ROUND TABLE
of Former Immigration Judges

July 13, 2020

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Re: Comments in Opposition to Proposed Rulemaking: 85 FR 36264
RIN 1125-AA94; 1615-AC42
EOIR Docket No. 18-0002; A.G. Order No. 4714-2020

Dear Ms. Alder Reid and Ms. Dunn,

The Round Table of Former Immigration Judges is composed of 46 former Immigration Judges and Appellate Immigration Judges of the Board of Immigration Appeals. We were appointed by and served under both Republican and Democratic administrations. We have centuries of combined experience adjudicating asylum applications and appeals. Our members include nationally-respected experts on asylum law; many regularly lecture at law schools and conferences and author articles on the topic.

Our members issued decisions encompassing wide-ranging interpretations of our asylum laws during our service on the bench. Whether or not we ultimately reached the correct result, those decisions were always exercised according to our "own understanding and conscience,"[1] and not in acquiescence to the political agenda of the party or administration under which we served.

We as judges understood that whether or not we agreed with the intent of Congress, we were still bound to follow it. The same is true of the Attorney General, Secretary of Homeland Security, and for that matter, the President.

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[1] *See Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

INTRODUCTION

In their introduction, the proposed regulations misstate the Congressional intent behind our asylum laws.[2] Since 1980, our nation's asylum laws are neither an expression of foreign policy nor an assertion of the right to protect resources or citizens. It is for this reason that the notice of proposed rulemaking must cite a case from 1972 that did not address asylum at all in order to find support for its claim.

The intent of Congress in enacting the 1980 Refugee Act was to bring our country's asylum laws into accordance with our international treaty obligations, specifically by eliminating the above-stated biases from such determinations. For the past 40 years, our laws require us to grant asylum to all who qualify regardless of foreign policy or other concerns. Furthermore, the international treaties were intentionally left broad enough in their language to allow adjudicators flexibility to provide protection in response to whatever types of harm creative persecutors might devise. In choosing to adopt the precise language of those treaties, Congress adopted the same flexibility. *See e.g. Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804), pursuant to which national statutes should be interpreted in such a way as to not conflict with international laws.

The proposed rules are impermissibly arbitrary and capricious. They attempt to overcome, as opposed to interpret, the clear meaning of our asylum statutes. Rather than interpret the views of Congress, the proposed rules seek to replace them in furtherance of the strongly anti-immigrant views of the administration they serve.[3] And that they seek to do so in an election year, for political gain, is clear.

In attempting to stifle clear Congressional intent in service of its own political motives, the administration has proposed rules that are *ultra vires* to the statute.

THE USE OF BRAND X TO SIDESTEP DECADES OF FEDERAL CASELAW

The proposed regulations acknowledge outright in Footnote One,[4] the proponents' intention to rely upon these new regulations to overrule many outstanding asylum-related decisions of the federal circuit courts of appeal. Looking to the Supreme Court's decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* ("*Brand X*"), 545 U.S. 967, 982 (2005), the proponents assert: "the Departments note that portions of this rule, in accordance with well-established administrative law principles, would supersede certain [existing] interpretations of the immigration laws by federal courts of appeals."[5] This statement ignores the actual requirements that have

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[2] 85 FR 36264, 36265.

[3] Examples of these anti-immigrant views include Donald J. Trump's June 16, 2015 speech announcing his candidacy for President ("When Mexico sends its people, they're not sending their best...They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people"); Trump's March 9, 2016 statement to CNN ("I think Islam hates us ... We can't allow people coming into this country who have this hatred of the United States and of people that are not Muslim"); Trump's suggestion as President to have DHS agents "shoot migrants in the legs to slow them down;" and his January 2018 remarks to Congressional leaders ("Why do we want all these people from 'shithole countries' coming here?").

[4] 85 FR 36265, n. 1.

[5] *Id.*

been articulated in the Supreme Court's decision in *Kisor v. Wilkie,* 139 S. Ct. 2400 (2019), discussed *infra*, which follows the recent trend towards limiting deference to an agency's interpretation of its own rules.

In *Brand X*, the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X,* 545 U.S. at 982 (internal quotations omitted) (emphasis added).[6] *See also Holder v. Martinez-Gutierrez,* 132 S. Ct. 2011 (2012). *See also Matter of M-H-*, 26 I. & N. Dec. 46 (BIA 2012). What this means in practice, is that where statutory or regulatory terms being construed are genuinely ambiguous and the agency has not ruled on the particular issue, the existing law of the circuit court which has addressed the issue in question governs only until the agency has issued a dispositive interpretation concerning the meaning of a genuinely ambiguous statute or regulation.

Brand X, for its part, relies upon the analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), which holds that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to fill the statutory gap and involve difficult policy choices that agencies are better equipped to make than courts. 467 U. S., at 865-866. Accordingly, *Chevron* deference requires a federal court to accept the agency's reasonable construction of an ambiguous statute. *Id*. at 843-844, and n. 11. The question of genuinely ambiguous language versus plain language thus is a critical distinction.

The Departments' reliance on *Brand X,* however, to entirely eviscerate federal court caselaw is misplaced and contrary to controlling law. First, the proponents have failed to demonstrate that each and every instance of the statutory language found in the decades of federal court case law that they seek to overwrite is "genuinely ambiguous." *See Kisor v. Wilkie,* 139 S. Ct. 2400 (2019)(ruling that deference under *Auer v. Robbins*, 519 U.S. 452 (1997) (*Auer* deference) to agency regulations should not be afforded automatically). *Kisor v. Wilkie*, the product of an increasing judicial preference not to give deference to agency interpretations that can be easily construed by courts, limits the propriety of affording deference unless (1) a regulation is genuinely ambiguous, requiring a court to employ all the tools of construction, (2) the agency's reading is reasonable as to text, structure, and history, (3) the interpretation must be the agency's official, authoritative position, (4) the regulation must implicate the agency's expertise, (5) the regulation must reflect the agency's fair and considered judgment.

Second, the departments' authority is not to rewrite the statute that Congress has written, but to faithfully interpret it. Rulemaking is not an opportunity for an agency to engage in an unauthorized writing exercise that duplicates the legislative role assigned to Congress.

The proponents have failed to demonstrate that the rules they wish to promulgate to supplant years of established asylum regulation address genuine ambiguities that cannot be filled by a court using tools of construction, that these proposed rules are reasonable, that the proposed rules

[6] The term "Chevron deference" refers to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

reflect agency expertise, that the drastic degree of change proposed is warranted, or that they reflects the agency's fair and considered judgment. *Cf. Kisor v. WIlkie, supra*. The Departments cannot satisfy the requirements recently imposed by the Supreme Court for limiting *Auer* deference to *genuinely ambiguous* agency regulations, or any of the other factors that warrant deference to agency interpretation. *Cf. Kisor v. Wilkie, supra*.[7] In publishing these proposed regulations, and asserting without specifically identifying either the provisions that they are intended to interpret, or the existing federal decisions that they are intended to supersede, the Departments improperly seek to re-write asylum law rather than interpret the statute.

AMENDMENTS TO THE CREDIBLE FEAR AND REASONABLE FEAR INTERVIEW PROCESS

Expedited removal was first proposed in 1992 in response to an increasing number of noncitizens arriving at U.S. airports without proper entry documents.[8] The proposal gained momentum following a March 14, 1993 *60 Minutes* report titled "How Did He Get Here?" focusing on asylum claimants gaining admission at New York's JFK International Airport.

In its early years, expedited removal involved a very small percentage of asylum seekers. In Fiscal Year 2001, 215,398 arriving noncitizens were designated for expedited removal. Only 5.7 percent were referred to USCIS for a credible fear determination. That number dropped to 3 percent in FY 2003.[9] Over the four and a half year period from April 1, 1997 through September 30, 2001, a total of 34,736 noncitizens subject to expedited removal claimed to have a credible fear of persecution, an average of less than 8,000 such claims per year.

By comparison, CBP reported 92,959 credible fear claims in FY 2018 alone.[10] Obviously, the present administration realizes that raising the credible fear standard would have a significant impact on overall immigration based on the present numbers, something that would not have been true in years past. Acting USCIS Director Ken Cuccinelli said as much in his June 2019 email to USCIS Asylum Officers, stating that asylum officers must apply a higher legal standard in credible fear determinations so that USCIS can do its "part to stem the crisis and better secure the homeland."[11]

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[7] Justice Kagan, writing for the majority emphasized that while *Auer* deference is "rooted in a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities" because agencies are best equipped to interpret the often-technical regulations, knee-jerk deference in response to the interpretation of agency regulations is not appropriate.

[8] *See* U.S. Committee on Refugees, *World Refugee Survey 1993* https://refugees.org/wp-content/uploads/2019/02/1993-World-Refugee-Survey.pdf at 43.

[9] Congressional Research Service, "Immigration Policy on Expedited Removal of Aliens," Updated May 15, 2006, https://www.everycrsreport.com/files/20060515_RL33109_dd7be03f25386d3a11a6461ec642c8cc9177b139.pdf at CS-9.

[10] U.S. Customs and Border Protection, Claims of Fear (FY 2017-2018), https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear.

[11] Hamed Aleaziz, "A Top Immigration Official Appears to Be Warning Asylum Officers About Border Screenings," *BuzzFeed News*, June 18, 2019, https://www.buzzfeednews.com/article/hamedaleaziz/uscis-director-asylum-officers-email.

As former judges who carefully applied such standards on a daily basis at the trial and appellate levels, we attest that there is no sliding scale for legal standards based on the volume of cases. It goes without saying that the need for USCIS to do its part to stem the crisis and better secure the country has no bearing on the proper legal standard for determining credible fear. The determination as to whether there is a significant possibility that an applicant could establish eligibility for asylum is the same whether one person or one million people per year are making such claims. To suggest that the standard should be raised in response to the number of applicants to "better secure the homeland" contradicts the clear meaning of the statute, and is thus ultra vires. It would constitute the equivalent of lowering the "beyond a reasonable doubt" standard required for criminal convictions in response to rising crime rates.

Nevertheless, the proposed rules seek to (1) create a higher evidentiary standard for arriving refugees to establish credible fear and avoid expedited removal; and (2) for some reason, create a new, more narrow scope of proceedings for those who do satisfy the new standard, under which the asylum applicants' rights and eligibility for alternate forms of relief would be limited.

The proposed rules would deprive those establishing a credible fear from being placed into full removal proceedings under section 240 of the Act. The proposal attempts to justify this by arguing that section 235(b)(1)(B)(ii) of the Act does not specifically require a hearing under section 240 of the Act, citing the observation of INS in 1997 that "the statute was silent as to procedures for those who demonstrated such a fear." The drafters therefore wish to place asylum-seekers who establish a credible fear into "asylum only" proceedings, of the type used for entrants under the Visa Waiver Program ("VWP").

However, the proposal overlooks critical facts. The Immigration and Nationality Act would not need to designate the type of removal proceeding because under the Act, there are only removal proceedings under section 240. "Asylum only" proceedings do not exist by statute, and are not mentioned anywhere in the Act. Such proceedings were created out of necessity due to the fact that those who enter under the VWP surrender their rights to removal proceedings by statute under section 217(b) of the Act, with the exception of claims for asylum and withholding of removal. As VWP entrants are entitled to review of their asylum claims before an immigration judge, but cannot by statute be placed in section 240 removal proceedings, there was no choice but to create something known as an "asylum only" proceeding.

As no such statutory prohibition exists on placing arriving asylum seekers into full section 240 proceedings, Congress had no need to specifically designate what is clear and obvious. The regulatory proposal is therefore contrary to Congressional intent. Had Congress intended to create an entirely new type of proceeding for those who established a credible fear of persecution, it would have explicitly said so.

The proposed rules reference DHS's ability to exercise "prosecutorial discretion" in removal proceedings as justification for the change. However, prosecutorial discretion does not include the inherent power to create entirely new types of proceedings, but rather, is limited to decisions involving whether or not to pursue charges. To again draw an analogy to criminal law, the fact that a criminal prosecutor may exercise prosecutorial discretion doesn't allow the prosecutor to

choose to prosecute, but only in a new, streamlined "murder only" trial of the U.S. Attorney's own invention, designed to create a greater likelihood of conviction.

The proposed regulations also argue that DHS has already determined removability for all those placed into expedited removal, and thus seems to believe that revisiting the issue before an Immigration Judge would be inefficient and redundant.

For all practical purposes, DHS has concluded that *everyone* placed into removal proceedings is removable; otherwise, it would not have issued a Notice to Appear and initiated removal proceedings. It bears noting that in the expedited removal context, these decisions are made by CBP officers who are not lawyers, and certainly aren't judges. There is obviously a risk of error or abuse in allowing an enforcement officer to also act as prosecutor and judge, and then not have the decision subject to appellate review.

Congress only authorized such procedure because it was deemed necessary to its goal of immediately removing noncitizens upon arrival, by foregoing the lengthier process of placing them into removal proceedings. In other words, Congress was willing to sacrifice quality in return for speed and deterrence for a specific category of noncitizens. It should be emphasized that in making such determination, the class of noncitizens involved was limited to those arriving at ports of entry, and did not include anyone located anywhere within the U.S. who could not demonstrate that they had been in the U.S. for a minimum of two years.

Once the noncitizen is already in immigration court proceedings, the purpose of allowing a non-attorney CBP officer's removal order to stand makes no sense. Someone who has cleared the hurdle of establishing a credible fear of persecution is not who Congress intended to deter, and is not who Congress was willing to risk wrongfully deporting.

Furthermore, based on our extensive knowledge and experience with immigration court proceedings, there is little efficiency in foregoing removability determinations in removal proceedings. In the overwhelming majority of cases, the pleadings required to establish removability take 30 seconds. That is all the time that relying on the removal determination of the CBP officer will save in close to all such cases. It is inconceivable that Congress would have chosen to sacrifice so much in terms of competency and accuracy to save 30 seconds.

The proposal makes no mention at all of the rare case in which there might be an issue regarding admissibility or removability which the non-attorney CBP officer got wrong. Once the asylum-seeker is in proceedings before a judge, with an actual attorney representing DHS, it makes absolute sense to have the determination made by a judge, with input from lawyers.

The proposal additionally seeks to limit asylum seekers from pursuing other forms of relief from removal in immigration court proceedings. We ask the question: Why?

We can attest from our extensive experience on the bench that the availability of a wide range of reliefs is a great aid to administrative efficiency. Hearings involving asylum, withholding of removal, or CAT applications are laborious, involving an extreme level of fact-finding, and the application and interpretation of increasingly complicated laws that are constantly evolving (as

these 161 pages of proposed regulations both acknowledge and demonstrate). Hearings generally take hours, and sometimes days, to complete, and usually involve at least one level of appeal. The proposed changes involving the meaning of key issues such as persecution, political opinion, particular social group, and the standards for exercising discretion will complicate those determinations even more, resulting in an increase in continuances for preparation and lengthier hearings. More evidence, expert testimony, and briefing involving legal theories will be necessary. Immigration Judges will have to issue more written decisions to address all of the new and complex issues created by the new rules. Hearing such cases in "asylum only" proceedings provides no shortcuts as to any of the above.

But should a respondent in full removal proceedings become eligible for a simpler form of relief, courts may forego the above. Some non-asylum forms of relief can be disposed of in hearings in a matter of minutes, and result in decisions more likely to be accepted by DHS as final, saving further time and resources by foregoing the need for appeal to the BIA and the circuit courts. It is clear that the motive behind this is purely punitive (which obviously has no place in the regulatory process).

The proposed regulations also seek to require applicants for withholding of removal to prove a "reasonable fear" of persecution, a higher evidentiary standard than the "credible fear" required for asylum. It is assumed that this proposal is meant to apply to those deemed ineligible for asylum, and who are thus applying only for withholding relief. It is imagined that the drafters assume that a significant number of refugees might fall into this category due to the administration's unsuccessful attempts to impose regulatory bans on asylum against those not entering at ports of entry and those arriving at the southern border who did not apply for asylum, and have such applications rejected, in third countries through which they were forced to travel en route to the U.S. The "third country" asylum ban regulations were vacated by a U.S. District Court on June 30, 2020.[12] And on July 6, 2020, the U.S. Court of Appeals for the Ninth Circuit upheld an earlier injunction against the same rule.[13]

Another rule the administration issued attempting to ban those entering the U.S. without inspection from asylum has been blocked by two separate district courts.[14] It is thus not clear who the drafters envision as falling into the category of being only eligible for withholding of removal or CAT.

Regardless, the rule is wrong. Having heard many, many such claims in court over many, many years, we can attest that claims for asylum, withholding, and CAT protection often develop slowly, and usually require the assistance of competent counsel.[15] Whether the relief involved is

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[12] *Capital Area Immigrants' Rights Coalition v. Trump*, No. 19-2117 (D.D.C. June 30, 2020).

[13] *East Bay Sanctuary Covenant v. Barr*, No. 19-16487 (9th Cir. July 6, 2020).

[14] *East Bay Sanctuary Convenant v. Trump*, No. 18-06810 (D. N. CA, 2018); *O.A. v. Trump*, No. 18-02718 (D. D.C. 2018).

[15] One study concluded that noncitizens are up to eight times more likely to obtain relief when represented by counsel in removal proceedings. Eagly & Shafer, *A National Study of Access to Counsel*, 164 U. Pa. L. Rev. at 57. Among asylum seekers, applicants represented by legal counsel were granted asylum at a rate 3.1 (affirmative) and 1.8 (defensive) times higher than unrepresented applicants. U.S. Gov't Accountability Off., GAO-17-72, Asylum Variation Exists in Outcomes of Applications Across Immigration Courts and Judges at 31, 33 (Nov. 2016).

asylum, withholding of removal, or CAT protection, our domestic law and international treaty obligations forbid the return of someone to suffer persecution on account of a statutorily-protected ground, or to suffer torture for any reason. A newly arrived refugee must overcome numerous obstacles to establishing the claim for relief. The refugee might be traumatized; often has not had the chance to consult an attorney, and lacks a sufficient knowledge of asylum and CAT law. A newly-arrived and detained refugee is not in a good position to gather evidence, present witnesses, or research the applicable case law. Furthermore, the applicable case law is in a state of extreme flux (a factor that would only be exacerbated by the proposed regulations).

Many of us can attest to claims that we granted on the bench that did not seem likely at the outset to qualify for relief. We can attest to cases becoming grantable well into the merits hearing. And Article III courts are presently issuing precedent decisions changing the applicable standards on a regular basis. Given the life or death nature of asylum, withholding, and CAT claims, and the recognition of such risk by Congress in creating the lower credible fear standard as a safeguard against removing one who might ultimately prove eligible for relief, the proposed raising of the applicable standard can only be described as cruelly irresponsible.

Regarding the proposal to consider applicable case law precedent in making credible fear determinations, it should be noted that those found to have a credible fear may have their ultimate immigration court proceedings held in an indeterminate jurisdiction. For example, an asylum applicant apprehended in Brownsville, Texas may have their asylum claim heard in an immigration court located within the jurisdiction of another circuit. Asylum Officers and Immigration Judges should therefore consider whether the asylum-seeker has established a credible fear under the case law of *any* U.S. jurisdiction. For example, the U.S. Court of Appeals for the Sixth Circuit has recently found the Attorney General's decision in *Matter of A-B-* to have been abrogated, and held out the possibility that therefore, the BIA's holding in *Matter of A-R-C-G-* might continue to be binding precedent. *Juan Antonio v. Barr*, No. 18-3500, ___ F.3d ___ (6th Cir. May 19, 2020). The First Circuit, in *De Pena Paniagua v. Barr*, No. 18-2100, ___ F. 3d ___ (1st Cir. April 24, 2020) held that *Matter of A-B-* did not categorically preclude the granting of domestic violence based asylum claims; further held that particular social groups may be properly defined by the feared harm without being deemed impermissibly circular; and further suggested the likelihood that gender per se may constitute a cognizable particular social group for asylum purposes. And all circuits that have ruled on the issue have found family to constitute a particular social group for asylum purposes. Regardless of the location of the credible fear determination, all such case law should be considered in determining the ultimate possibility of succeeding on the claim. For all the above mentioned reasons, we strongly oppose the amendments to the credible and reasonable fear processes.

AMENDMENTS TO THE CONFIDENTIALITY PROVISIONS FOR ASYLUM

The regulations at 8 CFR §§ 208.6 and 1208.6 protect the confidentiality of asylum applications as well as information disclosed in credible and reasonable fear proceedings. These regulations are vital to the protection of asylum seekers, as they may face additional harm if such information is disclosed. Moreover, the confidential process is central to many applicants' ability to

trust the United States asylum system such that they are able and willing to disclose highly sensitive and traumatic information. Many asylum seekers are afraid to disclose the intimate details of the persecution they suffered, as they worry about the information being disclosed to their government and other third parties.

While the proposed amendment suggests the information disclosure will remain limited, the proposed language is expansive and highly concerning.[16] The Departments propose to amend and limit confidentiality protections in "situations in which there is suspected fraud or improper duplication of applications or claims."[17] The Departments further justify the removal of confidentiality protections suggesting that such protections may shield investigations of fraud and other criminal behavior.[18] In addition, the Departments seek to disclose information about an individual's asylum claim in the context of federal litigation unrelated to the asylum application, where litigation is public record and can be accessed by anyone.[19] However, the actual proposed language, if finalized, will give the United States Government broad authority to disclose and share information from an asylum applicant's file:

> to the extent not already specifically permitted, and without the necessity of seeking the exercise of the Attorney General's or Secretary's discretion under paragraphs 208.6(a) and 1208.6(a), respectively, the Government may disclose **all relevant and applicable information** in or pertaining to the application for asylum, statutory withholding of removal, and protection under the CAT regulations as part of a federal or state investigation, proceeding, or prosecution; **as a defense to any legal action relating to the alien's immigration or custody status**; an adjudication of the application itself or **an adjudication of any other application or proceeding arising under the immigration laws**; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.[20]

The proposed rule would allow United States Government officials to disclose any piece of information in an applicant's file in a broad range of proceedings, including in other asylum applicants' cases, without seeking permission from anyone. In practice, this means that a DHS trial attorney would be permitted to file information from one asylum applicant's file in another applicant's case without seeking permission from the applicant. This also means that the information from one applicant's case would be accessible to another applicant, potentially putting asylum applicants in harm's way within the United States. This defeats the purpose of asylum, which is meant to protect those fleeing harm. Moreover, this is only one example of the way this rule could be implemented to disclose highly sensitive information under the guise of fighting fraud and criminal activity. In addition, the rule would allow the government to file information about an individual's asylum application in public proceedings in federal court, where evidence is accessible to anyone. This information could be easily accessed by individuals in the country of persecution.

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[16] 85 FR at 36288.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* (emphasis added).

As former Immigration Judges and Board of Immigration Appeals Members, we assured asylum applicants that their testimony in court was confidential, which encouraged applicants to disclose the most intimate and traumatic details of their lives, as they understood the information would not be shared with those whose could do them additional harm. If Immigration Judges are unable to provide such assurances to the applicants appearing before them, applicants will be less likely to disclose the details required for a grant of protection. In addition, by giving Immigration Judges the authority to receive information in this way, the Departments are allowing and encouraging Immigration Judges to further harm the most vulnerable individuals who are appearing before them. This provision is extremely concerning to us and we strongly object to its implementation.

AMENDMENTS ALLOWING PRETERMISSION OF LEGALLY INSUFFICIENT APPLICATIONS

The proposed rule, for the first time, would allow Immigration Judges to pretermit and deny applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT) without holding a hearing.[21] A decision to pretermit would be based on the Form I-589 and any supporting evidence, if an Immigration judge found the applicant did not establish a prima facie claim to relief.[22] While this rule would streamline the asylum process and allow the Immigration Courts to rapidly reduce the backlog, the rule flies in the face of due process and contrary to the purpose of asylum. It is particularly problematic for pro se and non-English speaking asylum seekers.

This proposed rule, in conjunction with the Immigration Court Performance Metrics, creates an incentive for Immigration Judges to pretermit asylum applications in order to meet case completion requirements and hear cases more quickly, without regard for the purpose of asylum, which is to protect the most vulnerable people in the world.[23] The proposed rule also ignores the realities of the Immigration Court and asylum systems, where asylum applicants have the "privilege of being represented, at no expense to the Government…"[24] In practice, this means that many indigent asylum seekers, including those who are detained and speak no English, must navigate the immigration court and asylum system with no assistance. Such individuals, many of whom are legitimate refugees, will never have their day in court under the proposed rule.

As former Immigration Judges and Board of Immigration Appeals Members, we understand the reality of the asylum process in Immigration Court. Countless times, we heard meritorious cases that, on their face originally, appeared to be lacking. In many cases, it was not until testimony was taken in open court and further inquiries made into the facts of the case that it became clear that the applicant qualified for asylum. By allowing and even encouraging Immigration Judges

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[21] 85 FR at 36277.
[22] *Id.*
[23] Case Priorities and Immigration Court Performance Measures, January 17, 2018, https://www.justice.gov/eoir/page/file/1026721/download; Tracking and Expedition of "Family Unit" Cases, November 16, 2018, https://www.justice.gov/eoir/page/file/1112036/download; EOIR Performance Plan: https://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf
[24] INA § 240(b)(4).

to pretermit asylum applications, legitimate refugees will be returned to harm without any due process. We strongly oppose this amendment.

AMENDMENTS TO THE DEFINITION OF PERSECUTION

The most fundamental aspect underlying the UN Convention And Protocol Regarding The Status Of Refugees is the concept of *surrogate* protection. That is, by signing the Convention/Protocol, the United States agreed to provide protection for those individuals meeting the terms of the refugee definition.[25] By enacting domestic asylum laws we have accepted the obligation of protecting individuals who have suffered past persecution or have well-founded fears of future persecution when their home countries cannot or will not protect them.

United States asylum law, as enacted by Congress, includes detailed statutory provisions concerning the reasons for persecution, the characteristics that may trigger persecution, the degree or type of harm faced, and the severity of persecution that is risked together with extensive eligibility and procedural provisions. Regulations are intended only to fill any gap left by Congress when the language used by Congress is ambiguous or silent with respect to an element of the refugee definition.

Nevertheless, the proposed rule essentially seeks to "overrule" the statute, as well as the case law, which has developed over the past 40 years with a dramatically restrictive regulation that, *inter alia*, drastically limits the types of harm that can "rise to the level of " or qualify as "persecution." The proposed rule narrowly redefines persecution and impermissibly alters the accepted statutory interpretation used to determine eligibility and afford protection.[26]

The proposed change excludes degrees of harm, and types of mistreatment.
In particular, under the proposed rule, acceptable evidence of persecution <u>does not</u> include:

- every instance of harm that arises generally out of civil, criminal, or military strife in a country;
- any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional;
- intermittent harassment, including brief detentions;
- repeated threats with no actions taken to carry out the threats;
- non-severe economic harm or property damage; or
- government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.[27]

The proposed rule emphasizes that the harm must be "extreme" and that threats must be "exigent."[28] Defining persecution in this way, by excluding less serious forms of abuse, necessarily

[25] 8 U.S.C. 1101(a)(42)(A).
[26] 85 FR at 36280.
[27] 85 FR at 36280-81.
[28] 85 FR at 36280.

limits the facts, circumstances, and combinations thereof, that may be deemed sufficient to qualify for asylum in a given case.

For example, the proposed regulations fail to consider or take into account the factor of age of the asylum applicant. This is blatant disregard of the US Department of Justice Guidelines for Assessing Children's Asylum Claims which states that "the harm that a child fears or has suffered may be relatively less than that of an adult and still qualify as persecution."[29] The Guidelines state, "in addition to the many forms of persecution an adult may suffer, children may be particularly vulnerable" to a number of other forms of persecution, including "the deprivation of food and medical treatment."[30]

Furthermore, the proposed rule explicitly directs adjudicators to not consider laws on the books that are "unenforced or infrequently enforced" unless applicants can demonstrate the laws will specifically be enforced against them.[31] This encourages overlooking the impact of LGBTQ persecution that could result from reporting a hate crime to the police where in a country in which LGBTQ activity is prohibited. Likewise, a woman who suffered sexual assault may not have reported it because she knows that laws against rape are not adequately enforced and she may fear retribution from her persecutor(s).

The proposed rule also does not require adjudicators to analyze harm cumulatively. Thus, adjudicators would likely deny claims by asylum seekers who have been repeatedly detained for their political or religious views if those detentions are considered "brief." The Board of Immigration Appeals, along with the Circuit Courts, have long held that even if individual acts of harm might not rise to the level of persecution, adjudicators must consider them in the aggregate.[32] This unquestionably compromises the ability of those who face multiple less serious harms that are brief in duration to obtain protection, notwithstanding the fact that cumulatively, they amount to severe persecution warranting protection.

Until these regulations were proposed, persecution has always been a flexible statutory concept that includes a subjective and circumstantial element. *See Matter of Acosta* which defines persecution as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." 19 I&N Dec. at 222. This definition has been further refined by case law and requires a fact-specific inquiry. Shockingly, the approach of the proposed regulation seeks to obviate one of the most universal precepts in asylum adjudication, which is that eligibility for protection is to be demonstrated through a case by case evaluation.[33] We therefore strongly oppose the proposed amendments to the definition of persecution.

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[29] *See* USCIS, *Guidelines for Children's Asylum Claims*, Asylum Office Basic Training Course, March 21, 2009, p. 19.
[30] *Id.*
[31] 85 FR36281.
[32] *See, Matter of O-Z- &I-Z-*, 22 I&N Dec. 23 (BIA 1998); *Herrera-Reyes v. Attorney Gen. of United States*, 952 F.3d 101, 109 (3d Cir. 2020) ("Even if the IJ was correct that no single incident in isolation rose to the level of past persecution, he was still required to analyze whether the cumulative effect of these incidents constituted a severe 'threat to life or freedom.'"); *Baharon v. Holder,* 588 F.3d 228, 232 (4th Cir. 2009).
[33] *See Cardoza-Fonseca v. INS*, 480 U.S. 421 (1987).

AMENDMENTS TO THE DEFINITION OF PARTICULAR SOCIAL GROUP

As former Immigration Judges and Board Members, we are acutely aware of the complexity of analyzing asylum claims involving membership in a particular social group. The inclusion of membership in a particular social group in the statute was meant to allow for flexibility in the refugee definition, and to ensure that the United States offers broad protection in accordance with our treaty obligations. These types of claims are among the most complicated faced by an adjudicator and cannot be made simpler at the expense of eviscerating the Immigration and Nationality Act, years of carefully developed case law, and the due process rights of asylum applicants. At their core, the proposed regulatory changes seek to exclude the most vulnerable applicants, long protected by our asylum laws.

Based on our collective experience, many of the social groups slated for dismissal in the proposed social group regulations encompass a wide cross-section of potentially successful asylum claims. Few commenters to this proposed regulation could state this with more certainty than the undersigned. Collectively, we have adjudicated tens of thousands of asylum cases over many decades throughout this nation, in both our home courts and while on detail in other jurisdictions. Some of us have served as Board members, reviewing the social group analysis of the Immigration Judge. Included on the list of generally excluded social groups are "presence in a country with generalized violence or a high crime rate," "interpersonal disputes of which government authorities were unaware or uninvolved," and "the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups."[34] The broad wording of these groups is extremely concerning, and encompasses many thousands of credible asylum cases granted by this group based on longstanding Board and circuit caselaw: survivors of domestic violence; families; individuals that refused gang recruitment and authority; women; landowners; survivors of female genital mutilation; and members of the LGBTQI community.[35]

The changes suggested in the proposed regulation are at odds with the well-established and critically important legal requirement of case-by-case adjudication of asylum claims. While problematic in many respects, the Attorney General's own decision in *Matter of A-B-* is premised on the need for a detailed, case-specific analysis of asylum claims, and repeatedly emphasizes the Board's prior errors in assessing the cognizability of a social group without proper legal analysis.[36] The proposed regulations short-circuit legal analysis of an asylum applicant's claim in particularly dangerous ways, by providing a checklist of groups that would be "generally" insufficient to establish a particular social group under the refugee definition in order to provide uniformity and save Court time.

The wording of the proposed regulation creates a rebuttable presumption that claims based on any of the broadly enumerated particular social groups are insufficient to state an asylum claim,

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[34] 85 FR at 36279.

[35] *See*, *e.g.*, *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) ("family remains the quintessential particular social group"); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (risk of female genital mutilation based on gender and clan membership); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (same) *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) (sexual orientation); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1081 (9th Cir. 2014) (suggesting "individuals taking concrete steps against gang authority and gang recruitment" would meet the Court's requirements for a cognizable social group).

[36] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

unless "more" is provided, without defining what would be sufficient to meet the exception.[37] Nowhere else in the regulations is such a negative presumption created—an applicant is left in the position of proving that they do not belong in, or are distinct from, one of social groups in the proposed regulations in order for their claim to either proceed to a full hearing, or to be granted by the adjudicator. This new rebuttable presumption harms the applicant, attempts to usurp independence from the Immigration Judge, and does nothing to increase Immigration Court efficiency.

The proposed social group regulations are particularly dangerous for pro se asylum seekers—an increasingly large part of many Immigration Court dockets. The statutory burden of proof in Immigration Court rests squarely on the applicant for asylum, whether represented or pro se.[38] The pro se asylum seeker is already at a profound disadvantage in making their case—completing a 12-page application in English, submitting English translations of all supporting documents, and recounting the past while suffering profound personal and family trauma, all in the increasingly limited timeframe allowed by the Court. Since January 2019, the majority of asylum seekers have been forced to prepare their cases entirely from Mexico, while living in refugee camps or on the street, because of the Migrant Protection Protocols ("MPP").

The proposed regulations render a successful pro se application even more difficult. An applicant who states in her asylum application, as translated through a non-professional translator, that she fears returning to her home country because of domestic violence has immediately placed herself in a category to be presumptively rejected, as she has broadly described fear based on "Interpersonal disputes of which government authorities were unaware or uninvolved," as listed in the proposed regulations. Unless she produces what the proposed regulations only generally describe as "more"—to, presumably, take her outside of the broad contours of the unacceptable social groups—her application will be denied, despite her lack of legal training to describe or obtain the additional information required. As a pro se applicant, this hurdle is nearly insurmountable, given the complexity of social group case law, including marshalling more complicated evidence of social distinction, obtaining more detailed supporting documents, and articulating a social group that places her outside of the proposed regulation.

The Immigration Judge's job is not made easier with a checklist of presumptively invalid social groups in the pro se context. Presented with a pro se applicant, an Immigration Judge has an enhanced duty under the regulations and the Constitution to assist the applicant in developing their claim.[39] Presented with an skeletal pro se asylum claim, an Immigration Judge has a clear duty to ask questions, explain the evidentiary requirements for relief, and provide the applicant with a full and fair hearing on their application. The proposed regulation's checklist of presumptively excluded social groups presents a potential pitfall for the busy Immigration Judge in a pro se case seemingly premised on gang violence, as she is compelled by her Constitutional duty to hold a

[37] 85 FR at 36279.
[38] INA § 208(b)(1)(B)(i).
[39] 8 U.S.C. § 1229a(b)(1) (Immigration Judges have a statutory duty to "administer oaths, receive evidence, interrogate, examine, and cross-examine the alien and any witnesses."); *Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000) (an Immigration Judge has the duty to fully develop the record where a respondent appears pro se); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (an Immigration Judge must adequately explain the procedures to the respondent, including what he must prove to prevail at the hearing).

full and fair hearing, but the regulations appear on the surface to compel one result for the applicant. Combined with performance goals and an unending docket, these proposed regulations will lead to the demise of due process in Immigration Court for pro se litigants.

Motions to Reopen and Reconsider

Motions to reopen and reconsider are critical tools for ensuring due process in removal proceedings. The standards for a motion to reopen and reconsider are spelled out in the regulations, well-developed in case law, and are not easy to meet.[40] Motions to reopen allow an applicant to reopen a case either before the Immigration Judge or the Board based on newly-discovered evidence that was unavailable at the original hearing, changed country conditions, or constitutionally deficient counsel. A person seeking reconsideration of a final agency decision must demonstrate an error of fact or law in that decision. A person seeking reopening or reconsideration must file a motion within a strict timeline, can only file one motion, and must provide objective evidence to support their motion.

We are deeply concerned that the motivation behind this proposed regulation is a false one: that asylum seekers are engaging in "gamesmanship" within our legal system.[41] We reject this attempt to amend federal regulations based on the nakedly biased position that asylum applicants have fraudulent or malevolent intent towards our honorable legal system. It is contrary to our experiences as adjudicators, and unbefitting of this process and our immigration system. The alternative stated motivation for this proposed regulation, encouraging "efficient litigation" is false rationale for this proposed change as well, as the motions practice is an essential accountability tool in a fallible legal system committed to due process.

Most disturbing in this portion of the proposed regulations is the limitation on motions to reopen even where the failure to raise a specific particular social group before the Court is the product of ineffective assistance of legal counsel.[42] Unfortunately, in our experience, it is not uncommon for respondents' counsel to fail to thoroughly research and prepare an asylum seeker's claim, which leads to a failure to present a properly articulated particular social group. An asylum seeker in this situation who was provided with constitutionally deficient counsel, including failure to raise a claim before the Immigration Judge, may currently raise that claim in a motion to reopen, and there long-recognized process established by the Board for the applicant to do so.[43] The circuit case law regarding ineffective assistance of counsel is well-developed, almost entirely through litigation of motions to reopen. To be clear, where an asylum applicant was provided with constitutionally deficient counsel, his counsel did not make "strategic choices" as suggested by the proposed regulation, as counsel is not permitted the strategic choice of violating their client's due process rights.[44] For all the above reasons, we strongly oppose the amendments to the definition and analysis of particular social group.

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[40] 8 CFR § 1003.2(c)(1); 8 CFR § 1003.23(b).
[41] 85 FR at 36279.
[42] *Id.*
[43] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
[44] *See, e.g., Nehad v. Mukasey*, 535 F.3d 962, 967-71 (9th Cir. 2008).

AMENDMENTS TO THE POLITICAL OPINION DEFINITION[45]

The proposed rule in pertinent part provides that "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 unit thereof."[46] The rule proceeds to provide that in general, asylum claims regarding political persecution will not be granted where the applicants "claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."[47] The run-on, tortuous, and restrictive language of the proposed rule is inconsistent with the relatively straightforward language of the statute, the embracing, humanitarian intent of Congress in enacting it, the international law on which it is predicated, and the holdings of Article III Courts.

Section 101(a)(42) of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. 1101(a)(42), provides that an individual is a refugee, and therefore eligible for asylum, if she that she "is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or *political opinion*" (italics added).[48] According to the Supreme Court, the meaning of the terms in the definition of refugee should be subject to "case-by-case adjudication," and not by executive proscriptions ahead of the relevant proceedings.[49]

The legislative history of the Refugee Act of 1980 clearly indicated that the provisions of Section 101(a) (42) of the INA were intended be interpreted in a liberal fashion.[50] At the time of pas-

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[45] Note from Former Immigration Judge Bruce J. Einhorn: As a Justice Department lawyer, I was privileged to participate in the drafting of the modern American law of asylum, the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in 8 U.S.C. 1101(a)(4) and 1158). From 1990 through 2007, I served as a United States Immigration Judge in Los Angeles, and in that capacity applied and interpreted the asylum law. Since my retirement from the immigration bench, I have taught Immigration, Asylum, and Refugee Law as an Adjunct Professor at Pepperdine and Oxford Universities. I have also written law review articles and co-authored books on asylum law and adjudication. Based on my decades of work and study in the area of asylum and refugee law, I am convinced that the proposed rule is not consistent with the Refugee Relief Act and its Congressional intentions, the treaty on which the law is based, or its interpretation by Article III Courts. I further maintain that the proposed rule ignores the realities of human rights violations in the world, and is particularly and unfairly restrictive of gender-based claims of political persecution. For all those reasons, the proposed rule should not be implemented.

[46] 85 FR at 36280.

[47] *Id.*

[48] Pursuant to 8 CFR 208.13(a), the burden of proving asylum eligibility rests with the asylum applicant. That burden has not been modified by the proposed rule 8 CFR 208.1(d). Thus, without the proposed rule, the regulatory system for adjudicating claims of political persecution already ensures against the unsubstantiated and overly broad assertions of asylum eligibility.

[49] *INS v. Abudu*, 485 U.S. 94, 104 n.9 (1988), *quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

[50] In this regard, a liberal construction of Section 101(a) (42) comports with the principle that "in the immigration context…doubts are to be resolved in favor of the alien…" *Alvarez-Santos v. INS*, 332 F.3d 1245, 1250 (9th Cir. 2003) (*citing INS v. Cardoza-Fonseca*, 480 U.S. at 448 (emphasizing that there is a "long standing principle construing any lingering ambiguities in deportation statutes in favor of the alien"). *See Matter of Vizcaino*, 19 I. &

sage of the asylum statute. Representative Peter Rodino, then Chair of the House Judiciary Committee, characterized it as "one of the most important pieces of *humanitarian* legislation ever enacted by a United States Congress…[I]t confirm[ed] what this Government and the American people are all about…By their deep dedication and untiring efforts, the United States once again…demonstrated its concern for the homeless, the defenseless, and the persecuted peoples…"[51] The legislative intention to have the asylum statute construed liberally included the reference to those "persecuted on account of…political opinion."[52]

The federal courts have held that Congress has "plenary power" to determine "what noncitizens shall be permitted to remain within our borders."[53] In its proposed rule change to 8 CFR 208.1(d), the current Administration is attempting to do an end run around the legislative intent behind Section 101(a) (42) of the INA. The proposed rule is therefore unlawful, including with regard to the phrase "persecution on account of…political opinion."

The proposed rule also runs afoul of the international agreements to which the United States is a party. As the Supreme Court has held, a primary purpose of Congress in passing the Refugee Act of 1980 "was to bring United States refugee law into conformance with the 1967 United Nations Protocol" and Convention on the Status of Refugees. *INS v. Cardoza-Fonseca*, 480 U.S. 426.[54] The Supreme Court has also stated that in construing the terms of the asylum statute, it was guided by the analysis set forth in the Office of the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979, as amended 2019). The Handbook cautions that "the [asylum] applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons set forth in the definition [including "on account of political opinion]." *Id.,* at Ch. II B (2) (a) Sec. 42. *See also id.,* Sections 37-41. In sum, the Handbook is completely consistent with the legislative intent behind the Refugee Act of 1980, that the concept of "political opinion" should be construed in a broad sense, encompassing any point of view regarding matters on which the machinery of the state, government, *or society* is engaged. The phrase "political opinion" therefore goes beyond identification with a specific political party or recognized ideology, and may, for example, include opinion on gender roles.

The Handbook's guidance contrasts sharply with the proposed rule at 8 CFR 208.1 (d), which prohibits a grant of asylum on grounds of political opinion '"defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."[55] Much

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N. Dec. 644, 648 (BIA 1988) (noting that the expansion of relief "clearly was intended as a generous provision, and it should therefore be generously interpreted").

[51] 126 CONG. REC. 1519 (1980).

[52] INA § 101(a)(42).

[53] *Carlson v. Landon*, 342 U.S. 524, 534 (1952) (footnote omitted); *See Arizona v. United States*, 567 U.S. 387 (2012).

[54] *See also* 19 U.S.T. 6223, T.I.A.S. 6577; S. REP. 90 n.264 at 19 (1980); H.R. CONF. REP. NO. 96-781 (1980).

[55] 85 FR at 36280.

more in conformity with the Handbook is the legislative intent behind the Refugee Act of 1980, that the concept of "political opinion" as grounds for asylum eligibility should be construed in a broad sense, encompassing any opinion on matters on which the machinery of the state, government, *or society* is engaged. Therefore, the phrase "political opinion" goes beyond identification with a specific political party or recognized ideology, including an opinion on gender roles.[56]

The current regulation on asylum eligibility, found at 8 CFR 208.13 is consistent with the language and legislative intent of the Refugee Act of 1980, and also consistent with the United Nations Protocol to the U.N. Convention on the Status of Refugees and UNHCR guidelines. For example, at 8 CFR 208.13(b)(2)(iii), the regulation states that an "asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility that he or she would be singled out individually for persecution [on account of political opinion, etc.] if:

(A) The applicant establishes that there is a pattern or practice in his or her country…of persecution of a group of persons similarly situated to the applicant account of race, religion, nationality, membership in a particular social group, or political opinion; and
(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable."

By contrast, the proposed rule, 8 CFR (1)(d), limits eligibility for asylum based on political opinion to "absent expressive behavior in furtherance of a cause" specifically delineated by the language of that provision.[57] The new rule thus is not in accord with the broad and humanitarian interpretation of the phrase "political opinion" as stated by Congress, the Supreme Court, and UNHCR.

Finally, the emphasis on "expressive behavior in furtherance of a cause" flies in the face of case law, which provides for political asylum eligibility based on neutrality and imputed opinions.[58] The proposed rule undercuts the principle that neutrality rather than "expressive behavior in furtherance of a cause" is sufficient to establish "political opinion" – *e.g.,* the refusal to hold or voice a partisan position between guerillas or gangs on the one hand and the government on the other, owing to the very real fear that overt action or statements will cause violent reprisals from the non-state actors on the one hand and the military or law enforcement on the other. Likewise, the proposed rule is inconsistent with the doctrine of imputed political opinion – *e.g.,* that the foreign government may impute to an asylum applicant a political opinion in favor of the guerillas or gangs on account of the individual's decision not to expressly act for or against the non-state actors.

In short, the proposed 8 CFR 208.1(d) is an overt attempt to subvert the language and legislative intent of Section 101(a) (42) of the INA regarding, *inter alia,* "persecution on account of political opinion." The proposed rule is also not in line with case law and the UNHCR Handbook and

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[56] *See* UNHCR Protection Training Manual, Session 3, Annex 2.

[57] 85 FR at 36280.

[58] *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Maldonado-Cruz v. INS*, 883 F.2d 788. 791 (9th Cir. 1989) (regarding neutrality); *Chun Gao v. Gonzales*, 424 F.3d 122, 129 (2d Cir. 2005 (regarding imputed political opinion).

Guidelines that have long been used as a guide to the adjudication of cases of politically based persecution. We therefore oppose the amendments.

Gender And Feminism As Forms Of Political Opinion

In the *Guidelines on International protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (May 2002), the United Nations Refugee Agency states that it "is an established principle that the refugee definition *as a whole* should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status" (emphasis added).

American case law has applied this principle in regard to women who claim asylum eligibility based on gender-related political persecution. For example, in *Lazo-Majano v. INS,* 813 F.2d 1432 (9th Cir. 1987), *overruled on other grounds by Fisher v. INS,* 79 F.3d 955 (1994), the asylum applicant was repeatedly raped and beaten by her employer, a sergeant in the Salvadoran Armed Forces. In connection with her rapes, she was threatened by the sergeant with guns, bombs, and hand grenades. The sergeant labelled her a "subversive." *Lazo-Majano v. INS*, 813 F. 2d 1433. The Court of Appeals held that the sergeant's "generalized animosity" toward women and his belief that they should be subordinate to men, sexually and otherwise, constituted persecution based on political opinion. *Id*. Furthermore, the Court found that the asylum applicant's attempts to escape her tormentor and the further rapes and beatings that ensued were acts of persecution on account of an imputed political opinion. *Id*.

As the world has evolved – or perhaps more accurately, devolved – the denial of women's rights has taken many forms, from bride burning to gender-specific violence in the home and in the public sphere. When women object to these forms of persecution, and when they resist or protest them, and when these forms of persecution are committed either by government officials or non-state actors that the government is unable or unwilling to stop, then the dissenting views and/or actions of the women should be considered expressions of political opinion for purposes of asylum eligibility.

Furthermore, the types of gender-based political opinion that have occasioned acts of persecution have evolved. Feminism now qualifies as a form of political opinion.[59] Put another way, the advocacy or belief in women's rights, should and does constitute actual or imputed political opinion. For example, in some Muslim societies, persecution on account of political opinion exists where violence occurs or is threatened against those women who refuse to wear the traditional "hijab" or "chador." This view of political opinion, expressed in the *Fatin* case, is consistent with the holdings in other Western democracies, such as the Immigration and Refugee Board in Canada in *Namitabar v. Canada (*Minister of Emp't & Immigration), [1994] 2 F.C. 42 (Can.).[60] As immigration judges, we have granted asylum cases based on feminist political opinion. In many situations, these cases were not appealed by the legacy INS or DHS.

[59] *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993)

[60] *See also* U.K. VISAS & IMMIGRATION, GENDER ISSUE IN THE ASYLUM CLAIM: PROCESS (2010) (U.K.); New Zealand Refugee Status Authority 76044 (2008).

A sensitivity to the gender-based nature of women's actual or imputed political opinions is critical in adjudicating asylum cases. "Women are less likely than their male counterparts to engage in high profile political activity and are more involved in 'low level' political activities that reject dominant gender roles."[61]

The Administration's proposed rule would narrow and redefine "political opinion" in such a way that gender-based claims, including but not limited to feminism, would have little if any chance of success. Claims that women may protest and resist rape and strict codes of dress, and that they may demand the right to land ownership and birth control[62], appear to be closed out of consideration as political opinions for asylum purposes. If women's rights are human rights, then their expression in repressive and sexist societies should be regarded as political opinions. To do otherwise would be a decision by our own government to relegate women to second-class status in asylum cases based on claims of political persecution.

The proposed rule, 8 CFR 208.1(d), should be rejected. It is not consistent with the asylum statute's language and legislative history, the Protocol and Convention on the Status of Refugees, UNHCR Guidelines, Article III case law, and the decent opinions of humankind.

AMENDMENTS TO NEXUS REQUIREMENTS

We have particular concerns that the purpose of the proposed regulation with regard to nexus is not national uniformity, but rather two things: attempting to accelerate complicated asylum hearings at the expense of due process, and the final codification of the Attorney General's flawed decision in *Matter of A-B-*, which has been widely criticized by federal courts, and was a sharp departure from decades of Board and circuit case law.[63]

The proposed regulation purports to "further the expeditious consideration" of asylum claims by listing eight non-exhaustive grounds that cannot form nexus in a successful asylum claim.[64] As with the enumeration of particular social groups, in our experience as adjudicators, creating a checklist to expedite the nexus analysis for asylum claims does not simplify the process. Due process requires a careful consideration of whether an applicant is properly included in one of the eight categories, a time-consuming factual inquiry. This attempt to short-circuit or simplify the factfinding and legal analysis by Immigration Judge is shortsighted.

Similar to the particular social group proposed regulations, the proposed regulation creates nine broad nexus grounds that presumptively cannot establish an asylum claim, except in "rare circumstances."[65] Many of the categories slated for exclusion are supported by established case law supporting nexus.[66] They propose eliminating asylum and statutory withholding of removal for

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[61] U.N. Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 33.

[62] Interestingly, the proposed rule recognizes that objections to involuntary abortions and sterilization are forms of political opinion, but not demands for birth control or access to family planning programs.

[63] 27 I. & N. Dec. 227 (A.G. 2018).

[64] 85 FR at 36281.

[65] *Id.*

[66] *See*, *e.g.*, *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (family); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (gender); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (gender) *Bringas-Rodriguez v. Sessions*,

all private-actor violence, and specifically target claims related to gang members or criminal enterprises.[67] Of particular concern, the proposed regulations target harm and feared harm based on gender as a protected characteristic, which has formed the basis of asylum claims for decades, contrary to the citation provided in the proposed regulations. *Matter of Acosta* stands as the seminal case where gender was held to be an immutable characteristic; since *Acosta*, the Board and the federal circuit courts have repeatedly acknowledged gender as a protected ground.[68],[69] Effectively excluding gender as a protected ground, as well as "interpersonal animus" and "personal animus" is a clear attempt to bar women from obtaining asylum based on domestic violence, an uncontroversial basis for asylum in many of our courtrooms until the Attorney General issued *Matter of A-B*. Changing the law by regulation in such a drastic manner is deeply concerning, as collectively we have granted thousands of credible asylum claims based on domestic violence and gender, and we are acutely aware of the importance of this basis of asylum protection.

Prohibiting Evidence of "Cultural Stereotypes"[70]

As former Immigration Judges and Board of Immigration Appeals members, neutrality and lack of bias are values at the core of our chosen profession. "Pernicious cultural stereotypes," as referenced in the proposed regulations,[71] have no place in any reasoned decision issued by the Immigration Court or the Board of Immigration Appeals. Based on our decades of experience in the courtroom, we are confident that Immigration Judges have the training to fairly assess evidence submitted by the parties in removal proceedings under clearly established standards. If an applicant believes that the Department has introduced evidence that is improper or prejudicial, he or she may object to the admission of that evidence, or request that it be given reduced weight by the Court. Similarly, if the Department believes that the applicant has submitted evidence that is improper, it may make similar objections. Either side may appeal an Immigration Judge's ruling regarding the admission of evidence, or the weight given to evidence, to the Board of Immigration Appeals.

We oppose the new proposed regulation which bars Immigration Judges from "consideration of evidence promoting cultural stereotypes of countries or individuals" because it is vague, unnecessary, and seeks to exclude the admission of necessary evidence that supports credible asylum claims. Detailed country conditions evidence is critical to establishing eligibility for asylum, and especially to establishing eligibility based on membership in a particular social group. To show cognizability of a proposed social group, an applicant needs to demonstrate social distinction of that group, and the existence of stereotypes about the group are directly at issue. The proposed regulation introduces a new evidentiary bar with vague standards, requiring Immigration Judges to uniformly understand an impossibly vague standard with no guidelines. The evidence this bar

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850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) (sexual orientation); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1081 (9th Cir. 2014) ("individuals taking concrete steps against gang authority and gang recruitment").

[67] 85 FR at 36281-82.

[68] *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

[69] *See, e.g.,Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (BIA erred in rejecting the particular social group of "women in Guatemala" as not cognizable solely on the breadth of the group); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

[70] 85 FR at 36282.

[71] *Id.*

will potentially apply to is broad, and includes critical evidence under the REAL ID Act, presenting judges with difficult and time consuming factual and legal issues to resolve. For all the reasons discussed above, we strongly oppose the amendment to the nexus standard.

AMENDMENTS TO THE INTERNAL RELOCATION STANDARD

The proposed regulation purports to eliminate "unhelpful" caveats with regard to determining whether internal relocation is reasonable, but in doing so also eliminates a non-exhaustive list of relevant factors which currently must be considered in such determinations in the totality of the circumstances.[72] The proposed rule also purports to realign the focus of this inquiry by replacing those factors with another list of factors which must be considered, and it fails to even advise that the new list is non-exhaustive, even though it purports to require a "totality of the circumstances" analysis.[73] The factors in the current regulation call for a broad consideration of the totality of an individual's circumstances and country conditions in determining whether it is reasonable to require internal relocation.[74] The current regulation's replacement with a new list of factors, focused entirely on the reach of the persecutor and the applicant's ability to flee to the U.S, implies that the only reason not to require internal relocation would be continued persecution in the new location and that personal circumstances and country conditions are irrelevant. This essentially and inappropriately equates whether *internal relocation* is reasonable with a reasonable possibility or well-founded fear of *persecution* in the new location where the current regulation recognizes that whether internal relocation is reasonable is a *separate* inquiry than whether it is reasonable to expect the applicant to relocate.[75] It also implies that in no case in which the applicant has relocated to the U.S. could an adjudicator find it to be unreasonable to have relocated within his or her own country.[76] These propositions are patently inconsistent with the well-developed "totality of circumstances" analysis currently in effect and claimed to be required in the proposed regulation. The proposal fails to recognize that whether internal relocation is "reasonable" depends on more than just the ability to pick up and move and/or whether persecution would continue in the new locale. Critically, the current regulation recognizes that the reasonableness of relocation is a complex analysis which depends on a variety of factors, names some examples, and makes it clear that there may be even more.[77] In our experience as adjudicators and appellate judges, the likelihood that persecution may follow the applicant to the new internal location is relevant, but it is certainly not the only relevant factor in a relocation analysis.[78]

The efficiency-based justification given for the changes in the proposed regulation is also patently false. Judges and other adjudicators are accustomed to utilizing such lists as non-exhaustive examples of the types of considerations that are relevant to a particular inquiry. The clear intent of the proposed change is to limit the relocation analysis, and center it on the persecutor and likelihood of persecution, rather than the entirely relevant circumstances of the individual applicant. the proposed rule ignores the fact that the possibility of persecution upon relocation

[72] 8 CFR § 208.13(b)(3); 8 CFR § 1208.13(b)(3).
[73] 85 FR at 36282.
[74] *Id.*
[75] 8 CFR § 208.13(b)(1)(i)(B).
[76] *Id.*
[77] *Id.*
[78] *See*, *e.g.*, *Eduard v. Ashcroft*, 379 F.3d 182, 193-94 (5th Cir. 2004) (requiring consideration of more than likelihood of countrywide persecution).

and whether relocation would be reasonable are two *separate* inquiries.[79] Currently adjudicators must consider a number of factors, including, "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." [80] The proposed rule replaces these factors with a "totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum."[81]

The proposed list of factors eliminates personal factors that, in our collective experience, profoundly and accurately impact the ultimate decision of whether it is reasonable for an asylum applicant to relocate within the country of origin or last residence. It is contrary to decades of carefully developed case law, including the agency's own long-standing precedent.[82] In doing so, the proposed regulation implies that consideration of such personal factors such as lack of employment, lack of housing, lack of family support, age, sufficient economic resources, are *categorically impermissible* factors.[83] Each example given in the proposed regulation is related to the alleged persecution or persecutor, except the demonstrated ability to come to the U.S. Since *every* asylum applicant has made it to the U.S. somehow, overemphasizing this factor is also inappropriate and clearly intended to exclude legitimate refugees from eligibility. Eliminating the current non-exhaustive list of factors from the regulation and emphasizing the ability to make it to the U.S. makes it appear as though *none* of these personal factors may be considered to support an applicant's

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[79] *See*, *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28 (BIA 2012) (The regulations promulgated in 2000, *specifically to comply with international obligations*, created a two-step process consisting of a first inquiry as to whether persecution can be avoided through internal relocation and a *second* inquiry whether to expect the applicant to relocate would be reasonable *under all the circumstances*.) In explaining the necessity of the two-step process, the Board quoted the Department's explanation for creating the regulatory process:

> "The Department does agree . . . that some changes to the proposed language are appropriate in order to ensure that those provisions are applied in a manner that complies with our international obligations under the 1951 Convention relating to the Status of Refugees ("1951 Convention"), as modified by the 1967 Protocol relating to the Status of Refugees. In determining how to revise these provisions, the Department referred to the relevant provisions of the United Nations High Commissioner for Refugee's Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook"). . . .
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> ....
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> [T]he provisions have been revised to require a showing by the Service that "under all the circumstances, it would be reasonable to expect the applicant to (relocate)." That language is nearly identical to the language used in the relevant section of the UNHCR Handbook, paragraph 91. 65 Fed. Reg. at 76,133 (codified at 8 C.F.R. § 1208.13(b)(1)(i)(B))."

[80] 8 CFR § 208.13(b)(3); 8 CFR § 1208.13(b)(3).

[81] 85 FR at 36282.

[82] *Matter of M-Z-M-R*, 26 I. & N. Dec. 28 (BIA 2012).

[83] *See Knezevich v.Ashcroft*, 367 F.3d 1206, 1214-1216 (9th Cir. 2004) (relocation not reasonable under all circumstances were respondents were elderly, had no way to support themselves, had no home, and quality of life was unsustainable in home country); *see also Mashiri v. Ashcroft*, 383 F.3d 1112, 1122-23 (9th Cir. 2004) (giving weight to family presence in determination that relocation was not reasonable); *Matter of Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996) (considering gender in relocation analysis).

contention that internal relocation is unreasonable, and that their ability to make it to the U.S. is conclusive of the unreasonableness of internal relocation. This is not only contrary to law, but it is also contrary to the reality faced by many of the legitimate refugees whose cases members of the Round Table have considered in centuries of combined experience on the Immigration bench. Often legitimate refugees have family support and opportunities in the U.S. that don't exist in their home countries, particularly outside of their hometowns where they suffered persecution. The summary included in the proposed regulation indicates that the "caveats" at the end of the current regulation are "unhelpful". However, in our collective experience, these caveats serve to emphasize the discretionary nature of this inquiry and that the "totality of the circumstances" is case-specific and all-inclusive. The listed factors may cut differently in different cases, depending on the *totality* of the circumstances. If the Departments believe too much guidance is confusing to adjudicators, they should simply remove *any* reference to specific factors to be considered and tell adjudicators to consider the totality of *all* circumstances in each case, rather than favoring certain types of circumstances and factors over others that are even more relevant and important.

The proposed regulation would also modify the current presumptions and burdens of proof as to internal relocation, placing new and onerous burdens on both applicants for asylum and adjudicators where the persecutor is a non-government entity. The proposal creates a rebuttable presumption, where the persecutor is not a government actor, that internal relocation would be presumptively reasonable.[84] A rebuttable presumption is antithetical to consideration of the totality of the circumstances as an individualized inquiry in each case. The law allows for protection from non-government persecutors, just as it does from government persecutors.[85] It is unfair to treat those who fear persecution from non-government actors differently than those who fear their governments, and will lead, in our collective experience, to meritorious cases deserving of protection being denied. As stated above, the identity and reach of a persecutor should be considered as one factor in determining whether relocation is reasonable, but it should not be a factor that alone creates a burdensome presumption and puts an entire category of legitimate refugees at a disadvantage. This proposed regulation creates a new and heavy burden for applicants who, in our experience, have few resources, often are unrepresented and have difficulty obtaining evidence from afar, merely on account of the identity of their persecutor. There is simply no justification for elevating the identity of the persecutor so substantially as to create such a heavy burden against the party with the fewest resources.

The proposed change in presumption also decreases judicial efficiency by creating a heavy burden on adjudicators who must apply differing standards and burdens, depending on the identity of the persecutor or persecutors in each case. In our collective experience adjudicating thousands of asylum cases over many decades, it is not uncommon for an adjudicator to encounter a case in which the applicant has established a well-founded fear of persecution by both the government and one or more non-governmental entities.[86] Such a situation would require the adjudicator to

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[84] 85 FR at 36282; compare to *Afriyie v. Holder*, 613 F.3d 924, 927-929 (9th Cir. 2010) (Immigration Judge incorrectly placed burden on asylum applicant in a private actor violence case, leading to improper denial of application).

[85] *Afriyie*, 613 F.3d. at 927-929.

[86] *See*, *e.g.*, *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1054-55 (9th Cir. 2006) (addressing both private actor and government-sanctioned harm); *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000) (addressing private actor violence combined with state-sponsored violence).

analyze the "totality of the circumstances" surrounding internal relocation multiple times with different presumptions and burdens applied to each persecutor, increasing the time required for taking of evidence and for issuing a far more complex decision. If the true goal of the proposed change is judicial efficiency, this proposed change will do nothing to further that goal, at the expense of credible claims for asylum protection. We therefore object to the amendment.

AMENDMENTS TO THE FIRM RESETTLEMENT ANALYSIS

For over 30 years, firm resettlement has been clearly defined by regulation and that definition is reasonable, comports with the reality of true refugees' situations, and has remained a clear and concrete standard for adjudicators to apply.[87] With certain exceptions, it requires that there have been an offer of permanent resident status, citizenship, or some other type of permanent resettlement in a third country for an asylum application to be denied on the basis of firm resettlement.[88] The proposed regulation would amend this one clear definition of firm resettlement by replacing it with three separate definitions, all of which put unreasonable burdens both on applicants and on adjudicators.[89] The first proposed definition requires denial of an asylum application where the applicant "either resided or could have resided in any permanent legal immigration status or any non-permanent, potentially indefinitely renewable legal immigration status" in a transit country.[90] The second proposed definition unfairly equates time in a transit country with firm resettlement there, requiring a denial of asylum whenever an applicant has remained in a transit country for one year or more.[91] The third proposed definition relates to having citizenship in a third country and its requirements are vague and difficult and time-consuming for the adjudicator to apply.[92]

Proposed § 208.15(a)(1)

The first arm of the new proposed definition is virtually impossible to implement as it calls entirely on improper speculation about what "could" have happened in a third country through which the applicant transited.[93] On what facts does an Immigration Judge or Asylum Officer rely in determining whether the applicant "could have resided in any permanent legal immigration status or any non-permanent, potentially indefinitely renewable legal immigration status" in a country of transit? Is the fact that that country has an asylum law, no matter how flawed or ineffectively implemented, enough? Is it sufficient that some non-immigrant visa categories in that country are renewable? How would an Immigration Judge or an asylum officer determine, under the laws of another country, whether the applicant "could have" obtained such status? How could an applicant possibly prove otherwise, particularly since any attempt to do so would require the ability to research potentially complex laws and practices of other countries? Does it mean that s/he/they might have, or that they definitely would have been granted status if they had only applied? This definition creates a standard which excessively complicates the firm resettlement determination, putting additional burdens on applicants and adjudicators alike. It will cause endless litigation,

[87] 8 U.S.C. § 1158(b)(2)(A)(vi); 8 C.F.R. § 1208.15.
[88] *See Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006) (en banc); *Matter of A-G-G-*, 25 I. & N. Dec. 486 (BIA 2011).
[89] 85 FR at 36286.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *See*, *e.g., Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) ("we have repeatedly held that it is error to rest a decision denying asylum on speculation and conjecture.").

further reducing certainty and efficiency in adjudication of applications. Legal standards must be clear and concrete, capable of being evaluated through the presentation of objective evidence. This standard is subjective and incapable of concrete evaluation, reliant on the laws of potentially hundreds of different countries through which applicants may transit. Applicants, who are often indigent, unrepresented and/or uneducated, but who have the burden of proof on this issue under the proposed regulation, are ill-equipped to present evidence of what might have happened under the laws of another country. By contrast, the current provision has been successfully applied for more than 30 years, has a uniform agency standard, and is easily implemented because it calls for an actual offer, rather than for speculation as to whether an offer of status might be granted by a third country.[94]

Proposed § 208.15(a)(2)

Under the second arm of the proposed definition, if the applicant voluntarily and without persecution remained for a year in a third country, that is sufficient to meet the definition of firm resettlement, *even if there is no possibility of ever obtaining any permanent or renewable status in that country*.[95] In our collective experience as adjudicators, this definition ignores the realities of what it is to escape persecution. Legitimate refugees don't always have choices about how they leave their countries, where they go, who they rely on, and how they travel. They frequently have severe restraints, economic or otherwise, which require moving along at a pace they would not choose under normal circumstances. Sometimes they must wait for documents to arrive, or money from relatives, or assistance from organizations. Refugees are sometimes stuck in unofficial refugee camps in appalling conditions of living, health, and crime, with no hope of receiving any status, for years before being able to leave and come to the U.S. where they can apply for asylum. Others similarly become "trapped" by economic circumstances and other factors in countries with no possibility of status.[96] Moreover, this subsection makes no exception for trafficked persons, who may be trapped for months or years by human traffickers before being able to escape to the U.S. Based on our collective experience as adjudicators, this proposed definition is unfair, unworkable, and does not reflect a truly resettled state as is contemplated by the statute. If Congress had intended to create a bar to asylum for those who spent a specified amount of time in a third country, it could and would have done so. Instead, it barred one who has been firmly resettled in a third country. This regulation is *ultra vires* and usurps Congressional power to make our immigration laws.

Proposed § 208.15(a)(3)

The third arm of the proposed definition relates to applicants who have citizenship in countries other than those from which they claim persecution. In our experience, this situation is exceedingly rare. Moreover, the definition also requires presence in the country of citizenship, but it is unclear when that presence is to have occurred. Does it mean that the applicant must have been present there *sometime* before coming to the United States, anytime in their whole lives? Or does it mean that they were present in the country of citizenship *after* leaving the country of persecution? If the latter, the current definition of firm resettlement would be sufficient to cover

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[94] *Matter of A-G-G-*, 25 I. & N. Dec. 486 (BIA 2011).

[95] 85 FR at 36286.

[96] *See*, *e.g. Arrey v. Barr*, 916 F.3d 1149, 1153-58 (9th Cir. 2019) (no firm resettlement where petitioner, a victim of decades of sexual assault from Cameroon, remained in South Africa for years, because no possibility of remaining permanently).

their situation. If the former, considering them firmly resettled in the country of citizenship, without more, is unreasonable and unfair. This definition makes no accommodation for whether s/he/they has a right to reside in that country and/or whether s/he/they could be reasonably expected to do so.

Proposed § 208.15(b):
This subsection applies the burden-shifting provision at 8 C.F.R. §1240.8(d) to firm resettlement. Where generally under section 1240.8(d), DHS must raise evidence sufficient to establish that a bar "may" apply before the burden shifts to the applicant, this subsection indicates that either the Immigration Judge *or* DHS counsel may raise the bar based on evidence in the record.[97] It is unclear from the way this subsection is written whether it intends to authorize DHS counsel to make a conclusive *finding* that firm resettlement may apply, even if the Immigration Judge disagrees. If so, the subsection inappropriately usurps Immigration Judge decisional authority. At any rate, considering the subjective and nearly impossible to prove nature of the standard contained in the proposed definition, particularly at subsection (a)(1), shifting the burden to the Respondent or applicant is unfair and unworkable.

For all the reasons discussed above, we strongly object to the amendments of the firm resettlement bar in their entirety.

AMENDMENTS LIMITING THE EXERCISE OF DISCRETION

This section of the proposed rule represents a naked attempt through Executive action to rewrite asylum law and create at least nine new absolute bars to asylum which are not contained in the statute enacted by Congress, under the guise of discretion.[98] Thus, it is a severe overreach of the Departments' authority. Asylum is a discretionary form of relief.[99] Immigration Judges and Asylum Officers are the most qualified to exercise discretion in each case, based on all of the evidence before them and all factors both favorable and unfavorable. This rule severely limits the discretion of adjudicators, mandating that extreme weight be given to numerous negative factors, many of which are likely to be present in nearly all asylum cases. The rule is clearly intended to withdraw the protection of asylum, and its attendant benefits, from the vast majority of those applicants who qualify for such protection. This wholesale withdrawal is absolutely contrary to the obligations of the United States under international instruments,[100] under our asylum statute,[101] and under our moral obligations to provide refuge to those who flee persecution.

For decades, in keeping with those international obligations, the Courts have recognized the unique situation of asylum seekers and found that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."[102] This proposed regulation represents an about-face on this principle by identifying 13 very common negative factors and rigidly elevating their weight in the discretionary analysis in *every single case*, no matter the surrounding

[97] 85 FR at 36286.
[98] 85 FR at 36282-85.
[99] INA § 208; *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 423, (1987).
[100] CONVENTION RELATING TO THE STATUS OF REFUGEES, *Geneva, 28 July 1951.*
[101] INA §§ 101(a)(42); 208.
[102] *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987); *Matter of D-X- and Y-Z-*, 25 I. & N. Dec. 664 (BIA 2012).

circumstances.[103] With regard to nine of these factors, the weight given them is so heavy as to preclude favorable discretion except in the very most exceptional of circumstances, or where a denial of asylum would cause exceptional and extremely unusual hardship to the applicant.[104] This not only would result in a discretionary denial of the vast majority of *those who have already met the statutory qualifications for asylum*, it would also burden Immigration Judges and Asylum Officers with an additional inquiry never before required in asylum proceedings, that of determining whether the hardship engendered by return to the country of persecution meets a hardship standard previously reserved for Cancellation of Removal cases.

The introductory portion of this section of the proposed rule merely states the obvious: that (impliedly negative) factors not amounting to an asylum bar under the statute may nevertheless be taken into account in exercising discretion.[105] Nevertheless, the manner in which this is stated implies that the only discretionary factors to be considered are *negative* equities that simply fall short of requiring mandatory denial. Discretion, if it means anything, means that the adjudicator weighs *all relevant factors* in each individual case, giving each factor the weight deemed to be appropriate under the totality of the circumstances of that case.[106] While the BIA, the courts and some regulations have occasionally mandated that certain factors be given more or less weight under certain circumstances, by nature of the definition of discretion, the agency cannot categorically limit discretion, since the discretionary determination in each case is dependent on the unique mix of factors present in that case, and on the interactions of all those factors.[107] The analysis of all relevant discretionary factors in each case, and how to weigh each of these factors is best left to the trier of fact. The purported justification for the proposed rule is to "ensure that immigration judges and asylum officers properly consider, in all cases, whether every applicant merits a grant of asylum as a matter of discretion, even if the applicant has otherwise demonstrated asylum eligibility."[108] However, this is in fact what asylum adjudicators have been doing in every case for decades. The subsections regarding discretion make a mockery of any discretionary consideration, which by nature must take into account both favorable and unfavorable factors, take into account the context in which those factors exist and determine the appropriate weight to be given each factor *in light of all the circumstances* of each particular case.

The subsections reveal the true purpose of this proposed section, which is to create new bars to asylum and severely limit the discretion afforded to Immigration Judges and Asylum Officers to grant asylum to qualified applicants by mandating that numerous factors present in the majority of all asylum cases be considered so devastatingly negative as to preclude eligibility except in the most exceptional of cases. That this is exclusively a discretion *limiting* provision is clear from the fact that not a single nod is given to the consideration of positive discretionary factors except to those of the most extraordinary, and impersonal, nature.

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[103] 85 FR at 36283-85.
[104] 85 FR at 36285.
[105] 85 FR at 36282.
[106] *See Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978); *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998); *Matter of Mendez-Morales*, 21 I. & N. Dec. 296 (BIA 1996).
[107] *See e.g. Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002); 8 C.F.R. §§ 212.7(d); 1212.7(d).
[108] 85 FR at 36285.

Proposed section 208.13(d)(1)/1208.13(d)(1) purports to identify "significant adverse discretionary factors" and to assign them significant weight *in every case*, without regard to the contextual circumstances under which those factors exist, a part of every legitimate discretionary determination.[109]

Subsections (1)(i) and (iii) together cover the vast majority of all asylum applications made in the United States,[110] particularly now that the DHS has virtually shut down the processing of asylum applications at many U.S. ports of entry.[111] Many legitimate refugees come from countries where U.S. visas are next to impossible to obtain. Therefore, through no fault of their own, refugees who are unable to escape persecution by obtaining a visa will be strapped with the additional burden to overcome a significant negative discretionary factor. Similarly, subsection (1)(iii) penalizes the use of fraudulent documents by making it a "significant negative discretionary factor", if not necessitated by the need to escape persecution.[112] The use of fraudulent documents is a factor that asylum adjudicators have always taken into account and assigned appropriate weight under the individual circumstances of each case.[113] But the subsection inexplicably draws a distinction, penalizing those who travel on fraudulent documents through multiple countries, and excusing those who come directly to the U.S. on such documents.[114]

Subsection (1)(ii) penalizes applicants who have not applied for protection elsewhere. [115] As justification, the Departments offer that the failure to do so: "may reflect an increased likelihood that the alien is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection."[116] While it may indeed reflect such misuse in rare cases, more frequently, refugees do not seek protection in third countries because of the lack of knowledge of of protection in other countries, how to seek protection, a lack of familial or social support in a transit country, a lack of sophistication, a lack of language skills, mistrust of officials, or fear of being returned to the country of persecution. On the off-chance that a failure to apply in countries of transit "may reflect" misuse of the system, the regulation guarantees that many legitimate refugees who in the totality of the circumstances are deserving of relief will have an uphill battle receiving asylum *even after they have established eligibility*. Discretionary considerations are meant to determine whether an applicant is *deserving* of relief by considering all relevant equities, not to cast such a wide net as to deny virtually all cases in order to catch the rare few who "may" be misusing the system. The system has other tools for doing that which do not result in demonizing legitimate refugees for doing what is necessary to flee persecution.

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[109] 85 FR at 36293.
[110] *Id.*
[111] Time, Mexican Asylum Seekers Are Facing Long Waits at the U.S. Border. Advocates Say That's Illegal, Oct. 16, 2019, https://time.com/5701989/mexico-asylum-seekersborder/; Vox, The abandoned asylum seekers on the US-Mexico border, Dec. 20, 2019, https://www.vox.com/policy-and-politics/2019/12/20/20997299/asylum-border-mexico-us-iom-unhcr-usaid-migration-international-humanitarian-aid-matamoros-juarez; https://www.humanrightsfirst.org/campaign/remain-mexico; https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program; https://www.aclu.org/news/immigrants-rights/asylum-seekers-stranded-in-mexico-face-a-new-danger-covid-19/.
[112] 85 FR 36293.
[113] *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987); *Matter of D-X- and Y-Z-*, 25 I. & N. Dec. 664 (BIA 2012).
[114] 85 FR at 36293.
[115] *Id.*
[116] *Id.*

Subsection (2)(i) mandates "discretionary" denial of asylum in each of 9 categories, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or where the applicant is able to establish by clear and convincing evidence that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the applicant.[117] As previously indicated, this subsection makes a mockery of the very idea of exercising discretion and withdraws the discretion that Immigration Judges and Asylum Officers now exercise to grant or deny asylum to qualifying applicants. The Round Table of Former Immigration Judges states from centuries of combined experience that at least one of these nine categories of negative factors will be present in nearly 100 percent of asylum cases, and that the cases in which counter-veiling positive factors involving national security or foreign policy considerations will be extremely few. Moreover, from our experience, virtually *every* qualifying asylum applicant faced with a mandatory discretionary denial will argue that they would suffer exceptional and extremely unusual hardship if asylum is denied. This will necessitate an additional complex inquiry and analysis on the part of asylum adjudicators and generate additional issues on appeal for the BIA and courts. This entire subsection is an attack on the discretionary nature of asylum relief and should be struck in its entirety. The Round Table will therefore not comment specifically on each of the nine categories, all of which suffer from this same infirmity. To the extent that certain of the categorical subsections merit additional criticism, our comments on those appear below.

Subsection 2(i)(A) essentially duplicates the Departments' concerns about applicants having traveled through other countries without applying for asylum in those countries and imposes an adverse discretionary finding in such cases.[118] In our experience, the poorest and least sophisticated of refugees must sometimes travel by foot, bus, or train, hiding from authorities and dangerous government and non-government actors, to avoid being sent back to the country of persecution.[119] Frequently they are robbed, kidnapped, or raped along the way. Navigating such perils can take refugees longer than 14 days, even though they remain in transit the entire time. To make a virtually conclusive determination that such a refugee is undeserving of asylum defies both reason and reality, and it is cruel and unfair to do so.

Subsection 2(i)(B) likewise increases the penalty against refugees with a more arduous journey, this time for those who have traveled through more than one country before arriving in the U.S.[120] This distinction is arbitrary and capricious and is proposed with the sole intent of reducing grants of asylum to legitimate refugees.

Subsection 2(i)(c) bars from a favorable exercise of discretion anyone who once had a conviction that would have barred asylum, *even if that conviction has been reversed, vacated, expunged or modified* in a way that eliminates the bar.[121] In other words, the subsection turns settled law on the sufficiency of post-conviction relief for immigration purposes on its head. That settled law

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[117] *Id.*
[118] *Id.*
[119] The Guardian, Rapes, murders ... and coronavirus: the dangers US asylum seekers in Mexico must face, March 23, 2020, https://www.theguardian.com/us-news/2020/mar/23/us-mexico-immigration-coronavirus-asylum.
[120] 85 FR at 36293.
[121] *Id.*

focuses on whether the reversal, vacatur, expungement, or modification was entered merely to relieve immigration consequences for equitable purposes or was based on a substantive or procedural infirmity of the underlying conviction, calling into question its legal basis.[122] The current approach is an appropriate one, which has been developed through painstaking analysis over many decades. It is inappropriate, unfair, and violates due process to penalize *bona fide* refugees for a conviction which has been reversed, vacated, or modified in a way that undermines its immigration effects based on a substantive or procedural infirmity.

Subsection 2(i)(D) penalizes applicants who have accrued more than one year of unlawful presence in the United States prior to filing an application for asylum.[123] The filing of an asylum application more than one year after entry into the U.S. already forms the basis of a bar to asylum eligibility, unless certain exceptions are met.[124] If an asylum applicant reaches the discretionary stage of the proceedings, she must already overcome the one year filing deadline through evidence of either exceptional circumstances or changed circumstances.[125] Therefore, this subsection is contrary to the statute by attempting to subvert the statutory exceptions to the one-year bar by guaranteeing a discretionary denial in the majority of cases in which the bar has been overcome. The protection of asylum, which is mandated by the international obligations of the United States and codified into U.S. law is not offered differently under the statute to undocumented immigrants versus those who have legal status in the U.S. To make unlawful presence (regardless of the length of such presence) a negative factor so severe as to bar a discretionary grant of asylum except under the most exceptional of circumstances disregards our international obligations and is antithetical to the letter, purpose and intent of our asylum laws.

Subsection 2(i)(F) penalizes anyone who has had two or more prior asylum applications denied for *any* reason.[126] Again, this penalty is so severe as to guarantee denial of a ***bona fide*** application for asylum. In our experience, it would be very rare for an asylum applicant whose application has been found to qualify under the law to have twice before been denied asylum. However, in the rare case, if the applicant qualifies under the statute, prior denials cannot justify a denial on a new application on the basis that the applicant is not *deserving* of relief. Particularly where life and limb are at stake, this is an entirely inappropriate calculus, and it points out in stark terms why limiting discretion in this brutally rigid manner violates the letter and spirit of our asylum laws and is simply wrong. A true discretionary determination would take into account the fact of prior denials in *context*, considering all factors, including the reasons for prior denials and the applicant's reasons for making the prior applications.

Subsection 2(i)(G) penalizes anyone who has previously withdrawn an asylum application and suffers from the same infirmities as subsection 2(i)(F).[127] Rather than making a legally conclusive assumption that the prior withdrawal indicated a misuse of the asylum system (while it may

[122] *See Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).
[123] 85 FR at 36293.
[124] INA § 208(a)(2)(D).
[125] *Id.*
[126] 85 FR at 36293.
[127] *Id.*

in reality have been just the opposite), this too should be considered in a truly discretionary manner, considering the totality of the circumstances while making a contextual analysis; not under a strict liability standard such as that proposed here.

Likewise, subsections 2(i)(H) and (I) penalize actions on the part of applicants (failing to appear at an asylum interview, and not filing within one year of a change in country conditions where subject to a final order of removal)[128] that can have a variety of causes, meanings, and motivations, many of which do not indicate any fault, mal-intent, or system abuse on the part of the applicant. Thus, while they are factors to be considered in a full, thorough, and contextual discretionary analysis, they are entirely inappropriate as bars to asylum, which would be their effect in nearly 100% of cases.

Accordingly, for all the reasons discussed above, we oppose all amendments to the discretionary analysis in the proposed rules.

AMENDMENTS REDEFINING THE DEFINITION OF FRIVOLOUS

The proposed rule would redefine the meaning of a "frivolous" asylum application, which has severe consequences.[129] The statute at INA § 208(d)(6) sets forth the consequences for "knowingly" filing a frivolous application for asylum, and requires that an asylum applicant receive notice of such consequences before a frivolous finding can be made. These safeguards are in place in the statue because a frivolous finding leads to permanent ineligibility for immigration benefits.[130]

However, the Departments seek to amend the current regulation, asserting that "frivolous" has been defined too narrowly and does not "capture the full spectrum of claims that would ordinarily be deemed 'frivolous'..."[131] Therefore, the Departments propose to broaden the definition to purportedly "bring it more in line with prior understandings of frivolous applications, including applications that are clearly unfounded, abusive, or involve fraud, and better effectuate the intent of section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), to discourage applications that make patently meritless or false claims."[132] The proposed rule goes well beyond Congressional intent and includes applications where the adjudicator[133] determines that the application lacks "merit" or is "foreclosed by existing law."[134] The proposed rule also includes the filing of an asylum application solely for the purpose of being placed in removal proceedings. These provisions are exceptionally unfair, particularly to pro se applicants and those who are the victims of unscrupulous practitioners.

First, asylum law is in a state of constant flux, and immigration law is extremely complicated. The federal courts have held that immigration law is one of the most complicated areas of law,

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[128] *Id.*
[129] 85 FR at 36273.
[130] INA §§ 208(d)(6), 208(d)(4).
[131] 85 FR at 36274.
[132] *Id.*
[133] Immigration Judge, BIA, or asylum officer per 85 FR at 36275.
[134] *Id.*

only second to tax law.[135] Accordingly, requiring asylum seekers, many of whom are unrepresented and most of whom are non-English speakers, to understand the intricacies of the ever-evolving law, is contrary to the purpose of asylum and unfair to the most vulnerable. Second, notary fraud and other fraudulent schemes are rampant in the immigration law space. Often, noncitizens are the victims of unscrupulous notaries, immigration consultants, and attorneys who file asylum applications in order to place them into removal proceedings to apply for cancellation of removal under INA § 240A(b). While we, as former Immigration Judges and Board of Immigration Appeals Members recognize the inherent problems in filing asylum applications in order to apply for cancellation of removal, it is wholly unfair to penalize the asylum applicants who rely on a "professional" to attempt to legalize their status.

The Departments also seek to amend the regulation to allow frivolous findings to be made by asylum officers and for cases to be denied or referred to immigration judges on that basis.[136] Yet, the proposal declines to extend necessary procedural protections to the asylum applicant, but rather indicates that USCIS would not be required to provide asylum applicants the opportunity to address discrepancies in the claim.[137] In practice, this means that asylum applicants appearing in non-adversary proceedings before a DHS officer will not be afforded important procedural protections before receiving a frivolous finding that will impact their ability to remain in the United States for an indefinite period of time. While the proposed rule indicates that immigration judges would have de novo review of an asylum officer's finding, any adverse finding from an asylum officer is always part of the DHS toolbox in immigration court and is always considered by the immigration judge. In addition, for asylum applicants in legal status, it means they have no means to challenge a determination by a DHS employee that impacts their entire future.

In addition to being unfair to asylum applicants, the proposed rule would increase the workload of already burdened Immigration Judges. In addition to evaluating the merits of a claim, including the credibility of the applicant, Immigration Judges would be tasked with determining whether legal arguments were presented in a way that is seeking to "extend, modify, or reverse the law" or whether the arguments were simply foreclosed by existing law.[138] This is an impossible task under the best of circumstances. However, Immigration Judges are expected to hear upwards of four asylum cases in a day. It is unrealistic to expect them to be able to make determinations in every case where asylum applicants are pro se and/or presenting creative legal arguments. Similarly, requiring Immigration Judges to consider frivolous findings made by asylum officers adds another layer to the litigation of referred asylum cases in immigration court. For all the above reasons, we strongly oppose this amendment to the rule.

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[135] *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 809 (9th Cir. 2007) ("immigration laws have been termed second only to the Internal Revenue Code in complexity"); *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).
[136] 85 FR at 36275.
[137] *Id.*
[138] 85 FR at 36276.

AMENDMENTS TO PROTECTIONS UNDER THE CONVENTION AGAINST TORTURE

Protection from torture is one of the most fundamental of human rights. It was for the purpose of providing such protection that the U.S. became a signatory to the U.N. Convention Against Torture. The interpretation of the Convention's requirements are meant to be flexible in order to allow courts the ability to provide protection where it is due. Yet the drafters of the proposed regulations seem to view our nation's obligations under the Convention as a game which is won by excluding the most victims from protection.

Following the lead of the BIA in its recent precedent decision in *Matter of O-F-A-S-*, the proposed rules intend to restrict eligibility for CAT protection by narrowing the definition of "government acquiescence," a requirement for protection under the Convention.

The courts have defined the meaning of when a public official acts "under color of law" in cases arising both in the CAT and the Civil Rights contexts. The applicable case law demonstrates that the "under color of law" determination is a far more nuanced one covering a far broader scope of actions than either the language of the proposed regulation or the BIA's decision in *O-F-A-S-*, would indicate.

The Supreme Court has held "[i]t is clear that under 'color' of law means under 'pretense' of law.... If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea." *Screws v. U.S.*, 325 U.S. 91, 111 (1945).

It is extremely important for any rule to emphasize that acting "under color of law" does not require the government official in question to be on duty, to be following orders, or to be acting on a matter of official government business. In *U.S. v. Tarpley*, 945 F.3d 806 (5th Cir. 1991), a case favorably cited by the BIA in its decision in *Matter of O-F-A-S-*, the Fifth Circuit concluded that a police officer acted under color of law when he lured his wife's lover to his home and beat him, put his service revolver in the lover's mouth, and said "I'll kill you. I'm a cop. I can." He also involved a fellow police officer in his plan, who was present as an ally. The court found that the "presence of police and the air of official authority pervaded the entire incident." The court's finding that an officer acting on a purely personal matter in his own home, who was not in uniform, did not threaten to arrest his victim, and threatened his victim not to report the incident, was acting under color of law should provide instructive guidance.

It is also not clear why the proposed regulations would exempt from the concept of acquiescence instances in which a public official "recklessly disregarded the truth, or negligently failed to inquire."[139] These terms seem indistinguishable from "willful blindness," which has been recognized as sufficient to constitute "acquiescence" by the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits in the CAT context.[140] The regulations should obviously

[139] 85 FR at 36286.

[140] *See Zheng v. Ashcroft*, 332 F.3d 1186, 1188-89 (9th Cir. 2003); *Khouzam v. Ashcroft*, 361 F.3d 161, 170 (2d Cir. 2004); *Myrie v. Att'y Gen. of U.S.*, *Romero-Donado v. Sessions*, 720 Fed. Appx. 693, 698 (4th Cir. 2018); *Iruegas-Valdez v. Yates*, 846 F.3d 806, 812 (5th Cir. 2017); *Torres v. Sessions*, 728 Fed. Appx. 584, 588 (6th Cir. 2018);

codify this near-universal standard. The proposed rules should also reflect that courts have also taken a broad view of what entities constitute "state actors" for CAT purposes, and have further held that government acquiescence may be found even where parts of the government have undertaken preventative measures.[141]

The administration should look to these decisions for guidance, and seek to codify their holdings in the proposed rules. Instead, the proposed rules aim to erase or overcome the law as it has developed over decades in violation of law.

CONCLUSION

For all the reasons set forth above, we strongly urge the Departments to withdraw all sections of the proposed rule.

Very truly yours,
The Round Table of Former Immigration Judges
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Lozano-Zuniga v. Lynch, 832 F.3d 822, 831 (7th Cir. 2016); *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017); *Medina-Velasquez v. Sessions*, 680 F.3d 744, 750 (10th Cir. 2017).

[141] *See e.g. Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015) (noting it is not required to find the entire Mexican government complicit); *De La Rosa v. Holder,* 598 F.3d 103, 110 (2d Cir. 2010).

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