AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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

Submitted via Email: DHSDeskOfficer@omb.eop.gov

Re: EOIR Docket No. 18-0002
Agency Information Collection Activities: Application for Asylum and for Withholding of Removal, Form I-589, Revision of a Currently Approved Collection
OMB Control Number 1615-0067
85 Fed. Reg. 36264 (June 15, 2020)

Dear Assistant Director Reid,

The American Immigration Lawyers Association (AILA) submits the following comments in response to the notice of proposed revisions to Form I-589, Application for Asylum and for Withholding of Removal and the accompanying instructions published in the Federal Register on June 15, 2020 (Proposed Revision).[1] The Proposed Revision accompanies Executive Office for Immigration Review's (EOIR) and U.S. Citizenship and Immigration Services' (USCIS) Joint Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (June 15, 2020) (the "Proposed Rule").

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

We believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government. Based on our expertise and experience, the Proposed Revision to Form I-589 and the accompanying instructions will

[1] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,290 (June 15, 2020).

substantially increase the time and cost burdens on applicants. Furthermore, the proposed form and instructions lack clarity about the scope of the information collection which will lead to confusion for users, and will ultimately result in refugees with bona fide asylum claims losing their ability to seek protection in the United States. Finally, on July 21, 2020, the Office of Information and Regulatory Affairs (OIRA) approved a separate distinct, form change to Form I-589 and the accompanying instructions.[2] The Proposed June 15, 2020 Revision which we address here, is based on the form version approved on September 10, 2019 rather than the most recent version changed by the rule that will go into effect later this month. Thus, the public is unable to evaluate an accurate draft of the final Form I-589 and instructions.[3] This inability to accurately comment, is a consequence of the agencies' patchwork attempts to overhaul the nation's asylum system through piecemeal regulations proposed in rapid succession during a global pandemic. The sweeping nature of these revisions means that we are unable to provide comprehensive comments to every revision or to even fully understand how they interact with one another. [4] To be clear, we oppose the Proposed Form Revision in its entirety and request that the agency withdraw it in full.

I. The Proposed Revision Substantially Increases the Time and Cost Burden on Asylum Seekers

The Proposed Revision is not merely a discrete change to the I-589 form, but rather constitutes a structural overhaul of the adjudication process. In other words, the Proposed Revision would fundamentally change how a record is built and how the Form I-589 is reviewed at USCIS Asylum Offices, the Immigration Courts, and the Board of Immigration Appeals (BIA). The Proposed Revision significantly increases the time and cost burdens on individuals seeking protection from persecution and torture; by the estimate of the Notice of Proposed Rulemaking, the new form will take 18 hours to complete.[5] The increased burden would fall particularly heavily on unsophisticated individuals without representation and often without strong or any English language skills, individuals with claims based on membership in a particular social group, and individuals with political opinions reflecting the modern world. These individuals will be forced to devote more time to responding to the questions and providing documentation and translations. In its supporting statement for OIRA's Information Collection Review (IRC), the agency acknowledges a six hour increase in time burden, based on upon an estimation of the activity required to gather all documentation, read the instructions, and fill out the form.[6] However, the agency reported no change to the estimated annual cost burden on applicants.[7] Our comments below elaborate on how the proposed revision will increase the cost burden on applicants.

As just one example of a significant increase in information collection with no stated purpose in

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[2] PAUL RAY, OFF. OF INFORMATION & REG. AFF., EXEC. OFFICE OF THE PRESIDENT, NOTICE OF ACTION (June 21, 2020) https://www.reginfo.gov/public/do/DownloadNOA?requestID=307879.

[3] Per the watermarks, these revisions were drafted on June 11, 2020 and the approved revisions were drafted on June 1, 2020.

[4] Our comments are based on the June 11, 2020 draft Form I-589 and the draft accompanying instructions.

[5] 85 Fed. Reg. at 36,290.

[6] *See* OFF. OF INFORMATION & REG. AFF., EXEC. OFFICE OF THE PRESIDENT, Information Collection Review (ICR) Documents, *Supporting Statement for Application For Asylum And For Withholding Of Removal OMB Control No.: 1615-0067 Collection Instrument(S): Form I-*589, (June 16, 2020) [Herein after *ICR Supporting Statement*] https://www.reginfo.gov/public/do/DownloadDocument?objectID=101956201

[7] *Id.*

the Proposed Rule, the new Form I-589 would require asylum seekers to include information about the past harm and torture experiences of "family, friends, colleagues, or *other similarly situated persons.*"[8] Question 4 of Part C requests the travel history and immigration history of the asylum seekers spouse, children, and *other family members*.[9] The scope of these questions is wide and their purpose is unclear. Thus, it is possible that asylum seekers will either provide more or less information than the agencies need and could take many hours and expend substantial money trying to include full information in response to questions which likely have no legal bearing on the case.

A. Increases Burden on Victims Persecuted on Account of Membership In A Particular Social Group

The Proposed Revision requires asylum seekers seeking protection on account of their membership in a particular social group to explicitly identify the particular social group.[10] The instructions direct applicants to 8 C.F.R.§ 208.1 for the definition of a particular social group.[11] The instructions inform asylum seekers that they must "articulate on the record, or provide a basis on the record for determining, the definition and boundaries" of the particular social group and warn that a failure to do so "shall waive any such claim for all purposes under the Act."[12] This addition imposes high time and cost burden on applicants. This requirement will present a huge hurdle for *pro se* applicants, who are already at a disadvantage attempting to navigate a complicated legal system often after experiencing severe trauma, and almost always in an unfamiliar language. Properly identifying a particular social group that meets the requirements of the law requires expertise in U.S. asylum law that is far beyond the ability of most *pro se* applicants with meritorious claims. Furthermore, although the agency admits the 50% increase in time it will take to complete the new form, it does not report an increase in cost burden to applicants, even though those who are able to retain counsel will have to pay for hours more work just at the application completion stage.[13] This omission is especially troubling because applicants in immigration proceedings have a right to effective assistance of counsel "stem[ming] from the Fifth Amendment's guarantee of due process."[14]

The increased burden stems from the Proposed Rule's attempt to narrow the definition of "particular social group," which undermines the 1951 Convention and Refugee Act by providing a non-exhaustive list of nine specific bases that will no longer meet the definition of a particular social group.[15] The new I-589 would force asylum seekers to articulate their particular social group(s) on the I-589 form. The instructions state that the applicant must "first articulate on the

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[8] *See* Pages 5– 6 Draft of I-589.
[9] *See* Pages 9–10 of Draft I-589.
[10] *See* Page 5 of Draft Form I-589.
[11] *See* Page 3 of Draft Instructions.
[12] *Id.* Additionally, this waiver applies on appeal, on motions to reopen, and on motions to reconsider. *See* Proposed Rule, 85 Fed. Reg. at 36,279.
[13] *See ICR Supporting Statement*, *supra* note 6.
[14] *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015); *see also Rodrigues-Lairz v. INS*, 282 F.3d 1218, 1226 (9th Cir. 2002) ("Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.").
[15] Proposed Rule, 85 Fed. Reg. at 36,278-79.

record, or provide a basis on the record for determining, the definition and boundaries of the alleged particular social group."[16] But the instructions do not explain what is meant by "on the record" and we have grave concerns that, coupled with the proposed rule that would allow adjudicators to pretermit cases based on how the asylum application is completed,[17] that many applicants will never get their day in court based on an inability to articulate a particular social group that meets the three-prong test in their I-589. Even those applicants who rely on ineffective counsel would be unfairly precluded from later asserting a legitimate basis for asylum protection, in violation of the Fifth Amendment, contrary to long-established precedent. The Proposed Revision's demand that asylum seekers articulate the particular social group facilitates the agency's violation of applicants' due process rights.

B. Increases Burden on Victims of Persecution by Non-State Organizations

The Proposed Revision requires asylum seekers seeking protection based on persecution committed by non-state organizations to provide significant details about the role of the government in the persecution.[18] The I-589 form gives the impression that persecution can only occur if the government is involved. But the questions on the form ignore the reality that the political landscape of the modern world has drastically changed since the 1951 Convention and 1967 Protocol. In today's reality, non-state organizations, such as gang, criminal, and terrorist organizations, play a substantial role in the persecution of refugees. For example, the Northern Triangle region, including Guatemala, El Salvador, and Honduras, presents an ongoing refugee crisis, as governments have lost control over their territories and transnational criminal organizations have taken power as the de facto governments.[19] Placing an additional time burden on applicants facing persecution by nonstate organization disfavors applicants with claims based on gang, criminal, and terrorist organizations that governments are unable or unwilling to control. Thus, these revisions hinder the agencies' ability to carry out their statutory mandate and address the needs of modern refugees, responding to modern conflicts around the world, and providing protection to victims of these non-state organizations.

C. Requires Applicants to Make Sophisticated Arguments Regarding Nexus Requirements

Question 4 of Part B asks asylum seekers to explain how the harm they suffered is on account of a protected ground.[20] This question requires the asylum seeker to engage in a sophisticated legal analysis which increases the time burden and will undoubtedly lead to user confusion. The Immigration and Nationality Act (INA), as amended by the Refugee Act of 1980 and the REAL ID Act of 2005,[21] provides that an individual is eligible for asylum if s/he can demonstrate that at least one central reason for his or her persecution or well-founded fear of persecution was on account of a protected ground: race, religion, nationality, membership in a particular social group,

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[16] Proposed Instructions at 3.
[17] *See* Proposed 8 CFR § 1208.13(e)(1).
[18] *See* Pages 6 –7 of Draft Form I-589.
[19] See Max G. Manwaring, *A Contemporary Challenge to State Sovereignty: Gangs and Other Illicit Transnational Criminal Organizations in Central America, El Salvador, Mexico, Jamaica, and Brazil* (Dec. 2007), https://www.files.ethz.ch/isn/47273/150108_TCOs_CentralAmerica.pdf.
[20] *See* Page 6 of Draft I-589.
[21] Pub. L. 109-13, § 101 (found at INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i)).

or political opinion.[22] The requirement that the fear be on account of an enumerated ground is commonly called the "nexus requirement."

Case law has provided ample interpretation of the nexus requirement. An applicant need not—indeed cannot—prove the exact motivation of the persecutor, but the applicant must establish "facts on which a reasonable person would fear that the danger arises on account of" a protected ground.[23] Courts have agreed that the standard is whether the persecutor's motivation to harm the applicant is based on a protected characteristic, and whether the protected characteristic is "at least one central reason" for the harm."[24] The proposed instructions simply reiterate the June 15, 2020 proposed asylum rules, without any acknowledgement of existing case law or the fact that asylum rules are modified constantly by agency and judicial interpretation.

The accompanying instructions direct asylum seekers to 8 C.F.R. 208.1 and 1208.1 for the definition of nexus.[25] Under the Proposed Rule, these sections improperly narrow the nexus requirement so as to render it unattainable, listing various grounds as presumptively excluded from the reasons that persecutors might target an applicant.[26] Directing asylum seekers to regulations that impermissibly narrow the circumstances that would establish nexus is not necessary for the agencies to properly perform their function of adjudicating asylum applications. The Proposed Rule's narrowing of the nexus requirement and barring of certain evidence effectively bars asylum seekers from raising the factual reasons for their persecution as a basis for seeking asylum. Such a result is fundamentally inconsistent with the statutory scheme enacted by Congress.[27] Further we are concerned that pro se applicants will not understand the relationship between the instructions and the cited proposed regulations. Again, this concern is heightened by the possibility under the proposed rules that misunderstanding the instructions or failing to fully complete the I-589 form will lead to immigration judges pretermitting asylum applications without asylum seekers ever having their day in court.[28]

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[22] *See* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42); INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).
[23] *Matter of J–B–N– & S–M–*, 24 I&N Dec. 208, 211; *Matter of S–P–*, 21 I&N Dec. 486, 490 (BIA 1996); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).
[24] INA § 208(b)(1)(B)(i), as amended by § 101(a) of the REAL ID Act, P.L. 109-13, 119 Stat. 302 (2005).
[25] *See* Page 3 of Draft Instructions.
[26] "[T]he proposed rule would outline the following eight nonexhaustive situations, each of which is rooted in case law, in which the Secretary of Homeland Security and the Attorney General, in general, will not favorably adjudicate asylum or statutory withholding of removal claims based on persecution." Proposed Rule, 85 Fed. Reg. at 36,281.
[27] Furthermore, the rule's rejection of asylum on the basis of "gender" does not grapple with the consequences that could cause for LGBT asylum seekers. As the Supreme Court recently clarified in *Bostock v. Clayton County*, 140 S.Ct. 1731 (June 15, 2020), the terms "sex" and "gender" may encompass aspects of sexual orientation and gender identity that go beyond simply biological sex. As written, the Proposed Rule's exclusion could lead to the rejection of asylum for gay, lesbian, trans, or gender non-conforming asylum seekers who have long been recognized as eligible for asylum protection. At the very least, the final rule must address the rule's impact on these populations.
[28] *See* Proposed 8 CFR § 1208.13(e)(1).

II. The Proposed Revision Will Collect Information that is not Useful or Clear to the Agencies.

A. Asylum Seekers Have A Right to Meaningfully Present Their Case

Cumulatively, the changes to Form I-589 and the accompanying instructions increase the time and cost burden on asylum seekers substantially and do not enhance the quality, utility and clarity of the information being collected. Most asylum seekers—who often speak little to no English, are not knowledgeable about asylum law, and are not represented by counsel[29]—simply cannot present a full picture of the record on paper, particularly at such an early stage in the asylum claim. Depending on the procedural posture of the case, applicants will be interviewed by an asylum officer or appear before an immigration judge.

Immigration judges have a well-established and vital duty develop the record in immigration proceedings, advise applicants of their rights, and explain any allegations against the applicant.[30] A hearing at which an IJ may examine the applicant personally is an indispensable tool for judges to develop the record fully—especially in asylum cases, in which the applicant's credibility is essential to the judgment.[31] Furthermore, as courts have repeatedly acknowledged, "the facts underlying an application for relief from removal may continue to develop up to the time of, and even during, the final individual hearing on the merits."[32]

The Proposed Revision is inconsistent with fundamental due process principles, and likely to have a devastating impact on pro se respondents.[33] Particularly with respect to indigent or unrepresented parties, and/or those with limited English or education, due process requires a meaningful

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[29] As Congress observed when drafting and enacting IIRIRA, "[r]efugees often arrive with little or no money [and] poor English." H.R. Rep. No. 104-469, pt. 1, at 214 (1996). *See also* Eleanor Acer & Tara Magner, *Restoring America's Commitment to Refugees and Humanitarian Protection*, 27 GEO. IMMIGR. L.J. 445, 450 (2013) ("Many asylum seekers do not speak English and struggle after their arrival simply to meet their basic needs. Many have little or no understanding of the complexities of U.S. asylum law and procedures, while others are not aware that their fear of persecution could make them eligible for asylum. . . . Others may face great challenges in retaining legal representation. Many asylum seekers do not have the resources to afford private counsel, and free legal counsel is very difficult to obtain given the lack of government-funded representation and the limited availability of *pro bono* representation.").

[30] *See* INA § 240(b)(1) (requiring IJs to "administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses"); 8 CFR §1003.10(b) (same and requiring IJs to take other actions that are "appropriate and necessary for the disposition of" an individual case); 8 CFR §1240.10(a) (requiring IJs to, *inter alia*, advise noncitizens of certain rights in proceedings and explain factual allegations and charges in non-technical language); *Matter of E-F-H-L-*, 26 I & N Dec. 319, 323-324 (BIA 2014), *vacated on other grounds* (recognizing that IJs have a "duty to fully develop the record).

[31] The credibility determination is sufficiently important that Congress has unequivocally established that the credible testimony of an applicant may *alone* be sufficient to carry an applicant's burden of proof. *See* 8 U.S.C. 1158(b)(1)(B)(ii).

[32] *Matter of E-F-H-L-*, 26 I & N Dec. 319, 323-324 (BIA 2014), *vacated on other grounds Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (citing *Litvinov v. Holder*, 605 F.3d 548, 555−56 (8th Cir. 2010); *Hoxha v. Gonzales*, 446 F.3d 210, 214, 217−18 (1st Cir. 2006); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003); *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998)).

[33] *See Oshodi v. Holder*, 729 F.3d 883, 889-93 (9th Cir. 2013) (en banc) (holding that an alien's Fifth Amendment due process right to a full and fair hearing, which includes the opportunity to present evidence and testify on one's behalf, was violated where the Immigration Judge refused to allow an applicant to testify regarding the contents of his applications).

opportunity to be heard and to present evidence orally.[34] Asylum seekers who are held in ICE detention are unlikely to have legal representation,[35] and have often recently arrived in the U.S., with little or no English language skills, familiarity with the U.S. legal system, or expertise in our asylum laws. They will now, essentially, be required to present all of their legal arguments through the extensive and highly complicated questions on the new I-589 form. Without the assistance of an attorney, it will likely be impossible for asylum seekers to fully complete the new version of this form.

The Proposed Revision would severely impact the rights of asylum seekers placed into the so-called Migrant Protection Protocols (MPP). Access to counsel for individuals placed into this program is even less available than for those held in ICE detention. Out of 65,246 people placed into MPP from January 2019 through May 2020, just 4,364 (6.7%) were represented by counsel.[36] Not only do asylum seekers placed into MPP proceedings overwhelmingly lack counsel, they often lack access to safety and security, and the ability to access interpretation resources that would be available in the United States. Given these obstacles, most asylum applicants in MPP proceedings are only able to submit threadbare Form I-589s with the support of volunteer interpreters unfamiliar with asylum law. Given these conditions, the Proposed Revision would require more time from asylum seekers and volunteers and increase the probability of errors. Any error would have a potentially devastating consequence: the IJ could pretermit an application if it is not filled out correctly, or the IJ could make a "frivolous" finding under the expansive new definition in the June 15 rule, which could subject the asylum seeker to a permanent bar on all immigration relief, based on an IJ's opinion that the application was without merit.

The changes to the I-589 appear to be an effort to shift the burden from the IJ to develop the record, to the applicant, even if unrepresented, to present their complete case on paper in order to "earn" a hearing before the IJ. The significant addition of complex and confusing questions on the new I-589 form, coupled with the Proposed Rule seeks to establish a mechanism by which IJs may deny an application without an oral hearing if the IJ finds that the asylum seeker has not made out a *prima facie* case on paper.[37] The proposed regulation provides little guidance as to what may constitute a "*prima facie* case." The absence of clear guidance as to what grounds may constitute the basis for pretermission is all the more significant because, in the asylum context specifically, an applicant's legal eligibility for asylum is inextricably intertwined with the applicant's factual account of persecution, which itself depends in large part on a credibility determination. IJs are well trained and experienced in conducting hearings, performing credibility assessments, and applying law to facts. Thus, in order to avoid triggering the pretermission mechanism, asylum seekers will have to retain counsel, which increases their costs burden. Those that do not have the financial means to retain counsel or can not access *pro bono* representation will suffer. As a result,

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[34] *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. . . . Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.").

[35] *See* American Immigration Council, Access to Counsel in Immigration Court (Sept. 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court (noting that only 14% of detained immigrants are represented).

[36] Transactional Records Access Clearinghouse, *Details on MPP (Remain in Mexico) Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/, last accessed July 9, 2020.

[37] Proposed Rule, 85 Fed. Reg. at 36,277.

refugees with valid asylum claims will be at significant risk of having their claims pretermitted.

B. Additional Questions Collect Information that is Irrelevant to Asylum Eligibility under the Statute

The Proposed Revision prioritizes gathering transit-related information, uncovering possible technical errors, and exploiting administrative deficiencies over the legitimacy of asylum claims. Two full pages[38] of the new I-589 are devoted to questions based on the Proposed Rule's new discretionary factors.[39] These proposed discretionary factors strip decision makers of meaningful discretionary authority and require blanket denials. As discussed in our separate comment submitted on these regulations, the Proposed Rule runs contrary to the spirit of asylum law, which mandates individualized review of each asylum claim based on the merits of the claim itself, not on meeting technical or administrative requirements.[40] The Refugee Act and the INA, for example, require an "individualized analysis" and "case-specific factually intensive analysis for each alien."[41]

The proposed I-589 form, which adds questions that will implement the June 15 Proposed Rule, makes clear how dramatically the Proposed Rule would change the asylum system as it has existed for decades in the United States. Each discretionary question requires complex legal analysis; it would be impossible for most pro se applicants to fully comprehend and complete these questions. Even for experienced attorneys these additional questions will add a substantial burden in time and cost in completing them. While many attorneys develop the theory of the asylum case over the course of months or years as they develop a relationship of trust with their clients, the level of detail required by these questions will force counsel to answer questions before they have had an opportunity to fully assess the case.

Under the Proposed Rule, large numbers of asylum seekers will become categorically ineligible for asylum in the United States. In completing the new I-589, asylum seekers would have to explain the increased risk in which they would be placed, since filing the application would result in many asylum seekers being returned to the same countries where they were persecuted—whether directly, or indirectly, by returning them to a country which may, in turn, return them to their countries of origin. The questions on the I-589 would tie the hands of adjudicators and remove their exercise of discretion by codifying several "nonexhaustive factors that adjudicators must consider" when evaluating a claim for asylum that bar a decision maker from "favorably exercis[ing] discretion" if any of nine enumerated "adverse" factors are present.[42] Although the Proposed Rule argues elimination of this discretion is warranted to prevent spending "significant time evaluating and adjudicating claims,"[43] the addition of this laundry list of questions on the I-589 makes clear that each adjudication would actually take longer as a dozen discretionary factors must be considered before an adjudicator can grant asylum.

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[38] *See* Pages 11–12 of Draft of I-589.
[39] Proposed Rule, 85 Fed. Reg. at 36,283.
[40] *See e.g., Grace v. Whitaker,* 344 F. Supp. 3d at 126-27, aff'd in part, rev'd in part and remanded sub nom. *Grace v. Barr,* No. 19-5013, 2020 WL 4032652 (D.C. Cir. July 17, 2020)
[41] *Id.* at 126.
[42] Proposed Rule, 85 Fed. Reg. at 36,283.
[43] *Id.* at 36,284.

The new I-589 would force asylum seekers to answer detailed questions about their travel to the United States. Without understanding how the Proposed Rule's transit-related discretionary bar would be used against them, asylum seekers would have no way to understand the requirement to prove at their fear of persecution or torture in countries they passed through en route to the United States. The factors in the Proposed Rule blatantly ignore the reality of asylum seekers,[44] who are often forced to trek with few resources through other countries in order to claim protection. Many asylum seekers are simply not safe from persecution by transnational criminal groups in "pass-through" nations, even in those countries that are signatories to the 1951 Refugee Convention.[45] For example, many asylum seekers continue to be pursued by their persecutors as they travel through Mexico to the United States' southern border.[46] Others are kidnapped by armed groups.[47] This may result in them unwillingly staying in a "pass-through" country for longer than 14-days and falling subject to an adverse discretionary factor on the new I-589. The same is true of many asylum seekers fleeing transnational persecution in other parts of the world.

The new I-589 would also force asylum seekers to evaluate the immigration law of any countries they or their family members previously visited. Without providing any time frame or other limitations, the new I-589 asks asylum seekers whether they or their family members "could have applied for…any lawful status in any country."[48] Conceivably, this would include trips that took place years prior to the asylum seekers' persecution and even trips that family members made before the asylum seeker was born. Such travel has no relevance to an asylum seeker's claim. Furthermore, answering this question requires asylum seekers and their lawyers to research the historical immigration laws of third countries in order to determine whether the asylum seekers or

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[44] For example, the administration formalized a "metering policy" implemented by U.S. Customs and Border Protection as part of a broader Turnback Policy intended to restrict the number of asylum seekers inspected and processed at ports of entry at the southern border. *See* Office of Inspector General, Dept. of Homeland Security, Report OIG-18-84 (2018). "Metering" was intended to "regulate the flow of individuals at ports of entry" (*id*) by limiting the number of asylum seekers examined, creating significant backlogs of asylum seekers waiting at the border.

[45] As the Ninth Circuit recently explained in striking down the July 2019 third-country transit ban, countries may be a signatory to the Refugee Convention without offering any meaningful access to asylum:

> The sole protection provided by the Rule is its requirement that the country through which the barred alien has traveled be a "signatory" to the 1951 Convention and the 1967 Protocol. This requirement does not remotely resemble the assurances of safety built into the two safe-place bars of § 1158. A country becomes a signatory to the Convention and the Protocol merely by submitting an instrument of accession to the U.N. Secretary General. It need not "submit to any meaningful international procedure to ensure that its obligations are in fact discharged." *See* Declaration of Deborah Anker, Harvard Law School, & James C. Hathaway, University of Michigan Law School, ¶¶ 5, 7. Many of the aliens subject to the Rule are now in Mexico. They have fled from Guatemala, Honduras, and El Salvador. All four of these countries are parties to the Convention and Protocol. 84 Fed. Reg. at 33,839.

East Bay Sanctuary Covenant v. Barr, Nos. 19-16487, 19-16773,_____F.3d____, 2020 WL 3637585 (9th Cir. July 6, 2020).

[46] *See, e.g.*, U.S. Dept. of State, Mexico 2018 Human Rights Report 19, https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf (Central American gangs have "spread farther into" Mexico and "threatened migrants who had fled the same gangs in their home countries").

[47] *Id.* at 20 ("There were numerous instances of armed groups limiting the movements of migrants, including by kidnappings and homicides.").

[48] *See* new I-589, Page 9, Part C, question 4.B.

their family members could have applied for "any" lawful status. This research will not only take a tremendous amount of time, but it is also likely to lead to user and adjudicator confusion since it requests information that is not relevant to the asylum seeker's claim.

The questions in the new I-589 would also require asylum seekers to provide information about time they have spent in the United States without lawful status. Whether or not an asylum seeker was in lawful status is a complex issue and not one that an asylum seeker should have to disclose at the time of the initial application. The I-589 which includes contradictory questions about unlawful presences for more than one year and exceptions to the one year filing deadline, will likely confuse many pro se applicants as the discretionary factor analysis appears to largely eliminate the long-established statutory exceptions to the one-year filing deadline for asylum claims.[49] These changes contradict clear congressional intent and violate fundamental notions of due process. Congressional history makes clear that the exceptions to the one-year filing deadline were enacted to ensure "that those with legitimate claims of asylum are not returned to persecution, particularly for technical difficulties."[50] Moreover, a federal court has confirmed that the one-year filing deadline should not be used as a categorical bar for legitimate asylum claims.[51] The Proposed Rule's consideration of failure to file within one year as an adverse discretionary factor for those who have accrued a year of unlawful presence prioritizes administrative deficiencies and technical errors over the legitimacy of asylum claims.

The Proposed Revision's inclusion of questions that carry out the Proposed Rule's constraint on adjudicators' discretion, focus on administrative deficiencies, and contravention of Congressional intent introduce significant additional challenges for applicants with legitimate claims for asylum.

C. The Scope of The Information Requested Is Unclear and Could Lead to An Increase In "Frivolous" Determinations

The consequences of filing a frivolous asylum application are devastating: One who has filed a frivolous asylum application is not only permanently barred from asylum, but also barred from almost any immigration benefits or relief from removal.[52] Under current law, only an IJ or the BIA may determine an application is frivolous through an adjudicative process, and only "if any of its material elements is deliberately fabricated."[53] The Proposed Rule radically changes the scope of the frivolous asylum application rule, and would allow relatively low-level Department of Homeland Security officials to deem an application frivolous. While the new I-589 references the consequences of filing a frivolous application, neither the new form nor the new instructions explain the new and expansive definition of frivolous under the June 15 Proposed Rule.

Under current regulations, an individual must "knowingly" submit a frivolous application to be subject to the frivolous bar. Under the Proposed Rule, the definition of "knowingly" would be

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[49] The Proposed Rule would require adjudicators to treat failure to apply for asylum within one year of arrival as an adverse discretionary factor for applicants who entered unlawfully and narrows the scope of the changed circumstances exception for applicants who received a final removal order. *See* Proposed Rule, 85 Fed. Reg. at 36,293, 36,285; Sections208.13(d)(2)(i)(D); Section 208.13(d)(2)(i)(I).
[50] 142 Cong. Rec. S11,840 (daily ed. Sept. 20, 1996) (statement of Sen. Hatch).
[51] *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. 2018).
[52] INA § 208(d)(6), 8 U.S.C. § 1158(d)(6).
[53] 8 CFR § 208.20.

expanded to include "willful blindness." Yet neither the new I-589 nor the new instructions explain this new standard anywhere; instead they cite to the new Proposed Rule. As defined by the Proposed Rule, "[w]illful blindness means the alien was aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise."[54] Expanding the definition in this way will penalize, among others, *pro se* applicants, who generally lack an understanding of the complexities of asylum law—especially given the expansion of the frivolousness definition to include claims that are "patently without substance." And it is especially concerning that the instructions do not clearly explain this new definition to asylum seekers.

Asylum seekers, many of whom are unrepresented, will first have to read the new proposed rule to understand how "frivolous" is defined, and will then need to understand whether the reason they fear returning to their country meets this new definition. The first new ground does not provide any explanation of what it means to file an application "without regard to the merits," other than suggesting that filing an application with the sole intent to be placed into removal proceedings would be one ground.[55] The second new ground allows IJs to declare an application frivolous if it is "clearly foreclosed by applicable law."[56] Because attorneys have a duty to zealously represent their clients, they are at times required to preserve arguments which are "foreclosed by applicable law" but which may be winnable on appeal. This is particularly true where an issue may have been decided by the Board of Immigration Appeals but remains unaddressed by a federal circuit court. Under the Proposed Rule, a respondent who presented a claim for asylum currently barred under BIA precedent but with a likelihood of success on a petition for review[57] could be subject to the extreme sanction of having an application deemed frivolous. Not only would this limit the development of precedent, it could interfere with the right to counsel by preventing attorneys from pressing cutting-edge legal arguments. This is counterproductive for the agencies charged with developing our nation's asylum laws.

III. Conclusion

AILA strongly opposes the Proposed Revision because it will create additional time and cost burdens on vulnerable individuals who deserve protection from danger and potential death. Under the Proposed Revision, asylum seekers would be required to fill out a lengthy, confusing, and overly intrusive application and understand complex asylum law. This is unnecessary and will likely lead to the denial of meritorious claims.

These and other policy changes are choking off access to asylum and are fundamentally undermining the U.S. commitment to protect those fleeing persecution and harm. We urge the agencies to reconsider the Proposed Revision and withdraw it from consideration.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[54] Proposed Rule, 85 Fed. Reg. at 36,283
[55] Proposed Rule, 85 Fed. Reg. at 36,273-77.
[56] The proposed rule offers no explanation *at all* as to what this means, or what standards an IJ is required to use.
[57] For example, where multiple circuits had already overturned a BIA precedent decision, but the circuit where the respondent was applying for asylum had not yet addressed the issue.