences of not exercising her right to a review hearing until speaking with American Gateways—would have waived that important right.

- A detained migrant woman was told by her deportation officer that she had failed her credible fear interview, but the officer refused to give her the transcript of the interview because "he was upset with her about another issue." The woman, unable to review the interview transcript, did not request a review hearing of the negative credible fear finding. American Gateways asked the Houston asylum office to reach out to ICE, which it did, and a review hearing was held. Although the immigration judge affirmed in this particular case, it demonstrates why a proposed rule whereby applicants must affirmatively request a review hearing or otherwise waive their right to review is not only unfair but fails to account for the many competing interests that impede applicants' ability to exercise their right to request review.

B. Frivolous Asylum Applications

On several occasions, the President has asserted an urgent need to "safeguard our system against rampant abuse of our asylum process."[28] Former attorney general Sessions similarly described the asylum system as being "subject to rampant abuse and fraud," and further remarked that, "as this system become overloaded with fake claims, it cannot deal effectively with just claims."[29] In his May 2018 House testimony, USCIS Director Cissna claimed that "[t]he integrity of our entire immigration system is at risk because frivolous asylum applications impede our ability to help people who really need it."[30] As part of its crusade to deter what it perceives as frivolous asylum claims, the administration has already implemented several harmful policies—including extending the waiting period before asylum applicants become eligible to seek work authorization and deeming ineligible for work authorization any asylum seeker who enters the country without authorization. *See* 85 Fed. Reg. 38532. The Departments' instant proposal to redefine what constitutes "frivolous" is yet another unjustifiable "anti-fraud" measure that will result in substantial harm to asylum seekers while doing nothing to decrease or deter actual fraud.

The Departments argue that expanding the definition of "frivolous" to encompass "claims that are patently without substance or merit" is necessary to "deter" and efficiently "root out" unmeritorious claims and thereby mitigate the administrative burdens on an overwhelmed asylum system. *See, e.g., id.* at 36275-76. This argument is unreasonable, not to mention that the

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[28] *See, e.g.*, Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System (Apr. 29, 2019), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/

[29] *See* U.S. Department of Justice, Office of Public Affairs, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

[30] U.S. Citizenship and Immigration Services, Written Testimony of Francis Cissna, Director of USCIS, before The House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Stopping the Daily Border Caravan: Time to Build a Policy Wall*, hearing, 115th Congress, 2nd session (May 22, 2018), https://docs.house.gov/meetings/HM/HM11/20180522/108323/HHRG-115-HM11-Wstate-CissnaL-20180522.pdf.

Departments have not provided any evidence or data showing widespread fraudulent intent among asylum seekers or mountains of frivolous claims. Deterring individuals from seeking humanitarian protection—a right enshrined in international law and the INA—is not a valid justification for implementing a rule that will result in the cursory denial of asylum claims, especially those brought by *pro se* applicants. *See* 8 U.S.C. § 1158(a); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188-89 (D.D.C. 2015) (granting preliminary injunction against policy of detaining asylum seekers that was intended to send "a message of deterrence to other Central American individuals who may be considering immigration."). And, even if deterring unmeritorious claims were a valid justification—which it is not—the Departments' proposal to harshly punish asylum seekers for not being familiar with the technicalities of U.S. immigration law is a patently irrational and unfair way to achieve that goal.

1. The proposed changes to the definition of "frivolous" create ambiguous and untenable standards that will result in substantial harm to asylum applicants.

First, the proposed definition of "frivolous" includes applications that are "clearly foreclosed by applicable law." 85 Fed. Reg. 36264, 36295 (proposed 8 C.F.R. § 208.20(c)(4)), 36304 (proposed 8 C.F.R. § 1208.20(c)(4)). But even within a particular circuit, it may not be clear (even to attorneys) what the law actually is. Under the proposed definitions, *pro se* applicants are at particular risk because they almost certainly do not have sufficient knowledge of the law. Given that only 37% of immigrants have access to legal representation in the immigration courts, the implications of this proposed change would be devastating for asylum seekers.[31]

Further, the proposed change creates opportunities to use divergences in the law to quickly dispense asylum applications. By including in the definition of "frivolous" a dependency on divergent laws, the proposed changes create an incentive to funnel asylum applicants through a federal circuit that has the most restrictive laws toward asylum seekers, resulting in the most rapid determination of applications. Particularly at risk are those applicants in detention because ICE has broad discretion to transfer detainees.[32] This means ICE can exercise influence over an applicant's physical location, as well as the likely location in which the applicant files his asylum application. Reports have shown that the location of the immigration court, and hence the judge assigned, can be outcome determinative.[33] Compare, for example, New York and Houston. In FY 2019, the New York immigration court completed 39,140 cases with an overall denial rate of 26.10%.[34] Houston, on the other hand, completed 11,243 cases with an overall denial rate of

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[31] *See* Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, at 2 (Am. Immigration Council, Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

[32] *See* U.S. Immigration and Customs Enforcement, *Policy 11022.1: Detainee Transfers*, at 3 (Jan. 4, 2010), https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf.

[33] *See, e.g.*, Mica Rosenberg, Reade Levinson and Ryan McNeill, *They Fled Danger at Home to Make a High-Stakes Bet on U.S. Immigration Courts*, Reuters (Oct. 17, 2017, 1 PM GMT), https://www.reuters.com/investigates/special-report/usa-immigration-asylum/; Transactional Records Access Clearinghouse (TRAC) Immigration, *Asylum Outcome Continue to Depend on the Judge Assigned* (Nov. 20, 2017), https://trac.syr.edu/immigration/reports/447/.

[34] TRAC Immigration, *Asylum Decisions Vary Widely Across Judges and Courts—Latest Results*, Table 1 (Jan. 13, 2020), https://trac.syr.edu/immigration/reports/590.

91.90%.[35] This means that an asylum applicant who is transferred from New York to Houston has a 65.8% less likelihood of prevailing on his claim, simply by virtue of the transfer. Even if the proposed change were to result in the more "efficient" denial of claims by immigration judges, this so-called efficiency would also incentivize exploiting divergences in the law to more quickly dispense with applications. Other likely collateral costs of the proposal will be an increased backlog of BIA appeals,[36] increased circuit court petitions, and the proliferation of lawsuits challenging the Proposed Rule's application, which will most certainly yield a net *decrease* in judicial efficiency.

Moreover, the Departments explain in the preamble to the Proposed Rule that "simply because an argument or claim is unsuccessful does not mean that it can be considered frivolous. Neither could reasonable arguments to extend, modify, or reverse the law as it stands." 85 Fed. Reg. 36264, 36276. However, this concept that even if the current law may consider an application frivolous, a reasonable argument to "extend, modify, or reverse the law" may not be considered frivolous, is found nowhere in the proposed rule. Without this language, even if an asylum seeker makes a reasonable claim for modifying or reversing the law, an adjudicator might still unreasonably find the application to be frivolous if it is foreclosed by current law. At a minimum, the Departments should include in the text of the Proposed Rule itself that reasonable claims for extending, modifying, or reversing law would not render an application frivolous.

Second, the Proposed Rule would deem an application frivolous if the applicant knowingly (*i.e.*, with actual knowledge or willful blindness) files an application "without regard to the merits of the claim." *Id.* at 36276 (proposed 8 C.F.R. § 208.20(c)(3)), 36304 (proposed 8 C.F.R. § 1208.20(c)(3)). The proposed rule does not indicate whether it would apply when a representative of the applicant stands in for the applicant. Thus, applicants represented by ineffective counsel or "notarios" (*i.e.*, persons unauthorized to practice law) could be punished for meritless applications filed on their behalf. The proposed changes should, if not rejected entirely, define "willful blindness" and absolve applicants from attorney error or malpractice if there was no complicity.

Take, for example, the case of American Gateways client Mr. B, who fled to the United States from Nepal. He spoke limited English, had a meritorious asylum claim, and was represented by a private attorney who has since been disbarred. The attorney filed an asylum application that was completely made up (because he did not get an interpreter and did not understand what Mr. B was trying to tell him about his claim). Mr. B signed the application because he trusted his attorney. The attorney submitted the application and falsely told Mr. B that there was a filing fee for the application, which Mr. B paid to the attorney. The attorney then dropped Mr. B as a client after Mr. B ran out of money and could no longer pay him. Mr. B came to American Gateways for services. When an attorney at American Gateways reviewed the application, Mr. B stated that the application was completely wrong and that he had not provided the information in the application to the attorney. Mr. B shared his actual claim with his American Gateways attorney (which he had previously told his attorney who did not bother to get an interpreter). American Gateways entered representation on behalf of Mr. B, assisted him in filing a bar complaint against the previous

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35 *Id.*

36 *See generally* EOIR Adjudication Statistics, *All Appeals Filed, Completed, and Pending* (Apr. 15, 2020), https://www.justice.gov/eoir/page/file/1248506/download.

attorney, and filed a request to withdraw the previous asylum application, setting forth the reasons that withdrawal should be permitted and appending a copy of the complaint against Mr. B's prior attorney. Mr. B's American Gateways' attorney then submitted a new application based on his actual asylum claim. Mr. B was subsequently granted asylum by an immigration judge. Under this Proposed Rule, if it does not exempt victims of ineffective assistance of counsel and malpractice, a frivolous finding would have been entered against Mr. B, barring him from all forms of relief.

2. Limitations on allowing an asylum applicant to explain discrepancies on the application deprive the applicant of a full and fair opportunity to be heard.

The Proposed Rule unfairly limits the ability of asylum applicants to explain any apparent discrepancies in their applications for relief. First, immigration judges can simply deny asylum applications without giving an applicant any opportunity to explain apparent discrepancies. *See infra* at Part III.C (discussing proposed rule regarding pretermission). Second, for affirmative asylum applications filed with USCIS, the rule provides for an opportunity for the applicant to explain any discrepancies to an asylum officer *only* at such officer's sole discretion, and an applicant need only be given a notice under INA § 208(d)(4)(A) after the officer determines that sufficient opportunity to explain has been given. 85 Fed. Reg. 36246, 36275 (proposed 8 C.F.R. § 208.20(b)), 36304 (proposed 8 C.F.R. § 1208.20(b)). This proposal effectively removes any requirement that an applicant be given the opportunity to explain apparent discrepancies because the asylum officer has discretion to determine when sufficient opportunity to explain has been given. If the case is then referred to an immigration judge, the judge must consider the case "de novo" without the benefit of a complete record.[37] *See* 8 C.F.R. § 1003.42. Allowing decision makers to make findings of "frivolousness" without any opportunity to be heard violates due process. The potentially dire consequences of not providing asylum seekers with an opportunity to explain seeming discrepancies in their applications is illustrated in the example below:

American Gateways client Ms. R was kidnapped as a minor, held captive, beaten, and raped by a police officer. She had a child from the rape. The police officer took the child and held him captive to force Ms. R to be with him. Ms. R could not go to authorities for help because her persecutor was a police officer. The credible fear interview contained several errors, and Ms. R had difficulty testifying during the interview because of the trauma that she had suffered. The asylum officer was very confrontational with Ms. R during the interview and repeated the same questions in several different ways in order to confuse her. The immigration judge performed a cursory review and affirmed the denial. American Gateways requested a re-interview with the asylum office supervisor, who granted the request. Once Ms. R was given an opportunity explain the "discrepancies," the initial finding was overturned.

[37] *See also* Andrew Patterson, Kristin Macleod-Ball, and Trina Realmuto, *Standards of Review Applied by the Board of Immigration Appeals*, at 2 (Am. Immigration Council, Apr. 22, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/standards_of_review_applied_by_the_board_of_immigration_appeals.pdf.

3. Giving asylum officers the power to reject asylum applications solely on a finding of frivolousness is unlawful and inefficient.

The Proposed Rule gives asylum officers the ability to deny affirmative asylum applications solely on the basis of frivolousness. Currently, such determinations must be made by an immigration judge or the BIA. Although the proposal provides that an asylum officer's finding of frivolousness would not render an alien permanently ineligible for immigration benefits unless an immigration judge or the BIA subsequently makes such finding upon *de novo* review, the proposal is nonetheless objectionable, as it encourages asylum officers to seek out indicators of frivolousness in written applications, narrow the scope of interviews (in a manner that is likely to render them more adversarial), and develop a record of frivolousness for the immigration judge to consider (or rubber stamp)—thereby increasing the likelihood that an applicant will be denied a full and fair hearing on his claims. Additionally, the proposed changes to the definition of "frivolousness" include a determination based on the law (*i.e.*, "frivolous" applications are those "clearly foreclosed by applicable law"). Given the complexities of asylum law, asylum officers are ill-equipped to adjudicate frivolousness; the power to determine whether an application is "frivolous" needs to remain with those who are experts in the law (*i.e.*, immigration judges).

None of the Departments' justifications for authorizing asylum officers to find that an application is frivolous has any validity. Enlisting a team of individuals not adequately trained in the law to assist with rooting out applications that are "clearly foreclosed by applicable law" will neither yield increased efficiency nor deter the filing of asylum applications by individuals who genuinely fear persecution. It will merely encourage asylum officers to deny and refer applications to immigration courts on the basis of frivolousness without having adequately assessed an applicant's credibility, thereby passing off undeveloped records to immigration judges. To the extent judges simply rubber-stamp the erroneous "frivolous" findings of asylum officers, applicants will appeal, contributing to the backlog of cases pending before the BIA and, ultimately, leading to the proliferation of petitions for review and lawsuits in federal courts.

4. Requiring applicants to withdraw applications with prejudice to avoid a finding of frivolousness is an unfair and will give rise to abuse.

The Proposed Rule would deem applications that are withdrawn frivolous unless the applicant withdraws the application with prejudice. Withdrawing with prejudice would require the applicant to accept voluntary departure with no more than a 30-day allowance, withdraw all other applications for relief with prejudice, and waive any right to appeal or file a motion to reopen or reconsider the application for any reason. 85 Fed. Reg. 36264, 36295 (proposed 8 C.F.R. § 208.20(f)), 36304 (proposed 8 C.F.R. § 1208.20(f)). These consequences would effectively bar an applicant from any future or further consideration. One can imagine the consequences to an applicant if a particular judge wishes to quickly dispense of asylum applications (and fast track deportations). The proposed process is ripe for abuse, as a judge need merely notify an applicant that an application appears to be frivolous and instruct the applicant that such a finding—and its attendant consequences—can be easily avoided if the applicant withdraws his pending asylum application *with prejudice* and accepts voluntary departure. And should the applicant again be subject to persecution in his home country, the prior withdrawal with prejudice would constitute a "significant adverse discretionary factor" weighing against a future grant of asylum. *See id.* at

36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)(G)), 36302 (proposed 8 C.F.R. § 1208.13(d)(2)(i)(G)). The Departments' suggestion that allowing applicants to disclaim and withdraw their applications with prejudice is an *ameliorative* mechanism intended to counterbalance the harsh consequences of filing a frivolous application is risible. *See id.* at 36277.

C. Pretermission of "Legally Deficient" Claims Without a Hearing

The Proposed Rule allowing immigration judges to pretermit and deny asylum and withholding applications that, in their assessment, fail to establish a *prima facie* claim for relief before an applicant ever has an opportunity to appear before the court violates both due process of law and the INA. Moreover, the rule's disproportionate impact on *pro se* asylum seekers, many of whom are detained, is particularly concerning.

"It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores*, 507 U.S. at 306). Indeed, for over a century, the Supreme Court has repeatedly affirmed that the "Due Process Clause applies to *all* 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693 (emphasis added). As early as 1896, the Court held that due process rights applied to an individual detained for unauthorized entry into the United States. *Wing v. United States*, 163 U.S. 228, 238-39 (1896). Less than a decade later, the Court reaffirmed that immigrants in removal proceedings are guaranteed due process rights, including the right "to be heard upon the questions involving [the] right to be and remain in the United States." *Yamataya* , 189 U.S. at 101; *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (Fifth Amendment protects all persons "from deprivation of life, liberty, or property without due process of law"); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (same).

It is similarly well settled that due process requires (1) notice and (2) an opportunity to be heard. *See, e.g., Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("[T]he fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.") (citations and internal quotation marks omitted). In the immigration context, due process requires that "[a]n alien who faces deportation is entitled to a *full and fair* hearing of his claims." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (emphasis added). The civil rather than criminal nature of removal proceedings does not diminish this due process right:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty . . . cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

Due process rights are intended to protect against practices and policies that violate precepts of fundamental fairness. Although the Departments' proposal requires that an applicant be given "notice" and ten (10) days to respond before an immigration judge may enter an order pretermitting and denying an application, *see* 85 Fed. Reg. 36264, 36302 (proposed 8 C.F.R. § 1208.13(e)(2)), this proposed procedure is patently *unfair* as applied to individuals seeking protection from persecution. And, when considered in connection with other proposed changes—including the narrowing of statutory terms that define the contours of eligibility for relief and the promulgation of a host of "adverse" factors that immigration judges must take into consideration with exercising their discretion to grant relief—it is abundantly clear that allowing the pretermission and denial of applications without a hearing is intended to strip applicants of their right to a full hearing and encourage the cursory denial of meritorious claims for relief.

Even under the current regulations, which provide for a hearing, asylum grant rates continue to plummet. In FY 2019, the overall asylum denial rate rose for the seventh straight year to over 69%.[38] The denial rate for unrepresented asylum seekers was a staggering 84%.[39] During the first quarter of FY 2020, less than 27% of asylum requests were granted in immigration court—a 36.6% percent decline from FY 2016.[40] The asylum grant rate for Central Americans has declined even more steeply to 13.3%—a 50 percent decline from FY 2016.[41] For those caged in detention facilities, where myriad barriers frustrate efforts to access counsel and basic legal information, circumstances are even more dire. Only 30% of detained immigrants are represented.[42]

The Departments' assertion that an "alien would be able to address any inconsistencies or legal weaknesses in the asylum application in the response to the judge's notice of possible pretermission" is a fiction. 85 Fed. Reg. 36264, 36277. Most persons seeking asylum do not speak English and have little, if any, familiarity with U.S. immigration law, which courts have described as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion," including among immigration lawyers. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003); *United States v. Aguirre-Tello*, 324 F.3d 1181, 1187 (10th Cir. 2003), *vacated* 353 F.3d 1199 (10th Cir. 2004) (en banc). Applications for relief must be submitted in English, or they will be deemed abandoned and the applicant ordered removed. Due to the circumstances under which asylum applicants flee their home countries, they often do not have the essential documentary evidence to support their claims of persecution. Moreover, any evidence they do have must be translated into English and be accompanied by a certificate of translation, which precludes the use of computer programs to translate foreign language documents. In order to meet the one-year filing deadline, many asylum seekers file their initial applications *pro se*. Without counsel, few applicants—most of whom are torture or trauma survivors who suffer from post-traumatic stress disorder or other

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[38] TRAC Immigration, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[39] *Id.*

[40] Human Rights First, *Fact Sheet* (June 2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf. USCIS has not released data for the first quarter of FY2020. As of FY 2019, the asylum grant rate for affirmative asylum claims adjudicated before USCIS was 30.7%--a decline of 28.8% since FY 2016. *Id.*

[41] *Id.*

[42] TRAC Immigration, *Who is Represented in Immigration Court?* (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/.

mental health ailments—can successfully articulate the basis of their claim in a written application, and even fewer would be able to precisely delineate a cognizable claim (especially if based on membership in a particular social group) under the Proposed Rule. Indeed, a hearing (however flawed) is—more often than not—a *pro se* applicant's *only* opportunity to articulate and present evidence in support of her claim and, therefore, the only vehicle through which an immigration judge can assess the viability of an applicant's claim.

American Gateways staff work inside four detention centers in Central Texas—T. Don Hutto Residential Center, South Texas Detention Complex, Karnes County Residential Center, and Limestone County Detention Center. With limited resources, it is impossible for American Gateways to represent the thousands of detainees who are seeking asylum. Hence, American Gateways staff often provides *pro se* assistance to detained individuals, which results in written applications that lay out the basic elements of their claims, but are not as nuanced or detailed as they could be if the individuals were represented. In such instances, it falls to immigration judges to elicit testimony and fully explore all bases when adjudicating an asylum claim. As the Eighth Circuit has explained,

> [c]onsidering [a] pro se alien's likely lack of legal knowledge, the difficulty of navigating immigration law, and the possibility of expulsion upon failure to do so successfully, we have recognized it is critical that the [immigration judge] scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.

Ramirez v. Sessions, 902 F.3d 764, 771 (8th Cir. 2018) (internal quotation marks omitted); *see also Barragan-Ojeda v. Sessions*, 853 F.3d 374, 381 (7th Cir. 2017) ("An IJ, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record. Particularly with a pro se respondent . . . , fair questioning by the IJ often is required to obtain information from the alien necessary for a reasoned decision on the claim.") (citations and internal quotation marks omitted); *Mohamed v. Att'y Gen.*, 705 F. App'x 108, 114 (3d Cir. 2017) ("The importance of that full examination is all the more apparent when considering the difficulties faced by a *pro se* applicant with little or no reading skills who was forced to seek help from his fellow detainees in a facility where he had already been assaulted, collect evidence and seek testimony while detained, and present his case via videoconference."); Immigration Court Practical Manual § 4.15(g) (instructing immigration judges to "advise[] the [pro se] respondent of any relief for which the respondent appears to be eligible")[43] If immigration judges are relieved of the

[43] In *INS v. Cardoza-Fonseca*, the U.S. Supreme Court instructed that the UNHCR Handbook "provides significant guidance in construing the [the 1967] Protocol, to which Congress sought to conform" and "has been widely considered useful in giving content to the obligations that the Protocol establishes." 480 U.S. 421, 439 n.22 (1987); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (describing the Handbook as a "useful interpretative aid"). The Handbook explains that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, at 43 (reissued Feb. 2019), https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html (hereinafter the *UNHCR Handbook*). The *UNHCR Handbook* continues: "Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and

obligation to conduct a hearing to "explore for all the relevant facts," and are instead permitted to cursorily deny any application they deem *legally* deficient, the vast majority of asylum seekers—and a disproportionate number of *pro se* asylum seekers—will be unfairly stripped of any opportunity—however minimal—to present their claims. This proposed procedure offends due process and other basic principles of justice under both domestic constitutional law and international law.

Procedural due process rights have also animated statutory rights that apply to immigration proceedings. Section 240 of the INA delineates the contours of a fair hearing and enumerates the rights that apply to persons in removal proceedings. The INA provides that an "immigration judge *shall* administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses." 8 U.S.C. § 1229a(b)(1)(emphasis added). Moreover, "the alien *shall* have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine the witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B) (emphasis added). The INA's implementing regulations also require a hearing. The BIA has acknowledged that "[a]t a minimum, . . . the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct." *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989). The BIA continued:

> We would not anticipate that the examination would stop at this point unless the parties stipulate that the applicant's testimony would be entirely consistent with the written materials and that the oral statement would be believably presented.
>
> 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. . . . [T]here are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.

Id.

The Departments attempt to circumvent this precedent by simply stating that "the regulations at issue in *Matter of Fefe* are no longer in effect." 85 Fed. Reg. 36264, 36277. But the administration fails to mention that the regulations on which the BIA relied in *Matter of Fefe* are substantively identical to the current regulations found at 8 C.F.R. § 1240.11(c)(3), which became effective in 1990. *See* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674-01. Those regulations provide that "[a]pplications for asylum and withholding of removal . . . will be decided by the immigration judge . . . *after an evidentiary hearing* to resolve factual issues in dispute" and that "[d]uring the removal hearing, the alien *shall* be examined under oath on his or her application and may present evidence and

there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt." *Id.*

witnesses on his or her own behalf." 8 C.F.R. § 1240.11(c)(3) (emphasis added). Furthermore, the discussion accompanying the April 6, 1988 revised proposed rule (which culminated in 8 C.F.R. § 1240.11(c)(3)) makes abundantly clear that the changes were intended to allow an immigration judge to limit the *scope* of evidentiary hearings (in the narrow circumstance where an applicant is clearly subject to a mandatory bar), not to dispense with the right to a hearing altogether. *See* Revised Proposed Rule, Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11300-01. Contrary to the Departments' flawed reasoning that "[n]o existing regulation requires a hearing when an asylum application is legally deficient," 85 Fed. Reg. 36264, 36277, the current regulations unambiguously provide for the right to a hearing.[44] *See, e.g.*, *Oshodi v. Holder*, 729 F.3d 883, 890 (9th Cir. 2013) ("Every asylum and withholding applicant is required to be examined under oath as to the contents of his application." (citing 8 C.F.R. § 1240.11(c)(3)(iii))).

Even more importantly, Congress enacted INA Section 240 in 1996—seven years *after* the BIA's decision in *Matter of Fefe* and six years *after* 8 C.F.R. § 1240.11(c)(3) became effective. As noted above, Section 240 mandates that an immigration judge administer oaths, receive evidence, and question witnesses. Similarly, it provides applicants with the right to present evidence and examine the evidence against them. Unsurprisingly, based on the plain language of the INA § 1229a(b)(4)(b) and 8 C.F.R. § Section 1240.11(c)(3), the BIA again held in 2014 that applicants are entitled, at a minimum, to an evidentiary hearing that includes "an opportunity for the respondent to present evidence and witnesses on his or her own behalf." *Matter of E-F-H-L-*, 26 I&N Dec. 319, 321 (BIA 2014).

As with *Matter of Fefe*, the Departments attempt to side-step *E-F-H-L-*, asserting that it is not precedential because former attorney general Sessions vacated the decision in 2018 on procedural grounds unrelated to the merits (and for the apparent purpose of paving the way for summary dismissal of asylum applications). *See Matter of E-F-H-L-*, 27 I&N Dec. 226, 226 (AG 2018). But, even accepting the dubious proposition that the substantive holding of *E-F-H-L-* is no longer precedential, the provisions on which the BIA's holding was based remain in the statute. Neither the former attorney general nor this Proposed Rule can change the fact that the statute speaks for itself. Indeed, by failing to meaningfully engage with the BIA's substantive holdings in *Matter of Fefe* and *Matter of E-F-H-L-*, the Departments tacitly admit that the INA requires a hearing for asylum applicants, as federal circuit courts have also consistently held. *See, e.g.*, *Jiang v. Holder*, 754 F.3d 733, 741 (9th Cir. 2014) ("[A]n alien who faces deportation is entitled to a full and fair hearing of [her] claims and a reasonable opportunity to present evidence on [her] behalf."); *Bah v. Keisler*, 249 F. App'x 876, 879 (2d Cir. 2007) ("Due process in the asylum context requires that an applicant receive a full and fair hearing that provides a meaningful opportunity to be heard."); *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002) (failure to allow the petitioner to present oral testimony constitutes a denial of right to due process).

[44] Federal circuit courts have (properly) continued to apply the BIA's reasoning in *Matter of Fefe* long after the regulations were revised. *See, e.g.*, *Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020); *Oshodi*, 729 F.3d at 890; *Mohamed*, 705 F. App'x at 114. This further underscores that *Matter of Fefe* cannot be so readily dismissed, as the Departments urge.

Standing alone, the Departments' proposed procedure permitting the summary denial of asylum claims without a hearing is rife with constitutional and statutory violations. When considered alongside the Departments' revised "standards for consideration during review" of an application—standards that unreasonably restrict an applicant's ability to establish *prima facie* eligibility for relief—the proposed pretermission of applications is legally and morally indefensible. As evidenced by other recent developments—such as the imposition of quotas for immigration judges[45] and a series of attorney general decisions stripping judges of the ability to grant continuances[46] and administratively close cases[47]—that incentivize judges to summarily deny claims, this portion of the Proposed Rule is part and parcel of a broader assault on the independence of the judiciary and an improper expansion of the Departments' invidious enforcement agenda.[48]

D. Proposed Standards for Reviewing Applications for Asylum and Withholding of Removal

When Congress passed the Refugee Act, it incorporated the international definition of "refugee" as a person with a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. None of the Departments' newly proposed standards can be reconciled with this intentionally expansive definition. That is no surprise, as the standards are quite obviously not the product of well-reasoned policy making, but part of a larger political project to undercut substantive asylum law, restrict access to the asylum process, and ultimately dismantle the asylum system. American Gateways outlines below just a few of its objections (which are far too numerous to identify in a 30-day comment period), to this invidious undertaking.

1. The proposed formulation of "particular social group" is impermissible and will embolden adjudicators to deny claims without individualized analysis.

Under the guise of promoting consistency and efficiency in the adjudication of asylum claims based on membership in a particular social group, the Departments propose a formulation of "particular social group" (PSG) that undermines substantive asylum law and will guarantee the speedy and consistent denial of protection to countless asylum seekers with meritorious claims for relief. The proposal does not provide for meaningful, individualized consideration of an individual's refugee status, and it unfairly requires applicants to articulate the boundaries of their membership in a PSG without providing any guidance regarding how precise that delineation must be. When implemented in tandem with the pretermission of "legally deficient"

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[45] *See* Executive Office of Immigration Review, *EOIR Performance Plan* (Mar. 30, 2018), *available at* https://www.aila.org/File/DownloadEmbeddedFile/75495.

[46] *See Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018) (requiring immigration judges to assess whether there is sufficient cause to support a continuance by considering "the likelihood that the collateral relief will be granted").

[47] *See Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018) (restricting the authority of immigration judges to administratively close proceedings).

[48] For a more fulsome discussion of the ways in which the administration has paved the way for summary denials to flourish, *see* Jeffrey S. Chase, *Are Summary Denials Coming to Immigration Court?* (June 24, 2018), https://www.jeffreyschase.com/blog/2018/6/24/are-summary-denials-coming-to-immigration-court?rq=summary%20denial (last visited July 12, 2020).

claims, the proposed rule regarding PSGs will certainly result in a return to persecution for some refugees. Returning refugees to persecution violates fundamental tenets of international law, including the principle of non-refoulment.[49]

American Gateways opposes the Departments' substantive formulation of the term "particular social group" and the related procedural requirements on several grounds, including but not limited to the following:

a. Blanket rules barring PSGs are impermissible.

The Departments' non-exhaustive list of claims not deserving of favorable adjudication essentially forecloses entire classes of claims with little to no explanation (aside from the administration's unique animus for asylum seekers from the Northern Triangle and desire to insulate from successful challenge the proposed summary denial of such claims—which typically require factual development through oral testimony at a hearing). As the court explained in *Grace v. Whitaker*, "a general rule 'that effectively bars [asylum] claims based on certain categories of persecutors (*i.e.* domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress' intent to bring 'United States refugee law into conformance with the [1967 Protocol],'" to which the United States acceded in 1968. *Grace*, 344 F. Supp. 3d at 126.

The phrase "particular social group" was included in the INA when Congress enacted the Refugee Act in 1980, and legislative history reveals that Congress accepted the definition of "refugee" under the 1967 Protocol. *See Grace*, 344 F. Supp. 3d. at 123-24. Additionally, the UNHCR Handbook, which the Supreme Court has identified as a source of "significant guidance" in construing the 1967 Protocol, construes the phrase "particular social group" broadly, stating that it "normally comprises persons of similar background, habits, or social status." *See id.* at 124 (quoting UNHCR Handbook at Ch. II B(3)(e) ¶ 77). Because Congress clearly intended that the meaning of "particular social group" be read expansively, the Departments' narrow interpretation, which effectively eviscerates protections for entire categories of refugees, is impermissible.

Although the holding in *Grace*—that the attorney general's near-blanket rule against domestic violence and gang-related claims was "an impermissible reading of the statute and is arbitrary and capricious"—concerned the credible-fear stage, the reasoning undergirding the court's analysis applies with equal force to the merits stage of asylum and withholding proceedings.[50] *See Juan Antonio v. Barr*, 959 F.3d 778, 790 & n.3 (6th Cir. 2020) (adopting the reasoning of *Grace* for full asylum and withholding proceedings). The BIA and federal circuit courts have long recognized that the INA requires adjudicators to analyze asylum and withholding claims on a case-by-case basis with attention to the specific facts and record evidence of a particular case. *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985); *Matter of M-E-V-G-*, 26 I&N Dec.

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[49] *See* 1951 Refugee Convention, art. 31(1).

[50] In the preface, the Departments acknowledge that the court in *Grace* invalidated the very type of rule they propose here "at least as applied to credible fear claims." 85 Fed. Reg. 36264, 36278 n.27 (citing *Grace*, 344 F. Supp. 3d at 126). The Proposed Rule contains *no* explanation as to why implementing the same rule at a different stage of proceedings is not similarly violative of congressional intent.

227, 251 28 (B.I.A. 2014); *Paiz-Morales v. Lynch*, 795 F.3d 238, 245 (1st Cir. 2015); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). This is consistent with the UNHCR Handbook, which provides that "refugee status must normally be determined on an individual basis . . . ."[51] Although states may *grant* refugee status to groups of individuals in urgent circumstances where it is "not . . . possible for purely practical reasons to carry out an individual determination . . . for each member of the group,"[52] this allowance for group-based protection does not permit states to *deny* refugee status to groups of individuals without individualized consideration. The Departments' renewed proposal to codify a standard that is so clearly contrary to the 1951 Refugee Convention and the INA will not survive judicial review.

b. The laundry list of circumstances that are "generally" insufficient to define a cognizable PSG are themselves ill-defined and will incentivize adjudicators to deny meritorious claims.

The touchstone for asylum is a failure of state protection. It thus follows that "the refugee definition does not require that the state itself be the agent of harm. Persecution at the hands of 'private' or non-state agents of persecution equally falls within the definition. The State's inability to protect the individual from persecution constitutes failure of local protection."[53] The rule nevertheless proposes to generally bar PSGs "consisting of or defined by" "interpersonal disputes" or "private criminal acts" without defining either of these phrases. 85 Fed. Reg. 36264, 36291 (proposed 8 C.F.R. § 208.1(c)), 36300 (proposed 8 C.F.R. § 1208.1(c)). Several categories of cognizable claims brought by refugees fleeing harm enacted by non-state actors—such as those involving domestic violence, anti-LGBT violence, or gang violence—arguably involve an "interpersonal" or "private" dimension. Those same claims also often implicate a failed state. The proposed PSG standards wholly ignore the reality that "private" violence is deeply rooted in societal, cultural, religious, and legal norms and biases that are, in turn, further exacerbated by rampant impunity. *See, e.g.*, *Alvarez Lagos v. Barr*, 927 F.3d 236, 250 (4th Cir. 2019) (reversing immigration judge's finding that the petitioner failed to establish a nexus to her PSG of "unmarried mothers living under the control of gangs in Honduras" and citing to "very patriarchal" and "*machista* culture" that renders unmarried women "especially vulnerable to gang violence"). Claims based on so-called "interpersonal" or "private" violence—like all other asylum claims—cannot be fairly adjudicated absent an individualized analysis that considers the facts of each case, including the broader socio-cultural context in which an applicant's harm is enacted. Codifying a rule whereby all such claims are foreclosed except in "rare circumstances," *see* 85 Fed. Reg. 36264, 36279, is improper. At the very least, the Departments should meaningfully define "interpersonal disputes" and "private criminal acts" so that individuals seeking asylum based on persecution by non-state actors (and their legal representatives) can adequately prepare their claims.

American Gateways further submits that the proposed PSG formulation improperly conflates several distinct elements of asylum claims. Whether an applicant's government was unable or

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51 *UNHCR Handbook*, at ¶ 44.

52 *Id.*

53 Roger Haines, Gender-Related Persecution Refugee Protection, in *International Law: UNHCR's Global Consultations on International Protection*, at 332 (ed. Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, 2003).

unwilling to control the non-state actors who persecuted her is an issue separate and distinct from the question of whether those actors harmed her on account of a statutorily protected ground, including membership in a PSG. The "unable or unwilling to protect" standard is well-established. Importing a different "unaware or uninvolved" standard into the list of generally non-cognizable PSGs is not only confusing, but also would prematurely cut off claims asserted by applicants who legitimately feared reporting their persecution to authorities. As demonstrated by the case below, a requirement that persecution perpetrated by non-state actors be reported to government authorities before it can form the basis of an asylum claim is untenable, especially as applied to particularly vulnerable populations.

Ms. T, originally from Burkina Faso, was studying in the United States on a student visa. When she went back to Burkina Faso to renew her visa, her family tried to force her into marriage with a distant relative. Ms. T fled and is afraid to return because of the forced marriage; she is also a victim of female genital mutilation. Even though forced marriage is technically illegal in Burkina Faso, Ms. T is reports that she cannot go to the police because female family members of hers who tried to report forced marriage to authorities were sent back to their families and told their families knew what was best for them. Ms. T, who is part of the Fulani tribe, also fears community retribution because she has gone against the wishes of her father, who is also a religious leader in the community. Under the current rules, Ms. T is eligible for asylum. She can show that she has suffered past harm that rises to the level of persecution on account of protected ground, that she has a credible fear of future persecution, and that her government is unwilling to protect her. The Proposed Rule would nonetheless bar Ms. T's claim. As an initial matter, forced marriage and FGM risk being characterized as "interpersonal disputes" and/or "private criminal acts." Furthermore, Ms. T cannot show that governmental authorities were "unaware or uninvolved" in her persecution because she reasonably fears that reporting the forced marriage to the police will result in her being sent back to her family, who will in turn force her to enter into the very marriage she sought to escape.

c. The proposed procedural requirements for claims premised on membership in a PSG are unconscionable, especially as applied to *pro se* applicants.

The Proposed Rule states: "No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group." 85 Fed. Reg. 36264, 36291 (proposed 8 C.F.R. § 208.1(c)), 36300 (proposed 8 C.F.R. § 1208.1(c)). Experienced immigration attorneys struggle to craft legally cognizable PSGs. For most *pro se* applicants, this requirement will be an insurmountable barrier. The requirement also appears to relieve immigration judges of their affirmative obligations when hearing claims of *pro se* applicants, including an obligation to seek clarification of a PSG's boundaries not clearly defined by the applicant. *See, e.g.*, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) ("If an applicant is not clear as to the exact delineation of the proposed social group, the Immigration Judge should seek clarification. . . ."). Furthermore, the proposed regulation does not even elaborate on the level of precision that is required before a PSG will be cognizable, leaving applicants, as well as their legal representatives, to guess just how exact their delineation of a PSG must be to pass muster under the new rules. American Gateways opposes

any requirement that applicants provide an "exact delineation" of proposed PSGs, as this requirement will certainly result in the pretermission of claims without a hearing. As discussed above, the summary denial of claims without hearing contravenes the INA, the U.S. Constitution, and well-settled principles of international law. *See supra* at Part III.C.

In an attempt to justify the unforgiving consequences of an applicant's failure to explain to the immigration judge the "exact delineation" of any PSG that forms the basis for asylum or withholding of removal, the Departments rely on *W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018). In that case, the BIA reasoned that a PSG must be articulated before the immigration judge so that the related facts are developed and available for review on appeal. *Id.* at 191. ("Where, as here, an applicant delineates a social group for the first time on appeal, the immigration judge will not have had an opportunity to make relevant factual findings, which we cannot do in the first instance on appeal."). As the BIA acknowledged, PSG cognizability presents a question of law. Applicants, therefore, should be able to present any modified PSGs on appeal—including for the first time—as long as they are supported by the factual record. There is no principled reason—and the Departments offer none—that PSGs based on facts presented to the immigration judge and developed in the record cannot be presented for the first time on appeal. In fact, the practice of reframing PSGs before the BIA, as well as federal circuit courts, is both widespread and longstanding. *See, e.g.*, *Hernandez-Navarro v. Lynch*, 605 F. App'x. 419, 419-20 (5th Cir. 2015) (noting that BIA addressed applicant's withholding of removal claim based on a PSG proposed for the first time on appeal); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (granting asylum to applicant based on PSG formulated by the BIA). This practice comports with the country's "obligations under international law to extend refuge to those who qualify for such relief." *Matter of S-M-J-*, 21 I&N Dec. 722, 723 (BIA 1997); *see also UNHCR* Handbook, ¶ 67 ("It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared . . . ."). Imposing a rule that is inconsistent with the judicial practice of clarifying PSGs "would undermine an applicant's ability to seek meaningful judicial review and relief based on revised PSGs, which is already undermined by the complexity of PSG jurisprudence and various access-to-justice barriers."[54]

The Departments also propose that the failure to sufficiently define a PSG before an immigration judge will result in the claim being waived and "shall not serve as the basis for any motion to reopen or reconsider for any reason, *including a claim of ineffective assistance of counsel*." *See* 85 Fed. Reg. 36264, 36291 (proposed 8 C.F.R. § 208.1(c)), 36300 (proposed 8 C.F.R. § 1208.1(c)) (emphasis added). This proposal is contrary to longstanding judicial practice, punitive, and unconstitutional. The right to a fair hearing in removal proceedings necessarily entails a due process right to effective assistance of counsel (even if at the respondent's own expense). *See Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Iavorski v. INS*, 232 F.3d 124, 128-29 (2d Cir. 2000); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Allabani v. Gonzales*, 402 F.3d 668, 676 (6th Cir. 2005); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005); *cf. Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006) ("[The Fifth Circuit] has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate

[54] Brief of Retired Immigration Judges and Former Members of the Board of Immigration Appeals as Amici Curiae Supporting *W-Y-C- & H-O-B-*'s Petition for Vacatur And Remand, at 2, *available at* perma.cc/9TTF-JNAR.

due process concerns under the Fifth Amendment."). Furthermore, the existing framework established by the BIA for evaluating motions to reopen based on ineffective assistance of counsel sets a "high standard" that vets out meritless (as well as many meritorious) ineffective assistance of counsel claims. *See Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). At the very least, the Departments should revise their proposal to remove the ban on ineffective assistance of counsel claims based on a failure to precisely define a legally cognizable PSG.

2. An overly narrow definition of "political opinion" is inconsistent with congressional intent and cannot be reconciled with the INA.

The Proposed Rule provides that, for purposes of adjudicating applications for asylum and withholding of removal, "a political opinion is one expressed by or imputed to an applicant in which the applicant possesses 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. 36294, 36291 (proposed 8 C.F.R. § 208.1(d)), 36300 (proposed 8 C.F.R. § 1208.1(d)). Additionally, the proposal excludes from the realm of "political opinion" nearly all opposition to "non-state organizations." *Id.* American Gateways submits that reading an overly narrow definition of political opinion into the statute under the guise of providing "additional clarity for adjudicators" is an impermissible attempt to rewrite the statute.

It is abundantly clear that Congress intended for the term to be interpreted expansively and consistently with international refugee law. As the Departments acknowledge in the preamble, the UNHCR analyzes political opinion not only in terms of overt involvement in a cause against a state or political entity, but in terms of "holding an opinion different from the Government or not tolerated by the relevant governmental authorities." 85 Fed. Reg. 36264, 36279 (quoting *UNHCR Handbook*, Ch. II(B)(3)(f), ¶¶ 80-82).[55] Additionally, UNHCR's 2002 Guidelines on International Protection No. 1, which "complement" the Handbook, state:

> Political opinion should be understood in the broad sense, to incorporate *any opinion on any matter in which the machinery of State, government, society, or policy may be engaged*. This may include an opinion as to gender roles.[56] It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her. In this sense, there is not as such

[55] The working papers from the Refugee Convention similarly confirm that the drafters conceptualized political opinion expansively from the outset, providing that the political opinion ground should include "diplomats thrown out of office," people "whose political party had been outlawed," and "individuals who fled from revolutions." *See* James C. Hathaway, Michelle Foster, *The Law of Refugee Status* (2d ed.), at 405 (Cambridge Univ. Press, 2014) (quoting UN Doc. E/AC.7/SR.172, at 18-23 (Aug. 12, 1950); UN Doc. E/AC.7/SR.173, at 5 (Aug. 12, 1950)).

[56] As the UNHCR further explains: "The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies." UNHCR, Guidelines on International Protection No. 1, HCR/GIP/02/01, May 7, 2002, ¶ 33; *see also Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (expressing "little doubt that feminism qualifies as a political opinion" in Iran).

> an inherently political or an inherently non-political activity, but *the context of the case should determine its nature*.[57]

The proposed definition constitutes a stark departure from this broad understanding of political opinion, positing an unworkable framework that seeks to distinguish between causes against states and political entities and causes against "a culture" that supposedly do not directly implicate the state or its actors. As the Departments are well aware, the machinery of the state is far-reaching, and the violence it engenders is, most often, not directly performed by the state. By way of example, in countries with weak rule of law—the very countries from which many refugees flee—non-state organizations often enjoy a "de facto" power that runs parallel to that of the state.[58] In such circumstances, how one would even begin the nearly impossible task of parsing out opinions that "relate[e] to political control of a state or unit thereof" from those that instead relate to the power asserted by "non-state organizations," the existence and conduct of which is a reflection of the state itself (and its failings), is entirely unclear. Moreover, in its fervor to foreclose claims based on domestic violence and gang violence (and perhaps a much broader universe of claims, such as those based on anti-LGBT violence), the Departments altogether disregard the reality that impunity is an integral component of state violence, as well as state power. American Gateways rejects any formulation of political opinion that does not afford adjudicators the flexibility to consider the larger political climate, "the power dynamics that surround any expressed or imputed view, and how those dynamics link, or fail to link, to formal authority within the relevant state."[59] Because any claim that implicates an express or implied political opinion relating to non-state actors cannot be fairly adjudicated within the contours of "political opinion" proposed by the rule, the proposal should be withdrawn.

Additionally, Congress has already provided clear guidance as to the proper scope of "political opinion." When it passed the Refugee Act, Congress expressed its clear intent to align domestic refugee law with the United States' obligations under the 1967 Protocol and to give statutory meaning to a national commitment to human rights. Since that time, Congress has amended the "refugee" definition as it concerns political opinion only once—to clarify that coercive abortion and sterilization procedures constitute persecution on account of political opinion. *See* INA § 101(a)(42). The Proposed Rule acknowledges that amendment, expressly incorporating coercive abortion and sterilization procedures into the proposed definition of political opinion, but the two cannot be reconciled. INA § 101(a)(42) does not contain any requirement that forced abortion or sterilization be carried out by the government or pursuant to a government policy. And, even if it were to be carried out by the government itself, forced abortion or sterilization is not necessarily "related to political control of a state or a unit thereof," 85 Fed. Reg. 36264, 36280, and one need not even hold an opinion on the matter to qualify for asylum

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[57] UNHCR, *Guidelines on International Protection No. 1*, HCR/GIP/02/01, May 7, 2002, ¶ 32, https://www.unhcr.org/en-lk/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html.

[58] *See, e.g.*, Sharyn Alfonsi, *"Our Whole Economy is in Shatters": El Salvador's President Nayib Bukele on the Problems Facing His Country*, 60 MINUTES (Dec. 15, 2019), https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/.

[59] Catherine Dauvergne, *Toward a New Framework for Understanding Political Opinion*, 37 Mich. J. Int'l L. 243, 294 (2016).

as a victim thereof. Congress has thus signaled that "political opinion" *must necessarily be construed more broadly than the regulations propose*.

The Departments' construction of "political opinion" is also objectionable on several other grounds, including but not limited to:

- The proposed rule narrowly links "political opinion" to "the furtherance of a *discrete* cause" without further defining the term "discrete." 85 Fed. Reg. 36264, 36291 (proposed 8 C.F.R. § 208.1(d)), 36300 (proposed 8 C.F.R. § 1208.1(d)). Where an individual broadly opposes an entire regime or its practices (*i.e.*, human rights violations), is such opposition discrete enough to constitute a political opinion within the meaning of the regulations? Are protests opposing police brutality "political" enough as to a given protestor, or must that protestor also be motivated by some "discrete" policy measure, such as defunding the police? Where would an LGBT individual who is beaten and raped following participation in a pride march fall under the new rule? Because the term "discrete" will generate more questions than it will answer, it should be withdrawn.

- The "expressive behavior" requirement is inconsistent with the plain language of the statute, which extends protections based on political "opinion," not political "activity." *Id.* Settled case law further underscores that protection based on political opinion is *not* limited to people who are engaged in overtly political activities. *See, e.g.*, *Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir. 2005) (recognizing that "[l]ess overtly symbolic acts may also reflect a political opinion" and explaining that "whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum"); *Coriolan v. INS*, 559 F.2d 993, 1001 (5th Cir. 1977) (noting that political expression is not limited to "conventionally 'political' action" and warning against assumptions that "people without overt political activity . . . are unlikely to be the victims of political persecution"). Had the drafters of the Refugee Convention, or Congress when it adopted the Convention's definition of "refugee," intended to extend protections only to individuals engaged in "public behavior commonly associated with political activism, such as attending rallies, organizing collective actions such as strikes or demonstrations, speaking at public meetings, printing or distributing political signs, or similar activities," 85 Fed. Reg. 36264, 36280 n.30, they could and would have said so.

- The proposal mentions express and imputed political opinions but is silent as to protections for individuals who have a well-founded fear of persecution based on unexpressed political opinions. As the UNHCR Handbook explains: "There may . . . be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have a fear of persecution for reasons of political opinion."[60] Accordingly, courts have granted asylum claims even where applicants never articulated their political opinions to their

[60] *UNHCR Handbook*, ¶ 82.

persecutors. *See, e.g.*, *Rivas-Martinez v. INS*, 997 F.2d 1143, 1147 (5th Cir. 1993) (concluding that the BIA had imposed an "unrealistic requirement on entitlement to asylum" by requiring an alien to "foolhardily court death by informing armed guerillas to their faces that she detests them or their actions or ideologies"). If the proposed changes regarding "political opinion" are not withdrawn, they should be revised to reflect that a political opinion may form the basis of an asylum or withholding claim even where that opinion is not expressed.

- The qualifying language relating to the general bar against political opinion claims involving opposition to non-state organizations is virtually unintelligible. Nonetheless, the proposal seems to improperly require that the expression of a political opinion in opposition to non-state organizations "relate[] to efforts by the state to control such organizations." 85 Fed. Reg. 36264, 36291 (proposed 8 C.F.R. § 208.1(d)). Limiting protections to political opinions that align with state efforts to control non-state organizations has no basis in the law, is confusing, and should be withdrawn.

3. Categorically narrowing the universe of conduct that amounts to persecution is inconsistent with congressional intent and international law.

The term "persecution" is not ambiguous, and the Departments' proposed interpretation is inconsistent with congressional intent in several respects. Two years prior to enacting the 1980 Refugee Act, Congress specifically debated whether to add a definition of "persecution" to the INA in the context of a bill concerning the deportation ground for Nazi persecutors (codified at 8 U.S.C. § 1227(a)(4)(D)).[61] Congress declined to do so because the meaning of "persecution" was well-established by judicial decisions and meant "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.*, race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[62] The fact that existing case law reflects a "wide range" of persecutory conduct does not warrant adding a new regulation that more specifically defines "persecution." Whether certain acts or omissions rise to the level of persecution must be individually analyzed based on the unique facts and circumstances of each case. Listing out types of harm that are generally *not* encompassed within the definition of persecution invites adjudicators to prejudge and summarily deny claims with little to no individualized analysis. The proposed language also confuses more than it clarifies. If the administration elects to define persecution, which it should not, it should strike and/or revise several statements contained in the proposed definition.

First, the Proposed Rule states that "persecution is an extreme concept involving a severe level of harm that includes actions *so severe that they constitute an exigent threat*." 85 Fed. Reg. 36264,

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61 H.R. Rep. 95-1452 (1978).

62 *Id.* at 5. The court in *Grace v. Whitaker* also examined the statutory term "persecution" and concluded that the term has a settled meaning. 344 F. Supp. 3d at 128. The government's conflicting interpretation of the term in that case therefore failed at *Chevron* step one. *Id.* The same is true here.

36291 (proposed 8 C.F.R. § 208.1(e)), 36300 (proposed 8 C.F.R. § 1208.1(e)) (emphasis added). The proposal does not further define "exigent threat," and it is entirely unclear whether an "exigent threat" is one circumstance that is sufficient to constitute persecution or a necessary circumstance before any conduct will be recognized as persecution. As written, this language risks being unreasonably construed and weaponized by adjudicators to deny almost every claim for relief on grounds that the harm alleged is not sufficiently severe. The administration should therefore strike the phrase "that includes actions so severe that they constitute an exigent threat." If it declines to do so, the administration should explain what it means by "exigent" and clarify whether evidence of an "exigent threat" is sufficient or necessary to establish persecution.

Second, the Proposed Rule states that persecution does not encompass "intermittent harassment, including brief detentions." *Id.* This statement, as written, risks being weaponized by adjudicators to deny any claim that involves brief detentions. By way of example, American Gateways client Mr. V was arrested and detained by the Cuban police shortly after midnight for expressing his opinion against the government. The police beat him with batons, knocking him unconscious and dislocating his shoulder. Mr. V. was released soon after regaining consciousness around seven hours after his arrest, but not before the police threatened him with imprisonment if he said anything more against the government. He had to go to the hospital and could not move his jaw for a week. As written, the proposed formulation of "persecution" has the potential to mislead adjudicators into thinking that the harm to Mr. V was just a "brief detention" that did not amount to persecution even though the police beat him unconscious during the detention and he required medical treatment. Similarly, Ms. J, a transgender woman, was arrested and detained by the Honduran police more than 10 times—sometimes at the police station and sometimes in a police vehicle. Each time, she was raped by multiple officers who promised to make her a "real woman," and, after several minutes or a few hours, released without any charges having been filed. As with Mr. V, the Departments' proposal could mislead adjudicators to conclude that the harm to Ms. J was a "brief detention" that did not amount to persecution. Given this risk, American Gateways urges the Departments to remove the phrase "including brief detentions" from the proposed regulation. Alternatively, the Departments should further explain what constitutes a "brief" detention and add qualifying language, such as "including harm described solely by brief detentions."

Third, the Proposed Rule states that persecution "does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country." *Id.* Denying refugee status on the ground that persecution is "generalized" cannot be reconciled with accepted refugee law doctrines. The definition of refugee in the 1951 Refugee Convention, which Congress adopted, does not make any distinction between refugees fleeing peacetime and "wartime" persecution. The UNHCR Guidelines on International Protection No. 12 for claims of refugee status related to situations of armed conflict and violence also clearly contemplate persecution against whole communities and civilians more generally.[63] As long as there is a causal link between a person's well-founded fear of being persecuted and a protected ground, that person may qualify as a refugee; the fact that entire groups or populations may also be at risk does not undermine the validity of any individual claim. Additionally, civil, criminal or military strife often weakens the rule of law and the justice system, erodes government institutions, and engenders political, religious, ethnic,

[63] UNHCR, *Guidelines on International Protection No. 12* (Dec. 2, 2018), UN Doc. HCR/GIP/16/12, ¶¶ 17-18.

and gender-based persecution. The consequences of situations of widespread internal strife may themselves be sufficiently serious to constitute persecution or create an environment conducive to persecution by non-state actors. This statement, risks being exploited by adjudicators to deny any claim involving flight from a country engaged in armed conflict or otherwise plagued by a generalized or indiscriminate violence. Given this risk, American Gateways urges the administration to remove the clause concerning "generalized harm" from the Proposed Rule.

Fourth, the Proposed Rule states that persecution does not encompass "threats with no actual effort to carry out the threats." 85 Fed. Reg. 36264, 36291 (proposed 8 C.F.R. § 208.1(e)), 36300 (proposed 8 C.F.R. § 1208.1(e)). American Gateways urges the administration to strike this language because it risks being unreasonably construed and utilized by adjudicators to deny all claims involving threatening behavior, no matter how severe. This exception ignores the reality that threats alone can cause significant psychological harm to those who reasonably fear that the threats will be carried out. It is also inconsistent with a long line of cases holding that threats alone may, under certain circumstances, constitute persecution. *See*, *e.g.*, *Garcia-Cruz v. Sessions*, 858 F.3d 1, 6 (1st Cir. 2017) ("so menacing as to cause significant actual suffering or harm"); *Escobar v. Holder*, 657 F.3d 537, 544 (7th Cir. 2011) ("immediate, menacing, or the perpetrators attempt to follow up on them"); *Chavarria v. Gonzalez*, 446 F.3d 508, 520 (3d Cir. 2006) ("highly immediate, concrete and menacing and [the applicant] suffered harm from it"); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119 (9th Cir. 2004) ("specific and menacing and are accompanied by evidence of violent confrontations, near-confrontations and vandalism"); *Vatulev v. Ashcroft*, 354 F.3d 1207, 1210 (10th Cir. 2003) ("so immediate and menacing as to cause significant suffering or harm in themselves"). Finally, this exception improperly shifts the focus from the point-of-view of the applicant to that of the persecutor. Whether a fear of persecution is well-founded turns on whether the applicant reasonably believed the threats against him would be carried out, not whether the persecutor intended to or made sufficient efforts to carry out the threats.

The harm that would befall asylum seekers if the proposed definition of persecution is codified is not hypothetical. American Gateways client Ms. S provided food for and transported injured persons during the 2018 protests against the Nicaraguan government, which responded with a policy of "exile, jail, or death" for perceived opponents.[64] Because of her role, two officials shoved Ms. S and threatened her with a firearm, telling her that they knew where she lived and that if she continued helping the student protesters, they would kill her. The incident left her "paralyzed." Under a week later, about six government sympathizers threatened Ms. S's husband with a pistol to his head right in front of her, accused him of being with an opposition party, and threatened to kill both of them within a week. This forced them to move to a different city. The next day, they found that the front door to the house they had left behind had been broken and vandalized with a note that said, "We have you controlled." Ms. S and her husband reported these incidents to a Nicaraguan human rights group. Finding past persecution, the immigration judge granted Ms. S asylum. Under the Proposed Rule, because Ms. S cannot identify who vandalized her home and whether they intended to physically harm her, a judge could unreasonably find that the harm was nothing more than "threats with no actual effort to carry out the threats" and thus did not rise to level of past persecution, even though the incidents,

[64] *See* U.S. Dep't of State, *Country Reports on Human Rights Practices for 2018: Nicaragua*, at 1 (Mar. 13, 2019), https://www.state.gov/wp-content/uploads/2019/03/NICARAGUA-2018.pdf.

both of which involved the use of a firearm, left Ms. S psychologically paralyzed and forced her to move cities.

If the administration declines to strike this exception, the administration should at least explain what constitutes "actual effort." As evidenced by the case of Ms. S, a persecutor wielding a gun and threatening to kill another individual may result in severe psychological trauma. Under the Proposed Rule, it is unclear if conduct such as wielding a firearm qualifies as "actual effort" if a persecutor does not actually discharge the firearm or even if a persecutor discharges the firearm but misses his target.

Fifth, the Proposed Rule states 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." 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.1(e)), 36300 (proposed 8 C.F.R. § 1208.1(e)). American Gateways urges the administration to strike this language because it is ambiguous and risks being unreasonably construed and weaponized by adjudicators to deny all claims involving laws and policies that the adjudicators deem insufficiently enforced. The proposed language ignores that laws and policies criminalizing protected characteristics have a chilling effect on the rights, freedoms, and protections afforded to individuals with such characteristics.

For example, a total of 68 U.N. member states criminalize consensual same-sex sexual conduct, and thirteen of those states may punish such conduct by death.[65] These laws are often described as "dormant" because they are not perceived to be actively enforced, but this characterization is inaccurate. Though data is limited, a recent report spanning 2018 and 2019 found that at least 55 states "arrested, charged, prosecuted, sentenced, jailed and even executed individuals for crimes or allegations consisting of, or related to, consensual same-sex sexual activity."[66] The proposal does not appreciate the lack of information available regarding the enforcement of laws criminalizing consensual same-sex sexual conduct or the reality that many individuals at risk of persecution on account of their sexual orientation or gender identity remain closeted, thus skewing downward any data concerning the frequency with which laws criminalizing same-sex sexual conduct are enforced. The proposal also ignores that criminal laws targeting protected characteristics often drive individuals to conceal their identities or deeply held beliefs in order to avoid harm—a reality that courts have recognized does *not* undermine a claim of asylum and may, in some instances, amount to persecution. *See, e.g.*, *Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004) (Posner, J.) (decrying "the assumption—a clear error of law—that one is not entitled to claim asylum on the basis of religious persecution if . . . one can escape the notice of the persecutors by concealing one's religion"); *Kazemzadeh v. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) ("We agree with the decision of the Seventh Circuit that having to practice religion underground to avoid punishment is itself a form of persecution." (citing *Muhur*, 355 F.3d at 960-61); *Bernard v. Sessions*, 881 F.3d 1042, 1049 (7th Cir. 2018) ("The law does not require people to hide

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65 Int'l Lesbian, Gay, Bisexual, Trans & Intersex Ass'n, *State-Sponsored Homophobia: Global Legislation Overview Update*, at 47, (Dec. 2019), https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf

66 *Id*. at 12.

characteristics like religion or sexual orientation . . . .” (quoting *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 262-63 (7th Cir. 2017) (“Suppose a person if removed to his country of origin would be sure to be persecuted unless, by living in a cave, he avoided all contact with other persons. The next step would be to rule that no one can have a real fear of persecution because if persecution looms he can avoid it by committing suicide.”))).

Furthermore, the Proposed Rule fails to provide any guidance as to what level of enforcement might be deemed sufficient to support a well-founded fear of persecution. For most individuals, any scintilla of enforcement would cause them to fear for their safety. Requiring an applicant who fled persecution based on a protected characteristic that is criminalized by the applicant’s government to establish either that the government’s enforcement of its criminal laws is not “infrequent” or that the government would have applied the law to applicant personally is unreasonable. Under the Proposed Rule, a gay asylum seeker from Mauritania who flees after his partner is stoned to death risks having his claim denied if he cannot establish that that the law making homosexuality a crime punishable by death has been “frequently” enforced against other gay men or would be similarly applied to him. Because the language of the Proposed Rule would lead to such absurd results, it should be withdrawn.

Finally, American Gateways objects to the proposed definition of “persecution” because it does not acknowledge, as it should, that adjudicators should consider the cumulative effect of all incidents when determining whether particular abuses add up to persecution,. *See Matter of O-Z & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998) (explaining that cumulative effect of several incidents may constitute persecution and should be viewed in the aggregate); *Venturini v. Mukasey*, 272 F. App’x 397, 403 n.2 (5th Cir. 2008) (“We have recognized, at least implicitly, that past persecution may be established based on the cumulative effect of multiple threats and attacks, even if no single incident is sufficient.” (citing *Eduard v. Ashcroft*, 379 F.3d 182, 187 (5th Cir. 2004) (citing *O-Z- & I-Z-*, 22 I&N Dec. at 26))); *accord Lin v. Holder*, 478 F. App’x 219, 227 (5th Cir. 2012). “While a single incident in some cases may not rise to the level of persecution, the cumulative effect of several incidents may constitute persecution.” *Singh v. INS*, 94 F.3d 1353, 1358 (9th Cir. 1996); *see also Abdalla v. Sessions*, 690 F. App’x 723, 725 (2d. Cir. 2017) (“We have explained that the ‘technique of addressing the severity of each event in isolation, without considering its cumulative significance,’ constitutes error.” (quoting *Poradisova v. Gonzales*, 420 F.3d 70, 79 (2d Cir. 2005))).

4. The enumerated list of circumstances that generally will not satisfy the “nexus” requirement has no basis in the law.

When Congress adopted the international definition of a refugee as a person with a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion,” it did not prescribe any standard for determining the “on account of” causation clause, which has come to be known as the “nexus requirement.” Congress then clarified in 2005 when it passed the REAL ID Act that a protected ground must be “at least one central reason” for the persecution suffered by an applicant—a standard that expressly permits “mixed motive” claims, as the protected ground need not be the sole or even the primary reason for an

applicant's persecution.[67] *See, e.g.*, *Sharma v. Holder*, 729 F.3d 407, 411 (5th Cir. 2013) (explaining that, although a statutorily protected ground cannot be an incidental, superficial, or subordinate reason for harm, it "need *not* be the *only* reason for harm." (quoting *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009))); *Matter of S-P-*, 21 I&N Dec. 486, 492 (BIA 1996) (acknowledging that "mixed motive" cases are actionable and instructing that "fundamental humanitarian concerns of asylum law" afford a "generous standard for protection in cases of doubt").

Like several of the Departments' other proposed changes, proposed 8 C.F.R. § 208.1(f) and 8 C.F.R. § 1208.1(f) improperly incentivize adjudicators to forego an individualized determination of the often complex and multi-faceted motives that animate persecution, as the INA requires, and to deny whole categories of claims. The enumerated list of circumstances that do not warrant favorable adjudication has no basis in refugee law or the INA. American Gateways strongly opposes the Departments' efforts to unfairly vet out claims involving harm inflicted by non-state actors (and, more specifically, claims involving domestic violence and opposition to gangs and other organized criminal entities). When combined with the proposal to allow the pretermission of claims without a hearing, the proposed guidance regarding "nexus" is particularly dangerous, as it will most certainly result in the widespread denial of meritorious claims without a hearing.

The Departments' proposed construction of "nexus" is objectionable in its totality. American Gateways' discussion of certain provisions below is intended to highlight just a few of the myriad harms that will flow from the proposed changes.

Interpersonal animus or retribution. The Proposed Rule excludes nexus based on "interpersonal animus or retribution." 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.1(f)(i)), 36300 (proposed 8 C.F.R. § 1208.1(f)(i)). This broad exclusion echoes the former attorney general's suggestion that a persecutor's "preexisting personal relationship" with an applicant undermines the nexus requirement. *Matter of A-B-*, 271 I&N Dec. 316, 339 (AG 2018). But the law does not limit refugee protection to individuals who are persecuted by strangers. Individuals often suffer persecution at the hands of family members or acquaintances and, even where persecution is driven by "interpersonal animus or retribution," such animus may simultaneously implicate a protected ground. Take, for example, the case of Ms. C, a transgender asylum seeker from Honduras. Ms. C suffered severe psychological and physical harm at the hands of an abusive ex-partner who repeatedly told her that reporting the harm to governmental authorities would be futile because the police would not respond to a complaint filed by a "culero" (a derogatory term for a transgender woman). Although Ms. C's partner persecuted her with impunity because of her transgender identity, a judge might nonetheless conclude that Ms. C cannot establish the "nexus" element of her claim because she had an "interpersonal" relationship with her persecutor. Because this vague and overbroad exclusion risks being weaponized by adjudicators to deny any claim (without a hearing) where an

[67] REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B)(i) (2009). In 2007, the BIA explained that, under the "one central reason" standard, "the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment. That is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Matter of Re J-B-N- & S-M-*, 24 I&N Dec. 208, 212 (BIA 2007). The BIA has also extended the "one central reason" standard to withholding of removal cases. *See Matter C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010).

applicant had a personal relationship with his or her persecutor, the exclusion should be withdrawn from the Proposed Rule.

Interpersonal animus not broadly manifested. The Proposed Rule excludes nexus based on "interpersonal animus in which the alleged persecutor has not targeted, or manifested animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue." 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.1(f)(ii)), 36300 (proposed 8 C.F.R. § 1208.1(f)(ii)). This exclusion, which calls for the unfavorable adjudication of claims where an applicant cannot connect her alleged persecutor to harms inflicted upon other members of her particular social group, has no basis in the law and is wholly illogical. Personal relationships may inform which members of a group a persecutor targets, but it says nothing of *why* he seeks to persecute her, which is the relevant issue for nexus. In fact, prior administrations have expressly acknowledged the reality that, in some cases, a persecutor may target an individual victim because of a shared characteristic, even though the persecutor does not act against others who possess that same characteristic:

> [I]n a society in which members of one race hold members of another race in slavery, that society may expect that a slave owner who beats his own slave would not beat the slave of his neighbor. It would nevertheless be reasonable to conclude that the beating is centrally motivated by the victim's race. Similarly, in some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or because of her status in a domestic relationship.

65 Fed. Reg. 76588-01, 76593.

Furthermore, in several cases, evidence that a persecutor has targeted or manifested animus against others who share an applicant's protected characteristic is simply not known or not reasonably available to the applicant.[68] By way of example, Ms. G is a young LGBT woman from Honduras. After it was revealed that she was a lesbian, her mother forced her to leave her home and she was fired from her job. Upon news of her sexuality, a male acquaintance stalked her and raped her to "make her a complete woman," all the while threatening to kill her if she told anyone what had happened. Ms. G attempted to report the rape and death threats to the police, but the police told her there was not any evidence. Ms. G does not know whether her rapist has "targeted, or manifested an animus against, other" LGBT individuals. Under the Proposed Rule, a judge might therefore unreasonably find that there was no nexus to a protected ground even though Ms. G's rapist attacked her precisely because she was a lesbian.

[68] The U.S. Supreme Court has acknowledged that marshaling direct evidence of one's persecutor's motives is often difficult, if not impossible. *See I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (stating the applicant "objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.") (emphasis in original). Heightening the existing standard by requiring proof that a persecutor also persecuted others with the same protected characteristic is nonsensical.

Generalized opposition to non-state organizations. The Proposed Rule excludes nexus relating to the "[g]eneralized 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," as well as "[r]esistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations. 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.1(f)(iii)-(iv)), 36300 (proposed 8 C.F.R. § 1208.1(f)(iii)-(iv)). As discussed above, American Gateways objects to these exclusions on several grounds, including that they are inconsistent with the expansive definition of "political opinion" intended by Congress, and they cannot be reconciled with the INA. *See supra* at Part III.D.2.

Criminal activity. The Proposed Rule excludes nexus relating to "[c]riminal activity." 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.1(f)(vi)), 36300 (proposed 8 C.F.R. § 1208.1(f)(vi)). This exclusion, which is so broad as to potentially bar all claims where the alleged persecutor is affiliated with a criminal enterprise or otherwise involved in criminal activity, should be withdrawn. As previously noted, Congress has spoken on the "nexus" requirement, stating that nexus may be established where an individual's protected characteristic was "at least one central reason" for his persecution. The fact that an applicant's persecutor may be involved with criminal activity often has no bearing on persecutor's motives in targeting a particular individual. In fact, many persecutors commit targeted crimes against individuals with shared protected characteristics *because of* a culture of impunity for such crimes. Hence, even where criminal activity is one motivating factor, it is typically not the central or only factor; therefore, it does not undermine an applicant's ability to satisfy the nexus requirement. *See, e.g.*, *Ayala v. Sessions*, 855 F.3d 1012, 1021 (9th Cir. 2017) (describing such persecution as "'extortion plus'—that is, extortion, with the threat of violence, on the basis of a protected characteristic" (quoting *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999))). The Departments wholly ignore judicial precedent concluding that "extortion plus" claims are cognizable without any explanation for their omission, instead proposing a blanket exclusion that will embolden judges to improperly pretermit claims, especially those filed by *pro se* applicants, where the perpetrator is involved with criminal activity without giving the applicant a fair opportunity to present evidence relating to nexus. As evidenced by the example below, the risk that the "criminal activity" exclusion will be improperly applied warrants it being withdrawn from the Proposed Rule.

American Gateways client Ms. M was assaulted at gunpoint and beaten unconscious with a rock by a group of masked men believed to be affiliated with the MS-13. While the men beat her, they called her "maricon" and "culero," and they expressed their hatred for transgender women. They also demanded that Ms. M pay them a specific amount of "rent" within five days. Ms. M reported the incident to the police, who mocked her and declined to take a report. About a week later, a group of masked men again attacked Ms. M, beat her, ripped her clothes off, threatened to rape her, and split her forehead open with a baseball bat, rendering her unconscious. During the second attack, believed by Ms. M to have been perpetrated by the same men, the men similarly expressed a hatred of transgender women. Following the second incident, Ms. M fled El Salvador in fear of her life. Ms. M's experience presents a classic "mixed motive" case whereby her transgender identity was at least "one central reason" that motivated her perpetrators. Under the Proposed Rule, Ms. M's claim would become legally suspect simply

because her persecutors also sought to extort money from her, a fact that should in no way undermine the nexus element of her claim.

Gender. The Proposed Rule excludes nexus based on "gender." 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.1(f)(viii)), 36300 (proposed 8 C.F.R. § 1208.1(f)(viii)). The categorical elimination of nearly all gender-based persecution claims is morally and legally indefensible. The Departments propose to withhold protection from vulnerable women and children targeted with a broad range of gender-based persecution—including but not limited to rape, forced marriage, human trafficking, and domestic violence. Moreover, in failing to describe the "rare circumstances" in which a gender-based claim might succeed (which the Departments concede in the preamble), 85 Fed. Reg. 36282, the proposal apparently sanctions even the most egregious, clear-cut cases of gender-based persecution. Under the Proposed Rule, a government could carry out a targeted extermination campaign against women precisely because of their gender and those women would barred from seeking asylum or withholding of removal because the implementing regulations provide that "gender" cannot suffice to satisfy the nexus requirement.

Equally concerning is that the Proposed Rule does not define "gender," thereby opening the door for the exclusion to sweep even more broadly than the administration may intend. It is no secret that the Departments wish to foreclose claims based on domestic violence and other forms of gender-based violence against women and children. Yet, given the Departments' curious silence regarding female genital mutilation (FGM) claims and LGBTQ claims throughout the Proposed Rule, this provision risks being weaponized by adjudicators to deny all claims *relating to* gender, including claims based on FGM and claims based on an applicant's sexual orientation and gender identity. Persecution against transgender persons is typically motivated by their defiance and/or disruption of gender norms, not their gender *per se*. This distinction may nonetheless be lost on adjudicators eager (or even not so eager) to satisfy their performance metrics by cursorily denying all claims arguably related to gender. This risk is not hypothetical. The U.S. Supreme Court recently held that discrimination on the basis of transgender status is inextricably tied to discrimination based on sex. *See generally Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020). It is not difficult to imagine an immigration judge concluding that the widespread persecution of transgender women constitutes gender-based persecution. The same is true of claims brought by women who are opposed to FGM, which have long been recognized as cognizable claims. American Gateways urges the Departments to withdraw the divisive "gender" exclusion in its entirety. In the alternative, the Departments should clarify that the exclusion does not wipe out decades of BIA and federal circuit case law recognizing the viability of certain gender-based claims. *See, e.g.*, *Matter of Kasinga*, 21 I&N Dec. 357, 357 (BIA 1996) (holding that "[t]he practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA) (finding that Cuban homosexual had established membership in a particular social group); *see also* Att'y Gen. Order No. 1895−94 (June 19, 1994) (designating *Toboso-Alfonso* as precedent for all cases involving same issues); *Amanfi v. Ashcroft*, 328 F.3d 719, 727-30 (3d Cir. 2003) (holding that petitioner may establish persecution on account of membership in a particular social group because he was perceived as gay, even though he is not gay).

Additionally, the Proposed Rule is in tension with the administration's 2019 proposal to implement several new asylum bars, including a bar for individuals who commit "a federal, state, tribal, or local domestic violence offense, or who are found by an adjudicator to have engaged in acts of battery or extreme cruelty in a domestic context, *even if no conviction resulted*." 84 Fed. Reg. 69645 (emphasis added).[69] If both rules are implemented, a perpetrator of domestic violence would be barred from obtaining asylum, and the victim of that same domestic violence would be unable to obtain asylum or withholding of removal.

5. Barring evidence relating to cultural stereotypes is inconsistent with the INA, other implementing regulations, and judicial precedent; it also infringes on due process rights.

The Proposed Rule provides that any "evidence promoting cultural stereotypes about an individual or a country, *including stereotypes based on race, religion, nationality, or gender . . . shall not* be admissible." 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.1(g)(viii)), 36300 (proposed 8 C.F.R. § 1208.1(g)(viii)). This proposal cannot be squared with the INA, which provides that an "alien *shall* have a reasonable opportunity to examine the evidence against the alien, *to present evidence on the alien's own behalf*, and to cross-examine the witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B) (emphasis added). Nor can it be squared with existing regulations, which provides that "the immigration judge *shall* receive and consider material and relevant evidence." 8 C.F.R. § 1240.1(c). Furthermore, in unduly restricting the presentation of evidence, the proposal infringes upon an applicant's constitutional right to a full and fair hearing. *See supra* at Part III.C.

The Proposed Rule is also out of step with well-established evidentiary rules applicable to immigration proceedings. The EOIR's Immigration Judge Bench Book states as follows:

> The strict rules of evidence are not applicable in deportation proceedings. *Matter of Wadud*, 19 I&N 182 (BIA 1984). Immigration proceedings are not bound by the strict rules of evidence. *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983); *Dallo v. INS*, 765 F.2d 581 (6th Cir. 1985); *Longoria-Castaneda v. INS*, 548 F.2d 233 (8th Cir.), *cert. denied*, 434 U.S. 854 (1977).
>
> The general rule with respect to evidence in immigration proceedings favors admissibility as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980), *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168 (BIA 1972); *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983); *Tashnizi v. INS*, 585 F.2d 781 (5th Cir. 1978); *Trias-Hernandez v. INS*, 528

[69] Procedures for Asylum and Bars to Asylum Eligibility, 8 Fed. Reg. 69640 (proposed Dec. 19, 2019), https://www.federalregister.gov/documents/2019/12/19/2019-27055/procedures-for-asylum-and-bars-to-asylum-eligibility.

> F.2d 366 (9th Cir. 1975); *Marlowe v. INS*, 457 F.2d 1314 (9th Cir. 1972)[.][70]

See also Matter of Y-S-L-C-, 26 I&N Dec. 688, 690 (BIA 2015) ("It is well established that the Federal Rules of Evidence are not binding in immigration proceedings, where the test for admitting evidence is whether it is probative and its admission is fundamentally fair."). It thus follows that any credible evidence relating to a stereotype should be admissible so long as it is relevant to an applicant's claim.

As the Departments certainly appreciate, cultural stereotypes are so intertwined with persecution that barring the admission of any evidence relating to such stereotypes is patently unfair. The Oxford English Dictionary defines "stereotype" as "[a] preconceived and oversimplified idea of the characteristics which typify a person, situation, etc.; an attitude based on such a preconception."[71] A lens through which individuals perceive, interpret, and describe their realities, stereotypes both fuel and are used to justify violence and other conduct that rises to the level of persecution. Indeed, in expressly barring evidence of stereotypes based on the statutorily protected grounds of race, religion, and nationality, as well as gender, the Departments tacitly concede that such evidence is relevant.

Moreover, the only authority cited in the preamble to justify excluding "evidence promoting cultural stereotypes" does not actually support its exclusion at all. *See* 85 Fed. Reg. 36264, 36282. Taking aim at gender-based violence claims (and domestic violence claims, in particular) former attorney general Sessions noted, that:

> conclusory assertions of countrywide negative cultural stereotypes, such as *A-R-C-G-*'s broad charge that Guatemala has a "culture of machismo and family violence" based on an unsourced partial quotation from a news article eight years earlier, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.

Matter of A-B-, 27 I&N Dec. at 336 n.9. The proposed rule sweeps far wider than the attorney general's dicta, which did not broadly criticize evidence based on stereotypes, but rather "conclusory assertions" based on unsourced, incomplete, and outdated materials.

As a practical matter, the Proposed Rule presents an unsolvable evidentiary paradox. It is unclear whether the proposal's reference to "evidence" encompasses only documentary evidence, or also testimonial evidence based on purported stereotypes. Where the only evidence of a persecutor's motive—such as the utterance of racial epithets during a brutal beating—implicates cultural stereotypes, will an applicant's testimony regarding the use of racial epithets be inadmissible? And, even if the Proposed Rule were limited to documentary evidence, it is

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[70] Executive Office of Immigration Review, *Immigration Judge Bench Book* (July 2017), https://www.justice.gov/eoir/page/file/988046/download.

[71] *Stereotype*, Oxford English Dictionary, https://www.oed.com/view/Entry/189956?isAdvanced=false&result=1&rskey=8z9gp (last visited July 13, 2020)

unworkable. Individuals fleeing persecution in their home countries face substantial obstacles in accessing, gathering, and presenting evidence in support of their claims. Often times, witnesses located thousands of miles away in an applicant's home country may still be at risk of harm and therefore unwilling to testify, assuming they even have the means to communicate with the applicant. *Pro se* asylum seekers, especially those caged in detention centers, have little means to access evidence in support of their claims and even lesser means to obtain properly certified English translations of that evidence. For many asylum seekers, the only evidence accessible to them is country conditions evidence—much of which inevitably addresses the socio-cultural factors (including stereotypes) that produce the violence and insecurity that contributed to, or at least enabled, the applicant's persecution. Under the Proposed Rule, even that evidence could be deemed inadmissible.

The below case examples highlight the irrationality of a rule that would exclude any evidence relating to "cultural stereotypes":

- American Gateways client Ms. A is a young woman from El Salvador. At age 14, Ms. A began a relationship with J, who was 17 years old. Soon after their relationship began, J became possessive and physically abusive to her. He also raped her, which ultimately resulted in the birth of her son. Ms. A tried to leave J, but he stalked her. He followed her to and from school and sat outside of her house watching and waiting for her to leave. On more than one occasion, J strangled Ms. A and severely beat her, calling her a "puta" and telling her that he would kill her if she did not return to him. Ms. A and her mother reported the abuse and stalking to the police, but the police refused to take a report and told them they would not intervene in any way because it was a family matter. Ms. A and her son fled to her aunt's home several hours away, but J located her. Ms. A feared for her life, so she and her son fled to the United States and applied for asylum. She was granted asylum by the immigration judge. Because the evidence supporting her claim was inextricably intertwined with cultural gender-based stereotypes, Ms. A likely could not prove her claim under the Proposed Rule.

- American Gateways client Ms. O is from Jordan. Her spouse is a Syrian national and citizen. After the marriage, he became incredibly abusive and wanted Ms. O to be subservient to him, despite the fact that prior to their marriage she had discussed with him that she wanted to have independence, to which he agreed. Ms. O's spouse used their two children, along with years of abuse, to control Ms. O. She fled to Jordan but was unable to take her children because, as a woman, she could not give them citizenship. Ms. O returned to her spouse on several occasions, to be able to be with her children. She also reported the abuse to authorities in Syria, but they refused to help her. Ms. O was eventually able to obtain passports for her children, came to the United States on a tourist visa, and applied for asylum. She was granted asylum by an immigration judge. Despite having suffered years of persecution because of the cultural stereotype for gender roles imposed on her by her spouse, much of the evidentiary record supporting Ms. O's claim would be inadmissible under the Proposed Rule because it necessarily implicates cultural beliefs based on gender. Moreover, Ms. O's claim based on her political opinion of feminism would also likely be treated as inadmissible under

the Proposed Rule, which seeks to eliminate claims where an applicant's opinions do not directly implicate the state or its actors, as discussed above. *See supra* at Part III.D.2.

- American Gateways clients, the B family, are from Honduras. Ms. B and her two surviving sons fled Honduras because a local gang, having already tortured and murdered a third son for (incorrectly) suspected rival gang activity, targeted them. Because of expert testimony on the general behavior of Central American gangs and the Honduran government's response to them, the Department conceded in closing arguments that the applicants were entitled to CAT protection. Though the parties disputed asylum eligibility, the immigration judge ultimately granted all applicants asylum based on their family being a particular social group, and the Department did not appeal. Under the Proposed Rule, the outcome-determinative evidence supporting the B family's claim may have been excluded as "promoting cultural stereotypes."

The irony of the proposed bar on evidence relating to "cultural stereotypes" is itself noteworthy. The nativist fear-mongering driving the current administration's continued assault on the country's immigration system—of which this Proposed Rule is a part—is wholly reliant on cultural stereotypes to justify unlawful and immoral immigration policies. Take just a few examples. In early 2018, the President infamously decried the entry of people to the United States from "shithole countries," including Haiti, El Salvador, and several African nations,[72] Following another of the President's remarks that some individuals being deported "aren't people—they're animals,"[73] the White House communications office proceeded to issue a statement titled "What You Need to Know About the Violent Animals of MS-13," which used the term "animals" no less than *ten* times and described their goal as to "kill, rape, control."[74] When the administration's family separation policy was in full-swing, the President stuck by his earlier characterization of individuals crossing the southern U.S. border as criminals, rapists, and drug dealers as being "100 percent right."[75] Given the administration's weaponization of stereotypes to incite violence and hatred against entire groups of people based on their national origin, race, ethnicity, and immigration status, the proposed evidentiary bar is not only arbitrary and capricious, but indefensible.

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[72] Laignee Barron, *'A New Low.' The World is Furious at Trump for His Remark About 'Shithole Countries,'* N.Y. Times (Jan. 12, 2018, 2:17 AM EST), https://time.com/5100328/shithole-countries-trump-reactions/.

[73] Matthew Nussbaum and Christopher Cadelgo, *White House Doubles Down on Trump's 'Animals' Comments*, Politico (May 21, 2018), https://www.politico.com/story/2018/05/21/trump-animals-white-house-immigrants-601843.

[74] White House Press Release, *What You Need to Know About the Violent Animals of MS-13* (May 21, 2018), https://www.whitehouse.gov/articles/need-know-violent-animals-ms-13/ (vowing to work "tirelessly to bring these violent animals to justice").

[75] Dylan Scott, *Trump is Repeating His Most Explosive Immigration Rhetoric During the Family Separation Crisis*, Vox (June 19, 2018), https://www.vox.com/policy-and-politics/2018/6/19/17479542/family-separation-trump-mexico-rapists.

Among the several others stereotypes that have reportedly propped up the administration's immigration agenda are: people coming from Haiti "all have AIDS," recent Nigerian immigrants would "never go back to their huts" in Africa, and Afghanistan is a terrorist haven. *See* Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html?_r=0.

E. Establishing Asylum Eligibility

1. Shifting the burden of proof regarding the reasonableness of internal relocation is inconsistent with fundamental tenets of humanitarian protection and basic notions of fairness.

Under the INA, a showing of past persecution qualifies an applicant for refugee status. 8 U.S.C. § 1101(a)(42). Furthermore, under existing regulations, if the applicant suffered past persecution, it is presumed that he has a well-founded fear of future persecution on the same basis unless the preponderance of the evidence shows a fundamental change in circumstances or that internal relocation would be effective and reasonable. 8 C.F.R. § 208.13(b)(1)(i). The burden is on the government to overcome that presumption. 8 C.F.R. § 208.13(b)(1)(ii).

The administration does not propose any changes to 8 C.F.R. § 208.13(b)(1)(i) or (ii), and it should not. As explained in the Guidelines on International Protection No. 4:

> The use of the relocation concept should not lead to additional burdens on asylum-seekers. The usual rule must continue to apply, that is, the burden of proving an allegation rests on the one who asserts it.[76]

In line with this guidance, the existing regulations appropriately place the burden on the government to overcome the presumption of a well-founded fear of future persecution by showing that internal relocation would be effective and reasonable. Indeed, when the Department last modified these regulations in 2000, the Department described them as "consistent with the [INA], relevant case law, international instruments and guidance in the UNHCR Handbook" stating that they reflect "the important principle that an applicant who has established past persecution on account of one of the five grounds is a refugee[,]. . . continue[] to provide that a person who has established past persecution . . . shall be presumed to have a well-founded fear of future persecution on account of this same grounds, and . . . also make clear that the Service has the burden of overcoming such presumption by a preponderance of the evidence." 65 Fed. Reg. 79121, 76127; *see also* 65 Fed. Reg. 76588, 76595 ("The presumption places the burden on the U.S. government to show by a preponderance of the evidence that a refugee no longer has a well-founded fear of persecution. The Department believes that this allocation of the burden generally is appropriate in light of the applicant's refugee status").

Amending the regulations to presume that internal relocation would be reasonable where the persecutor is a non-state actor and place the burden on the applicant to demonstrate by a preponderance of the evidence that internal relocation is not reasonable, would be inconsistent with the UNHCR guidelines and established practice. Moreover, the Departments' proffered justification for re-allocating the burden of proof on internal relocation is unsound. The

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[76] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/04, ¶ 33 (July 23, 2003), https://www.refworld.org/docid/3f2791a44.html.

Departments argue that a well-founded fear of future persecution should not be presumed when "a private actor is the persecutor" because "a private individual or organization would not ordinarily be expected to have influence everywhere in the country." 85 Fed. Reg. 36264, 36282. This ignores that in order to establish refugee status where the persecutor is a non-state actor, the applicant must also establish that his government was either unable or unwilling to protect him. Even accepting as true the Departments' questionable assumption regarding a private organization's likely sphere of influence (an assumption that is certainly not true with respect to several criminal enterprises), that is not the relevant inquiry. Regardless of the reach of any individual persecutor, the failings of the state typically permeate the national landscape, enhancing the likelihood that an applicant will be persecuted in the future on account of the same protected ground. Because the Departments put forth no persuasive justification for shifting the burden of proof on internal relocation—a burden that basic notions of fairness and fundamental tenets of humanitarian protection dictate should be shouldered by the government—the internal relocation provision should be withdrawn in its entirety.

American Gateways agrees that any assessment of the reasonableness of internal relocation options must take into account the "totality of the relevant circumstances." Nonetheless, American Gateways objects to the newly enumerated list of factors to be taken into account in making such assessment. 85 Fed. Reg. 36264, 36293, 36301, 36303 (proposed 8 C.F.R. §§ 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), 1208.13(b)(6)). The proposal omits several important factors that appear in the current regulations, including "ongoing civil strife in the country," "administrative, economic, or judicial infrastructure," and "social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 208.13(b)(3). The Departments generally assert that some factors, such as administrative, economic, or judicial infrastructure, lack "clear relevance in assessing the reasonableness of internal relocation," but it offers no explanation as to why that it so. 85 Fed. Reg. 36264, 36282. Clearly, a functioning justice system (and rule of law)—or lack thereof—is relevant to the internal relocation inquiry. Consider which institutions would ensure that an internal relocation would be effective and reasonable, affording the applicant protection from persecution, in the presence of "ongoing civil strife" and the absence of infrastructure (of various kinds). The Departments also imply that an applicant's flight to the United States to seek humanitarian protection necessarily means the applicant could reasonably overcome any social and cultural constraints relating to internal relocation in her home country. The notion that an individual's having survived an arduous journey to the United States—and in many instances have endured beatings, kidnapping, sexual assault, extortion, and similarly heinous violations along that journey—has any bearing on the reasonableness of internal relocation is plainly offensive.

Finally, the proposed changes to 8 C.F.R. § 208.13(b)(3)(iii)[77] squarely conflict and cannot be reconciled with the existing regulations. Under 8 C.F.R. § 208.13(b)(1)(i)-(ii), an applicant who suffers past persecution at the hands of a private actor is presumed to have a well-founded fear of future persecution and it is the government's burden to overcome that presumption with evidence of fundamental changed circumstances or that internal relocation is reasonable under the circumstances. Under proposed 8 C.F.R. § 208.13(b)(3)(iii), that same applicant must establish that internal relocation is unreasonable. 85 Fed. Reg. 36264, 36293 (proposed 8

[77] This same objection applies to proposed 8 C.F.R. §§ 208.16(b)(3)(iii), 1208.13(b)(3), and 1208.13(b)(6)).

C.F.R. § 208.13(b)(3)(iii)). It is elemental that both parties cannot be charged with the burden of proof on the same issue.

2. The Departments' proposal to codify several "discretionary factors" is inconsistent with the INA, arbitrary and capricious, and contravenes congressional intent to afford protection to refugees.

The Proposed Rule enumerates twelve factors that decision makers would be required to consider in determining whether to exercise favorable discretion with respect to an application for asylum: three that *must* be considered as significant adverse factors and nine that would *prohibit* a favorable exercise of discretion, absent extraordinary circumstances. Citing *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987), the Departments justify these additional regulations as necessary to ensure that decision makers properly exercise discretion with respect to asylum. 85 Fed. Reg. 36264, 36282-83. Requiring decision makers to credit these factors with predetermined weight (either as (1) significantly adverse or as (2) ordinarily warranting a denial[78]) applies a one-size-fits-all approach to inherently diverse experiences while improperly instructing judges to deny meritorious asylum claims in all but the most extraordinary of circumstances.

American Gateways submits that several of the proposed "discretionary" factors violate the APA, either because they are inconsistent with existing immigration law or because they are arbitrary and capricious. The Departments fail to provide any reasonable explanation, based on a consideration of relevant factors, for requiring that any single circumstance be considered and given significantly adverse weight in *every* case. Such an approach undermines rather than enables the exercise of discretion. Additionally, all of the proposed factors are objectionable on the ground that they severely infringe upon the ability of decision makers to *grant* discretionary relief to asylum seekers, as Congress intended. Indeed, the discretionary factors fly in the face of decades of case law and the long-standing position of the government that a person who has suffered persecution on account of a protected ground should be granted asylum, unless some particularly egregious circumstance(s) justifies denying relief. Here, the Departments propose just the opposite—that a person who has suffered persecution on account of a protected ground should be denied asylum unless some extraordinary circumstance(s) justifies granting relief. And they do so without so much as acknowledging, much less meaningfully engaging with, contrary judicial precedent and existing government policy. Such a radical policy shift, with no proffered justification, aside from conclusory references to purported interests in efficiency and consistency, will not survive review.

The proposed codification of adverse circumstances that would ordinarily require immigration judges to deny asylum is particularly concerning in light of the administration's sustained attacks on judicial independence—a key component of its larger effort to "usurp an adjudicatory process that is supposed to be impartial and fair."[79]

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[78] The nine factors that will preclude an exercise of favorable discretion absent "extraordinary circumstances" cannot accurately be described as "discretionary" factors. The Departments, in essence, propose nine new (not-quite-mandatory) bars to asylum.

[79] Innovation Law Lab and Southern Poverty Law Center, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, at 10 (June 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.

a. The Departments' proposed blow to the independence of immigration judges constitutes an abuse of power.

The Departments' proposal comes as no surprise. The administration has already taken several steps to strip immigration judges of their judicial independence, thereby expanding political control of immigration courts. As aptly summarized in a joint June 2019 report published by the Southern Poverty Law Center and Innovation Law Lab, the administration has transformed immigration courts into a "weapon of deterrence and deportation:"

> The attorneys general have interfered with immigration judges' control of their courtrooms by reassigning case dockets to align with enforcement priorities and attacking crucial case management tools. In contravention of every known norm respecting impartiality, the attorneys general have pitted immigration judges against due process by threatening to punish—and even fire—judges for failing to meet enforcement-driven quotas.[80]

For purposes of contextualizing its objection to the newly proposed discretionary factors, American Gateways briefly describes just a few of the administration's most obvious strikes in its multi-pronged assault on the independence of immigration judges:

- In April 2018, the Department of Justice rolled out quotas for immigration judges in an "EOIR Performance Plan" memorandum. In order to receive a "satisfactory" rating, judges are required to clear at least 700 cases a year and have fewer than 15 percent of their decisions overturned on appeal.[81] These onerous numeric quotas that are designed to promote speedy deportations, not fair adjudications, place judges in an untenable position—they must rush through cases to keep their own jobs.[82]

- In May 2018, former attorney general Sessions held in *Matter of Castro-Tum*—a case he certified to himself for decision—that immigration judges "lack a general authority to administratively close cases" because no regulation expressly grants them such authority. 27 I&N Dec. 271, 281 (AG 2018). The decision also called for cases that had previously been administratively closed to be put back on the docket. *Id.* A move allegedly designed to reduce a growing case backlog and maximize docket efficiency has instead *exacerbated* the case backlog and decreased efficiency, as administrative closure had long been a useful tool utilized by immigration judges to manage their dockets.[83] Simultaneously, *Matter of Castro-Tum* has undermined due process by restricting the ability of immigrants to pursue other forms of relief while in removal proceedings. The Fourth Circuit has since

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[80] *Id.*

[81] Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges.

[82] During FY 2019, two-thirds of immigration judges completed fewer than 700 cases, and 378 out of 380 judges failed to meet either quotas or other deadlines set by court officials. Stephen Franklin, *The Revolt of the Judges*, The American Prospect (June 23, 2020), https://prospect.org/justice/revolt-of-the-immigration-judges/.

[83] AILA, *FOIA Reveals EOIR's Failed Plan for Fixing the Immigration Court Backlog* (Feb. 21, 2019), https://perma.cc/34ER-5ANQ.

overturned *Matter of Castro-Tum*, concluding that immigration judges have an inherent authority to control their dockets. *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). Although limited to the Fourth Circuit, *Romero* highlights the abusive nature of the administration's attempts to undercut judicial independence.

- After having tied the hands of immigration judges with respect to administrative closures, the DOJ orchestrated another direct strike on judicial independence in July 2018. For several years, immigration judge Steven Morley had overseen the immigration case of Reynaldo Castro-Tum.[84] After issuing his ruling in *Matter of Castro-Tum*, Sessions gave Judge Morley fourteen days to issue a new notice of hearing to Castro-Tum, whose whereabouts were unknown.[85] An immigration attorney appeared in court, volunteered to represent Castro-Tum, and requested a brief continuance so that he could attempt to locate Castro-Tum.[86] Judge Morley granted the continuance.[87] Without any explanation and no indication of a legitimate basis for doing so, the DOJ responded by simply taking the case away from Judge Morley.[88] At Castro-Tum's next hearing on July 26, 2018, Assistant Chief Immigration Judge Deepali Nadkarni, who had been reassigned to handle the single preliminary hearing in the Castro-Tum case, ordered Castro-Tum removed *in absentia*.[89] The message was clear—immigration judges must quickly get on board with the administration's agenda or risk having their cases reassigned. This direct assault on judicial independence and due process was widely condemned, including by a group of retired immigration judges and former members of the BIA, who described the maneuver as an "unacceptable" instance of "interference with judicial independence."[90]

- In an apparent effort to speed up decision and increase removals, former attorney general Sessions issued yet another decision limiting immigration judges' discretionary authority in August 2018. *Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018), sets forth certain factors that an immigration judge take into consideration when ruling on a request for a continuance in order "to await the resolution of a collateral matter." Although the good cause standard for continuances requires the application of a multi-factor balancing test, *see* 8 C.F.R. § 1003.29, judges must now give more weight to two specific factors: (1) the likelihood that the "collateral" relief will be granted, and (2) whether the relief will materially affect the outcome of the proceedings. *Matter of L-A-B-R-*, 27 I&N at 413. Combined with the performance evaluation metrics, this decision improperly incentivizes immigration judges to grant fewer continuances, thereby restricting an important

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84 Tal Kopan, *Immigration Ordered Departed after Justice Department Replaces Judge*, CNN (Aug. 7, 2018), https://www.cnn.com/2018/08/07/politics/immigration-judge-replaced-deportation-case-justice-department/index.html.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Latest Attack on Judicial Independence* (July 30, 2018), https://www.aila.org/infonet/retired-immigration judges-former-bia-mems-attack-on-jud-independ.

mechanism for providing respondents with much-needed time to retain counsel and gather evidence.[91]

- In September 2018, former attorney general Sessions held in *Matter of S-O-G- & F-D-B-*—cases he certified to himself for decision—that immigration judges have no inherent authority to terminate or dismiss removal proceedings. 27 I&N Dec. 462, 462 (2018). Instead judges may only dismiss or terminate proceedings when the regulations expressly permit, or if the charges of removability against a respondent have not been sustained. *Id.* This ruling further inhibits the ability of judges to manage their dockets in a manner that does not permits respondents to pursue other forms of immigration relief.

- In August 2019, the DOJ moved to decertify the union of immigration judges, an organization whose members have, at times, openly criticized the administration's efforts to conscript immigration judges for to carry out its law enforcement agenda.[92]

- In 2017, EOIR implemented a policy requiring immigration judges to obtain government approval before they speak about immigration-related issues, marking a departure from prior policy pursuant to which immigration judges were free to speak on such issues in their personal capacities.[93] Then, in January 2020, EOIR tightened the restrictions, forbidding judges from publicly discussing immigration law or policy at all.[94] This series of increasingly harsh directives has effectively silenced immigration judges from participating in any public discussion concerning the operation of courts over which they preside—including the impact of COVID-19 on immigration courts—or risk being disciplined or fired.[95] On July 1, 2020, the National Association of Immigration Judges filed suit against the government, challenging the policy on the grounds that it constitutes an unconstitutional prior restraint on immigration judges' ability to write and speak publicly about immigration issues in their personal capacities.[96]

- Even more recently, on June 8, 2020, the DOJ reassigned nine BIA career members (all of whom were appointed prior to the current administration) to new roles.[97] The retaliatory reassignment, which followed their reject of an April 17, 2020 buy-out offer from the DOJ, is part and parcel of the ongoing effort to restructure the BIA with new hires who are more

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91 *The Attorney General's Judges*, at 25 (describing a "noticeable increase" in "respondents accepting voluntary departure and removal orders due to a lack of continuances to find representation and prepare their cases" after *Matter of L-A-B-R-* was decided).

92 Christina Goldbaum, *Trump Administration Moves to Decertify Outspoken Immigration Judges' Union* (Aug. 10, 2019), https://www.nytimes.com/2019/08/10/us/immigration-judges-union-justice-department.html

93 *Immigration Judges Challenge Justice Department Speech Policy*, Knight First Amendment Institute at Columbia University (July 1, 2020), https://knightcolumbia.org/content/immigration-judges-challenge-justice-department-speech-policy.

94 *Id.*

95 *Id.*

96 *Id.*; *see also* Complaint, *National Association of Immigration Judges v. James McHenry III, et al.*, Case No. 1:20-cv-00731, (D. Va., filed July 1, 2020), Dkt. No. 1.

97 Tanvi Misra, *DOJ "Reassigned" Career Members of Board of Immigration Appeals*, Roll Call (June 9, 2020), https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/

likely to deny asylum claims.[98] Then, on July 2, 2020, the DOJ announced the appointment of ICE's chief immigration prosecutor, Tracy Short, as the new Chief Immigration Judge—an appointment that has been described as the "nail in the coffin of judicial neutrality."[99]

The Departments' instant proposal that would require immigration judges (and asylum officers) to consider a list of exclusively adverse discretionary factors in adjudicating asylum applications would even further erode judicial neutrality. In many instances, mandatory consideration of the proposed discretionary factors will be outcome-determinative. And, in all instances, the consideration of such factors will unfairly disadvantage asylum applicants. Rather than guide the exercise of considered discretion to ensure fair outcomes, the factors erode discretion in the name of speedy deportations and, in the process, erode longstanding judicial precedent and government policy.

b. Certain enumerated discretionary factors are contrary to or fundamentally at odds with the INA.

Congress has authorized the attorney general to establish by regulation "additional limitations and conditions" on asylum *only if* such regulations are "consistent with" 8 U.S.C. § 1158(b)(2)(C).[100] The INA provides that

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum.

Id. § 1158(a). When it enacted IIRIRA, Congress identified three categories of individuals who, with limited exceptions, are ineligible to apply for asylum: (1) individuals who can be removed to a safe third country with which the United States has a qualifying safe-third-country agreement, (2) individuals who did not apply for asylum within one year of their arrival in the United States, and (3) individuals who previously applied for asylum and had their applications denied. *Id.* § 1158(a)(2)(B)-(C). Congress also adopted six mandatory bars, which preclude a grant of asylum to individuals who: (1) have "ordered, incited, assisted, or otherwise participated" in the persecution of others on account of a protected ground; (2) have been convicted of a "particularly serious crime" in the United States; (3) have committed a "serious nonpolitical crime outside the United States" prior to their arrival in the United States; (4) are a "danger to the security of the United States"; (5) are inadmissible or removable under a set of specified grounds relating to

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[98] Documents obtained through a FOIA request reveal that the DOJ modified its hiring procedure to permanently place six immigration judges with some of the highest asylum denial rates on the BIA. *See* Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, Roll Call (Oct. 29, 2019), https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/

[99] AILA, *Trump Administration Makes Immigration Courts an Enforcement Tool by Appointment Prosecutors to Lead* (July 6, 2020), https://www.aila.org/advo-media/press-releases/2020/trump-administration-makes-immigration-courts-an-e.

[100] Congress has also authorized the attorney general to establish by regulation "any other conditions or limitations on the consideration of an application for asylum *not inconsistent with*" the asylum statute. 8 U.S.C. § 1158(d)(5)(B) (emphasis added).

terrorist activity; and (6) have "firmly resettled in another country prior to arriving in the United States." *Id.* § 1158(b)(2)(A)(i)-(vi). When Congress detailed the specific circumstances that would render an individual ineligible for asylum, it struck a measured balance between fulfilling international obligations to protect vulnerable refugees from harm and other interests it deemed important, such as national security interests and sharing the responsibilities of asylum processing with other countries that have well-functioning systems for processing and protecting refugees. The Proposed Rule would not just disrupt, but upend that balance. As the Departments are certainly aware, "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014)). Nor may an agency simply "abandon [a statutory] scheme because [it] thinks it is not working well." *Id.* at 774 (citing *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 368 (2005)). The Supreme Court, in fact, "has firmly rejected the suggestion that a regulation is to be sustained simply because it is not 'technically inconsistent' with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982). Thus, even though the Departments are not expressly prohibited from regulating asylum eligibility, the Proposed Rule's "inconsistency with the design and structure of the statute as a whole" makes it unlawful. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90-94 (2002) (holding "challenged regulation . . . invalid because it alters [the Family and Medical Leave Act's] cause of action in a fundamental way" by imposing a "categorical penalty" in place of "a fact-specific inquiry," thereby "subvert[ing] the careful balance" Congress struck in guaranteeing paid leave).

Here, the Departments propose to add to the regulations an additional nine factors that will result in an asylum application being denied, 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)), 36302 (proposed 8 C.F.R. §§ 208.13(d)(2)(i)), unless there are (1) "extraordinary circumstances, such as those involving national security or foreign policy considerations" or (2) the applicant "by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship." *Id.* at 36293-94 (proposed 8 C.F.R. § 208.13(d)(2)(ii)); 36302 (proposed 8 C.F.R. §§ 1208.13(d)(2)(ii)). Although the proposed factors appear in a sub-section titled "Discretion," the circumstances under which their consideration might not result in asylum being denied are so exceedingly narrow that factors are, effectively, new bars to asylum. The Ninth Circuit recently rejected the administration's attempt to artificially distinguish between a right to apply for asylum and eligibility for asylum. *See East Bay*, 932 F.3d at 771 ("Although the Rule technically applies to the decision of whether or not to *grant* asylum, it is the equivalent of a bar to *applying* for asylum. . . . The technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same."). Similarly, the fact that the proposed "discretionary factors" fall just short of constituting a mandatory bar is a distinction without much difference. Because the proposed subsection on discretion directly conflicts with the statute or, alternatively, is fundamentally "incompatible" with the "substance of Congress' regulatory scheme," *see Util. Air Regulatory Grp.*, 573 U.S. at 322 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000))—a scheme intended to generally *extend* rather than withhold asylum protections to those who establish their status as refugees—it should be withdrawn.

The Departments also propose to add three factors that a decision maker must consider and assign significant adverse weight *in every case*. The Proposed Rule would not demand an unfavorable exercise of discretion when such considerations are present, but the factors are nonetheless at odds with congressional intent that factors of this kind (*e.g.*, an individual's method of entry into the country) not weigh heavily against asylum. Furthermore, the Departments' proposal to codify unlawful entry and third-country transit as "significant adverse discretionary factors" is an improper attempt to circumvent recent court decisions enjoining administration policies that would categorically exclude asylum seekers on these very same grounds. *See supra* at Part II.C; *cf. Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (questioning the validity of deference doctrine where "an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends").

Having represented asylum seekers for more than three decades, American Gateways believes that the fair adjudication of asylum claims requires a careful analysis of each asylum seeker's individual circumstances. Moreover, American Gateways, along with its clients, has an interest in the preservation of an asylum system that does not arbitrarily deny asylum to refugees. It therefore stringently objects to the proposed checklist of reasons why decision makers either should or must ordinarily deny asylum. Some of its various grounds for objection are set forth in greater detail below. As with other sections of these comments, the failure to address a particular "discretionary factor" does not indicate tacit agreement with the factor.

Unlawful entry. The first proposed significant adverse factor negatively impacts the case of an applicant who has made an "unlawful entry" into the United States (unless made in immediate flight from persecution in a "contiguous country"). 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(1)(i)), 36302 (proposed 8 C.F.R. § 1208.13(d)(1)(i)). Requiring that unlawful entry weigh negatively in every case is fundamentally at odds with INA § 208(a)(1), which unambiguously provides that immigrants are eligible for asylum regardless of where they enter.

In November 2018, the President issued a proclamation that, in combination with a rule promulgated by the Departments, would bar asylum for almost all individuals who enter the country through the southern border outside a port of entry. On February 28, 2020, the Ninth Circuit upheld an injunction blocking the policy from taking effect. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242. The court's reasoning is instructive here:

> Forty years ago, Congress recognized that refugees fleeing imminent persecution do not have the luxury of choosing their escape route into the United States. It mandated equity in its treatment of all refugees, however they arrived. This principle is embedded in the Refugee Act of 1980, which established an asylum procedure available to any migrant, "irrespective of such alien's status," and irrespective of whether the migrant arrived "at a land border or port of entry." Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (1980). Today's Immigration and Nationality Act ("INA") preserves that principle. It states that a migrant who arrives in the United States—"whether or not at a designated port of arrival"—

> may apply for asylum. *See* 8 U.S.C. § 1158(a). In November 2018, the Departments of Justice and Homeland Security jointly adopted an interim final rule ("the Rule") which, coupled with a presidential proclamation issued the same day ("the Proclamation"), strips asylum eligibility from every migrant who crosses into the United States between designated ports of entry. In this appeal, we consider whether, among other matters, the Rule unlawfully conflicts with the text and congressional purpose of the INA. We conclude that it does.

Id. at 1259.

Although the Departments propose implementing something short of categorical ban on asylum for those who enter between ports of entry, its renewed attempt to restrict such individuals from obtaining asylum is inconsistent with the congressional mandate that refugees be treated equitably, "however they arrived." The Departments' belabored arguments that this adverse discretionary factor is permissible simply because it does not infringe on an individual's right to *apply* for asylum and, relatedly, that an individual "who has unlawfully entered the United States is at risk of the same discretionary denial of asylum as any other applicant" is unreasonable. *See* 85 Fed. Reg. 36264, 36283 n.34. Because the administration has selected "unlawful entry" as a factor that (1) must be considered and (2) must be given "significant adverse" weight, any claim that the Proposed Rule does not somehow tilt the scales against individuals who enter unlawfully is disingenuous.

The Departments' proposal that unlawful entry be uniformly considered a significant adverse factor in adjudicating asylum applications is particularly reprehensible in light of (at least) three current policies. None of these policies is even mentioned in the Proposed Rule, thereby making the proposal also arbitrary and capricious.

Metering: In April 2018, the administration implemented a "metering" policy that limits the number of individuals who can access the asylum process on any given day.[101] CBP officers began instructing asylum seekers to go to a port of entry to request asylum, rather than crossing between ports of entry; at the same time, CBP began strictly limiting the number of individuals who are allowed to apply for asylum at ports of entry.[102] In short, CBP effectively closed the ports of entry to asylum seekers, turning them away to wait in Mexico. In most instances, CBP officers simply turn asylum seekers away with no further instructions regarding how they can place themselves on a "wait list" or how long they must wait in Mexico before they can start the asylum process.[103] At some ports of entry, multiple days pass with no one being called off "the list."[104]

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[101] James Frederick, *'Metering' at the Border*, NPR (June 29, 2019), https://www.npr.org/2019/06/29/737268856/metering-at-the-border.

[102] AILA, *Policies Affecting Asylum Seekers at the Border*, at 1 (Jan. 2020), https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border.

[103] *Id.* at 1-2.

[104] *Id.* at 2.

Part of a broader practice of "asylum turnbacks,"[105] the impact of metering has been substantial. According to a May 2020 report published by the Strauss Center, an estimated 14,580 asylum seekers were on waitlists in 11 Mexican border cities.[106] Although wait times at different points of entry have varied over time, the wait time at ports of entry between Ciudad Juarez, Chihuahua, and El Paso has been as long as *six months*.[107] Rather than wait months in Mexico, where they are at risk of rape, torture, kidnapping, and other violent assaults[108] and have no guarantee of ever being allowed to access asylum at a port of entry, some asylum seekers instead cross without inspection between ports of entry. Even the Office of Inspector General at DHS has acknowledged the obvious consequence of metering: "[L]imiting the volume of asylum-seekers entering at ports of entry leads some aliens who would otherwise seek legal entry into the United States to cross the border illegally."[109]

Migrant Protection Protocols: On December 20, 2018, then-DHS Secretary Kirstjen Nielsen announced the implementation of the Migrant Protection Protocols (MPP), which she described as a "historic action to confront the illegal immigration crisis facing the United States."[110]

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105 *Id.* at 1.

106 Strauss Center, *Metering Update: May 2020*, at 1 (University of Texas, Austin, May 2020), https://www.strausscenter.org/wp-content/uploads/MeteringUpdate_200528.pdf. Due to COVID-19, CBP stopped processing asylum seekers at ports of entry altogether on March 20, 2020. Asylum waitlists also closed to new entrants in late March 2020, and have since remained frozen. Thus, the actual number of asylum seekers waiting at the U.S.-Mexico border is not presently known. *Id.*

107 AILA, *Policies Affecting Asylum Seekers at the Border*, at 1, *supra* note 102.

108 As of May 13, 2020, there were at least 1,114 *publicly* reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers forced to wait in Mexico. *See* Human Rights First, *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger* (May 13, 2020), https://www.humanrightsfirst.org/campaign/remain-mexico; *see also* Human Rights Watch, *DHS OIG Formal Complaint Regarding "Remain in Mexico"* (June 2, 2020), https://www.hrw.org/news/2020/06/02/dhs-oig-formal-complaint-regarding-remain-mexico.

109 Department of Homeland Security, Office of Inspector General, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, at 7 (Washington, DC, Sept. 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.

110 Dep't of Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration. The announcement described the need for MPP program thusly:

> Illegal aliens have exploited asylum loopholes at an alarming rate. Over the last five years, DHS has seen a 2000 percent increase in aliens claiming credible fear (the first step to asylum), as many know it will give them an opportunity to stay in our country, even if they do not actually have a valid claim to asylum. As a result, the United States has an overwhelming asylum backlog of more than 786,000 pending cases. Last year alone the number of asylum claims soared 67 percent compared to the previous year. Most of these claims are not meritorious—in fact *nine out of ten asylum claims are not granted by a federal immigration judge*. However, by the time a judge has ordered them removed from the United States, many have vanished.

According to DOJ statistics, between 2013 and 2017, 92 percent of asylum seekers appeared in court to receive a final decision on their claims. *See* Human Rights First, *Fact Check: Asylum Seekers Regularly Attend Immigration Court Hearings* (Jan. 25, 2019), https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-

Under the MPP, individuals who arrive at the southern border and ask for asylum are issued notices to appear in immigration court and sent back to Mexico to await their court date.[111] The government's announcement of the MPP program was coupled with several promises:

> We will confront this crisis head on, uphold the rule of law, and strengthen our humanitarian commitments. Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. "Catch and release" will be replaced with "catch and return." . . .
>
> Let me be clear: we will undertake these steps consistent with all domestic and international legal obligations, including our humanitarian commitments.[112]

Credible reports reveal that the government has not performed on these promises (excepting the promise to "catch and return") and has executed the program in blatant violation of domestic and international law—precisely as it intended to do all along. Indeed, the following features of the MPP (among others) all but guarantee a host of violations:

- DHS allows CBP agents charged with a law enforcement function to conduct nonrefoulment interviews, and those CBP agents are *not* required to ask asylum seekers placed in the MPP program if they fear being sent to Mexico;[113]

- the standard for nonrefoulment interviews is impossibly high; migrants are required to remain in MPP unless they are "more likely than not" to face persecution on account of a protected ground or torture (a standard much higher than that which currently governs credible fear determinations);[114]

- migrants are generally held in CBP custody and not given access to attorneys for non-refoulment interviews;[115]

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immigration-court-hearings. Asylum seekers who are released from detention to pursue their claims attend immigration court hearings nearly *100 percent* of the time.

111 AILA, *Policies Affecting Asylum Seekers at the Border*, at 2, *supra* note 102.

112 Dep't of Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, *supra* note 110.

113 *Id.*

114 Human Rights Watch, *DHS OIG Formal Complaint Regarding "Remain in Mexico," supra* note 108.

115 On January 14, 2020, a U.S. district court issued a preliminary injunction requiring DHS to give asylum seekers access to an attorney before and during nonrefoulment interviews along the California-Mexico border but that injunction does not apply to interviews conduct along other parts of the border. *See* Order Granting Motion for Classwide Preliminary Injunction, *Doe v. Wolf*, Case No. 19-cv-2119-DMS (S.D. Cal. Jan. 14, 2020), https://www.aclusandiego.org/wp-content/uploads/2020/01/ORDER-GRANTING-MOTION-FOR-CLASSWIDE-PRELIMINARY-INJUNCTION.pdf

- DHS decisions to return asylum seekers to Mexico are not subject to review by an immigration judge.[116]

Between January and mid-November 2019, nearly 60,000 migrants were returned to Mexico to await their court hearings. During that time, USCIS and CBP completed non-refoulment screenings for only about 13.5% of those individuals.[117] According to government estimates, between 1% and 13% of the individuals selected for screenings passed.[118] Crediting the most generous of those figures, no more than 1.75% of individuals placed in the MPP have been found to have a fear of being returned to Mexico.

The remaining 98.25% of individuals—including women (among them pregnant mothers), LGBTQ persons, disabled persons, more than 16,000 children, and nearly 500 infants—found not to have a fear of being returned to Mexico have fared as follows:

- most are living in conditions without access to adequate housing, food, sanitation, or adequate medical care;[119]

- as of November 2019, more than 2,000 asylum seekers resided in a tent camp with no running water or electricity;[120]

- all are at risk of kidnapping, sexual abuse, extortion, torture, and other types of violence, including cases in which Mexican officials are alleged to have participated;[121]

- as of May 13, 2020, there were at least 1,114 *publicly* reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers subject to MPP;[122]

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116 Human Rights Watch, *DHS OIG Formal Complaint Regarding "Remain in Mexico," supra* note 108.

117 *Id.*

118 AILA, *Policies Affecting Asylum Seekers at the Border*, at 4, *supra* note 102; Julio-Cesar Chavez and Andy Sullivan, *Few Migrants Seeking U.S. Asylum Successfully Claim Fear of Waiting in Mexico*, Reuters (June 28, 2019), https://www.reuters.com/article/us-usa-immigration-crossings/few-migrants-seeking-u-s-asylum-successfully-claim-fear-of-waiting-in-mexico-idUSKCN1TT2UP; Dep't of Homeland Security, *Assessment of the Migrant Protection Protocols (MPP)* (Oct. 28, 2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf ("As of October 15, 2019, USCIS completed over 7,400 screenings to assess a fear of return to Mexico. . . . Of those, approximately 13% have received positive determinations.").

119 Rochelle Garza, *Trump's War on Asylum-Seekers is Endangering Pregnant Women*, ACLU (Oct. 13, 2019 4:15 PM), https://www.aclu.org/blog/immigrants-rights/trumps-war-asylum-seekers-endangering-pregnant-women.

120 Nomaan Merchant, *Tents, Stench, Smoke: Health Risks are Gripping Migrant Camp*, Associated Press (Nov. 14, 2019), https://apnews.com/337b139ed4fa4d208b93d491364e04da.

121 Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* (Oct. 2019), https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf.

122 *See* Human Rights First, *Delivered to Danger*, *supra* note 108..

- one-fourth of 607 asylum seekers subject to MPP reported having been threatened with violence; half of them actually suffered physical violence;[123]

- less than 2% have a lawyer;[124] and

- after waiting months for a hearing, thousands of asylum seekers have been unable to return to the border for their scheduled court hearings—some were kidnapped and prevented from attending their hearings; others abandoned their cases due to the dangers faced in the border region.[125]

On February 28, 2020, the Ninth Circuit upheld a preliminary injunction of the MPP, noting that "uncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death." *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1093 (9th Cir. 2020), *petition for cert. filed*, (U.S. Apr. 14, 2020) (No. 19-1212). The court subsequently limited the scope of its injunction to the Ninth Circuit pending the government's appeal to the U.S. Supreme Court, which then issued its own stay of the injunction. *See Innovation Law Lab v. Wolf*, 951 F.3d 986 (9th Cir. 2020); *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020). However, the current stay in no way undermines the Ninth Circuit's finding that individuals sent to Mexico under the MPP "risk substantial harm, even death, while they await adjudication of their applications for asylum." *Innovation Law Lab*, 951 F.3d at 1093. Quite understandably, the very prospect of potentially being funneled into the MPP pushes asylum seekers to enter between ports of entry.

Safe-Third-Country Agreements: In November, the administration issued an interim final rule—the Asylum Cooperation Agreements Rule—which made safe-third-country agreements (also known as Asylum Cooperation Agreements) with each of El Salvador, Guatemala, and Honduras, effective November 19, 2019. 84 Fed. Reg. 63994.[126] Pursuant to the rule, the government may turn away asylum seekers upon their arrival at the border and deport them, with or without their consent, to countries that are not equipped to process asylum claims and

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[123] Tom K. Wong, *Seeking Asylum: Part 2*, U.S. Immigration Policy Center, at 4 (Oct. 29, 2019), https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf.

[124] TRAC, *Access to Attorneys Difficult for Those Required to Remain in Mexico* (July 29, 2019), https://trac.syr.edu/immigration/reports/568/.

[125] AILA, *Policies Affecting Asylum Seekers at the Border*, at 5-6, *supra* note 102.

[126] U.S. Dep't of Homeland Security and U.S. Dep't of Justice, Interim Final Rule Implementing Bilateral Multilateral Asylum Cooperation Agreements Under the Immigration and Nationality Act (Nov. 19, 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

On November 20, 2020, the administration issued written guidance implementing its agreement with Guatemala. The United States has not yet begun deporting individuals pursuant to the agreements with El Salvador or Honduras, both of which were signed in September 2019. However, on May 1, 2020, the administration published the agreement entered into with Honduras, thereby indicating that it has not abandoned its intentions to implement that agreement. Dep't of Homeland Security, Notice of Agreement Between the Government of the United States of American and the Government of the Republic of Honduras in the Examination of Protection Claims, 85 Fed. Reg. 25462 (May 1, 2020), https://www.federalregister.gov/documents/2020/05/01/2020-09322/agreement-between-the-government-of-the-united-states-of-america-and-the-government-of-the-republic.

lack adequate protection for their own nationals.[127] These agreements, which are designed not to ensure the safety of asylum seekers in third countries but to externalize this country's responsibility of protection onto other countries that lack the requisite "full and fair" procedures for determining asylum, will also drive asylum seekers to enter the country between ports of entry.[128]

Pursuant to the agreement with Guatemala (signed in July 2019), the government can rapidly expel non-Guatemalan asylum seekers and require that they file their asylum claims in Guatemala.[129] Prior to the suspension of the agreement on March 16, 2020, because of COVID-19, the U.S. government deported 939 Honduran and Salvadoran asylum seekers to Guatemala in just a few months.[130] Of those deported, less than 2% (20 of 939) applied for asylum in Guatemala, despite having a well-founded fear of persecution in their home countries.[131] According to the Network in Solidarity with the People of Guatemala (NISGUA), deportations are scheduled to resume as soon as "sanitary protocols are established."[132]

In addition to metering, MPP, and "safe" third-country agreements, the proposed "unlawful entry" factor also ignores a number of other relevant circumstances, such as an asylum seeker's age, gender, gender identity, and sexual orientation, among other particular vulnerabilities. Many migrants travel with groups or a guide and, therefore, are subject to group decision-making, especially if they are young or female. In such circumstances, there is no justification for unlawful entry to weigh significantly against a grant of asylum. And in no case should a decision-maker be *required* to give adverse consideration to the "lawfulness" of an asylum seeker's entry.

Should the Departments choose to endorse the patently unreasonable position that codifying unlawful entry as a significant adverse discretionary factor is inconsistent with the INA, it must necessarily address the impact of metering, the MPP, the safe-third-country agreements, and other similar policies that influence—and in several instances directly cause—unlawful entry in the first instance. The Departments' failure to consider these relevant circumstances renders the proposal arbitrary and capricious. *See e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1929-30 (2020) (holding that administration's rescission of DACA program was arbitrary and capricious under the APA because it failed "to supply the requisite 'reasoned analysis'" for its policy choice (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983))).

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127 *See generally* Nicole Narea, *Trump's Agreements in Central America are Dismantling the Asylum System as We Know It* (Nov. 20, 2019), https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained.

128 The agreements with Guatemala, El Salvador, and Honduras are being challenged in *U.T. v. Barr*, Case No. 1:20-cv-00116-EGS (D.D.C.) (filed Jan. 15, 2020).

129 Human Rights Watch, *Deportation with a Layover: Failure of Protection under the U.S.-Guatemala Asylum Cooperative Agreement* (May 19, 2020), https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative#_ftn3.

130 *Id.*

131 *Id.*

132 NISGUA, *No Safe Third Country Agreements with Central America*, https://nisgua.org/portfolio-items/safe-third-country/ (last visited July 14, 2020).

Third-Country transit. The third proposed significant adverse factor negatively impacts the case of an applicant who has transited through any third country that is a signatory to the Refugee Convention and 1967 Protocol without applying for and being denied protection from persecution or torture in that country. *See* 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(1)(ii)), 36301 (proposed 8 C.F.R. § 1208.13(d)(1)(ii)). As discussed in Part II, this discretionary factor mirrors—and expands upon—the administration's earlier failed attempt to subject migrants at the southern U.S. border to a third-country asylum transit ban. *See supra* at II.C. As a panel of the Ninth Circuit explained in a well-reasoned opinion upholding a district court order enjoining implementation of the transit ban, a third-country transit "factor" of the type the administration poses is inconsistent with 8 U.S.C. § 1158. *E. Bay Sanctuary Covenant*, 2020 WL 3637585, at *2. In enacting the safe-third-country[133] and firm resettlement bars, Congress has already identified "the circumstances in which an alien who has traveled through, or stayed, in a third county can be deemed sufficiently safe in that country to warrant a denial of asylum in the United States." *Id.* The Proposed Rule conflicts with the protections provided by the two safe-place bars for the following reasons:

(1) Unlike the safe-third-country and firm resettlement bars, the proposed rule does nothing to ensure that the third country through which the migrant transited is actually a "safe option." *Id.* at *11. Although the Proposed Rule requires that the country be a signatory to the Refugee Convention and the 1967 Protocol, the mere act of accession does not itself guarantee that a country actually discharges its obligations under the Convention and Protocol. *Id.* (Such a circumstance is not difficult to imagine, as the MPP is an excellent example of a signatory country having openly abdicated its obligations under the Convention and Protocol. A transit ban that seeks to externalize those obligations and impose them on third countries is another such example.)

(2) Unlike the safe-third-country bar, which allows the United States to deny asylum on the basis that an individual may be removed to apply for asylum in a safe third country, the Proposed Rule neither requires any formal agreement[134] between the

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[133] The existing safe-third-country bar provides that an individual shall be barred from applying for asylum "if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country . . . in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States." 8 U.S.C. § 1158(a)(2)(A). On December 5, 2002, the United States and Canada entered into a safe-third-country agreement that lays out two conditions for that agreement—the agreement is between countries where an immigrant's "life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion" and where they would have "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection"—and acknowledges that the U.S. and Canada both have strong traditions of welcoming asylum seekers, as well as robust processes under which asylum seekers can petition for protections. *See* Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229 (2004), https://www.refworld.org/pdfid/42d7b9944.pdf. Canada is the only country with which the United States currently has a bi-lateral safe-third-country agreement that meets the statutory requirements.

[134] As discussed herein, adding a "formal agreement" requirement would not provide asylum seekers with any additional protections, at least under the current administration, which has entered into safe-third-country agreements

United States and the third country through which an applicant transits, nor requires that the country have a "full and fair" procedure for asylum. *Id.*

(3) The firm resettlement bar denies asylum to migrants who have either truly resettled in a third country or have received an offer of firm resettlement in a country in which they have ties and will be provided appropriate status. *Id.* Migrants who transit through a third country to reach the U.S. border, on the other hand, often have no intention to settle in the transit country, have not received an offer of firm resettlement, and otherwise have no ties to the transit country. *Id.* Moreover, the "Supreme Court has long recognized that the firm resettlement bar does not bar aliens who may have merely traveled through third countries, since 'many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way." *Id.* (quoting *Rosenberg v. Woo*, 402 U.S. 49, 57 n.6 (1971)).

The third-country transit "significant adverse factor" is nothing more than a watered-down version of the currently enjoined transit ban that the Department now proposes to apply to all asylum seekers, not just those who enter at the southern border. As previously noted, pushing forward with this proposed regulatory change in the face of a nationwide injunction concerning a near-identical interim rule constitutes an abuse of the rule-making process.

In an obvious attempt to bolster its position that the proposal is in step with the INA, the Departments propose to also redefine "firm resettlement." Yet, the newly proffered definition of firm resettlement is not only inconsistent with the INA but defies common sense. *See infra* at Part III.E.3. Two wrongs do not make a right and redefining the plain meaning of another statutory term cannot save this slightly modified iteration of a third-country transit ban.

As applied, the third-country transit factor (proposed 8 F.C.R. §§ 208.13(d)(1)(ii), 1208.13(d)(1)(ii)), which is drafted so broadly as to encompass anyone who has a layover in a country that is a signatory to the 1951 Convention, 1967 Protocol, and Convention Against Torture, would produce non-sensical outcomes. Consider how the rule would have impacted American Gateways client Mr. Z, who flew from Afghanistan to the U.S. on an F-1 visa in 2012 with a connection through London. Over several years, he came to the realization that he was gay and an atheist, both of which make him vulnerable to persecution in Afghanistan. USCIS granted his application for asylum, and Mr. Z now has a pending green card application. Under the plain text of the proposed rule, Mr. Z's failure to apply for refugee status in the U.K. would have been considered a significant adverse factor against the grant of asylum even though the grounds for his asylum claim did not arise until after his entry into the United States. Consider also how the rule would impact A.P., a transgender person, who fled El Salvador with the intent of resettling in Mexico. Upon arriving in Mexico, A.P. attempted to apply for asylum. Mexican immigration authorities advised them to forego applying for asylum in Mexico because Mexico is unsafe for transgender persons. Those same authorities then proceeded to help A.P. fill out an application for a humanitarian visa, recommending that they travel through Mexico to apply for asylum in the

with Guatemala, Honduras, and El Salvador—countries in which individuals do not have access to a full and fair asylum process. *See supra* at 65-66.

United States. Under the proposed rule, A.P.'s having traveled through Mexico and failed to file an application for asylum in Mexico would be considered a significant adverse factor against a grant of asylum even though Mexican immigration officials told A.P. *not* to apply for asylum in Mexico and thereby functionally denied their application.

Third-Country transit bans. The Departments seek to implement two additional (and more stringent) third-country transit bans, each of which would generally require that an asylum application be denied. With a narrow exception for victims of a severe form of trafficking in persons, the first transit ban provides that asylum shall be denied absent extraordinary circumstances[135] to an individual who spends more than 14 days in any one country that is a party to the Refugee Convention,1967 Protocol, and Convention Against Torture *en route* to the United States unless he applied for protection from persecution or torture in such country and was denied protection. *See* 85 Fed. Reg. 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)(A)), 36302 (proposed 8 C.F.R. § 1208.13(d)(2)(i)(A)) (hereinafter the "14-day Transit Ban")). With the same narrow exception, the second transit ban provides that asylum shall be denied to an individual who transits through more than one country between his home country and the United States unless he applied for protection from persecution or torture in at least one such country and was denied protection or all countries through which he transited were not parties to the Refugee Convention, 1967 Protocol, or Convention Against Torture. *See* 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)(B)), 36302 (proposed 8 C.F.R. § 1208.13(d)(2)(i)(B)) (hereinafter the "Multiple-Country Transit Ban").

To the extent the 14-day Transit Ban and Multiple-Country Transit Ban mirror proposed 8 C.F.R. § 208.13(d)(1)(ii), they are objectionable on the very same grounds. *See supra* at 67-69.

American Gateways further objects as the 14-day Transit Ban is facially unreasonable. There is simply no rational reason to codify a rule whereby, in the case of an individual who travels through a third country on the way to the United States in 14 days or less without applying for and being denied protection, that transit is considered a significant adverse factor; yet, if it takes that same individual 15 days to travel through the third country, that very same transit will result in his asylum application being denied. Moreover, many refugees fleeing persecution travel thousands of miles, often on foot for long stretches of the journey. Some are kidnapped, and several fall ill or run out of money or food along the way. The length of a refugee's journey simply has no bearing on whether his application for asylum merits a favorable exercise of discretion. The proposed rule is simply unworkable.

Furthermore, the reasonableness of the 14-day Transit Ban cannot be assessed without taking into account the administration's several "asylum turnback" policies, including metering and the MPP. *See supra* at 61-66. Under the Proposed Rule, the government can easily orchestrate the blanket denial of asylum to all refugees at the southern border simply by forcing them to remain in Mexico for more than 14 days before allowing them to access the U.S. asylum system. Such a result is most certainly unlawful.

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[135] Each of the nine discretionary factors that would ordinarily result in asylum being denied contains an identical exception, discussed *infra* at Part III.E.2.e. American Gateways, therefore, does not separately reference that exception when explaining its objections to individual factors.

American Gateways would be remiss to not also mention the current public health situation. On March 20, 2020, CBP stopped processing asylum seekers at ports of entry. As of July 15, 2020—117 days later—CBP has not yet resumed processing asylum seekers. If the 14-Day Transit Ban were to be applied, every asylum seeker who has been turned back to wait in Mexico as a result of the global COVID-19 pandemic will be denied asylum unless she can prove, by clear and convincing evidence, that denial of her application "would result in exceptional and extremely unusual hardship" (that is, assuming she can first decipher the meaning of the nebulous "exceptional and extremely unusual hardship" standard in the first instance or is among the 2% of applicants forced to wait in Mexico who secure legal representation).

American Gateways also opposes the Multiple-Country Transit Ban. As previously noted, the U.S. Supreme Court has acknowledged that "many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way." *Rosenberg*, 402 U.S. at 57 n.6; *see also Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003) ("[A] refugee need not seek asylum in the first place where he arrives" because "it is 'quite reasonable' for an individual fleeing persecution 'to seek a new homeland that is insulated from the instability [of his home country]." (quoting *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986))) (second alternation in original). The Departments offer no rational explanation for why asylum should be denied to an applicant who makes successive stops in two or more countries instead of just one country. The Proposed Rule would also produce absurd results, as an applicant's chances of receiving a grant of asylum turn on arbitrary factors, such as the number and location of flight layovers, hardly something an individual fleeing persecution would think to consider before boarding a plane. The Departments should therefore withdraw the Multiple-Country Transit Ban.

Alternatively, if the Departments decline to withdraw the Multiple-Country Transit Ban, they should amend it to require that at least two, not just one, country of transit is a party to the Refugee Convention, 1967 Protocol, and Convention Against Torture. If not amended, the Multiple-Country Transit Ban could result in the proposed rule (1) not applying to an individual who transits through a country that is a party to the Refugee Convention, 1967 Protocol, and Convention Against Torture for 14 days, but (2) applying to another individual who transited through the same country for one hour if he also transited through a non-party country. By way of example, if Person A, fleeing Haiti, flies to Brazil, spends exactly 14 days in Brazil, and then flies to the United States, neither proposed § 208.13(d)(2)(i)(A) nor (B) would apply. If Person B, fleeing India, flies to the U.S. by connecting flights through Dubai and Sao Paulo, proposed § 208.13(d)(2)(i)(B) would apply, even though Person B spent less than a day in Brazil and could not apply for protection in the United Arab Emirates, a non-party country, because the exception requires that *all countries* through which the applicant transited were not parties to the Convention.

Unlawful presence. The fourth of nine factors would require that a decision maker ordinarily deny asylum to any refugee who has "accrued more than one-year of unlawful presence in the United States prior to filing an application for asylum." 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)(D)), 36302 (proposed 8 C.F.R. § 1208.13(d)(2)(i)(D)). This factor conflicts with the statutory rules governing the one-year filing deadline for asylum applications. Congress created two categories of exceptions to the one-year filing deadline: (1) changed

circumstances and (2) extraordinary circumstances. *See* 8 U.S.C. § 1158(a)(2)(D). These exceptions apply equally to all individuals, regardless of their immigration status (*e.g.*, EWI, visa holder, parolee). The Departments' proposed "unlawful presence" factor, which does not contain any similar exceptions, cannot be squared with the statute. A bright-line rule requiring that decision makers ordinarily deny the asylum claims of individuals who entered the country unlawfully and did not apply for asylum within one year of the date of entry is also inconsistent with 8 U.S.C. § 1158(a), which preserves the principle of "equity in the treatment of [all] refugees, however they arrived."

The Departments should also clarify that the "unlawful presence" factor does not apply to minor children under the age of 18. Absent such clarification, the proposed rule is inconsistent with both (1) INA § 212(a)(9)(B)(iii)(I), which provides an exception to the 3-year and 10-year unlawful presence bars for periods of time during which an individual is under 18 years of age and (2) the Trafficking Victims Protection Reauthorization Act of 2008, which exempts unaccompanied children from the one-year filing deadline for asylum. *See* 8 U.S.C. § 1158(a)(2)(E).

Finally, the Departments should clarify that the "unlawful presence" factor does not apply to *Mendez Rojas* class members. During the pendency of the appeal in *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. Mar. 29, 2018), *appeal docketed*, No. 18-35443 (9th Cir. May 25, 2018), the government has agreed to treat as timely filed all pending and newly filed asylum applications of *Mendez Rojas* class members (whom the government failed to provide adequate notice of the one-year filing deadline).[136] Applying the unlawful presence factor to the *Mendez Rojas* class would undermine that prior agreement and the reliance interests of the class members.

c. Even where the regulation of discretionary factors arguably falls within the ambit of the attorney general's authority, the proposed factors are arbitrary and capricious.

Use of fraudulent documents. The third "significant adverse discretionary factor" negatively impacts the case of a refugee who uses fraudulent documents to enter the United States, unless that applicant arrived in the United States directly from the applicant's home country without transiting through any other country. 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(1)(iii)), 36302 (proposed 8 C.F.R. §§ 208.13(d)(1)(iii)). American Gateways does not disagree that case law has identified the use of fraudulent documents as one of several factors that an adjudicator may consider when assessing the totality of the circumstances relating to an application for asylum. Nonetheless, the administration's attempt to codify a bright-line rule is objectionable. As the Departments acknowledge, an applicant's use of fraudulent documents to escape the country of persecution should not itself be a significant adverse factor when deciding whether a refugee merits a grant of asylum. *See* 85 Fed. Reg. 36264, 36283 n.35. But, as drafted, proposed § 208.13(d)(1)(iii) would produce that very result. For an applicant who used fraudulent documents to flee persecution in her home country and arrived in the United States on a direct flight from her home country, her use of fraudulent documents would not weigh against her request for asylum. But, if that same applicant used

[136] American Immigration Council, et al., *Court Decision Ensures Asylum Seekers Notice of the One-Year Filing Deadline and an Adequate Mechanism to Timely File Applications*, at 1 (Aug. 2, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/mendez_rojas_v_johnson_faq.pdf.

fraudulent documents to flee persecution in her home country and arrived in the United States on a connecting flight through any other country in the world (regardless of whether that country is a signatory to the 1951 Refugee Convention, 1967 Protocol, or Convention Against Torture), her use of fraudulent documents would weigh against her request for asylum.

American Gateways further objects to this factor because it ignores the reality that individuals in flight from persecution often remain at risk when they are transiting through a third country. For example, several Central Americans seek humanitarian protection in the United States because of the very real risk that persecutors will pursue them in other nearby countries.[137] There is simply no factual evidence to support the government's assumption that it is less likely that an applicant's use of fraudulent documents to effect entry into the United States at a land border is coterminous with the use of those documents to escape persecution simply because the applicant's home country is not Mexico or Canada.

Criminal convictions. The third of nine factors proposes that an applicant ordinarily be denied asylum if she "would otherwise be subject to 8 U.S.C. § 208.13(c) [the asylum bar for convictions of a "particularly serious crime" or "aggravated felony"] but for the reversal, vacatur, expungement, or modification of conviction or sentence unless the [applicant] was found not guilty." In describing the factor, the Departments represent it as consideration of "convictions that remain valid for immigration purposes." 85 Fed. Reg. 36264, 36284 (proposed 8 C.F.R. § 208.13(d)(2)(i)(C)), 36302 (proposed 8 C.F.R. § 1208.13(d)(2)(i)(C)). This representation aligns with the *Pickering* rule, affirmed by attorney general in *Matter of Thomas & Thompson*, which is cited by the Departments. 27 I&N Dec. 674, 680 (AG 2019) ("[T]he Pickering test should apply to state-court orders that modify, clarify, or otherwise alter the term of imprisonment or sentence associated with a state-court conviction."). Under *Pickering*, the relevant question hinges on "whether the original conviction was valid." *Id.* at 676. "[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a 'conviction' as that term is defined in the INA. If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, [then] the respondent remains 'convicted' for immigration purposes." *Id.* (quoting *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)). While an innocent applicant having been found guilty is one example of a defect in the underlying criminal proceeding, it is *only* one example. There is an abundance of procedural and substantive defects outside of actual innocence that could undercut the validity of an original conviction. Since the attorney general has established the rule applicable to this factor in *Matter of Thomas and Thompson* and does not claim to supersede it with this Proposed Rule, the text of this factor should (if it is to be implemented) comport with the established *Pickering* standard.

Failure to timely file taxes. The fifth of nine factors would require that a decision maker ordinarily deny asylum to any refugee who has failed to timely file any taxes, satisfy any outstanding tax obligations, or report any income to the Internal Revenue Service. 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)(E)), 36302 (proposed 8 C.F.R. §

[137] *See, e.g.*, Human Rights First, *Orders from Above*, *supra* note 121; Tim MacGabhann, *Gangs Menace Central Americans Seeking Refuge in Guatemala*, U.N. High Commissioner for Refugees (July 1, 2016), http://www.unhcr.org/news/stories/2016/7/577395af4/gangs-menace-central-americans-seeking-refuge-guatemala.html.

1208.13(d)(2)(i)(E)). This proposed penalty is both draconian and arbitrary; therefore, it should be withdrawn in its entirety.

American Gateways strongly objects to this proposal because the failure to pay taxes simply does not warrant, under any circumstances, denying asylum to individuals who have established their refugee status. Its irrelevance is further underscored by the fact that decision makers rarely—if ever—even inquire about an applicant's compliance with tax obligations when deciding whether to grant asylum. Furthermore, the rule contains no scienter requirement (*e.g.*, knowing / willful) such that individuals who have little or no familiarity with U.S. tax law will be arbitrarily denied asylum even if they are *unaware* of their obligations to report income, file taxes, or pay taxes, or they *inadvertently* fail to comply with such obligations. Even worse, the rule does not forgive any partial infractions, however insignificant. If a refugee files her taxes one day late—something many conscientious U.S. citizens have done at least once—a decision maker shall not grant her asylum.

The administration defends it proposal on the basis that it would simply hold asylum applicants "to the same standards as most individuals in the United States who are required to file federal, state, and local taxes" and "are subject to negative consequences should said filings and associated obligations not been met." 85 Fed. Reg. 36264, 36284. The typical negative consequences that arise from an individual's failure to timely file his taxes cannot be fairly likened to denying asylum to a refugee.[138]

Additionally, in considering the reasonableness of this proposal, the administration must also consider its newly promulgated rules restricting the ability of asylum seekers to obtain work authorization.[139] The new rule imposing a 365-day waiting period before an asylum seeker can apply for work authorization and rendering asylum seekers who enter the country between ports of entry ineligible for work authorization (among several other similarly damaging measures), as well as the new rule removing the requirement that USCIS process asylee work authorization applications within 30 days, will inevitably force asylum seekers into informal economies and make it increasingly difficult for them to obtain social security numbers, report income to the IRS, and file and pay taxes. In short, if an asylum seeker were to take an odd job in the informal economy to put food on the table for himself or his family and did not report and pay taxes on every penny of that income, he will have severely impaired the likelihood of being granted asylum, even if he was unaware of his obligation to file taxes.

Such an unforgiving rule is, on its face, arbitrary and capricious. Take, for example, Ms. B, a non-literate orphan who attended school for one year in her home country of Honduras, was

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[138] The penalty for filing one's taxes late is normally 5 percent of the unpaid taxes for each month or part of a month that a tax return is late, with the penalty not to exceed 25 percent of one's unpaid taxes. The penalty for not paying one's taxes by the tax deadline is one-half of 1 percent of one's unpaid taxes for each month or part of a month that a payment is late. Moreover, the late-filing and late-payment penalties can be excused for "reasonable cause." *See* Internal Revenue Service, *Eight Facts on Late Filing and Late Payment Penalties*, https://www.irs.gov/newsroom/eight-facts-on-late-filing-and-late-payment-penalties (last visited July 14, 2020).

[139] *See* Department of Homeland Security, *Asylum Application, Interview, and Employment Authorization for Applicants*, Final Rule, 85 Fed. Reg. 38,532 (June 26, 2020), https://www.federalregister.gov/documents/2020/06/26/2020-13544/asylum-application-interview-and-employment-authorization-for-applicants.

sexually trafficked as a minor, brutally persecuted by state and non-state actors alike for more than a decade, and entered the United States at age 19. Before retaining counsel to represent her in her asylum case and prior to obtaining work authorization, she worked as a housekeeper at a budget hotel and was paid in cash. She had never heard of the IRS, was unaware of any obligation to file taxes, and cannot read or count. Therefore, Ms. B could not have accurately counted and reported her income even if she were aware of her obligation to do so. Under the proposed rule, Ms. B would be denied asylum unless she can demonstrate, by clear and convincing evidence, that such denial "would result in exceptional and extremely unusual hardship," or, alternatively, the government determines that some unidentified "national security or foreign policy considerations" apply. That is most certainly not a result Congress intended.

Withdrawal with prejudice or abandonment of a prior asylum application. The seventh of nine factors would require that a decision maker ordinarily deny asylum to any individual who has "withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application." 85 Fed. Reg. 36264, 36293 (proposed 8 C.F.R. § 208.13(d)(2)(i)(G)). Taken in connection with the administration's proposal to expand the definition of what constitutes a "frivolous" asylum application, *see id.* at 36295 (proposed 8 C.F.R. § 208.20(c)), and the proposed procedure by which an applicant can avoid a frivolous finding, *id.* (proposed 8 C.F.R. § 208.20(e)(1)), this rule would have ruinous consequences, especially for *pro se* applicants. An unrepresented asylum seeker unfamiliar with the law who wishes to avoid a frivolous finding for having filed an asylum application "clearly foreclosed by applicable law" must "wholly disclaim" her asylum application and *withdraw it with prejudice*, waive all rights to appeal and reconsideration of that decision, and accept voluntary departure within 30 days. *Id.* If she is again persecuted upon being returned to her home country and flees in search of protection, any subsequent asylum application she files will almost certainly be denied on account of her having withdrawn a prior asylum application with prejudice. In other words, in order to avoid a frivolous finding under the administration's new framework, an applicant is also unfairly forced (without fair notice) to surrender any future eligibility for asylum.

d. The Proposed Rule would unduly restrict judicial discretion and interfere with a fair evaluation of the totality of the circumstances unique to each case.

By mandating the consideration of the proposed lists of discretionary factors (and, in many circumstances, prescribing an outcome), the Departments seek to undermine the deference accorded to immigration judges (or, alternatively, asylum officers) as the finders of fact with respect to asylum cases. Federal courts have "repeatedly held that in an exercise of discretion related to an application for asylum, 'all relevant favorable and adverse factors must be considered and weighed.'" *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007) (quoting *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004)). The proposed list of factors deviates from historic practice by (1) assigning directionality and weight to each factor, ignoring the established judicial interpretation that factors ought to be considered and weighed based on the facts and circumstances present in each case, and (2) prescribing only the consideration of *adverse* factors. As explained in *East Bay Sanctuary Covenant v. Barr*:

> In *Matter of Pula*, the BIA had rejected a rule that accorded [one factor] so much weight that its 'practical effect [was] to deny relief in virtually all cases,' instructing instead that 'the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted.' And although the BIA included" a variety of "relevant factors . . ., those factors were not given dispositive weight, and they were to be considered among a host of other relevant factors in their totality."

E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 940 (N.D. Cal. 2019) (second alteration in original) (citing 19 I&N Dec. at 473), *order reinstated*, 391 F. Supp. 3d 974 (N.D. Cal. 2019), *and aff'd*, No. 19-16487, 2020 WL 3637585 (9th Cir. July 6, 2020). *Matter of Pula* further explains that there are various factors that can weigh for and against a claim for asylum, depending on the facts of a case (for example, the use of fraudulent documents can either weigh for or against an application in varying circumstances). 19 I&N Dec. 467, 474 (BIA 1987). Most importantly, *Matter of Pula* provides that, if the applicant experienced past persecution or if deportation would result in a reasonable possibility of persecution, that danger "*should generally outweigh all but the most egregious of adverse factors.*" *Id.* (emphasis added). The Proposed Rule turns this presumption on its head.

e. The proposed exceptions to the discretionary factors are unduly narrow, vague, and impose an abnormally high standard of proof.

The Proposed Rule affords two exceptions to the factors that would prohibit a decisionmaker from granting asylum: first, if there are "extraordinary circumstances, such as those involving national security or foreign policy considerations," and second, the applicant "demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship." 85 Fed. Reg. 36264, 36294-95 (proposed 8 C.F.R. § 208.13(d)(2)(ii)), 36302 (8 C.F.R. § 1208.13(d)(2)(ii)).

The first exception is overly vague, as the Departments offer no explanation as to when "national security or foreign policy considerations" might constitute an exceptional circumstance permitting a grant of asylum.

The second exception deviates from established policy and regulatory norms by raising the standard of proof borne by the applicant. According to the USCIS Policy Manual, "[t]he standard of proof applied in most administrative immigration proceedings is the preponderance of the evidence standard. Therefore, even if there is some doubt, if the benefit requestor submits relevant, probative, and credible evidence that leads an officer to believe that the claim is 'probably true' or 'more likely than not [true],' then the benefit requestor has satisfied the standard of proof."[140] The BIA's precedent echoes this same point: "It is the general rule in both administrative and immigration law that the party charged with the burden of proof must establish the truth of his

[140] Policy Manual, USCIS, at Ch. 4(B) Standards of Proof & n.2, https://www.uscis.gov/policy-manual/export (last updated June 18, 2020) (citing *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring)).

allegations by a preponderance of the evidence." *Matter of Acosta*, 19 I&N Dec. 211, 215 (BIA 1985). There are several policy-driven reasons that preponderance is the near-universal standard of proof for immigration proceedings:

(i) it takes place in a civil court, which diminishes the need for a high degree of certainty (such as would be present in criminal proceedings, which require proof beyond a reasonable doubt);

(ii) most people seeking immigration to the United States are representing themselves, without the assistance of legal counsel; because these are civil matters, the subjects of immigration proceedings are not entitled to counsel and many cannot afford it so they appear *pro se*; less than 30% of detained immigrants are represented by counsel; and

(iii) many immigrants come from situations that limit their ability to provide physical evidence of the claims they are making.

Consider asylum applicants, who enter the United States in immediate flight from persecution—they may have nothing more than the clothes on their backs. A "preponderance of the evidence" standard enables a person, no matter how desperate, to seek refuge in the United States through our immigration procedures.

In fact, a "preponderance of the evidence" standard is so prevalent with respect to an immigrant's burden of proof, there are only ten circumstances under which the regulations impose the higher "clear and convincing evidence" standard on the immigrant. Most of these circumstances relate to situations in which a person is rebutting a presumption. For example, a person who marries a naturalized citizen while in the process of being deported is presumed to have married to remain in the United States, and must rebut that presumption with clear and convincing evidence that the marriage was entered into in good faith. 8 C.F.R. § 245.1; 8 C.F.R. § 1245.1. The only instance in which current regulations apply the clear and convincing evidence standard to asylum seekers is with respect to demonstrating that they filed the application for asylum within one year of arriving in the United States. 8 U.S.C. § 1158(a)(2)(B).

Under the Proposed Rule, applicants would be required to meet this heightened evidentiary standard to prove that "the denial of the application for asylum would result in exceptional and extremely unusual hardship" to enable a decision maker to consider a favorable exercise of discretion. A person applying for asylum already claims to have been persecuted or to have a well-founded fear of persecution based on membership in a protected class. It is hard to even to imagine what *exceptional* and *extremely unusual hardship* would look like if persecution is the baseline. In this context, and when the only thing to be gained is the *possibility* of a favorable exercise of discretion, placing a heighted evidentiary burden on applicants is unduly punitive, not to mention arbitrary and capricious.

The Departments assert that the "exceptional and extremely unusual hardship" standard "build[s] on prior precedent," 85 Fed. Reg. 36264, 36284 (citing *Matter of Jean*, 23 I&N Dec. 373, 385 (AG 2002)). Yet the Departments omit any mention of the circumstances that motivated the standard articulated in *Matter of Jean*—respondent's killing a nineteen-month-old child by shaking and

hitting him to stop him from crying, then failing to call for emergency assistance when he lost consciousness, stopped breathing, and stopped blinking, which conduct led to a conviction for second-degree manslaughter. *Matter of Jean*, 23 I&N Dec. 373 at 374-75. The Departments' proposal to put a failure to pay taxes (and other similar conduct) in the same category as violent criminal acts without any rational justification for doing so is contrary to existing practice and judicial precedent and at odds with an asylum system designed to extend protections to refugees.

3. The proposed definition of "firm resettlement" is over-broad, onerous, and designed to create barriers to relief

Someone who "was firmly resettled in another country prior to arriving in the United States" is considered ineligible for asylum. INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi). Purportedly in the "interest of those genuinely in fear of persecution in attaining safety as soon as possible," the Proposed Rule seeks to change the definition of "firm resettlement that applies to asylum adjudications at 8 C.F.R. § 208.15 and § 1208.15." 85 Fed. Reg. 36264, 36286. The proposed definition of "firm resettlement," however, is contrary to the plain meaning of those terms and creates illogical and onerous burdens on asylum seekers that directly contradict the stated purpose of furthering the "interest of those genuinely in fear of persecution in attaining safety as soon as possible." 85 Fed. Reg. 36264, 36285.

Under the Proposed Rule, an asylum seeker would be considered firmly resettled in three circumstances:

1. the alien either resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding a status such as tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status;

2. the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence prior to arrival in or entry into the United States; or

3. (i) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or (ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States.

85 Fed. Reg. 36264, 36294 (proposed 8 C.F.R. § 208.15), 36303 (proposed 8 C.F.R. § 1208.15).

These circumstances are overbroad and, consequently, far more restrictive for asylum seekers than the current definition. Under the Proposed Rule, a person who *could have resided* in any permanent legal immigration status or non-permanent legal immigration status (including as an asylee, etc.), in a country through which the person transited on the way to the U.S., regardless of whether the person applied for or was offered such status, is deemed to be firmly resettled. *Id.* The definition is so broad that people who have a layover in a country with a system that would

have permitted them to apply for asylum would bear the burden of establishing that the firm resettlement bar does not apply to them.

A definition this broad directly contradicts the plain meaning of firm resettlement. The Oxford English Dictionary defines "firmly" as "[w]ith little possibility of movement; . . . securely."[141] "Settle" is defined as "to be settled, to be at ease," and "resettle" is defined as "to settle (a thing or person) again in a place; . . . re-establish."[142] Given these definitions, the Departments' proposed definition of firm resettlement would lead to absurd applications. For example, it would be non-sensical to consider someone on a layover in an airport to be firmly resettled. Nothing about a layover, or other temporary stay in a country, could be considered secure, or with little possibility of movement. Regardless, the Proposed Rule would consider a layover in another country where someone could possibly apply for asylum or refugee status as firm resettlement.

Further, under the Proposed Rule, if a person lives in another country for one year or more after departing her home country, regardless of her status, and does not suffer persecution, she has firmly resettled. This also contradicts the plain meaning of "firm resettlement" and could bar otherwise meritorious claims. An individual may choose not to apply for legal status in a third country because she reasonably fears persecution, whether or not the persecution actually occurs. Under the proposed definition, however, if that person remains in that country for more than one year and did not actually suffer persecution, the firm resettlement bar applies. If the fear is reasonable, whether or not she actually suffered persecution should not matter. A critical flaw of the proposed definition is that it fails to acknowledge that someone who reasonably fears harm in the country of alleged resettlement cannot actually be resettled because, as the definitions cited above show, to be settled requires security.

Worse still, under the Proposed Rule, if the government of the country of purported resettlement tortures an individual on day 366, that individual is deemed to be firmly resettled. This one-year arbitrary line in the sand precludes taking into consideration the unique circumstances of each case and would, if implemented, block deserving applicants from obtaining relief.

The Ninth Circuit case of *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004), provides an example of the perils of a one-year firm resettlement bar. Siong worked for the Central Intelligence Agency in Laos during the Vietnam War and fled to France in 1977, later becoming a French citizen. *Id.* at 1034. Though Siong and his family lived in France for thirteen years, they moved five times during that period and eventually fled to the United States, citing fear that the Laotian government was sending people to harm him, and his inability to find work in France due to prejudice. *Id.* at 1034 & n.4. The Ninth Circuit, despite noting the presumption of resettlement due to Siong's French citizenship, held that because he "presented a plausible claim for asylum from France based on a well-founded fear of future persecution," he "established at least a plausible claim that he is not firmly resettled in France." *Id.* at 1040. Under the Proposed Rule, however, Siong would have

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[141] *Firmly*, Oxford English Dictionary, https://www.oed.com/view/Entry/70601?redirectedFrom=firmly#eid (last visited July 14, 2020).

[142] *Settle*, Oxford English Dictionary, https://www.oed.com/search?searchType=dictionary&q=settle&_searchBtn=Search (last visited July 14, 2020); *Resettle*, Oxford English Dictionary, https://www.oed.com/view/Entry/163528?redirectedFrom=resettle#eid (last visited July 14, 2020).

been considered firmly resettled, and would not have been eligible for asylum relief, because the feared persecution had not yet come to fruition.

Even in cases where an asylum seeker does not have a reasonable fear of persecution, there may be other reasons why the one-year firm resettlement bar does not make sense in the reality of negotiating complicated international immigrations laws. Take American Gateways client Mr. S., for example. Mr. S., a Russian national, fled his home country after government officials detained and tortured him, causing internal brain trauma, because of his political opinion. He, his wife, and their two-year-old U.S.-citizen son, who was born during an earlier temporary visit to the U.S., moved to New Zealand on low-skilled worker visas. After approximately 13 months in New Zealand, because the nature of the visa would not allow Mr. S. to renew his family members' visas after the initial expiration, he and his family left New Zealand for the U.S. on a temporary visa so he could receive job training. The job training would have allowed Mr. S. to upgrade his New Zealand visa to high-skilled and thereby renew his family members' visas. But, after they left New Zealand, Mr. S. was dismissed from his job. Because the work visas were connected to his job, the family was unable to return to New Zealand—nor were they able to return to Russia because of the government's past persecution. Their only option was to apply for asylum in the United States, where both Mr. S and his wife currently work under DHS authorization, the latter as a healthcare worker on the COVID-19 frontlines in a strained Texas hospital. Under the proposed rule, Mr. S. could be considered firmly resettled in New Zealand because he was there for more than one year even though he was never offered permanent resettlement, could not extend his family members' temporary legal status, came to the United States with the intent to stay only temporarily, and was prohibited from returning to New Zealand. Essentially, under the proposed rule, Mr. S. would be considered firmly resettled in a country he could not legally enter and barred from seeking asylum in the United States. This is directly contradictory to the plain meaning of firm resettlement and is an absurd and unjust result.

Siong's case also highlights the poor drafting of the third circumstance under which an individual would be considered firmly resettled under the Proposed Rule. The proposal mandates firm resettlement for citizens of countries "other than *the one* where the alien alleges a fear of persecution." 85 Fed. Reg. 36264, 36294 (proposed 8 C.F.R. § 208.15(a)(3)(iii)), 36303 (proposed 8 C.F.R. § 1208.15(a)(3)(iii)) (emphasis added). The Departments fail to appreciate that an individual, like Siong, can plausibly assert a fear of return to multiple countries. American Gateways urges the Departments to correct this oversight and expressly decline to apply the firm resettlement bar to an individual who reasonably fears persecution in the supposed country of resettlement, even if he is a citizen of that country. This common-sense position that, regardless of citizenship, an applicant with a well-founded fear of persecution in a country cannot be firmly resettled in that country is supported by judicial precedent and regulatory history. *See, e.g.*, *Matter of L-K-U-*, at 2 (BIA June 16, 2017) (unpublished decision) ("Firm resettlement . . . is not a bar to asylum when the country in which resettlement allegedly occurred is one in which the respondent faces persecution."); 62 Fed. Reg. 10312, 10342 (Mar. 6, 1997) (emphasis added) (codified at 8 C.F.R. § 208.13(d) (repealed 2001)) ("An asylum applicant may be denied in the discretion of the

Attorney General if the alien can be removed to a third country which has offered resettlement *and in which the alien would not face harm or persecution.*") (emphasis added).[143]

The following case examples further underscore that the Departments should revise proposed 8 C.F.R. § 208.15(a)(3)(iii) to clarify that individuals who fear persecution in the supposed country of resettlement, even if they are citizens, are not subject to the firm resettlement bar.

- American Gateways client Ms. AS, who is a citizen of the Democratic Republic of Congo (DRC). Ms. AS was severely beaten and raped by militia members who tried to forcibly recruit her. The militia members spoke Kinyarwanda, and she believed that they were members of a Rwandan militia fighting for power in the eastern Kivu region of the DRC. Her mother is Rwandan and her father is Congolese. Ms. AS never lived in Rwanda and was raised in the DRC. She belongs to a distinct ethnic group in the DRC, despite her mother being Rwandan. To help her to escape the DRC, Ms. AS's mother obtained a valid Rwandan passport for her. Ms. AS crossed the DRC border to Rwanda for a few days to get this passport, which she then used to escape and make her way to the U.S. where she applied for and was eventually granted asylum. Ms. AS did not believe that she would be able to safely resettle in Rwanda, as she believed that the militia who attacked her were Rwandan. Under the proposed rule, Ms. AS could be deemed ineligible for asylum in the U.S., as she would be considered "firmly resettled" as a citizen of Rwanda, despite the fact that she never lived there and only traveled there for a few days to obtain a passport to be able to escape harm.

- Mr. N, a political activist and dual citizen of Cameroon and Burkina Faso, fled Cameroon for Burkina Faso after politically driven government detention and torture in Cameroon and, later, fled Burkina Faso for the United States after politically driven government detention and torture in Burkina Faso. USCIS granted him asylum because he reasonably feared return to both countries, and he successfully petitioned for his wife and their two children to enter as asylees. All four are now U.S. permanent residents. Under the proposed rule as currently drafted, Mr. N's asylum claim may have been cut off upon his flight to Burkina Faso.

Lastly, under the Proposed Rule, if a parent is deemed to be firmly resettled outside of the United States, so is the child, regardless of that child's circumstances or legal claims. 85 Fed. Reg. 36264, 36294 (proposed 8 C.F.R. § 208.15(b)), 36303 (proposed 8 C.F.R. § 1208.15(b)). A parent's legal claims are not necessarily the same as those of a child, but this rule would treat them as the same regardless. Furthermore, it is wholly unclear whether and how the rule would apply if the cases of the parent and minor child were not consolidated. Take for example a father who arrives in the U.S., applies for asylum, and is found to have been firmly resettled in a third country. If, years later, his child arrives in the U.S. and independently applies for asylum as an unaccompanied alien child (UAC), it is unclear whether the firm resettlement finding relating to the father would attach to the UAC and, if so, how it would be applied in practice. The UAC may have no knowledge of

[143] Notably, the Department of Justice removed that regulation solely "to avoid confusion" because some commenters argued it was inconsistent with the INA's "safe third country" provision, but nonetheless "the Department still f[ound] that the regulatory provision would be fully in keeping with the [INA]." 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000).

his father's prior arrival in the U.S. or that his father was deemed to have been firmly resettled in a third country. Immigration judges and asylum officers may similarly be unaware of the prior finding in the father's case. If the decision makers were themselves unaware of the firm resettlement finding, but it was later discovered, could the grant of asylum to the UAC then be rescinded? Aside from the sheer confusion and illogical results that would arise from this proposal, the Departments failure to consider all of the relevant factors and explain its reasoning renders the proposal arbitrary and capricious.

Ultimately, the Proposed Rule's new definition of "firm resettlement" is overly restrictive and, if implemented, would lead to absurd results, preventing asylum relief for exactly the people the law was designed to protect. In an area of the law where the facts of each case vary tremendously, having such a rigid standard is simply not workable. Thus, the proposed definition of firm resettlement should be removed entirely, or, in the alternative, amended to apply more narrowly and provide for exceptions.

F. The proposed revisions to the regulations implementing CAT are vague and contrary to binding precedent.

The CAT regulations define torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. §§ 208.18(a)(1), § 1208.18(a)(1).

1. The "rogue official" exception is vague, contrary to binding precedent, and risks being misinterpreted to encompass any official who acts contrary to national policy.

The Departments propose to codify a "rogue official" exception such that pain and suffering inflicted by or with the acquiescence of a public official does not constitute torture unless the public official acts (or fails to act) in an official capacity—*i.e.*, under color of law. American Gateways opposes the codification of this exception on the grounds that it conflicts with the plain language of the existing regulation, and the Departments fail to adequately explain their rationale for changing the regulation. *See Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2017) ("The regulation uses the word 'or' between the phrases 'inflicted by . . . a public official' and 'acting in an official capacity.'" The word 'or' can only mean that either one suffices, so the torture need not be both by a public official and also that the official is acting in his official capacity."). Nonetheless, American Gateways acknowledges that the proposed codification finds some support in existing BIA and federal circuit precedent. Hence, American Gateways focuses its instant objections on the Departments' drafting omissions.

The Proposed Rule states that "[p]ain or suffering inflicted by a public official who is not acting under color of law ('rogue official') shall not constitute pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity." 85 Fed. Reg. 36294, 36287 (proposed 8 C.F.R. § 208.18), 36303 (proposed 8 C.F.R. § 1208.18). However, the Proposed Rule does not define "rogue official," aside from stating that a rogue official does not act "under color of law." *Id.* Moreover, the rule itself does not define "under color of law." *Id.* These silences must be

remedied. As written, the "rogue official" exception risks being misinterpreted by adjudicators to encompass any official who acts contrary to national policy, including officials who exploit their official authority in the commission of torture. *See, e.g.*, *Iruegas-Valdez v. Yates*, 846 F.3d 806, 812-13 (5th Cir. 2017) (holding that the BIA erred by "concluding that the applicant's evidence did not prove that the *government* would torture him" and by failing to consider evidence that "police officers were active participants in the Allende massacre"); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138 (7th Cir. 2015) ("The immigration judge erred when she said . . . that to be a ground for deferral of removal the infliction, instigation, consent, or acquiescence in torture must be by the Mexican *government* rather than just by Mexican police officers or other government employees . . . ."); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079-80 (9th Cir. 2015) (holding that "[t]he BIA erred by requiring Avendano–Hernandez to also show the 'acquiescence' of the government when her torture was inflicted *by* public officials themselves," and "reject[ing] the government's attempts to characterize these police and military officers as merely rogue or corrupt officials," as they "assaulted[] Avendano–Hernandez while on the job and in uniform"); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 899-904 (8th Cir. 2009) (holding that "the BIA misunderstood and misapplied the parameters of 'under color of law'" because it "improperly focused on and opined on the likelihood of Ramirez Peyro's *lawful* arrest") (emphasis added). And, quite expectedly, any misapplication of the "rogue official" exception will fall hardest on *pro se* and detained individuals who are not well-versed in the applicable case law.

After the Proposed Rule was published, the attorney general clarified that CAT applies to actions performed "under color of law," while declining to endorse a separate "rogue official" standard for the very reasons noted above. *See Matter of O-F-A-S-*, 28 I&N Dec. 35, 38 (AG 2020) ("[C]ontinued use of the 'rogue official' language by the immigration courts going forward risks confusion, not only because it suggests a different standard from 'under color of law' standard, but also because 'rogue official' has been interpreted to have multiple meanings."). The attorney general also expressly rejected the use of "rogue official" as shorthand for someone not acting in an official capacity, which is precisely what the Departments propose to codify. *Id.* at 38. In order to avoid contradicting binding precedent, the Departments must strike all references to "rogue official" from the Proposed Rule.

Additionally, the Departments should codify the "under color of law" analysis set forth in their prefatory comments, namely that a public official acts "under color of law" if "he was able to engage in tortuous conduct because of his government position" or "connection to the government." 85 Fed. Reg. 36264, 36287 (quoting *Matter of O-F-A-S-*, 27 I&N Dec. 709, 718 (BIA 2019)). Or, as stated by the attorney general, "a public official acts under color of law when he exercise[s] power possessed by virtue of law and made possible only because [he] is clothed with the authority of . . . law." *Matter of O-F-A-S-*, 28 I&N Dec. at 40. Furthermore, the Departments should codify a non-exclusive list of considerations that it concedes are relevant to a proper "under color of law" analysis, including "whether government connections provided the officer access to the victim, or to his whereabouts or other identifying information; whether the officer was on duty and in uniform at the time of his conduct; and whether the officer threatened to retaliate through official channels if the victim reported his conduct to authorities." 85 Fed. Reg. 36264, 36287 (quoting *Matter of O-F-A-S-*, 27 I&N Dec. at 718). The Departments should also expand the relevant considerations to include whether the officer exploited his official status to prevent the victim from seeking state protection—a clear example of an officer's "connection

to government" enabling him to engage in tortuous conduct. Finally, the Departments should clarify that the "under color of law" standard "does not categorically exclude corrupt, low-level officials" or "extrajudicial acts" from CAT's scope. *Matter of O-F-A-S-*, 28 I&N Dec. at 40

2. The proposed definition of "acquiescence" is vague and overly narrow so as to sanction official complicity in the commission of torture.

Under the existing CAT regulations, a public official acquiesces to the infliction of torture if he (1) had prior awareness of the activity constituting torture and (2) breached a legal responsibility to intervene to prevent the activity. 8 C.F.R. § 208.18(7). The Departments propose to narrow the definition of "acquiescence" by providing that a public official cannot breach his legal responsibility to intervene unless he was "charged with preventing the activity as part of his or her duties." 85 Fed. Reg. 36264, 36294 (proposed 8 C.F.R. § 208.18(7)). The proposed definition is too narrow, as it could be read to exclude a wide range of conduct not criminalized under domestic laws. By way of example, in several countries marital rape, sexual assault, and "honor crimes" are either legal or not criminalized, such that *no* governmental official will have been "charged with preventing the activity as part of his or her duties." *Id.* This means, for example, that law enforcement officials in countries that do not criminalize marital rape could knowingly decline protection to marital rape victims, and such clear acquiescence would not amount to torture under the Proposed Rule.[144] Even if the Convention Against Torture itself were to charge public officials in party States with preventing such activities, there are many examples of legalized torture in *non*-party States.[145] Thus, under a literal reading of the proposed rule as currently drafted, an applicant for CAT protection based on fear of those acts in those countries, at least, would be unable to show acquiescence. American Gateways therefore urges the Departments to clarify that an official's legal responsibility may derive from international norms. *Cf.* H.R. Rep. 95-1452, at 5 (1978) (defining "persecution" as "the infliction of suffering or harm, under government sanction, upon

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[144] According to a 2019 UN study, four out of 10 countries do not criminalize marital rape. Ellen Wulfhorst, *U.N. Urges Countries to End Marital Rape and Close Legal Loopholes* (June 26, 2019), https://www.globalcitizen.org/en/content/un-women-marital-rape-laws/.

[145] The five non-party States are Brunei, Haiti, India, Palau, and Sudan. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 U.N.T.S. 85, https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en. Examples of legalized torture in these non-party states include: spousal rape (Brunei, Haiti, India, Sudan); rape of men (Brunei); and the stoning of LGBTQ persons (Brunei). *See* U.S. Dep't of State, *Brunei 2019 Human Rights Report*, at 14 (Mar. 11, 2020), https://www.state.gov/wp-content/uploads/2020/02/BRUNEI-2019-HUMAN-RIGHTS-REPORT.pdf ("The law does not criminalize rape against men or spousal rape and explicitly states that sexual intercourse by a man with his wife is not rape as long as she is not younger than 14 (15 if she is ethnic Chinese)."); U.S. Dep't of State, *Haiti 2019 Human Rights Report*, at 18 (Mar. 11, 2020) https://www.state.gov/wp-content/uploads/2020/03/HAITI-2019-HUMAN-RIGHTS-REPORT-REVISED-3.13.2020.pdf ("The law prohibits rape of men and women but does not recognize spousal rape as a crime."); U.S. Dep't of State, *India 2019 Human Rights Report*, at 42 (Mar. 11, 2020), https://www.state.gov/wp-content/uploads/2020/03/INDIA-2019-HUMAN-RIGHTS-REPORT.pdf ("The law criminalizes rape in most cases, although marital rape is not illegal when the woman is older than 15."); U.S. Dep't of State, *Sudan 2019 Human Rights Report*, at 35 (Mar. 11, 2020), https://www.state.gov/wp-content/uploads/2020/02/SUDAN-2019-HUMAN-RIGHTS-REPORT.pdf ("Rape and sexual harassment are criminal offenses, and a rape victim cannot be prosecuted for adultery. Marital rape is not recognized."). Although not currently enforced, death by stoning of LGBTQ individuals remains in the Brunei penal code. *See* Ben Westcott and Rebecca Wright, *Brunei Backs Down on Gay Sex Death Penalty After International Backlash*, CNN (May 6, 2019), https://www.cnn.com/2019/05/05/asia/brunei-lgbt-death-penalty-intl/index.html.

persons who differ in a way regarded as offensive (*e.g.*, race, religion, political opinion, etc.), in a manner condemned by civilized governments").

G. The proposed amendments regarding information disclosure strip asylum seekers of important safeguards.

The Departments propose to amend regulations 8 C.F.R. § 208.6 and 8 C.F.R. § 1208.6 (the "Nondisclosure Rules"), which govern "the disclosure of information contained in or pertaining to an asylum application, credible fear records, and reasonable fear records." Under the guise of maintaining the integrity of the immigration process, the Departments wish to rescind all protection of an applicant's personal information, thereby extinguishing longstanding safeguards against retaliation for asylum seekers.

The Nondisclosure Rules generally prohibit the disclosure to third parties of information contained in or pertaining to asylum applications, credible fear determinations, and reasonable fear determinations, except under certain limited circumstances. *See* 8 C.F.R. § 208.6; 8 C.F.R. § 1208.6. These regulations safeguard information that, if disclosed publicly, could subject an asylum applicant or refugee to retaliatory measures by government authorities or non-state actors in the event that the applicant or refugee is returned to the country of origin. Disclosure also may endanger the applicant's security or that of his or her family members who may still be residing in the country of origin. Asylum records are maintained in service of carrying out immigration and law enforcement responsibilities and are properly subject to a variety of protections to ensure that personal information is not improperly disseminated or used. The possibility that an applicant's private information may be disseminated for improper purposes—or on a hunch—raises serious concerns.

In keeping with the protections afforded under the Nondisclosure Rules, the USCIS announced in October 2012, that "[r]equests for asylum information" related to counterterrorism or intelligence matters required "a detailed justification directly linking the request to an authorized intelligence or counterterrorism function . . . ."[146] The USCIS regulations show that, unless otherwise allowed under 8 C.F.R. § 208.6, disclosure of confidential information is subject to stringent restrictions. Yet, the Departments' proposed changes to the Nondisclosure Rules demolish all expectations of privacy by offering third parties access to confidential information—provided by people who have entered the United States for protection and were promised confidential treatment—in order to fish for evidence of improprieties without articulating a basis for doing so. No other law provides such unfettered access for the purpose of digging up wrongdoing without a requirement of a particularized showing for doing so.[147]

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[146] USCIS Asylum Division, *Confidentiality Fact Sheet* (Oct. 18, 2012), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Asylum-ConfidentialityFactSheet.pdf.

[147] For instance, a search warrant must be based on reliable information showing probable cause to search, and the warrant must state specifically the place to be searched and the items to be seized. *United States v. Dupree*, 781 F. Supp. 2d 115, 149 (E.D.N.Y. 2011) ("'General warrants,' that authorize 'a general, exploratory rummaging in a person's belongings,' are prohibited under the Fourth Amendment."). Similarly, a party seeking disclosure of trade secrets (to prove misappropriation) must show a likelihood of success on the merits and describe with "reasonable particularity" the property to be seized and location of seizure. 18 U.S. Code § 1836. The Departments offer no reason why searches involving an asylum applicant's personal information should be treated differently in this context.

Despite the Departments' purported need to "clarify that information may be disclosed in certain circumstances that *directly relate to the integrity of immigration proceedings*, including situations in which there is suspected fraud or improper duplication of applications or claims," 85 Fed. Reg. 36264, 36288, the Departments seek to permit unfettered access in connection with non-immigration proceedings including:

> (ii) As part of *any* state or federal criminal investigation, proceeding, or prosecution;
>
> (iii) As part of *any* state or federal mandatory reporting requirement; [and]
>
> (iv) To deter, prevent or ameliorate the effects of child abuse.

85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.6(e)(ii)-(iv)) (emphasis added).

While the merits of such goals are subject to reasonable debate, the Proposed Rule offers no protection to the applicant and, instead, breaks wide open the applicant's file to render *all* information collected for immigration purposes available for non-immigration purposes without any showing that all such information is necessary or even relevant. The USCIS currently provides guidance on who can access an applicant's confidential information.[148] The Departments' proposal does not address why the current rule is insufficient for the newly articulated circumstances for disclosure.

Instead, proposed provision 8 C.F.R. § 208.6(d)-(e) nullify any potential protections set forth in the Nondisclosure Rules, and specifically in subsections (a) ("Information contained in or pertaining to any asylum application. . .shall not be disclosed without the written consent of the applicant"), (b) ("The confidentiality of other records kept by DHS and the Executive Office for Immigration Review . . . shall also be protected from disclosure"), and (c) (limiting exceptions to nondisclosure rule). 8 C.F.R. § 208.6(a)-(c).

While subsections (a), (b), and (c) appear to offer protection to an asylum seeker's confidential information, the proposed subsection (d)(2) extinguishes any actual confidentiality safeguards if an applicant's information is sought in any one of six enumerated categories: "If information may be disclosed under paragraph (d)(1) [including subsections (i) through (vi)] of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section *shall not apply*." 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.6(d)(2)). So long as an applicant's confidential information is sought, for example, "[a]s part of any state or federal criminal investigation, proceeding, or prosecution," information that was once collected for immigration purposes will lose its confidential status. *Id.* (proposed 8 C.F.R. § 208.6(d)(1)(ii)). Importantly, the proposed regulations are silent about the subsequent treatment of the once-protected information. The new regulations do not limit in any way the recipient's use or disclosure of confidential information.

In addition, Proposed Rule 8 C.F.R. § 208.6(e) further nullifies any protection afforded by subsections (a), (b), and (c) by mandating that "[n]othing in this section shall be construed as

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148 *See USCIS Policy Manual* (June 18, 2020), https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-7.

prohibiting the disclosure of information" to (1) a variety of agencies "having a need to examine the information for an official purpose," *Id.* (proposed 8 C.F.R. § 208.6(e)(1)); or (2) "[w]here a United States Government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime." *Id.* (proposed 8 C.F.R. § 208.6(e)(1)). Again, the Proposed Rule is silent about how an applicant's confidential information is to be treated once it is disclosed to these agencies and their employees or contractors.

The proposed addition of subsection (e)(1) is also intolerably vague. This section purports to provide access to numerous agencies[149] "having a need to examine the information for an official purpose." However, the Departments offer no guidance as to whether the party seeking disclosure must proffer any evidence that fraud or abuse exists or whether the requesting party may make a generalized claim of "need" and "official purpose." Absent clear guidelines on what "having a need to examine" or just what an "official purpose" is, disclosure should not be made. Indeed, the rule proposed as subsection (e)(2) requires any "United States Government employee or contractor [to have] a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime." *Id.* (proposed 8 C.F.R. § 208.6(e)(2)). The Departments do not explain why certain agencies may access information simply by asserting "a need to examine the information for an official purpose," while other government employees are obligated to act in good faith and reasonably. *Id.* (proposed 8 C.F.R. § 208.6(e)(1)). Neither new standard, however, satisfies the current requirement of detailed justification.

For the foregoing reasons, the Departments' proposed revision of 8 C.F.R. § 208.6(b) and proposed addition of 8 C.F.R. § 208.6(d)-(e) should be withdrawn.

[149] *See* 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.6(e)(1)). The proposed subsection seeks to provide access to "a U.S. national security agency," without any explanation of which or how many such agencies should have access. Like the other identified agencies, this reference should be specific. As written, "a U.S. national security agency" is too vague and risks ambiguity in enforcement.