

July 15, 2020

Submitted via <https://www.regulations.gov/>

Re: Comments in Response to the United States Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) and Department of Justice (DOJ) Office for Immigration Review (EOIR) (the Departments) Joint Notice of Executive Proposed Rulemaking (NPRM or the rule): Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020

The Tahirih Justice Center¹ (Tahirih) submits the following comments to DHS USCIS and DOJ EOIR in response to the above-referenced NPRM issued by the Departments on June 15, 2020.² Tahirih opposes the rule as both a matter of public policy and because it patently violates numerous laws, including the Immigration & Nationality Act (INA), the Administrative Procedure Act (APA), and the international obligations of the United States as a State party to the United Nations (UN) Convention Relating to the Status of Refugees and 1967 Protocol (collectively, the Convention). *See generally* UNHCR, *The 1951 Refugee Convention*.³ While we condemn the rule in its entirety, in light of our particular mission, experience, and expertise, our comments highlight the devastating impact the rule will have on a uniquely vulnerable population of asylum seekers: immigrant survivors of gender-based violence. *See generally* U.S. Dep't of State, *Gender and Gender-Based Violence*.⁴

I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 survivors of gender-based violence since its inception twenty-three years ago. Our clients are primarily women and girls

¹ <https://www.tahirih.org/>. We note that although these comments are the official comments of Tahirih as an organization, individual Tahirih employees may also have submitted comments on the NPRM in their personal capacities. The agencies must, of course, also consider those individual comments.

² Whenever possible, we have provided the relevant text of secondary sources cited in this comment as attachments to the comment. However, because the agencies have given the public only 30 days to comment on a complex rule during a pandemic, we have not been able to provide all of those sources. All sources cited in this comment—including, but not limited to, court opinions, legislative history, and secondary sources—are to be considered part of the administrative record.

³ <https://www.unhcr.org/1951-refugee-convention.html>.

⁴ <https://www.state.gov/other-policy-issues/gender-and-gender-based-violence/#ftn1>.

ATLANTA

230 Peachtree Street NW
Atlanta, GA 30303
Tel: 470-481-4700
Fax: 470-481-7400
Atlanta@tahirih.org

BALTIMORE

211 E. Lombard Street
Suite 307
Baltimore, MD 21202
Tel: 410-999-1900
Fax: 410-630-7539
Baltimore@tahirih.org

GREATER DC | NATIONAL

6402 Arlington Boulevard
Suite 300
Tel: 571-282-6161
Fax: 571-282-6162
TTY: 711
Falls Church, VA 22042
GreaterDC@tahirih.org
Justice@tahirih.org

HOUSTON

1717 St. James Place
Suite 450
Houston, TX 77056
Tel: 713-496-0100
Fax: 713-481-1793
Houston@tahirih.org

SAN FRANCISCO BAY AREA

881 Sneath Lane
Suite 115
San Bruno, CA 94066
Tel: 650-270-2100
Fax: 650-466-0006
SFBayArea@tahirih.org

tahirih.org

who endure horrific human rights abuses such as domestic violence, rape and sexual torture, forced marriage, human trafficking, widow rituals, female genital mutilation/cutting (FGM/C), and “honor” crimes.⁵

Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our clients’ stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence both abroad and within the U.S. *See, e.g.,* Tahirih Justice Center, *Tahirih in the News*;⁶ Tahirih Justice Center, *Congressional Testimony*;⁷ Tahirih Justice Center, *Comments*.⁸

Among the clients we have served are Mariam*⁹ from Mali, who learned at a very young age that her community did not value women and girls and about how they are punished. She recounts:

In my family, there is no joy when a girl is born. When a boy is born, relatives gather at the parents’ home. They offer small gifts of gold in celebration, and they sacrifice three to four animals. They celebrate the day with food, conversation, and laughter. When a girl is born, my relatives kill just one lamb. No one talks. No one celebrates. They eat quickly and leave.

All of my uncles have more than one wife, and they treat them very poorly. They only talk to their wives to give them orders. I have heard my uncles and aunts fighting, and it always gets physical. I have seen my uncles hit their wives with belts, shove them against walls, and push them to the ground and kick them.

The day after my 16th birthday, my father circled a date on the calendar: August 28. He told me this was the day that I would be married. My soon-to-be-husband was a wealthy man from Mali. He was older than my father! I begged my father to stop the marriage, but he insisted it was final. In that moment, I felt like my life was over. My mom learned that my fiancé had AIDS. Villagers said his first wife died of the disease.

Desperate for a way out, I told my uncles I was no longer a virgin. They beat me so badly that I thought I would die. Then, they locked me in a room used to store crops.

⁵ For background information on these types of gender-based violence, *see, e.g.,* UNHCR, *Guidelines on the Protection of Refugee Women* 17, <https://www.unhcr.org/3d4f915e4.html>; UN Women, *Defining “honour” crimes and “honour” killings*, <https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html>; https://en.wikipedia.org/wiki/Female_genital_mutilation; https://en.wikipedia.org/wiki/Forced_marriage; <https://www.widowsrights.org/>.

⁶ <https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news>.

⁷ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131.

⁸ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=261.

⁹ An * after a name denotes a pseudonym.

There was no bathroom or windows, just a hole in the wall for food. I couldn't tell if it was night or day, and I knew that if my life ended, they would not care.

Eight months passed before my mom rescued me. My uncles went away on a business trip, and she broke through the bolt on the door. With the help of my sister I escaped to the United States and applied for asylum. I'll never forget the day I received my asylum approval. I am free! I can live my life without fear of being forced back to Mali, where my uncles would kill me.

Very soon, I will graduate from college with a degree in agribusiness. I hope to get a job in banking or at a government agency and then pursue an MBA. And I want to get married and start a family, but at my own pace.

Another client, Meena* from Iran, was taught early on that her sole purpose was to serve men. She would be “transferred” from a childhood serving her father, to a lifetime of serving a husband. She explains:

I grew up in a very conservative community in southwest Iran. For as long as I can remember, my father treated me and my mother like servants in our own home. No matter how hard we tried to please him, he found a reason to beat us and threaten to kill us. I'll never forget the time he hurled a butcher knife at my head when I was 10 because I didn't say “hello” to my uncle when he entered our home. I threw my hands up to protect my face, and the knife went through my right hand, causing severe bleeding. I was not allowed to see a doctor.

My father got away with this because women were treated as property or worse in my family — my paternal relatives beheaded their wives and daughters for disobeying orders and fleeing arranged marriages. Despite my persistence to get out of the house and go to school, my father told me I would never be a source of pride because I am a girl. He said being obedient to men was my destiny as a woman.

When I turned 15, my father arranged for me to marry my cousin. I dreaded a life of never-ending misery. My mother, a brave and strong-willed woman, decided it was time to save us both. In the middle of the night, with only a few clothes and a blanket, we ran away. We spent the next seven years in hiding.

During my travels abroad with relatives, I befriended an American man. I fell in love, and when he proposed, my mother and I agreed I should accept his offer. My fiancé helped me obtain a visitor's visa to come to America but he soon revealed that he was already married and abandoned me. I felt so alone, with no home, no family, and no resources.

My attorneys and social service aides helped me access the food, shelter, and support services I needed to survive. Their unwavering support gave me the courage to move forward and share my story with an asylum officer. After several difficult months, I was granted asylum. I felt like I had a second chance at life.

I found work as a translator for the U.S. military and have been working in this position for the past three years. Today, I am determined to earn a degree in criminal justice because I want to have a career protecting others. I just received a full scholarship to go to college. Never in my life would I have imagined writing these words except in a dream.

And finally, Koumba* from Benin began her fight for justice when she was raped at the age of 11 by a man from her father's village. Four years later, she was raped a second time by a different man. She then learned that she had been promised to this man in marriage. Koumba* suffered for a long time with shame from the rapes, but she tried her best to establish as normal a life as possible.

Koumba* eventually attended university, earned her degree, and worked as a human resources professional for an insurance company. A decade passed, and she fell in love with a man from her church and married him. Koumba* put her past abuse behind her and built a happy new life with her husband.

In 2010, Koumba*'s world was violently upended when the rapist to whom she had been promised in her teens passed away. To her shock and dismay, this man and his family had never forgotten that Koumba* had been promised to him like property. Now, upon the rapist's death, his brother "inherited" Koumba*. At his direction, members of a sect from his village kidnapped her. Koumba* was forced to perform widow rituals, which included washing the dead man's body as well as her own intimate parts with the same water. She was then forced to spend the night lying next to the corpse of her rapist. She knew she would get no help from the local police, so at the first opportunity, she fled to another town.

Unfortunately, her safety was temporary. A few months later, Koumba* was kidnapped again. This time, the dead man's brother kept her in a dark hut with her arms and legs tied to a bed and raped her every day. Once again she escaped, this time the night before their formal marriage ceremony was to take place. Because she knew that she could no longer live in Benin in safety, she gave up her career and everything she had worked for in her native land and fled to the United States. After facing additional hardship here, she was finally able to apply for and win asylum.

A. Asylum Seekers Fleeing Gender-Based Violence are a Uniquely Vulnerable Population

Gender-based violence is ubiquitous:¹⁰ Even women and girls who are also targeted for persecution for reasons unrelated to their gender are unfortunately likely to suffer gender-based discrimination or violence in some form. And gender-based violence in all of its forms involves a unique set of common characteristics that leave survivors of such violence uniquely vulnerable. That set of characteristics includes (i) persecution at the hands of family members, communities, and other non-state actors; (ii) severe ostracization and searing social stigmas; (iii) disbelief of survivors; (iv) internalized shame; (v) the inability to disclose gender-based violence to or in the presence of children or male family members; (vi) the absence or nonenforcement of laws to protect survivors; (vii) laws permitting gender-based discrimination or violence; (viii) cultural acceptance of gender-based

¹⁰ See generally UNFPA, *Against My Will: Defying the Practices That Harm Women and Girls and Undermine Equality* (2020), https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf.

violence; (ix) barriers to medical or mental health treatment for survivors; (x) forced dependence or unequal caretaking responsibilities; (xi) multiple victimization and revictimization; and (xii) ongoing gender-based violence even after a survivor reaches the United States.

Survivors of gender-based violence—who include entrepreneurs, physicians, teachers, historians, grocery clerks, lawyers, authors, caregivers, politicians, entertainers, and scientists—are thus isolated, traumatized, and cut off from family and community resources, and those who do manage to escape are in desperate need of counsel,¹¹ medical, mental health, and other services as they navigate our system. *See, e.g.,* Tahirih Justice Center, *Immigrant Survivors Fear Reporting Violence* (May 2019).¹² Yet due to the nature of gender-based violence, survivors are *least* likely to be able to access such services. Access to corroborating evidence to support their claims is also very limited. In fact, as noted by U.N. High Commissioner for Refugees (UNHCR), in “gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution.” UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01, at 10 (2002) (*Gender Guidelines*).¹³ The formidable obstacles survivors already face in seeking safety have only been amplified by the global pandemic. *See, e.g.,* Rená Cutlip-Mason, *For Immigrant Survivors, the Coronavirus Pandemic is Life-Threatening in Other Ways*, Ms. Magazine (Apr. 14, 2020);¹⁴ Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020).¹⁵

B. The NPRM Would Inexplicably Eviscerate Humanitarian Protection for Survivors of Gender-Based Violence

As a law student in 1996, Tahirih founder and CEO Layli Miller-Muro¹⁶ was involved in a landmark asylum case on behalf of Fauziya Kassindja¹⁷ from Togo. Ms. Kassindja recounted her escape, at just 17 years of age, from imminent FGM/C and a forced polygynous marriage¹⁸ to a man more than twice her age: “On Thursday they said I’d be married. On Friday they told me they’d cut

¹¹ This is particularly the case for detained asylum seekers. *See, e.g.,* Tahirih Justice Center, *Nationwide Survey: A Window into the Challenges Immigrant Women and Girls Face in the United States and the Policy Solutions to Address Them* (Jan. 31, 2018), <http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf>.

¹² <https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5d290b07a8dea8000138bf97/1562970888076/2019-Advocate-Survey-Final.pdf>.

¹³ <https://www.unhcr.org/3d58ddef4.pdf>.

¹⁴ <https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life-threatening-in-other-ways/>.

¹⁵ https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf.

¹⁶ *See* https://en.wikipedia.org/wiki/Layli_Miller-Muro.

¹⁷ *See* <http://www.pbs.org/speaktruthtopower/fauziya.html>.

¹⁸ *See* <https://en.wikipedia.org/wiki/Polygyny>.

me. At midnight, I escaped.” Ms. Kassindja was ultimately granted asylum and her case, *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), set national precedent establishing gender-based persecution as a ground of asylum in the United States.¹⁹ Soon thereafter, Congress enacted legislation criminalizing FGM/C of a minor. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, div. C, title VI, § 645(b)(1), 110 Stat. 3909-709 (1996), *codified at* 18 U.S.C. § 116. Thirty-five states have since followed suit. See Equality Now, *FGM in the US: What Is Female Genital Mutilation (FGM)?*.²⁰

For decades, the United States has more generally recognized the pervasive, severe, and acute threat that gender-based violence poses to the lives and safety of women and girls. Since 1984, for example, bipartisan majorities of Congress have enacted the Family Violence Prevention and Services Act (FVPSA), Pub. L. 98-457, title III, 98 Stat. 1749, 1757, *codified at* 42 U.S.C. §§ 10401-12,²¹ the Violence Against Women Act (VAWA), Pub. L. 103-322, 108 Stat. 1796 (1994), and the Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. 106-386, 114 Stat. 1464 (2000). And nine states plus Washington, D.C. and the U.S. Virgin Islands have enacted criminal laws barring forced marriage. See Tahirih Justice Center, *Criminal Laws Addressing Forced Marriage in the United States* (Aug. 2019).²²

The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980), did not explicitly name persecution based on “gender” as a ground for asylum. That omission reflects Congress’s adoption of the UN Convention’s then nearly 30-year old refugee protection framework, which was drafted from a male-centered perspective. See UNHCR, *Gender Guidelines 2*. But “properly interpreted,” the definition of “refugee” included in the Convention, and adopted by Congress, “covers gender-related claims.” *Id.* at 3. As UNHCR put the matter in 2002 guidelines for interpreting the Convention, “it is widely accepted that [gender] can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment...as such, there is no need to add an additional ground to the 1951 Convention definition.” *Id.* And those guidelines, which remain in effect today, “provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary” in all countries, including the United States, that are parties to the Convention. See *id.* at 1.²³

¹⁹ Following the decision, Ms. Miller-Muro founded Tahirih to help more women and girls targeted for violence and torture simply because they are female.

²⁰ https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/216/attachments/original/1565706130/FGMintheUS_factsheet_Aug2019.pdf?1565706130.

²¹ See also Nat’l Resource Ctr. on Domestic Violence, *Learn About FVPSA*, <http://www.learnaboutfvpsa.com/35yrs-impact>.

²² https://preventforcedmarriage.org/wp-content/uploads/2015/01/Forced-Marriage-Criminal-Statutes_2019.pdf.

²³ UNHCR’s views on the proper interpretation of asylum law are entitled to particular deference because they reflect extensive input by member states—including the United States. See, e.g., UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the Convention* (1992) <https://www.unhcr.org/4d93528a9.pdf>; see also, e.g., *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (Department of Immigration and Humanitarian Affairs, Australia, July 1996); *Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Immigration and Refugee Board, Canada, 13 November 1996); *Position on Asylum Seeking and Refugee Women* (European Council on Refugees and Exiles,

The U.S. government routinely recognizes that the definition of “refugee” encompasses those persecuted on account of gender. The State Department, for instance, has emphasized in the refugee protection context that the “empowerment and protection of women and girls has been a central part of U.S. foreign policy and national security” and that “gender-based violence[] is a critical issue” that is “intricately linked to” the Department’s strategic goals. Bureau of Population, Refugees, and Migration, *Gender and Gender-Based Violence*.²⁴ To that end, the State Department has “implement[ed]” an entire strategy to combat gender-based violence around the world. *Id.*; see USAID, *United States Strategy to Prevent and Respond to Gender-Based Violence Globally* (2016).²⁵ And as noted above and shown in detail below, the agencies and the federal courts have, in the decades since *Kasinga*, consistently treated gender-based persecution as grounds for asylum.

The NPRM, in contrast, would plainly bar asylum for survivors of violence inflicted on account of their gender. It is nothing short of astounding for the U.S. government to outlaw gender-based violence within the United States; retain its status as a Refugee Convention State party; currently proclaim itself a “leader within the humanitarian community on the protection of women and girls” (Bureau of Population, Refugees, and Migration, *Gender and Gender-Based Violence*); and, in the very next breath, decimate humanitarian protections for women and girls. Even more incomprehensible is that just last year, the same agencies that now seek to dismiss gender-based violence as unworthy of redress deemed even *unproven acts* of domestic violence so egregious that they sought to categorically bar perpetrators of such violence from asylum. See DOJ & DHS, *Procedures for Asylum and Bars to Asylum Eligibility*, 84 Fed. Reg. 69,640 (Dec. 19, 2019). Finally, and most importantly: To say that the rule will swiftly, cruelly, and arbitrarily sentence women and girls to torture and death is not hyperbole. It is the plain, simple truth. See, e.g., Human Rights Watch, *Deported to Danger* (Feb. 5, 2020).²⁶

II. Comments on the NPRM as a Whole

The NPRM should be withdrawn in its entirety. As discussed above, it will lead to the persecution, torture, and death of survivors of gender-based violence—and countless others. Unsurprisingly, the entirety of the NPRM also violates federal law in at least four ways.

December 1997); *Gender Guidelines for the Determination of Asylum Claims in the UK* (Refugee Women’s Legal Group, July 1998); *Gender Guidelines for Asylum Determination* (National Consortium on Refugee Affairs, South Africa, 1999); *Asylum Gender Guidelines* (Immigration Appellate Authority, United Kingdom, November 2000); *Gender-Based Persecution: Guidelines for the investigation and evaluation of the needs of women for protection* (Migration Board, Legal Practice Division, Sweden, 28 March 2001); *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (UNHCR, Geneva, 1995); *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* (Report of Inter-Agency Lessons Learned Conference Proceedings, 27-29 March 2001, Geneva).

²⁴ <https://www.state.gov/other-policy-issues/gender-and-gender-based-violence/#ftn1>.

²⁵ <https://www.state.gov/wp-content/uploads/2019/03/258703.pdf>.

²⁶ <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and>.

A. Pretext

As an initial matter, the NPRM is nothing more than a pretext for enshrining anti-asylum seeker sentiments in the Code of Federal Regulations. The Supreme Court recently made clear that “[t]he reasoned explanation requirement of administrative law ... is meant to ensure that agencies offer genuine justifications for important decisions.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). To that end, the agencies’ actual reasoning must be provided so that it “can be scrutinized by courts and the interested public.” *Id.* at 2576. And as part of disclosing their “actual reasoning,” administrative agencies “must ‘disclose the basis’” of their actions. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Bd.*, 313 U.S. 177, 197 (1941)). The provision of “contrived reasons would defeat the purpose of the enterprise.” *Dep’t of Commerce*, 139 S. Ct. at 2576.

The agencies have not taken this basic step. In fact, the agencies have not even satisfied the bedrock criterion of “disclos[ing] the basis” of their proposed actions. *Burlington Truck Lines*, 371 U.S. at 168. The NPRM discloses no basis at all for the entirety of the package of sweeping changes it proposes. That fact, standing alone, renders the proposals arbitrary and, thus, void under the APA.

Moreover, any rationale that the agencies may attempt to advance at a later stage will unquestionably be pretextual rather than “genuine justifications.” *Dep’t of Commerce*, 139 S. Ct. at 2575. The NPRM is a miscellaneous grab-bag of proposals: It would change both substance and procedure; both credible-fear proceedings and full asylum proceedings; both required showings by asylum seekers and the exercise of discretion; and both legal questions and factual evidence. Only one common thread runs through this mishmash of proposals: All of the changes, without exception, would make the road to relief more difficult for asylum seekers. That fact is, without more, sufficient to give rise to the strong inference that barring the door to asylum seekers is the underlying goal of the agencies.

That inference is further supported by at least four features of the new rule. *First*, the agencies have not even attempted to identify any other unifying principle in (much less rationale for) the NPRM. *Second*, the NPRM makes clear that the agencies have not considered any alternatives to the proposals included in the NPRM. In particular, the agencies have not considered any changes that would make it easier to seek or obtain asylum in the United States. *Third*, as shown above (*see* Section I.B, *supra*), the treatment of domestic violence in the NPRM is diametrically opposed to the treatment of domestic violence in an NPRM issued by the same agencies only months earlier. The only consistency between the NPRM and the earlier proposal is that both would bar individuals from asylum—one on the ground that they committed gender-based violence, the other on the ground that they survived gender-based violence. *Fourth*, despite the length of the NPRM, many of the individual proposals in the NPRM contain no justification at all. And the purported justifications for individual provisions that the agencies have included are uniformly so thin as to reinforce the inference that they are nothing more than a pretense.²⁷

²⁷ We show this failure of justification below in our comments on the individual provisions. To be clear, our comments concerning the absence or inadequacy of justifications for individual proposals also stand on their own as reasons why those proposals are arbitrary. Any response by the agencies to the general point that the NPRM’s reasoning is pretextual therefore does not discharge the agencies’ duty to respond to our comments on individual provisions.

The inference also finds support in the statements of those who signed or influenced the rule. To start at the top, President Donald J. Trump has stated that immigrants attempting to cross the southern border of the United States should be shot. Eugene Scott, *Trump's most insulting—and violent—language is often reserved for immigrants*, Wash. Post (Oct. 2, 2019).²⁸ He has suggested that the border should include an “electrified” wall with “spikes on top that could pierce human flesh.” *Id.* He has referred to immigrants as “animals” who “infest” the United States. Juan Escalante, *It's not just rhetoric: Trump's policies treat immigrants like me as “animals,”* Vox (May 19, 2018);²⁹ Brian Resnick, *Donald Trump and the disturbing power of dehumanizing language*, Vox (Aug. 14, 2018).³⁰ And he has, without citing to any evidence, both associated immigrants generally with “[d]rugs, gangs, and violence” (Dara Lind, *Trump just delivered the most chilling speech of his presidency*, Vox (June 28, 2017)),³¹ and said that Mexican immigrants “bring[] drugs,” “bring[] crime,” and are “rapists.” Scott, *supra*.

More specifically, President Trump has referred to asylum seekers as “invas[ing]” and “infest[ing]” the United States. Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 6:52 AM);³² Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 8:02 AM).³³ He has claimed without evidence that support for asylum seekers is equivalent to support for “crime,” “drugs,” and “human trafficking.” *Remarks: Donald Trump Meets With Representatives of Law Enforcement* (Sept. 26, 2019).³⁴ And he has made clear his view that all asylum seekers should “IMMEDIATELY” be deported without any legal process whatsoever, in clear contravention of the INA and international law. Donald J. Trump (@realDonaldTrump), Twitter (June 30, 2018, 3:44 PM).³⁵

President Trump has also repeatedly claimed that the asylum system routinely grants relief to people without legitimate claims. He has, for instance, claimed that there is routine “abuse” of the asylum process. Exec. Order No. 13,767, *Border Security and Immigration Enforcement* (Jan. 25, 2017). He has referred to the lawful asylum process as a “loophole” exploited by those with “fraudulent or meritless” claims. *Remarks by Pres. Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018).³⁶ He has referred to asylum as a “hoax” and a “scam” and claimed, in clear contravention of U.S. and international law, that “we’re not taking [asylum seekers]

²⁸ <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/>.

²⁹ <https://www.vox.com/first-person/2018/5/18/17369044/trump-ms-13-gang-animals-immigrants>.

³⁰ <https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omarosa-dehumanization-psychology>.

³¹ <https://www.vox.com/policy-and-politics/2017/7/28/16059486/trump-speech-police-hand>.

³² <https://twitter.com/realDonaldTrump/status/1009071403918864385>.

³³ <https://perma.cc/35AQ-NSDH>.

³⁴ <https://factba.se/transcript/donald-trump-remarks-law-enforcement-september-26-2019>.

³⁵ <https://twitter.com/realDonaldTrump/status/1013146187510243328?s=20>.

³⁶ <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

anymore.” *Trump on Asylum Seekers: ‘It’s a Scam, It’s a Hoax’*, Daily Beast (Apr. 5, 2019).³⁷ He has expressed the unelaborated view that “asylum procedures are ridiculous” and that “you have to get rid of [immigration] judges” to get the outcomes he prefers. *Remarks by President Trump and NATO Secretary General Jens Stoltenberg Before Bilateral Meeting* (April 2, 2019).³⁸ He has claimed that asylum laws are “horrible” and “unfair” (*Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border* (Mar. 15, 2019))³⁹ and that asylum claims are “frivolous” and “bogus” (*Remarks: President Trump Signs Taxpayer First Act in the Oval Office* (July 1, 2019)).⁴⁰ None of these statements were supported by so much as a shred of evidence, and no supporting evidence exists for any of them.

These views constitute just a small sample of President Trump’s anti-immigrant, and anti-asylum seeker, statements.

Attorney General William Barr, who signed the NPRM on behalf of DOJ, likewise has a long history of statements that, at the time of his confirmation, led to the accurate prediction that he would “be a loyal foot soldier for Trump’s aggressive immigration agenda.” Dara Lind, *William Barr hearing: attorney general nominee’s immigration record aligns with Trump’s*, Vox (Jan. 16, 2019).⁴¹ For instance, in 1992, when the acquittal of the white Los Angeles police officers who savagely beat Rodney King led to violence, Barr made the astonishing claim that “[t]he problem of immigration enforcement” was in part responsible for the violence. Ronald J. Ostrow, *William Barr: A “Caretaker” Attorney General Proves Agenda-Setting Conservative*, L.A. Times (Jun 21, 1992).⁴² Like Trump, Barr has long believed—without a shred of supporting evidence—that large numbers of asylum seekers present “patently phony claims.” *Asylum and inspections reform: Hearing before the Subcommittee on International Law, Immigration, and Refugees of the Committee on the Judiciary, House of Representatives* (Apr. 27, 1993).⁴³ And more recently, while criticizing so-called “sanctuary” policies, Barr baselessly referred to all undocumented people as “criminal aliens.” *E.g.*, Justine Coleman, *Barr announces ‘significant escalation’ against ‘sanctuary’ localities*, The Hill (Feb. 10, 2020).⁴⁴

There is little public information about Chad Mizelle, who illegally signed the NPRM on behalf of DHS (*see* Section II.C, *infra*). However, Mizelle is universally described as having been made purported Acting General Counsel of DHS thanks to his close ties to White House immigration adviser Stephen Miller. *See, e.g.*, Geneva Sands, *Stephen Miller ally tapped as top Homeland Security*

³⁷ <https://www.thedailybeast.com/trump-on-asylum-seekers-its-a-scam-its-a-hoax>.

³⁸ <https://perma.cc/5ZKY-P53D>.

³⁹ <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border-2/>.

⁴⁰ <https://factba.se/transcript/donald-trump-remarks-bill-signing-taxpayer-act-july-1-2019>.

⁴¹ <https://www.vox.com/2018/12/7/18128926/barr-confirmation-senate-immigration-trump>.

⁴² <https://www.latimes.com/archives/la-xpm-1992-06-21-op-1236-story.html>.

⁴³ https://archive.org/stream/asyluminspection00unit/asyluminspection00unit_djvu.txt.

⁴⁴ <https://thehill.com/regulation/court-battles/482425-barr-announces-significant-escalation-against-sanctuary-cities>.

attorney, CNN (Feb. 12, 2020);⁴⁵ Meghana Srivastava, *Cornell Law Alum Named Homeland Security Head Lawyer*, Cornell Sun (Feb. 19, 2020).⁴⁶ Presumably, then, Mizelle broadly shares Miller’s views toward asylum seekers and other immigrants.

Miller’s view of asylum seekers is that the United States should treat the children in families seeking asylum “badly enough” that parents will no longer seek refuge in this country. Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, The New Yorker (Feb. 21, 2020).⁴⁷ He, too, has claimed without evidence that there is an “‘asylum fraud crisis’ at the border.” *Id.* More generally, Miller has, by his own admission, dedicated his entire life to making the lives of immigrants more difficult. *Id.* Miller’s central driving belief is that immigrants bring crime to the United States. SPLC, *Emails Confirm Miller’s Twin Obsessions: Immigrants and Crime* (Nov. 25, 2019).⁴⁸ That belief, however, has been repeatedly and conclusively refuted. *See, e.g.*, Jason L. Riley, *The Mythical Connection Between Immigrants and Crime*, Wall St. J. (July 14, 2015);⁴⁹ Christopher Ingraham, *Two charts demolish the notion that immigrants here illegally commit more crime*, Wash. Post (June 19, 2018);⁵⁰ Walter Ewing et al., *The Criminalization of Immigration in the United States* (July 13, 2015);⁵¹ Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, The Marshall Project (May 13, 2019).⁵²

Thus, even if the text of the NPRM left any doubt about the true goal of its proposals—and it does not—that doubt would be dispelled by the statements of those who approved the NPRM or were in a position to dictate its contents. Because the NPRM does not, and cannot, justify that true goal of making it effectively impossible for asylum seekers to receive relief in the United States, it must be withdrawn in its entirety.

⁴⁵ <https://www.cnn.com/2020/02/12/politics/chad-mizelle-department-of-homeland-security/index.html>.

⁴⁶ <https://cornellsun.com/2020/02/19/cornell-law-alum-named-homeland-security-head-lawyer/>.

⁴⁷ <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession>.

⁴⁸ <https://www.splcenter.org/hatewatch/2019/11/25/emails-confirm-millers-twin-obsessions-immigrants-and-crime>.

⁴⁹ <https://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798>.

⁵⁰ <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/>.

⁵¹ <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states>.

⁵² <https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime>.

B. Impermissible Retroactivity

Almost all of the NPRM's provisions are, by their terms, illegally retroactive in effect. The NPRM proposes to make its redefinition of "frivolous" only prospective in application (*see* 85 Fed. Reg. at 36,304), but it is silent as to whether its remaining provisions would apply to applications filed before its provisions become effective. The natural inference is therefore that the agencies intend all of the NPRM's remaining provisions to apply to applications for asylum and related relief that are pending at the time the rule becomes effective. Thanks to a variety of factors, prominently including USCIS's decision to shift to a last-in-first-out priority system in adjudicating asylum claims and DOJ's meddling in the dockets of the immigration courts (*see* Section III.D.1, *infra*), there are many such applications—including some that have been pending for at least five years.

The application of the NPRM to pending applications would violate the well-settled presumption against retroactivity. A regulation may not be applied retroactively unless Congress has included a clear statement that the agencies may promulgate regulations with that effect. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001). There is no statute that authorizes either DHS or DOJ to promulgate regulatory changes to the asylum system that have retroactive effect.

The application of the NPRM's proposals to pending asylum applications is therefore illegal if that application qualifies as "retroactive." It does. "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *St. Cyr*, 533 U.S. at 317 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The phrase "new legal consequences" encompasses any provision that would "take[] away or impair[] vested rights acquired under existing laws" or that would "create[] a new obligation, impose[] a new duty, or attach[] a new disability, in respect to transactions or considerations already past." *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269)). And the inquiry into whether a provision does so must "be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* (quoting *Martin v. Hadix*, 527 U.S. 343, 358 (1998)).

There can be no doubt that each provision of the NPRM would either impair rights concerning, or place new disabilities on, asylum applications already filed. This is obvious with the NPRM's procedural proposals. The new rule concerning pretermission would retroactively disentitle asylum seekers with pending applications from the only process in which may individuals can effectively convey the persecution inflicted on them—*i.e.*, an oral hearing before an immigration judge. *See* Section III.D.2, *infra*. The proposed changes to confidentiality, meanwhile, would open prior applicants to the possibility of unforeseen reprisals by government agencies or private actors. And the new credible-fear procedures would, if applied to individuals who are in the middle of the CFI process when the regulation takes effect, unlawfully disentitle those individuals to (among other things) consideration under settled credible-fear standards and placement in full removal proceedings under 8 U.S.C. § 1229a.

The NPRM's proposed substantive standards would also have an impermissible retroactive effect as applied to pending applications. All of those standards—including, but not limited to, the previously unthinkable list of bars to the favorable exercise of discretion—would overrule BIA opinions, seek to override opinions from the federal courts of appeals, newly shift burdens of proof, or otherwise expressly or implicitly change settled law. And without exception, the changes wrought by the NPRM would work to the detriment of asylum applicants. Further, many of the new standards,

such as the laundry lists of generally barred claims in the portions of the NPRM concerning PSGs, nexus, and the exercise of discretion, would also disentitle those with pending applications from receiving the case-by-case adjudication on all of the individual circumstances that asylum seekers have always received under U.S. and international law. *See* Section III.A.1.b.i, *infra*. Applicants who submitted applications on the basis of existing law would therefore find themselves newly disadvantaged in numerous, serious ways. For this reason, too, the NPRM must be withdrawn in its entirety.

C. Violation of the Vacancies Act

The NPRM is also invalid, and must be withdrawn, in its entirety because it was issued in violation of the Federal Vacancies Reform Act (FVRA). The NPRM was signed by Chad Mizelle in his purported capacity as “Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.” 85 Fed. Reg. at 36,306. Because the DHS General Counsel does not have the authority to sign proposed or final rules under the Homeland Security Act or existing DHS delegations, the NPRM also includes a paragraph in which purported Acting Secretary Chad Wolf “delegate[s] the authority” to sign the document to Mizelle. *Id.* at 36,290. However, both Wolf and Mizelle are serving in violation of the FVRA, 5 U.S.C. §§ 3345 & 3346. As a result, both Wolf’s delegation and Mizelle’s signature are without force and effect under the FVRA, 5 U.S.C. § 3348(d)(1), and contrary to law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The NPRM, and any final rule based on the NPRM, are accordingly void.

D. Insufficient Time for Public Comment

Finally, the agencies have provided insufficient time for public comment, and have done so without any attempted justification.⁵³ The NPRM contains highly technical and complex regulatory changes that span 63 pages—and that follow nearly 100 pages of preamble. Those changes must be addressed individually in comments, because they have nothing in common beyond working against asylum seekers. And the changes will directly implicate the lives and safety of, at a minimum, thousands of people.

Yet the public has been given a mere 30 days to respond. Even under normal circumstances, at least 60 days would be needed for the public to engage in a meaningful review and analysis of such a lengthy and disjointed rule. And these are not normal circumstances: The public is at an even greater disadvantage now due to the COVID-19 global pandemic.

The 30-day period has also proven insufficient in practice, as our experience highlights. At Tahirih all employees continue to perform mandatory telework, many while simultaneously caring for babies, toddlers, and/or school-age children. As a result, full-time Tahirih employees were expected to work no more than 32 hours per week during the comment period, with the expectations for part-time employees—two of whom were crucial to the drafting of these comments—reduced

⁵³ The agencies received numerous letters from potential commenters requesting extensions of the comment period. *See Letter from Bahá’is of the United States et al.* (July 1, 2020); *Letter from Ravi Ragbir, Director, New Sanctuary Coalition* (June 18, 2020); *Letter from Rep. Jerrold Nadler, Chair, House Judiciary Committee and Zoe Lofgren, Chair, Subcommittee on Immigration and Citizenship* (June 22, 2020); *Letter from 502 Organizations* (June 18, 2020). So far as we know, the agencies did not see fit to respond to any of those requests.

proportionally. Thus, extensive as these comments may appear, they do not represent Tahirih’s full response to the rule. And they do not, because they cannot, include all of the analysis and evidence that Tahirih would have provided if given at least 60 days to respond to the rule. The agency’s decision not to provide more than 30 days for comment has therefore impaired Tahirih’s opportunity and ability to comment on the rules.⁵⁴

Furthermore, that decision is arbitrary. The NPRM contains no reasons for permitting only a 30-day comment period. And there can be no legitimate urgency to the agencies’ proposals, because effectively no asylum seekers are arriving in the United States at this moment. After all, because of COVID-19, U.S. borders are indefinitely closed, and air travel into the country is severely curtailed. Nor is there any urgent need to apply the rule to asylum seekers who have already submitted applications to EOIR or USCIS. Many EOIR courts remain closed for non-detained hearings, and USCIS has extended due dates for responses that would be due through September 11, 2020, because of difficulties caused by the pandemic. Further, the CFI and RFI portions of the rule are simply inapplicable to individuals with pending applications. And in any event, any application of the NPRM’s proposals to pending applications would, as shown above, be impermissibly retroactive. There is, in other words, no plausible and non-arbitrary reason for the agencies to have provided only 30 days for comment on the NPRM’s complex and disjointed proposals.

III. Comments on Individual Proposals in the NPRM

The individual proposals in the NPRM are no better thought out than the rule as a whole. To the contrary, as explained below, each individual proposal is contrary to law, arbitrary, or both.

A. Substantive Inquiries in Asylum Adjudications

1. “Particular Social Group”

Each of the changes that the NPRM proposes with respect to PSGs would preclude many survivors of gender-based violence from receiving asylum even though they satisfy the definition of “refugee” in the INA. Each is both contrary to law, arbitrary, or both. And each must accordingly be withdrawn.

a. “Circularity”

The NPRM proposes to codify a variant of the rule against so-called “circularity.” Under the general understanding of that rule, “a particular social group cannot be defined exclusively by the alleged persecutory acts or harms” giving rise to the asylum claim. 85 Fed. Reg. at 36,291. The NPRM would, however, define as circular not only those PSGs that are exclusively defined by persecution but also those that do not “exist[] independently of the alleged persecutory acts or harms that form the basis of the claim.” *Id.* In doing so, the NPRM apparently seeks to adopt the circularity analysis in *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018), which treats—and has been interpreted by the BIA

⁵⁴ Among other things, the restricted time frame has left us unable to comment on the effect of the NPRM on LGBTQI/H asylum seekers. Although the existence of other comments on those effects does not cure the prejudice to Tahirih, we point the agencies to the comment submitted by Immigration Equality, which specifically addresses the effects the NPRM would have on LGBTQI/H people.

as treating—any group even partially defined by “the persecution of [its] members” as “categorical[ly]” circular. *De Pena-Paniagua v. Barr*, 957 F.3d 88, 93 (1st Cir. 2020).

The NPRM’s expansion of the meaning of circularity is inconsistent with international law. Although the phrase “particular social group” in the Refugee Convention is not a “‘catch all’ that applies to all persons fearing persecution,” the Convention requires only that a social group not be “defined exclusively by the fact that it is targeted for persecution.” UNHCR, *Guidelines on Int’l 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*, HCR/GIP/02/02 (2002), at 2.⁵⁵ Thus, “the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.” *Id.* at 4 (internal quotation omitted). The Convention, in other words, allows PSGs that do not “exist[] independently” of the persecution. 85 Fed. Reg. at 36,291. But the agencies do not even acknowledge, much less justify, this departure—and their proposal is therefore arbitrary.

The proposed expansion of the meaning of circularity also represents a dramatic departure from longstanding precedent. The courts of appeals have routinely said that a PSG is not circular unless it is defined entirely by persecution. *See, e.g., De Pena-Paniagua*, 957 F.3d 88; *Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020); *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc); *De Castro-Gutierrez v. Holder*, 713 F.3d 375 (8th Cir. 2013); *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2011); *Kante v. Holder*, 634 F.3d 321 (6th Cir. 2011); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). Notably, the federal appellate cases on which the NPRM purports to rely are to the same effect. *See Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018) (quoting *Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011) for the proposition that a PSG is circular if it is “defined only by the characteristic that is persecuted); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). And the BIA, too, has long accepted PSGs that include references to the persecution that drives asylum seekers to the United States. *See, e.g., Kasinga*, 21 I. & N. Dec. 357 (“young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”).

The NPRM arbitrarily fails to recognize the magnitude of the difference between the test uniformly applied by the courts of appeals and the test it proposes. The NPRM says only that the two are “not precisely the same.” 85 Fed. Reg. at 36,278 n.38. In fact, comparing the two is—in the words of a case the NPRM cites on this point—“like comparing carrots to cucumbers.” *Perez-Rabanales*, 881 F.3d at 67. Under the federal courts’ test, “an unfreed slave in first century Rome” who is “persecuted precisely because he had been enslaved” would be able to seek relief. *De Pena-Paniagua*, 957 F.3d at 94. Under the NPRM’s proposed test, he would not.

A comparison of two cases on which the NPRM purportedly relies—*Matter of A-B-* and *Perez-Rabanales*—further clarifies the difference. The First Circuit in *Perez-Rabanales* correctly held that the PSG accepted by the BIA in *Matter of A-R-C-G-*, 26 I. & N. Dec. 390 (BIA 2014)—namely, “married women in Guatemala who are unable to leave their relationship”—represents a non-circular reference to a group “viewed by society as a discrete class of persons.” *Perez-Rabanales*, 881 F.3d at 67. In contrast, *Matter of A-B-*, which sought to overturn decades of case law, opined that the same PSG was impermissibly circular as a matter of law. 27 I. & N. Dec. at 334-35. By treating these

⁵⁵ <https://www.unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

approaches as essentially equivalent even though they generate extremely different outcomes, the NPRM makes clear that it is the agencies, not the courts, who are “confus[ed].” 85 Fed. Reg. at 36,278 n.28. And its proposal to redefine circularity is therefore arbitrary.

Unsurprisingly, the NPRM’s *ipse dixit* claiming that the courts have been “confus[ed]” about the meaning of circularity (85 Fed. Reg. at 36,278 n.38) is false. As the caselaw above makes clear, the courts have adopted a broadly uniform approach to circularity that asks whether a group is “viewed by society ... as either distinct or uniquely vulnerable prior to the commission of the acts of persecution of which they complain.” *Perez-Rabanales*, 881 F.3d at 67. And they have recognized that groups defined in part by reference to persecution can satisfy that criterion—a fact illustrated by, among many others, the PSG in *Kasinga*. There, the persecution was female genital mutilation/cutting—and the acronym “FGM” expressly appears in the PSG formulation the BIA accepted. But it is self-evident that the PSG is not impermissibly circular. And although the agencies apparently do not agree with that analysis, the NPRM does not even attempt to explain why. Nor does the NPRM make any attempt to justify the absurd consequence that it would bar asylum for individuals who *are* part of particular social groups as that term has always been understood.

Moreover, the analysis of circularity in *Matter of A-B-* on which the NPRM relies is contrary to the evidence. The Attorney General in that case simply assumed that an inability to leave was always on account of the persecution at issue—*i.e.*, physical abuse. But as the First Circuit recently put the point, there is no “basis other than arbitrary and unexamined fiat” for any such “categorical[] decree.” *De Pena-Paniagua*, 957 F.3d at 94.

There are, in fact, a multitude of reasons other than physical abuse that can give rise to an inability to leave a relationship. Economic dependence is one. *See, e.g., De Pena-Paniagua*, 957 F.3d at 94. Social and cultural norms are another. *See id.* In some countries, those norms are backed by the force of the state. *See, e.g., U.S. Dep’t of State, Afghanistan 2018 Human Rights Report* 30.⁵⁶ Because people who engage in abuse seek to control every aspect of a survivor’s life, an inability to leave can also result from enforced isolation from family and friends, the unavailability of means of communication, and the inability to access money or key documents are still other factors that can render it impossible to leave but that are separate from physical abuse. *See, e.g., Anne L. Ganley, Health Resource Manual* 16, 37 (2008); Rachel Louise Snyder, *No Visible Bruises: What We Don’t Know About Domestic Violence Can Kill Us* 36 (2019); Zlatka Rakovec-Felser, *Domestic Violence and Abuse in Intimate Relationships from Public Health Perspective*, 2:1821 *Health Psych. Research* 62, 63 (2014); Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 *Sex Roles* 743 (2005). “[P]hysical abuse might” therefore be visited upon people “because they are among those unable to leave, even though such abuse does not define membership in the group of” those “who are unable to leave.” *De Pena-Paniagua*, 957 F.3d at 94. The Attorney General’s failure to recognize as much was arbitrary—and so is the agencies’ decision to blindly follow the same misguided path.

b. List of Disfavored PSGs

The NPRM next states that DHS and DOJ will, “in general, ... not favorably adjudicate claims” where a PSG “consist[s] of or [is] defined by” the following disjointed laundry list of topics:

⁵⁶ <https://www.state.gov/wp-content/uploads/2019/03/AFGHANISTAN-2018.pdf>.

Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States.

85 Fed. Reg. at 36,291. Under the proposal, even this list “is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list.” *Id.*

i. As a Whole

The NPRM’s laundry list of disfavored PSGs violates the APA for at least seven reasons.

First, the laundry list is contrary to law. The INA, the 1967 Protocol, and BIA precedent all make clear that PSGs put forward by asylum seekers must be considered on a case-by-case basis, with key consideration given to the specific group at issue and the facts in the record. *See, e.g.*, 8 U.S.C. § 1158; UNHCR, *Gender Guidelines* at 3; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Ordonez Azmen v. Barr*, No. 17-982 (2d Cir. July 13, 2020); *Herrera-Reyes v. Att’y Gen. of the U.S.*, 952 F.3d 101, 110 (3d Cir. 2020); *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014) (citing *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (BIA 2014)); *Rivera-Barrientos*, 666 F.3d at 648 (citing *Niang v. Gonzales*, 442 F.3d 1187, 1196 (10th Cir. 2005)); *Jian Hui Shao v. Mukasey*, 546 F.3d 138, 148 (2d Cir. 2008) (citing *In re J-H-S-*, 24 I. & N. Dec. 296, 197-98 (BIA 2007)); *Zavala-Bonilla v. INS*, 730 F.2d 562, 565 (9th Cir. 1984); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). The NPRM would, without explanation, upend that procedure and instead impose near-blanket rules that some categories of PSGs may not proceed. The agencies are, in other words, attempting to “dictat[e] the ... decision” of the immigration courts, the BIA, and the federal courts in individual cases. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954). That the agencies may not do. *Id.*

To be sure, the proposed language states only that this is a “general” rule, but the NPRM provides no meaningful guidance for distinguishing when an exception would be permitted. Thus, assuming the laundry list is not merely hortatory, it imposes a near-dispositive presumption that violates the required, case-specific analysis demanded by the INA. The laundry list in the NPRM is therefore contrary to international law that binds the United States, to federal statute, and to the agencies’ own longstanding position.

Second, the agencies have failed to provide any colorable justification for their decision to depart from their prior practice and categorically bar certain PSGs. The NPRM claims that the list is intended “to ensure the consistent consideration of asylum and statutory withholding claims.” 85 Fed. Reg. at 36,278. But the agencies have not provided any plausible explanation for the view that any standards (much less their chosen standards) are needed to guide the courts or asylum officers in determining which PSGs are cognizable.

The NPRM does attempt to imply that guidance *must* be necessary, because “[t]he definition of ‘particular social group’ has been the subject of considerable litigation and is a product of evolving case law.” 85 Fed. Reg. at 36279. But as the NPRM itself concedes, the BIA “‘has articulated a consistent understanding of the term’” particular social group. *Id.* (quoting *Matter of A-B-*, 27 I.&N. Dec. at 321). And the agencies have not even attempted to provide evidence that either the federal courts or USCIS asylum officers have acted differently. The agencies have, in other words, failed to consider whether a problem actually exists; they have instead proposed a purported “solution” in search of a problem.

Third, the proposed laundry list of disfavored PSGs would directly impede the agencies’ stated objective of consistency. The NPRM suggests that it is enunciating only a general rule subject to exceptions, rather than a universal rule. But the agencies have not explained—or apparently even considered—when an exception would be appropriate. The NPRM, in other words, would take an area of law that it concedes is well-settled and inject a novel, formless inquiry. That is a recipe for *inconsistency* and increased case processing times.

Fourth, the NPRM provides no justification at all for any of the specific items on the laundry list of forbidden PSGs. It simply asserts, without evidence or argument, that “[w]ithout additional evidence, these circumstances are generally insufficient to demonstrate a particular social group that is cognizable.” 85 Fed. Reg. at 36,279. The use of such a brazen *ipse dixit* without more renders each entry on the list arbitrary. *See, e.g., Ill. Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997). And there is no plausible justification for any of the items on the list.

Fifth, the NPRM also incorrectly assumes that many of the items on the list do no more than codify settled law—when they in fact seriously distort preexisting precedent and practice. Because “an agency may not depart from a prior policy *sub silentio*” (*FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009)), the NPRM’s failure to acknowledge any of the individual changes it proposes, much less explain them in a rational way (which the agencies cannot do), independently renders its proposals arbitrary.

Sixth, the agencies’ decision to include a laundry list of disfavored PSGs is invalid insofar as the proposed list is based on the analysis in *Matter of A-B-*. *See* 85 Fed. Reg. at 36,279 (repeatedly citing *A-B-*). The Attorney General in *Matter of A-B-* disapproved *Matter of A-R-C-G-* on the theory that the latter case “recognized an expansive new category of particular social groups.” 27 I. & N. Dec. at 319. That characterization is false. The BIA in *Matter of A-R-C-G-* instead narrowly held, on the basis of longstanding principles, that a particular domestic violence survivor had put forward a cognizable PSG, but that whether the PSG is cognizable “will depend on the facts and evidence in each individual case.” 26 I. & N. Dec. at 395. The post-*A-R-C-G-* decisions of the courts of appeals cited in *A-B-* make that clear. Those opinions did not, as the Attorney General claimed in *Matter of A-B-*, express “skepticism” about *A-R-C-G-*. 27 I. & N. Dec. at 332. Instead, they applied *A-R-C-G-* by finding that the factual records before them warranted a different conclusion. *See, e.g., Vega-Ayala v. Lynch*, 833 F.3d 34, 39 (1st Cir. 2016); *Cardona v. Sessions*, 848 F.3d 519, 520-21 (1st Cir. 2017); *Guzman-Alvarez v. Sessions*, 701 F. App’x 54, 56-57 (2d Cir. 2017); *Marikasi v. Lynch*, 840 F.3d 280, 290-91 (6th Cir. 2016); *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 853 (8th Cir. 2017); *Jeronimo v. U.S. Att’y Gen.*, 678 F. App’x 796, 800-01 (11th Cir. 2017).

Seventh, in proposing these categories of generally barred PSGs, the agencies have arbitrarily failed to consider an important aspect of the problem—namely, the real-world implications of their

proposal. The fact that the NPRM expressly states a general rule rather than a universal rule shows that the agencies recognize that some PSGs included in the list can give rise to meritorious claims for asylum. But the agencies never take the obvious and necessary next step: They never consider whether their laundry list of generally barred PSGs will result in the erroneous denial of meritorious claims (and violations of the duty of *non-refoulement*). This problem is made worse by the agencies' failure to define when exceptions to the general rule would be appropriate—a failure that will, in some immigration courtrooms, doubtless result in the application of the categories as a general bar to asylum and withholding of removal. See TRAC, *Asylum Decisions*⁵⁷ (showing that, in some areas of the country, denial rates are in excess of 95%).

ii. *Specific PSGs*

Each individual entry in the laundry list of disfavored PSGs is also arbitrary and contrary to law.

(a) *“Interpersonal Disputes” and “Private Criminal Acts”*

The proposal to generally bar all asylum claims stemming from “interpersonal disputes” and “private criminal acts” of which “the government were unaware or uninvolved” (85 Fed. Reg. at 36,279) would, if enacted, violate the APA in at least six independent ways.

First, the proposals are contrary to law. Nothing in the INA either states or implies that interpersonal or “private” acts cannot generally give rise to asylum. To the contrary, the statute makes clear that such acts can do so if they rise to the level of persecution, are taken on account of a protected ground, and are inflicted by actors the government is unable or unwilling to control. 8 U.S.C. §§ 1101(a)(42)(A) & 1158(b)(1)(A). The NPRM's attempt to create what amounts to categorical exceptions to that statutory framework lies well beyond the limits of the agencies' authority.

To be clear, this aspect of the NPRM threatens to bar from relief individuals who clearly meet the definition of “refugee” in the INA. Claudine*, for example, suffered two intersecting forms of persecution—her family's experience of political persecution left her vulnerable to gender-based violence, and her persecutor's position of political power enabled him to abuse her with impunity. She had no choice but to flee her home and seek safe haven abroad. She explains:

When I was a child, my country experienced political unrest and my family and I became refugees in another country. While abroad, a good family friend, Marc, briefly moved in with us, hoping to convince my parents to join his political movement back in our home country.*

One day, while my parents were away, Marc raped me. He took out a knife and cut my stomach, as if to mark his territory. Being just a child, I laid on the floor in shock until my mother came home.*

My community learned about the assault and shunned me. Feeling desperate, ashamed, and alone, I tried slitting my wrists. Thankfully, I didn't succeed. Life started to improve when my family was able to move back to our home country. However, my new life did

⁵⁷ <https://trac.syr.edu/phptools/immigration/asylum/>.

not last long. Marc moved next door. My family was powerless to remove Marc* because he had become a ranking member of the dominant political party.*

Marc started taunting me. One day, he threatened to have a “talk” with my younger sister, who was in elementary school at the time. I wanted to protect my sister, so I followed my sister and Marc* to his house. There, he brutally raped me. Again. He cut my stomach once more to mark his crime.*

The police dismiss women’s reports of rape, so I didn’t even try. My first rape was too shameful for my family and me. I kept this one a secret. I persevered. I moved on with my life and enrolled in university. There, I became involved with a new political party that had split from Marc’s. However, Marc’s* political party grew in power and started threatening members of mine. Police made constant arrests and would often torture and murder anyone they took in. Marc* consistently called my phone just to harass me.*

I had to escape, so I fled to the United States and applied for asylum. Eventually I was able to talk about what happened to me and I was finally granted asylum.

Asylee Kae* provides another example. Kae* survived her abusive stepfather and FGM/C as a child and was threatened with yet more gender-based violence when her family discovered she had converted to a different religion. Kae*’s stepfather, a powerful man in the local government, was not only abusive to his children, but also to his three wives. His power protected him from any form of police intervention, and Kae* knew early on that she could never ask for help. Her cries would fall on deaf ears. When she was 10 years old, Kae*’s stepfather required that she undergo FGM/C. She was taken to an old house where two women, who had no professional training, forced her down on the carpet where she was cut. She bled profusely and fell ill with an infection. To this day, Kae* is haunted by what happened to her.

Despite her traumatic childhood, Kae* did very well in her studies and had the opportunity to continue her education in the United States. She moved to Houston, where she excelled academically. She lived with her stepsister, and her stepfather paid for their rent, food, and tuition.

Suddenly, the arrangement changed. Her stepfather and mother came to visit and discovered that Kae* had converted to another religion. Kae*’s stepfather was outraged. He immediately returned home, had her stepsister move out, and cut off all communication and financial ties with Kae*. A few months later, Kae*’s mother called to tell her that she must marry a man in her home country. He was more than 20 years Kae*’s senior and shared the same religion as her family, meaning that she would be forced to abandon her faith. And he already had one wife. The forced marriage was the only way Kae* would be accepted back into her family, but Kae* had always been strongly opposed to polygamy and wanted to practice her own religion. She wanted a future free of violence for both herself and her children. She wanted to choose her own path. Eventually she applied for and was granted asylum.

Second, it is manifestly unreasonable to use the PSG analysis to place entire groups of persecutors outside the asylum laws. After all, the PSG analysis turns on the nature of the group to which a survivor belongs, not on the identity of the persecutor. *See, e.g., Acosta*, 19 I. & N. Dec. at

232-34; *De Pena-Paniagua*, 957 F.3d at 94-97. These proposed bars on PSGs are therefore “circular” by the agencies’ definition: They are defined by reference to the persecution at issue.

Third, a general bar on asylum in all situations in which the government is “uninvolved” in the persecution is arbitrary and contrary to law. As a threshold matter, this requirement has nothing to do with the question of whether a PSG is cognizable. Rather, it involves the question of what showing an asylum seeker must make concerning the conduct of the government in her country of origin.

Further, the NPRM silently proposes a dramatic alteration of the well-established standard governing that question. “[T]he Board of Immigration Appeals and the Federal circuit courts of appeals,” as well as EOIR and DHS, “universally acknowledge that for purposes of asylum and withholding of removal under the [INA] ‘persecution’ may involve a ‘government’s inability or unwillingness to control *private* conduct.’” Joseph Hassell, *Persecutor or Common Criminal? Assessing a Government’s Inability or Unwillingness to Control Private Persecution*, EOIR Immigration Law Advisor (Sept. 2014) (quoting *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) and citing further cases) (emphasis in original).⁵⁸ By substituting “uninvolved” for “unable or unwilling,” the NPRM would foreclose large categories of previously meritorious claims. The NPRM, however, does not even acknowledge that it would have this sweeping effect. And the agencies’ silence reflects the lack of any non-arbitrary justification for this change.

The case of Uwa* from Nigeria illustrates that the government can be “unable or unwilling” to control a persecutor without being involved in the persecution. As an independent, well-educated, primary breadwinner, Uwa* outraged her husband’s family. They pressured Uwa*’s husband to “control” her, including through violence. She refused to submit to their oppression, took her daughters, and left. Specifically wanting to share her story to both educate and feel supported by others, Uwa* explains:

In the community where I was born, a woman’s place is thought to be in the home. But I had other plans. I was determined to pursue a higher education and obtain economic independence, so I attended college, obtained multiple degrees and worked hard to have a very successful career in banking and finance in the top banks in the capitol, Lagos.

Unfortunately, my husband Ndulu’s family did not care about my career. They were from a different tribe than I was, and they told Ndulu* that women from my tribe were too hard to control. Though my job supported my husband, many of his siblings, and his extended family, living with them was misery. I was constantly insulted, with Ndulu*’s family calling me names like “useless woman” and mocking my tribe. Whenever I tried to assert my independence, they turned their insults to Ndulu* for not controlling me better.*

Soon, Ndulu too began to insult me, beat me physically, and then rape me, in order to “teach me” to be “his woman.” For over two years I suffered his abuse. Ndulu* dragged me from my bed and beat me with an electrical cord, slammed me into the*

⁵⁸ <https://www.justice.gov/sites/default/files/eoir/legacy/2014/10/03/vol8no7.pdf>.

headboard, slapped me, hit me, and kicked me. Once Ndulu's beatings left me unconscious in a pool of blood and nearly caused me to miscarry our daughter. He kept me from seeking medical attention in all but the most dire of circumstances, so to this day my body bears the marks of his abuse.*

I tried to get help. I went to our church's marriage committee for counseling but Ndulu continued to threaten and abuse me in front of the committee, yelling 'Leave me alone. If I had a gun I would kill her and nothing would happen to me!' Next, I tried the police, but they told me, 'Woman, that is a family affair. Go and submit to your husband.' Finally, I decided to do the unthinkable and file for divorce. Nigerian women simply don't divorce their husbands. I had a very hard time finding a lawyer to represent me, and even when I found an attorney he eventually withdrew his representation because of Ndulu's* death threats against him.*

After a period spent in hiding and with no other options, I fled with my children to the United States where I applied for and was granted asylum. I am now studying to become a nurse so that I may realize the goals of economic independence and self-sufficiency that have always been so important to me.

The case of Aicha from Niger is also instructive. She recounts:

From a very young age, I witnessed and experienced violence in my home country. My father beat my mother, one of his four wives, sometimes so badly that she could not speak or eat for weeks. At age 15, my family began pressuring me to undergo female genital mutilation, but after seeing what my sister had gone through – the razor, the blood, the pain – I didn't want it. Because of my refusal, my family took away meals as punishment, and they cut me anyway.

At age 17, I was forced into marriage with a 52-year-old man. I cried on my wedding day, and that night began years of rape and beating that broke my body and my soul. After a beating that sent me to the clinic for stitches, I went to the police, but they had been paid by my husband to ignore my plea for help. I knew then that I had to escape. At the age of 19, I fled first to Togo, but my husband had family there, so I traveled to the United States in hope of finding safety. However, I just found more violence, as strangers who had initially offered me help forced me to cook and clean and forced sex on me.

I didn't speak any English. I didn't have any friends or family nearby and was not allowed to have visitors at the home where I was staying. And because of my past experience with police, I didn't think I could call them for help. I did not know at the time what human trafficking was, but I knew what I felt – being treated like a slave was wrong. I experienced persistent panic attacks, and when it got to the point where I had to be hospitalized, the woman I worked for told me not to come back.

I knew I had to seek real help. Eight years after I first arrived in the U.S., my attorney helped me file my asylum application and it was granted.

The NPRM’s proposed standard would also perversely require survivors of persecution by non-state actors to report persecution to authorities even where laws against gender-based violence are limited or non-existent. Paula Tavares & Quentin Wodon, *Ending Violence Against Women and Girls: Global and Regional Trends in Women’s Legal Protection Against Domestic Violence and Sexual Harassment* (Mar. 2018).⁵⁹ Even if a country does have laws on the books that purport to protect survivors, prosecutors may routinely fail to bring charges, and judges and juries may render weak verdicts or acquittals. Reporting gender-based violence in and of itself can even be life threatening due to retribution for doing so. While some law enforcement officers ignore or dismiss reports of gender-based violence, others may even be complicit in harming survivors as perpetrators themselves or those with family or other relationships to them.

Current asylum law permits asylum applicants to submit evidence as to why reporting gender-based violence to the authorities was not possible or dangerous. There is no legitimate justification for prohibiting an applicant from even presenting such evidence. It is absurd for a rule designed to protect asylum seekers to require that they potentially risk their lives to qualify for its protection. Rather, survivors should be permitted to seek asylum as victims of systemic human rights abuses, sanctioned by the state. They should not be punished twice: first by the failure of their own government to protect them, and second by our asylum system’s refusal to accept evidence of that failure.

Fourth, the NPRM’s use of the word “private” has the same effect: It implicitly raises the “unable or unwilling” standard on some claims. And the NPRM again fails even to recognize as much. The use of the word “private” is therefore arbitrary and contrary to law for the same reasons.

Fifth, the “interpersonal” category is even more sweeping and therefore also contrary to the INA. “Interpersonal” simply means “between persons.” Webster’s New World College Dictionary 706 (3d ed. 1997). That fact inescapably means that *all* persecution is “interpersonal.” Persecution is not committed by cows, trees, or buildings; it is committed by one human being against another. The plain meaning of the “interpersonal” violence category would therefore bar *all* asylum claims in contravention of the INA. And once again, the NPRM fails to acknowledge this effect.

Sixth, the “interpersonal” and “private” categories are also contrary to the APA to the extent that, in the agencies’ view, those categories apply to domestic or other gender-based violence. Any such application would be at odds with the evidence. Decades of research make clear that gender-based violence, including domestic violence, is *not* simply a private matter based on personal animosity. See, e.g., Karen Musalo, *El Salvador – A Peace Worse Than War: Violence, Gender, and a Failed Legal Response*, 30 *Yale J.L. & Feminism* 3, 35 (2018); Comisión Internacional Contra la Impunidad en Guatemala, *Human Trafficking for Sexual Exploitation Purposes in Guatemala* (2016);⁶⁰ UN Women, *A Framework to Underpin Action to Prevent Violence Against Women*

⁵⁹ <http://pubdocs.worldbank.org/en/679221517425064052/EndingViolenceAgainstWomenandGirls-GBVLaws-Feb2018.pdf>

⁶⁰ <https://www.refworld.org/docid/584aaec4.html>.

(2015);⁶¹ The Geneva Declaration, *Lethal Violence against Women and Girls* (2015);⁶² United Nations Secretariat Department of Economic and Social Affairs, *The World's Women 2010*; ⁶³ U.N. Secretary-General, *In-Depth Study on All Forms of Violence against Women*, U.N. Doc A/61/122/Add. 1 (July 6, 2006);⁶⁴ National Research Council, *Understanding Violence Against Women* (Nancy A. Crowell & Ann W. Burgess, eds. 1996); *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, 43 U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/Res/48/104 (1994);⁶⁵ Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 305 (1994). And the agencies do not cite any meaningful contrary evidence.

In fact, this proposal reverts us back several decades, prior to passage of the FVPSA and VAWA. Domestic violence in the United States was dismissed as a private family matter, meant to stay behind closed doors with victims suffering in silence. The government remained on the sidelines precisely for this reason, yet this was circularly used to justify its failure to intervene. The rule's retrogressive framing of family violence as a "personal dispute," even when an asylum seeker can document that it is severe, pervasive, and widely tolerated by authorities and others in her country, runs afoul of the United States' own domestic laws and policies. Rather, it is a core function of the government to protect individuals from gender-based violence. This function cannot simply be abdicated by deliberately obscuring such violence from view. In short, domestic and other gender-based violence cannot reasonably be seen as only "intrapersonal" or "private," and any application of the NPRMs proposed categories to that violence would be arbitrary.

The application of the "interpersonal" and "private" categories to domestic and other gender-based violence would also violate the Equal Protection Clause of the Fourteenth Amendment. The presumption created by these categories would disproportionately affect women, who are much more likely than men to experience violence by an intimate partner. *See, e.g.*, UN News, *67% of Women Have Suffered Some Type of Violence in El Salvador* (April 17, 2018); U.S. Dep't of State, *Guatemala 2018 Human Rights Report* 16 (2018);⁶⁶ U.S. Dep't of State, *Afghanistan 2018 Human Rights Report* 30; U.S. Dep't of State, *Saudi Arabia 2018 Human Rights Report* 44 (2018);⁶⁷ U.S. Dep't of State, *Kenya 2018 Human Rights Report* 23 (2018);⁶⁸ U.S. Dep't of State, *Russia 2018 Human Rights*

⁶¹ https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/prevention_framework_unwomen_nov2015.pdf?la=en&vs=5223.

⁶² http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf.

⁶³ https://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010%20Report_by%20chapter%28pdf%29/Violence%20against%20women.pdf.

⁶⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>.

⁶⁵ https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21_declaration%20elimination%20vaw.pdf.

⁶⁶ <https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf>.

⁶⁷ <https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf>.

⁶⁸ <https://www.state.gov/wp-content/uploads/2019/03/Kenya-2018.pdf>.

Report (2018);⁶⁹ U.S. Dep’t of State, *Burma 2018 Human Rights Report* 37 (2018);⁷⁰ U.S. Dep’t of State, *Haiti 2018 Human Rights Report* 19–20 (2018);⁷¹ Nat’l Coalition Against Domestic Violence, *Statistics*.⁷² “Worldwide, almost one third (30%) of women who have been in a relationship report that they have experienced some form of physical and/or sexual violence by their intimate partner in their lifetime.” World Health Org., *Violence Against Women*.⁷³ In fact, we are unaware of any published opinion considering a PSG involving only those who identify as straight, cis men. And the NPRM proposes no rational explanation linking this disproportionate effect on women to a legitimate government policy—much less show that it bears a substantial relationship to an important government objective. *See Craig v. Boren*, 429 U.S. 190, 197 (1976). To the contrary, given that there is no evidence to support the NPRM’s assertion of widespread confusion over the definition of PSG, the only apparent goal of these categories is to reduce the number of people—especially women—who receive asylum in the United States.

(b) *Remaining Factors*

The remaining categories in the NPRM are equally infirm. The NPRM’s attempt to disapprove of all PSGs within countries “with generalized violence or a high crime rate” (85 Fed. Reg. at 36,279), for instance, would work another sea change in the law that cannot possibly be squared with the INA. That category would, if enacted, prevent asylum seekers from the most violent countries in the world from basing PSGs in part on their nationality. But the social distinction requirement makes it effectively impossible to craft a cognizable PSG that does *not* refer to the asylum seeker’s country of origin. This proposal would therefore upend 8 U.S.C. § 1158 by preventing people fleeing the most violent countries in the world from receiving asylum or withholding of removal in the United States.

The “generalized violence” category is also arbitrary to the extent that it seeks to codify the statement in *Matter of A-B-* that certain “claims are” purportedly “unlikely to satisfy the statutory grounds for” showing government inability or unwillingness to control the persecutors. 27 I. & N. Dec. at 320 (cited by 85 Fed. Reg. at 36,279). Attempting to codify that rule in regulations concerning PSGs once again impermissibly conflates two distinct elements of the test for asylum, because whether the government can control persecutors represents a distinct inquiry from whether a PSG is cognizable. And the agencies do not acknowledge, much less justify, this conflation.

The purported bar on PSGs defined by past criminal conduct, including membership in gangs (85 Fed. Reg. at 36,279), suffers from at least four fatal defects. It would change the law without explanation or justification by silently seeking to overturn the decisions of multiple federal courts of appeals. *See, e.g., Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). By muddying the waters in this way, it would run directly counter to the stated goal of the laundry list—*i.e.*, legal consistency (85 Fed. Reg. at 36,278). It would be contrary to the intent behind the bars to asylum in the INA, which preclude asylum based on a range of criminal

⁶⁹ <https://www.state.gov/wp-content/uploads/2019/03/RUSSIA-2018-HUMAN-RIGHTS-REPORT.pdf>.

⁷⁰ <https://www.state.gov/wp-content/uploads/2019/03/BURMA-2018.pdf>.

⁷¹ <https://www.state.gov/wp-content/uploads/2019/03/HAITI-2018.pdf>.

⁷² <https://ncadv.org/statistics>.

⁷³ <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

conduct but pointedly do *not* preclude individuals from relief on the ground of previous gang membership. 8 U.S.C. § 1158(b)(2)(A)-(B). And it would work that contravention of congressional intent without even attempting to explain “why the statutory bars” on certain former persecutors “should be extended by administrative interpretation to former members of gangs.” *Ramos*, 589 F.3d at 430.

The NPRM’s proposed bar on “past persecutory activity” (85 Fed. Reg. at 36,279) is contrary to the APA in the same ways as the proposed bar on past criminal conduct. In fact, it would create even greater uncertainty, because the NPRM leaves the phrase “past persecutory activity” entirely undefined.

The NPRM next proposes to make gang recruitment-related PSGs generally non-cognizable (85 Fed. Reg. 36,279), but there is no support for doing so in the cases cited by the NPRM. And the NPRM does not, because it cannot, advance any ground for believing that the courts should not continue to consider recruitment-based PSGs on a case-by-case basis.

There is similarly no legal basis—and no ground advanced in the NPRM—for precluding the courts from assessing PSGs that touch on wealth on a case-by-case basis. 85 Fed. Reg. at 36,279. And the fact that the BIA thirteen years ago held, on a particular record, that “affluent Guatemalans” is not a cognizable PSG does not even begin to support the NPRM’s sweeping proposal to bar all PSGs that mention wealth. *See In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (cited at 85 Fed. Reg. at 36,279).

Finally, the claim that any group premised on individuals returning from the United States will necessarily be “too broad” to qualify as a PSG (85 Fed. Reg. at 36,279) is factually and legally erroneous. As a factual matter, the number of people returning to some countries from the United States will be quite small. And as a legal matter, the fact that a group is potentially large does not by itself mandate the conclusion that the group is particular. *See, e.g., De Pena-Paniagua*, 957 F.3d at 97; *Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010); *Malonga v. Mukasey*, 546 F.3d 546, 553-54 (8th Cir. 2008); *Ucelo-Gomez*, 509 F.3d at 73 n.2; *Niang*, 422 F.3d at 1199-1200.

c. Particularity and Social Distinction

The NPRM would require a PSG to be not only “based on an immutable or fundamental characteristic” but also “defined with particularity” and “recognized as socially distinct in the society at question.” 85 Fed. Reg. at 36,291. The NPRM, however, arbitrarily fails to provide any reason for its proposal to codify these standards. That failure is unacceptable, because—as applied by the BIA—the particularity and social distinction requirements cut across each other. Specifically, under the BIA’s interpretation of those requirements, an asylum seeker “identify a group that is broad enough that the society as a whole recognizes it, but not so broad that it fails particularity.” *W.G.A. v. Sessions*, 900 F.3d 957, 964 n.4 (7th Cir. 2018). This “create[s] a conceptual trap that is difficult, if not impossible, to navigate,” and that has led the BIA to effectively end grants of asylum based on PSGs that have not been previously approved. *Id.* And given that the NPRM would sweep away numerous other BIA precedents with no justification, the lack of an explanation for the agencies’ choice to adhere to BIA precedent on this score is doubly arbitrary.

Further, if the agencies are to codify these prerequisites to PSGs, they must “consider all reasonable alternatives presented to” them. *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43

(1983)). To date, the agencies have failed to consider the alternate possibility of simply codifying the original definition of PSG set forth in the foundational case of *Matter of Acosta*, 19 I. & N. Dec. at 233. That definition, which requires PSGs to be based on immutable characteristics, has the signal virtue of being simple and straightforward. In fact, the *Acosta* definition would be understood even by many *pro se* asylum seekers. The particularity and social distinction requirements, on the other hand, are complex enough—and cut against each other enough—that they are incomprehensible even to some trained lawyers.

The definition in *Acosta* is also much more closely grounded in the statutory text than the requirements proposed in the NPRM. After all, “general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.” *De Pena-Paniagua*, 957 F.3d at 96 (quoting *Acosta*, 19 I. & N. Dec. at 233). And each of the grounds for asylum in the INA “describes persecution aimed at an immutable characteristic.” *Id.* (quoting *Acosta*, 19 I. & N. Dec. at 233). “‘The shared characteristic’ underlying a particular social group, therefore, ‘might be an innate one such as sex, color, or kinship ties.’” *Id.* (quoting *Acosta*, 19 I. & N. Dec. at 233). The definition in *Acosta*, unlike the requirements proposed in the NPRM, is also consistent with international law. *See, e.g.*, UNHCR, *Gender Guidelines* at 7.

The agencies have also failed to consider a second alternative closer to the proposal in the NPRM. The UNHCR now defines a PSG in ways that include both immutability and the simple requirement that the group “be perceived as a group by society.” *Id.* at 7. That definition, like the *Acosta* definition, is reasonable; it also remains significantly closer to the other grounds for asylum in the INA than the agencies’ proposal. It is therefore arbitrary for the agencies to rubber-stamp existing BIA precedents without considering other options—especially in a rule that proposes to overturn numerous other BIA cases.

d. Procedural Matters

As a procedural matter, the NPRM proposes to require the specific PSGs on which an asylum seeker will base her claims to be put forth before the immigration judge or be forfeited forever. The NPRM again arbitrarily fails to provide so much as a word of explanation for this proposal. In particular, although it cites to a BIA opinion declining to entertain a PSG proffered for the first time on appeal where the asylum seeker had counsel in immigration court (*Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (BIA 2018)), the NPRM does not acknowledge, much less attempt to justify, the fact that its new procedure would also apply to asylum seekers who are not represented in immigration court.

That failure also amounts to an arbitrary failure to consider a significant aspect of the issue. Over the past five years, between 15% and 24% of all asylum seekers have been unrepresented by counsel. TRAC, *Record Number of Asylum Cases in FY 2019*.⁷⁴ People representing themselves lack significant legal training in U.S. asylum law, often speak little or no English, and have no way to fully familiarize themselves with the intricate rules surrounding PSGs. To require people in that situation to define their own PSGs dooms every *pro se* asylum seeker to failure on a PSG theory (no matter the underlying merits of the claim) and makes a mockery of the immigration courts.

⁷⁴ <https://trac.syr.edu/immigration/reports/588/>.

The NPRM’s proposal also violates due process. The Supreme Court made clear decades ago that immigrants “within the territory of the United States,” including those who are “unlawfully present” as well as immigrants with status and asylum seekers, are protected by the Due Process Clause of the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 212 (1982). And the “specific dictates of due process” derive from “three distinct factors”: (1) “the private interest that will be affected” by a government action; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value * * * of additional or substitute procedural safeguards”; and (3) “the Government’s interest.” *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Here, the private interest at stake—avoiding the violence or torture that results from *refoulement*—is the most weighty interest conceivable. The government’s countervailing interest is, given the NPRM’s silence, nonexistent. And working with pro se asylum seekers, many of whom are unable to obtain counsel because the government has detained them in areas with very few lawyers, imposes a minimal burden on the government. Finally, we know that additional measures, such as allowing immigration judges and the BIA to reformulate proposed PSGs, provide effective and valuable safeguards.

For asylum seekers who are initially represented by counsel, meanwhile, the proposed procedural change would unlawfully revoke the right to raise an ineffective assistance claim later in the proceedings. As by numerous courts of appeals have recognized, asylum seekers have the due process right to the effective assistance of counsel in removal proceedings. *See Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Iavorski v. INS*, 232 F.3d 124, 128-29 (2d Cir. 2000); *Fadiga v. Att’y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Allabani v. Gonzales*, 402 F.3d 668, 676 (6th Cir. 2005); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane v. Att’y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005); *cf. Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006) (“[This circuit] has repeatedly assumed without deciding that an [individual’s] claim of ineffective assistance may implicate due process concerns under the Fifth Amendment.”). The NPRM would unconstitutionally attempt to revoke this right. It would also arbitrarily do so without acknowledging, much less justifying, that result.

2. Nexus

a. Laundry List of Barred Grounds

The NPRM’s proposal as to nexus consists largely of a second laundry list of disfavored categories. This list would generally bar claims based on seven grounds: “[i]nterpersonal animus or retribution”; “[i]nterpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue”; “[g]eneralized disapproval of, disagreement with, or opposition to” gangs and other criminal groups; “[r]esistance to recruitment” by gangs and others; “targeting . . . for financial gain based on wealth or affluence”; “[c]riminal activity”; “[p]erceived, past or present, gang affiliation”; and “[g]ender.” 85 Fed. Reg. at 36,292.

i. As a Whole

Like the laundry list in the PSG section of the NPRM, the laundry list in the nexus section must be withdrawn for a variety of reasons.

First, a general requirement that asylum claims will fail if there is evidence of particular motives is directly contrary to the INA. As the NPRM acknowledges (85 Fed. Reg. at 36,281), the

statute requires that a protected ground be only “one central reason for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). This language is clear and unambiguous: As the courts of appeals have uniformly recognized, it means that a protected ground need not constitute a persecutor’s sole or even primary motive to satisfy the “one central reason” standard. *See, e.g., Lara v. Barr*, 962 F.3d 45 (1st Cir. 2020); *Guzman-Vazquez v. Barr*, 959 F.3d 253 (6th Cir. 2020); *Ordonez v. Barr*, 956 F.3d 238 (4th Cir. 2020); *Enamorado-Rodriguez v. Barr*, 941 F.3d 589 (1st Cir. 2019); *Garcia-Moctezuma v. Sessions*, 879 F.3d 863 (8th Cir. 2018); *Gonzalez Ruano v. Barr*, 922 F.3d 346 (7th Cir. 2019); *Perez-Sanchez v. U.S. Att’y Gen.*, 935 F.3d 1148 (11th Cir. 2019); *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017); *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017); *Sharma v. Holder*, 729 F.3d 407 (5th Cir. 2013); *Shaikh v. Holder*, 702 F.3d 897 (7th Cir. 2012); *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010); *Rodas Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010); *Yinggui Lin v. Holder*, 565 F.3d 971 (6th Cir. 2009); *Ndayshimiye v. Att’y Gen. of the U.S.*, 557 F.3d 124 (3d Cir. 2009); *Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009). And an applicant for withholding of removal must meet the even lower standard of showing that a protected ground was “a reason” for the persecution. *Barajas-Romero*, 846 F.3d at 360.

The NPRM’s laundry list would violate the statutory language. By stating that evidence of certain motives leads to claims that *cannot* receive asylum or withholding, it puts certain mixed motives beyond the reach of the statute. But because Congress has stated generally that “the applicant”—*i.e.*, all asylum applicants—must satisfy only the “one central reason test”—the agencies are not free to craft exceptions that place a higher burden on only some applicants. *See, e.g., Bostock v. Clayton Cnty.*, ___ U.S. ___, 2020 U.S. LEXIS 3252, at *27-*28 (June 15, 2020) (discussing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* § 9, at 101 (2012) (“general words (like all words, general or not) are to be accorded their full and fair scope”).

Second, the laundry list of claims that generally fail on the basis of nexus also violates the case-by-case adjudication requirement discussed above (*see* Section III.A.1.b.i, *supra*).

Third, the NPRM fails to recognize that it would supersede the statutory “one central reason” test in situations where its laundry list applies. The NPRM, in other words, would invert the statutory standard under the guise of advancing that standard. The laundry list of claims that purportedly fail at nexus is thus utterly arbitrary in addition to violating the plain text of the statute.

Fourth, the list is also arbitrary because, as with the list in the PSG section, the agencies have failed to consider the real-world effects of their proposal. As with the PSG list, there can be no question that the nexus list will result in the *refoulement* of asylum seekers who are entitled to relief under the INA. And as with the PSG list, this problem is made even worse by the fact that the agencies have not attempted to define when exceptions to the general bar on relief are appropriate. A general rule with no identified or identifiable exceptions is effectively a universal rule.

Fifth, the only justification put forward for the laundry list is equally arbitrary. The NPRM asserts that there is a need for bright-line rules around nexus. But the NPRM provides no reason why the courts should not continue to “shape” the nexus inquiry “through case law.” 85 Fed. Reg. 36,281. In particular, the NPRM does not identify so much as a single development in the case law that it believes is erroneous or inconsistent with the statute. And the shaping that the NPRM seeks to preterm is the inevitable result of the case-by-case determination of asylum applications required by

statute and international law. The NPRM’s attempt to pretermitt consideration by the courts thus cannot stand.

Sixth, as with the PSG list, the agencies provide no justification whatsoever for any individual entry on the laundry list. And no plausible rationale exists for any of those entries.

ii. “Gender”

The NPRM more specifically would prevent claims based on “gender” on purported nexus grounds. 85 Fed. Reg. at 36,281. There are at least nine independent reasons—in addition to the six reasons enunciated above for withdrawing the entire laundry list—why this specific proposal cannot stand.

First, any general rule that claims premised on gender lack a nexus to a protected ground is nonsensical. The inclusion of gender in the nexus list means that, in the agencies’ view, gender can be used to define a particular social group—but that any persecution inflicted on the basis of gender cannot have been inflicted on the basis of a particular social group, even one defined in part by gender. That position cannot withstand even cursory scrutiny and is, therefore, arbitrary.

Second, the proposal interprets the statutory term “particular social group” in an unreasonable way. As shown above (*see* Section III.A.1.c), “gender” is—like family—a prototypical protected social group. And although “gender” appears in the “nexus” section of the NPRM, the agencies are effectively saying that gender cannot be part of the PSG analysis. That is contrary to precedent and an unreasonable interpretation of the INA.

Third, the inclusion of gender violates the constitutional guarantee of equal protection. The NPRM makes no attempt to state such an objective or to show how a nexus-based bar on gender asylum advances that objective. Indeed, the NPRM does not even provide a rational basis for singling out gender.

Fourth, the inclusion of gender in the laundry list is contrary to the evidence. The NPRM’s theory, as demonstrated by the categories of “interpersonal” violence, appears to be that gender-based claims are purely personal disputes. And as shown above (*see supra* Part III.A.1.b.ii.(a)), that theory is at odds with the evidence.

Fifth, the NPRM’s failure to include a rationale for listing gender as failing the nexus requirement is, without more, sufficient to render that inclusion arbitrary. And no non-arbitrary rationale for the inclusion of gender exists.

Sixth, assuming *arguendo* that a rationale can be implied from the NPRM’s one-sentence quotation of *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005), that rationale is itself arbitrary. If it provides a reason at all, the quotation suggests that the agencies believe that the continued acceptance of claims based on gender will result in too many meritorious asylum claims. Any such rationale is contrary to the INA. Nothing in the “one central reason” language or the nexus language in the definition of “refugee” even begins to suggest that nexus can be rejected in any particular situation simply because accepting it might allow other persecuted asylum seekers to obtain relief.

For example, assume that 50.1% of a populous country follows one religion, while the remaining 49.9% of the country follows a second. Further assume that the majority relentlessly persecutes that highly numerous minority. There would self-evidently be no basis in the INA for rejecting the nexus simply because the persecuted minority is numerous. Similarly, if 20% of a country's population exerts control over the rest of the population through persecutorial violence tied to racial distinctions, there is no basis under the statute for holding that nexus does not exist simply because the persecuted are in the majority.

So, too, with gender—as *Niang* itself illustrates. After all, in the sentence *immediately following* the quotation in the NPRM, the Tenth Circuit states that gender *can* provide a basis for relief and that a case-by-case analysis of nexus is necessary. *Niang*, 422 F.3d at 1199-1200; *see also* Section III.A.1.b.ii.(b), *supra* (citing further cases). That rule mirrors international law: In its guidelines on claims involving gender-based persecution, UNHCR specifically notes that “[a]dopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status” and that “[t]he refugee claimant must establish that he or she has a well-founded fear of being persecuted” on account of a protected ground. UNHCR further emphasizes that while a group's size has been used “as a basis for refusing to recognise ‘women’ generally as a particular social group,” this “argument has no basis in fact or reason, as the other grounds are not bound by this question of size.” UNHCR, *Gender Guidelines* at 7.

Seventh, the NPRM fails to mention, much less reckon with, the cases in which immigration judges, the BIA, and the courts of appeals have held that gender-based persecution provides a valid ground for asylum. *See, e.g., De Pena-Paniagua*, 957 F.3d 88; *Cece*, 733 F.3d 662; *Sarhan v. Holder*, 658 F.3d 649, 654-57 (7th Cir. 2011); *Perdomo*, 611 F.3d 662; *Agbor v. Gonzales*, 487 F.3d 499 (7th Cir. 2007); *Hassan v. Gonzales*, 484 F.3d 513, 517-18 (8th Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006); *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2004), *vac'd on other grounds sub nom. Keisler v. Gao*, 552 U.S. 801 (2007); *Niang*, 422 F.3d 1187; *Mohammed v. Gonzales*, 400 F.3d 785, 795-98 (9th Cir. 2005); *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 639-42 (6th Cir. 2004); *Yadegar-Sargis v. INS*, 297 F.3d 596, 603-04 (7th Cir. 2002); *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (Alito, J.); *Kasinga*, 21 I. & N. Dec. 357; *cf., e.g., Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (“Sexual orientation can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group.”); *Karouni v. Gonzales*, 399 F.3d 1163, 1171-72 (9th Cir. 2005) (reaching the same conclusion).

UNHCR likewise recognizes countless forms of gender-based persecution for purposes of asylum:

The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identify documents...In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.

UNHCR, *Gender Guidelines* at 5. A rule that fails to recognize, much less provide a plausible justification for, such a dramatic departure from these well-settled legal principles is arbitrary. And no plausible justification exists.

The case of Talya* is illustrative. Talya* helped support her family while she attended school to fulfill her dreams of becoming a nurse. During lunch with a “friend” one afternoon, several men entered the restaurant, sat down with the two girls, and became aggressive. Talya* quickly removed and destroyed her phone’s SIM card, preventing the men from finding her family’s contact information. Moments later, she was forced into a car at gunpoint, and the ringleader threatened to kill her. When the men suddenly released her “friend,” Talya* realized they were traffickers and she had been set up. They drove for seven hours to an isolated house where she was confined to a small room and guarded by an armed man. He was instructed to kill her if she tried to escape. Talya* was raped by her kidnapper every night. He threatened to locate and punish her family if she protested. One day, Talya’s* guard seized her birth certificate because the men planned to sell her. On the way back to the city, Talya* begged the guard to let her go. In a moment of compassion, he dropped her off at a bus station with a dire warning: “they will kill you if they find you.” Talya* immediately took the bus home and arranged to meet her family in a safe place. Talya*’s family had very little money, knew the journey would be perilous, and dreaded separation from Talya* but fearing the worst, her mother arranged for her to flee to the United States. She is now safe after securing legal relief here and she looks forward to becoming a nurse and dedicating her life to helping others.

Eighth, because it would exclude meritorious claims for relief, the rule against gender-based asylum would violate the government’s duty of *non-refoulement* as codified in the withholding of removal statute, 8 U.S.C. § 1231(b)(3)(A).

Ninth, the rule against gender-based asylum would aid and abet violations of the law of nations in contravention of the Alien Tort Claims Act (“ATCA”). There is a specific and universal obligation to prevent domestic violence and other violence against women in international law. That obligation is embodied in, among other things, Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women. *See Convention on the Elimination of All Forms of Discrimination Against Women*, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13;⁷⁵ U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 19: Violence against women, 1992*.⁷⁶ The NPRM, however, would specifically require the removal of people whose lives are in danger as a result of domestic and other gender-based violence to countries with long histories of violating this well-settled principle of international law. By doing so, the NPRM would make the U.S. government the aider and abettor of such violations. That result would place the government squarely in violation of the ATCA. *See, e.g., Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vac’d on other grounds*, 527 F. App’x 7 (D.C. Cir. 2013).

iii. “Interpersonal” Persecution

The NPRM’s laundry list of claims that are, as a general matter, supposedly unable to meet the nexus requirement also includes “personal animus or retribution” and “interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an

⁷⁵ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

⁷⁶ <https://www.refworld.org/docid/52d920c54.html>.

alleged particular social group in addition to the member who raised the claim at issue.” 85 Fed. Reg. at 36,281. The NPRM’s citation to *Matter of A-B-*, which asserted that “[g]enerally, claims by [individuals] pertaining to domestic violence ... will not qualify for asylum,” because such violence is purportedly “private” and based only “on a personal relationship with a victim” (27 I. & N. Dec. at 320, 338), strongly implies that these categories, too, are meant to foreclose claims premised on gender-based violence. Both categories are therefore invalid for all fourteen reasons above.

They are also arbitrary for additional, and independent, reasons. As shown above, the overwhelming evidence demonstrates that gender-based violence is not purely interpersonal. The application of these items to claims of gender-based persecution is therefore contrary to the evidence.

Further, the agencies have provided—and can provide—no rational justification for the “personal animus” category. The agencies quote *Zoarab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008), for the proposition that “[a]sylum is not available to [anyone] who fears retribution solely over personal matters.” But that quote highlights the illegality of the NPRM’s proposal. By making anyone “who claims persecution” based on “personal animus” ineligible for relief (85 Fed. Reg. at 36,292), the agencies also seek to foreclose claims in which personal animus is *one* driver, but not the *sole* driver of persecution. In other words, they seek to foreclose mixed motives claims. The quotation from *Zoarab*, far from supporting the NPRM, thus underscores its deficiencies.

The second category, for situations in which a persecutor has not persecuted others, is likewise arbitrary. As with the “interpersonal” category in the PSG laundry list, the agencies fail to acknowledge that the qualifier “interpersonal” is no qualifier at all; rather, it means that this category applies to *all* asylum applicants. Further, the agencies may not bar the initial victims of a persecutor from relief. After all, a persecutor may have the requisite motive to inflict violence on others but lack the means or opportunity to do so. And they also may not, consistent with definition of “refugee” in the INA, require individuals to prove that persecutors manifested animus against others. The question is only why a persecutor acted against *the applicant*, who is exceedingly unlikely to have evidence of the persecutor’s statements or actions against a broad range of others.

iv. “Criminal activity”

Just as the agencies’ attempt to limit claims based on “interpersonal” persecution will apply to all claims, their attempt to generally bar claims based on “criminal activity” (85 Fed. Reg. at 36,292) also sweeps broadly in ways the NPRM arbitrarily fails to recognize. Acts like murder, rape, and torture—the very acts that constitute persecution—are routinely criminalized around the world. A bar on claims based on “criminal activity” is therefore a bar on all claims based on persecution not expressly sanctioned by a state. That result is inconsistent with the INA, which allows claims based on the actions of non-state actors that the state is unable or unwilling to control. 8 U.S.C. § 1101(a)(42)(A).

b. *Limitations on Country Conditions Evidence*

The NPRM also proposes to bar “evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes were offered to show that a persecutor conformed to a cultural stereotype.” 85 Fed. Reg. at 36,282. The agencies’ explanation of this provision makes clear, however, that they have arbitrarily elided the distinction between stereotypes on one hand and legitimate country-conditions evidence

on the other. The proposal would therefore illegally result in the exclusion of significant evidence necessary for asylum seekers to show an entitlement to relief.

A stereotype is a “fixed or conventional notion or conception ... held by a number of people, and allowing no individuality [or] critical judgment.” Webster’s New World College Dictionary 1314 (3d ed. 1997). For example, a pernicious and false stereotype, which is reflected in the comments by Attorney General William Barr quoted above, sees all asylum seekers as mere economic migrants seeking to game the U.S. immigration system. An equally pernicious and false stereotype, repeatedly peddled by both President Donald Trump and Stephen Miller, is that undocumented immigrants are criminals who terrorize U.S. citizens. As shown above (*see* Section III.A.1.b.ii.(a), *supra*), the NPRM’s attempt to paint all domestic violence as driven only by interpersonal disputes is a similarly false stereotype. The “patriarchal attitudes ... concerning the roles and responsibilities of women and men in the family, the workplace, political life and society” that are prevalent in countries such as Guatemala represent other notable and “deep-rooted stereotypes.” U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination Against Women: Guatemala* 4 (2009).⁷⁷

The NPRM, however, makes clear that it has no interest in ending the use of such stereotypes. In fact, as shown at various places in this comment, the NPRM actively perpetuates several of the stereotypes identified above. The provision against “stereotypes” would instead preclude asylum seekers from presenting legitimate country-conditions evidence.

The NPRM cites as its only so-called “stereotype” the statement that Guatemala has a “culture of machismo.” 85 Fed. Reg. at 36,282 (quoting *Matter of A-B-*, 27 I. & N. Dec. at 336 n.9). That statement is not a stereotype. It is not “fixed,” it is not “conventional,” and it most certainly does allow for individuality and critical judgment on during case-by-case adjudication. Rather, it is a *general* description of *prevailing* attitudes in Guatemala and neighboring countries that is grounded in fact and based on decades of research and reporting about that country. *See, e.g.,* Eileen Wang et al., *Experiences of Gender-Based Violence in Women Asylum Seekers from El Salvador, Honduras, and Guatemala: A Retrospective, Qualitative Study* (March 8, 2019); Musalo, *supra*; Inter-American Dialog, *High Rates of Violence Against Women in Latin America Despite Femicide Legislation: Possible Steps Forward* (2018); Candace Piette, *Where women are killed by their own families*, BBC (Dec. 5, 2015);⁷⁸ Julie Guinan, *Nearly 20 years after peace pact, Guatemala’s women relive violence*, CNN (Apr. 7, 2015);⁷⁹ Joyce Gelb & Marian Lief Palley, *Women and Politics Around the World: A Comparative History and Survey* (2009); Special Rapporteur on violence against women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Addendum: Guatemala* (2005);⁸⁰ Immigration and Refugee Board of Canada, *Human Rights Brief: Domestic Violence in Guatemala* (1994).⁸¹ It is also based on reports from the U.S. State Department. *See, e.g., Guatemala 2018 Human Rights Report* 16-17; U.S. Dep’t of State, *Guatemala 2016 Human Rights*

⁷⁷ <https://www.refworld.org/publisher,CEDAW,,GTM,49e83edd2,0.html>.

⁷⁸ <https://www.bbc.com/news/magazine-34978330>.

⁷⁹ <https://www.cnn.com/2015/04/02/world/iyw-guatemala-gender-violence/index.html>.

⁸⁰ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/108/17/PDF/G0510817.pdf?OpenElement>.

⁸¹ <https://www.refworld.org/publisher,IRBC,COUNTRYREP,GTM,3ae6a8108,0.html>.

*Report 18-21.*⁸² And in the context of *A-R-C-G-*, which gave rise to the quote the NPRM seeks to disapprove, it also reflects the individual experiences of an asylum seeker. See *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389-90. The NPRM’s failure to distinguish between (i) inflexible, reflexive stereotypes, and (ii) evidence of prevailing conditions that admits of exceptions and is drawn from systematic research and reporting—a distinction that any rational judge will be able to draw without difficulty—renders this proposal arbitrary.

The proposal is also arbitrary because the agencies have once again failed to acknowledge or reckon with the consequences of their proposal. Those consequences would be perverse. Paradoxically, the NPRM disparages the submission of the key corroborative evidence it simultaneously requires applicants to submit to support their claims; immigration judges and asylum officers would have to selectively ignore significant content in the very country conditions reports they are mandated to consult and apply. In cases involving gender-based violence, for instance, UNHCR notes that

...country of origin information should be collected that has relevance in women’s claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status.

UNHCR, *Gender Guidelines*, at 10.

The NPRM’s view of what constitutes a “stereotype” would also prevent an ethnic Tutsi fleeing the Rwanda in the 1990s from presenting evidence that large numbers of the ethnic Hutu majority in that country were active, or at least complicit, in genocide. And it would prevent Guatemalan people of indigenous descent from showing that the majority of the country views them as lesser. It would, in short, prevent demonstrations of nexus under the guise of a bar on stereotypes.

It would also bar the presentation of legitimate evidence necessary for other portions of the asylum inquiry. For instance, nothing less than evidence concerning the broad conditions in a whole country will suffice to show the impossibility of internal relocation—which asks whether there is any safe refuge in a country—in some cases. The agencies’ redefinition of “stereotypes” to include country conditions therefore has the severe consequence of barring legitimate claims. The agencies themselves, however, have arbitrarily failed to acknowledge as much.

3. Political Opinion

The NPRM’s proposed restrictions on “political opinion” as a basis for asylum are inconsistent with the plain meaning of that term. The NPRM proposes to restrict the term to an opinion “expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof”

⁸² https://www.justice.gov/sites/default/files/pages/attachments/2017/03/09/dos-hrr_2016_guatemala.pdf.

and to foreclose claims based on any opinion concerning a non-state organization that lacks a direct tie to the state. 85 Fed. Reg. at 36,291. But the term “political” is unambiguous. And it includes anything “concerned with government, the state, or politics” (Webster’s New World College Dictionary 1045 (3d ed. 1997)), which is to say anything to do with “political affairs,” “participation in” such affairs, and “political opinions [and] principles” (*id.*). The NPRM’s proposed definition is therefore at odds with the plain text of the INA.

The proposed restrictions are also arbitrary and unreasonable. The agencies claim that the definition is necessary to “avoid further strain on the INA’s definition of refugee.” 85 Fed. Reg. at 36,280. But given that the *agencies’* proposed definition cannot stand with the text of the INA, it is the NPRM that would “strain ... the INA’s definition of refugee.”

The agencies’ only other proffered justification—that the term “political opinion” has been “difficult ... to uniformly apply” (85 Fed. Reg. at 36,279) fares no better. The two cases the NPRM cites as supposedly contradictory are not: The cases involved different individuals and reached different outcomes based on different opinions and distinguishable facts. *Compare Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020), with *Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005).

In fact, although the agencies fail to acknowledge as much, the NPRM’s proposed definition of “political opinion” is contrary to the uniform construction given to that term by the federal courts. The courts routinely hold, in line with the plain definition of “political opinion,” that relevant opinions extend beyond who controls a state. *See, e.g., Hernandez-Chacon*, 948 F.3d 94 (BIA did not adequately consider claim for asylum based on persecution on account of political opinion where applicant argued she would be persecuted by gang members because of her opposition to male-dominated social norms in El Salvador and her taking stance against culture that perpetuated female subordination and brutal treatment of women); *Faruk v. Ashcroft*, 378 F.3d 940 (9th Cir. 2004) (“We have established that persecution for marrying between races, religions, nationalities, social group members or political opinion is persecution on account of a protected ground.”); *Sangha v. INS*, 103 F.3d 1482 (9th Cir. 1997) (holding that “[p]ast persecution of family members is routinely considered as evidence of possible imputed political opinion”); *Fatin*, 12 F.3d 1233 (“[W]e have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes.”).

Even the cases cited by the NPRM fail to support its proposed definition. The Fourth Circuit in *Saldarriaga* expressly held that “political opinion” reaches a “cause”—not just control of the state. 402 F.3d at 466. And the BIA’s nuanced opinion in *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996), which sought evidence of imputed anti-government opinion in a case in which the asserted political opinion directly involved the government, is likewise at odds with the blunt, unthinking approach in the NPRM. The agencies have, in short, provided no non-arbitrary justification for their proposed definition of “political opinion,” and they have also arbitrarily failed to recognize that their definition is at odds with preexisting law.

Further, international law is to the same effect as federal court decisions. According to UNHCR:

Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-

conformist behaviour which leads the persecutor to impute a political opinion to him or her... the image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. Women are less likely than their male counterparts to engage in high profile political activity and are more often involved in 'low level' political activities that reflect dominant gender roles. For example, a woman may work in nursing sick rebel soldiers, in the recruitment of sympathisers, or in the preparation and dissemination of leaflets.

UNHCR, *Gender Guidelines*, at 8.

Under the NPRM's exceptionally narrowed definition, by contrast, asylum seekers targeted for trying to advance equal access to education, employment, marriage, property ownership and inheritance, legal systems, and even the political process would not be eligible for relief. And persecution on account of "feminism" as a political opinion—the right to equality under the law for women and men—would not be accepted, no matter how extreme the harm inflicted on activists.

Finally, the NPRM fails to mention—much less seek to justify—the absurdities that would result from the application of its definition. As applied to the United States, the NPRM's proposed definition would mean that opinions and activism on topics including criminal justice, abortion, and civil rights are somehow not "political" because they do not go directly to the control of the federal, state, or local governments. And it would, as the NPRM all but admits, create equally bizarre results when applied to other countries. 85 Fed. Reg. at 36,279 (citing *Hernandez-Chacon*, 948 F.3d at 102-03). For instance, in countries where people are persecuted because they are feminists, a woman could be raped for educating other women about birth control or beaten for attending school. The proposed definition would preclude such claims, even though the plain meaning of the term "political" leaves no doubt that feminism is a political opinion. *See Fatin*, 12 F.3d at 1242.

4. Persecution

Persecution has traditionally been understood in our domestic asylum laws and under international refugee protection principles to mean a "threat to life or freedom." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* § 51 (1979) (*Handbook*).⁸³ The NPRM, however, proposes to drastically limit the definition of persecution to harm so severe that it "constitute[s] an 'exigent' threat," and to do so by negative inference from still another laundry list. Like the other laundry lists, however, this one violates the well-settled principle that asylum cases must be decided on their individual facts. *See also id.* To take one example, a threat of minor vandalism is very different from, say, a threat by a mob to kill an asylum seeker while beating him and dousing him in kerosene. *See Doe v. Att'y Gen. of the U.S.*, 956 F.3d 135 (3d Cir. 2020) (rejecting the argument that the latter threat was not persecution because it was "unfulfilled"). Yet the NPRM would lump both together—a result that is irrational as well as contrary to law.

Further, the NPRM would treat all asylum seekers the same, even though violence can rise to the level of persecution when directed against children even when it does not when directed against adults. *See, e.g., Santos-Guaman v. Sessions*, 891 F.3d 12, 18 (1st Cir. 2018); *Hernandez-Ortiz v.*

⁸³ <https://www.unhcr.org/4d93528a9.pdf>.

Gonzales, 496 F.3d 1042, 1045 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 105 (2d Cir. 2006); *Liu v Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004). Indeed, the predecessor agency to both EOIR and USCIS expressly recognized as much. Jeff Weiss, Acting Director, INS Office of Int'l Affairs, *Guidelines for Children's Asylum Claims* (1998).⁸⁴ The agencies may not silently change that position without a sound rationale, which they have not attempted to—and cannot—provide.

The NPRM also ignores the possibility that various harm can cumulatively amount to persecution (*see, e.g.*, UNHCR, *Handbook* § 201)—as well as the uniform decisions of the federal courts holding as much. *See, e.g.*, *Karki v. Holder*, 715 F.3d 792, 805 (10th Cir. 2013); *Fei Mei Cheng v. Att'y Gen. of the U.S.*, 623 F.3d 175, 192-94 (3d Cir. 2010); *Bracic v. Holder*, 603 F.3d 1027, 1036 (8th Cir. 2010); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008); *De Santamaria v. U.S. Att'y Gen.*, 525 F.3d 999, 1008 (11th Cir. 2008); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1048-49 (9th Cir. 2005); *Porodisova v. Gonzales*, 420 F.3d 70, 79-80 (2d Cir. 2005). There is no discussion of the vastly different forms of harm experienced by different asylum seekers. For example, survivors of intimate partner violence might experience it as relentless cumulative harassment, intimidation, threats, or acts of violence to themselves or their children, resulting in chronic, extreme, and debilitating post-traumatic stress disorder. Under this provision, such harm will be arbitrarily dismissed regardless of the devastating impact on the individual who must endure it. The agencies have thus arbitrarily ignored three critical aspects of the problem. And the fact that the list rests on faulty assumptions means that it will inevitably result in *refoulement*—a possibility that the agencies have also chosen to ignore.

In addition, the NPRM provides no rational justification for proposing a laundry list. It contends that there is a “wide range of cases interpreting ‘persecution’” (85 Fed. Reg. 36,280), but that is unremarkable: Decades after the enactment of the INA, there are bound to be many cases interpreting a core term of asylum law. And the mere fact that many cases exists does not show regulations are necessary; after all, there would be just as many cases discussing the meaning of “persecution” if regulations defining the term had issued 30 years ago. The agencies could, of course, attempt to show some confusion or inconsistency among the cases—but with one exception (which incorrectly interprets the case law), they fail utterly to do so.

The purported explanation of the rule also misstates settled legal standards. It cites *Matter of A-B-* for the proposition that “persecution requires an intent to target a belief, characteristic or group.” 85 Fed. Reg. at 36,280 (discussing *Matter of A-B-*, 27 I. & N. Dec. at 337). This has nothing to do with the definition of persecution—it is instead a purported restatement of the nexus standard. And it is inconsistent with the statutory statement of nexus, which requires only that a protected ground be “one central reason” for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). The NPRM is arbitrary to the extent it bases its attempt to define persecution on this impermissible definition of a separate concept.

The individual items in the laundry list are also contrary to law and arbitrary. For example, the first item on the list would place every “instance of harm that arises generally out of civil, criminal, or military strife in a country” outside the definition of “persecution.” 85 Fed. Reg. 36,280. That result is flatly contrary to the INA. Although some violence inflicted during conflicts is not persecution on account of a protected ground—a statement that encapsulates the limited holding of the BIA opinion that the agencies attempt to cite in support of the NPRM (*see Matter of Sanchez & Escobar*, 19 I. &

⁸⁴ <https://www.aila.org/infonet/ins-guidelines-for-childrens-asylum-claims>.

N. Dec. 276 (BIA 1985))—some violence does rise to that level. And the INA prohibits the agencies from turning away asylum seekers who suffer such violence on the ground that it does not constitute “persecution.” *See* 8 U.S.C. §§ 1101(a)(42)(A) & 1158(b)(1)(A).

The list entry concerning “threats” (85 Fed. Reg. at 36,281) is similarly arbitrary, because the NPRM fails to consider the significant on-the-ground effects a rule placing threats beyond the realm of “persecution” would have. The NPRM would turn away a person who experiences credible death threats because they have not yet been murdered and would turn away a person who experiences credible threats of sexual assault because they have not yet been raped. Essentially, the agencies propose to require asylum seekers to take the chance that they will survive an actual murder attempt, and to undergo the serious psychological and physical harm of rape, before they enjoy even the possibility of receiving asylum in the United States. That result cannot be squared with the INA’s definition of “refugee” or justified in a non-arbitrary way. *See, e.g., Antonio*, 959 F.3d at 794.

Further, the NPRM significantly misstates the existing case law as it concerns threats. The agencies contend that “courts have been inconsistent in their treatment of threats as persecution.” 85 Fed. Reg. at 36,281 n.32. But that is not so: It has been settled for more than 40 years that persecution encompasses “threat[s] to [the] life or freedom of . . . those who differ in a way regarded as offensive.” *Acosta*, 19 I. & N. Dec. at 222-23 (citing cases). And the extant cases, including all of the cases cited in the NPRM, uniformly demonstrate that certain severe threats, most commonly serious threats of death, can constitute past persecution.

To be clear, none of the cases cited in the NPRM’s footnote on this subject actually holds that threats never constitute past persecution. Rather, all but one of those cases expressly hold or suggest that at least some threats *can* constitute past persecution (*Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000); *Zhen Hua Li v. Att’y Gen.*, 400 F.3d 157, 164 (3d Cir. 2005); *Boykov v. INS*, 109 F.3d 413, 417 (7th Cir. 1997); *Ang v. Gonzales*, 430 F.3d 50, 56 (1st Cir. 2005)), while the final case holds only that specific, relatively less serious threats did not constitute past persecution (*Guan Shan Liao v. United States DOJ*, 293 F.3d 61, 70 (2d Cir. 2002)). There is, in fact, no good-faith way to read the cases cited in the NPRM in any other way. The agency’s claim that judicial discrepancies require a regulation on this topic is therefore patently false.

The remaining entries in this laundry list arbitrarily downplay the severity and traumatic effects of various actions, including detention, violent harassment, and state coercion. *See* 85 Fed. Reg. at 36,280-81. In particular, the NPRM would silently overturn cases holding that detention can rise to the level of persecution. *See, e.g., Shi v. U.S. Atty. Gen.*, 707 F.3d 1131, 1237 (11th Cir. 2013); *Haider v. Holder*, 595 F.3d 276, 286 (6th Cir. 2010); *Beskovic v. Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006). It would silently overturn the cases, cited above, making clear that persecution can be found on the basis of an accumulation of incidents over time. And it silently implies that criminal laws subjecting individuals to death on protected grounds cannot give rise to a well-founded fear of persecution if the state uses the law to kill relatively few people. Absent a non-arbitrary justification for these results—which the NPRM does not even try to provide, because no such justification exists—these factors must also be withdrawn.

5. Internal Relocation

The NPRM’s proposed changes to the internal relocation analysis would arbitrarily replace a set of factors that bear directly on whether internal relocation is feasible with a set of factors that has

extremely limited relevance to that question. The current regulation governing internal relocation states that “adjudicators should consider,” among other things, (1) “whether the applicant would face other serious harm in the place of suggested relocation”; (2) “any ongoing civil strife in the country”; (3) “administrative, economic, or judicial infrastructure”; (4) “geographical limitations”; and (5) “social and cultural constraints.” 8 C.F.R. § 208.13(b)(3); *accord id.* § 1208.13(b)(3).

Contrary to the NPRM, all of the factors in the current regulations bear directly on whether “the applicant could avoid future persecution by relocating to another part of the country.” 8 C.F.R. § 208.13(b)(1)(B). In particular, the infrastructure factor—the only factor the NPRM specifically singles out as supposedly irrelevant (85 Fed. Reg. at 36,282)—directly goes to the question whether officials in a proposed part of the country would have the ability to control persecutors. Absent administrative infrastructure, such officials would not exist; absent economic infrastructure, they would not be able to respond; and absent judicial infrastructure, their orders would not be enforceable.

In contrast, the factors proposed by the NPRM do not bear directly on the question whether someone could avoid future persecution by relocating to another part of the country. The “size of the country” at issue (85 Fed. Reg. at 36,293), for instance, is usually not relevant. The persecutor in an asylum case is, by definition, either the state or an actor the state is not willing or able to control—and there is no reason to believe that either state persecution or state acquiescence is limited to a particular locality. The U.S. government does not act in one way in New York and in another way in North Dakota—and it is folly to expect other governments to act differently.

The “geographic locus” of the persecution (85 Fed. Reg. at 36,293) is similarly irrelevant. A persecutor who acted in one place because that is where a survivor was located is exceedingly unlikely to cease their violence simply because the asylum seeker moves. Rather, if the persecutor can follow, they are likely to follow. For the same reason, the “size, reach, or number of the alleged persecutor [sic]” (*id.*) has no bearing on whether internal relocation is reasonable, because even a single persecutor with local reach might well have the power to follow the asylum seeker.

Any consideration of an asylum seeker’s “demonstrated ability to relocate to the United States” would be triply arbitrary. Whether an asylum seeker can move represents a categorically different inquiry from whether an asylum seeker is safe in their new home. In many cases—as in asylum seekers from the Northern Triangle—the United States is the first safe haven they encounter, because there is formal freedom of movement among Northern Triangle countries under the Central America-4 Free Mobility Agreement, and because persecutors routinely show their willingness and ability to follow survivors into Mexico. One example includes Beatrice*, a woman whom Tahirih counseled. Beatrice* fled Central America after suffering years of domestic abuse including regular beatings and rapes. Her husband became increasingly violent toward both her and their children over time. She finally fled to Tijuana, found a shelter, and applied for asylum. After several weeks, however, she realized that she and her children were no longer safe in Mexico either. Her husband’s relative, also from their country, managed to find them in Tijuana and violently attack them.

Given that someone to whom the internal relocation inquiry is applied has definitionally reached the United States, this factor is not a “factor” at all but rather an inappropriate, universal thumb on the scale against a grant of asylum. There is simply no connection between the NPRM’s proposed factors and “whether ... persecution generally occur[s] nationwide.” 85 Fed. Reg. at 36,282. Indeed, the list of factors in the NPRM is so unmoored from reality that it will routinely cause the government to abet violations of international law in violation of the ATCA.

Finally, the NPRM is arbitrary insofar as it argues that the current regulations provide insufficient guidance by stating that factors “‘may, or may not’ be relevant” or “‘determinative’” in any given case. 85 Fed. Reg. at 36,282. That language is nothing more than a realistic, and necessary, recognition that asylum cases are decided on their individual facts. Any attempt to provide that certain factors—especially the irrelevant factors proposed by the NPRM—must be considered and determinative of every set of facts is therefore arbitrary.

The NPRM also proposes to shift the burden of proof on internal relocation to asylum seekers whenever “the persecutor is not the government or a government-sponsored actor.” 85 Fed. Reg. at 36,293. The NPRM’s sole justification for this change is that “a private individual or organization would not ordinarily be expected to have influence everywhere in a country.” *Id.* at 36,282. That statement is both incorrect and irrelevant. The agencies themselves routinely claim that private organizations have influence that crosses borders and, in fact, extends into this country. *See, e.g., ICE, Combating Gangs*;⁸⁵ DOJ, *Department of Justice Fact Sheet on MS-13* (Apr. 18, 2017).⁸⁶ Case law also illustrates the nationwide reach of much persecution inflicted by non-state actors. *See, e.g., Antonio*, 959 F.3d 778; *Cece*, 733 F.3d 662.

Furthermore, even a single persecutor acting alone may have the ability to move—and if the persecutor moves to follow an asylum seeker, internal relocation is unreasonable. In some cases, however, it will be difficult for an asylum seeker to show that a persecutor will follow unless the persecutor has already done so. In such cases, the NPRM’s proposed shift of the burden of proof will inevitably result in refolement by returning a country in which prior persecutors can, and do, find and commit violence against the asylum seeker.

Finally, the rule arbitrarily sets standards that survivors of gender-based violence will rarely, if ever, meet. A survivor often fears persecution from one individual. A common tactic of perpetrators is to threaten to find and punish victims for escaping, no matter where they escape to. A survivor would have to be harmed because her persecutor carried out his threats, and then have objective evidence of such harm, in order to even have a chance of meeting the NPRM’s proposed burden as to internal relocation. It is, of course, highly unlikely that a survivor could do so, no matter how severe the persecution. It is unjust to impose such an unrealistic burden under these circumstances.

For example, Camille* from Burkina Faso was unable to relocate within her country. From the moment of her birth, Camille’s* religion set her apart from others in her tribe. Her parents were Catholic. They raised Camille* to share their religion, but they did not protect her from life-threatening customs that prevailed in her community.

At age 7, Camille* was sent to a hut in the woods. Inside, a villager cut her genitals with a rudimentary blade. She walked back to her village with blood streaming down her legs.

At 19, she was forced into marriage and had to leave her family and friends behind to live in her husband’s village. Upon arrival, Camille’s* sister-in-law examined her genitals and declared that she must undergo another cutting. A few days later, a group of women attacked Camille*, sitting on

⁸⁵ <https://www.ice.gov/features/gangs>.

⁸⁶ <https://www.justice.gov/opa/speech/file/958481/download>.

her stomach and pinning down her arms and legs as a second FGM was performed. A month later, Camille* and her husband moved into the city.

Once the new couple was away from home, their relationship took a surprising turn; it flourished. Her husband broke away from the traditions of the men of his community. He refused to take a second wife, and he eventually converted to Catholicism for Camille*. The birth of their first child—a girl—was difficult, likely as a result of complications from FGM/C, and Camille* was in labor for three days. With an intimate understanding of the dangers of FGM/C and the support of her husband, Camille* became a traveling nurse, educating people in rural villages about the life-threatening effects of FGM/C.

Camille's* career as a nurse, however, did little to prepare her for the sudden death of her husband. Doctors told her he died of a heart attack or stroke. "*My world died with him that day,*" Camille* recalls. When Camille* returned to her husband's village for his funeral, his family forced her to undergo a humiliating ritual. They shaved her head and paraded her naked around the village while people beat her with sticks to exorcise the demons that they believed had killed her husband. According to the tribe's tradition, Camille* now belonged to the family, like a piece of property passed from one person to the next. The family demanded that Camille* marry her late husband's younger brother, in part so that he would inherit her husband's money. Camille* refused.

Her defiance enraged the brother and marked the beginning of a violent 12-year campaign against Camille* and her children. The family sold her home in the city without her knowledge. Camille* was forced to move. She sought help from her family and several governmental agencies, including the police, but no one was able to protect her. The abuse, led by her husband's brother, escalated. He stalked her at home and at work. On one occasion, he came into her house, grabbed her by the neck, and took out a knife. Camille*'s youngest son tried to save her and was stabbed. Less than a year later, her tormenter attacked her with a stick outside the hospital where she worked, threatening to kill her with his bare hands.

Camille* had two choices: escape or die. "*There was nowhere safe in my country for me,*" she says. "I fought for 12 years, and I cannot fight any longer." Camille* escaped to the United States and sought and was granted asylum.

Ana* from Honduras similarly tried several times to escape violence within her own country and abroad but was always discovered and returned to harm. When Ana* was 23 years old, she met a man named Wilmer, and they moved in together. Wilmer eventually began to abuse Ana* and, as a tactic of isolation, he forbade Ana* from leaving the house unaccompanied. Ana tried to separate from Wilmer many times, even moving in with her brother, but Wilmer came after her each time. She could not even contact the police because Wilmer had a friend on the force who would make sure to protect him. After years of living in fear, Ana* knew that she had to flee Honduras for her safety. After unsuccessfully trying to flee to the United States, she returned to Honduras and Wilmer found her again. The abuse continued. Ana* fled for a second time and was finally granted asylum.

Aicha's case described above also illustrates the challenges survivors face in fleeing their persecutors even when they flee to non-contiguous countries. Aicha first tried to flee from Niger to Togo, but her husband's family was in Togo so she no safer there than she had been in Niger.

6. Firm Resettlement

The NPRM’s proposed changes to the “firm resettlement” rule are contrary to the plain text of the INA. The statute provides that an individual who “was firmly resettled in another country prior to arriving in the United States” is ineligible for asylum. 8 U.S.C. § 1158(b)(2)(A)(vi). In this context, the word “firm” means “fixed; stable,” “continued steadily; remaining the same,” or “unchanging; resolute; constant.” Webster’s New World College Dictionary (3d ed. 1997), at 509. And because to “settle” is “to establish as a resident or residents” (*id.* at 1228), to “resettle” is to do so again. To be “firmly resettled” in another country, then, is to be a fixed, stable resident of that country.

None of the NPRM’s proposals can plausibly be seen as consistent with the statutory text. It is laughable to call anyone who “could have resided in any permanent legal status or ... renewable legal immigration status” in a country in which they fleetingly set foot (85 Fed. Reg. at 36,286) “firmly resettled” in that country. Someone who only “potentially” might be able to stay in a country “indefinitely” (*id.*) is also not established as a resident of that country until that potential turns into a reality. Someone who is voluntarily present for the relatively short duration of one year (*id.*) is also not established as a resident—as DOJ’s statements about DACA recipients make abundantly clear. *See, e.g.,* Oral Arg. Tr., *DHS v. Regents of the Univ. of Cal.* (Nov. 12, 2019) (describing the fact that DACA is “only granted in two-year increments” as evidence that it is “a temporary stop-gap measure that could be rescinded at any time”).⁸⁷ And being a “citizen” of another country who was fleetingly “present” in that country (*id.*) has nothing at all to do with “residence.” To the contrary, someone with citizenship in country A but who resides in country B is, by definition, *not* a resident in—and therefore not settled in—country A at all.

For the same reasons, even if the phrase “firmly resettled” were ambiguous—and it is not—each of the NPRM’s proposed expansions of that concept would be unreasonable. Furthermore, the rationales that the agency has provided for those proposed expansions are arbitrary. The agency claims that there are now more “resettlement opportunities,” because “[f]orty-three countries have signed the Refugee Convention since 1990.” 85 Fed. Reg. at 36,285 & n.41. But the question whether someone is *actually* resettled in a country has nothing to do with whether there is an *opportunity* for resettlement. Furthermore, the agency’s logic is fallacious. The fact that a country signs the Refugee Convention bears no relationship to whether the country provides (1) actual pathways to asylum or other status; (2) full and fair procedures; or (3) a safe haven that would permit refugees to avoid persecution. And as shown by sources cited throughout this comment, countries such as Afghanistan, Haiti, Russia, Mexico, Guatemala, Honduras, and El Salvador—all signatories to the Convention (UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*)⁸⁸—are countries in which these criteria are not met. In particular, none of those countries provides a possible escape from persecution for survivors of gender-based violence.

For the same reasons, the proposed expansion of “firm resettlement” does not advance the “interest of those genuinely in fear of persecution in attaining safety as soon as possible.” 85 Fed. Reg. at 36,285. Passing through a country does not make it a safe. *See* Section III.A.7.c, *infra*. The

⁸⁷ https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-587_886a.pdf.

⁸⁸ <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

ability to stay in a country without authorization for a year does not make it safe for long-term resettlement and does not account for the possibility of a well-founded fear of future persecution. And being a citizen of a country, without more, does not make it safe. To take just one example, a survivor of gender-based violence from Honduras who is also a citizen of Guatemala, and passes through Guatemala when fleeing Honduras, is not safe from persecution in Guatemala.

Furthermore, the proposed redefinition of “firm resettlement” ignores the on-the-ground experiences of survivors and other asylum seekers. Limited access to financial resources might make flight directly from a home country to the United States very challenging for women and girls. Their escape will be circuitous and arduous, and they might be more likely to need false documents or to leave under false pretenses, if they would otherwise need permission of an abusive male relative to exit their country. Once a survivor has reached a country of transit, resettlement may be unsafe despite an offer of refugee or asylee status. As noted above, persecutors are known to pursue survivors in neighboring countries after they try to escape, and a survivor might also face threats to her safety as a woman residing alone in the country, or even in a refugee camp where there is little if any protection from sexual assault. *See* UNHCR, *Guidelines on the Protection of Refugee Women*.

The NPRM would also shift the initial burden of proof as to firm resettlement without even acknowledging, much less justifying, the change. At present, the government “bears the burden of presenting prima facie evidence of firm resettlement.” *Matter of A-G-C-*, 25 I. & N. Dec. 486, 501 (BIA 2011). Under the NPRM, however, the burden would immediately be placed on the asylum seeker to negate the possibility of firm resettlement whenever “the evidence of record indicates that the firm resettlement bar may apply.” 85 Fed. Reg. at 36,303. In other words, the NPRM would eliminate the government’s burden *sub silentio*. Such a change is arbitrary by definition.

Further, the NPRM’s proposal would needlessly prolong and complicate proceedings in immigration court. The agencies have not provided any definition of what it means for “the evidence of record” to “indicate[] that the firm resettlement bar *may* apply.” *Id.* (emphasis added). Without such a definition, immigration judges and practitioners will suffer confusion, not present under current law, about whether firm resettlement is an issue in a case.

7. Discretionary Factors

The final two laundry lists in the NPRM include entries that would bar a favorable exercise of discretion under 8 U.S.C. § 1158(b)(1)(A) in effectively every asylum case. Specifically, the NPRM proposes three “significant adverse discretionary factors”: (1) any “unlawful entry or attempted unlawful entry” not “made in immediate flight from persecution in a contiguous country”; (2) with trivial exceptions, “[t]he failure . . . to apply for protection” in a third country through which an individual transited; and (3) the “use of fraudulent documents to enter the United States” unless an individual traveled to the United States directly from their home country. 85 Fed. Reg. at 36,292.

The NPRM also proposes no fewer than nine factors that would bar asylum except “in extraordinary circumstances.” 85 Fed. Reg. at 36,293. Those factors are: (1) spending more than 14 days in almost any third country en route to the United States; (2) traveling through more than one country en route to the United States; (3) being subject to a criminal conviction or sentence that would bar asylum “but for the reversal, vacatur, expungement, or modification of [the] conviction or sentence”; (4) accruing “more than one year of unlawful presence” before applying for asylum; (5) failing to timely report income to the IRS, to file any tax return, or to pay any tax due; (6) the previous

filing of two or more denied applications for asylum; (7) a finding that the asylum seeker withdrew with prejudice, or abandoned, a prior asylum application; (8) failing to attend an asylum interview; and (9) failing to file a motion to reopen based on changed country conditions “within one year of those changes in country conditions.” *Id.*

Like the laundry lists concerning PSGs, nexus, and persecution, these lists must be withdrawn in their entirety—and each individual entry on the lists must also be withdrawn—as arbitrary and contrary to law.

a. Generally

The lists must be withdrawn in their entirety for at least seven reasons. *First*, whether read together or alone, the lists will functionally exclude almost all asylum seekers from the remedy of asylum. They are therefore contrary to the statutory presumption in § 1158(a)(1) that all refugees may apply for, and are eligible for, the remedy of asylum.

Second, the NPRM provides no explanation at all for the agencies’ choice to codify lists of adverse factors. Instead, it notes only that the agencies have issued guidance on the exercise of discretion in other circumstances, without ever suggesting why it is reasonable to do so here. 85 Fed. Reg. at 36,283. That fact, without more, makes the proposal arbitrary.

Third, the agencies do not appear to have considered any alternatives to the lists of adverse factors. The agencies could, for instance, discuss positive factors instead of, or in addition to, negative factors. Or the agencies could continue to trust the immigration courts and the BIA to properly conduct a totality-of-the-circumstances analysis. After all, the immigration courts have done so for decades, and the NPRM expresses no disapproval whatsoever of the job the courts have done over that period of time. This failure to consider significant alternatives is also sufficient, standing alone, to render the proposed lists arbitrary.

Fourth, as with all of the other proposals in the NPRM, the agencies have made no attempt to consider the real-world consequences of the proposed lists of adverse factors. In particular, they fail to acknowledge—much less justify—the inescapable consequence that the lists would make effectively every asylum seeker ineligible for asylum.

Fifth, the NPRM’s claims that the lists “build on the BIA’s guidance” (85 Fed. Reg. at 36,283) and on “prior precedent from the Attorney General” (*id.* at 36,284) are simply false. The only examples the NPRM provides of prior bars involve individuals who committed violent crimes—and one of those examples is not even from the realm of asylum law. But none of the factors that the agencies now propose has exclusively to do with violent crime, and only one of those factors even carries the potential ever to overlap with the commission of violent crime. The agencies do not acknowledge, much less attempt to justify, the disconnect between existing rules barring those who commit certain violent crimes from asylum and their much more wide-ranging proposals. Further, as shown at length below, the NPRM proposes to dramatically reweight some factors and invent others out of whole cloth. The list of discretionary factors is therefore also arbitrary for the reason that it does not, and cannot, advance the only arguable goal enunciated by the NPRM.

Sixth, the exceptions to the lists are insufficiently crafted. The list of “significantly adverse” factors has no express exceptions at all. That fact both suggests that the agency has not even attempted

to consider countervailing equities and ensures that the implementation of the list by immigration judges will be messy and inconsistent. And although the list of general bars does have exceptions, those exceptions are so narrow as to be meaningless. The list of general bars is, in other words, a functionally universal rule masquerading as a more flexible guideline. The result is that it violates the requirement that asylum determinations be made on a case-by-case basis. And the agency’s failure to recognize the universal nature of the list, much less justify that nature, also renders the list arbitrary.

Seventh, the separate justification for the list of effective bars on asylum—that the issues it covers are ones that “adjudicators might otherwise spend significant time evaluating and adjudicating” (85 Fed. Reg. 36,284)—is false. The agencies make no pretense of having evidence to back that justification. And in our experience, none of the nine issues is one that routinely arises in asylum proceedings. That is no surprise, given that none of the nine is connected in any way to any requirement for asylum enunciated in the INA, preexisting regulations, or existing opinions of the BIA or the federal courts. To the contrary, the proposed list would require adjudicators to consider these issues for the first time. It would therefore inject new issues into asylum proceedings rather than removing issues that already exist, and it would require immigration judges, the BIA, and the federal courts to spend significant time addressing issues that would otherwise not arise. The inevitable effect of agencies’ proposed list of bars is therefore directly at odds with the stated goal of that list.

b. Unlawful Entry

The NPRM’s proposal to make almost any “unlawful entry” or “attempted unlawful entry” a “significant adverse discretionary factor” (85 Fed. Reg. at 36,283) is contrary to the INA. The BIA recognized more than thirty years ago that it is inappropriate to require an “unusual showing of countervailing equities” to overcome an unlawful entry. *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987). After that holding, Congress amended § 1158(a)(1) to state that it does not matter “whether or not” an asylum seeker entered “as a designated port of arrival.” IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-579 (1996). The statute, in other words, now states that anyone may apply for, and receive, asylum no matter their method of entry into the United States. 8 U.S.C. § 1158(a)(1); *cf. E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020). And the courts have thereafter continued to hold that, although an unlawful entry can be given *some* weight in the asylum analysis, the statute does not permit that fact alone to carry significant weight. *See, e.g., E. Bay Sanctuary Covenant*, 950 F.3d at 1275-76; *Huang v. INS*, 436 F.3d 89, 99 (2d Cir. 2006); *Hussam F. v. Sessions*, 897 F.3d 707, 718 (6th Cir. 2018); *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008).

The NPRM’s attempt to dramatically increase weight to illegal entries is also contrary to the Refugee Convention, which precludes states from “impos[ing] penalties” on the basis of “illegal entry or presence.” Refugee Convention art. 31(1). By precluding individuals from seeking asylum on the basis of illegal entry, the NPRM’s proposal also stands in significant “tension with the United States’ commitment to avoid refouling individuals to countries where their lives are threatened.” *E. Bay Sanctuary Covenant*, 950 F.3d at 1276-77.

Finally, the NPRM’s illegal-entry bar is arbitrary. Contrary to the agencies’ assertion, there is no “growing number of [people] who illegally enter the United States.” 85 Fed. Reg. 36,283. To the contrary, the number of people encountered by CBP along the Southwest border plummeted by almost 69% from June 2019 to June 2020. *See* CBP, *Southwest Border Migration FY2020*.⁸⁹ And that drop

⁸⁹ <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

cannot be written off as an artifact of COVID-19. Even in October 2019, before COVID-19 even appeared, border encounters were down almost 69% from May 2019—and they have not returned even to that level in any month since. *See id.* The rationale behind the proposal is therefore contrary to the agencies’ own evidence.

Even if there were an increasing number of people crossing between ports of entry—and there is not—that circumstance would be nothing more than a reflection of the agencies’ own recent (and illegal) policy choices. Over the last four years, the agencies have effectively closed ports of entry to all asylum seekers. They have done so through the official (and illegal) means of the third-country transit bar, the farcically named “Migrant Protection Protocols,” safe-third-country agreements with the Northern Triangle countries, and a drastically overbroad border closure purportedly related to COVID-19. *See* DHS & DOJ, *Asylum Eligibility & Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019), *enjoined by E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019), *and vac’d by Capital Area Immigrants’ Rights Coalition v. Trump*, D.D.C. No. 1:19-2117, Dkt. 72 (June 30, 2020); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) (holding “Migrant Protection Protocols” illegal); DHS & DOJ, *Implementing Bilateral & Multilateral Asylum Cooperative Agreements Under the Immigration & Nationality Act*, 84 Fed. Reg. 63,994 (Nov. 19, 2019), *challenged by U.T. v. Barr*, D.D.C. No. 1:20-cv-116; CDC, *Control of Communicable Diseases*, 85 Fed. Reg. 16,559 (Mar. 24, 2020); Camilo Montoya-Galvez, *Federal judge skeptical of Trump order used to expel migrants at border*, CBS News (June 25, 2020)⁹⁰ (reporting on oral ruling blocking removal of child under the CDC order). They have done so through the unofficial (but equally illegal) means of “metering” entry at ports of entry. *See, e.g., Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019). And they have done so by failing to properly train DHS agents, to monitor agents with a history of routinely (and illegally) lying to and abusing asylum seekers, and by failing to impose any consequences on agents who break the law. *See, e.g., Brief Amici Curiae of Tahirih Justice Center, et al., Hernandez v. Mesa*, S. Ct. No. 17-1678 (Aug. 9, 2019),⁹¹ and sources cited therein; *Letter from Am. Immigration Council & ACLU re: CBP Officers Conducting Credible Fear Interviews* (Apr. 30, 2019), and sources cited therein.

The result of these combined policies and failures is clear: Notwithstanding the fact that it is entirely legal under U.S. law to present at a port of entry and seek asylum, the agencies have made it impossible for individuals to do so. Faced with such a situation, crossing between ports of entry is the only way to vindicate an individual’s right to apply for asylum in the United States. The NPRM therefore proposes to penalize asylum seekers for the agencies’ own illegal actions.

The NPRM accuses people who commit illegal entry of only “putatively” crossing the border to seek asylum. 85 Fed. Reg. 36,283. But there is no evidence that the vast majority of those who enter “in order to seek asylum” (*id.*) are anything other than bona fide asylum seekers. To the contrary, this accusation constitutes the sort of pernicious stereotype that the agencies claim to want to eradicate. *See id.* at 36,282. It is therefore arbitrary.

These deficiencies are exacerbated, rather than cured, by the purported exception for those “in immediate flight from persecution or torture in a continuous country.” 85 Fed. Reg. at 36,283. That

⁹⁰ <https://www.cbsnews.com/news/federal-judge-trump-order-migrant-expulsions-policy-aclu/>.

⁹¹ https://www.tahirih.org/wp-content/uploads/2019/08/17-1678-SCOTUS-Amicus-Brief_Tahirih-Justice-Center.pdf.

exception effectively encompasses only people who happen to be tortured in the areas of Canada or Mexico that immediately abut the United States. It is therefore so narrow as to be entirely meaningless. It is also unjustified and arbitrary, especially in light of the policies noted below (*see* Section III.A.7.c, *infra*) that have effectively (though illegally) closed U.S. ports of entry to all asylum seekers, including those with a well-founded fear of persecution in Mexico.

c. *Transit Bars*

The NPRM includes three transit-related bars: the proposal to make a significantly adverse factor the “failure ... to seek asylum or refugee protection in at least one country through which [a person] transited before entering the United States” (85 Fed. Reg. at 36,283) and the proposed bars on asylum for any person who either “spent more than 14 days in one country” or “transit[ed] through more than one country” en route to the United States. *Id.* at 36,284. These provisions are both contrary to the INA and arbitrary.

The new proposed transit bars, like the agencies’ previous interim final rule on the same topic (*see* 84 Fed. Reg. 33,829), violate the INA in numerous ways. As an initial matter, the NPRM would nullify the general rule in § 1158(a)(1). Under the NPRM’s proposal, the only individuals who would remain eligible for asylum absent the most extraordinary of circumstances are (1) Mexican and Canadian citizens and residents; (2) individuals who fall into an exception to the safe-third-country agreement with Canada and spend less than 14 days in that country; (3) individuals who survive a sea journey to the United States with no more than one stop; and (4) the small number of individuals who have the resources to purchase direct or one-stop airfare to the United States. Notably, women fleeing gender-based persecution are much less likely than men to have such resources available to them. Women may be subject to discriminatory laws or practices prohibiting them from owning land or other assets or from holding certain jobs. And, women fleeing forced marriage or “honor” crimes at the hands of their families or communities certainly could not turn to them for assistance in order to escape.

Of these exceptions, the one for Mexican nationals is easily the most numerically significant—and Mexican nationals accounted for only 6% of the asylum applications filed in immigration courts between 2001 and 2019. TRAC, *Asylum Decisions*.⁹² The result is that, under the NPRM, the general rule in § 1158(a)(1) would be gutted: While Congress expressly mandated that individuals must generally be allowed to apply for asylum, the NPRM’s transit bars would render that an empty exercise by ensuring that no one could receive asylum.

Contrary to the agencies’ *ipse dixit* (85 Fed. Reg. at 36,284), the NPRM’s transit bars are also inconsistent with Congress’s judgment concerning the circumstances in which the United States may force individuals to apply for asylum in another country. Congress enacted two statutory provisions on that topic. One provision, the “[s]afe third country” exception, states that an individual “may be removed, pursuant to a bilateral or multilateral agreement, to a [third] country ... in which the [individual’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 [individual] would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.” 8 U.S.C. § 1158(a)(2)(A).

⁹² <https://trac.syr.edu/phptools/immigration/asylum>.

The second provision renders ineligible for asylum any individual who “was firmly resettled in another country prior to arriving in the United States.” 8 U.S.C. § 1158(b)(2)(A)(vi). An individual is presumed to have firmly resettled in another country if she has “an offer of permanent resident status, citizenship,” or equivalent status from that country. 8 C.F.R. § 208.15. Because evidence of persecution in the third country rebuts a showing of firm resettlement, an individual ineligible for asylum in the United States under this provision has still “by definition” found a safe home in another country. *Arrey v. Barr*, 916 F.3d 1149, 1159-60 (9th Cir. 2019).

Three features of these provisions are immediately apparent. First, they are very narrowly drawn. Second, they require asylum seekers to look to another country only if that country provides a “safe option.” *E. Bay Sanctuary Covenant v. Barr*, 2019 U.S. Dist. LEXIS 124268, at *39 (citing *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013)). And third, they take careful account of whether an asylum seeker has already received protection from the third country or, at the least, can avail himself of a full and fair asylum procedure in that country. Thus, to be consistent with § 1158, any regulations requiring additional individuals to seek asylum in a third country must exclude only narrow classes of individuals and must take account of both the safety of those countries and the fairness of their asylum procedures.

The proposals in the NPRM satisfy none of these requirements. Where Congress enacted provisions that require only small numbers of asylum seekers to seek refuge elsewhere, the NPRM would require the vast majority of asylum seekers to do so. Where Congress required asylum seekers to seek protection only in *safe* third countries, the NPRM fails to consider whether an asylum seeker would be persecuted in the third country. And where Congress carefully took account of the fairness of other countries’ asylum procedures, the NPRM asks only the question whether those countries are formal signatories to the Refugee Convention, Refugee Protocol, and CAT—a question that has no relationship to whether a country actually has a full and fair asylum system and is both capable of processing claims and protecting refugees. Perversely, if finalized, this NPRM would ensure that the United States itself would fail this test. The NPRM is therefore in no way consistent with Congress’s judgment about when asylum seekers must seek relief in other countries. *See Slip op., E. Bay Sanctuary Covenant v. Barr*, 9th Cir. Nos. 19-16487 & 19-16773, at 27-36 (July 6, 2020).⁹³

All three of the transit-related factors are also manifestly arbitrary. The NPRM states, in language so hedged as to be virtually meaningless, that “the Departments believe that the failure to seek asylum or refugee protection in at least one country through which a[person] transited while en route to the United States may reflect an increased likelihood that the [person] is misusing the asylum system.” 85 Fed. Reg. at 36,283 (emphases added). In other words, the agencies have taken the position that it is appropriate to impose drastic bars on asylum on the basis of the bare possibility that the current system might one day attract a trivial number of fraudulent claims. That is irrational.

Further, there is not a shred of evidence to back the agencies’ stated belief. *See slip op., E. Bay Sanctuary Covenant*, at 41-45. And there is a mountain of contrary evidence. There is, for instance, ample evidence that Mexico is unsafe for many asylum seekers, including women, LGBTQI/H people, and anyone fleeing persecution in Central America. *See, e.g., Human Rights First*,

⁹³ <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/06/19-16487.pdf>.

Is Mexico Safe for Refugees and Asylum Seekers?;⁹⁴ Amnesty International, *Mexico 2017/2018*;⁹⁵ NACLA, *Surviving One of Mexico's Most Dangerous Places for Women* (Apr. 2, 2019);⁹⁶ World Health Organization, *Femicide 3*.⁹⁷ Indeed, women and girls face alarming rates of femicide, extortion, kidnapping, and sexual assault in Mexico, as illustrated by just a small sample of Tahirih clients including:

- A 20-year-old woman from Honduras who was raped in Mexico after fleeing her country with her two young sons, ages 2 and 4;
- A 19-year-old Salvadoran woman traveling with her younger brother who was kidnapped in Mexico by the Gulf Cartel *en route* to the United States and was sexually assaulted by one of her kidnappers;
- A 16-year-old girl from Honduras who was raped and sex trafficked in Mexico; and
- A 17-year-old Honduran girl, a 16-year-old Guatemalan girl, and a 15-year-old Guatemalan girl, who were raped in Mexico after fleeing home.

There is also ample evidence that women, LGBTQI/H people, and indigenous peoples are unsafe in all three Northern Triangle countries. *See, e.g.,* Azam Ahmed, *Women Are Fleeing Death at Home. The U.S. Wants to Keep Them Out*, N.Y. Times (Aug. 18, 2019);⁹⁸ *see also, e.g.,* Human Trafficking for Sexual Exploitation Purposes in Guatemala, *supra*; Guatemala 2018 Human Rights Report, *supra*; El Salvador 2018 Human Rights Report, *supra*; U.S. Dep't of State, *Honduras 2018 Human Rights Report* (2018);⁹⁹ *Teenage Girls Most at Risk Amid Rising Sexual Violence in El Salvador—Report*, The Guardian (Apr. 17, 2019);¹⁰⁰ Immigration & Refugee Board of Canada, *El Salvador: Information Gathering Mission Report—Part 2. The Situation of Women Victims of Violence and of Sexual Minorities in El Salvador*;¹⁰¹ U.N. Office on Drugs and Crime, *Int'l Homicide Statistics Database*.¹⁰²

And there can be no doubt that persecution in other areas of the globe also crosses national borders. This is certainly the case for survivors of gender-based violence who are often followed by their persecutors to wherever they try to escape, including neighboring countries as in the case of Beatrice* described above. Persecutors may also enlist proxies to pursue, capture, punish and return

⁹⁴ https://www.humanrightsfirst.org/sites/default/files/MEXICO_FACT_SHEET_PDF.pdf.

⁹⁵ <https://www.amnesty.org/en/countries/americas/mexico/report-mexico/>.

⁹⁶ <https://nacla.org/news/2019/02/04/surviving-one-mexico%E2%80%99s-deadliest-places-women>.

⁹⁷ https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf?sequence=1.

⁹⁸ <https://www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.html>.

⁹⁹ <https://www.state.gov/wp-content/uploads/2019/03/HONDURAS-2018.pdf>.

¹⁰⁰ <https://www.theguardian.com/global-development/2019/apr/17/teenage-girls-el-salvador-rising-sexual-violence-report>.

¹⁰¹ <https://www.refworld.org/cgi-bin/tehis/vtx/rwmain?page=printdoc&docid=57f7ac384>.

¹⁰² <https://tinyurl.com/UNHomicideDatabase>.

survivors to them. A survivor might also face threats to her safety as a woman traveling alone in a country of transit, or without permission from a male relative. All of the available evidence therefore serves to refute the sole premise of these proposals. *See Slip op., E. Bay Sanctuary Covenant*, at 36-41. Put another way, the agencies have once again attempted to justify a draconian restriction on the basis of the very sort of stereotype they claim to abhor. 85 Fed. Reg. at 36,282.

Moreover, even if the agencies' conjecture were backed by evidence, the rule would not be tailored to prevent the kind of fraud the agencies guess might occasionally occur. A rule tailored in that way would, at a minimum, (1) include rational ties, backed by evidence, between the underlying bar and fraud, and (2) include clear exceptions for anyone and everyone who might face persecution in countries through which they traveled as well as categorical exceptions for third countries with asylum systems that do not, or cannot, process significant numbers of application. The NPRM, of course, has neither feature.

Worse still, the agencies have apparently not even contemplated the possibility that people subject to this discretionary bar would be subject to persecution while awaiting asylum adjudications in other countries. Nor have the agencies contemplated the possibility that many countries through which asylum seekers pass lack asylum systems that are fair and have the capacity to process more than a handful of claims. *See, e.g., Guatemala 2018 Human Rights Report, supra*; David C. Adams, *Guatemala's "Embryonic" Asylum System Lacks Capacity to Serve as Safe U.S. Partner, Experts Say*, Univision News (Aug. 2, 2019);¹⁰³ Sharyn Alfoni, "Our Whole Economy is in Shatters": *El Salvador's President Nayib Bukele on the Problems his Country is Facing*, CBS News (Dec. 15, 2019);¹⁰⁴ Yael Schacher, *Letter to USCIS* (Dec. 23, 2019);¹⁰⁵ UNHCR, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on his Mission to Honduras* (Apr. 2016);¹⁰⁶ UNHCR, *Honduras Fact Sheet 2* (Mar. 2017);¹⁰⁷ Daniella Silva, *U.S. signs asylum deal with Honduras that could force migrants to seek relief there*, NBC News (Sept. 25, 2019);¹⁰⁸ Michelle Hackman and Juan Montes, *U.S., El Salvador Reach Deal on Asylum Seekers*, Wall St. J. (Sept. 20, 2019);¹⁰⁹ Patrick Timmons, *Mexico facing two-year backlog as asylum requests soar*, UPI (Aug. 31, 2018);¹¹⁰ *Central American Refugees in Mexico: Barriers to Legal Status, Rights, and Integration*,

¹⁰³ <https://tinyurl.com/tb55o7t>.

¹⁰⁴ <https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/>.

¹⁰⁵ <https://tinyurl.com/LettertoUSCISRequestComments>.

¹⁰⁶ <https://www.refworld.org/docid/575fb8db4.html>.

¹⁰⁷ <https://reporting.unhcr.org/sites/default/files/UNHCR%20Honduras%20Fact%20Sheet%20-%20March%202017.pdf>.

¹⁰⁸ <https://www.nbcnews.com/news/us-news/u-s-signs-asylum-deal-honduras-could-force-migrants-seek-n1058766>.

¹⁰⁹ <https://www.wsj.com/articles/u-s-el-salvador-reach-deal-on-asylum-seekers-11569006377>.

¹¹⁰ https://www.upi.com/Top_News/World-News/2018/08/31/Mexico-facing-two-year-backlog-as-asylum-requests-soar/2031535567041/.

PRP 206 (2019);¹¹¹ U.S. Dep't of State, *2019 Trafficking in Persons Report: Guatemala*;¹¹² Congressional Research Service, *Guatemala: Political & Socioeconomic Conditions and U.S. Relations 2*;¹¹³ Amnesty International, *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum*;¹¹⁴ *E. Bay Sanctuary Covenant*, 2019 U.S. Dist. LEXIS 124268, at *76; Slip op., *E. Bay Sanctuary Covenant*, at 37-40. And the agencies have failed to do so even though these facts have been repeatedly brought to their attention. See, e.g., Compl., *U.T. v. Barr*, D.D.C. No. 1:20-cv-116, Dkt. 3 (Jan. 15, 2020); Tahirih Justice Center, *Comments in Response to Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994 (Nov. 19, 2019), USCIS-2019-0021, EOIR Docket No. 19-0021;¹¹⁵ Tahirih Justice Center, *Comments in Response to Interim Final Rule: EOIR Docket No. 19-0504/ AG Order No. 4488-2019: Asylum Eligibility and Procedural Modifications*.¹¹⁶ That failure, too, renders the NPRM's transit-related bars manifestly arbitrary.

The agencies have also failed to recognize that their own preexisting policies would render all non-Mexican asylum seekers who approach the southern border ineligible for asylum under these proposals. As noted above, for years now, the agencies have “metered” entry at the southern border. Doing so has forced all asylum seekers to wait in Mexico for months. Thus, even if an asylum seeker from Guatemala transited through Mexico in 7 days and approached a port of entry (thereby avoiding the illegal-crossing negative factor), U.S. government policy would render that person ineligible for asylum by forcing her to remain present in Mexico for a period of more than 14 days. The illegal and misnamed “Migrant Protection Protocols,” which have left asylum seekers stranded in hugely dangerous conditions on the Mexican side of the border for months and even years (see, e.g., Human Rights First, *Delivered to Danger*)¹¹⁷, would doubtless be construed by the agencies to have the same effect (see, e.g., *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848 (S.D. Cal. 2019) (rejecting the argument that DHS policies preventing entry meant individuals are now subject to the agencies' 2019 third-country transit bar)). Both the fact that the NPRM would have this outcome if adopted, and the agencies' failure to consider the outcome, render the transit bars arbitrary.

Finally, the agencies have not even attempted to explain “why the [NPRM] provides no special protection for unaccompanied minors.” Slip op., *E. Bay Sanctuary Covenant*, at 45. They have thus “entirely failed to consider an important aspect of the problem.” *Id.* at 45-46 (quoting *State Farm*, 463 U.S. at 43). The transit-related proposals in the NPRM are also arbitrary for that reason.

¹¹¹ https://repositories.lib.utexas.edu/bitstream/handle/2152/75036/prp_206-central_american_refugees_in_mexico_barriers_to_legal_status_rights_and_integration-2019.pdf?sequence=3&isAllowed=y.

¹¹² <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/Guatemala>.

¹¹³ <https://fas.org/sgp/crs/row/R42580.pdf>.

¹¹⁴ <https://www.amnestyusa.org/reports/overlooked-under-protected-mexicos-deadly-refoulement-of-central-americans-seeking-asylum/>.

¹¹⁵ <https://www.regulations.gov/document?D=USCIS-2019-0021-0067>.

¹¹⁶ <https://www.regulations.gov/document?D=EOIR-2019-0002-1184>.

¹¹⁷ <https://www.humanrightsfirst.org/campaign/remain-mexico>.

d. Fraudulent Documents

The third “significantly adverse” factor—the use of fraudulent documents by those who pass through a third country (85 Fed. Reg. at 36,283)—is also arbitrary. The NPRM’s explanation for its proposed rule—*i.e.*, that such use “makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources” (*id.*)—applies to all entries with fraudulent documents. But the NPRM correctly recognizes that “the use of fraudulent documents to escape the country of persecution should not itself be a significant adverse factor.” *Id.* at 36,283 n.35. That consideration, too, is universal. After all, perpetrators of gender-based violence, such as domestic violence, forced marriage, or “honor” crimes, might block a survivor from securing proper documentation, or laws in a woman’s country might require a male relative’s approval in order for her to obtain documents in her name. In such situations, survivors may literally have no choice but to procure false documents in order to escape.

In short, the NPRM has identified two countervailing, universal factors. The NPRM, however, gives those factors different weight in different situations, holding the use of false documents against asylum seekers based on their method of transit to the United States. That distinction is arbitrary. After all, an asylum seeker using false documents to flee persecution does so no matter her country of origin—and using false documents for that purpose is different in kind from the use of false documents to file a fraudulent claim for relief. *See, e.g., Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007); *In re Pula*, 19 I. & N. Dec. at 474.

Further, the NPRM fails to provide any explanation of its proposed distinction. That failure, too, is arbitrary. And assuming, *arguendo*, that the NPRM’s unstated rationale for the distinction it draws is the same as the rationale for the proposed transit bars, that rationale remains arbitrary when imported to this context. It again fails to take into consideration the fact that countries through which an asylum seeker transits might themselves be ones in which she is subject to persecution—or ones in which there is, as a functional matter, no asylum system capable of fairly hearing her application.

e. Convictions

The next factor—vacated, expunged, or modified convictions or sentences—is likewise arbitrary. The NPRM never considers how much weight a conviction or sentence that is reversed, vacated, expunged, or modified should be given in the asylum context. In particular, it fails to consider whether a conviction entered on erroneous grounds should ever be sufficient to expose asylum seekers to the violent consequences of refoulement.

f. Unlawful Presence

The proposed bar on those with more than one year of unlawful presence is both contrary to law and arbitrary. Congress, in 8 U.S.C. § 1158(a)(2)(B), set a one-year statute of limitation on asylum claims and created exceptions to that time period. The NPRM would, however, undo those exceptions and bar from asylum almost all individuals who could satisfy the statutory standard. Further, the agencies have apparently not given consideration either to the real-world consequences of this proposal, or to whether it is merited in the asylum realm. For reasons above—including that official ports of entry have been effectively closed to asylum seekers for years and that the well-recognized aftereffects of trauma mean that many asylum seekers cannot apply within one year—it is not.

Aicha’s asylum case, described above, was initially denied because she did not file for asylum within one year of arriving in the United States. However, once here, she was exploited by strangers who initially offered to help her. Instead they subjected her to forced household and sexual labor, and false imprisonment. She was isolated and feared trying to contact police because of her experience in her home country. After experiencing persistent panic attacks to the point of hospitalization, she was left on her own by her captors. It took her six years to be able to heal enough to apply for asylum. Likewise, Aida’s* case below illustrates the need for more flexibility, not less, in allowing survivors to heal before requiring them to file for asylum. Aida’s* application for asylum included a lengthy psychological evaluation performed. She was diagnosed with severe post-traumatic stress disorder, depression, and anxiety, and the expert noted that she applying for asylum immediately would have likely re-traumatized her and impeded her recovery. These unimaginable circumstances reflect the horrifying reality asylum seekers face. Requiring a survivor like Aicha or Aida* to have applied for asylum within one year of arrival is fundamentally at odds with this reality.

g. *Remaining Factors*

The remaining provisions of the list would all return asylum seekers to persecution for trivial reasons. Violence as punishment for failing to file one tax return. Death as punishment for a missed asylum interview. Rape as punishment for involuntarily being deemed to have “abandoned” an earlier asylum application. Yet the agency makes no attempt to justify, or even consider, this imbalance between these severe consequences—which will inevitably occur in some subset of cases—and the relative triviality of the actions or failures to act that would trigger them under the NPRM. Each of the remaining discretionary factors is accordingly arbitrary.¹¹⁸

Further, the NPRM’s justification for precluding those who fail to file a single tax violation from receiving asylum is false. It is simply not the case that “most individuals in the United States” are subject to “standards” under which they run the risk of persecution or torture for the failure to file or pay taxes or to report income. 85 Fed. Reg. at 36,284. Rather, at worst, those individuals face penalties imposed by the IRS or state agencies—just as asylum seekers already do. And any asylum seekers who fail to file taxes and report income very likely do so because of restrictions on employment authorization documents—restrictions that DHS has illegally tightened to such a degree that almost no asylum seekers will be able to work legally while their cases proceed. DHS did so while knowing full well that depriving asylum seekers of work authorization would leave them destitute. *See, e.g., DHS, Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38,532, 38,567 (June 26, 2020) (advancing the chilling suggestion that “[a]sylum seekers who are concerned about homelessness ... become familiar with the homelessness resources provided by the state where they intend to reside”).

The NPRM arbitrarily provides no rationale at all for its proposal concerning “multiple asylum applications.” 85 Fed. Reg. at 36,284. It does imply that the next factor in the list—“having an application withdrawn with prejudice or abandoned an asylum application”—is an indicator of “abusive ... applications.” *Id.* But in many cases, it is not. Asylum seekers often have their applications deemed withdrawn or abandoned for reasons far beyond their own control—including that the agencies failed to inform the asylum seeker of a court date, that the agencies failed to note

¹¹⁸ It is no answer to cite the possibility of withholding of removal. As the agencies are well aware, the standard for withholding is substantially higher than the standard for asylum—meaning that, if these bars take effect, some people affected by them *will* be returned to persecution.

the correct time and place of the proceedings, or that the proceedings were conducted in a language the asylum seeker does not understand. In effect, then, this proposal seeks to penalize many asylum seekers for the agencies' own errors. It is accordingly arbitrary.

The same considerations apply to the factor concerning missed interviews. Notably, the agencies make no attempt to state the reasons for missed interviews—*e.g.*, whether individuals left the United States, withdrew the application for another reason, failed to receive the notice, could not attend the interview, or simply failed to show up. The NPRM assumes that all those who miss the interviews fall into the last category, but there is no evidence for that assumption, and common sense refutes it.

These factors especially disadvantage survivors suffering from post-traumatic stress disorder as a result of persecution. PTSD can severely disrupt day-to-day life and interfere with even basic administrative tasks. *See, e.g.*, Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (Oct. 2009).¹¹⁹ In addition, asylum-seeking survivors simultaneously experiencing intimate partner violence in the United States constantly contend with their abusers' attempts to thwart their independence. This can take many forms, including preventing survivors from filing paperwork or paying bills, attending key appointments with government agencies, or communicating with and meeting with service providers trying to help them as they prepare their case.

Finally, the proposed time limit on motions to reopen is both contrary to law and arbitrary. That limit cannot possibly be reconciled with 8 U.S.C. § 1229a(c)(7)(C)(ii), which expressly provides that “[t]here is no time limit on the filing of a motion to reopen” in an asylum proceeding. The NPRM, however, seeks to impose an effective limit by precluding asylum if the motion is filed after a given point. And the fact that Congress *did* include a time limit for initial applications (see 85 Fed. Reg. at 36,285 (citing 8 U.S.C. § 1158(a)(2)(B))) simply provides further evidence that its statement that no such deadline exists for motions to reopen must be taken at face value. Further, the NPRM presumes that the date when “changed country conditions” occur can be determined with precision. That, in turn, presumes that country conditions turn on a dime—which is, of course, not so. And the NPRM fails to recognize that fact, much less provide guidance on when a “change” occurs. This factor will, if implemented, therefore give rise to protracted disputes over when a change occurred and be antithetical to judicial economy.

B. Claims Under the Convention Against Torture

The NPRM proposes yet another series of changes aimed at dramatically restricting relief under the Convention Against Torture when the torture has been committed by a government official. *See* 85 Fed. Reg. at 36,286-88. These proposed changes wholly ignore the actual conditions under which people flee for their lives. They also introduce requirements of proof that would be difficult for anyone in the United States with access to government materials under FOIA to be able to provide, let alone individuals who have fled their homes in other countries because of such torture. Indeed, the proposed rules would require an applicant to both divine and prove that an official claiming to be acting in an official capacity and wearing an official uniform was *not* acting as a “rogue official.” But a CAT applicant cannot know, much less provide documentary proof, that an official was not acting

¹¹⁹ https://www.tahirih.org/wp-content/uploads/2009/10/Precarious-Protection_Tahirih-Justice-Center.pdf.

in a “rogue” capacity—and there is no reason whatsoever to think otherwise. Requiring this level of detailed information about a government official who has tortured or threatened the applicant with torture is unreasonable, largely impossible, and unworkable.

Taken literally, the proposed rules would allow asylum officers and immigration judges to find that police officers and military officials who rape, extort, or severely beat private citizens are not acting under color of state law by reasoning that, because these sorts of actions can have no legitimate purpose, the only explanation is that the officer was “rogue” in their conduct. Similarly, where government officials are ineffective at enforcing laws due to disinterest, bias, or cultural disapproval of laws against gender-based violence, the proposed rule would require a finding that the government did not “acquiesce,” as it is “unable to prevent” those attitudes or the torture that occurs as a result. 85 Fed. Reg. at 36,288. This is contrary to decades of practice on this issue, as many of the cases cited in the rule note—and the NPRM offers no explanation for this change.

Read together, the proposed changes to CAT claims in the NPRM would make it virtually impossible for survivors of gender-based violence to succeed in CAT claims. For example, a survivor of torture inflicted by a police officer spouse would have to show that her the torture was inflicted deliberately to further an official purpose, despite both the survivor’s utter powerlessness in light of the spouse’s position of and the spouse’s immunity from accountability as an official. This provision would likely exclude survivors of extreme torture like Aida* from protection:

Aida* from Central America was severely traumatized for 11 years. She endured violent beatings and sexual assault within her family, who effectively gave her to Juan, a high-ranking army officer who was 27 years her senior. He raped her regularly, poured boiling water on her, gouged her with fence wire, burned her with a branding iron, and rubbed salt on her open wounds. When Aida* was 15, Juan discovered she was pregnant from the rapes and he beat her until she aborted twins. Juan then hired his nephew to murder Aida*. She was shot in the stomach but recovered. Eventually she fled to the United States and received asylum after a grueling healing process.

In countries where certain forms of intimate partner violence, sexual assault, and “honor crimes” are either legal or not illegal, there would be no affirmative duty of an official to protect a survivor from this harm. A government official could be enlisted by a woman’s family to torture her to compel her to submit to a forced marriage. Under the rule, the official would be considered “rogue,” yet the survivor would still suffer at the hands of authorities with absolutely no possibility of recourse at all. Claudine’s* case recounted above is illustrative, as her persecutor Marc* was a member of the ruling political party in her country. Yet, under the NPRM, Claudine* would likely be denied asylum despite Marc’s* ability to torture her with the impunity he enjoyed as such.

These rules are contrary to the recognition in both domestic and international law that that public officials do inflict torture under color of law for personal benefit. *See Khouzam v. Ashcroft*, 361 F.3d 161 (2nd Cir. 2004) (“As two of the CAT’s drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.”) Likewise, nearly every circuit to address the concept of “willful blindness” in the CAT context has settled on an approach that is more permissive than the one in this Proposed Rule. *See Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2003); *Khouzam v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004); *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007); *Amir v. Gonzales*, 467 F.3d

921, 927 (6th Cir. 2006); *Silva-Rengifo v. Attorney General*, 473 F.3d 58, 69 (3d Cir. 2007); *Hakim v. Holder*, 628 F.3d 151, 157 (5th Cir.2010).

Finally, we note that on July 14, 2020, Attorney General William Barr—who signed the NPRM on behalf of DOJ—made clear in *Matter of O-F-A-S-*, 28 I. & N. Dec. 35 (AG 2020), that a “rogue official” analysis has no place in CAT cases. It would be utterly arbitrary for the Attorney General to take that position in *O-F-A-S-* and then endorse final regulations including such an analysis.

C. Credible Fear Interviews

1. Asylum-Only Proceedings

The NPRM proposes to exclude applicants for admission seeking safety from persecution and torture from the normal removal proceedings that have been used for nearly twenty-five years, and to shunt them instead into a new and significantly more limited “asylum-and-withholding-only” proceeding. This proposal raises a myriad of problems: It violates the INA, it lacks justification, it fails utterly to explain the departure from 24 years of practice, it makes procedures more complex rather than more efficient, and it would improperly and unfairly cut off access to relief that Congress provided.

a. *Inconsistency with the INA*

The NPRM asserts that the Departments may choose to severely limit proceedings for asylum seekers because the expedited removal provisions of 8 USC § 1225(b)(1) do not explicitly mandate full removal proceedings for persons who establish credible fear. Without that mandate, the agencies say, they are free to institute any other proceeding they choose. This position is untenable.

When Congress enacted IIRIRA, it created two specific removal processes: expedited removal proceedings in Section 235 (codified at 8 U.S.C. § 1225) and regular removal proceedings in Section 240 (codified at 8 U.S.C. § 1229a).¹²⁰ Under this statutory framework, Section 240 proceedings are the default and “exclusive” admission and removal proceedings “unless otherwise specified” in the Act. 8 U.S.C. § 1229a(a)(3). And Congress has specified that certain classes of individuals are not to be placed in full removal proceedings. It has, for example, excluded persons convicted of particular crimes from Section 240 proceedings. *See* 8 U.S.C. § 1229(a)(3); *see also* 8 U.S.C. § 1187(b) (prohibiting Visa Waiver program participants from contesting inadmissibility or removal except on the basis of asylum.)

Indeed, within the expedited removal statute itself, Congress specified one group of arrivals – stowaways – who are excluded from Section 240 proceedings. *See* 8 U.S.C. § 1225(a)(2). In contrast, Congress deemed asylum seekers to be applicants for admission under 8 U.S.C. § 1225(a)(1), and it *did not* similarly exclude them from Section 240 proceedings. *See id.* § 1225(b). Thus, Congress created the default rule that arriving individuals are to be placed in Section 240 proceedings, and it specifically excluded one subset of arriving persons from Section 240—but did not exclude asylum seekers from those proceedings. The plain text of the INA thus precludes the agencies’ claim that

¹²⁰ For ease of reference, we will generally use the term “Section 240” as it is commonly used among practitioners and courts.

they are free to make up new procedures to apply to arriving asylees. *See Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1723 (2017) (“differences in language ... convey differences in meaning”).

Unsurprisingly, IIRIRA’s legislative history unanimously confirms that conclusion. As the Conference Report presented by the Joint Committee from the House and the Senate explained:

If the officer finds that [an individual] has a credible fear of persecution, the [individual] shall be detained for further consideration of the application for asylum under *normal non-expedited removal proceedings*.

H. Rept. 104-828, at 209 (1996) (emphasis added).

That straightforward understanding that normal removal proceedings apply for those screened out of the expedited removal process appears repeatedly in the rest of the Act’s legislative history. In presenting presented the compromise bill to the Senate, for instance, Senator Hatch stated as follows:

Under the revised provisions, [individuals] coming into the United States without proper documentation who claim asylum would undergo a screening process to determine if they have a credible fear of persecution. *If they do, they will be referred to the usual asylum process.*

142 Cong. Rec. S, 11491 (Sept. 27, 1996) (emphasis added). Likewise, in explaining the new credible fear standard itself, Senator Hatch noted: “The standard adopted in the conference report is intended to be a low screening standard *for admission into the usual full asylum process.*” *Id.* (emphasis added).

Moreover, even the original drafters of the more onerous—and rejected—House screening standard plainly expected that those who passed the threshold would be afforded the full adjudication of their claims for relief:

If the [individual] meets this [credible fear] threshold, the [individual] is permitted to remain in the U.S. to receive *a full adjudication of the asylum claim—the same as any other [non-citizen] in the U.S.* Under this system, there should be no danger that [a person] with a genuine asylum claim will be returned to persecution.

H. Rept. 104-469 at 158 (1996).

Ignoring this statutory language and history entirely, the NPRM states that a “negative inference” justifies its new interpretation. The agencies note that 8 U.S.C. § 1225(b)(2) specifically “mandates” Section 240 proceedings for “other classes of [individuals],” but that § 1225(b)(1) does not. It then claims that “[t]hat negative inference is reinforced by the fact that [individuals] in expedited removal are expressly excluded from the class of [people] entitled to section 240 proceedings under section 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A). *See* INA 235(b)(2)(B)(ii), 8 U.S.C. 1225(b)(2)(B)(ii).” 85 Fed. Reg. at 36,266. But the agencies have it backwards. As explained above, where Congress has explicitly excluded some classes of people (stowaways) from the “normal” 240 default and exclusive proceedings, but it has not explicitly excluded others (those who have established credible fear), those who have not been specifically excluded must be included in the general 240 proceedings.

Moreover, there are three additional problems with this argument. *First*, if the agencies were correct, then they have been violating the statute for the past 25 years by expressly providing section 240 proceedings to the very class of applicants they now claim is expressly excluded from them.

Second, the argument fails to recognize that credible fear screening creates an *exit* from expedited removal proceedings. By design, those who establish credible fear are effectively screened out of expedited removal proceedings – they are no longer subject to expedited removal. *See* 8 U.S.C. § 1225(b)(1)(B)(ii)–(iii) (those with credible fear to be detained and “referred” for consideration of their claims, and those who have not established fear ordered removed without “further hearing or review” as an expedited removal order).

Third, the “negative inference” the agencies claim is nothing of the sort. To the contrary, “the function of § [1225](b)(2)(B)(ii) is to make sure we understand that the *automatic* entitlement to a regular removal hearing under 1229a, specified in (b)(2)(A) for a (b)(2) applicant, does not apply to a (b)(1) applicant.” *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1086 (9th Cir. 2020) (emphasis added). Instead, the agencies screen (b)(1) applicants to determine which of the two statutorily established methods of removal will apply: expedited removal for those without fear, and normal removal for those who establish fear. The statute has never been and cannot now reasonably be understood to exclude all (b)(1) applicants from a full removal hearing, once they are no longer subject to the alternative of expedited removal.

The agencies also claim, without support, that those applicants who have established credible fear are entitled “only” to a proceeding on the application for asylum. 85 Fed. Reg. at 36,266. But the statute does not use the term “only.” The agencies themselves have inserted that word. Nor is that word implicit in the statute. To the contrary, as demonstrated above, the statutory structure, legislative history, and 23 years of administrative practice indicate quite the opposite. The same is true for the agencies’ attempt to limit applicants to “only” withholding or CAT relief. Congress, in 8 U.S.C. § 1225(a), explicitly deemed every unadmitted or arriving person (except stowaways) an “applicant for admission.” Those without a claim of fear are subject to expedited removal proceedings and not allowed to seek admission, but those who are screened out of expedited removal are no longer in that category. The agencies’ argument that asylum is not admission is beside the point: In the context of removal, asylum is not a standalone claim. Rather, it is a defense to a removal charge. There is no rational basis or statutory authority for excluding those with credible fear from seeking any relief Congress has authorized them to seek.

b. Arbitrary and capricious

In the NPRM, the agencies state that severely limiting the process due to an asylee who has shown credible fear is “better policy.” 85 Fed. Reg. at 36,266. But the justifications offered in the NPRM do not support that view.

First, the proposed policy is a dramatic change from decades of practice, yet the agencies offer no discussion of why the current practice is problematic, or how this change will improve the process. The agencies dismiss the original administrative decision to place those claiming asylum after a positive fear finding into the regular asylum procedures as based on “very limited” analysis. *Id.* But the agencies completely ignore the heart of that analysis:

Once an [individual] establishes a credible fear of persecution, *the purpose behind the expedited removal provisions of section 235 of the Act to screen out arriving [individuals] with fraudulent documents or no documents and with no significant possibility of establishing a claim to asylum has been satisfied.* Therefore, the further consideration of the application for asylum by an [individual] who has established a credible fear of persecution will be provided for in the context of removal proceedings under section 240 of the Act.

DOJ, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,321 (Mar. 6, 1997).

Second, the current practice of placing those applicants with credible fear into Section 240 proceedings does not “effectively negat[e]” DHS’s prosecutorial discretion. 85 Fed. Reg. at 36,266. DHS certainly has discretion to place an arriving person without documentation directly into Section 240 proceedings instead of into expedited removal.¹²¹ But that initial discretion is just that: initial. And once an applicant establishes fear, DHS has no discretion to exercise, as the applicant is no longer subject to expedited removal procedures but must instead be referred for full consideration of his claims. Just as a grand jury’s decision not to indict does not “negate” prosecutorial discretion to initiate grand jury proceedings and seek indictment, neither does an asylum officer’s finding of credible fear “negate” DHS’s initial discretion to place the applicant in expedited removal or Section 240 proceedings. Instead, in both cases, prosecutorial discretion may initiate proceedings, but an independent third party’s decision controls the direction of the case. If it were otherwise, DHS’s discretion to place someone in expedited removal would exceed statutory bounds.

Third, the agencies’ claim that “[b]y deciding that the [individual] was amenable to expedited removal, DHS already determined removability” (85 Fed. Reg. at 36,266) also overreaches. Under § 1225(b)(1), a DHS inspector has initial discretion to place into expedited removal proceedings an applicant she determines “is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title.” But that initial inadmissibility determination is not the ultimate determination for those applicants who can show credible fear, as DHS may not continue to seek their expedited removal based on that inadmissibility. Instead, once an applicant for admission has established credible fear, she is entitled to an immigration judge’s determination of her claims for relief, notwithstanding DHS’s initial determination. Under 8 USC § 1229(a), an “immigration judge *shall* conduct proceedings for deciding the inadmissibility or deportability of” the applicant. Nothing in the expedited removal statute or its history suggests that Congress intended to cut off applicants who establish fear from seeking all the relief for which they might be eligible.

Fourth, the agencies assert that their limited procedure is more consistent with Congress’ intent than placing applicants into regular 240 proceedings. It is telling that after 23 years of placing applicants with credible fear into Section 240 proceedings—beginning immediately after the statute was enacted—Congress has never suggested that the agencies got that wrong. Indeed, as we have

¹²¹ A DHS inspector’s “discretion” to choose to skip over expedited removal even when an applicant lacks documentation, and to place an applicant directly to Section 240 proceedings, simply affords DHS the discretion to avoid wasting resources on a credible fear interview when the claim for asylum or CAT relief is quite clear at inspection. It is not at all clear what the agency means by suggesting that its discretion to make that decision is negated by the post-credible fear referral to Section 240 proceedings.

shown above, every piece of legislative history confirms that Congress intended and expected that asylum seekers who establish credible fear would be placed into “normal” removal proceedings. For support, the best the agencies can muster is the *ipse dixit* that because Congress intended expedited removal to be quick, a new quick procedure is consistent with that intent. But the agencies rely on statutory review limitations and short timeframes relating to *negative* credible fear findings and *removal* decisions to justify limiting *positive* fear findings and *asylum* decisions. This mixes apples and oranges, as the statute does not similarly limit or time the latter. *See* 8 U.S.C. § 1225(b)(2)(iii) (establishing time frames for review of negative fear findings, but no time frames in that provision for decisions following positive fear findings).

Fifth, the agencies fail to explain or consider how the proposed rule will function in light of the expanded expedited removal scope promulgated by the administration. Under those regulations, any non-citizen detained anywhere in the county who cannot demonstrate two years of presence to the satisfaction of the immigration officer, and whom DHS determines to be inadmissible under § 1225(b)(1), may be subject to expedited removal. Assuming such a non-citizen can establish fear of persecution or torture, they would then be forced into limited asylum-and-withholding-only proceedings. That would effectively deny them access to any other form of relief for which they might be eligible, including different forms of cancellation of removal, adjustment of status, and different types of waivers. For example, a non-citizen may be eligible for adjustment of status (a green card) if the applicant is married to a U.S. citizen and otherwise eligible. Similarly, a non-citizen may be eligible for a U- or a T-visa, or for relief under VAWA as a self-petitioner or as an applicant for cancellation of removal. There are procedures in Section 240 proceedings to allow respondents to raise those issues: For example, a survivor of gender-based violence who has a pending U or T visa petition with USCIS can request additional time in Section 240 proceedings to permit the agency to provide a *prima facie* determination on the petition or complete adjudication of the petition. But under the proposed rules, an immigration judge would be strictly limited to considering *only* the asylum/CAT/withholding claims. Therefore, the judge would likely refuse to grant continuances or requests for stays of removal. This would cut off access to potential relief relating to these other claims. This is both arbitrary and in violation of law.

The consequences of expanded expedited removal are particularly dire for survivors of gender-based violence. As noted above, those who are technically exempt from expedited removal because they have been present in the United States for the past two years can still be subjected to it if they cannot immediately prove their two-year presence upon apprehension. Many asylum seekers who fled gender-based violence in their home countries continue to endure it in the United States. Human traffickers and perpetrators of domestic violence notoriously withhold or confiscate survivors’ identity or other official documents to control them and keep them dependent. Abusers also prevent survivors from holding bank accounts, utility bills, bus passes, or even library cards, in their own name. *See, e.g.,* Ganley, *Health Resource Manual* 37; Snyder, *No Visible Bruises*; Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 *Women’s Health & Urb. Life* 15, 21-24 (2012); Misty Wilson Borkowski, *Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration Relief*, 31 *U. Ark. Little Rock L. Rev.* 567, 569 (2009); Nat’l Domestic Violence Hotline, *Abuse and Immigrants*;¹²² Edna Erez & Nawal Ammar,

¹²² <https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2>.

Violence Against Immigrant Women and Systemic Responses: An Exploratory Study (2003);¹²³ Julieta Barcaglioni, *Domestic Violence in the Hispanic Community* (Aug. 31, 2010);¹²⁴ Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), at 7-8;¹²⁵ Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 *Feminist Criminology* 32, 46-47 (2009); Immigration & Customs Enforcement, *Information for Victims of Human Trafficking* (2016);¹²⁶ National Sexual Violence Resource Center, *Assisting Trafficking Victims: A Guide for Victim Advocates 2* (2012);¹²⁷ see also Violence Against Women Act of 2000 Section-by-Section Summary, 146 Cong. Rec. S10188-03, at S10195 (2000) (noting that, before VAWA, abusive U.S. citizen and lawful permanent resident spouses used their ability to petition for a permanent visa for their abused spouses “as a means to blackmail and control the spouse”). Not only do survivors have limited access to documents that may help establish length of presence for these reasons; a survivor may risk her safety by trying to retain possession of her own documents in defiance of her abuser.

Survivors who are swiftly removed while their petitions for relief are pending will face an inappropriately uphill battle to securing relief in direct contravention of the express intent and will of a bipartisan Congress. Upon removal, survivors will be largely unable to coordinate with counsel if represented, or to respond to Requests for Evidence and other critical notices about their cases. Most critically, they will once again be vulnerable to life-threatening violence that will prevent them from ever safely returning to the United States even if their petitions are ultimately granted. And deported survivors of human trafficking with pending T-visa petitions who are not protected through “continued presence” will have their petitions denied outright for failure to maintain presence in the United States as required for the visa.

2. Consideration of Precedent

The proposed rule claims to simply codify existing practice and clarify that immigration judges must apply the law of jurisdiction where the credible fear interview is held. However, the rule is contrary to existing practice, and it requires asylum officers and immigration judges to deny relief to applicants who are statutorily eligible.

First, well-settled USCIS policy has long provided that where there is a conflict or question of law, “generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard” regardless of where the credible fear interview is held. See, e.g. USCIS, 2017 Credible Fear Training 17;¹²⁸ RAIO Training Course, Credible Fear (Feb. 28,

¹²³ <https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf>.

¹²⁴ <https://safeharborsc.org/domestic-violence-in-the-hispanic-community>.

¹²⁵ <https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf>.

¹²⁶ <https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf>.

¹²⁷ https://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf.

¹²⁸ <https://www.aila.org/infonet/raio-and-asylum-division-officer-training-course>.

2014), at 16;¹²⁹ RAIIO Training Course, Credible Fear of Persecution and Torture Determinations (Apr. 14, 2006), at 14.¹³⁰ See also 8 C.F.R. § 208.30(e)(4) (“the asylum officer shall consider whether the [individual’s] case presents novel or unique issues that merit consideration in a full hearing before an immigration judge”). This longstanding policy plainly is in accord with what Congress envisioned: “Legal uncertainty must, in the credible fear context, adhere to the applicant’s benefit.” 142 Cong. Rec. H616 (daily ed. Apr. 18, 1996) (statement of Rep. Smith). The NPRM fails to even note this departure from practice, much less to explain it.

Second, the NPRM fails entirely to account for the fact that asylum merits claims are often not held where the credible fear hearing is held. Thus, contrary to 8 U.S.C. § 1225(b)(1)(B)(v), the rule could require asylum officers to order the expedited removal of applicant who has shown she “could establish eligibility for asylum under section 1158 of this title” in another circuit or district. Indeed, this proposed rule is flatly contrary to the decision in *Grace v. Whitaker*, 344 F. Supp. 3d 96, (D.D.C. 2018), which held that the same provision in a USCIS guidance was contrary to the INA. “The government’s reading would allow for an [individual’s] deportation, following a negative credible fear determination, even if the [individual] would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government’s reading leads to the exact opposite result intended by Congress.” *Id.* at 140. And the proposed rule also violates *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), because it exceeds the agencies’ limited ability to displace circuit precedent on a specific question of law to which an agency is entitled to deference. *Grace*, 344 F. Supp. at 136-37.

Finally, this provision is especially harmful for survivors of intimate partner violence who apply for asylum on that basis. To the extent that the asylum laws we operate under today originate from a 70-year old, male-centered refugee protection framework, more nuanced and careful analysis is often required in gender-based claims. Immigration judges have commonly misread *Matter of A-B-*, 27 I. & N. Dec. 227 (AG 2018), as a general rule foreclosing claims involving domestic violence. This misreading is contrary to the well-established requirement, reiterated in the rule itself, that the merits of asylum must be considered on a case-by-case basis. See Section III.A.1.b.i, *supra*. Imposing a blanket prohibition on such claims is also contrary to the plain language of *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). And in 2016, UNHCR confirmed that the Refugee Convention’s protection may extend to claims from Central American women fleeing gender-based violence such as the respondent in *Matter of A-B-*. See UNHCR, *UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender* (Nov. 2016);¹³¹ UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* (Mar. 15, 2016);¹³² UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015).¹³³

¹²⁹ <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf>.

¹³⁰ <http://www.virginiaraymond.com/wp-content/uploads/2014/11/Credible-Fear-31augu2006-USCIS.pdf>.

¹³¹ <https://www.unhcr.org/en-us/5822266c4.pdf>.

¹³² <https://www.refworld.org/docid/56e706e94.html>.

¹³³ <http://www.unhcrwashington.org/womenontherun>.

3. Heightened Screening Standard

The NPRM proposes to raise the burden of proof, at the expedited removal screening stage, for applicants for admission who may be eligible for withholding of removal or relief under the Convention Against Torture. As the proposed rule concedes, the government has for decades conducted one screening at expedited removal that considers whether there is a significant possibility that an applicant could establish eligibility for relief under any of those claims. That process has met the balance Congress struck between an efficient immigration system and ensuring that “there should be no danger that [a person] with a genuine asylum claim will be returned to persecution.” H.R. Rep. No. 104-469, pt. 1, at 158 (1996). As the Conference Report on IIRIRA explained:

The purpose of these provisions is to expedite the removal from the United States of [individuals] who *indisputably* have no authorization to be admitted to the United States, while providing an opportunity for such an [individual] who claims asylum to have the merits of his or her claim promptly assessed....

H.R. Rep. No. 104-828, at 209 (Conf. Rep.) (emphasis added).

The NPRM would raise the screening standard from showing a significant possibility that the applicant will be able to establish eligibility for statutory withholding of removal to “a reasonable possibility that the [person] would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion.” 85 Fed. Reg. at 36,268; *see* 8 C.F.R. §§ 208.16, 208.30(e)(2), 1208.16. Separately, for applicants expressing a fear of torture, the agencies propose “to raise the standard of proof from a significant possibility that the [person] is eligible for withholding or deferral of removal under the CAT regulations to a reasonable possibility that the [person] would be tortured in the country of removal.” 85 Fed. Reg. at 36,268; *see* 8 C.F.R. §§ 208.18(a), 208.30(e)(3), 1208.18(a). These proposed changes to the screening standard lacks an adequate or rational explanation for departing from decades of practice, is arbitrary and capricious, and violates the United States’ obligations of *non-refoulement*.

First, the agencies suggest that the higher burdens of proof will increase efficiency.¹³⁴ 85 Fed. Reg. at 36,270-71. They will not. When the agencies first implemented screening for CAT and withholding of removal, they explained: “This screening [for reasonable fear] will be conducted in conjunction with the existing credible fear of persecution screening process, *so that it will not complicate or delay the expedited removal process established by Congress for arriving [individuals].*” DOJ, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8748, 8479 (Feb. 19, 1999). Though the NPRM dismisses this conclusion as an “assumption,” the agencies offer no evidence that existing procedure of using one standard to screen for any claim for relief complicated or delayed the expedited removal process. Government data does not support that argument. The number of immigrants removed from the United States through the expedited removal process has increased fairly steadily over the years, reaching a high of 192,416 in fiscal year 2013.

¹³⁴ The agencies claim that raising the burden of proof in fear screening is simply an “expansion” of DHS’s already-existing practice. However, as the cases identified in the footnotes make clear, the only two attempts to apply this new standard have both been halted in full or in part by the courts. The agencies may not attempt to pass off this new and far-reaching rule as simply more of the same. It is not.

DHS Office of Immigration Statistics, *Annual Report, Immigration Enforcement Action* (March 2019) at 12 (Table 6).¹³⁵ Forty-three percent of all removals during 2018 were through the expedited removal process, a proportion that has remained fairly steady over the past decade. *Id.* And there is no showing that requiring asylum officers to evaluate varying claims relating to the same group of facts with three different screens would be simpler. To the contrary, this rule makes that determination more complicated, not less.

Moreover, even if the agencies were correct that this rule would increase efficiency, there is no countervailing consideration of its cost. Reasoned decision-making requires that both sides of the balance be examined. Agency action is lawful only if it rests “on a consideration of the relevant factors.” *State Farm*, 463 U.S. at 43. Here, the inevitable cost is that some survivors of persecution and torture—who could not bring with them sufficiently high levels of evidence as they fled—will be returned to persecution and torture.

Second, the agencies claim that raising the screening bar is necessary to “align” the screening with the burden of proof in the merits proceeding for each kind of relief. But asylum officers screening for fear under existing law must *already* take the merits burden of proof into account. Under existing rules, an asylum officer must determine whether there is a “significant possibility” that an applicant “could be eligible” for each type of potential relief: asylum, withholding, and/or CAT. That determination necessarily includes assessing whether the applicant can meet the relevant burden of proof. Thus, when an asylum officer elicits facts in a fear interview that raise the possibility of CAT relief, the officer must determine whether there is a significant possibility of eligibility for CAT relief, which requires evaluating whether the applicant could establish that she would more likely than not be tortured if returned to her country of origin or other removal country. Imposing a higher screening burden, then, does not ensure that the proper merits burden is considered at screening. Instead, it serves only to require more and stronger evidence before the merits stage, and at a moment when applicants are least likely to be able to amass it.

Third, and relatedly, the agencies utterly ignore the timing and nature of the screening process itself. Recognizing that expedited removal screening occurs immediately at entry, Congress firmly rejected imposing a higher level of proof at the screening stage for asylum. The legislation was designed to provide major safeguards to prevent the persons with a significant chance of obtaining asylum from being returned to persecution. Recognizing that in expedited removal proceedings, the asylum officer’s “power to send people summarily back to dangerous places” is “extraordinary,” Representative Christopher Smith stressed the importance that “the process be fair—and particularly that it not result in sending genuine refugees back to persecution.” 142 Cong Rec. H11054, H11066-67 (daily ed. September 25, 1996) (statement of Rep. Smith). And Senator Hatch expressed concern “about the harsh consequences that could result to asylum applicants who do have a valid claim but who may not speak English, may not have the necessary proof of their claim with them.” 142 Cong. Rec. S4457-91 (daily ed. May 1, 1996) (statement of Sen. Hatch). These concerns apply equally to applicants seeking relief under CAT or withholding, as the agencies can have no legitimate interest in sending people back to persecution or torture.

The agencies fail to consider the many practical reasons justifying the existing low threshold screening standard. The regulations provide that the initial screening interviews are to be conducted “in a non-adversarial manner,” 8 C.F.R. § 208.30(d), so attorneys are rarely present at this stage.

¹³⁵ https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf.

However, applicants who have just arrived from other countries and are not represented by counsel are unlikely to understand American legal standards or processes. In addition to significant language and cultural barriers, refugees who have just fled from persecution in their home countries may be fearful or reluctant to talk about that persecution with U.S. authorities. *See, e.g., Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998).

The agencies also fail to take into account how trauma affects the fear screening process. Tahirih clients are survivors of violence in countries and cultures around the world. They have survived rape, severe and routine beatings, FGM/C, and attempted femicide. They have been trafficked for profit, subjected to slavery, and coerced into relationships with men who use violence—sexual, verbal, emotional, and physical abuse—to establish power over them, effectively forcing them into the submissive role they are expected to fill in their societies as women in a domestic relationship. They have been subject to acid attacks and attempted murder as a matter of family “honor.”

Finding the courage to escape that violence does not mean escaping the associated trauma. Like survivors of other traumatic events—war, hurricanes, criminal attacks—immigrant survivors of gender-based violence are marked by that trauma in ways both visible and invisible. For those who successfully make their way to the U.S. border to seek asylum based on such persecution, that trauma is likely to be, if anything, sharpened by a dangerous journey, fear of the asylum process, fear of being returned to their conditions of persecution, and—especially now—fear of border officials. Especially in the fear screening that occurs at or near the time of reaching the border, that trauma is likely at its zenith. And virtually any survivor interview at the border is affected by this trauma.

The effects of trauma in a screening fear interview are real and indisputable. Decades of research confirm that trauma affects demeanor in ways that could easily affect credibility: nervousness, passivity, inability to make eye contact, reluctance to speak, speaking too fast, giving too much detail or not enough. *See, e.g.,* Dept of Health and Human Services, SAMSA, *A Treatment Protocol: Trauma-Informed Care in Behavioral Health Services* 61-62 (2014) (common effects of trauma include “exhaustion, confusion, sadness, anxiety, agitation, numbness, dissociation, confusion, physical arousal, and blunted affect”);¹³⁶ *id.* at 69 (noting that signs of dissociation include fixed or “glazed” eyes, sudden flattening of affect, long periods of silence, monotone, responses that are not congruent with the present context or situation). Trauma may also result in vague or evasive testimony due to the victim’s desire to avoid or stop a flood of memories of the abuse. It might result in a withdrawn or detached witness if a victim tries to dissociate from the memory or event. Indeed, the experience of simply testifying about sexual abuse can be traumatic, because it forces the victim to “relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring.” Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Nat’l Crime Victim Law Institute, *Violence Against Women Bulletin* at 1-2 (Sept. 2011) (internal quotation marks and alteration omitted). Research supports similar conclusions about the trauma of human trafficking: “The stress of the trafficking situation is almost guaranteed to create dissonance between thoughts, feelings, and behavior that can greatly reduce flexible coping and rational decisions that could be expected of people in free conditions.” T. K. Logan et al., *Understanding Human Trafficking in the United States*, 10 *Trauma, Violence, & Abuse* 3, 16 (January 2009).

¹³⁶ https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf.

Courts across the country have recognized the effects of trauma on survivor interviews and testimony. The Fourth Circuit called it “unsettling” that the BIA simply dismissed the “potential impact” of torture on an applicant’s testimony. *Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015). Similarly, the Third Circuit has recognized the “numerous factors that might make it difficult for an [individual] to articulate his/her circumstances with the degree of consistency one might expect from someone who is neither burdened with the language difficulties, nor haunted by the traumatic memories, that may hamper communication between a government agent in an asylum interview and an asylum seeker.” *Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d Cir. 2003) (vacating a BIA decision based in part on inconsistencies between the asylum testimony and the credible fear interview). And the Ninth Circuit has noted that

[v]ictims of repeated physical or sexual abuse, for example, remember the gist of their experiences. However, they often confuse the details of particular incidents, including the time or dates of particular assaults and which specific actions occurred on which specific occasion. As events recur, it can become difficult to remember exactly when specific actions occurred even though memory for what happened is clear.

Singh v. Gonzales, 403 F.3d 1081, 1091 (9th Cir. 2005) (citing Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1514-15 (2001)); *see also, e.g., Fiadjoe v. Att’y Gen.*, 411 F.3d 135, 154 (3d Cir. 2005) (“Women who have been subject to domestic or sexual abuse may be psychologically traumatized. Trauma ... may have a significant impact on the ability to present testimony.”); *id.* (holding that INS Guidelines entitled “Consideration for Asylum Officers in Adjudicating Asylum Claims from Women” are as applicable to an immigration judge’s credibility determinations as they are to an asylum officer’s credibility determination).

UNHCR’s recommendations for ensuring that women’s refugee status determinations are appropriately made are particularly instructive. They include the following:

- Separate, private interviews away from male family members, during which women are explicitly notified of their right to pursue asylum as a principal applicant, and not merely as a derivative of their husbands;
- Treating language access and legal advice as “essential; informing women that they may choose to have female interviewers and interpreters; interviewers and interpreters should be culturally competent and sensitive to other factors such as educational level and religion and should understand how culture and trauma influence behavior;
- Interviewers should demonstrate objectivity and compassion, avoiding interruption and “body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate”; and
- Counseling and auxiliary services should be made available before and after interviews and referrals should be provided as appropriate.

UNHCR, *Gender Guidelines*; see also, e.g., Executive Committee of the High Commissioner's Programme, *Refugee Women and International Protection No. 64*, § (a)(iii) (1990).¹³⁷ The NPRM fails to address these highly relevant issues in seeking to impose a higher burden, especially when the existing standard already takes the merits burdens of proof for each kind of relief into account.

Fourth, the agencies suggest that DOJ's language imposing the higher burden to a particular group in a previous rule supports their rationale. 85 Fed. Reg. at 36,270. It does not. Significantly, in that rule, DOJ applied a higher screening standard *only* to a discrete and objectively identifiable group of people "subject to streamlined administrative removal processes for aggravated felons under section 238(b) of the Act and for [people] subject to reinstatement of a previous removal order under section 241(a)(5) of the Act." 64 Fed. Reg. at 8484-85. DOJ specifically distinguished that group as being "[u]nlike the broad class of arriving [individuals] who are subject to expedited removal." *Id.* The agencies offer no explanation for why they now believe the broad class with multiple claims and concerns can fairly and efficiently be treated as if they were a narrowly defined class whose members can raise only one claim. Nor have they explained how screening for multiple claims of relief under three burdens of proof instead of one makes the process more effective or efficient. And finally, the agencies have failed to explain by what authority they add to and raise the statutory burden of proof in Congress' carefully described credible fear procedures. 8 U.S.C. § 1225(b).¹³⁸

Fifth, the NPRM proposes a new and unjustified definition of "significant possibility" as "a substantial and realistic possibility of succeeding." Again, the agencies have failed to show any confusion over the past 23 years requiring clarification as to the statutory term. Moreover, the agencies' only source for this definition is a District of Columbia Court of Appeals decision about a local District of Columbia law relating to spoliation of evidence. That case has no bearing on what Congress meant in the immigration context when it set what it "intended to be a low screening standard for admission into the usual full asylum process." 142 Cong. Rec. S11491-02 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

Nor are the agencies without guidance as to what Congress meant. The Supreme Court held before IIRIRA was enacted that a person has a well-founded fear of persecution, and thus is eligible for asylum if "the applicant only has a 10% chance of being...persecuted." *Cardoza-Fonseca*, 480 U.S. at 440. Against that background, Congress set a far lesser burden: it required an asylum seeker to show only a "significant possibility" that they "could establish eligibility" for asylum. Therefore, under the IIRIRA, "to prevail at a credible fear interview, the [individual] need only show a 'significant possibility' of a one in ten chance of persecution, i.e., a fraction of ten percent." *Grace*, 344 F. Supp. 3d at 127; see *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 (2015) ("when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute is presumed to incorporate that interpretation") (internal quotation marks omitted).

¹³⁷ <https://www.unhcr.org/en-us/excom/exconc/3ae68c441f/refugee-women-international-protection.html>.

¹³⁸ The wildly different standards the government seeks to apply leads it to some convoluted grammatical gyrations; the government is forced to refer to both credible fear proceedings and "credible fear" proceedings (one with and one without quotation marks), because it seeks to hijack a statutorily-defined process with burdens of proof never included or contemplated by Congress when it defined that process. See 85 Fed. Reg. at 36,269 n.15.

Moreover, Congress actually considered and rejected a standard in which “only applicants with a likelihood of success will proceed to the regular asylum process.” H. Rep. 104-469, pt. 1, at 158 (1996) (emphasis added); *see* H.R. 2202, 104th Cong. § 235(b)(1)(B)(v) (1995). As the Conference Report explained:

The purpose of these provisions is to expedite the removal from the United States of [individuals] who *indisputably* have no authorization to be admitted to the United States, while providing an opportunity for such an [individual] who claims asylum to have the merits of his or her claim promptly assessed....

H.R. Rep. No. 104-828, at 209 (Conf. Rep.) (emphasis added).

The proposed rule, which echoes the rejected focus on a substantial possibility of succeeding instead of on the possibility of establishing eligibility, strays far from its statutory mooring. It would pervert the credible fear process into one that immediately removes everyone except those who can immediately prove they are likely to succeed. And where there is no indication of confusion as to the statutory meaning, and where the new definition is likely to cause confusion, the proposed rule is arbitrary.

4. Other Proposed Changes

The remaining hodgepodge of proposed amendments to the CFI process should likewise be withdrawn.

a. Asylum Bars

The NPRM proposes that, contrary to decades of practice, asylum officials should now adjudicate the merits of mandatory bars to asylum, in the middle of a credible fear screening. 85 Fed. Reg. at 36,272. This is contrary to law and to existing practice. Under 8 U.S.C. § 1225(b), Congress required asylum officers to determine whether there is a significant possibility that an applicant could, in some future proceeding, establish eligibility for asylum.

The proposed rule is also unworkable. The mandatory bars are often extremely fact-sensitive and heavily litigated, and how they apply often differs from circuit to circuit. For example, 8 U.S.C. § 1158(b)(2) bars asylum if “there are serious reasons for believing that the [person] has committed a serious nonpolitical crime outside the United States prior to the arrival of the [person] in the United States.” But determining whether a serious crime was political or not is a very fact-specific inquiry. The nature of the offense, its intended target, the circumstances surrounding the conviction, and the conditions of where it took place are all significant factors to weigh. The context also matters. Without the opportunity to develop facts and argument, an asylum officer could, facially at least, apply a mandatory bar to a survivor of human trafficking who was forced by her traffickers to engage in crimes such as commercial sex/prostitution, drug smuggling, etc. That finding would not only unduly bar her from asylum under the “serious non-political crime” bar, it would result in her expedited removal right back to her trafficker. The brief and non-adversarial credible fear interview

is a wholly inappropriate forum for these decisions, which require evidence and responses from both sides.¹³⁹

b. Merits Adjudication

The proposed rule requiring asylum officers to determine and apply asylum bars also requires a *merits adjudication* of eligibility in the credible fear hearing. The rule would thus require asylum officers to exceed their statutory authority. It would also violate due process by requiring fact-finding in a procedure that affords applicants neither notice nor an opportunity to respond with evidence. Front-loading highly fact-specific and nuanced legal considerations when asylum seekers cannot possibly put their best case forward and generally lack guidance from counsel is patently inappropriate.

As UNHCR aptly notes in its guidelines for considering claims involving gender-based persecution, survivors of sexual trauma in particular may need “second and subsequent interviews...in order to establish trust and to obtain all necessary information...interviewers should be responsive to the trauma and emotion of claimants and should stop an interview where the claimant is becoming emotionally distressed.” UNHCR, *Gender Guidelines* at 9. Furthermore, applicants should not have to describe the “precise details of the act of rape or sexual assault itself,” not least because “in some circumstances,” a “woman may not be aware of the reasons for her abuse.” *Id.* at 10.

Trauma is likely to be freshest for survivors arriving at the border, so that they are at their most vulnerable, and least equipped to effectively communicate with immigration officials due to profound traumatization, hunger, exhaustion, lack of understanding of our legal process, and language and cultural barriers. They may have been separated from family and still be suffering acute physical effects of violence in addition to emotional trauma. It is fundamentally incompatible with the purpose of asylum itself to expect survivors to collect their thoughts, let alone corroborative evidence to support highly fact-specific inquiries. Mandated consideration of the merits during initial screenings for asylum is certain to shut survivors out of the process before they ever have their day in court.

Furthermore, the narrowly proscribed “rare circumstances” exception within the rule’s prohibition on claims asserting “gender” as the nexus is effectively meaningless 85 Fed. Reg. at 36,282. Its parameters will go untested because virtually no survivor will be able to articulate and corroborate the facts required to meet such exceptions on the spot. The agencies are not fooling anyone by including them in the rule; their sole purpose is to “check the box” to satisfy the non-negotiable legal requirement of a case-by-case analysis in asylum claims. Moreover, survivors would be required to make their claims to an officer least qualified to assess them, and with virtually no accountability measures to ensure proper decision-making.¹⁴⁰ As screenings are increasingly conducted by minimally trained border agents with an enforcement rather than trauma-informed or

¹³⁹ Nor does the possibility of an immigration judge review of the decision cure the problem. The judge’s review is based on the asylum officer’s written summary, and in any event cannot redress the applicant’s inability to respond with written or other evidence unobtainable during the brief credible fear proceedings.

¹⁴⁰ https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf.

legal background,¹⁴¹ more and more asylum seekers with meritorious claims are being unduly turned away.¹⁴²

The NPRM suggests that waiting for an actual adjudicatory procedure is “pointless and inefficient” when the agencies would prefer to make that decision at an earlier point. 85 Fed. Reg. at 36,272. But the credible fear process Congress enacted was not designed to adjudicate the merits of asylum claims. Contrary to the agencies’ claim, it is not pointless to adjudicate the merits of an asylum claim in the very forum designed to do that.

There is no review in immigration court of denials of initial fear screenings unless an applicant proactively requests such review. Due to the crippling impact of trauma as described above, pervasive social stigmas and accompanying fear of reporting gender-based violence, especially to government officials, it is highly unlikely that survivors will take it upon themselves to (1) disclose key, required elements of their claims; (2) have sufficient objective evidence corroborating such claims; and (3) affirmatively request an appeal or understand the consequences of declining to do so.¹⁴³

D. Procedural Proposals

1. “Frivolous” Applications

The NPRM’s proposal to change the test for frivolous applications rests on the notion that entirely baseless applications are so numerous that they have overwhelmed the system. 85 Fed. Reg. at 36,273. The NPRM, however, presents no evidence for that assertion. Instead, it uses ellipses to badly mischaracterize a decision by a Ninth Circuit judge (who was forced to resign after committing serious gender-based misconduct) that likewise provides no evidence of widespread fraud. *See id.* (quoting *Angov v. Lynch*, 788 F.3d 893, 901-02 (9th Cir. 2015) (Kozinski, J.)). In fact, the reason that the NPRM fails to cite any actual evidence of pervasive frivolousness, or of pervasive fraud, is that no such evidence exists.¹⁴⁴ *See, e.g.*, 85 Fed. Reg. at 38,590.

¹⁴¹ <https://www.borderpatroledu.org/become-cbp-officer/>.

¹⁴² https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf.

¹⁴³ <https://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>.

¹⁴⁴ Any attempt by the agencies to use denial rates in asylum cases as evidence of purported frivolousness would be arbitrary. The available evidence makes clear that the outcome of an asylum seeker’s claim is primarily based on two factors not related to the merits of the claim—whether the asylum seeker is represented by counsel, and the identity of the immigration judge. *See, e.g.*, TRAC, *Asylum Decisions*, <https://trac.syr.edu/phptools/immigration/asylum>; TRAC, *Asylum Decisions Vary Widely Across Judges and Courts—Latest Results*, <https://trac.syr.edu/immigration/reports/590/>; TRAC, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, <https://trac.syr.edu/immigration/reports/491/>; TRAC, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018*, <https://trac.syr.edu/immigration/reports/judge2018/denialrates.html>; Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 48-58 (2015). Moreover, the fact that denial rates are rising reflects only that the Attorney General and the BIA have previously attempted to use case law to establish some of the illegal and arbitrary measures proposed in the

Without evidence of pervasive fraud, there is no evidence that fraudulent applications have overwhelmed the system. In fact, the available evidence demonstrates that the backlog in immigration court is not due to any action by asylum seekers. After all, the number of immigration judges has increased at a *higher* rate than the number of new proceedings in immigration court. See TRAC, *Immigration Court Backlog Surpasses One Million Cases*.¹⁴⁵

Any increased burden on the immigration courts instead stems directly from recent executive-branch policies. One recent decision of the Attorney General—*Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018)—“removed 330,211 previously completed cases and put them back on the ‘pending’ rolls.” TRAC, *Immigration Court Backlog Surpasses One Million Cases*. Standing alone, that flagrantly illegal decision (see *Morales v. Barr*, ___ F.3d ___, 2020 U.S. App. LEXIS 19911 (7th Cir. June 26, 2020); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019)) accounts for more than one-quarter of all currently pending cases (see TRAC, *Immigration Court Backlog Tool*).¹⁴⁶ The Remain in Mexico program, meanwhile, serves to overwhelm immigration courts at the southern border rather than allowing claims to be heard by courts throughout the United States. See, e.g., Brief of *Amicus Curiae* Local 1924 in Support of Plaintiffs-Appellees, *Innovation Law Lab v. McAleenan*, 9th Cir. No. 19-15716, Dkt. 39, at 25-26. And the “[s]hifting scheduling priorities” and shifting “legal standards” that immigration judges must apply likewise contribute to the backlog. TRAC, *Immigration Court Backlog Surpasses One Million Cases*. Assuming *arguendo* that the system is overwhelmed, then, that state of affairs is the fault of the agencies themselves, not of the imaginary influx of “frivolous” asylum applications. And as shown at various places in this comment, adoption of the NPRM would further increase the backlog by unsettling settled law and injecting novel inquiries into asylum cases. The basis for this change is accordingly arbitrary.

Further, the NPRM fails to grapple with the key question whether it is appropriate to broaden the situations in which immigration judges impose the harsh penalties associated with findings of frivolousness. See 8 U.S.C. § 1158(d)(6). That question takes on great urgency given the NPRM’s harsh, broad expansion of what constitutes a frivolous application. Yet the agencies ignore it entirely.

More specifically, although the NPRM proposes to define “knowledge” to include “willful blindness,” it provides no justification whatsoever for this proposal. 85 Fed. Reg. at 36,273. The proposal is accordingly arbitrary.

In fact, there is no plausible reason to include “willful blindness” in the definition of knowledge in the context of asylum applications. As shown above, asylum law necessarily proceeds on a case-by-case basis, with—for instance—a PSG that does not entitle one asylum seeker to relief nevertheless potentially applying someone else to relief on a different set of facts. Further, many asylum seekers, especially those in civil detention, are forced to proceed *pro se*. And *pro se* asylum speakers, many of whom face language barriers and lack legal training, are exceedingly unlikely to have the slightest idea whether their claim is frivolous, however that term is defined. The use of a “willful blindness” standard here will therefore do nothing more than waste government resources and chill potentially meritorious claims.

NPRM. See, e.g., *Matter of A-B-*, 27 I. & N. Dec. 227; *Matter of O-F-A-S-*, 27 I. & N. Dec. 709 (BIA 2019).

¹⁴⁵ <https://trac.syr.edu/immigration/reports/536/>.

¹⁴⁶ https://trac.syr.edu/phptools/immigration/court_backlog/.

The NPRM’s proposed definition of “frivolous” is also arbitrary. As an initial matter, the NPRM does not provide a plausible argument that the current definition is unworkable. The NPRM cites only two cases to argue that the current definition is too limited in “discouraging false claims.” 85 Fed. Reg. at 36,274. But the citation to one of those cases notes only the facially despicable nature of a claim based on denial of the Holocaust (*see id.* (citing *Scheerer v. U.S. Att’y Gen.*, 445 F.3d 1311 (11th Cir. 2006)))—and awful as it is, that basis has no bearing on the question whether the claim was “false” or falsified. That leaves only *L-T-M- v. Whitaker*, 760 F. App’x 498 (9th Cir. 2011), an unpublished case in which a court of appeals held that the knowing submission of a false medical record did not render an application frivolous under the current definition. The NPRM, in other words, scoured decades of experience with the current definition and turned up precisely one colorable example in which a false claim was found not to be frivolous. And as the NPRM concedes, the courts of appeals much more routinely uphold findings of frivolousness in the exceptionally rare case where an asylum seeker submits a false document. *See* 85 Fed. Reg. at 36,274. The proposed redefinition of “frivolous” is therefore a solution in search of a problem.

Even assuming, contrary to the evidence, that there is an epidemic of “false” claims not being tagged frivolous, the NPRM’s proposed definition of frivolous would remain arbitrary. A redefinition aimed at any such problem would simply add proposed 8 C.F.R. § 208.20(c)(2), which states that an application is frivolous if it “[i]s premised on false or fabricated evidence” and would not be granted absent that evidence. 85 Fed. Reg. at 36,295. Trauma has well-known and well-established adverse effects on memory and the ability to recount experiences. *See, e.g.*, Catrina Brown, *Women’s Narratives of Trauma: (Re)storying Uncertainty, Minimization and Self-blame*, 3 Narrative Works 1, 11-12, 17 (2013); Christine Sanderson, *Counselling Skills for Working with Trauma: Healing From Child Sexual Abuse, Sexual Violence and Domestic Abuse* 31 (2013); Angela E. Waldrop & Patricia A. Resick, *Coping Among Adult Female Victims of Domestic Violence*, 19 J. Family Violence (2004); International Association of Chiefs of Police, *Sexual Assault Incident Reports: Investigative Strategies* 5;¹⁴⁷ Office on Violence Against Women, Dep’t of Justice, *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers* (July 30, 2014).¹⁴⁸ A rational rule would therefore also specify that an adverse credibility determination, without more, is not grounds for a frivolousness finding. That is, however, not what the NPRM does. Rather, the NPRM also proposes to tag as “frivolous” any application that is “filed without regard to the merits of the claim” or “clearly foreclosed by applicable law.” 85 Fed. Reg. at 36,295. Those provisions are arbitrary, because they have nothing to do with the supposed problem of “false” claims.

The inclusion of the phrase “filed without regard to the merits of the claim” is also arbitrary for the independent reason that it has no settled meaning and is not explained by the NPRM.

Furthermore, the redefinition of “frivolous” to include cases that the government believes are “clearly foreclosed” would remain arbitrary even if it were rationally related to some problem identified by the NPRM. Like many other features of the NPRM, this proposal is flatly inconsistent with the fact that asylum decisions are, by law, reached on a case-by-case basis. The redefinition also fails to acknowledge, much less grapple with, the fact that many applications are filed by pro se individuals with no knowledge of what is “foreclosed” by applicable law and what is not. It would be

¹⁴⁷ <https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf>.

¹⁴⁸ <https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>.

manifestly unfair to inflict the “severe” consequences of a finding of frivolousness (*Scheerer*, 445 F.3d at 1317) on pro se asylum seekers simply because they have run afoul of a precedential opinion. And it is no response to say that only asylum seekers who know the law will be deemed to have filed frivolous applications, given that the NPRM proposes to expand the definition of “knowingly” beyond actual knowledge.

In addition, the NPRM effectively proposes to force all survivors of gender-based violence, including those appearing pro se, to have their claims deemed frivolous. The rule’s prohibition on “gender” as a nexus between persecution and a protected ground does contain an exception in undefined “rare circumstances.” However, the broad definition of “frivolous,” and its harsh consequences will deter and prevent anyone from successfully arguing that their case meets the exception. Also, a survivor whose case is deemed frivolous under the rule will be permanently ineligible for any relief (other than withholding of removal), including VAWA cancellation of removal, or a VAWA, U-visa, or T-visa petition. As explained above, survivors like Aicha applying for asylum who are also experiencing intimate partner violence or trafficking in the United States are often blocked by their captors from accessing counsel and other service providers. Traumatized and isolated, they are in no position to learn about their legal rights or access or pay lawyers to help them frame their claims in order to preserve their right to seek other relief.

In Koumba*’s case, counsel was crucial for her in securing relief. Koumba* had minimal resources when she arrived in the United States, and weak competence in English. She was tricked by a fellow church goer into paying him \$500 for an asylum application even though she later learned that it was available online for free. She filed the application on her own. Without assistance, the application was returned to her three times due to errors and inadequacies. The first time, she failed to include the required number of photocopies, and the second time she hadn’t checked the correct boxes. Eventually she attended her asylum interview and her application was referred to the immigration court. Dreading having to recount her story and relive her trauma in front of a judge, she fell into a deep depression. Her husband, however, saw Tahirih staff at his church giving a presentation one day, so he called Koumba* and told her to come quickly for a consultation. Tahirih took on Koumba* as a client and persuaded the asylum office to give her a second interview since she was initially denied asylum for a minor technical reason. The asylum office then asked that DHS terminate proceedings. Tahirih quickly prepared Koumba*’s new application and represented Koumba* for her second interview. Empowered and confident, Koumba* was finally granted asylum.

Aida*, whose case involved severe torture as detailed above, enlisted Tahirih’s help including the securing of an expert on the dynamics and psychological impact of domestic violence. Tahirih helped Aida* establish how the trauma she endured caused her delay in filing. Tahirih also helped Aida* explain that she did file for asylum soon after she discovered that her brother had been murdered, likely by Juan in order to punish Aida* for escaping. Finally, in Camille’s* case also described above, her counsel was able among other things to track down her medical records to effectively document her brutal abuse.

The proposal to allow USCIS asylum officers to refer “frivolous” applications to immigration court suffers from the same infirmities. The NPRM states that the proposal is intended to “root out frivolous applications more efficiently, deter frivolous filings, and ultimately reduce the number of frivolous applications in the asylum system.” 85 Fed. Reg. at 36,275. The NPRM, however, provides no evidence that any affirmative asylum applications are frivolous—much less that there is a systemic

problem of frivolous applications that requires a response. And the NPRM provides no such evidence of a systemic problem because none exists.

Further, it is inappropriate to give asylum officers any role in frivolousness determinations. Although the NPRM does not even acknowledge as much, affirmative asylum interviews are not adversarial proceedings, and DHS is not represented at the interviews. Requiring asylum officers to confront asylum seekers about supposed frivolousness therefore requires the officers to act as both decisionmaker while also acting as a shadow prosecutor. That conflation of roles—and the injection of prosecutorial functions where they do not belong—is pernicious at the best of times, and when carried out in the context of interviews with trauma survivors who have little knowledge of U.S. law, the result will inevitably be that asylum seekers are unable to tell their stories. *See, e.g.*, Mark S. Silver, *Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Toward a Better Legal Outcome* 6-7 (6th ed. 2017); Heather J. Clawson et al., U.S. Dep’t of Health & Human Servs. Office of the Assistant Sec’y for Planning & Evaluation, *Treating the Hidden Wounds: Trauma Treatment & Mental Health Recovery for Victims of Human Trafficking* 3 (2008).¹⁴⁹ The proposal is, in other words, a self-fulfilling prophecy: By forcing asylum officers to adjudicate frivolousness, the NPRM will create more applications that appear frivolous—but those additional referrals will actually result from the adversarial questioning required by the NPRM rather than from a lack of merit in the underlying claim.

To make matters worse, the NPRM proposes to remove procedural safeguards against findings of frivolousness. It does so, once again, on the “belie[f]” that significant numbers of asylum seekers submit “knowingly frivolous applications.” 85 Fed. Reg. at 36,276. But once again, the NPRM includes no evidence to back that belief, because none exists; the agencies’ “belief” is nothing more than a pernicious stereotype that has no place in the law at all, much less in asylum law.

Further, as stated above, the NPRM is flatly wrong to assert that asylum seekers will know whether their application is frivolous under the proposed definition—and it would also remove the requirement of actual knowledge. Nor will the statutory notice required by 8 U.S.C. § 1158(d)(4)(A), which goes only to the consequences of filing a frivolous application, suffice to put asylum seekers on notice that their application is frivolous. The NPRM would, for example, allow a pro se asylum seeker who submits a claim premised on gang-based violence in good faith to suffer the consequences of filing a “frivolous” application without warning and without any advance knowledge of why the application would be deemed frivolous. That result will do nothing except deter meritorious claims and result in mass *refoulement*.

The so-called “safety valve” in the NPRM (85 Fed. Reg. at 36,277) is nothing more than the caricature of an actual safety valve. Essentially, the safety valve would force anyone who submits an application deemed “frivolous” to forgo all relief and take voluntary departure. Given the utter absence of evidence that the asylum system is overrun with fraudulent or false applications, this means that the “safety valve” forces asylum seekers back into the very violence and persecution they fled in the first place. That is no safety valve at all.

Finally, taken together, these changes violate asylum seekers’ rights to due process. Here, the private interest at stake is extraordinarily significant, given the consequences of a frivolousness

¹⁴⁹ <https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf>.

finding and the likely consequences of *refoulement*; the government's stated interest is so negligible as to be irrational; and the obvious additional safeguards are ones that the NPRM proposes to abolish.

2. Pretermission

The proposal to allow immigration judges to “pretermite” an asylum application without a hearing would, if enacted, make a mockery of due process and the government's duty of non-refoulement. The NPRM would require—not just allow, but require—judges to deny applications without a hearing if the application itself does not “establish[] a prima facie claim for relief.” 85 Fed. Reg. at 36,302. The NPRM provides no rationale for this proposal. It states only that “neither the INA nor current regulations require more” and then claims that “pretermission . . . is consistent with current practice.” *Id.* at 36,277. But even if there were no bar to pretermission (and, as described below, there is), that would not make pretermission a good idea. Rather, it would do no more than open the door to the inquiry whether a requirement of pretermission, an allowance of pretermission, or a ban on pretermission makes the most sense. The agencies do not even pretend to have undertaken that inquiry, with the result that the proposal is arbitrary on its face.

Far from being a good idea, pretermission in the context of asylum claims would have extraordinarily malignant effects. “With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’” *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting Elizabeth Hull, *Without Justice for All* 107 (1985)). The law has not become less complex since 1987. And many asylum seekers proceed pro se and have limited English proficiency, much less familiarity with the intricacies of U.S. asylum law. Their ability to present a prima facie case for asylum in writing thus bears no relationship to the merit of their underlying claim.

Further, it should go without saying that refugees are often unable to take all of the documentation relevant to claims for relief with them when they flee their homes. In fact, “cases in which an applicant can provide” documentary “evidence of all of his statements will be the exception rather than the rule.” UNHCR, *Handbook* § 196. As the BIA said in *Matter of Fefe*—in a statement that did *not* turn on then-applicable regulatory requirements—“the full examination of an applicant [is] 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.” *Matter of Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989). The agencies’ failure to consider this aspect of the problem—the effect of pretermission on pro se applicants—also renders the proposal arbitrary.

Survivors of gender-based violence, like all asylum seekers, will suffer swift pretermission for failing to establish a *prima facie* claim. Again, along with the new “frivolous” standard, pretermission will prevent even those who might ultimately meet the “rare circumstances” exception in gender-based cases from framing and presenting evidence of such circumstances in court. Those who simultaneously have pending VAWA or U-visa petitions will likely be removed in the meantime, before decisions on their petitions that could have permitted them to remain in the U.S. have been rendered. As a result, survivors and their children who return with them will face new unlawful presence bars requiring waivers to be filed from abroad. They will have limited if any access to counsel and face additional, undue barriers in responding to Requests for Evidence and other critical correspondence about their cases. And most critically, they will be vulnerable to life-threatening violence and other harm that will prevent them from ever safely returning to the United States even if their petitions are ultimately granted. And T-visa petitioners who are deported (*i.e.*, those who do

not have “continued presence”) will eventually have their petitions denied outright for failure to maintain presence in the United States. These results grossly undermine the express intent of Congress in enacting these remedies for survivors.

Moreover, the NPRM is incorrect that there is no bar to pretermission under current law. The agencies have not considered whether pretermission would violate the statutory and international-law rule against *non-refoulement*, and it would. As noted above (*see* Section III.A.1.d, *supra*), a significant percentage of asylum seekers are unrepresented. The agencies have not shown—and cannot show—that pro se asylum seekers with meritorious cases are able to show a prima facie case for relief on their written applications. All evidence is, in fact, to the contrary. In particular, between October 2000 and March 2020, 48% of represented asylum seekers received relief in immigration court, while only 17% of unrepresented asylum seekers did so. TRAC, *Asylum Decisions*. And the vast majority of asylum seekers who fail to find representation do so for reasons unrelated to the merits of the case. In particular, detained asylum seekers—especially those detained by ICE in areas with exceedingly few lawyers—have difficulty finding representation *because* they are detained. *See, e.g., id.*; Eagly & Shafer, *supra*. There can thus be no doubt that requiring applications to be pretermitted without a hearing will result in the illegal return of asylum seekers to persecution.

The proposed provision giving an asylum seeker an opportunity respond to the pretermission motion or show-cause order (*see* 85 Fed. Reg. at 36,277) will not change that result. There can be no rational expectation that a person without legal representation, who is almost certainly not versed in U.S. asylum law and very likely does not understand legal English, can correctly remedy deficiencies identified by an immigration judge. The way for an asylum seeker to do so is to be interviewed—i.e., to have an opportunity to present her full story with an interlocutor able to elicit and understand those details and how they mesh with U.S. law. Immigration court by no means provides a perfect opportunity for such interactions—but it is immeasurably better than written papers. The agencies have nevertheless refused to consider these on-the-ground effects before making their proposal.

As with the changes regarding “frivolous” applications, the NPRM’s proposals concerning pretermission also violate due process. Here, the private interest in literally life and death, because the proposed rules bear no relationship to the merit of underlying asylum claims; the government’s interest is so negligible as not to be articulated in the NPRM; and the procedural safeguards are again ones that already exist.

3. Confidentiality

The NPRM would expressly allow disclosure of information in an asylum application “as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the [person’s] immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.” 85 Fed. Reg. at 36,301.

The release of information from asylum applications will put asylum seekers at grave risk of harm. In disclosing critical details of persecution, an asylum seeker will necessarily implicate her persecutor. A persecutor may seek retribution by further harming the applicant upon deportation if her claim is denied. Or, he may punish her by harming family members at home while she awaits

adjudication of her application or if she prevails in her claim. As noted by UNHCR, with regard to asylum claims based on persecution in the form of human trafficking:

...trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination.

See UNHCR, *Gender Guidelines*, at 5. This is precisely the reason why existing rules prohibit release of inherently sensitive information in asylum applications other than in exceptional circumstances.

While this confidentiality provision appears purely procedural, it may in fact compromise asylum seekers' claims on the merits. A survivor fearing punishment from her persecutor for revealing details of her ordeal may be deterred from doing so at all. Yet withholding such information will certainly weaken her case substantively. It will also unjustly make her appear less credible. Perversely, this provision requires asylum seekers to choose *how*, not *whether*, they risk punishment: they can do so by presenting a weak claim, or by presenting a strong claim. Those who choose to risk retaliation by revealing the full details of their claims but who fail nonetheless, are undoubtedly at greatest risk of harm upon *refoulement*. UNHCR is likewise clear that this catch-22 has no place in the asylum process. Rather, an adjudicator should

...take the time to introduce him/herself and the interpreter to the claimant, explain clearly the roles of each person, and the exact purpose of the interview. The claimant should be assured that his/her claim will be treated in the strictest confidence.

UNHCR, *Gender Guidelines*, at 9. The adjudicator should further

gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed.

Id. And those fleeing gender-based persecution in particular, who may have internalized shame and stigmas,

may be reluctant to identify the true extent of the persecution...They may continue to fear persons in authority, or...rejection and/or reprisals from their family and/or community...An open and reassuring environment is often crucial to establishing trust between the interviewer and the claimant, and should help the full disclosure of sometimes sensitive and personal information. The interview room should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances.

Id. at 8-9.


Asylum seekers may also simultaneously experience gender-based violence in the United States, as explained above. The abuse could be either related or unrelated to the persecution they are fleeing abroad. Abusers notoriously lodge false accusations against survivors to punish them for reporting abuse, or to manipulate and wreak havoc on their lives to reinforce control. For example, in

Uwa's* case described above, once she applied for asylum, her abusive husband contacted the U.S. Embassy in Nigeria to falsely accuse her of kidnapping their children in order to damage her case. Tahirih was ultimately able to help obtain documents from Nigeria proving that Uwa* did in fact have legal custody of their children, and she eventually prevailed in her claim. This provision unfairly puts survivors at the mercy of abusers who trigger disclosure of information in their asylum applications. Under the NPRM, disclosure could be triggered if an abuser reports fabricated allegations of crime, child abuse, or immigration violations to law enforcement or DHS.

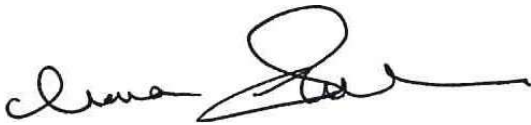
IV. Conclusion

The NPRM must be withdrawn in its entirety.

Sincerely,

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read 'Richard Caldarone'.

Richard Caldarone
Litigation Counsel

A handwritten signature in black ink, appearing to read 'Irena Sullivan'.

Irena Sullivan
Senior Immigration Policy Counsel

/s/Julie Carpenter

Julie Carpenter
Senior Litigation Counsel