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Submitted via www.regulations.gov

Lauren Alder Reid, Assistant Director,
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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

July 15, 2020

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

Dear Mrs. Alder Reid,

Ayuda writes to comment in strong opposition to the Notice of Proposed Rulemaking referenced above and published in the Federal Register on June 15, 2020. This Notice of Proposed Rulemaking seeks to overturn decades of U.S. and international law governing asylum in the United States, and it does so without justification. The results of these proposed rules will include not only depriving *bona fide* refugees of the protections of asylum, which Congress has long extended to them, but also confusion among adjudicators, conflicts between the statute and the regulations likely to lead to multiple legal challenges, diminished standing of the United States globally as these provisions violate international law, and increased burdens on small businesses (such as small immigration law firms) and non-profits such as Ayuda.

Ayuda is a 501(c)(3) organization that provides legal, social and language access services to low-income immigrants in Virginia, Maryland, and the District of Columbia. For over forty-five years, we have served tens of thousands of immigrants through our legal services program. For the last several fiscal years, Ayuda has served approximately 3,000 individuals in its

direct services programs.[1] More specifically relevant to these comments, Ayuda has represented hundreds of individuals from all over the world in asylum applications. In addition to the legal services that Ayuda offers, our social services program provides counseling and comprehensive case management services to hundreds of immigrant victims of violence each year.[2]

1. Introduction and Summary of Objections to the Proposed Regulations

The proposed rules suffer from multiple deficiencies, as detailed below, that are both procedural and substantive in nature. Of greatest concern, these proposed regulations are part of a concerted attack on asylum seekers and the very system of asylum in the United States. These proposed rules appear to be yet another effort to limit the access that Central Americans in particular have to asylum protections in the United States. (Though, to be clear, the harms inherent in these proposed regulations would affect individuals from all over the world seeking protection in the United States). Repeatedly, the proposed rules refer to efficiency, clarity, and consolidation – each of which is merely a trojan horse for what is an effort to severely limit, if not totally undermine, the statutory protections that these regulations purportedly seek to implement.

Because of this conflict between the proposed rules and the statute, several provisions of the proposed regulations, as detailed further below, far exceed the scope of the agency to issue regulations interpreting the statute. The agency may issue regulations only where there is a gap in the statutory language or some ambiguity as to the intent of the statute. In so doing, the agency's interpretation embodied in the regulations must be consistent with the statute itself. The proposed regulations include several provisions that plainly violate both the intent and the clear language of the INA, as demonstrated by several conflicts with decades of case law interpreting the INA issued by the Executive Branch itself.

Like many reforms before them, the proposed rules assume that asylum seekers are maliciously intending to defraud the United States government, exploiting supposed loopholes in the system and misleading adjudicators at every turn. Although in any group of people there are individuals ready to commit fraud, whether out of desperation or some other motivation,

[1] For additional detail about Ayuda's work, please see Ayuda's annual impact reports, available at: https://www.ayuda.com/about-us/impact-reports/. Attached or including all sources referenced in this comment would result in prohibitive length, so instead we have included hyperlinks to sources wherever possible. We respectfully request that the Agency review each of these sources as part of its consideration of our comments.

[2] The individuals contributing to these comments have more than fifty years of combined experience practicing immigration law, including Ayuda Pro Bono Attorney Larry Katzman (formerly Pro Bono Counsel at Steptoe and Johnson, Legal Director at Northwest Immigrants' Rights Project, and protection officer with the United Nations High Commissioner on Refugees, among other related qualifications), Ayuda Legal Director Laurie Ball Cooper (also adjunct professor of Refugee and Asylum Law at Scalia Law School, George Mason University and formerly adjunct professor at Washington College of Law, American University), Ayuda Managing Immigration Attorneys Katharine Clark (formerly Immigration Counsel, U.S. Senate Judiciary (Minority) Committee and Senior Litigation Counsel, Office of Immigration Litigation- Appellate Section, U.S. Department of Justice) and Joshua Doherty, Ayuda Crime Victims' Rights Fellow Katie Flannery (formerly Protection Officer at the United Nationals High Commissioner for Refugees), Staff Attorney Dana Florkowski, and law student intern Katie Weise. Resumes are attached, and we request that the Departments review our collective qualifications in assessing our comments and the experience that informs them.

Ayuda's experience is that individuals willing to subject themselves to the rigors of the existing asylum adjudication system in the United States are, in the vast, vast majority of cases, *bona fide* refugees fleeing persecution and seeking only the protection to which they are entitled by virtue of federal and international law.

One shortcoming of the system of asylum that such individuals in the United States must traverse is that the asylum system is difficult to understand, difficult to navigate, and confusing: an applicant proceeding without legal counsel is too often already set up to fail. These proposed regulations would further burden *pro se* asylum seekers, and the proposed regulations fail to examine or appreciate the effects on asylum seekers with no legal counsel – the majority of asylum seekers in the United States. In addition, the proposed regulations ignore the potential effects on legal service providers – those organizations, like Ayuda, providing free and/or low-cost legal services to those seeking asylum. The proposed regulations would increase substantially the hours of preparation that go into evaluating, preparing, and presenting asylum cases on behalf of Ayuda's clients (who live at or below 300% of the federal poverty line). This imposes financial costs on Ayuda in terms of staff time (and therefore financial resources to pay for that staff time) as well as opportunity costs. Each additional hour (or ten hours, as the case may be, or more) spent on existing asylum cases adds up to potential clients that Ayuda, and other organizations like us, will then be unable to assist because of these undue burdens. The proposed regulations ignore these costs completely, which is both a procedural oversight that renders the proposed regulations inadequate as a matter of law and a substantive oversight that underestimates, quite substantially, the negative effects of the proposed regulations.

As detailed further below, the proposed regulations do not provide adequate rationale for the restrictive changes proposed. Although it is not clear that any data could justify the proposed regulations because of their conflict with the statute, we are left with many questions in trying to assess the proposed regulations and their likely effects:

- How many asylum applications filed since 2010 have been deemed frivolous by USCIS and EOIR?
- How many asylum applications filed since 2010 have been referred to the fraud unit or its equivalent for suspected fraud?
    - On what basis have such applications been deemed suspicious?
    - What have been the results of those inquiries by the fraud unit?
    - What are the specific purported deficiencies in the current system for the detection of fraud that justify these proposed regulations?
- How many additional hours would the proposed regulations require from attorneys representing asylum seekers as compared to current law, both in calculating the financial/staff costs of shifting *decades* of case law and therefore requiring intense learning immediately after implementation *and* in terms of ongoing increased efforts required under these proposed regulations?
- How would asylum seekers without legal counsel, which comprise the majority of asylum seekers in the United States, be informed of these changes in regulations? How much would such efforts cost?
- In what ways would these proposed regulations, if made law, render asylum seekers ever more vulnerable to immigration legal services fraud (often known as notario fraud), and what would be the costs of that, financially, to asylum seekers

so defrauded, to the system, in terms of erroneous applications filed on behalf on *bona fide* refugees and taking government resources, and to asylum seekers and legitimate providers of legal services in terms of the need for rehabilitative legal services to correct erroneous filings?

- To what extent, and how, did the Departments consider the ongoing global COVID-19 pandemic and the limitations it has placed on asylum seekers worldwide in crafting these regulations and considering their effects?
- To what extent, and how, did the Departments consider the effects of civil unrest, conflict, and prevalent violence in countries through which asylum seekers may pass in proposing these regulations and considering their effects on asylum seekers? For example, did the Departments consider the effects of uncontrolled violence in third countries in determining whether the United States should require an individual to apply for asylum there? Did the Departments consider the porousness of borders and possibility of international or transnational criminal networks assisting in the location and ongoing persecution of asylum seekers in such supposedly safe third countries? Did the Departments consider the additional traumas experienced by many asylum seekers in their journey to the United States and the effects of such experiences on how asylum seekers present and share information in credible fear interviews, to which the regulations would apply heightened standards?
- Did the Departments consider the impact that these regulations would have on asylum seekers from different regions of the world, for example, comparing the likely effects of these regulations on asylum seekers from Africa versus asylum seekers from Latin America?
- Did the Departments intend these regulations to deter individuals from crossing the United States' Southern border in particular?
- Did the Departments intend these regulations to deter individuals from Central America, Hispanic and/or Latinx individuals, and/or Mexican nationals from entering the United States and seeking asylum?
- Did the Departments intend these regulations to result in increased deportations of individuals of Central American and/or Mexican nationalities in particular?
- Did the Departments consider the effects of these proposed regulations on women and individuals who are gender-non-conforming, transgender, and/or homosexual?

2. The 30-Day Comment Period is Insufficient

The 30-day period permitted for comments on these proposed regulations is woefully insufficient. The original notice of proposed rulemaking was over 150 pages of text. More significant than the length alone of the text is the dramatic nature of the proposed rules: because the proposed rules seek to overturn decades of case law interpreting the INA, and indeed in many places conflict with the statute itself and clear Congressional intent, responding to the proposed rule required extensive review of existing law to examine these conflicts. There is no emergent need for the proposed regulations to justify a 30-day comment period, and indeed this is

precisely the type of special circumstance given the extensive and broad-sweeping nature of the proposed regulations that warrants a longer, 180-day comment period.[3]

Moreover, this abbreviated notice and comment period took place in the context of a global pandemic. In June and July 2020, much of the country, and the areas in which Ayuda operates, remained at limited stages of openness in response to the public health crisis wrought by COVID-19. Ayuda team members, and other members of the public commenting and intending to comment on these regulations, continue to be affected by caring for other family members, including individuals suffering from COVID-19 and children and others without usual care arrangements due to the virus. In addition, cases and client matters are taking a prolonged period of time to prepare because of the effects of the virus and the related closures and precautionary measures, reducing the organizational and individual capacity of legal services providers.

Although extensive, Ayuda's comments did *not* cover several issues we hoped to cover and simply ran out of time to address, including (but not limited to) the following:

a. The changing burden of proof for reasonable fear interviews;
b. Fully briefing the shortcomings of the paperwork reduction act analysis in the proposed regulations;
c. Fully articulating the reasons that the proposed regulations require more than a 30-day comment period;
d. Detailing the many ways in which any retroactive application of the proposed regulations, which amount to a complete shift in governing law, to any applications filed on or before the eventual date of implementation, if implemented, would deny applicants due process of law; and
e. Examining the ways in which weakened confidentiality protections undermine the integrity of the asylum system and further place beyond reach the protection of asylum for those in the most danger, and, correspondingly, those who most need the protection asylum offers.

An extension of the time period allowed to submit comments is required to permit the public to meaningfully exercise its right to comment as required by law. A subsequent re-opening of the comment period will be necessary to remedy this problem, and any such subsequent re-opening of the comment period must be for an additional time of 60 days or more to allow for meaningful participation in the process. Ayuda and other providers and members of the public have had to shift workloads and priorities in order to respond to this 30-day notice and comment period in the first instance, and recovering from this period of what amounts to unjustifiable, unnecessary emergency response will require more than a mere additional 30 days. Ayuda requests that the comment period be re-opened for a minimum of 120 additional days in light of the extensive nature of the proposed regulations and the unique moment, in terms of the public health crisis, in which they have been issued.

3. Asylum/Withholding Only Proceedings

[3] https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

The Departments propose to deny access to Section 240 proceedings to persons who are subject to the expedited removal process and who are determined to have a credible fear of return to their country of origin. The Departments claim that they are authorized to do this under the statute and that doing so will provide so-called efficiency gains.

The efficiency rationale is repeated over and over in the proposed regulations and their related justifications. The Discussion, for instance, explains that this sea-change in procedure related to those applying for asylum, withholding, and CAT relief will avoid "lengthy and resource-intensive removal proceedings". In relying on cryptic comments from BIA decisions in determining Congressional intent, rather than engaging in their own intensive examination of the matter, the Departments assert that "Congress intended the expedited removal process to be streamlined, efficient, and truly 'expedited'."

Efficiency is favored not only for its obvious benefit of reducing or eliminating the court backlog (by denying applicants access to the courts) but also as a pretext to denial of legitimate asylum claims and reducing perceived flows of asylum seekers arriving at the border. How else are we to understand the context of this statement: "Section 240 proceedings are often more detailed and provide additional procedural protections, including greater administrative and judicial review, than expedited removal proceedings"? Or the assertion, in applying mandatory bars to asylum at the credible fear stage that it would be "pointless and inefficient" to adjudicate claims without also considering these bars. Related to this is the corollary proposal to mandate the applicability of internal relocation at this procedural stage.

It is precisely because the credible fear process affords far fewer procedural protections that such preclusive procedures and bars should not be closely examined and considered at the initial credible fear stage, which is by design cursory. Asylum officers do not have the time to engage in such comprehensive examinations within the context of credible fear interviews, which are often conducted in crowded detention centers with multiple other people overhearing such interviews – resulting in many applicants declining to share critical details in that process.

More significantly, asylum applicants are not equipped upon arrival to understand the nature of the necessary questions that would be required, or their gravity. Many are tired, hungry, frightened, and without any evidence to demonstrate eligibility and the absence of bars. Moreover, Ayuda has represented many clients who were not provided interpretation in their best language – including many individuals who are most comfortable speaking indigenous languages but who were provided only with Spanish interpretation. How on earth is the typical asylum applicant to explain, under these circumstances and to the asylum officer's satisfaction, that a minor transgression was not a "serious non-political crime" or that staying in a country of transit for a week or two did not amount to firm resettlement?

Only a very small portion of individuals going through credible fear interviews have counsel, so establishing credible fear to the heightened standards in these proposals or the absence of bars is unfair. In addition, many might be eligible for other forms of relief, such as a T or U visa (including, for example, based on abuses suffered during their journey to the United States and after arrival and even their treatment in detention centers in the United States), but

they would be unable to assert their potential eligibility for these forms of relief if they are placed in asylum/withholding only proceedings.

UNCHR, which provides guidance to states on the UN Convention and Protocol, is quite specific in required procedures for asylum applicants. In the *U.N. Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, [4] it explains why such a cursory review, and so early in the process, is contrary to these treaties that the U.S. has codified:

> [A]n applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. *In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documen*ts. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. (Emphasis added)
>
> *At* paragraph 196.

The procedures discussed in the UNHCR Handbook relate to actual asylum determinations, which have heretofore been handled by immigration judges in Section 240 proceedings with attendant rights such as due process, right to representation (albeit at the applicant's expense), and appeal. The preliminary stage, which the credible fear level has been, has heretofore had a lower threshold, and justifiably so, for the reasons outlined above. The proposals would turn this "gatekeeping" stage on its head, raising the threshold while reducing legal rights – all in the name of efficiency and denying asylum seekers their day in court.

4. Frivolous Applications

The proposed expansion of the frivolousness definition will discourage the filing of meritorious asylum applications and violate due process by effectively foreclosing administrative and judicial review.

(a) <u>The rationale for the proposed expansion mischaracterizes the history of the current regulatory language.</u>

[4] Found at https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

The Departments' rationale for expanding the definition of "frivolous" relies on a fundamental mischaracterization of the regulatory history. The proposed regulation aims to "broaden" the definition of a frivolous asylum application to bring the definition of frivolous in line with what the Departments perceive as "prior understandings" of the term. 85 Fed. Reg. 115, 36274. However, the broader "improper purpose" language that the Departments cite with approval from the initial 1997 proposed regulation was rejected after thoughtful consideration in favor of the current definition. A finding of frivolousness now requires an immigration judge to find that an asylum applicant "deliberately fabricated" "material elements" of the claim. 8 C.F.R. 1208.20.

The fact that a broader definition was considered and rejected shows that the narrower definition was, in fact, the accepted "understanding" of the term "frivolous" at the time section 1158(d)(6) was enacted.[5] Moreover, the current requirement of materiality in order to find frivolousness is consistent with the requirement of materiality in analogous contexts elsewhere in the INA. *See, e.g.*, *Maslenjak v. United States*, 582 U.S. __ (2017), 137 S. Ct. 1918 (2017) (barring denaturalization for immaterial false statement in naturalization application). Thus, the proposal to expand the definition does not accurately account for the regulatory history or the larger context of similar determinations in other immigration-related contexts and demonstrates how much the proposed regulations are a departure from previous agency judgment.

(b) <u>The expanded definition of frivolousness does not achieve the stated goal.</u>

Furthermore, the expanded definition of frivolousness does not achieve the objective stated in the Departments' own prefatory discussion. This discussion indicates that the expanded definition will address applications only that are filed for an "ulterior purpose," such as "being placed in immigration proceedings to seek some other form of relief." 85 Fed. Reg. 115, 36276. The discussion purports to provide reassurance that "[o]f course, simply because an argument or claim is unsuccessful does not mean that it can be considered frivolous," and "[n]either could reasonable arguments to extend, modify, or reverse the law as it stands." *Id*.

However, these reassurances are meaningless because they appear nowhere in the proposed regulatory language itself, and the proposal is not limited to "improper purpose" filings. Instead, the proposed regulations permit a frivolousness finding, with all of its severe consequences, whenever an application is determined in the estimation of an asylum officer or an immigration judge to be "filed without regard to the merits of the claim" or is "clearly foreclosed by applicable law."

Given the extreme complexity of asylum law, it will often be entirely unclear whether an asylum claim is "unfounded" as a matter of law, where the applicant is truthfully representing his or her fear and past experience. For the same reason, it is plainly incorrect that an asylum applicant "presumably knows whether his or her application is . . . meritless." 85 Fed. Reg. 115, 36276. Indeed, the courts regularly characterize credible applications as "without merit" not because of fraud or false documents, but, for example, because a proposed social group is not

[5] The legislative history cited in the discussion is not to the contrary, as it speaks generally to Congress's desire to deter frivolous applications for asylum, without ever so much as discussing potential definitions of "frivolous." *See* S. Rept. 104—209 at 2 (cited at 85 Fed. Reg 115, 26275).

cognizable. *See e.g.*, *Hernandez-De La Cruz v. Lynch*, 819 F.3d 784 (5th Cir. 2016) (finding meritless an applicant's challenge to the rejection of his proposed social group of "former informants").

The complexity of these analyses can be seen in the different conclusions reached by different federal circuit courts as to what is required to set forth a meritorious asylum claim. It would be manifestly unjust for an asylum applicant to be barred forever from discretionary immigration relief merely because the applicant did not understand that in his judicial circuit a death threat could constitute persecution only under the most extreme circumstance, while in another circuit a death threat can much more easily constitute persecution or torture. *Compare Cano v. Barr*, 956 F.3d 1034 (8th Cir. 2020) (holding that asylum applicant did not suffer persecution when she was held at gunpoint and threatened with death while being forced to watch as her abductors brutally beat her son) *with Tairou v. Whitaker*, 909 F.3d 702, 707 (4th Cir. 2018) (death threat deemed to constitute persecution); *Cabrera-Vasquez v. Barr*, 919 F.3d 218, 224 n.3 (4th Cir. 2019) (death threat deemed to constitute torture).

This injustice is magnified for *pro se* asylum applicants, given that represented applicants are already two to five times more likely to obtain relief from removal in Immigration Court. *See* Ingrid Eagly & Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court*, September 2016, p. 19-22. In addition, the differences in interpretation between the circuits will not be rectified by the Departments' attempts to clarify and develop consistency in areas such as social group and political opinion, as discussed elsewhere in Ayuda's comments.

(c) <u>The proposed consequences for use of fabricated evidence are overbroad and unfair.</u>

Apart from the proposed provisions related to the merits of an applicant's asylum claim, the proposed provision regarding "false or fabricated evidence" is fundamentally overbroad and at odds with governing caselaw. Courts have long held that, because individuals fleeing persecution often must rely on false documents in order to escape imminent harm, asylum may not be denied due to the submission of fraudulent documents, so long as an applicant has established past persecution or a well-founded fear of future persecution. *See, e.g.*, *Zuh v. Mukasey*, 547 F.3d 504, 512 (4th Cir. 2008); *Huang v. INS*, 436 F.3d 89, 98 (2d Cir. 2006); *see also Matter of Kasinga*, (BIA 1996) (holding, *inter alia*, that use of a purchased British passport to fly to the United States did not amount to fraud). By proposing to authorize frivolousness findings based on false documents, the agency impermissibly attempts to skirt these longstanding rulings.

The Departments cite *Scheerer v. U.S. Att'y Gen'l*, 445 F.3d 1311, 1317-18 (11th Cir. 2006) and *L-T-M- v. Whitaker*, 760 F.App'x 498, 501 (9th Cir. Jan. 14, 2019) (unpublished) as decisions that will surely prompt a parade of horribles, in which the agency will be unable to make frivolousness findings in meritless cases filed by applicants who are abusing the U.S. asylum system. However, the sparse caselaw cited – only a single published decision – belies this concern. This is particularly evident in light of the hundreds of circuit court frivolousness affirmances in the circuits that decided these cases and elsewhere, which were not precluded by *Scheerer* and *L-T-M-*. *See, e.g.*, *Manhani v. Barr*, 942 F.3d 1176 (9th Cir. 2019) (affirming

frivolousness finding without citing or addressing *L-T-M-*); *Ndibu v. Lynch*, 823 F.3d 229, 235 (4th Cir. 2016); *Niang* v. Holder, 762 F.3d 251, 254-55 (2d Cir. 2014); *Ruga v. U.S. Att'y Gen'l*, 757 F.3d 1193, 1196 (11th Cir. 2014). Indeed, it does not appear that *L-T-M- v. Whitaker* has influenced subsequent jurisprudence even insofar as to prompt a single subsequent citation by a circuit court.

For that reason, we urge the Departments to strike sections (2), (3), and (4) from the proposed definition of "frivolous" at section 1208.20(c) of the proposed regulation. These proposed expansions of the frivolous definition are not in accordance with the "improper purpose" proposal that, in any event, was rejected as overbroad in 1997. Such an expansion will unjustly dissuade truthful survivors of persecution from filing meritorious asylum applications.

(d) The proposed scienter requirements for a frivolousness finding are unconstitutional and unnecessary in light of current caselaw regarding frivolousness.

We also urge the Departments to strike proposed sections 208.20(a)(2) and 1208.20(a)(2), requiring knowledge or willful blindness to the fact that an application is frivolous. The term "willful blindness" is not defined in this section of the proposed regulation, and this lack of clarity would lead to confusion and inconsistent adjudications. Indeed, such ambiguity would preclude asylum applicants from having fair notice of the conduct proscribed by the new bar and would render the regulation invalid on vagueness grounds. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding crime of violence definition void for vagueness for failure to provide fair notice of conduct proscribed).

While the term "willful blindness" is undefined in the context of frivolousness, elsewhere in the same proposed regulation, the Departments propose to use the term "willful blindness" to mean that a public official committing torture must be "aware of a high probability of activity constituting torture" and must "deliberately avoid[] learning the truth." 85 Fed. Reg. 115, 36303. Thus, if the term is to be applied consistently throughout the chapter, a frivolousness finding based on willful blindness will require a finding that an asylum applicant was at least aware of a high probability that the application was frivolous, and that the applicant deliberately avoided learning the truth.

In the context of section 1158(d)(6), this scenario is most similar to a frivolousness finding on an asylum application that is fabricated for a client by his or her representative, where the client was or should have been aware of the attorney's fraudulent actions. Courts have held that such a claim may be found frivolous under the current requirements of deliberate action. *See, e.g., Ndibu v. Lynch*, 823 F.3d 229 (4th Cir. 2016) (affirming frivolousness finding where applicant knew the application contained false information when he signed it); *Fernandes v. Holder*, 619 F.3d 1069 (9th Cir. 2010) (affirming frivolousness finding where asylum applicant signed blank application and attorney filled in a concocted claim). Because the "deliberate" action requirement already captures the sorts of abuses that the proposed regulation purports to target, a new regulatory *mens rea* for frivolousness is not necessary.

(e) The proposed provisions on appeals and motions to reopen violate asylum applicants' due process rights and are not ameliorative.

Finally, Ayuda urges the Departments to strike proposed sections 208.20(f) and 1208.20(f) in their entirety, as flagrant violations of due process that will deprive asylum applicants of their statutory rights to file appeals and motions to reopen. Immigration proceedings must conform to the Fifth Amendment's requirement of due process. *United States v. Nicholas-Armenta*, 763 F.2d 1089, 1090 (9th Cir.1985). *See also Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings."). An individual in removal proceedings has a statutory right to appeal and judicial review of a final removal order, and to file a motion to reopen removal proceedings. 8 U.S.C. 1229a(a)(1); 8 C.F.R. 1003.1(b)(3); *Lopez-Angel v. Barr*, 952 F.3d 1045, 1049 & n.1 (9th Cir. 2020) (explaining that denial of administrative appeal is functional equivalent of denial of judicial review, in light of requirement to exhaust administrative remedies). "The motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 239 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)). Where the Government impermissibly deprives individuals of their statutory rights under the INA, it deprives them of their due process rights under the Constitution. *See Brown v. Holder*, 763 F.3d 1141, 1147 (9th Cir. 2014) (transferring to district court for determination of whether USCIS violated due process rights by depriving applicant of statutory right to apply for naturalization).

The proposed regulation violates due process because it does not merely require applicants to waive their rights to appeal the frivolousness determination and withdraw the asylum application in order to avoid the grave and permanent consequences of a frivolousness finding. The proposed regulation instead requires asylum applicants to sacrifice their statutory and Constitutional right to appeal a decision that may be fundamentally defective in some other respect, such as a denial of withholding of removal or protection under the Convention Against Torture, in order to avoid the consequences of a frivolousness finding on a withdrawn application. By stripping an asylum applicant of appeal rights as to the full decision, proposed sections 208.20(f)(4) and 1208.20(f)(4) effectively moot sections 208.20(g) and 1208.20(g), which purport to preserve the right to seek withholding of removal and CAT protection despite a frivolousness finding. Such a right is meaningless without an accompanying right to judicial review. Indeed, by waiving an appeal in these circumstances, an asylum applicant would even lose the opportunity to challenge the immigration judge's finding of alienage, the foundational fact of any removal proceeding and of an immigration court's jurisdiction. Therefore, this mechanism for withdrawal does not "ameliorate" the severity of the proposed regulation, 85 Fed. Reg. 115 at 36277, but instead is so fundamentally coercive that a waiver of appeal under these circumstances would not amount to "volitional conduct," as required for a legally valid waiver of appeal. *Lopez-Angel*, 952 F.3d at 1048.

To the extent that the wavier of appeal and motion to reopen provisions, or any other part of the proposed regulation, are intended to conserve resources and decrease processing times for an "already overloaded immigration system," 85 Fed. Reg. at 36273, it is not constitutionally permissible to cast aside due process and statutory rights in order to serve such goals. Indeed, when looking at the larger regulatory context, it becomes clear that the stated motivation of efficiency is a pretext for stripping asylum applicants of due process rights and imposing harsher consequences for denials of asylum. For example, the proposed regulation imposes an additional

burden on asylum officers to engage in an entirely new area of legal analysis in order to make frivolousness determinations that will be duplicated by the immigration judge at a later stage in the proceeding. Making this additional determination will only place additional strain on agency resources, while placing due process rights in jeopardy.

5. Pretermission

In explaining the proposed rule on pretermission, the Departments assert "there is no reason to treat asylum applications differently" from other immigration applications which are subject to pretermission without a hearing. 85 FR 36264, 36277. This assertion ignores history, treaty obligations, Congressional intent, and the nature itself of an application for asylum, withholding, and/or CAT protections. The introduction of pretermission of protection claims jeopardizes our nation's protection regime for the most vulnerable migrants and diminishes the United States' position as a moral and compassionate leader in the international community.

(a) Claims arising from U.S. international treaty and *non-refoulement* obligations require more procedural safeguards than other types of applications.

Unlike most other immigration applications, asylum, withholding of removal, and CAT protection are rooted in the United States' international treaty obligations, including the absolute, non-derogable prohibition against *refoulement*.[6]

UNHCR is the international agency mandated to supervise and to provide guidance to nation states regarding the implementation of the 1951 Refugee Convention and its 1967 Protocol. UNHCR has stated that one core element of the convention's objective and purpose is to "ensure the protection of the specific rights of refugees."[7] The United States is bound to fulfill its treaty obligations in good faith and to comply with the objective and purpose of the treaties to which we are party. Vienna Convention on the Law of Treaties arts. 18 and 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.[8]

These international obligations mandate that the U.S. treat asylum, withholding, and CAT protection claims differently from other types of immigration applications. The U.S. Refugee Act of 1980 "set a humanitarian benchmark for all countries and peoples,"[9] aligning U.S. law with

[6] *See, inter alia*, United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, as made applicable by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223; 606 U.N.T.S. 267; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Oct. 21, 1994, 1465 U.N.T.S. 85; S. Treaty Doc No. 100-20 (1988).
[7] UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, available at https://www.refworld.org/docid/3b20a3914.html.
[8] The United States, though not a signatory to the Vienna Convention on the Law of Treaties, considers it to be binding as international customary law. https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm.
[9] https://www.unhcr.org/en-us/news/press/2020/3/5e713c8d4/commemorating-the-40th-anniversary-of-the-us-refugee-act.html.

the principles and obligations enshrined in the 1951 Refugee Convention and acknowledging the duty of the State to protect and assist people violently uprooted from their homes.

However, the proposed rule to require pretermission of protection claims slams the door on asylum seekers and survivors of torture and creates a system in which meritorious claims will certainly be pretermitted, resulting in the *refoulement* of unknown numbers of vulnerable individuals seeking protection in the United States. Pretermission of protection claims based on a perceived lack of merit is an aggressively accelerated procedure for claims that would have predictable and devastating results: the United States would violate the most fundamental principles of international law, including the absolute protection against *refoulement.*[10] The Departments' proposal to implement such a procedure demonstrates a cavalier approach to international and statutory obligations and is contrary to the object and purpose of the Refugee Convention and its Protocol.

(b) Congress intended for the U.S. immigration system to treat asylum seekers humanely and fairly.

In enacting the Refugee Act of 1980, Congress declared "the historic policy of the United States [is] to respond to the urgent needs of persons subject to persecution in their homelands[.]" Pub. Law 96-212, 94 Stat. 102. The proposed rule requiring pretermission of protection claims without a full and fair hearing oversteps the Departments' legal authority, particularly where such procedural change directly contravenes clear Congressional intent.

(c) Because of the nature of asylum, withholding, and CAT claims, pretermission is most likely to prejudice respondents with meritorious claims.

The very nature of asylum, withholding, and CAT protections and the characteristics of the populations they are intended to protect provide yet another compelling reasons to treat these claims differently from other immigration applications. Indeed, allowing or requiring pretermission of these types of claims would frustrate the very purpose of these applications.

Pretermission of claims is premised on an applicant's reasonable ability to articulate the basis for an application at first blush. However, *pro se* applicants, who are rarely familiar with U.S. asylum law and may not speak English, are unlikely to elucidate a cognizable social group, for instance, or (as UNHCR points out) even be aware that sexual orientation can constitute a basis for asylum. [11]

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[10] UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, paras. 4–5. See also Executive Committee, Conclusion No. 81 (XLVIII) "General" (1997), para. (h); Conclusion No. 82 (XLVIII), "Safeguarding Asylum" (1997), para. (d)(iii); Conclusion No. 85 (XLIX), "International Protection" (1998), para. (q); Conclusion No. 99 (LV), "General Conclusion on International Protection" (2004), para. (l)

[11] *See*, e.g., UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (2008), available at https://www.refworld.org/pdfid/48abd5660.pdf ("The applicant will not always know that sexual orientation can constitute a basis for refugee status or can be reluctant to talk about such intimate

Even more significantly, copious scientific, psychological, and social science research tells us that pretermission in the context of protection claims would be self-defeating. Research reflects the reality that individuals who have survived trauma, including torture, sexual assault, and other forms of persecution, struggle to recount and disclose their experiences.[12] For survivors of persecution and torture, research further demonstrates that their great difficulties in disclosing traumatic events—or their greater tendency to disclose them "late"—renders these most vulnerable applicants at highest risk of *refoulement* and denial.[13] For the same reasons, these individuals would be at highest risk of having their claims inappropriately pretermitted.[14]

Thus, by virtue of the very persecution and torture that should create pathways to meaningful protection in the United States, individuals with meritorious claims are instead most likely to be significantly harmed by the pretermission of their protection claims.

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matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case."); United Nations, *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶¶ 142, 253 (2004) ("Torture survivors may have difficulty recounting the specific details of the torture for several important reasons, including… [p]rotective coping mechanisms, such as denial and avoidance…"); UK Home Office, *Asylum Policy instruction: Sexual orientation in asylum claims, Version 6.0* (2016) ("Feelings of shame, cultural implications, or painful memories, particularly those of a sexual nature, may [lead] some claimants to feel reluctant about speaking openly about such issues and may therefore not be uncommon"); B. R. Marriott et al., *Disclosing traumatic experiences: Correlates, context, and consequences,* 8(2) PSYCH. TRAUMA: THEORY, RESEARCH, PRACTICE, & POL., 141 (2016), available at https://doi.org/10.1037/tra0000058; Matthew D. Jeffrys et al., *Trauma Disclosure to Health Care Professionals by Veterans: Clinical Implications*, 175 MILITARY MED. 719 (Oct. 2010) ("PTSD presents unique challenges related to the stages of change regarding disclosure"); Diana Bögner et al., *Impact of sexual violence on disclosure during Home Office interviews*, 191(1) British J. of Psych. 75, (2007), available at https://doi.org/10.1192/bjp.bp.106.030262 ("The results indicate the importance of shame, dissociation and psychopathology in disclosure… Judgments that late disclosure is indicative of a fabricated asylum claim must take into account the possibility of factors related to sexual violence and the circumstances of the interview process itself.").

[12] *Supra.*

[13] Int'l Rehabilitation Council for Torture Victims, RECOGNISING VICTIMS OF TORTURE IN NATIONAL ASYLUM PROCEDURES (2013), available at https://irct.org/assets/uploads/pdf_20161120143448.pdf.

> [14] [N]umerous factors that can discourage survivors from indicating that they had been tortured which are often compounded in a migration setting. Migrants, particularly in transit and migration settings, may not feel it is safe to disclose this information. Another deterrent may be related to the perceived stigma that is associated with torture and mental disorders. Moreover, many torture survivors may be unaware that simply telling their story, which had only negative connotations until that point, could actually be the key to their enjoyment of certain rights, and also therapeutically positive for their rehabilitation. Finally, language and cultural barriers frequently prevent survivors from speaking about what has happened to them
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> Voluntary Fund for Victims of Torture, UN Office of the High Commissioner for Human Rights, *Torture Victims in the Context of Migration: Identification, Redress and Rehabilitation* (2017), available at https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/UNVFVT_ExpertWorkshop2017.pdf.

(d) BIA and federal court precedential authority are contrary to the proposed rule

The Departments invoke insufficient legal justification for a procedure that would cause the United States to violate its obligations against *non-refoulement*, in addition to defying the intents of Congress. It also errs in applying Board precedent in attempting to support its proposed changes.

The Departments acknowledge that the BIA decision in *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989), is directly in opposition to the envisioned rule's pretermission procedures. While the Departments dismiss this inconsistency based on the fact that the regulations at issue in *Fefe* are no longer in effect, they fail to address the overarching statements of the Board related to general principles, regardless of the viability of any specific regulation. In *Matter of Fefe*, the Board clearly articulates the essential nature of the full examination of asylum applications:

> In the ordinary course, however, *we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself*. We note that there are often significant differences (either discrepancies or meaningful omissions) between the written and oral statements in an asylum application; these differences cannot be ascertained unless an applicant is subjected to direct examination. Moreover, if an applicant is not fully examined under oath there would seldom be a means of detecting those unfortunate instances in which an asylum claim is fabricated. On the other hand, there are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.[15] (Emphasis added)

In *Matter of Fefe*, the Board further reflects on the asylum standard articulated in another longstanding precedential decision, *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987),[16] In *Mogharrabi,* the Board stated that it is "difficult for any alien to satisfy this standard unless he presents testimony as his hearing which is consistent and corroborates any previous written statements in his Form I-589." 20 I&N Dec. 116 (BIA 1989), *citing* 19 I&N Dec. 439 (BIA 1987). These observations and principles are equally valid under any set of regulations, and they contradict the Departments' claims that *Matter of Fefe* is inapplicable because the regulations are no longer in effect.

The Departments also cite two recent Board decisions by the Attorney General in support of its notion that an immigration judge may pretermit applications for protection if the judge finds that a *prima facie* case is lacking. However, the holdings in both cases are incorrectly interpreted and applied.

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[15] *Id.* at 118.

[16] "The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

In the first case, *Matter of E-F-H-L*, the Board, looking to the statute rather than regulations, reasserted the validity of *Matter of Fefe*, holding:

> In the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of those applications, including an opportunity to provide oral testimony and other evidence, *without first having to establish prima facie eligibility for the requested relief*. 26 I&N Dec. at 324 (Emphasis added)

Although the Board's decision was technically vacated,[17] the decision raises no doubts about the validity of the Board's legal conclusion or its decision to follow *Matter of Fefe* many years after *Fefe* was decided and, as a result, offers no support for the Departments' contention that pretermission of asylum and withholding claims is allowable.

In the second cited case, the Departments rely on language from *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018), stating that, where an asylum application fails to establish a protected ground, then no further examination of the remaining elements is necessary to deny the claim. But reliance on this statement is completely misplaced, since the Attorney General's statement addresses the decision-making process on an asylum claim after all required evidence-gathering has been completed. While failure to prove any of the necessary elements in a legal definition may of course be dispositive in the outcome, it has no bearing on the *procedural* steps required before reaching a decision.

In fact, *Matter of A-B-* does not address pretermission at all. In stark contrast to the accelerated and procedurally deficient process that the proposed rules would impose, *Matter of A-B-* stresses the importance of "rigorous analysis" in determining asylum claims and emphasizes that all evidence must be considered and analyzed in adjudicating them ("Neither immigration judges nor the Board may avoid the rigorous analysis required in determining asylum claims…"). *Id.* at 340.

Further, the Attorney General rejects the analysis by the Board in *Matter of A-R-C-G-*, 26 I&N 388 (BIA 2014), citing its failure to observe its "duty" to "evaluate any claim… in the context of the evidence presented[,]" because the Board engaged in "little or no analysis." *Matter of A-B*, 27 I&N at 339, *citing* 26 I&N Dec. at 392 (BIA 2014). Thus, *Matter of A-B-* rejects, rather than supports, the Departments' proposal to allow pretermission of asylum, withholding, and CAT claims, instead stressing a retention of the current model of case-by-case analysis.

Similarly, the citations in *Matter of A-B-* supporting the language quoted in the proposed rule ("Of course, if an alien's asylum application is fatally flawed in one respect… an immigration judge or the Board need not examine the remaining elements of the asylum claim") offer no support for pretermission, either. In *Matter of A-B-*, the Attorney General cites to *Guzman-Alvarez v. Sessions*, 701 F. App'x 54, 56-57 (2d Cir. 2017), and *Perez-Rabanales v.*

[17] 27 I&N Dec. 226 (A.G. 2018). It was vacated for mootness rather than any legal flaw in the Board's reasoning. Subsequent to the Board's 2014 decision in *Matter of E-F-H-L-*, the respondent withdrew his application for asylum and withholding to pursue a family petition instead, and the immigration judge administratively closed the removal proceedings.

Sessions, 881 F.3d 61, 67 (1st Cir. 2018). 27 I&N Dec. at 340. The first case is unpublished and therefore of no precedential value. Also, both cases involve federal court review of whether proposed particular social groups are viable. Neither case discusses, or indeed even contemplates, pretermission of protection claims.

In addition, the Departments' decision to invoke *Zhu v. Gonzales*, 218 F. App'x 21 (2d Cir. 2007) is also curious since, aside from also being unpublished, this decision does not support the Departments' position on pretermission. The Departments state that *Zhu* establishes the notion that pretermission of asylum applications is permissible since "other immigration applications" are so subject. But, significantly, the Departments' interpretation of the holding in *Zhu* is incorrect. They write that pretermission does not violate due process as long as the respondent is given an opportunity to resolve the flaw in the application. But this is merely dicta, as *Zhu* rests on an IJ's authority to set filing deadlines pursuant to 8 C.F.R. § 1003.31(c), not pretermission.

Next, the Departments attempt to justify the pretermission concept by claiming that it is "akin to" a decision to an IJ or the Board requiring the setting out of a *prima facie* case in determining whether to grant a motion to reopen. But their reliance here on *INS v. Abudu*, 485 U.S. 94 (1988) fails because the situations are not analogous since the comparison ignores the heavy substantive burden required to reopen a case. In denying the motion to reopen, the Supreme Court noted this point explicitly:

> If respondent had made a timely application for asylum, supported by the factual allegations and exhibits set forth in his motion to reopen, the Immigration Judge would have been required to grant him an evidentiary hearing. However, an alien who has already been found deportable has a much heavier burden when he first advances his request for asylum in a motion to reopen. The BIA did not abuse its discretion when it held that respondent had not reasonably explained his failure to apply for asylum prior to the completion of the initial deportation proceeding.

Id. at 104. This "much heavier burden" for a motion to reopen is all the more reason to avoid imposing burdensome barriers to a full and fair consideration of protection claims at the first instance.

Finally, the Departments state in a footnote that they "do not believe that requiring a sufficient level of detail to determine whether or not an alien has a prima facie case for asylum, statutory withholding of removal, or protection under the CAT regulations would necessarily require a voluminous application." This references a House of Representatives Judiciary Committee Report from 1996 in connection with unenacted immigration reform legislation. The section of the Report explains the Judiciary Committee's support for imposing a 30-day filing deadline for asylum, stating its belief that filing an application soon after arrival to the United States was more important than failing a "comprehensive application." H.R. Rep. No. 104-469, part 1, at 175. The Committee encouraged the INS to adopt a simpler application form for asylum, with "generous allowance for amendment," to accomplish this goal. *Id.* at 176. The Committee's exhortation to provide such allowance for amendment is instructive of the reality and complexity of asylum applications, especially for *pro se* applicants.

Furthermore, it is unclear how the Departments can claim – without one shred of analysis – that the possibility of pretermission would not require voluminous applications, especially when accompanied by the other onerous changes and restrictions in the proposed regulations (e.g., heightened standards on particular social groups, political opinion, persecution, and nexus). In particular, voluminous applications will often be necessary to guard against the proposed expansion of grounds to deem applications as "frivolous" and the concomitant consequences.

Finally, the Departments cite no legal authority for the proposition that applications for withholding of removal or CAT protections may be pretermitted. It is unclear how the Departments believe they can require pretermission of these claims in a manner consistent with the United States' international obligations. In a 2007 Advisory Opinion, UNHCR noted that the principle of *non-refoulement* requires states to "adopt a course that does not result in [the removal of persons who are seeking international protection on their territory], *directly or indirectly*, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion."[18] Pretermission of withholding of removal and CAT claims is almost guaranteed to result in such prohibited removal. UNHCR advised that, in order to comply with obligations against *refoulement*, states must assure access to "fair and efficient asylum procedures." *Id.*

Even in an accelerated or streamlined process, such procedures must include a "complete personal interview by a fully qualified official… of the authority competent to determine refugee status."[19] The proposed procedure for pretermission does not meet these minimum standards to ensure the United States is in compliance with its most fundamental international obligations against torture.

(e) Pretermission of protection claims would deny procedural due process.

The proposed procedure for pretermission is fundamentally unfair and violates a non-citizen's right to due process, including the reasonable opportunity to present testimony and evidence, in removal proceedings. It is well-established in case law that non-citizens in removal proceedings are constitutionally guaranteed fair procedures and due process.[20] The Supreme

[18] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Jan. 26, 2007), available at https://www.unhcr.org/4d9486929.pdf (emphasis added).
[19] UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), para. 32, EC/GC/01/12 (2001), available at https://www.refworld.org/docid/3b36f2fca.html.
[20] *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100-01 (1903); *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019) ("The Due Process Clause of the Fifth Amendment guarantees that aliens in removal proceedings have 'a full and fair opportunity to be represented by counsel, to prepare an application for ... relief, and to present testimony and other evidence in support of [that] application.'"); *Chen v. Holder*, 578 F.3d 515 (7th Cir. 2009) ("[D]ue process requires, among other things, that an applicant receive a meaningful opportunity to be heard") (quoting *Kerciku v. INS*, 314 F.3d 913, 917 (7th Cir. 2003) (per curiam)); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) ("The Fifth Amendment's due process clause mandates that removal

Court has determined that the fundamental requirements of procedural due process, rooted in the Fifth Amendment to the U.S. Constitution, include notice of the government's proposed action, an opportunity for a fair hearing before an impartial decision-maker, the right to present evidence and confront the government's evidence, and the right to be represented by counsel.[21]

The reality is that the current regulations essentially proscribe pretermission, aside from the presence of mandatory bars to asylum eligibility. The Departments' efforts to read these regulations as supporting their proposal are, thus, unsuccessful.

While case law requires that non-citizens be provided a reasonable opportunity to present evidence in support of their claims, including testimony,[22] the Departments claim support from 8 C.F.R. § 1240.11(c)(3), which references "an evidentiary hearing to resolve *factual* issues in dispute" (emphasis in proposed regulation). 85 FR 36264, 36277. But this ignores the fact that decisions in asylum cases must always take into account *both* facts and law, applied to the individualized circumstances of the applicant.[23] Pretermission would reverse established and procedurally required elements, forcing immigration judges to consider the question of legal sufficiency in isolation and without providing respondents with their constitutionally and statutorily guaranteed right to a full and fair hearing. The Ninth Circuit has written that "the importance of an asylum or withholding applicant's testimony cannot be overstated court." *Oshdi v. Holder*, 729 F.3d 883, 889-90 (9th Cir. 2013).

Moreover, while the Departments refer to 8 C.F.R. § 1240.11(c)(3), they tellingly don't address a subsection of the same regulation, which requires that an asylum or withholding of removal applicant in removal proceedings "shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf." 8 C.F.R. § 1240.11(c)(3)(iii). In addition, the Departments do not reference 8 C.F.R. § 1229a(b)(4)(B), which guarantees non-citizens "a reasonable opportunity… to present evidence on the alien's own behalf[.]"[24]

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proceedings be fundamentally fair"); *cf. Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (describing motion to reopen as an "'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings") (quoting *Dada v. Mukasey*, 128 S. Ct. 2307 (2008)).

[21] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

[22] *See Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075–76 (9th Cir. 2005) (alien's due process rights violated where the IJ barred him from presenting his mother's testimony, refused to permit family members to develop the record as to the family's persecution, and refused to hear testimony from alien's expert witness).

[23] *See* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, para. 29, HCR/1P/4/ENG/REV.4 (2019) ("Determination of refugee status is a process which takes place in two stages. *Firstly*, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.") (emphasis added).

[24] *See also Naing Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007) (determining a "fair hearing" requires the immigrant "be given the opportunity to fairly present evidence, offer arguments and develop the record").

In short, the proposal to require pretermission of asylum claims directly and flagrantly violates the procedure due process rights of noncitizens.

(f) If not abandoned, the proposed rule on pretermission requires significant clarification.

The Departments should eliminate pretermission from the final rule. However, if the Departments insist on pushing forward with the proposed procedure, the following clarifications and changes should be implemented in the final rule:

- Ensure pretermission is permissive, not mandatory, to ensure immigration judges' authority to exercise their independent judgment and discretion, consistent with 8 C.F.R. § 1003.10;
- Eliminate pretermission for applications for protection under the CAT regulations, to ensure United States compliance with fundamental international obligations;
- Add language explicitly allowing for interlocutory appeals of pretermission decisions to the Board of Immigration Appeals;
- Provide a minimum of 90 days for parties to respond to an immigration judge's notice of intent to pretermit or a DHS motion to pretermit and add language explicitly allowing the immigration judge to exercise discretion in setting a longer deadline if warranted by circumstances in the case;
- Ensure that no application for asylum is pretermitted prior to the expiration of the respondent's one-year filing deadline;
- Add language clarifying that pretermission must strictly consider legal as well as factual matters and may not consider, implicitly or explicitly, the respondent's credibility.

6. Standards for decisions on the merits

The Departments also set forth several broad-sweeping changes to how asylum applications will be decided on the merits, including changes to the definitions of critical terms in the asylum statute such as "particular social group," "political opinion," and "on account of" (nexus). As detailed more fully below, these changes serve to dramatically narrow the availability of asylum's protections to individuals who are, in every way, just the refugees Congress wrote the INA to protect. Many of these proposed changes would have a disparate impact on women and individuals who are gender-non-conforming, transgender, and/or homosexual.

(a) Proposed Changes to the Standards for Adjudicating Claims Based Upon Membership in a Particular Social Group.

i. The proposed rule will essentially eliminate particular social group as a statutory basis for asylum.

The proposed rule creates such an overly narrow definition of "particular social group" claims that it may in practice eliminate entirely this statutory basis for asylum specifically enacted by Congress. This category of asylum claims was specifically included within the statutory bases for asylum in the INA (and also in the 1951 Refugee Convention) in order to recognize the myriad types of violence from which an individual may be fleeing and to capture those cases that do not fit neatly into the others.

ii. The proposal will eliminate individualized analysis of claims by adjudicators.

The Discussion appropriately highlights the problematic nature of seeking to define specific particular social groups where cases necessarily require individualized analysis, (see the discussion of *Grace v. Whittaker*, 344 F. Supp. 3d 96, 126 (D.D.C 2018) at Footnote 27). But the proposed regulation will, in effect, eliminate this case-by-case approach by defining a series of purported social groups that would automatically not satisfy the requirements for asylum eligibility.

Indeed, this list of cases seeks to do exactly what the Departments caution against. It will direct adjudicators to avoid undertaking the important fact-finding and careful analysis of claims in order to identify and consider viable bases for asylum. Instead, it will have them rely on these overbroad examples to swiftly deny legitimate asylum claims. Or, worse, the new regulation will encourage adjudicators to pretermit applications (as discussed in Section 5 above) without undertaking any direct investigation into the basis for a claim.

For example, the exclusion of particular social group claims for individuals hailing from countries "with generalized violence or a high crime rate" would result in the denial of cases where the individual's specific victimization takes place in a broader context of impunity for violence, thereby exacerbating the futility of seeking local recourse to combat the violence.

iii. The proposal places an unfair and punitive burden on the applicant.

The proposed rule introduces an additional requirement forcing the asylum seeker to articulately and narrowly define every particular social group or groups which he or she claims as the basis of his or her claim at the outset of the case. It deprives applicants of the ability to present refined or additional particular social groups at a later time. This requires asylum seekers to possess a nuanced knowledge of the intricacies and minutiae of asylum law that can be challenging even for experienced practitioners and judges. *See Matter of A-B-*, 27 I&N Dec. at 331 (describing the difficulty with which even the esteemed members of the Board have following its own guidance and understanding of the term "particular social group").

This requirement is particularly egregious because it specifically forecloses the ability for asylum seekers to seek to rehabilitate their claims after they suffered from receiving ineffective assistance of counsel. This limitation is overly punitive to asylum seekers, both those who are represented and especially *pro se* applicants. In addition, this regulation would preclude the introduction of additional formulations of particular social groups to which the claimant may belong which have subsequently become recognized as viable social groups by the courts, and it

purports to shift any fact-finding responsibility on the part of the asylum officer or immigration judge to identify plausible social groups raised by the testimony of the applicant.

Furthermore, this requirement ignores the fact that many asylum applicants must file their asylum applications without any assistance of counsel because they have been advised of the one-year filing deadline but remain unable to retain counsel. This is often the case, for example, for individuals who receive free consultations through Ayuda's in-house staff attorney consultations or Ayuda's pro bono clinics, but who are unable to retain private counsel and unable to be represented for free by Ayuda or similar legal service providers because of capacity constraints.

It is worth noting that it is unclear what problem, precisely, this provision of the proposed regulations seeks to resolve. Asylum seekers are already precluded from raising new particular social groups on appeal and must instead detail their claims before the immigration judge, at the latest.[25] The Departments fail to articulate why any further limitation on the timing of claim presentation is required.

iv. The revised regulations would not achieve the Departments' stated goal.

The Departments state that the primary reason for the enormous changes that the proposed regulations represent is to provide clearer guidance for adjudicators. However, it fails to do this. While it concedes that "additional evidence" could overcome factual deficiencies, it fails to elaborate on the nature of the evidence that would suffice. For instance, what must an asylum seeker from a country with "generalized violence or a high crime rate" demonstrate? The cited passage from *Matter of A-B-* suggests that only state involvement in the persecution will satisfy this greatly-heightened standard. This, coupled with a preclusion elsewhere in the NPRM of claims based on non-state actors, effectively closes off all non-state actor claims from most asylum-source countries in the world.

v. Decreased agency time per application, if even achieved, would be at the expense of fairness.

Another apparent reason for these restrictions is to provide greater efficiency, in the eyes of the Departments ("reduce the amount of time the adjudicators must spend evaluating such claims"). Virtual total elimination of a large percentage of social group claims will certainly decrease the amount of time that adjudicators spend on each case, but at the expense of decades of established case law and heretofore adherence to the letter and spirit of the Refugee Protocol and Convention.

Moreover, these requirements, in direct conflict with decades of case law and due process and fundamental fairness, would give raise to additional appeals, including to the federal circuit courts, and significant additional investment of time by all sides, including the Departments, in litigating such appeals. This cannot accurately be characterized as an efficiency gain: it merely shifts the burdens from the first effort at adjudication to subsequent efforts, involving additional

[25] *In Re W-Y-C-*, 27 I. & N. Dec. 189 (B.I.A. 2008).

divisions within and between the Departments as well as the federal courts, to say nothing applicants' own time and the time of legal service providers representing them.

vi. The changes violate the Administrative Procedures Act.

The Departments explained why, in their view, there is a need to refine legal analysis vis-à-vis social groups, but they provided absolutely no rationale as to why every refinement entails a restriction – or total foreclosure – of interpretation of the INA that would provide any guidance likely to support the claims of *bona fide* refugees to protection. In addition, the Departments do not provide any data, analysis or insight into why these seismic shifts in social group analysis and adjudication are warranted. And they concede that they have conducted no independent analysis of legislative intent, instead relying on offhand quotations from two precedents.

Without this additional background and context, the Departments have violated the APA by preventing interested parties, such as Ayuda, from having a meaningful opportunity to communicate information, concerns, and criticisms about these changes. The agency must "provide an accurate picture of the reasoning that has led the agency to the proposed rule". *Connecticut Light & Power Co. v. Nuclear Reg. Comm.*, 673 F.2d 525, 528, 530 (D.C.Cir.1982).

vii. The Departments do not properly consider the guidance provided by UNHCR.

The Departments bemoan the fact that the UN Convention does not define the term "membership in a particular social group". However, they seem unaware that UNHCR, which provides guidance to governments on the Convention, has issued Guidelines for International Protection on social group claims.[26] In many ways, these Guidelines support the spirit of the proposed rules. For instance, they specify that a social group cannot be defined exclusively by its feared persecution and that the category cannot be seen as a catch-all for all persons fearing persecution.

But, in stark contrast to what is proposed here, UNHCR emphasizes that persecution by non-State actors can be cognizable if it is "knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." (paragraph 20). The Departments' omission of this guidance seems particularly jarring given their reliance for guidance with respect to political opinion claims on UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, a document which incorporates the specific Guidelines referenced above both by citation and by directly incorporating it into the addenda of the Handbook.

[26] UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, UN Document Number HCR/GIP/02/02.

(b) The Proposed Rule Redefines Political Opinion Eviscerating Decades of Case Law (8 CFR § 208.1(d); 8 CFR § 1208.1(d)).

i. The proposed standard is too narrow and restrictive in its reimaging of claims based on political opinion.

The proposed regulation seeks to limit the availability of asylum based on persecution on account of political opinion only to those claims expressed by or attributed to a discrete cause relating to political control of a state or a unit thereof. It does not allow for asylum claims based on numerous legitimate political opinions that may not espouse, as a belief, specifically the overthrow of the systems of power.

The envisioned rule defines what is "political" much more narrowly than existing case law or the UN Convention. The court in *Saldarriaga v. Gonzales* (a decision that the Departments single out to serve as a model for the proposed regulation) says that an opinion is political if it is a sufficiently detailed articulation of an "an ideal or conviction of sorts[.]"[27]

But the proposed definition is breathtaking in its narrowness. The political opinion ground is broad and "designed to suit the situation of common [people], not only that of philosophers." *See* Grahl-Madsen, *The Status of Refugee in International Law* 251 (1966).[28] In other words, a political opinion is not limited to espousal of a formal political ideology or to the platform of a specific political party. Instead, § 101(a)(42)(A) protects *any* opinion on *any* matter in which the machinery of the State or uncontrolled non-state actors may be engaged against.[29]

By limiting cognizable opinion as that which is "related to political control of a state," the Departments adopt an overly restrictive view of what is political. They present the holding in *Saldarriaga v. Gonzales* as reflective of their view. However, the *Saldarriaga* court spends much effort emphasizing that political opinion must comprise more than a personal dispute. But there are many opinions and activities that lie between purely personal disputes and efforts to confront political control of a state.

ii. The proposal would reject many opinions and activities that are political in nature.

The leader of a conservation group who is advocating for stronger environmental protections would not be recognized, nor would women seeking enfranchisement or rights or LGBTQ individuals advocating for equal rights. These individuals are all expressing views that challenge governmental policies or laws but not necessarily state control.

[27] 402 F.3d 461, 466 (CA4 2005).
[28] Mr. Grahl was the original commentator on the Refugee Convention on which U.S. asylum law is based.
[29] *See* Goodwin-Gill, *The Refugee in International Law* 30 (Oxford: Clarendon Press,1983).

Even the *Saldarriaga* court recognized with approval that "demonstrating with students" and participating in a "protest march" for ethnic rights demonstrates political opinion for asylum purposes,[30] and less overtly symbolic acts (holding that applicant's provision of material information concerning a political insurgency reflected a political opinion) may also reflect a political opinion.[31] In other circuits, resisting corruption and abuse of power — including non-governmental abuse of power — can be an expression of political opinion,[32] as can the refusal to give technical assistance to the FARC in Colombia.[33]

The proposed regulation also makes dramatic and unsupported leaps in interpreting the holding of *Matter of S-P-*, which the Departments cite in support of their extreme and restrictive language redefining political opinion for asylum purposes. As stated in the Discussion, the BIA in *Matter of S-P-* found that a persecutor must have been "in part motivated by an assumption that [the asylum seeker's] views were antithetical to those of the government." 21 I&N Dec. 486,494 (BIA 1996). The proposed regulations, then, rely on the UNHCR's Handbook and the *Saldarriaga* decision to require that political opinion claims must show that the opinion is "intended to advance or further a discrete cause *related to political control of a state*" (emphasis added). The concept of "political control" is not cited in any of the sources upon which DHS and EOIR rely.

iii. <u>The proposal rejects a thoughtful and individualized approach to analysis.</u>

The Departments use a bludgeon-like one-size-fits-all approach when a more thoughtful and analytical approach is necessary in cases involving political opinion. The Discussion suggests that the holding in *Hernandez-Chacon v Barr*[34] adopted a too-permissive attitude towards what constitutes cognizable political opinion when it granted asylum based on opposition to a culture of male domination present in criminal gangs.

But absent from this cursory mention was that court's nuanced analysis of the nature of opinion that is "political." The *Hernandez-Chacon* court stressed, for instance, that a proper analysis "involves a 'complex and contextual factual inquiry' into the nature of the asylum applicant's activities in relation to the political context in which the dispute took place."[35] It then proceeded to engage in a review of recent precedents. Left unexplained in the Discussion is why the Departments dispensed out-of-hand this line of reasoning in favor of a one-dimensional standard.

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[30] *See., Camara v. Ashcroft*, 378 F.3d 361, 364 (4th Cir.2004)
[31] *See Briones v. INS*, 175 F.3d 727, 728-29 (9th Cir.1999) (en banc).

[32] *Castro v. Holder*, 597 F.3d 93, 101 (2d Cir. 2010) (quoting *Yueqing Zhang*, 426 F.3d at 54
[33] *Delgado v Mukasey*, 508 F.3d 702,, 706 (2nd Cir 2007).
[34] 948 F3d 94 (2nd Cir 2020)
[35] *Id*, at 103, *citing Castro v. Holder*, 597 F.3d 93, 101 (2d Cir. 2010) (quoting *Yueqing Zhang*, 426 F.3d at 548).

iv. The proposed rule is contrary to the UN Convention and UNHCR guidance.

The proposed regulation also implicitly eliminates any basis for political opinion based upon opposition to *de facto* political actors or non-state actors.[36] This restriction is contrary to UNHCR's guidance, which explicitly acknowledges that non-state actors can indeed be considered agents of persecution.[37] This definition calls into serious question the viability of political opinion asylum claims emanating from, for instance, pro-democracy activists in Venezuela who have opposed the dictatorial Nicolas Maduro government. Given the U.S. government's recognition of Juan Guaido[38] as the legitimate head of state of Venezuela, this regulation would purport to prohibit a political opinion asylum claim from Mr. Guaido's supporters notwithstanding the widespread violence and oppression which continues to be meted out by forces controlled by Mr. Maduro by forcing the conclusion that the asylum seekers' behavior is no longer "antithetical" to the "ruling legal entity of the state." Rather, their support is instead directly in favor of the ruling legal entity of the state.

v. The proposal does not achieve its stated purposes.

The Departments identify as their rationale for this further restriction on the ability of persecuted people to seek asylum (1) to avoid further strain on the INA's definition of refugee, and (2) to provide clarity to adjudicators. Regarding the first goal, it is rather the tortured re-defining of "political opinion" that excludes vast swaths of potential claims on the basis that they are not "related to political control of a state" that strains the commonplace definition of political opinion, as correctly applied through prior case precedent and UNHCR guidance.

Regarding the second purported goal of this regulation, the Departments do not provide any clarity insofar as they introduce heretofore undefined and novel terms and concepts, such as "discrete cause," "expressive behavior," and "political control of the state," which will surely cause significant confusion for adjudicators. The Departments' attempt to define "expressive behavior" through Footnote 30 does so with no substantive support, based on pure conjecture and in apparent ignorance that a "mere act of personal civic responsibility such as voting" or refusing to join the dominant political party can indeed have fatal implications for the asylum seeker and thus give rise to a viable claim.[39]

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[36] *See Jabr v. Holder*, 711 F/3d 835 (7th Cir. 2013).

[37] UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, ch. II (B)(2)(g), ¶ 65 (Feb. 2019).

[38] Statement for President Donald J. Trump Recognizing Venezuelan National Assembly President Juan Guaido as the Interim President of Venezuela, The White House, Jan. 23, 2019, https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/.

[39] *See Mandebvu v. Holder*, 755 F.3d 417, 428-32 (6th Cir. 2014), and *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997); *see also* "Bullets for Each of You": State-Sponsored Violence since Zimbabwe's March 29 Elections, Human Rights Watch, Jun 9, 2008, *available at*: https://www.hrw.org/report/2008/06/09/bullets-each-you/state-sponsored-violence-zimbabwes-march-29-elections.

(c) The Proposed Rule Narrowly Defines Harm Rising to the Level of Persecution, Impermissibly Altering the Accepted Definition (8 CFR § 208.1(e); 8 CFR § 1208.1(e)).

i. The proposed standard of "extreme" harm and "exigent" threats is too restrictive and without authority.

The proposed regulation would provide the first regulatory definition of persecution, dramatically uprooting decades of caselaw in order to implement a narrow concept of persecution that would preclude asylum seekers from obtaining the protection from harm that they require. For the past 35 years, the concept of persecution in asylum law has been defined by *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) 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."

This proposed rule would further delimit the concept of persecution by requiring that the harm be "extreme" and threats be "exigent." These concepts further narrow the accepted definition that has governed asylum law for decades. "Extreme" harm goes well beyond the current definition that allows for harm that does not result in permanent or serious injury to nonetheless be considered persecution.[40]

ii. The proposal does not recognize the viability of emotional harm, harm to children, or the cumulative effects of harm.

In addition, the Discussion and language of the regulation do not acknowledge that persecution may be emotional as well as physical. This has been recognized by numerous circuits and was tacitly acknowledged by Congress.[41] This has also been recognized for a child in his or her reaction to injuries suffered by the parents.[42]

The Discussion then seeks to further restrict which acts may be considered persecution through overly-broad examples of which acts are *not* considered persecution. These regulatory exclusions would unfairly result in denials of legitimate claims by adjudicators who fail to consider the cumulative effects of harm, particularized violence that results within a context of broader violence, or the different impact of instances of harm on particularly vulnerable populations, such as children.

For instance, what may constitute "minor beating" of an adult that would not constitute persecution for asylum purposes could create lifelong psychological trauma for a young child. Indeed, the proposed regulations cite *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231 (11th Cir. 2013) to support their restrictive proposal regarding persecution; however, this decision explicitly acknowledges the need to "evaluate the harms a petitioner suffered cumulatively – that is, even if

[40] *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998).

[41] *See Kovac v. INS*, 407 F.2d 102, 106-07 (9th Cir. 1969). *See Also Gatimi v Holder,* 578 F3d 611 (7th Cir 2009).

[42] *Hernandez-Ortiz v Gonzales,* 496 F3d 1042 (9th Cir, 2007).

each fact considered alone would not compel a finding of persecution, the facts taken as a whole may do so." *Id.* at 1235.

iii. The proposal unduly eliminates the important role of threats in persecution.

In addition, the proposed regulation dismisses out of hand the use of threats as a means of persecution by stating that "repeated threats with no actions taken to carry out the threats" do not constitute persecution. This exclusionary definition fails to take into consideration the dynamics of power and the context within which threats may be made. A state actor may coerce the desired behavior by a simple threat due to the powerful means it controls. Although no further acts specific to an individual may have been carried out, if that state has engaged in violent and punitive behavior against similarly situated individuals, the threat against this particular asylum seeker is nonetheless sufficient to instill a very credible fear of future harm.

An example would be where a pro-democracy activist is threatened by state police with imprisonment and death should he not halt publishing an online message board for other pro-democracy activists. One of the activist's colleagues who runs a similar message board also received the threat and has subsequently been kidnapped, his dead body later found mutilated on the street. In this example, the oppressive state would not be required to take any further steps to compel the asylum-seeking activist's obeisance or flight, since the very credible nature of the threat has been made abundantly clear. This regulation would foreclose this activist's ability to seek asylum in the U.S.

iv. The proposal's focus on "intermittent harassment" would lead to unjust results.

In support of their argument regarding intermittent harassment, the Departments rely upon the case of *de Zea v. Holder*, in which the asylum seeker was shot at twice, ten years apart, and in neither instance do the Departments pay much attention to the threats he received. This case, which deals with an unusual situation, forms the backbone of the Departments' argument that intermittent harassment cannot constitute a basis for persecution. A much more typical case is where harassment and threats are more serious and, though not constant, are received much more frequently than every ten years. Are the Departments saying that this situation would not be deserving of protection? This could lead to very unjust results.

More broadly, this regulation would fail to recognize the significant chilling effect of state behavior on someone pursuing their legal rights; certainly, repeated detentions and threats would be sufficient to prevent an individual from, for instance, being politically active. In addition, these regulations would likely preclude individuals from seeking asylum on the basis of harm or threats of harm to family members or colleagues. *See Salazar-Paucar v. I.N.S.*, 281 F.3d 1069 (9th Cir. 2002) *and Matter of A-K-*, 24 I&N Dec 275, (BIA 2013).

v. The proposal departs from USCIS guidance for adjudicators, without explanation.

Lastly, the proposed regulations provide no explanation of the agencies' departure from the framework for contemplating persecution set forth in the Asylum Officer Basic Training Course.[43] These materials discuss and categorize various types of harms that can constitute persecution, such as human rights violations, discrimination and harassment, arrests and detention, economic harm, psychological harm, sexual harm, and harm to family members or other third parties. The discussion of the proposed regulations provides no explanation for discarding this framework and upending decades of interpretive caselaw included therein.

By defining "persecution" so narrowly, this regulation will have the effect of depriving countless legitimate asylum seekers that are fearing real harm if returned to their country of origin of the safety and protection they should be afforded under our asylum laws. The purported rationale for doing so is to define persecution and clarify what does and does not constitute persecution. However, through this regulation, rather than seeking to provide this definition and clarity based on the current state of the law, the Departments instead seek to unilaterally and dramatically restrict which types of harms can be considered persecution, in contravention to decades of caselaw and guidance from the UNHCR that demands a "particular geographical, historical and ethnological context" to evaluate claims of persecution. *See UNHCR Handbook* at ¶ 53.

(d) The Proposed Rule Inexplicable contradicts decades of case law defining the standards for determining what persecution is *on account of* a protected ground.

Ayuda strongly opposes the proposed changes to the nexus requirement, which outlines nine[44] categories of claims where the Secretary of Homeland Security and Attorney General will "not favorably adjudicate" asylum and withholding claims. Thus, the proposed changes, in essence, completely foreclose nine of the most common avenues of asylum for our clients and are contrary to longstanding legal precedent and congressional intent. Further, because the list is said to be non-exhaustive, one can anticipate additional critical areas being declared off-limits in the future.

The Departments provide virtually no rationale for these seismic changes. First, they write that nexus requirements have been shaped more by case law than by rulemaking. But while the rules proposed here are purported to be "rooted in case law," the Departments are extremely selective as to which case law they rely upon, with no explanation as to why they exclude contrary case law and longstanding asylum principles.

Second, the commentary also says that the changes will "further the expeditious considerations of asylum and withholding claims." While we favor the efficient use of government resources in adjudications, efficiency cannot come at the expense of our country's

[43] USCIS Training Module: Definition of Persecution and Eligibility Based on Past Persecution, AILA Doc. No. 17051034, June 12, 2015, *available at*: https://www.aila.org/infonet/uscis-training-module-definition-of-persecution.
[44] The rules list eight changes but then add "cultural stereotypes".

statutory, treaty, and moral obligations to ensure due process for asylum seekers. These rules seem to us to be a continuation of efforts by this administration to curtail human rights in an effort to cut off the flow of immigrants. While we are cognizant of the immense asylum backlogs at both USCIS and EOIR, short-circuiting due process is not the legal or moral way to lessen the backlogs.

The Departments' final justification is that these changes will "provide clearer guidance" for asylum adjudicators in determining nexus. However, as discussed below, some of the proposed standards do just the opposite by providing muddled or unclear language or tests.

In reality, the proposed changes constitute a frontal assault on the long-standing legal rights of women, girls, LGBTI individuals, and individuals fleeing gang persecution and other non-state actors engaging in extra-legal activity to a full and fair asylum process. Courts have consistently held that asylum law requires case-by-case adjudication on the facts and merits of each claim. But the nexus section proposes sweeping blanket denials of asylum claims by closing off entire areas of inquiry and preventing adjudicators from considering case- and country-specific factual elements.

The Departments claim that these rules do not absolutely foreclose claims that possess applicable elements of the listed *nexi*. The Departments themselves note that "additional evidence" and attention to the "fact-specific nature" of determinations could be the basis for finding nexus in "rare circumstances." But these are presented as an after-thought, with no guidance as to what such additional evidence should demonstrate. So, we see through such noise and realize that these nexus restrictions will eliminate perhaps 99% of historically-deserving claims – or, as the Discussion phrases it, "in rare circumstances."

And the impact will have adverse consequences beyond the immediate issue of nexus. For instance, the proposed rules will allow adjudicators to pretermit applications for asylum, withholding, and CAT relief that do not present *prime facie* claims for relief. Assumptions regarding the sufficiency of nexus, made by a cursory review of applications without any contact with the applicant, will result in inappropriate rejection of claims on this basis. So, an application that describes a personal animus will be pretermitted without interviewing the asylum seeker to discover that such animus is, in reality, based on religious antipathy or opposition based on imputed political opinion.

i. Gender-Based Violence

Principally, the proposed rule would categorically eliminate claims where an individual suffered persecution on account of their gender. Many of Ayuda's clients have fled severe domestic violence, human trafficking, sexual assault, female genital mutilation, and persecution on account of their LGBTQ identity. These clients and thousands of other asylum seekers across the country would be ineligible for asylum under this new rule. For over 30 years, legal precedent from both the BIA and a cross-section of circuits has held that individuals who have suffered or fear violence based on their gender are eligible for asylum.[45] In addition, USCIS has

[45] *See* Matter of Acosta, 19 I.& N. Dec. 211 (BIA 1985) (recognizing that "sex" is a common characteristic of a particular social group that its members cannot change or should not be required to change); Matter of Toboso Alfonso, 20 I.&N. Dec. 819 (BIA 1990) (recognizing sexual orientation as an

issued detailed guidance for asylum officers on how claims based on sexual orientation and gender identity can support an asylum grant based on membership in a particular social group.[46]

The Departments cannot disregard these precedents or agency guidance in dismantling asylum protection for all survivors of gender-based violence. In fact, the Departments have provided only a disingenuous fig leaf to justify this legal sea change in asylum law. For instance, the administration provides a single precedent, *Niang v Gonzales,* from the Tenth Circuit, including a quotation from the decision to suggest that gender cannot constitute a social group. But the very next sentence in the *Niang* opinion clarifies that gender *can*, in fact, constitute a social group:

> But the focus with respect to such claims should be not on whether either gender constitutes a social group (*which both certainly do*) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted "on account of" their membership. 8 U.S.C. § 1101(a)42(A). (Emphasis added)[47]

Excluding any claim where gender is one of the central reasons for persecuting the applicant (nexus) is contrary to the case-by-case adjudication required under U.S law.

ii. <u>"Interpersonal Animus"</u>

Additionally, the rule further restricts access to the asylum system for survivors of gender-based violence by barring claims based on "interpersonal animus" where the persecutor has not targeted other members of the particular social group. Ayuda works with many asylum seekers who have fled very abusive domestic violence from countries that do not afford adequate protection. The husbands and boyfriends of these asylum seekers do not attack every woman in their sights.

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immutable characteristic); Matter of Kasinga 21 I.&N. Dec. 357 (BIA 1996) (holding that female genital mutilation was persecution on account of the applicant's gender and membership in a tribe); Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000) (recognizing that transgender identity constituted a cognizable particular social group because sexual orientation and sexual identity are immutable characteristics that an individual should not be required to change); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (holding that "Somali females" constitute a particular social group and "that a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM"); Cece v Holder, 733 F.3d 662, 672 (7th Cir. 2013) (holding that "young, Albanian women who live alone" constitute a particular social group); De Pena-Paniagua v. Barr, 957 F.3d 88, 89 (1st Cir. 2020) (holding that there is no categorical rule prohibiting applicants from establishing asylum based on their membership in a particular social group defined as women "unable to leave" a domestic relationship).

[46] *See also* U.S. CITIZENSHIP AND IMMIG. SERV., RAIO DIRECTORATE – OFFICER TRAINING: GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 20-21 (2015)("In an LGBTI claim, you would consider evidence that the persecutor banned or tried to change the applicant because the persecutor knows or believes the applicant belongs to a sexual minority.") Available at: https://www.aila.org/infonet/uscis-guidance-adjudicating-lgbti-refugee-asylum

[47] 422 F3d. 1187, 1200 (10th Cir. 2005)

Yet, this violence occurs intimately on account of the woman's gender and the persecutor's view on her proper role in their relationship and in society. Domestic violence abusers target their victims as a mechanism for maintaining power and control. Under this rule, these victims would be barred from seeking asylum because their partner did not threaten another woman in their community. Moreover, it is often the case that the very reason the state permits or assists the persecutory in perpetuating this violence is because of the way that the state itself views women writ large and their proper role in society.

Indeed, there has never been a fixed, well-defined requirement in asylum law that the persecutor must target other individuals.[48] The NPRM cites only one precedent (by the BIA) as controlling, *Matter of R-A-*. The selection of this decision is curious because it is contrary to the departments' position here. *R-A-* was remanded twice by two different Attorneys General. DHS submitted a brief in the case that conceded that the applicant should be granted asylum based upon the social group of "married women in Guatemala who are unable to leave the relationship" where no evidence was presented that the abuser victimized any other members of that group.

In fact, *Matter of R-A-* runs exactly counter to a subsequent BIA decision, *Matter of A-R-C-G-*. The Board reversed the IJ's denial and found that the social group of unmarried Guatemalan women who are unable to leave their relationship satisfied all of the BIA's recently-clarified test for the viability of social group claims: immutability, particularity, and social distinction.[49] If the Departments are going to cherry-pick case law, they should be careful to select settled and viable precedent.

It should also be noted that, under the proposal, a Catholic asylum seeker fleeing persecution on account of her religion would not have to prove that her persecutor attacked other Catholics. This rule imposes additional barriers to seeking asylum based on membership in a particular social group and will disproportionately harm individuals fleeing domestic violence and violence on account of their gender identity.

iii. Personal animus or retribution

Ayuda also disagrees with the way that the ban on claims based on "personal animus or retribution" has been framed. Ayuda recognizes that asylum law does not – and should not – protect against purely personal acts of reprisal. However, our concerns are two-fold.

First, Ayuda fears that this language will cause many valid asylum claims to be rejected at the credible fear stage. In USCIS's own training guidelines, the agency cautions adjudicators that:

> Persecution that at first glance may appear to be based on a personal vendetta or dispute may actually be on account of a protected ground….when the persecutor and the applicant have a personal relationship, the persecutor might target the applicant because

[48] *See* U.S. CITIZENSHIP AND IMMIG. SERV., RAIO DIRECTORATE – OFFICER TRAINING: NEXUS AND THE PROTECTED GROUNDS, 19 (2019) ("While evidence that the persecutor seeks to harm others is relevant, it is not required.") Available at: https://www.uscis.gov/sites/default/files/files/nativedocuments/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf

[49] 26 I&N Dec. 388, 392-395 (BIA 2014).

of a belief or trait that is not immediately obvious to the adjudicator. You should carefully consider whether the applicant is in fact being targeted because of a belief or trait that might define a social group.[50]

Second, Ayuda fears that many claims based on particular social group and imputed political opinion will be summarily and unfairly rejected. Regarding social group, there is a danger that instances of intrafamilial violence, such as honor killings,[51] domestic violence, sexual assault, and trafficking involving family members, will be dismissed without a proper and full analysis of the persecutors' motives.

Likewise, injuries inflicted in disputes that may appear to be purely personal in nature often mask motivations based on the imputation of political opinion. For instance, while the facts in *Zoarab v Mukasey* cited in the discussion suggest purely personal motives, other similar situations require a more thorough analysis. In *Khudaverdyan v Holder*,[52] the court reversed a denial at EOIR because what appeared to be a personal dispute between an Armenian national and a police official was in fact motivated by the official imputing a political opinion to the asylum applicant. The court urged a full case-by-case analysis, warning that something that "begins as a personal dispute can be interpreted as political dissent."[53]

While the Departments do not completely bar such claims, their ominous warning that a nexus could be found to exist in "rare circumstances," without emphasizing the need for a fact-specific analysis, heightens the danger of summary rejection of deserving claims at the credible fear or adjudication stage. Adjudicators should instead be required, as they are currently under asylum regulations, to fully assess the persecutor's motives in relation to the five statutorily protected grounds.

iv. Persecution By Gangs and other Non-State Organizations

Furthermore, the proposed rule would completely bar claims where an individual has faced persecution because he resisted recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations. The Departments argue that this proposal is supported by the Supreme Court's ruling in *INS v. Elias-Zacarias*; however, they have reached a conclusion that is inaccurate and much broader in scope than the Supreme Court reached. In *Elias-Zacarias,* the Supreme Court held that a guerilla organization's attempt to forcibly recruit a person does not *per se* constitute persecution on account of political opinion.[54] However, recruitment could constitute persecution had the respondent provided sufficient evidence that he was recruited due to his political opinion.[55]

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[50] *Id.* at 20, 45.
[51] *See e.g.* Sarhan v Holder, 658 F.3d 649, 656 (7th Cir 2011) (holding that a planned honor killing was not a personal dispute between a brother and sister, but rather was based on her membership in a particular social group and the "complex cultural construct that entitles male members of families dishonored by perceived bad acts of female relatives to kill those women.")
[52] 778 F3d 1101, (9th Cir 2015).
[53] *Id,* at 1108.
[54] INS v. Elias-Zacarias, 502 U.S. 478, 479 (1992).
[55] *See id.* at 482.

So, contrary to the Departments' suggestion and resulting proposed rule, *Elias-Zacarias* does not foreclose all political opinion claims based on guerilla or gang recruitment. Rather, a fact-specific inquiry is required into whether the victim was targeted due to his own political beliefs.

Even in the wake of *Elias-Zacarias*, appellate courts have continued to affirm that claims based on recruitment require a detailed examination of the specific factual situation.[56] Ayuda represents many asylum seekers who have fled Guatemala, Honduras, and El Salvador due to pervasive gang recruitment and violence. Under this new rule, our clients will have no opportunity to present evidence that their refusal to join a gang is motivated by their political opinion or their membership in a cognizable particular social group. The Administration's blanket ban on recruitment-related claims is plainly contrary to Supreme Court and Circuit Court precedent, and Ayuda urges the Departments to rescind it.

v. Generalized disapproval, disagreement, or opposition to gangs, criminal, terrorist, guerilla, or other non-state actors

Furthermore, the rule further restricts access to the asylum system by foreclosing any claims based on "generalized disapproval, disagreement, or opposition to" gangs, criminal, terrorist, guerilla, or other non-state actors absent "expressive behavior in furtherance of a discrete cause against organizations related to control of a state." Principally, this rule is contrary to recent precedents in multiple circuits, holding that opposition to non-state actor violence can constitute a political opinion or form the basis of a particular social group.[57] Second, USCIS's own training guidelines emphasize the need for an individualized analysis of political opinion cases involving opposition to gangs.[58] The Departments provide virtually no justification for abandoning such recent case law and agency guidance.

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[56] *See* Marroquin-Ochoma v. Holder, 574 F.3d 575, 577 (8th Cir. 2009) ("At the outset, we reiterate that "careful attention to the particular circumstances surrounding the alleged persecution remains necessary even if the persecution is generally categorized as extortion or recruitment."); Zhang v. Gonzales, 426 F.3d 540, 546–47 (2d Cir. 2005) (rejecting "the categorical rule that opposition to government extortion cannot serve as the basis for a claim based on political opinion" and instead requiring "examination of the political context in which the dispute took place.").

[57] Regalado-Escobar v. Holder, 717 F.3d 724, 729 (9th Cir. 2013) ("When a political organization has a pattern of committing violent acts in furtherance of, or to promote, its politics, such strategy is political in nature; it advances a political goal through certain means rather than others. Therefore, *opposition to the strategy of using violence* can constitute a political opinion that is a protected ground for asylum purposes."); Marroquin-Ochoma 574 F.3d 574, 578 (8th Cir, 2009) (recognizing that "opposition to a gang such as Mara Salvatrucha may have a political dimension."); N-L-A- v. Holder, 744 F.3d 425, 439 (7th Cir. 2014) (holding that "Colombian land owners who refuse to cooperate with the FARC" are a cognizable particular social group).

[58] U.S. CITIZENSHIP AND IMMIG. SERV., RAIO DIRECTORATE – OFFICER TRAINING: NEXUS AND THE PROTECTED GROUNDS, 19 (2019) ("To show that violence inflicted by gang members has a nexus to the applicant's actual or imputed political opinion, an applicant needs evidence that he or she was politically or ideologically opposed to the gang's particular ideals or to gangs in general (or that the gang believes this) and not merely that he or she did not want to be personally involved in or had an aversion to specific activities of the particular gang").

Additionally, as referenced in our introduction to the Nexus section, while the rule purports to provide clearer guidance for asylum adjudicators, the language in the rule is vague and will be difficult to apply in practice. What counts as "expressive behavior" against a gang? Does attending a community meeting about keeping youth in schools and off the streets count as "expressive behavior" or "generalized opposition"? What about refusing to pay a gang member who demands extortion money for "protecting your business"? What about voting for a local official who is strongly anti-gang? What about campaigning for a local official who is strongly anti-gang?

In short, this rule will result in the obliteration of a major component of one of the statutory bases for asylum without justification. And, in the process, it creates confusion and a lack of clarity for adjudicators. In addition, the rule fails to consider that, in many situations, remaining neutral is a political opinion.[59] In many of our clients' home countries, gangs or other non-state actors will violently attack community members who do not actively support their cause.

vi. Perceived past or present gang affiliation

This rule completely bars claims where an individual was persecuted on account of their "perceived, past or present gang affiliation." The administration argues that this category is supported by case law, yet multiple Circuit Courts have held that past gang membership can constitute a particular social group and persecution on account of that membership can be grounds for asylum and withholding of removal.[60] Moreover, as both the Fourth and Seventh Circuits have recognized, the INA does not disqualify past gang members from qualifying for asylum or withholding of removal, and attaching this condition is "untenable as a matter of statutory interpretation and logic."[61]Ayuda agrees with the Fourth, Sixth, and Seventh Circuits

[59] See Arriaga-Barrientos v. U.S.I.N.S., 937 F.2d 411, 413 (9th Cir. 1991) (holding that "political neutrality is a political opinion or in other words, that the absence of a political opinion is a political opinion.")

[60] Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009) (holding that a former member of MS-13 was a member of a particular social group because "being a former member of a [gang] is a characteristic impossible to change, except perhaps by rejoining the group."); Martinez v. Holder, 740 F.3d 902, 911 (4th Cir. 2014) (holding that former gang membership is an immutable characteristic and that it "would be perverse to interpret the INA to force individuals to rejoin such gangs to avoid persecution"); *see also* Urbina–Mejia v. Holder, 597 F.3d 360, 366 (6th Cir. 2010) (holding that former gang membership is an immutable characteristic).

[61] Martinez, 740 F.3d at 912 ("Nothing in the statute suggests that persons categorically cannot be members of a cognizable "particular social group" because they have previously participated in antisocial or criminal conduct. Rather, Congress has identified only a subset of antisocial conduct that would bar eligible aliens from withholding of removal, defined by the alien's engaging in past persecution, committing a particularly serious crime, or presenting a danger to the security of the United States….But Congress has said nothing about barring former gang members."). *See also* Benitez Ramos v. Holder, 589 F.3d at 439-30 ("there are hints in the Arteaga opinion that being persecuted for being a former member of a gang should not be a basis for asylum or withholding of removal either. That is not Congress's view. It has barred from seeking asylum or withholding of removal any person who faces persecution for having [committed specific crimes]…But it has said nothing about barring former gang members, perhaps because of ambiguity about what constitutes a 'gang'").

that persecution on account of past gang membership is a ground for asylum and withholding of removal, and the administration's failure to consider this extensive case law and congressional intent is arbitrary and capricious.

vii. Evidence of Social Norms and Attitudes

Finally, Ayuda firmly opposes the ban on considering evidence of social norms and attitudes in the nexus analysis. The proposed rule bars consideration of any cultural stereotypes related to race, religion, nationality, and gender, such as evidence that a country has a "culture of machismo" or a "culture of family violence." The decision to ban all evidence of truly pervasive social norms is arbitrary and capricious under Section 706(2)(A) of the Administrative Procedure Act. An agency's action is arbitrary and capricious if it fails to "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[62]

Here, the Department of Justice and the Department of Homeland Security have utterly failed to articulate a rational connection between the facts and their choice to ban all evidence of social norms. The NPRM cites deficiencies related to outdated and uncited sources, such as the use of a partial quote from an 8-year-old news article to prove Guatemala's culture of machismo. However, it is entirely irrational to equate unsupported, outdated sources with extensively documented and credible evidence. The Departments could have simply prohibited the use of uncited sources, but, rather, they banned all evidence of pervasive social norms, including extensively documented evidence from the U.S. Government.

Under this new rule, a Serbian transgender asylum seeker with HIV could not present evidence from the U.S. State Department's 2019 Human Rights Report that "homophobia and transphobia were deeply rooted in [Serbian] society."[63] The immigration court could not consider the State Department's thorough analysis that there is "significant prejudice against persons with HIV/AIDS in all aspects of public life, including employment, housing, and access to public services."[64]

Yet, evidence of pervasive social norms and attitudes is critical circumstantial evidence in asylum cases. Our attorneys frequently utilize extensively documented evidence from government reports and country experts to help demonstrate the nexus requirement and a persecutor's motive. Persecutors are often emboldened when community members tolerate violence against a particular social group because the persecutor has no reason to fear retribution or interference. In addition, the proposed rule belies the Departments' mention of "fact-specific" evidence, which could explain perceived nexus deficiencies.

Furthermore, evidence of pervasive social attitudes also frequently reveal that it would be unsafe to relocate internally to another part of the country. This proposal is arbitrary and capricious under the APA standards and is inconsistent with the Supreme Court's decision in *INS v. Elias Zacarias*, which held that asylum seekers can demonstrate the persecutor's motive

[62] Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 43 (1983).
[63] U.S. Department of State 2019 Human Rights Report: Serbia. https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/serbia/
[64] Id.

through either direct or circumstantial evidence.[65] Ayuda urges the Departments to rescind this proposed ban entirely.

In conclusion, the proposed changes to the nexus requirement would eviscerate the U.S. asylum system and overrule established legal precedent. Under these proposed changes, the vast majority of our clients would no longer qualify for asylum.

(e) Internal Relocation

The current regulations have long provided valuable guidance to adjudicators in determining whether internal relocation is possible for an asylum seeker and, if possible, whether it is reasonable for him/her to do so. They succinctly provide a non-exhaustive list of five factors to be considered.

i. Deficiencies in the current system are not explained.

The Departments propose wholesale changes to the current factors for adjudicators to consider when determining whether an applicant can reasonably relocate within their home country. But the rationale provided for such enormous revisions is scant. The Discussion to the proposed regulations explains that the primary goal for the substantive changes is to ensure that adjudicators have "practical guidance" in determining the reasonableness of expecting internal relocation by providing "the most relevant factors for adjudicators to consider".

But it doesn't explain why the current non-exhaustive list of factors does not provide "practical guidance". Its conclusion that the utility of this list is "undermined" by the caveat that the factors "may or may not be relevant" to the determination is ludicrous. Of course, not all factors will be relevant in every single case, and adjudicators certainly understand this.

ii. Elimination of current factors poses enormous barriers to internal relocation.

While the proposal maintains a "totality of the circumstances" test, it eliminates all five of the enumerated factors in the current regulations and replaces them with three new ones. But the current list includes practical and realistic factors impacting whether someone can reasonably live safely in another part of their own country.

For instance, why is "ongoing civil strife" in one's country of origin no longer to be specifically considered by adjudicators? In *Awale v Ashcroft*, internal relocation was found to be not practical because of evidence presented that members of Somali minority clans continue to be "subjected to harassment, intimidation and abuse by armed gunmen" and that travel is difficult because rival groups control routes of transportation.[66]

[65] INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).
[66] 384 F3d 527, 532 (8th Cir. 2004)

It is also unclear, and not explained, why the factor in current regulations of the presence of "social and cultural constraints, such as age, gender, health, and social and familial ties" is not considered relevant as indicative of the reasonableness of internal relocation and therefore is stricken. In *Knezevic v Ashcroft*, the court was swayed by evidence showing that Bosnian Serb applicants, ages 75 and 66, would have great difficulty finding employment and thereby be able to support themselves.[67]

Age is only one of many factors that can impose impractical and often insurmountable barriers to relocation. Single and unprotected women and mothers, minors, members of religious and ethnic minorities, persons who are disabled, and persons suffering from physical or mental health issues (often as a result of the very persecution they seek to escape) may face much greater hurdles to being able to live safely and support themselves in many developing countries than in the United States.

These practical considerations are included in the existing list of factors that the Departments would arbitrarily eliminate.

iii. <u>The proposed factors are exceedingly narrow.</u>

The absence of explanatory background or context continues with the presentation of the proposed regulations. We welcome the preservation of the "the totality of the relevant circumstances" test, but, in listing three new factors, the strong suggestion in the proposed rule is that these are the <u>only</u> factors that are relevant to be considered by the adjudicator. While not specifically foreclosing the consideration of other factors, there is no language inviting or encouraging the adjudicator to take other circumstances into account.

No guidance is provided to adjudicators as to why these three factors are listed and in what context they should be considered. It is not clear what "geographic locus of the alleged persecution" means, for instance, or why it is more relevant than the excised factors.

Similarly, the "size of the country" is a factor but without any guidance as to how this is to be analyzed. By inclusion of this factor, the Departments seem to be making an assumption that a larger country would be easier for an asylum seeker to relocate in than a smaller country. While this may seem logical, examples belie this rationale. Afghanistan is the size of Texas but numerous precedents attest to citizens' inability to safely relocate there.

Such a blanket assumption with no encouragement of a specific analysis would unduly force the denial of deserving asylum applicants. Colombia is as big as California and Texas, combined but non-government forces in the recent past have prevented Colombians from safely relocating.

[67] 367 F3d 1206, 1214 (9th Cir 2004)

In addition, the new regulations provide insufficient guidance as to how the "reach and numerosity" of alleged persecutors are to be factored in.

iv. One factor is, in fact, a mandatory adverse factor.

The proposal purports to list four factors in its revised list. However, the fourth factor listed in the proposed rules – the asylum applicant's "demonstrated ability to relocate to the U.S." – is, in reality, an adverse factor that adjudicators will now be required to consider. Because the INA requires that asylum seekers be physically present in the US., every would-be asylee or applicant for withholding would automatically enter the asylum office or the immigration court with one strike already against them, whether their entry into the U.S. was lawful or not.

Furthermore, the addition of this factor is like mixing apples and oranges. The internal relocation discussion has historically focused on factors in one's own country that prevent a safe and reasonable change of residence. The reach and numerosity of persecutors have no bearing on one's ability or need to flee to the U.S. for protection.

v. The proposed regulations do not provide a meaningful opportunity to communicate concerns.

Given the Departments' proposed wholesale changes to the current factors for adjudicators to consider, the failure to provide rationale or justification is glaring. They do not provide any data, analysis, or insight into why the factors currently listed in 8 CFR 208.13 are deemed not relevant or less relevant than the proposed factors in determining whether internal relocation is reasonable.

This is a violation of the APA, which directs that interested parties be afforded a meaningful opportunity to communicate information, concerns, and criticisms to the agency during the comment period. To achieve this, the agency must "provide an accurate picture of the reasoning that has led the agency to the proposed rule". *Connecticut Light & Power Co. v. Nuclear Reg. Comm.,* 673 F.2d 525, 528, 530 (D.C.Cir.1982). The commentary is devoid of such reasoning.

This is not a mere exercise in semantics. Enormous stakes are involved. What hangs in the balance is whether applicants who have already demonstrated past persecution by government actors (where ICE seeks to overcome the presumption) and by non-government actors should nevertheless be denied the safety of the United States and be removed back to dangerous circumstances.

vi. Changes in the burden of proof apply too broad of a brush.

We appreciate that the new rules would retain the presumption of countrywide danger when past persecution by the government is established. However, the exclusion of this presumption when past persecution is not by the government or is not "government-sponsored" unfairly shifts the burden. It is not correct to state that non-government entities

normally are not expected to have a national reach. Just the reverse is the reality in many countries. This includes non-governmental groups, such as gangs and ultra-left or ultra-right groups that control vast territories of their countries and that often work in tandem with law enforcement or other government bodies. The same is true regarding many religious extremist groups where the separation of church and state does not exist.

(f) Firm Resettlement

The proposal would greatly extend the bar to asylum eligibility beyond the current regulations and, significantly, beyond the plain meaning of the statutory language. It is, thus, *ultra vires.*

Under the statute, INA 208(b)(2)(A)(vi), asylum is barred in cases where "the alien *was firmly resettled* in another country prior to arriving in the United States." (emphasis added). While Congress did not define either "firmly" or "resettled" in the statute, the proposed regulations are in direct conflict with the understood meanings of each of the words as well as the past tense indicated by the use of the word "was."

It seems clear that the proposed regulations would contradict the plain meaning of Congress' terminology in the statute. The inclusion of the word "was" in the phrase "was firmly resettled" is indicative of the past tense – an applicant must have already been firmly resettled for this bar to apply. Any reading that looks to whether an applicant *could have* resettled, and not whether the applicant *was already* resettled, is in direct conflict with the plain meaning of the statute and thus, exceeds the intent of Congress. So, for instance, to consider a person who transited through any country where they could have applied for any form of indefinitely renewable status as firmly resettled is an unsupportable reading of the statute.

Similarly, while the current regulations have provided a framework for determining when someone is "firmly resettled," in the absence of statutory definitions, the proposals would contradict the plain meaning of these words. The statute's inclusion of "firmly" to modify "resettled" indicates that an applicant's resettlement in a third country must be solid, fixed, or not subject to change or revision. (*see* "firm," *Merriam Webster* (2020), *available at* https://www.merriam-webster.com/dictionary/firmly?src=search-dict-hed*).* An analysis of multiple factors regarding the applicant's past physical presence in a third country is necessary to determine if the applicant was "firmly" resettled.

In addition, common definitions for the word "resettled" are in direct conflict with proposed circumstances one and three. "Settle" is defined as, among other things, **"**to place so as to stay" and "to establish in residence." *See* "settle," *Merriam Webster* (2020), *available at* https://www.merriam-webster.com/dictionary/settle#h1. But the proposals would encompass situations that would not constitute "resettlement."

i. Redefinition of What Constitutes permanent legal status in a third country.

The first circumstance would bar an asylum applicant who resided in a third country while in permanent legal immigration status. This is similar to the current framework. However,

the commentary in the first circumstance includes additional conditional and tenuous situations that would also constitute a bar to asylum based on firm resettlement.

Primarily, the proposed regulation would bar a person if they "could have resided" in a "non-permanent but potentially indefinitely renewable legal immigration status" in "a country through which the alien transited prior to arriving in or entering the United States." This is far beyond the clear intent of the statute, which requires that a person's resettlement be "firm."

For support of this excessive and illegal departure from the statute, the Departments rely on a recent BIA decision, *Matter of K-S-E-*.[68] But, in that case, the applicant acknowledged receiving an offer of permanent residence in a third country. That detail hardly supports the extreme restriction of access to asylum that this proposal represents, i.e., someone who "could have" received a "potentially renewable" status. The NPRM also cites a passage in *Matter of A-G-G-*,[69] but, again, this references a mechanism for obtaining permanent residence.

In addition, this proposed provision would amount to a Safe Third Country agreement since it would penalize a refugee for failing to apply for status in a country through which they transited. This is in clear contravention of INA §258 (a)(2)(A), since it would place an expectation on these persons to apply in countries that the U.S. has not determined have "full and fair" asylum procedures. Until the current administration, the U.S. had entered into such an agreement with only one country (Canada). This proposal is reminiscent of this administration's efforts to restrict access to asylum by creating the equivalent of Third Country Agreements with multiple Central American countries.

ii. Extension of Bar to Individuals merely residing "voluntarily" in a third country, regardless of status.

The second circumstance would bar applicants who "resided voluntarily, and without continuing to suffer persecution, in any one country for more than a year." In drafting this, the Departments were clearly influenced by cases such as *Matter of A-G-G-*, where a Mauritanian citizen fled to Senegal, where he married a Senegalese citizen, had children and held a job, resided for eight years, and never applied for any immigration status, though he could have applied for permanent status as the spouse of a Senegalese citizen.

But most situations are less clear-cut than that presented in *A-G-G-*. Much more typically, asylum seekers remain in another country temporarily without forming significant economic or social roots, while they arrange onward travel. Sometimes, refugees are so traumatized by the persecution they suffered that they need some period of time to stabilize psychologically in order to determine their next steps.

[68] 27 I&N Dec 818 (BIA 2020)
[69] 25 I&N Dec 486 (BIA 2011)

iii. Access to asylum in other countries

The Discussion suggests that the enhanced restrictions are, in part, justified by the "increased availability of resettlement opportunities" around the world. It references the number of countries that have signed the Refugee Convention since 1990, according to a UNHCR list.

But this is taking false comfort in a list while ignoring real-world realities. In countries that are Western democracies and on the UNHCR list, additional requirements and other conditions severely restrict access to asylum. For instance, Belgium imposes a time limit for applying for asylum of "eight working days" after arriving in the country.[70] In Australia, all asylum seekers are forced to await the long process on an island far off the Australian coast, where they live under "appalling" conditions.[71]

And during the Covid-19 pandemic, Amnesty International reports that countries that might normally process asylum seekers have closed their borders. This includes countries that are on the UNHCR list as signatories to the Convention, such as Burundi, Ethiopia, Kenya, and Uganda.[72] So, refugees may find themselves unable to reach a country where they could otherwise apply for asylum. Under the proposed procedures, they would be barred from U.S. asylum processes because of their inability to apply in a country in which they are trapped.

The Departments' failure to recognize the changed refugee landscape during the pandemic and to make appropriate accommodations is short-sighted and unfair.

The circumstances proposed by the Departments would encompass situations in which the applicant clearly had not been firmly resettled in a third country. These enumerated circumstances are overbroad and unreasonable readings of the statute. If enacted, the Departments' proposed reading of "was firmly resettled" would not be worthy of deference when challenged in federal court.

(g) Discretionary Determinations

The Departments seek to restrict the discretion of adjudicators by proposing a list of three "significantly adverse" factors that must be considered in the exercise of discretion, plus nine additional "adverse" factors that would "ordinarily result in the denial of asylum." The Departments' proposal weights these twelve adverse factors so heavily that the regulations, if enacted, would result in the denial of practically all asylum applications. The weight that these factors are to be given under the proposed regulations fly in the face of decades of precedent and the moral and legal obligations of our nation. In the commentary to support their proposals, the Departments consistently cite regulations, statutes, and case law in an incredibly inaccurate and irresponsible manner.

[70] https://www.asylumineurope.org/reports/country/belgium/asylum-procedure/procedures/registration-asylum-application
[71] https://www.amnesty.org/en/latest/news/2016/08/nauru-australias-shame-and-a-warning-for-europe/
[72] https://www.amnesty.org/en/latest/news/2020/06/east-africa-people-seeking-safety-are-trapped-at-borders-due-to-covid-19-measures/

To introduce this portion of the regulations, the Departments make several citations they state are in support of their proposal. A closer examination of these sources makes clear that there is no legal support for the drastic changes proposed by the Departments. The Departments cite *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987) to defend the new discretionary factors, stating that the case includes "a lengthy list of possibly relevant factors for consideration."

While this is true, the Departments gloss over what is arguably the most important part of *Pula*'s holding – "the discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; *the danger of persecution should generally outweigh all but the most egregious of adverse factors*." *Matter of Pula*, 19 I&N Dec. at 474 (emphasis added). Thus, absence of one shred of compassion or humanity in its laundry list of factors is at complete odds with the individualized analysis and holding in *Pula* or are country's legal and moral obligations. The Board in that decision actually reversed the IJ's denial of asylum on discretionary grounds and granted asylum. So, the Departments' proposal to introduce three factors that would be "significant adverse factors" and nine factors that would "ordinarily result in the denial of asylum as a matter of discretion" is not supported by *Pula*, but rather undermined by it.

In an attempt to further support the proposed regulations, the Departments compare the proposed regulations pertaining to discretion to regulations issued on discretionary considerations for other forms of relief, listing 8 CFR 212.7(d) and 1212.7(d). The Departments suggest that these prior regulations on discretion make it "similarly appropriate to establish criteria for considering discretionary asylum claims." The Departments fail to address two important differences between the cited regulations and the proposed ones.

First, 8 CFR 212.7(d) and 1212.7(d) state that the Attorney General generally would not exercise discretion to waive grounds of inadmissibility where an applicant had been convicted of violent or dangerous crimes, except in extraordinary circumstances. By limiting discretion to waive grounds of inadmissibility triggered by violent or dangerous crimes, the regulations laid out specific and compelling circumstances that applied only to a narrow subset of applicants. The same cannot be said of the present proposal, which seeks to limit discretion in such a broad manner that nearly every asylum applicant would be rejected as a matter of discretion.

The Departments' reliance on the above CFR sections, that deal with persons who have committed "violent or dangerous crimes" is ironic, given the demonization of asylum applicants in this proposal. This is apparent from the unrelenting focus on fraud, lying, forum-shopping, and gaming of the system without countervailing attention to a nuanced exploration of benign motivations or the impacts of harm and trauma.

Moreover, the regulations at 8 CFR 212.7(d) and 1212.7(d) relate to a statute that specifically confers the Attorney General discretion, INA 212(h) ("The Attorney General may, *in his discretion*, waive the application…") (emphasis added). The inclusion of the phrase "in his discretion" here, where it is not included in the asylum statute, suggests a broader range of discretion for the Attorney General. *See Zadvydas v. Davis*, 533 U. S. 678, 697 (2001) (stating "[t]he Government points to the statute's word "may." But while "may" suggests discretion, it does not necessarily suggest unlimited discretion"). Thus, while "may" connotes discretion, it

does not suggest "unlimited discretion," and the comparison to 8 CFR 212.7(d) and 1212.7(d) is insufficient to justify the sweeping changes the Departments seek to make through regulation.

Finally, while some discretionary decisions are shielded from judicial review by statute, discretionary decisions on asylum applications are exempted by statute and caselaw and remain judicially reviewable. 8 U.S.C. 1252(a)(2)(B)(ii); *see also Kucana v. Holder,* 558 US 233 (2010), FN 13 ("Congress excepted from §1252(a)(2)(B)(ii) 'the granting of relief under [§]1158(a).' Section 1158 concerns applications for asylum"). Therefore, discretionary decisions on asylum applications made under the proposed regulations will be judicially reviewable.

As the Departments conclude their commentary introducing the adverse discretionary factors they propose, the Departments make the claim that this proposed regulation would "build on the BIA's guidance regarding discretionary asylum determinations." No support could be found in existing BIA precedent for such a sweeping and restrictive view of discretion. To the contrary, a number of precedential cases reflect and build upon *Pula*'s holding that the most important factors when making discretionary determinations are humanitarian-related, i.e., the persecution the applicant suffered or would suffer. *See e.g. Matter of Pula, Supra*; *Matter of Chen,* 20 I&N Dec. 16 (BIA 1989) (holding that even though there was little likelihood of future persecution, the past persecution suffered by the applicant was a strong factor in the discretionary decision to grant asylum); *Matter of H-,* 21 I&N Dec. 337, 347 (BIA 1996) (stating "[c]entral to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past"). It is with this decades-long focus on humanitarian relief and the consideration of compassion that the Departments' proposed discretionary factors must be considered.

i. The first three factors

First, the Departments propose three "specific but nonexhaustive factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion." The Departments propose that these factors be "significant adverse factors" when making discretionary decisions. As discussed above, per federal court precedential guidance, the most important factor that adjudicators have weighed has been the persecution the applicant could suffer if deported. *See Matter of Pula,* 19 I&N Dec. 467. The Departments do not include this among their three factors; since restriction and efficiency appear to be the primary goals of these proposals. How else to explain why all three factors (plus the additional nine) would weigh so heavily against an exercise of discretion?

A. Unlawful entry or attempted unlawful entry

The Departments propose that entering or attempting to enter the United States unlawfully should be a significant adverse factor. Once again, the Departments cite *Matter of Pula* as precedent but, tellingly, are silent on the humanitarian concerns of the Board in *Pula,* and that such concerns should outweigh all but the most egregious of adverse factors.

The Departments state that they are concerned by the resources needed to "apprehend, process, and adjudicate the cases of the growing number of aliens who illegally enter the United States putatively in order to claim asylum." The U.S. government's own data contradicts the claim that there are a growing number of individuals entering the United States without inspection. According to Customs and Border Protection, October of 2019 represented the fifth straight month of decline in border apprehensions.[73] The Departments' concern for the "growing number of aliens who illegally enter the United States" is therefore misplaced.

In addition, the government has taken direct actions to impede asylum seekers from entering the U.S. at ports of entry to ask for asylum. Through metering, thousands of asylum applicants have been forced to wait in Mexico for months after attempting to present themselves at a port of entry to enter the U.S. to seek asylum only to be turned away.[74] The administration then enacted the so-called "Migrant Protection Protocols," forcing countless asylum applicants to remain in Mexico while they waited for their hearings.[75] There have been over 1,000 reported cases of violent crimes, including kidnapping, torture, and rape, among asylum seekers subjected to MPP.[76]

CBP has the discretion to return asylum seekers to Mexico under MPP, and also has the discretion to remove asylum seekers from the program and allow them to enter the U.S. to await their hearings.[77] DHS does, in fact, have the discretion to address the issue of entry without inspection at the Southern border – but such discretion does not exist in the adverse discretionary factors proposed here. If DHS were truly concerned about the number of people entering the U.S. outside of ports of entry, it would erase barriers to entering at ports of entry, not erect them. This would greatly reduce the resources needed to apprehend, transport, safeguard, and process such persons.

B. Failure to seek asylum or refugee protection in at least one country through which the applicant transited

The Departments cite Asylum Eligibility and Procedural Modifications, 84 FR at 33831 as justification for this proposal. This Rule has since been enjoined, and the Court of Appeals for the 9th Circuit has found that it is arbitrary and capricious and in conflict with 8 USC 1158. *See East Bay Sanctuary Covenant v. Barr* at 54 (9 Cir. July 6, 2020) (affirming preliminary injunction against the government, finding that the Rule is in contradiction with 8 USC 1158 and was arbitrary and capricious); *see also I.A. v. Barr* at 2 (D. D.C. June 30, 2020)[78] (finding that the Government "unlawfully promulgated the rule without complying with the APA's notice-and-comment requirements"). As a Rule that has been found arbitrary and capricious and

[73] https://www.cbp.gov/newsroom/national-media-release/southwest-border-apprehensions-decline-october
[74] https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border
[75] Id.
[76] https://www.washingtonpost.com/opinions/the-real-border-crisis-is-trumps-remain-in-mexico-policy/2020/03/06/02d6964c-5cd8-11ea-9055-5fa12981bbbf_story.html
[77] https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border
[78] https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv2530-55

contrary to the statute, 84 FR at 33831 is hardly a justification for such a drastic shift in discretionary determinations.

There are many justifiable reasons why a legitimate asylum seeker would not seek asylum in a transit country. These include the absence of full and fair refugee (asylum) procedures, barriers to applying for asylum, danger to foreigners in transit countries, and compromised functioning caused by the effects of traumatization.

To illustrate just one of these reasons that asylum seekers may not apply in a transit country due to appalling and dangerous conditions there, Mexico is listed as a signatory to the 1951 UN Convention and 1967 Protocol.[79] However, "68.3 percent of the migrant and refugee populations entering Mexico reported being victims of violence during their transit toward the United States".[80] Human Rights First has recently documented over 340 public reports of rape kidnapping, torture, and other violent attacks against asylum seekers in Mexico.[81]

Guatemala is also a state signer to the UN Convention and Protocol. However, children attempting to apply for asylum there would face extreme danger. The living conditions in Guatemala's state-run welfare facilities are inhumane. In 2017, more than 40 Guatemalan girls burned to death after they were locked in an orphanage.[82] Other children are held in cages, tied to wheelchairs, and bound to railings like animals. *Id.* And numerous children are trafficked for sex and forced labor from within Guatemala's orphanages, and often sterilized to cover up institutionalized sexual abuse.[83]

The Departments reveal their biases when they claim that not applying for asylum in a country that an applicant travels through "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." Similar reasoning was provided in the now-enjoined Rule.

But as the Ninth Circuit explains in *East Bay Sanctuary Covenant v. Barr*, "There is no evidence in the record to support the…assumption that [asylum seekers who transited through Mexico or Guatemala and did not apply for asylum there] are not credible." *East Bay Sanctuary Covenant v. Barr* at 42. The Departments in this proposed rule likewise provide no data on the

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[79] https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html

[80] *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1118 (N.D.Cal. 2018)

[81] Available at https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf.

[82] *See* Anastasia Moloney, *Guatemala's orphanage children caged, abused: report*, Thomson Reuters (July 16, 2018), http://www.reuters.com/article/us-guatemala-child-abuse/guatemalas-orphanage-children-cagedabused-report-idUSKBN1K7007.

[83] *See* Eric Rosenthal, *A Mandate to End Placement of Children in Institutions and Orphanages*, Georgetown Law: Human Rights Institute (Jan. 2017), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Perspectives-on-Human-Rights-Rosenthal.pdf.

veracity of asylum claims made by individuals who have transited through another country on the way to the United States.

In addition, these provisions contravene the UN Refugee Convention. Article 33(1) of the 1951 Convention prohibits state parties from "expel[ling] or return[ing] (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The article has a broad reach, reflecting that the principle of *nonrefoulement* applies both within a state's territory and at its border. S*ee Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 180–82 (1993).

The principle of *non-refoulement* is "the cornerstone of asylum and of international refugee law" and one of the core principles of the 1951 Convention. Note on International Protection ¶ 10; Handbook 9. The proposal does not comply with Article 33(1)'s prohibition against *refoulement*. By denying asylum seekers the right to seek asylum because they have crossed through a third country en route to the United States, they would be at risk of removal to the very states that they have sought to escape. *See* 8 U.S.C. § 1231(b). Such a return to persecution—whether directly or, through chain *refoulement*, indirect—is forbidden by Article 33(1) and is inconsistent with the "international community['s commitment] to ensure to [all] those in need of protection the enjoyment of fundamental human rights, including the rights to life . . . and to liberty and security of [the] person."9 Note on International Protection ¶ 10; UNHCR Exec. Comm., Conclusion No. 6 (XXVIII) ¶¶ (a)–(c) (1977).

C. Use of fraudulent documents to enter the United States

The Departments express concern that "the use of fraudulent documents makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources." The Departments do not provide any data on the frequency with which applicants use fraudulent documents to enter the U.S. or the resources required to identify fraudulent documentation. The exclusion of such data prevents Ayuda and other commenters from conducting a thorough analysis of this proposed factor and thus violates the requirements of the APA.

Ayuda appreciates the Departments' inclusion of an exception for applicants arriving directly from their home country. This indicates that the Departments recognize the important humanitarian concerns present for asylum seekers – some asylum seekers may face danger should their true identity be known. While the proposed regulations recognize this danger in the applicant's home country, they don't recognize that the applicant may continue to face danger in a second country they transit through in order to reach the United States. The regulations also fail to consider that an applicant may use false documents out of a fear of persecution should they be returned to their home country and a belief that the U.S. government would deport them if their true identity were known.

ii. The additional nine factors

In addition to these three factors, the Departments propose nine additional factors that would even further restrict adjudicator discretion, stating that the presence of any of these nine

factors would "ordinarily result in the denial of asylum as a matter of discretion." The Departments incorrectly claim this would be "similar to how discretion is considered in other applications." Once again, the Departments cite to 8 CFR 212.7(d) and 1212.7(d), which limit the use of discretion only when the applicant's inadmissibility involves violent or dangerous crimes, and where a broader use of discretion is given to the Attorney General by statute.

The Departments go on to cite *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), which also addresses only violent or dangerous offenses, and required that the gravity of the applicant's offenses be weighed against the extraordinary circumstances or exceptional and extremely unusual hardship. The Departments also cite *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019), which is a cancellation of removal case and therefore does not reflect the same humanitarian considerations as cases based in persecution abroad.

The factors proposed by the Departments are a drastic departure from the current standard, in which only violent or dangerous offenses would result in this general discretionary bar, and the most heavily weighted discretionary factor is the persecution abroad. Once again, humanitarian concerns are largely absent from the conversation. The proposal would reduce adjudicators to automatons and keepers of a checklist of numerous "significantly adverse factors", stripped of virtually any discretion.

A. Factors one and two: Whether an applicant had spent more than fourteen days in any one country that permitted application for refugee, asylee, or similar protections prior to entering the United States, or transit through more than one country prior to arrival in the United States

The Departments introduce these two factors together and use the same argument to justify the factors in the commentary. The Departments suggest that these factors are "supported by existing law surrounding firm resettlement and aliens who can be removed to a safe third country." As discussed elsewhere in this comment paper, existing law surrounding firm resettlement does *not* support these assertions. In fact, existing caselaw and the plain language of the statute is in direct conflict with the Departments' understanding. The Departments' proposal is arbitrary and capricious, as explained above when addressing the initial three discretionary factors.

The Departments also misunderstand the concept of safe third country agreements, which do not lend any support to the proposed factors. An applicant can be removed to a "safe third country" that has a "bilateral or multilateral agreement" with the U.S., and that country is one in which "the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection." 8 USC 1158(a)(2). This refers to specific bilateral or multilateral agreements between nations. Presently, the U.S. has entered into a formal safe third party agreement with only one country, Canada.

The application of the "safe third country" bar could presumably be challenged if a signatory country did not provide full and fair access to asylum procedures or did not adequately

protect applicants from persecution, and preliminary research on countries with which the United States recently entered such agreements suggests these challenges have merit.[84] It appears that the proposed regulations are an attempt to circumvent such challenges, as the regulations would allow a discretionary denial even where the third country did not provide adequate access to asylum procedures or where the applicant was persecuted in the third country.

The Departments provide several exceptions, including where the applicant transited through a country not party to the Refugee Convention, Refugee Protocol, or Convention Against Torture. This exception is inadequate and does not ensure that applicants have full and fair access to asylum, as many countries party to these agreements do not provide sufficient protection. In countries that are Western democracies and are parties to all of these agreements, additional requirements and other conditions severely restrict access to asylum.

As detailed above, many countries have severely restricted access to asylum in the midst of the COVID-19 global pandemic, meaning that many refugees are unable to reach safe harbor where they can in fact apply for asylum, no matter how many countries they pass through en route to the United States.[85] The duration of the pandemic is unknown but could be lengthy, and its scope was certainly known long before the Departments' issued the proposed regulations. The Departments' failure to acknowledge limitations that this might place on asylum seekers and to attempt to accommodate for them is inexcusable.

B. Factor three: Criminal convictions that remain valid for immigration purposes

The Departments do not provide any justification for this factor, but rather provide citations to a number of cases defining "valid for immigration purposes." What constitutes a conviction "valid for immigration purposes" is not in question here. The question is whether *any* conviction valid for immigration purposes should "ordinarily result in the denial of asylum." For instance, one of the cases cited in the Discussion, *Matter of Thomas & Thompson,* involves the impact of a conviction on an LPR seeking to avoid removal. Because the court did not engage in analyzing the INA with regard to asylum law, this precedent is of no value to the discussion of this instant proposal.

The Departments' proposal that any valid conviction ordinarily would result in the denial of asylum would mean that an individual convicted of, for example, driving without a valid license, would need to demonstrate "extraordinary circumstances" in order to overcome this negative discretionary factor. The Departments do not cite a single policy concern or benefit to the public in enacting this factor.

Certain criminal convictions and categories of crime are already addressed as bars to asylum in the statute, so it is clear that Congress considered criminal convictions and their consequences when drafting our asylum system. Because Congress did not call for a bar on asylum for any individual with any criminal conviction, and because this regulation would result

[84] https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie/; https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained.
[85] https://www.amnesty.org/en/latest/news/2020/06/east-africa-people-seeking-safety-are-trapped-at-borders-due-to-covid-19-measures/

in the discretionary denial of asylum in cases of even the most minor convictions, it is obvious that the proposed discretionary factor reaches outside of Congressional intent and is therefore *ultra vires*.

C. Factor four: Unlawful presence of more than one year's cumulative duration before filing an application for asylum

The Departments only attempt to explain or justify this adverse factor is that it is "consistent with the unlawful presence bar" at INA 212(a)(9)(B)(i)(II) and the permanent bar under INA 212(a)(9)(C). However, these bars do not make a person inadmissible for admission as an asylee or refugee nor act as a bar to asylum eligibility.

Additionally, the statute already addresses situations where asylum applicants have been present for more than one year before filing for asylum, often referred to as the "one-year filing deadline." INA 208(a)(2)(B). Significantly, the statute includes two exceptions to the one-year filing deadline: changed circumstances and exceptional circumstances. Because the one-year filing deadline is already in place, the proposed regulations are merely an attempt to circumvent the essential exceptions Congress put in place to protect vulnerable applicants who did not meet the one-year deadline.

D. Factor five: failure to file taxes or fulfill related obligations

The Departments propose that an applicant who has ever failed to file taxes should "ordinarily" be denied asylum as a matter of discretion. But there are many reasons why a well-meaning and otherwise law-abiding non-citizen might fail to file a required tax return.

The U.S. tax code is confusing, and few taxpayers are able to file income taxes without the assistance of tax preparers or tax preparation programs. Tax preparation is expensive, and American taxpayers will pay around two billion dollars on tax preparation software alone this year.[86] While tax preparation software is available for free to taxpayers making below a certain income, the software has been intentionally hidden from Google searches and is notoriously inaccessible, with millions of taxpayers paying for software that should have been free.[87]

Asylum applicants may be unaware of the requirement to file taxes, or they may believe that they do not need to file taxes because taxes are already deducted from their paychecks. An asylum applicant may be a national of one of the many foreign countries that do not require any affirmative action be taken by taxpayers to pay their taxes or that have pre-filled forms that require only minutes of taxpayer effort even for complicated cases.[88]

In addition, the tax code and filing procedures in the U.S. are complicated – the Internal Revenue Code was 2.4 million words long in 2019.[89] While some information about tax filing is

[86] https://www.nytimes.com/2017/04/14/opinion/filing-taxes-in-japan-is-a-breeze-why-not-here.html
[87] https://www.cbsnews.com/news/turbotax-h-r-block-tax-software-overcharged-14-million-file-free-irs-inspector-report/
[88] https://www.nytimes.com/2017/04/14/opinion/filing-taxes-in-japan-is-a-breeze-why-not-here.html
[89] https://taxfoundation.org/brazil-us-tax-complexity/

provided online by IRS.gov, the information is provided only in English and five other languages.[90]

As a nonprofit organization serving low-income immigrants, Ayuda is especially concerned about how this adverse factor will disproportionally impact asylum seekers who lack financial and community resources. Many of our clients lack the financial resources to pay a tax preparer for assistance or to pay for the use of tax software, and many more do not have the technological access or ability to use tax preparation software even when it is provided for free. This regulation would disproportionately impact applicants who are low-income, who do not speak English, who are illiterate or partially literate, and who do not have access to technology. There is no identifiable benefit behind the proposed regulation, but the incredible harm is apparent.

The Departments provide no justification beyond the false assertion that this would "hold all asylum applicants to the same standards as most individuals in the United States". But it is apparent that the true purpose is to create yet another barrier to asylum. The Departments ignore the humanitarian nature of asylum and would *refoule* (return) individuals or families to danger of torture or death. Again, to quote the Board in *Matter of Pula,* the danger of persecution should generally outweigh all but the most egregious of adverse factors."[91] To remove a would-be asylee because of the failure to file a tax return, even an intentional failure, is heartless, indefensible, and contrary to this country's legal and moral obligations.

E. Factor six: having had two or more applications for asylum denied for any reason

The inclusion of "for any reason" is the most troubling part of this proposed adverse factor. This would require adjudicators to ignore entirely the circumstances behind which an asylum application could have been denied. For example, an applicant may have consulted with a *notario* or been the victim of ineffective assistance of counsel and had asylum applications denied through no fault of their own. Another possibility warranting an exception to this rule is if an applicant is a *refugee sur place.* It is conceivable that circumstances in the country of origin changed or deteriorated after their arrival in the U.S. such that they now have a new well-founded fear of persecution.

Ayuda agrees that the applicability of this factor will be exceedingly rare. But to rule out eligibility "for any reason" is too extreme.

F. Factor seven: having withdrawn with prejudice or abandoned an asylum application

The withdrawal of an asylum application with prejudice or the abandonment of an asylum application does not always indicate that the initial application lacked merit. We are aware anecdotally that some immigration judges will require the withdrawal of an asylum

[90] https://www.irs.gov/newsroom/help-available-at-irsgov-in-different-languages-and-formats
[91] *Matter of Pula*, 19 I&N Dec. at 474

application with prejudice if an applicant for asylum wishes to return to the master calendar docket to pursue an alternate form of relief – such as Special Immigrant Juvenile Status – for which the individual is also eligible. It is quite possible, and in fact not uncommon, for an asylum applicant to be eligible for multiple forms of relief. Asylum applicants should not be punished for pursuing all relief available to them.

In addition, there are countless reasons that an individual may abandon an asylum application that should not warrant a negative exercise of discretion. Individuals who are victims of *notarios* or victims of fraud by their immigration lawyers may unintentionally abandon applications due to ineffective assistance of counsel. Individuals may be forced to flee their homes due to domestic violence or other criminal activity and miss interview dates. Ayuda has seen instances with their own clients where hearing notices and other legal documents may be hidden or destroyed by abusers as a method of control. This could result in the unintentional abandonment of an asylum case. While administrative efficiency is an important goal, and wait times are a concern, safeguarding humanitarian protections outweighs this.

G. Factor nine: failure to file a motion to reopen within one year of changed circumstances

While it is not entirely unreasonable to view the failure to file a motion to reopen within one year of changed circumstances as a negative factor, it is also necessary to consider any extraordinary circumstances that may have prevented the applicant from filing a motion to reopen within one year. The consideration of extraordinary circumstances and the use of the doctrine of equitable tolling is consistent with the treatment of motions to reopen in other contexts. For example, in the context of other motions to reopen, all Circuits but the First Circuit have recognized the application of equitable tolling where a Respondent missed the 90-day deadline to reopen proceedings.[92]

In addition, the imposition of an ironclad time period (one year) is unreasonable and contrary to the very case precedent cited by the Departments in the Discussion. In *Wang v BIA*, the court rejected a four-year delay in filing a motion to reopen based on ineffective assistance of counsel. But it is instructive that the court wrote that "there is no magic period of time for equitable tolling premised on ineffective assistance of counsel. Rather, the nature of the analysis in each case is a two-step inquiry that first evaluates reasonableness under the circumstances, namely, whether and when the ineffective assistance [was], or should have been, discovered by a reasonable person in the situation."[93]

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[92] *American Immigration Council*, citing Iavorski v. INS, 232 F.3d 124 (2d Cir. 2000); Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005); Kuusk v. Holder, 732 F.3d 302 (4th Cir. 2013); Lugo-Resendez v. Lynch, 831 F.3d 337 (5th Cir. 2016); Harchenko v. INS, 379 F.3d 405 (6th Cir. 2004); Pervaiz v. Gonzales, 405 F.3d 488 (7th Cir. 2005); Hernandez-Moran v. Gonzales, 408 F.3d 496 (8th Cir. 2005); Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001) (en banc); Riley v. INS, 310 F.3d 1253 (10th Cir. 2002); Avila-Santoyo v. Att'y Gen., 713 F.3d 1357 (11th Cir. 2013) (en banc), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf

[93] *Wang v BIA*, at 715, *citing Iavorski* v USINS, 232 F.3d 124, 134 (2nd Cir 2000).

iii. The revised discretionary factors are, seen as a whole, contrary to the INA and arbitrary and capricious.

The Departments propose to change completely the way discretion is considered in asylum cases. The Departments' proposal is arbitrary and capricious and contrary to the statute as written. The proposed discretionary factors would result in the discretionary denial of most asylum applications and are designed with only one interest in mind: preventing the just administration of asylum in furtherance of the current administration's anti-immigrant policies.

Further, while the proposals list factors rather than mandates, the overall tone and expectation essentially remove the element of discretion from adjudicators' determinations and leave no doubt that the presence of any of the factors will be fatal to an asylum application. This restrictive tone is clear from such terms as "significantly adverse", would "ordinarily result in the denial of asylum as a matter of discretion" and that only "extraordinary circumstances" demonstrated by a very high standard ("clear and convincing evidence") and resulting in "exceptional and extremely unusual hardship" would suffice to overcome one of these factors.

The proposals' breadth and overall restrictive and uncompassionate tone put large segments of the asylum applicant population at severe disadvantages, although the proposals offer no recognition of this. These segments include children, those suffering from trauma or other mental health issues, and *pro se* applicants.

7. Rogue Officials (CAT)

The regulations at 8 CFR 1208.18(a)(1) stem from the language of the Convention Against Torture and include torture inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." As the Departments state, federal courts have generally implied that this is to be read as dividing into two groups of persecutors, with one group being public officials, and the other group being individuals acting in an official capacity (for example, individuals deputized to perform government duties). *See e.g. Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017); *Rodriguez-Molinero v. Lynch*,808 F.3d 1134 (7th Cir. 2015).

i. Official Capacity

The Departments review several case precedents but provide no rationale for the enhanced standard, other than to increase the requirements for applicants for CAT relief to prevail. There are several deficiencies in the approach taken by the Departments.

First, while they focus on "rogue officials", they never define "rogue". The suggestion is that the focus should be on individual, out-of-control officers acting alone in not following the law. However, Merriam Webster defines the word as "corrupt, dishonest" with the example given of "rogue cops".[94]

[94] https://www.merriam-webster.com/dictionary/rogue

So, the proposed standard ignores a common situation that has been recognized by the federal courts: the situation in which government corruption is so deep and entrenched that law enforcement officials are essentially acting under "color of law". In *Ramirez-Peyro v Holder,* for instance, the court cited the U.S. State Department in observing the "deeply entrenched culture of impunity and corruption in [Mexico's government]."[95] It then reversed the IJ and BIA's denial of CAT protection since the torture he feared by police officers connected to Mexico's drug cartel would be a public official acting "under color of law when he misuses power possessed by virtue of . . . law and made possible only because he was clothed with the authority of . . . law."[96]

In *Barajas-Romero v Lynch,*[97] the court quotes from the U.S. Department of State Human Rights Report for Mexico in describing the endemic corruption in the country. In particular, it cited reports "that police, especially at the state and local level, were involved in kidnapping, extortion, and in providing protection for, or acting directly on behalf of, organized crime and drug traffickers." [98] When official corruption is this entrenched, it is difficult to understand how the offending officers are "rogue". And the Discussion does not explain why "or" in the current regulations needs to be changed to "and" to require both actions in one's official capacity and instigation, consent, or acquiescence.

Official corruption between extrajudicial organizations, such as violent gangs in the Northern Triangle, is well-documented there and in other parts of the world. The proposed regulations should recognize this reality in providing potential CAT protection to victims of such groups.

Another scenario not contemplated by the proposal is where there is no functioning government in wide swaths of a country. For instance, in *Gomez-Beleno v Holder*[99], the court found that the BIA "failed to consider whether the term 'government' in the regulations implementing CAT applies to the FARC as the *de facto* government in parts of Colombia".[100]

ii. Acquiescence

The proposed regulation would heighten the official acquiescence standard. It relies on a string of decisions that analyze "willful blindness", which is sometimes referred to as "deliberate ignorance". All of these precedents are criminal cases and draw on concepts within criminal law.

The problem with this approach is that, unlike in the criminal context, the public official in a Torture Convention claim resides in another country and typically is not subject to cross examination and impeachment. Applicants for CAT relief have no access to the offending public officials, as well as, usually, no records or documentary evidence nor witnesses, in order to prove

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[95] 574 F3d 893 (9th Cir 2009).
[96] *Id,* at 901, citing *United States v. Colbert,* 172 F.3d 594, 596 (8th Cir.1999) (citing *West v. Atkins,* 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)); *see Screws v. United States,* 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).
[97] 846 F3d 1134 (7th Cir 2015).
[98] *Id*. At 362.
[99] 644 F3d 139 (7th Cir, 2011).
[100] *Id,* at 146.

what were the knowledge and motivations of the official. As such, this standard is patently unfair, since it imposes an insurmountable barrier to proof.

8. Conclusion

As detailed more fully above, Ayuda objects to the proposed regulations nearly in their totality. Seen together, the Departments' proposals and justifications can only be described as a complete attack on the asylum system – designed to limit asylum to protection available essentially only to the main character in Casablanca – the male political activist who opposes, directly, his home-country but government. This alone would be an impermissible narrowing of the protections of asylum, ignoring several prongs of the statute and the 1951 Refugee Convention. However, the Departments go beyond this to instead say that even this the refugee must have never made a mistake, never faced an impossible situation, never in fleeing for his life been unable to explain with legal specificity, in a language potentially not his own, and in a traumatic detention-center setting, the most difficult details, perhaps, of his life.

And, of course, asylum is meant for more than this individual. Asylum is for the protestor, for the norms-bender, for the dissident, for the protestor, for those victimized for *who they are*, for *what they stand for*, for *what the believe.* Asylum is for the heroes, the wounded, the desperate. It is for all those who are fleeing persecution, and it is already more difficult to obtain than it ever should be. The Departments' proposed regulations take an already difficult-to-navigate system and place it, quite simply, beyond the reach of all but the most select few refugees.

And asylum is not for the select few. Asylum is for the persecuted, seeking safety.

We hope that the Departments will re-visit and withdraw these proposed regulations. At the very least, we hope that the Departments will open a new (and adequate, as detailed above) notice and comment period to allow Ayuda and others to more fully examine and comment upon this dramatic departure from decades of case law implementing the Refugee Act in the United States.

In addition, if the Departments move forward with these proposed regulations, we urge the Departments to make clear in any final regulations that the application of such regulations will only be to applications filed on or after a date established *after* the publication of the final rule. These proposed regulations are a dramatic departure from decades of case law, as detailed above, and to apply them retroactively to already pending applications at the time of any final rule would be unconstitutional.

It bears repeating: asylum is for the persecuted. The fleeing. The injured. The traumatized. Asylum is the protection available to these in what may be the worst moment of their lives. To further complicate and place beyond reach what is already the protection of last resort is not only inconsistent with the APA, US law, and international law as detailed above: it is cruel.

We urge the Departments to revoke the proposed regulations and reconsider entirely.

Sincerely,

Laurie Ball Cooper
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EXPERIENCE

Ayuda, Silver Spring, MD
Managing Attorney, Immigration, July 2019-present

Management: Supervise attorneys and legal assistants on immigration representation; manage grants in Ayuda's Maryland office; assist with organizational communications, policy, and community outreach tasks.

Direct Legal Services: Represent clients in immigration and related state court matters including removal defense, administrative appeals, affirmative and defensive asylum, SIJS filings, family-based immigration petitions, and T and U visa applications.

U.S. Senate Judiciary Committee, Ranking Member Dianne Feinstein, Washington, D.C.
***Counsel**, August 2018-June 2019*

Oversight: Staffed Senator Feinstein for Judiciary Committee and Immigration Subcommittee hearings. Drafted oversight letters to federal agencies on immigration and LGBTQ issues.

Legislation: Draft and introduce legislation on immigration issues. Evaluate legislation for co-sponsorship and votes.

Services to Constituents and Advocates: Worked with state staff to assist California constituents.

U.S. Department of Justice, Office of Immigration Litigation (OIL), Washington, D.C.
***Senior Litigation Counsel**, April 2014 – August 2018; **Trial Attorney**, July 2007 – April 2014*

Division-Wide Honors: Civil Division Rookie of the Year, 2009; Division-Wide Special Commendation, 2011.

Supervision and Coordination: Reviewed pleadings as Subject Matter Expert on Nationality/Citizenship for 250 attorneys. Taught classes at DOJ and DHS. Coordinated inter-agency nationality policy. Gave technical assistance on draft legislation.

Appellate Litigation: Presented over 40 oral arguments and filed over 100 briefs before U.S. Courts of Appeals. Appellate litigation resulted in 10 published wins in the federal courts of appeals.

District Court Litigation: Conducted and responded to extensive written discovery. Gathered evidence from domestic and international sources. Took and defended over 50 depositions. Drafted dispositive motions. Served as lead counsel at trials.

Additional Responsibilities: Responded to FOIA requests; fielded questions from state and federal prosecutors regarding immigration consequences of convictions; analyzed Division hiring practices as part of Civil Division Diversity Committee.

U.S. Department of Justice, Executive Office for Immigration Review
***Judicial Law Clerk**, September 2006 - July 2007, Boston, Massachusetts/**Summer Internships**, 2004 & 2005*

Drafted detailed decisions and memoranda for 12 Immigration Judges in over 175 cases. Hired and managed interns.

EDUCATION

Georgetown University Law Center, Juris Doctor, Washington, D.C., May 2006.
Honors: Full-Tuition Dean's Scholarship; Certificate in Refugee and Humanitarian Emergencies

Teaching: Senior Writing Fellow, September 2005- May 2006; Law Fellow, September 2004- May 2005.

Internships: Center for Applied Legal Studies (3 semesters representing asylum applicants), Catholic Charities Immigration Legal Services (VAWA petitions), Public Employees for Environmental Responsibility

Brown University, Bachelor of Arts, Providence, RI, May 2003: English Literature. *Magna cum laude*; *Phi Beta Kappa*
Scholarships: Americorps Scholarship; Kapstein Scholarship for Excellence in English Concentration

Katie Flannery

Education

American University Washington College School of Law, March 2016
Certificate in U.S. Immigration Law

University of Pennsylvania Law School, May 2013
J.D. *cum laude*
Certificate in Global Human Rights

University of California, Berkeley, May 2009
B.A. with High Honors, Interdisciplinary Field Studies. Minor, Public Policy.

Work Experience

Ayuda, Fairfax, VA July 2018—present
Equal Justice Works Crime Victims Justice Corps Fellow

- Provide direct immigration legal services to immigrant survivors of labor and sex trafficking before USCIS and EOIR.
- Accompany survivors to law enforcement interviews and advocate on their behalf.
- Train legal and non-legal providers on how to identify trafficking survivors and provide referrals.
- Conduct outreach and education activities, provide referrals, and leverage pro bono resources.

UN High Commissioner for Refugees Egypt, Cairo, Egypt February 2017—July 2018
Assistant Refugee Status Determination (RSD) Officer

- Conducted refugee status determination (RSD) interviews in accordance with established norms and standards, with a special focus on exclusion cases, complex cases (including complex credibility determinations), unaccompanied and separated child applicants, stateless applicants, and applicants from uncommon countries of origin.
- Undertook country of origin research on individual claims and prepare reasoned recommendations on whether asylum seekers should be recognized as refugees under UNHCR's mandate.

Egyptian Foundation for Refugee Rights, Cairo, Egypt July 2015—September 2016
RSD & Resettlement Team Leader

- Prepared and reviewed testimonies and legal briefs for RSD first instance, appeal, and reopening applications, as well as resettlement referrals to UNHCR.
- Accompanied asylum seekers to interviews at UNHCR.
- Trained staff on interviewing skills, refugee law, and legal writing.

Asylum Access Tanzania, Dar es Salaam, Tanzania September 2014—July 2015
Legal Advocate

- Represented individuals undergoing refugee status determination (RSD) process in Tanzania.
- Authored legal analysis and draft text to improve refugee legislation and policy reform.

International Justice Project, Newark, NJ December 2013—August 2014
Program Director

- Conducted individual needs assessments for Darfurian refugee clients and referred them to appropriate service providers. Screened clients for asylum and other immigration assistance.
- Recruited and supervised staff and interns.
- Attended domestic and international meetings on behalf of the IJP.

- Organized development campaigns and wrote grants to sustain and expand operations.

Associate Program Officer September 2013-December 2013

- Researched international criminal justice and accountability and supported UN-level advocacy.

Penn Law Transnational Legal Clinic, Philadelphia, PA, USA August 2012–May 2013
Law Student Representative

- Successfully moved for BIA to terminate removal proceedings against U visa clients.
- Submitted report on immigrant rights for 2013 review of U.S. compliance with ICCPR.
- Authored case study on Buduburam Refugee Camp in for Liberian refugees in Ghana to inform how the international community manages prolonged refugee crises.
- Trained medical students and grassroots leaders in Port-au-Prince, Haiti, to identify human rights violations.

Southern Africa Litigation Centre, Johannesburg, South Africa May 2012–Aug. 2012
International Summer Human Rights Fellow

- Researched Art. 1F of the Refugee Convention for litigation challenging wrongful grant of asylum by South Africa to suspected Rwandan war criminal.
- Developed litigation manual on forced HIV testing and unlawful disclosure of HIV status.

International Refugee Rights Initiative, Kampala, Uganda May 2011–Aug. 2011
International Summer Human Rights Fellow

- Prepared and filed request for provisional measures to ACHPR to secure release of female Darfurian human rights defender from detention in Sudan.
- Conducted field research with Darfurian refugees on expectations for South Sudanese independence.

Pro Bono Experience

Florence Immigrant & Refugee Rights Project (remote) December 2016
Pro Bono Attorney (remote drafting)

- Drafted appellate brief on unreasonable bond set for a detained asylum seeker in Arizona.

CARA Project, Dilley, TX and remote October 2016—February 2017
Pro Bono Attorney

- *On-the-ground:* Provided legal assistance to detained Central American mother and child asylum seekers. Prepared clients for credible/reasonable fear interviews with USCIS. Drafted declarations for IJ review of negative findings.
- *Remotely*: Drafted requests for reconsideration and/or re-interview for especially vulnerable detained women and children in Dilley and Karnes facilities in expedited removal proceedings.

Asylum Access Refugee Toolkit (remote) March 2015—June 2017
Expert Editor

- Edited online content for factual accuracy, feasibility, accessibility, and gender inclusivity.

Skills and Certifications

Languages: English (native), Spanish (proficient)

Bar membership: New York (2014), Washington D.C. (2020)

JOSH DOHERTY

EXPERIENCE

Ayuda, Inc. Washington, D.C.

Managing Attorney, DC Immigration *July 2018 – Present*

- Supervise members of the D.C. immigration program, providing substantive supervision on cases and administrative management of caseloads, professional goals and development, including Attorneys, B.I.A. Accredited Representatives, Legal Fellows, Paralegals, and Legal Assistants; manage substantive implementation and financial management of federal and local grants, and the D.C. immigration office's *lo bono* fee-for-services program, a budget totaling over $750,000 per year; coordinate with other grant managers to ensure appropriate usage of grant funds; direct recruitment and staffing efforts for the D.C. immigration program; assist Development program in preparing new grant applications that will support Ayuda's D.C. immigration program.
- Screen individuals for potential immigration relief during immigration intake appointments; represent clients before U.S. Citizenship & Immigration Services (USCIS), Arlington and Baltimore immigration courts, and the District of Columbia Superior Court's Domestic Relations Branch; work directly with clients in multilingual setting on complex immigration cases including U visas, T visas, adjustments of status, Special Immigrant Juvenile Status (SIJS), naturalization, removal defense, Temporary Protected Status, VAWA, asylum, and other humanitarian and family-based immigration cases; work with parents and guardians to obtain custody and SIJS predicate orders in family court; mentor *pro bono* attorneys by providing expert guidance as needed; engage with media and community groups to conduct "Know Your Rights" presentations.

Supervising Immigration Attorney *Aug. 2017 – June 2018*

- Supervise entry-level immigration staff attorneys and legal fellows; manage Ayuda's D.C. Immigration internship program, including recruitment, training, and supervision of interns, along with coordination with Ayuda's other internship and fellowship programs; report on grant goals and deliverables for services provided to survivors of domestic violence, sexual assault, and stalking; manage the Mexican Consulate's External Legal Assistance Program (PALE) $21,000 grant to provide immigration legal services to Mexican nationals.
- Screen individuals for potential immigration relief during immigration intake appointments; represent clients before U.S. Citizenship & Immigration Services (USCIS), Arlington and Baltimore immigration courts, and the District of Columbia Superior Court's Domestic Relations Branch; work directly with clients in multilingual setting on complex immigration cases including U visas, T visas, adjustments of status, Special Immigrant Juvenile Status (SIJS), naturalization, removal defense, Temporary Protected Status, VAWA, asylum, and other humanitarian and family-based immigration cases; work with parents and guardians to obtain custody and SIJS predicate orders in family court; mentor *pro bono* attorneys by providing expert guidance as needed; engage with media and community groups to conduct "Know Your Rights" presentations.

Immigration Staff Attorney *Dec. 2014 – July 2017*

- Screened individuals for potential immigration relief during immigration intake appointments; represent clients before U.S. Citizenship & Immigration Services (USCIS), Arlington and Baltimore immigration courts, and the District of Columbia Superior Court's Domestic Relations Branch; work directly with clients in multilingual setting on complex immigration cases including U visas, T visas, adjustments of status, Special Immigrant Juvenile Status (SIJS), naturalization, removal defense, Temporary Protected Status, VAWA, asylum, and other humanitarian and family-based immigration cases; worked with parents and guardians to obtain custody and SIJS predicate orders in family court; mentored *pro bono* attorneys by providing expert guidance as needed; managed Ayuda's D.C. Immigration internship program, including recruitment, training, and supervision of interns, along with coordination with Ayuda's other internship and fellowship programs; reported on grant goals and deliverables for services provided to survivors of domestic violence, sexual assault, and stalking; coordinated with the Mexican Consulate's External Legal Assistance Program (PALE) to provide immigration legal services to Mexican nationals; engaged with media and community groups to conduct "Know Your Rights" presentations.

Domestic Violence/Sexual Assault Staff Attorney *Feb. 2016 – July 2016*

- Conducted legal intakes, crisis screening, safety planning, and cycle of domestic violence and abuse education for domestic violence survivors; provided legal advice and counsel on clients' rights with respect to civil protection order and family law matters in the District of Columbia, as well as rights and risks in criminal matters; represented clients seeking civil protection orders in D.C. Superior Court; provided support to clients pursuing civil protection order and family law matters pro se, including advice on gathering evidence, documenting a case, and preparing and filing applications; conducted domestic violence-related "Know Your Rights" and other outreach presentations; screened clients for a variety of service needs and provide intra-office referrals to social services and immigration programs, or external referrals for other needs.

Immigration Law Clerk *Aug. 2014 – Dec. 2014*

- Performed client intakes and communicated case developments to clients in French and Spanish; prepared and managed asylum, U-visa, Temporary Protected Status, naturalization, family-based, and other humanitarian petitions for submission to USCIS

Domestic Violence & Family Law Intern *Aug. 2012 – Jan. 2013*

- Performed client intakes and communicated case developments to clients in French and Spanish; prepared trial materials including pretrial statements, direct examinations, and a motion to reconsider; researched family law and domestic violence issues, including whether a rapist could seek custody of a child born from his rape and the effect of an abuser's diplomatic immunity on a victim's access to justice; prepared and served subpoenas; drafted immigration documents in U-visa cases.

National Network to End Domestic Violence's WomensLaw.org project Washington, D.C.

Volunteer Hotline Editor (May 2011 – Present);
Volunteer Hotline Responder (Sept. 2010 – May 2011) *Sept. 2010 – May 2014*

- Through the WomensLaw.org email hotline, supervised and edited emails of Volunteer Responders, providing feedback to Responders and performing final revision of emails prior to sending to the Hotline User; drafted email responses to individuals who contacted the website seeking general legal information on issues relating to domestic violence, custody, and other gender issues; wrote or reviewed emails to over 400 hotline users, many of whom are survivors of domestic violence unable to afford private legal representation and may be reaching out for help leaving an abusive situation for the first time.

United Nations International Law Commission
Geneva, Switzerland

Legal Liaison to Commission Member Sean Murphy *May – Aug. 2013*

- Researched and drafted formal statements and memoranda on topics such as Immunity of State Officials from Foreign Criminal Jurisdiction, the Obligation to Extradite or Prosecute, and the Protection of Persons in the Event of Disasters.
- Researched and drafted memorandum analyzing domestic legislation worldwide addressing disaster risk reduction.

American Bar Association Commission on Domestic & Sexual Violence Washington, D.C.

Law Clerk *May 2012 – Aug. 2012*

- Researched, compiled statutory charts and wrote memoranda on legal issues relating to domestic and sexual violence, including current USAID policy on women's rights, use of GPS tracking technology for domestic violence offenders, state treatment of domestic violence in custody and parental kidnapping laws, and the military's response to sexual assault.

American Red Cross Washington, D.C.

Legal Intern, International Humanitarian Law Dissemination Program *May 2011 – July 2011*

- Drafted a briefing sheet on Additional Protocol II of the Geneva Conventions of 1949 to clarify myths and misconceptions to inform Members of Congress and their staffers; wrote articles and briefs, and conducted presentations on various IHL issues including sexual violence in Libya, IHL in current events and guerrilla warfare during the American Civil War for use by IHL instructors.

Law Office of Charles A. Tievsky, PLC, Reston VA *Aug. 2008 – Jan. 2010*

Paralegal

- Prepared filings and collected documents and information for family and employment-based immigration cases (including H-1b, EB-1, EB-2, EB-3, E-2, Labor Certification, Adjustment of Status, Change of Status, Naturalization, FOIA, Employment Authorization, and Trade-NAFTA).

EDUCATION

The George Washington University Law School Washington, D.C.
J.D. *with honors* (ranked 165 out of 530) *May 2014*
GPA: 3.516 – Thurgood Marshall Scholar (top 15-35% of the class as of Fall 2013), Presidential Merit Scholar, Member – The George Washington International Law Review
Study abroad: GWU/Oxford University International Human Rights Law Program, Oxford, England, Summer 2011

The George Washington University Elliott School of International Affairs Washington, D.C.
M.A. in International Affairs (Int'l Law & Organizations; Int'l Affairs & Development major fields) *May 2014*
GPA: 3.93 – Michele Manatt Fellow

University of Richmond Richmond, VA
B.A. *Magna cum Laude*, in International Studies: International Economics (French and Spanish minors) *May 2008*
GPA: 3.72 – National Merit Scholar, UR Honors Scholar, University Scholar, Holt Scholar
Study abroad: University of Virginia Hispanic Studies in Valencia, Spain, Spring 2007; School for International Training,
Antananarivo, Madagascar, Fall 2006; University of Richmond/Universidad Blas Pascal, Córdoba, Argentina, Summer 2005

Language Skills: French (fluent), Spanish (fluent)

PROFESSIONAL ASSOCIATIONS

- **Admitted to the Bar of the Supreme Court of Virginia** (Active Member since December 2014)
- **Admitted to the Bar of the District of Columbia** (Active Member since March 2016)
- **National Network to End Domestic Violence** (Charter Member)

Katie Wiese

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER **Washington, D.C.**
Juris Doctor **Expected May 2022**
GPA: 3.88 (Top 10%)
Honors: Blume Public Interest Scholar; Dean's List Fall 2019
Activities: Public Interest Fellow; Board Member of Advocates Against Sexual Violence

OCCIDENTAL COLLEGE **Los Angeles, CA**
Bachelor of Arts, *summa cum laude*,
in Diplomacy and World Affairs (DWA), with Honors **May 2015**
GPA: 3.96
Honors: Phi Beta Kappa and Mortar Board National Honor Societies, Dean's List, Margaret Bundy Scott Scholarship (Highest Merit Scholarship), Honors and Distinction on Senior Thesis, Annual Award for Highest Student Achievement in the DWA Major (3 Consecutive Years)
Activities: Honor Board Juror and President, Research Assistant for DWA Professor, United Nations Program Participant, Dean's Conduct Review Committee Member, Orientation Leader, Peer Advisor for DWA Department, Great Strides Program Facilitator, Varsity NCAA Volleyball, Study Abroad in Guatemala

EXPERIENCE

AYUDA **Washington, D.C.**
Legal Intern **May 2020 – Present**

- Prepare and manage humanitarian immigration petitions under the supervision of an attorney, including asylum, U-Visa, T-Visa, and Violence Against Women Act claims
- Work directly with immigrant clients to draft personal statements and prepare immigration forms; conduct relevant country condition research; write memos, court motions, and briefs

U.S. DEPARTMENT OF STATE - TRAFFICKING IN PERSONS OFFICE Washington, D.C.
Program Assistant for Public Engagement
and Intergovernmental Affairs **July 2016 – May 2019**

- Strengthened partnerships with trafficking survivors to integrate survivor expertise into the federal government's policies; provided programmatic and technical support to the President's U.S. Advisory Council on Human Trafficking
- Supported congressional, interagency, and strategic outreach matters; conducted research on human trafficking issues and drafted public outreach materials
- Drafted and edited sections of the annual *Trafficking in Persons Report*; planned the Secretary's annual report rollout event
- Researched and compiled daily news brief to inform Department colleagues of country-specific and global developments related to human trafficking; presented to international delegations and civil society; managed office website and contact database system

D.C. RAPE CRISIS CENTER **Washington, D.C.**
Hotline Advocate (Volunteer) **January 2017 – May 2019**

- Provided crisis intervention, trauma-informed support, and referrals to survivors of sexual assault and other callers who contacted the confidential 24-hour hotline; answered calls for three 4-hour shifts per month and completed case logs
- Certified as a crisis intervention advocate and first responder after completing 60 hours of training on trauma-informed care, systems of power, neurobiology, mental health, and developmental trauma

POLARIS **Washington, D.C.**
Policy Fellow **January 2016 – May 2016**

- Conducted legal and statutory research related to human trafficking, immigration, and labor rights; monitored pending trafficking legislation and provided technical assistance during the bill drafting process; wrote briefings and helped direct lobbying efforts
- Represented Polaris at congressional hearings; prepared legislative outreach materials and letters of support; drafted blogs; conducted research and outreach for the Global Modern Slavery Directory

FREE THE SLAVES **Washington, D.C.**
Research Associate **August 2015 – December 2015**

- Member of the Standards & Norms Working Group, analyzing the current frameworks on standards of care for human trafficking survivors; researched European protocols and contributed to a paper for the Freedom from Slavery Forum

UNITED KINGDOM MISSION TO THE UNITED NATIONS **New York, NY**
Attaché **August 2014 – December 2014**

- Represented the United Kingdom in UN General Assembly and Security Council meetings; drafted concise and confidential reports to inform UK policy decisions on human rights and international development issues
- Conducted research and helped negotiate UN resolutions on child marriage, violence against women, migration, extrajudicial killings, and peacebuilding issues

SKILLS AND CERTIFICATIONS

- Proficiency in Spanish
- Certified as a crisis intervention advocate for survivors of trauma

Dana M. Florkowski

Attorney licensed in Virginia and the District of Columbia
(202) 387-4848 – 6925B Willow St NW, Washington, DC 20012

Education:

The George Washington University Law School – Washington, DC
May 2018
Juris Doctor
Member: Federal Circuit Bar Journal, Immigration Law Association, ACLU at GW Law
GPA: 3.464, graduated with Honors

The University of Georgia – Athens, GA
May 2014
Bachelor of Arts in International Affairs
Bachelor of Arts in German Language
Minor in Spanish Language
Certificate in Latin American and Caribbean Studies
GPA: 3.72, Magna Cum Laude, graduated with Honors

Employment Experience:

Ayuda, Staff Attorney – Washington, DC August 2018-present

- Prepare various humanitarian and family-based immigration applications, including U visas, T visas, SIJS petitions, asylum applications, and family petitions
- Represent clients in removal proceedings before the Arlington and Baltimore immigration courts
- Respond to Requests for Evidence and work with clients to identify potential supporting corroborating evidence and prepare personal statements

GW Law Immigration Clinic, Student-Attorney – Washington, DC August 2017 – May 2018

- Prepared asylum and U Visa applications and represented clients in other immigration matters
- Successfully represented an asylum seeker in her Individual Calendar Hearing before the Arlington Immigration Court

GW Law School, Research Assistant – Washington, DC August 2017 – May 2018

- Assisted Professor Catherine Ross in researching, editing, and citation for the new edition of her Family Law casebook

Kids in Need of Defense (KIND), Legal Intern – Falls Church, VA June 2017 - August 2017

- Worked with supervising attorney on Special Immigrant Juvenile Status (SIJS) and asylum cases by drafting motions, researching and preparing briefs and country conditions reports, and drafting client declarations with clients
- Conducted intake screenings to assist in determining potential availability of immigration relief

Trow & Rahal, P.C., Law Clerk – Washington, DC January 2017 - April 2017

- Worked with supervising attorneys to prepare employment- and family-based Adjustment of Status applications
- Prepared I-765, I-90, and I-131 applications for existing clients

National Immigration Law Center (NILC), Legal Intern – Washington, DC January 2017 - April 2017

- Performed research relating to potential and existing immigration-related Executive Orders, challenges to ICE enforcement actions, and related subjects
- Drafted memoranda for office circulation on recently filed immigration-related lawsuits

Ayuda, Legal Intern – Washington, DC May 2016 - November 2016

- Worked with supervising attorney on SIJS, U-Visa, and T-Visa cases
- Assisted in court preparation and drafted complaints and motions for state custody hearings in SIJS cases

Access to Law Foundation, Inc./A Salmon Firm, LLC, Paralegal – Norcross, GA June 2014 - July 2015

- Provided support for attorneys working primarily in immigration law

Leadership Experience:

GW Law Immigration Law Association (ILA) – Washington, DC
August 2015 - present

- President, 2017-2018
- Alternative Spring Break Coordinator, 2016-2017
- 1L Representative, 2015-2016

American Civil Liberties Union-GW – Washington, DC
April 2017 - present

- Secretary, 2017-2018

Language Skills:

Spanish Language, Professional Working Proficiency

LAURIE BALL COOPER

Laurie.BallCooper@ayuda.com

EDUCATION

Yale Law School, Juris Doctor *June 2010*

Charles Albom Prize for Excellence in Appellate Advocacy in Connection with a Clinic
Yale Journal of International Law 2006-2008, Articles Editor 2007-2008

Princeton University, Woodrow Wilson School, Masters of Public Affairs *June 2010*

Duke University, Bachelor of Arts (Public Policy Studies) *May 2004*

Magna cum laude; Phi Beta Kappa; Highest Distinction in Public Policy Studies

FULL TIME POSITIONS

Legal Director, Ayuda *2018*

Oversee and supervise Ayuda's legal program, including immigration, family law, and consumer protection (Project END), including providing substantive supervision, mentorship, and primary responsibility for questions of legal ethics and staff training. Manage multiple grants, amounting to close to two million dollars in program funding. Maintain a small caseload of immigration matters.

Senior Immigration & Pro Bono Coordinating Attorney, Ayuda *2018*

Represent clients in a wide array of immigration matters, focused on humanitarian relief, and help coordinate and develop Ayuda's pro bono program, including through managing free immigration consultation clinics in addition to coordinating, supporting, and developing infrastructure for long-term representation of Ayuda's clients by pro bono attorneys from private law firms, including managing relationships with both clients and pro bono partners.

Associate, Human Rights Group, Cohen, Milstein, Sellers & Toll, PPLLC *2017 – 2018*

Represented survivors of human rights violations, with a focus on human trafficking, in complex federal litigation at all stages of investigation, trial, and appeal. Experiences included investigating and preparing complaints for novel human rights cases; responding to motions to dismiss, discovery motions practice (including arguing discovery motions in federal court), preparation of expert reports, fee petitions, and assisting with Petition for Certiorari.

Senior Staff Attorney, Housing Unit, Legal Aid Society of the District of Columbia *2013 -2017*

Represented low-income District tenants in D.C. Superior Court in eviction matters and affirmative litigation and before the Office of Administrative Hearings, the Housing Authority, and as amicus before the D.C. Court of Appeals; engage in law reform work on behalf of low-income District residents, including related to language access and rental housing protections.

(Staff Attorney September 2013 – September 2016; Senior Staff Attorney September 2016 – March 2017)

Skadden Fellow and Immigration Staff Attorney, Tahirih Justice Center *2011-2013*

Represented immigrant survivors of gender-based violence in USCIS petitions and before immigration court in matters including, among others, asylum, U visa, T visa, and VAWA self-petition applications.

Law Clerk to The Hon. M. Margaret McKeown, U.S. Court of Appeals for the Ninth Circuit *2010-2011*

Research & Policy Manager, Mozaik Community Development Foundation, Bosnia-Herzegovina *2004-2006*

TEACHING EXPERIENCE

Adjunct Professor, George Mason University Antonin Scalia Law School *January 2014 – Present*

Refugee and Asylum Law spring seminar for five semesters; Poverty Law fall seminar for one semester.

Adjunct Professor, Washington College of Law, American University *January 2014 – May 2016*

Gender, Cultural Difference, and International Human Rights spring seminar for three semesters.

ADDITIONAL PROFESSIONAL EXPERIENCE

Immigration Legal Services Clinic, Law Student Intern & Director, Yale Law School*2007-2008; Spring 2010*

Represented asylum seekers and other immigrants in administrative and court proceedings, including federal district court and the Second Circuit Court of Appeals; supervised students as student director.

Iraqi Refugee Assistance Project, Yale Law School and University of Jordan Law Faculty *2009-2010*

Assisted with and developed curriculum for a pilot, international clinic representing Iraqi refugees

Tahirih Justice Center, Legal and Policy Intern, Falls Church, VA *Summer 2009*

Human Rights First, Law and Security Program, Legal Intern, New York, NY *July-August 2008*

Human Rights Watch, Western Balkans Unit, Intern, Brussels, Belgium *May-July 2008*

Domestic Violence Clinic, Law Student Intern, Yale Law School *Spring 2008*

Represented survivors of domestic violence in Connecticut family court, conducted intake at local shelter.

State Court of Bosnia-Herzegovina, Office of the War Crimes Prosecutor, Intern, Sarajevo *Summer 2007*

Assisted the special team for Srebrenica with ongoing trials and investigations.

Yale Law School, Research Assistant, Professors Harold Koh and Judith Resnik *2007-2008, 2010*

SELECTED PUBLICATIONS

Sessions Holds Safety Beyond the Grasp of Abuse Victims, *The Washington Post* (June 17, 2018).

Legal Responses to the Crisis of Forced Moves Illustrated in Evicted, 126 YALE L.J. F. 448 (2017).

Rethinking Rapid Re-Housing: Toward Sustainable Housing for Homeless Populations, 19 U. PA. J. L. & SOC. CHANGE (February 2017), with Ana Vohryzek

Reducing Gender-Based Violence* in *The SAGE Handbook on Gender and Psychology (Michelle K. Ryan and Nyla R. Branscomb, eds.) (SAGE UK: 2013), with Elizabeth Levy Paluck and Erin K. Fletcher

Reducing Societal Discrimination Against Adolescent Girls: Using Social Norms to Promote Behavior Change (Nike Foundation/Girl Hub: 2013), with Erin K. Fletcher

Social Norms Marketing Aimed at Gender-Based Violence (IRC: 2010), with Elizabeth Levy Paluck

Entre la mística y la estigmatización en dictadura y democracia: narraciones orales de la poblacion La Victoria, Chile (Duke University Working Paper Series: 2004)

OTHER QUALIFICATIONS

Languages: Fluent in Spanish and Bosnian/Croatian/Serbian

Bar Admissions: District of Columbia; California (inactive); U.S. Court of Appeals for the 9th Circuit; Central District of California; Federal District Court for the District of Columbia.

LARRY KATZMAN
Silver Spring, MD 20910
larrykatzman@verizon.net
240-381-4695 (cell)

WORK EXPERIENCE

2019 – Present: **Ayuda, Washington, DC**
Volunteer Attorney (retired) for non-public legal services provider

2008 – 2018: Present: **Steptoe & Johnson, LLP, Washington, DC**
Deputy Public Service Counsel

2006 – 2008: **American Immigration Lawyers Association (AILA), Washington, DC**
Deputy Director of Liaison

2004 – 2006: **Transactional Records Access Clearinghouse (TRAC), Washington, DC**
Director of Immigration Project

2001 – 2004: **United Nations High Commissioner for Refugees (UNHCR), Washington, DC**
Protection Officer (U.S. attorney corps)

1991 – 2001: **Northwest Immigrant Rights Project (NWIRP), Seattle, WA**
Positions held: Asylum Director; Pro Bono Coordinator; Legal Director

IMMIGRATION LEGAL SKILLS

- Developed relevant practice experience for over 20+ years in all areas of removal defense, including asylum U/T visas, SIJS, VAWA, and criminal issues
- Experienced in other immigration work, including derivative applications, adjustments, employment cards, appeals, and amici briefs
- Collaborated with many immigrations stakeholders and policy-makers (UNCHR, Steptoe, AILA)

PRO BONO SKILLS

- Have unique perspective on the pro bono process from my work at both legal referral organizations (such as NWIRP) and law firms (Steptoe) that provide legal assistance

PROJECT MANAGEMENT SKILLS

- Expanded a small asylum program into one involving 200 lawyers and 100 cases per year (NWIRP)
- Created immigration data gathering and analysis project from inception (TRAC)

TRAINING SKILLS

- Mentor pro bono attorneys on their cases and provide in-house training (Steptoe)
- Have given Know-Your-Rights presentations at immigration centers and at forums in immigrant communities (NWIRP, AILA)
- Regularly trained juvenile court judges on SIJS law and procedure (NWIRP)
- Regularly trained local government officials in Caribbean nations on refugee/asylum laws and procedures (UNHCR)