TAHIRIH JUSTICE CENTER®

Protecting Immigrant Women and Girls Fleeing Violence

October 22, 2020

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

Re: Comments in Response to Department of Justice Executive Office for Immigration Review Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal,* EOIR Docket No. 19-0010; RIN 1125-AA93; A.G. Order No. 4843-2020

The Tahirih Justice Center[1] (Tahirih) submits the following comments to the Executive Office of Immigration Review (EOIR) in response to the above-referenced NPRM published on September 23, 2020.[2] *See* EOIR, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 59,692 (Sept. 23, 2020). Tahirih opposes the rule as both a matter of public policy and because it 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]

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 and their families since its inception twenty-three years ago. Our clients are primarily women and girls 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.[4]

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

---

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 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 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/.

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 (GBV). *See, e.g.*, Tahirih Justice Center, *Tahirih in the News*;[5] Tahirih Justice Center, *Congressional Testimony*;[6] Tahirih Justice Center, *Comments*.[7]

Among the clients we have served are Mariam*[8] from Mali, who recounts:

"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. 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, at my own pace."

Another client, 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

---

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

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

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

8 Names followed by an asterisk are pseudonyms.

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.

As survivors of gender-based persecution, our clients are severely traumatized and uniquely vulnerable. In addition to the violence they endure, they face searing social stigmas and ostracization from family members and their communities if they dare to come forward and report abuse. They are often disbelieved and internalize shame particularly in the case of rape and sexual assault. As a result, they are isolated and cut off from family and community resources that they desperately need. Ultimately, as further explained below, the nature of gender-based persecution itself serves as an obstacle for survivors to effectively prepare their asylum cases - even under the most forgiving of circumstances. The formidable challenges survivors already face 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);[9] Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020).[10]

II. Comments on the NPRM as a Whole

The entirety of the NPRM is contrary to law in at least three ways.

A. Pretext

As an initial matter, the NPRM is nothing more than a pretext for severely restricting asylum and related relief. 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.

---

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

[10] 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.

Here, the agencies' rationales are, as shown in detail below, entirely implausible. That fact, standing alone, gives rise to a strong inference that the agencies' stated reasoning is pretextual rather than "genuine." *Dep't of Commerce*, 139 S. Ct. at 2575.

That inference is further supported by the fact that the NPRM does not once mention the realities faced by asylum seekers, either in their home countries or after they arrive in the United States. It is also supported by the fact that, in the five sets of proposed regulations issued solely or jointly by EOIR in the last year that directly affect asylum applicants, there is not so much as a single provision that can fairly be construed as working in favor of the applicant. *See also* EOIR, *Procedures for Asylum and Bars to Asylum Eligibility*, 84 Fed. Reg. 69,640 (Dec. 19, 2019); EOIR, *Fee Review*, 85 Fed. Reg. 11,866 (Feb. 28, 2020); EOIR & USCIS, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (June 15, 2020); EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 52,491 (Aug. 26, 2020). And it is supported by the fact that, in these proposed rules, EOIR has routinely accused asylum seekers of misconduct without a shred of supporting evidence. *See, e.g.*, 85 Fed. Reg. at 36,283 (claiming, contrary to all available evidence, that those who arrive at the southern border misuse the asylum system); *id.* at 36,273 (claiming, contrary to all available evidence, that baseless asylum applications are a significant problem); *id.* at 52,501 (claiming, contrary to all available evidence, that respondents deliberately withhold evidence from the immigration judge); Sections III.A.1 & III.A.2, *infra.*

The inference of pretext 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).[11] 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);[12] Brian Resnick, *Donald Trump and the disturbing power of dehumanizing language*, Vox (Aug. 14, 2018).[13] 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)),[14] and said that Mexican immigrants "bring[ ] drugs," "bring[ ] crime," and are "rapists." Scott, *supra*.

More specifically, President Trump has referred to asylum seekers as "invad[ing]" and "infest[ing]" the United States. Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 6:52

---

[11] https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/.

[12] https://www.vox.com/first-person/2018/5/18/17369044/trump-ms-13-gang-animals-immigrants.

[13] https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omarosa-dehumanization-psychology.

[14] https://www.vox.com/policy-and-politics/2017/7/28/16059486/trump-speech-police-hand.

AM);[15] Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 8:02 AM).[16] 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).[17] 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).[18]

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).[19] 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] anymore." *Trump on Asylum Seekers*: 'It's a Scam, It's a Hoax', Daily Beast (Apr. 5, 2019).[20] 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).[21] 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))[22] and that asylum claims are "frivolous" and "bogus" (*Remarks: President Trump Signs Taxpayer First Act in the Oval Office* (July 1, 2019)).[23] 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).[24]

---

15 https://twitter.com/realDonaldTrump/status/1009071403918864385.

16 https://perma.cc/35AQ-NSDH.

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

18 https://twitter.com/realDonaldTrump/status/1013146187510243328?s=20.

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

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

21 https://perma.cc/5ZKY-P53D.

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

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

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

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).[25] 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).[26] 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).[27]

In short, the NPRM itself, and the statements of those who directed its creation, clearly demonstrate that NPRM's stated goals are a mere pretext for imposing further restrictions on asylum seekers. It is therefore arbitrary and capricious in its entirety. And for the same reasons, the NPRM violates the constitutional guarantee of equal protection by implementing the animus that high-ranking administration officials have repeatedly expressed about keeping non-white immigrants from places as disparate as Central America, Haiti, Mexico, the Middle East, and Nigeria out of the country.

B. Impermissible Retroactivity

The NPRM does not state whether its provisions would apply to pending cases. That silence cannot stand, because the application of the NPRM to cases pending at the time its provisions take effect would be flatly illegal. 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 DOJ to retroactively apply new rules for asylum cases.

The application of the NPRM's proposals to pending cases in immigration court would therefore be illegal if that application would qualify as "retroactive." It would. "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)). Each of the NPRM's provisions would entail new legal consequences, by either (1) imposing new deadlines on asylum seekers (that might already have passed), (2) removing deadlines that previously bound the agency, (3) changing the standards for continuances, (4) requiring the payment of a fee to apply for asylum, or (5) changing the rules concerning the introduction and treatment of evidence. The result is that none of its provisions can

---

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

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

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

apply to individuals who are at any point in the asylum process—even as early a point as having requested a credible fear interview—when the final version of the rule takes effect.

C. Insufficient Time for Public Comment

Finally, EOIR has provided insufficient time for public comment, and it has done so without any attempted justification. The NPRM proposes drastic and sweeping changes to the asylum process—but 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 submit thorough, considered comments on a rule with such sweeping consequences. And these are not normal circumstances: The public is at an even greater disadvantage now due to the COVID-19 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 proportionally. Thus, these comments do not—and cannot—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.

III. Comments on Individual Proposals in the NPRM

The individual proposals in the NPRM are, without exception, contrary to law, arbitrary, and/or lacking any legitimate purpose.

A. Impermissible, Arbitrary Timing Rules

1. Fifteen-Day Window for Filing Asylum Applications

The NPRM proposes to make all asylum applications filed by those in asylum-and-withholding-only proceedings due within 15 days after an individual's first hearing. 85 Fed. Reg. at 59,693. This is no minor change, although the NPRM arbitrarily fails to consider the significance of this fact, EOIR has proposed regulations that would shunt anyone who was placed in expedited removal, but then received a positive finding of credible fear, into asylum-and-withholding-only proceedings.[28] *See* USCIS & EOIR, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264, 36,265-67 (June 15, 2020). This rule would therefore affect tens of thousands of asylum seekers each year.

[28] Although it is beyond the scope of the current NPRM, we note that the June proposal is also blatantly illegal. *See* Tahirih Justice Center, *Comments in Response*, at 57-62, *available at* https://www.tahirih.org/wp-content/uploads/2020/07/Attachment1_Tahirih-comment-on-anti-asylum-NPRM.pdf.

a. Violation of the INA and Due Process

This proposal is flatly contrary to the INA. The time limit for filing asylum applications is set by 8 U.S.C. § 1158(a)(2)(B) at one year after an individual enters the United States (subject to tolling). That statutory deadline applies across the board—to individuals who are in removal proceedings governed by 8 U.S.C. § 1229a and to those who are not. *See, e.g.*, 8 U.S.C. § 1158(a)(1) ("*[a]ny*" individual "physically present in the United States or who arrives in the United States" may apply for asylum "in accordance with" § 1158); *id.* § 1225(a)(2) (stowaways not entitled to § 1229a removal proceedings but can file application for asylum under § 1158 upon finding of credible fear of persecution).

The NPRM's proposal would preempt this statutory deadline. Where an individual's first hearing is held less than 350 days after the individual enters the country, the regulation would cut short the statutory deadline. Where an individual's first hearing is held more than 350 days after entry, it would extend the statutory deadline. And it is hornbook law familiar to any first-year law student that a regulation may not preempt a statute in this way; where Congress has spoken, its word cannot be overridden by unelected bureaucrats.

The NPRM 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).

As an initial matter, because immigration cases lead to decisions on whether individual immigrants are removed from the United States, the private interest at stake is literally life or death. The Supreme Court has repeatedly recognized that removal "may result in poverty, persecution, and even death" (*Bridges v. Wixon*, 326 U.S. 135, 164 (1945)) and of "life" or "all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). This is true of asylum seekers, who are, by definition, seeking protection from persecution. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). And it is particularly true of survivors of gender-based violence, who form a vulnerable population not protected by the governments of many countries.

Decisions with such life-or-death consequences must include appropriate safeguards. The NPRM does not. In fact, it does not even so much as acknowledge the stakes for the asylum seekers it represents, much less consider the safeguards appropriate to those stakes. And this lack of safeguards means that the NPRM will result in increased numbers of erroneous removals from the United States—*i.e.*, *refoulement*—in direct violation of our obligations as a signatory to the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees. And a simple, straightforward alternative—continuing the *status quo ante*—would prevent this increase.

b. Arbitrary failure to consider circumstances faced by survivors and other asylum seekers

The NPRM is arbitrary in addition to being contrary to governing law. As an initial matter, it asserts that because those in asylum-and-withholding-only proceedings are knowingly applying for asylum and related relief, "there is no reason not to expect the [individual] to be prepared to state his or her claim as quickly as possible." 85 Fed. Reg. at 59,694. That is laughable. Anyone even vaguely familiar with the circumstances faced by asylum seekers is well aware that an individual's *knowledge* that she will be applying for asylum does not equate to an immediate *readiness* to prove her claim. This is especially true of survivors of gender-based persecution, for at least four reasons.

First, because of the trauma they experienced, survivors of gender-based persecution who manage to flee in pursuit of safe haven are in desperate need of medical, mental health, and other services as they navigate our system and often cannot meaningfully recount their stories without such services. *See, e.g.*, Tahirih Justice Center, *Immigrant Survivors Fear Reporting Violence* (May 2019).[29] Severely traumatized and socially and economically isolated, they are often *least* able to access them. Survivors have endured unimaginable violence and torture including rape, severe and routine beatings, FGM/C, attempted femicide and a journey fraught with peril and uncertainty. They have been trafficked for profit, and subject to acid attacks and attempted murder as a matter of family "honor." In one case, currently on appeal, Tahirih client Maria* was kept by a man as his property for 11 years, referring to her as "mi perra" ("my dog") and whistling rather than calling her by name. He told her she was registered to him like a car, and he constantly abused, controlled, and humiliated her. He tied her child up and tried to light him on fire. He mocked Maria's* religion, beat her for trying to go to church, and told her he owned her vote too. After she reported him to the police twice to no avail, he threatened to kill Maria* if she did so again. He sharpened his machete in front of her, saying he wanted a clean edge when he cut her head off.

Our clients like Koumba,* Mariam,* Maria,* and others need *at least* six months to begin processing and healing from their trauma in order to effectively describe their ordeals in even the most basic terms needed for filling out their asylum applications. Requiring those in asylum-only proceedings to file applications for relief within a mere 15 days of their initial court hearings will all but guarantee swift denial and deportation. And there is no guarantee that a survivor will later be permitted to supplement or amend her application. Permission to do so is entirely within the judge's discretion; when judges limit applicants to their initial application, the most vulnerable will inappropriately and cruelly suffer as a result.

Second, survivors are in desperate need of counsel to assist them with preparing their applications. Even the most straightforward cases require technical legal analysis to ensure meaningful access to the asylum process—and cases involving gender-based persecution are notoriously complex. As a historically marginalized population, survivors have faced a long, hard road in establishing that gender-based persecution is in fact a human rights abuse from which they deserve legal protection. While survivors who endure abuses such as FGM/C, domestic violence, forced marriage, and human trafficking may qualify for asylum in the United States, decision-making is routinely flawed in these cases. Among other things, this is the result of (1) ever evolving legal standards; (2) dramatic, unchecked politicization within our immigration agencies; (3) the nature of

[29] https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5d290b07a8dea8000138bf97/1562970888076/2019-Advocate-Survey-Final.pdf.

trauma itself; (4) the evidentiary challenges survivors face, as noted below; and (5) a longstanding, cis-male centered analytical framework that clings to an artificially simplistic public/private distinction to the detriment of survivors who are predominantly women and girls.

Matter of A-B-, 27 I. & N. Dec. 227 (AG 2018), provides a striking recent example of these problems. Immigration judges frequently misinterpret *Matter of A-B-* as mandating the denial of all claims involving domestic violence. The consequences of this misreading are dire; survivors' lives are put at grave risk upon deportation. It is also contrary to the well-established requirement that the merits of asylum must be considered on a case-by-case basis. And imposing a blanket prohibition on such claims is contrary to the plain language of *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). Notably, 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);[30] UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* (Mar. 15, 2016);[31] UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015).[32]

Survivors therefore desperately need counsel to help prepare their asylum cases. But they are mostly indigent, with close to 100% of survivors of intimate partner violence suffering economic abuse,[33] and 75% of women report staying in abusive relationships due to economic barriers.[34] Furthermore, According to a nationwide survey of advocates, immigrant women, and service providers Tahirih conducted, safe and affordable housing and economic hardship ranked among the top three most urgent and prevalent systemic challenges, respectively, confronting immigrant women in the US. *See* 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).[35] It is therefore highly unrealistic to expect survivors to secure counsel, *pro bono* or otherwise, in time for their first hearing so that they can have help preparing their applications. Even with the extensive *pro bono* program Tahirih has meticulously built since its inception, it can take over two months to match a *pro bono* team with a case, plus an additional month to run conflicts checks and sign retainers. And *pro se* applicants will not even know to request a continuance so they can have more time to find counsel, much less how to satisfy the requisite standards.

Further, as the NPRM concedes (85 Fed. Reg. at 59,693), most of those who are or will be placed in asylum-or-withholding-only proceedings have been imprisoned by CBP or ICE—a fact that

---

30 https://www.unhcr.org/en-us/5822266c4.pdf.

31 https://www.refworld.org/docid/56e706e94.html.

32 http://www.unhcrwashington.org/womenontherun.

33 *See, e.g.*, J.L. Postmus et al., *Understanding economic abuse in the lives of survivors*, Journal of Interpersonal Violence 27(3), at 411–430 (2012); A. Adams et al., *Development of the scale of economic abuse*, Violence Against Women vol. 13, at 563-588 (2008).

34 The Mary Kay Foundation. (2012). 2012 Mary Kay Truth About Abuse Survey Report available at: http://content2.marykayintouch.com/Public/MKACF/Documents/2012survey.pdf.

35 http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf.

compounds these problems. *See, e.g.*, Tahirih, *Nationwide Survey.* Asylum seekers are exceedingly unlikely to have access to lawyers from prison. And asylum seekers held in prison are also exceedingly unlikely to be able to understand the I-589 asylum application, much less meaningfully understand the requirements they must meet to receive relief under U.S. asylum law. The inevitable effect of the NPRM's illegal proposed deadline will therefore be to prevent almost all of those placed in asylum-and-withholding-only proceedings—again, a group that EOIR has proposed will include all those placed in expedited removal—from filing a full and complete application and from meaningfully accessing the U.S. asylum system.

Third, corroborative evidence for refugees in any context is largely elusive, given the desperate circumstances under which they flee their homes in pursuit of safe haven. For that reason, "cases in which an applicant can provide" documentary "evidence of all of his statements will be the exception rather than the rule." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* § 196 (1979). After being abused, one of our clients had gone to a doctor in a very remote clinic in her home country. During her asylum hearing, the judge asked why she didn't have proof of the visit. She explained that a family member had tried to get proof, but the doctor no longer worked at the clinic. The judge asked if her relative could continue to try to figure out what the doctor's new job might be and where in the country he was now located. With limited education, no computer, and living hours away from the clinic, it was simply not possible for him to do so.

Survivors of gender-based violence face even greater obstacles in this regard. Post-traumatic stress disorder can also severely interfere with survivors' ability to carry out even basic administrative tasks needed in order to obtain evidence. *See, e.g.*, Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (Oct. 2009).[36] So, too, can external actors. A potential witness might refuse to believe or help a woman alleging sexual assault by a relative or respected religious leader for fear of community reprisal. And a woman who endures domestic violence might be blocked from seeking and documenting medical treatment, either by the perpetrator himself or by strict laws or customs requiring accompaniment to the doctor by a male relative. As noted by the 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*).[37]

Human traffickers and perpetrators of domestic violence also notoriously prevent survivors from holding bank accounts, purchasing bus passes, or even obtaining library cards—all potential sources of evidence in other types of cases. Abusers confiscate survivors' documents ranging from passports to personal correspondence to further manipulate, isolate, and punish them and prevent them from escaping or seeking help. A survivor might have to risk her safety trying to retain or regain control over her own documents and other belongings that could serve as key evidence in her case.

---

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

[37] https://www.unhcr.org/3d58ddef4.pdf.

See, e.g., Anne L. Ganley, *Health Resource Manual* 37 (2018); Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* (2019); 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*;[38] Edna Erez & Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003);[39] Julieta Barcaglioni, *Domestic Violence in the Hispanic Community* (Aug. 31, 2010);[40] Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), at 7-8;[41] 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);[42] National Sexual Violence Resource Center, *Assisting Trafficking Victims: A Guide for Victim Advocates* 2 (2012).[43]

Further, even survivors who have possible evidence in their countries of origin face a difficult process when attempting to obtain it for use in a U.S. asylum proceeding. The process of having such documents sent to the United States after a survivor has arrived is, even in the best-case scenario, long and involved. In many other situations, including when an asylum seeker is *pro se* and detained, the rapid receipt of documents is a logistical impossibility. But under the NPRM's proposal, survivors still waiting to receive documents from abroad would be forced to proceed with their cases regardless. The NPRM will certainly fail to "encourage the presentation of all available and probative evidence at the trial level before an immigration judge" as required by the last NPRM published by EOIR on just August 26. *See* EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. at 52,501. To the contrary, the rule's effect would be to prevent consideration of relevant evidence survivors were genuinely unable to locate and receive before their hearing. Their cases will be prejudiced, with justice and due process denied.

Fourth, as the above evidence demonstrates, It is essential for survivors to have sufficient time—with or without counsel—to present the complex and nuanced legal arguments their cases demand. On average, *pro bono* attorneys representing clients in defensive asylum cases through Tahirih spend 300 hours during their first year of representation. It goes without saying that a respondent with no legal training would require much more. Appearing *pro* se—already a well-documented disadvantage[44]—is all too common. A recent national study found only 37% of

---

38 https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2.

39 https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf.

40 https://safeharborsc.org/domestic-violence-in-the-hispanic-community.

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

42 https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf.

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

44 From October 2000 to March 2020, 48% of represented asylum seekers received relief in immigration court, while only 17% of unrepresented asylum seekers did. TRAC, *Asylum Decisions*.

respondents were represented in immigration court, and around 86% of immigrants in detention were unrepresented. *See* Eagly & Shafer, *Access to Counsel in Immigration Court* (Sept. 28, 2016).[45] Drastically limiting the window of time within which respondents have to present their legal arguments as the NPRM proposes will ensure many more denials, unduly putting survivors' lives at grave risk in the process.

The NPRM, of course, blinds itself to all of this. It is utterly arbitrary as a result. Its flippant claim that asylum seekers will be ready for the proceedings is also arbitrary as contrary to the evidence. And its claim that allowing longer than 15 days (or, say, adhering to the *statutory* deadline) "risks delaying protection for meritorious claims" (85 Fed. Reg. at 59,694) is pure nonsense. Requiring the filing of an application before evidence can be received will lead to the immediate *denial* of many meritorious claims—with *refoulement* in direct violation of the United States' treaty obligations the inevitable result.

c. No non-arbitrary justification

None of the NPRM's other attempts to justify its proposal fare any better. The NPRM does not even acknowledge the conflicts with settled legal principles discussed above. It does, in a cursory footnote, note the existence of the statutory deadline. 85 Fed. Reg. at 59,693 n.1. But the NPRM fails to discuss the cardinal importance of that deadline. Instead, it dryly asserts that "the *regulations* do not currently prescribe a specific deadline for filing an application for asylum and withholding of removal with EOIR" (85 Fed. Reg. at 59,693 (emphasis added)) as if regulatory law were the higher authority.[46] The NPRM's failure to even consider the conflict between its proposal and the governing statute renders it arbitrary in addition to contrary to law.

The NPRM also asserts that individuals in asylum-and-withholding-only proceedings "are generally already subject to removal orders, denials of applications for admission, or denials of permission to land in the case of crewmembers." 85 Fed. Reg. at 59,693. Even assuming, *arguendo*, that this assertion correctly states current law, it will—if EOIR has its way—no longer be accurate by the time the proposal is finalized, because of the prior proposed rule that would place all those who receive positive credible-fear determinations in asylum-and-withholding-only proceedings. Such individuals are not yet subject to removal orders (*see* 8 U.S.C. § 1225(a)(1)(A)(i) & (a)(2)(B)(ii)), are applicants for admission whose applications have not been denied (*see id.*; *id.* § 1225(a)(1)), and are not typically subject to limitations that apply to crewmembers. Moreover, this population of individuals newly subject to asylum-and-withholding only proceedings will vastly outnumber all of those subject to such proceedings under current law.

The NPRM next suggests that asylum seekers will "simply delay proceedings" for no good reason. 85 Fed. Reg. at 59,694. In keeping with EOIR's other recent accusations against asylum seekers (*see* Section II.A, *supra*), this offensive suggestion comes with no supporting evidence—because the agency has none. And as illustrated above, there is ample evidence that delays are attributable to problems finding counsel and receiving evidence. There is also ample evidence that

---

[45] https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[46] At any other point since the advent of the administrative state, the arrogance inherent this statement would properly be described as breathtaking. Now, however, it is an almost expected expression of EOIR's routine contempt for the rule of law.

many continuance requests are caused by *government* delays, such as USCIS's inability to process applications for relief in a reasonable time, not to some wish to lengthen proceedings. *See, e.g.*, Am. Immigration Lawyers Ass'n, *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration*, (Jan. 30, 2019).[47] The NPRM's attempt at placing the blame for delay on asylum seekers is therefore squarely contrary to the evidence before the agency.

The NPRM's last purported justification involves an analogy to a regulation forcing "detained crewmembers" to file an asylum application within 10 days. 85 Fed. Reg. at 59,694 (citing 8 C.F.R. § 1208.5(b)(1)(ii)). But that regulation, too, violates the one-year deadline in 8 U.S.C. § 1158(a)(2)(B), and the existence of one illegal regulation cannot justify the promulgation of a second, equally illegal, regulation. Furthermore, the practical considerations above—especially the difficulty of garnering relevant evidence—apply with much less force to most crewmembers, who would have substantially more time to gather documents before embarking on a voyage than asylum seekers do before fleeing from persecution and torture.

Finally, the 15-day proposal cannot be saved by the meager, all-but-useless exceptions noted in the NPRM. The NPRM would add a "good-cause" exception to the deadline (85 Fed. Reg. at 59,694)—but it includes no guidance whatsoever to immigration judges on the application of that exception. That is a recipe for inconsistent adjudication. Further, the difficulties in obtaining an attorney, obtaining evidence, and understanding the application will arise in *every* case, and many immigration judges are likely to be unwilling to apply a good-cause exception to a ubiquitous situation. For all of these reasons, the NPRM's good-cause exception is patently insufficient.

So, too, is the purely discretionary ability of immigration judges to allow supplemental filings. *See* 85 Fed. Reg. at 59,694 (citing 8 C.F.R. § 1208.4(c)). Immigration judges are exceedingly unlikely to exercise that discretion in most cases, because they are forced by the performance metrics foisted on immigration judges by EOIR—which are illegal (*see* Compl., *Las Americas v. Trump*, D. Or. No. 3:19-cv-2051, Dkt. 1 (Dec. 18, 2018), *mot. to dismiss denied*, Dkt. 79 (July 31, 2020))—to clear set numbers of cases each year. The hard and arbitrary deadline the NPRM proposes for deciding asylum cases (*see* Section III.A.2, *infra*) will only worsen that problem, because it would establish a zero-sum situation: Any extra day given to the applicant would be a day the immigration judge will not have to decide the case. The NPRM's inevitable result will thus be that innumerable survivors and other asylum seekers will be unable to meaningfully seek relief in the United States.

2. Period for Refiling Rejected Applications

The NPRM proposes to make two changes with respect to applications that are deemed incomplete: It would remove a deadline currently placed on the agency by revoking the rule that an application is deemed complete unless returned by EOIR in 30 days, while at the same time imposing a new deadline on asylum seekers by requiring that returned applications be refiled within 30 days. 85 Fed. Reg. at 59,694. Those changes are no less arbitrary than the 15-day deadline for filing applications in the first place. *See* Section III.A.1, *supra*.

As an initial matter, the NPRM does not even attempt to provide a rationale for removing the deadline from EOIR. And no non-arbitrary rationale exists. That proposal is therefore arbitrary by definition.

---

[47] https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays.

Furthermore, the proposal to remove the deadline from EOIR cuts directly against the agency's stated reasons for imposing a deadline on asylum seekers. According to the NPRM, EOIR believes the latter deadline is needed to "ensur[e] that cases proceed in a timely and predictable manner." 85 Fed. Reg. at 59,694. But removing the deadline currently placed on EOIR reduces predictability, because it newly opens the question whether an application not returned within 30 days will be returned, or whether the application will trigger a merits hearing on the applicant's claim for relief. It also reduces timeliness, because it opens the door for EOIR to delay beyond 30 days in returning applications.

The NPRM also provides no non-arbitrary rationale for newly imposing a deadline on asylum seekers. The NPRM asserts, without reasoning or evidence, that "[t]hirty days is a reasonable period in which to remedy application defects." 85 Fed. Reg. at 59,694. That statement is nothing more than an *ipse dixit*—and an indefensible one at that. For the same reasons stated above (*see* Section III.A.1, *supra*), asylum seekers—especially detained and *pro se* asylum seekers—will be no more able to understand and complete an application in 30 days than in 15 days. And the agency cites no contrary evidence because none exists.

The NPRM next speculates that "applicants would have an incentive to re-file the application as soon as possible in order to trigger the possibility of obtaining employment authorization." 85 Fed. Reg. at 59,694. But that possibility is illusory. Under the 180-day deadline proposed in the NPRM, asylum seekers will effectively never be eligible for work authorization before the adjudication of an application. This is true both under the newly enacted (and illegal) regulations concerning asylum EADs, which require asylum seekers to wait a full year after filing an application to seek work authorization (*see* DHS, *Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38,532 (June 26, 2020); *Casa de Maryland, Inc. v. Wolf*, D. Md. No. 8:20-cv-2118, Dkt. 69 (Sept. 11, 2020)), and under preexisting law, which set the same waiting period at 150 days (*see* 8 C.F.R. § 208.7(a)(1) (2019)). Yet the NPRM has provided no rationale for effectively rendering its pre-adjudication EAD regulations a dead letter—or even acknowledged that this result would inevitably follow.

Moreover, work authorization *after* disposition of an asylum application naturally depends on the favorable disposition of that application. And rushed applications will, for all the reasons above, be far less likely to lead to favorable dispositions. EOIR's proposed deadlines—both the deadline for initial submission and the deadline for resubmitting returned applications—therefore act to decrease the chance that asylum seekers will receive relief, regardless of the strength of their claims (and arbitrarily do so without acknowledging that result). Thus, although asylum seekers surely benefit from work authorization, the 30-day deadline—contrary to the NPRM's assertion—cuts directly against their eligibility for that benefit.

The NPRM also cites cases for the proposition that "*reasonable* filing deadlines do not violate the immigration laws or any international treaty obligations." 85 Fed. Reg. at 59,694 (emphasis added). But that misrepresents the cases cited by the NPRM. One of those cases says only that there is nothing preventing the imposition of reasonable deadlines for bringing claims under the Convention Against Torture, without mentioning asylum or withholding of removal. *Foroglou v. Reno*, 241 F.3d 111, 113 (1st Cir. 2001). And the other two cases cited by the NPRM are silent on the interplay between deadlines and statutory and international law. *See Zheng v. Holder*, 562 F.3d 647 (4th Cir. 2009); *Qing Li Chen v. Mukasey*, 524 F.3d 1028 (9th Cir. 2008).

In any event, the NPRM's citation of this supposed principle is question-begging. Even assuming for the sake of argument, that the 30-day deadline is legal if it is reasonable, that principle would do nothing to show that the deadline is reasonable. As for the reasons above, it is not.

The NPRM next speculates that, "[w]ithout such a deadline, there is a risk that applicants will delay proceedings based on an assertion that a corrected application will be forthcoming." 85 Fed. Reg. at 59,694. This is another accusation against asylum seekers that the agency apparently has no evidence whatsoever to support—despite the fact that there has been no deadline on resubmission since at least 1997. *See* 8 C.F.R. § 1208.3(c)(3); EOIR, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312 (Mar. 6, 1997). Moreover, although the specific incentive dreamt up by the agency to defend the 30-day deadline is ephemeral, it is true as a general matter that asylum seekers have little to gain by delaying the adjudication of their applications simply for the sake of delay. The NPRM's suggestion on this point is thus both unsupported by any evidence and contrary to common sense.

Undaunted, the agency invokes judicial efficiency, claiming that delays will "result[ ] in wasted immigration judge time," prevent timely adjudications, and decrease "timely and predictable" processing of asylum applications. 85 Fed. Reg. at 59,692. But these consequences depend on the existence of actual, avoidable delays in resubmitting returned applications—and again, the agency, despite having decades of experience under the current system, has proven unable to find a shred of evidence to show that such delays exist.

Furthermore, even if such delays were real—and they are not—the efficiency gains from eliminating them would be minimal at best. After all, a returned application will take up no immigration judge time at all until and unless it is resubmitted. Actual delays in immigration court have instead been driven by policies implemented by EOIR and the Attorney General: 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* (Sept. 18, 2019).[48] Standing alone, that flagrantly illegal decision (*see Morales v. Barr*, 963 F.3d 629 (7th Cir. June 26, 2020) (Barrett, J.); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019)) accounts for roughly one-quarter of all currently pending cases (*see* TRAC, *Immigration Court Backlog Tool*).[49] The illegal 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.*, *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020); 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 also significantly contribute to delays. TRAC, *Immigration Court Backlog Surpasses One Million Cases*.

The agency's last attempt to justify this deadline is to point to sources suggesting that it has the "prerogative to determine proper rules of procedure." 85 Fed. Reg. 59,694. Be that as it may, the agency does *not* have the prerogative—or the authority—to promulgate arbitrary rules. There is accordingly no statutory or common-law basis for the proposed 30-day deadline.

---

48 https://trac.syr.edu/immigration/reports/574/.

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

Finally, even if the removal of the deadline binding EOIR or the imposition of the new deadline on asylum seekers could be justified individually—and they cannot—the combination of the two changes would remain arbitrary. As between EOIR and an individual asylum seeker (especially a detained, pro se asylum seeker), there can be no question that the greater resources and the greater ability to understand the asylum application lie with EOIR. But the agency has proposed that deadlines should not reflect these inequities but should instead reinforce them. And it has done so without acknowledging, much less attempting to justify, this unjustifiable disparity.

3. Effective Bar on Continuances Beyond 180 Days After Application Filed

The NPRM also proposes to impose a third incredibly restrictive deadline on asylum seekers. It would preclude asylum seekers from receiving continuances that would extend the adjudication of an asylum application more than 180 days after the application is filed absent "exceptional circumstances." 85 Fed. Reg. at 59,695-97. And crucially, it proposes to define "exceptional circumstances" to mean "battery or extreme cruelty to the [applicant] or any parent or child of the [applicant], serious illness of the [applicant], or serious illness or death of the spouse, child, or parent of the [applicant]." *Id.* at 59,699.

Although we agree that the enumerated circumstances, including battery and extreme cruelty, always warrant continuances, the NPRM's proposed definition of "exceptional circumstances" remains so narrow as to be utterly arbitrary. It will have serious negative consequences for asylum seekers—but the NPRM fails to mention, much less justify, these consequences. It can take many months to gather evidence. In one of our cases, a *pro bono* attorney contacted five different country conditions experts and none were available to help. It can take at least three months to set up an appointment for a client's psychological evaluation, and another two months for the actual appointment to occur and for a report to be written.

And, decades of research confirm that trauma interferes with one's ability to effectively develop testimony, as is necessary to present an asylum case. Trauma affects demeanor in ways that could easily impact an adjudicator's perception of 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");[50] *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

[50] https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf.

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).

Courts across the country have recognized the effects of trauma on survivor interviews and testimony. The Third Circuit, for instance, 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). To take another example, 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)). 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." UNHCR, *Gender Guidelines at* 9.

The NPRM attempts to simply ignore this problem of the well-documented impact of trauma on the development of testimony in asylum cases.[51] It also again attempts to ignore everything said above (*see* Section III.A.1, *supra*) concerning the necessity and difficulty in procuring evidence and counsel. Rather, the NPRM has proposed, with no justification, to penalize asylum seekers for these consequences of their persecution. Its definition of "exceptional circumstances" is arbitrary as a result.

The narrowness of the NPRM's proposed definition of "exceptional circumstances" is also arbitrary because it would, again without justification, penalize asylum seekers for problems created by the U.S. government. USCIS has extensive backlogs. As of October 14, 2020, for example, the processing time for a U-visa petition—the petition filed by those who are the victims of serious crime in the United States and assist law enforcement with the investigation or prosecution of the crime—exceed 56 months. USCIS, *Check Case Processing Times*.[52] The processing time for T-visa petitions filed by survivors present in the United States on account of human trafficking, meanwhile, is 18 to 29 months. *Id.* And the processing time for I-360 applications is 16.5 to 21.5 months for those petitioning under the Violence Against Women Act and 14.5 to 18.5 months for all others, including children petitioning for Special Immigrant Juvenile (SIJ) status. *Id.*

---

[51] Exorbitantly lengthy proceedings are likewise not in the interest of survivors, as they wait in limbo to learn their fate while evidence grows stale. Fair and effective asylum proceedings must be neither drawn out nor hastened arbitrarily.

[52] https://egov.uscis.gov/processing-times/.

An 180-day deadline for processing asylum cases thus means that individuals who file for survivor-based relief before USCIS will, if denied asylum, be ordered removed—and, in some cases, actually be removed from the United States—before USCIS acts on their petitions. Moreover, most of the people so affected will have *meritorious* petitions for relief before USCIS. *See, e.g.*, USCIS, *Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status*;[53] USCIS, *Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status*;[54] USCIS, *I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter and Case Status*;[55] USCIS, *Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, by Fiscal Year, Quarter, and Case Status (VAWA)*.[56] The NPRM therefore implicitly proposes to remove from the United States people who are entitled to remain in the United States. Worse still, in the case of T-visa petitioners, the NPRM proposes to remove people from whom removal erases their entitlement to relief. *See* 8 U.S.C. § 1101(a)(15)(T)(i) (requiring "physical presence" in the United States "on account of …trafficking").

The NPRM does not, because it cannot, attempt to justify either of these results. Rather, it remains silently content to punish courageous individuals for a combination of USCIS's unaccountable delays and EOIR's unaccountable insistence on speed. The wheels of the deportation machine must apparently grind on, no matter the human cost. But the agency's failure to consider—much less grapple with—these results renders the NPRM's crabbed definition of "exceptional circumstances" entirely arbitrary.

In any event, that definition fails on its own terms; none of the agency's stated justifications for the definition even rise to the level of plausibility. The agency's primary rationale is that 8 U.S.C. § 1158(d)(5)(A)(iii) sets out an "exceptional circumstances" standard for exceeding 180 days, whereas 8 C.F.R. § 1003.29 sets out a "good cause" standard for continuances. 85 Fed. Reg. at 59,696. The agency reasons that "the two terms reflect different standards," with "exceptional circumstances" being the higher of the two. *Id.* at 59,697. Thus, the NPRM concludes, the latter standard must account for only very narrow circumstances.

That conclusion is a mere fatuity. It would be one thing if Congress had set forth two contrasting standards for two situations, but that is not the case here. Rather, Congress set forth one standard, and *EOIR itself* established the other standard by regulation. Further, the two standards were enacted years apart in different contexts and do not speak to each other, and any comparison between them is accordingly entitled to exceedingly little weight. And in any event, even assuming *arguendo* that one standard must be read as narrower than the other, that does not dictate the content of either standard. The comparison therefore cannot even begin to justify the definition that EOIR has proposed

---

[53] https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2020_qtr2.pdf.

[54] https://www.uscis.gov/sites/default/files/document/data/I914t_visastatistics_fy2020_qtr2.pdf.

[55] https://www.uscis.gov/sites/default/files/document/data/I360_sij_performancedata_fy2020_qtr2.pdf.

[56] https://www.uscis.gov/sites/default/files/document/data/I360_VAWA_performancedata_fy2020_qtr2.pdf.

for "exceptional circumstances"—much less the specific deficiencies in that definition identified above.[57]

The NPRM's only other effort to justify its definition seeks to draw on the definition of "exceptional circumstances" in 8 U.S.C. § 1229a(e)(1). 85 Fed. Reg. at 59,696. But the fact that Congress expressly defined "exceptional circumstances" in that way for purposes only of § 1229a (and § 1229b)—and *not* for purposes of § 1158—suggests exactly the opposite: that the term should be given a different meaning here. And that implication is even stronger because Congress enacted both provisions at the same time. *See* IIRIRA, Pub. L. 104-208, div. C, title VI, §§ 304 & 604 (1996).

In short, the NPRM's proposed rule on continuances—like everything else the NPRM proposes—lacks any rational justification and ignores on-the-ground realities faced by asylum seekers. And because the proposal will have the collateral effect of rushing immigration judges to ill-considered decisions, it will unquestionably result in increased error rates. This, in turn, means that it will lead to increased appeals, contributing to already massive backlogs, and still further increase the number of erroneous removals from the United States—*i.e.*, *refoulement*—in direct violation of our obligations under the Convention.

B Full Payment of Illegal Fee Up Front

The NPRM's next proposal is to require "any filing fee" that attaches to an asylum application to "be submitted … at the time" the application is filed. 85 Fed. Reg. at 59,695. This proposal relates to both (i) USCIS's recently finalized, but now enjoined, rule imposing a fee for affirmative asylum applications (*see* USCIS, *U.S. Citizenship & Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 85 Fed. Reg. 46,788 (Aug. 3, 2020)), and (ii) a proposed, but not yet finalized, EOIR rule imposing a similar fee (*see* EOIR, *Executive Office for Immigration Review; Fee Review*, 85 Fed. Reg. 11,866 (Feb. 28, 2020)). Solely for the purposes of this comment, we assume those fees are legal and non-arbitrary—although they are not. *See, e.g.*, *Immigrant Legal Resource Ctr. v. Wolf*, N.D. Cal. No. 4:20-cv-5883, Dkt. 98, at 18-28 (Sept. 29, 2020); *Nw. Immigrant Rights Project v. USCIS*, 2020 U.S. Dist. LEXIS 187410, at *97-*106 (D.D.C. Oct. 9, 2020).

Even assuming the lawfulness of the fees, the requirement of full payment up front is arbitrary. As an initial and dispositive matter, the agency provides no rationale at all for its proposal. Furthermore, the NPRM fails to mention—much less account for—the fact that very few asylum seekers will be able to afford *any* fee up front. For example, consider the situation of someone faced with the 15-day deadline also proposed by the NPRM. That person will, by definition, have fled their home in haste to escape violence; will have somehow had to make their way to the United States; and, on arrival, would have undergone the credible-fear process, meaning that they would (under current DHS practice) have been detained for the entire 15 days the NPRM would give them to submit

---

[57] The NPRM does suggest that an "exceptional" circumstance must be "rare." 85 Fed. Reg. at 59,697. But confining such circumstances to "rare" occurrences, to the exclusion of extreme USCIS delays, would impermissibly leverage the executive branch's failure against asylum seekers. Further, when Congress enacted the "exceptional circumstances" language in 1996, such delays *were* extremely rare; as the data cited in the text show, it is only in recent years that USCIS has systematically failed to satisfy its adjudicatory obligations.

an asylum application. There is extremely little chance that such an individual would have access to funds for a fee, be it the $50 fee EOIR previously proposed or some other fee.

That is the extreme case, but survivors and many other asylum seekers would face the same problem even absent the illegal and paltry 15-day window. As shown above (*see* Section III.A.1, *supra*), abusers and traffickers frequently keep control of survivors' resources—including money. Indeed, in the context of U and T visas and VAWA self-petitions, both Congress and USCIS have explicitly recognized the financial hardship survivors face; there is no fee for primary survivor-based immigration petitions, survivors can access certain public benefits without penalty, and fee waivers for ancillary survivor-related immigration benefits are mandated. In addition, our client base is overwhelmingly comprised of indigent women of color, who must overcome tremendous obstacles to apply for relief to begin with. As a result, we do not charge a fee for our services. The NPRM, however, disproportionately and arbitrarily punishes them further.

Finally, women asylum seekers who flee together with their families may suffer disproportionately in cases where the family cannot afford to pay for more than one asylum application. If the head of the household is deemed to be male, and thus the chosen applicant, unequal power dynamics within the family will be perpetuated to the detriment of its female members.

The result of the NPRM's proposal regarding fees will therefore be to *refoul* countless asylum seekers simply because they are unable to pay the fee. That result would be arbitrary even if the NPRM acknowledged it—but the agency has not even paid lip service to that inevitable consequence of its proposal.

C. Stacking the Evidentiary Deck

The final two proposals in the NPRM, while presented as supposedly neutral evidentiary rules, would both result in helping DHS, and harming respondents, in immigration proceedings—and thus in further mass *refoulement*.

1. Express power for adjudicators to submit evidence

The NPRM proposes, for the first time, to expressly allow immigration judges to "submit evidence into the record and consider that evidence, so long as the judge has provided a copy to both parties." 85 Fed. Reg. at 59,695. The NPRM focuses on whether EOIR *can* take this step, almost entirely to the exclusion of whether it *should*. It should not—and, in fact, the proposal is arbitrary.

EOIR adjudicators are neither Article III judges nor independent administrative judges appointed under Article I. Rather, they are housed in an arm of the Department of Justice—the nation's highest law enforcement agency. *See, e.g.*, DOJ, *About DOJ*.[58] Immigration judges thus ultimately answer to the Attorney General, the nation's chief prosecutor. And the Attorney General has, especially in recent years, not been shy about using that relationship to control the actions of immigration judges. *See, e.g.*, *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (AG 2018); *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (AG 2018). Thus, unlike almost every other federal adjudicator in the United States, EOIR judges are not, and cannot be, truly independent actors.

---

[58] https://www.justice.gov/about.

Given that immigration judges are functionally and bureaucratically aligned with the executive branch in this way, it is no surprise that a significant number of those judges routinely badger and disparage respondents—and engage in a host of other unethical behavior toward respondents. *See, e.g.*, AILA, *AILA Receives Records Relating to EOIR Misconduct in FOIA Lawsuit* (Nov. 1, 2018).[59] The inevitable result of allowing immigration judges to introduce evidence, then, will be to produce additional evidence in favor of the government and against the respondent in the vast majority of cases. That evidence will not even always be relevant: In one recent case in which Tahirih represents the respondent on appeal, an immigration judge placed evidence in the record concerning "youth" in the respondent's home country and then denied relief to the respondent—who had not been a "youth" for decades—in part on the basis of that irrelevant evidence.[60] We note that we are unaware of any prior case in which an immigration judge introduced evidence, relevant or not, in favor of a respondent.

This routine bias of many immigration judges (*see, e.g.*, Compl., *Las Americas v. Trump*, D. Or. No. 3:19-cv-2051, Dkt. 1 (Dec. 18, 2018)) belies the NPRM's unsupported speculation that its proposal "will better enable immigration judges to ensure full consideration of all relevant evidence and full development of the record for cases involving a pro se respondent." 85 Fed. Reg. at 59,695. To the contrary, many immigration judges will never, or almost never, introduce evidence *in support of* pro se respondents—who need it most. And introducing additional evidence in favor of DHS, which is always represented, often by experienced litigators with expertise in immigration cases, does nothing to further development of the record. The NPRM's sole justification for using its asserted authority to allow immigration judges to introduce evidence is therefore patently false.

The NPRM's proposal is also arbitrary because it fails to consider an obvious alternative that would result in the development of the record: a proposal to allow immigration judges to introduce only evidence *favorable to the respondent* (or to require them to enter such evidence), either when the respondent is pro se or in all cases. This would hardly be unprecedented: The Social Security Administration—whose procedures EOIR has recently suggested form a strong analogy for the immigration courts (*see* EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 52,491, 52,502 (Aug. 26, 2020))—assists claimants in gathering their evidence where necessary. *See* 20 C.F.R. §§ 404.1512(b)(1) & 416.912(b)(1); HALLEX I-2-5-1. Similarly, the Veterans' Administration must "assist[ ] veterans in developing supporting evidence" that underpins benefits claims. *Henderson v. Shinseki*, 562 U.S. 428, 430 (2011). A similar rule in immigration court would, unlike the NPRM's proposal, at least begin to remedy the imbalance in knowledge, understanding, evidence, and power that routinely exists between DHS and respondents.

2. Precedence given to politically motivated reports that downplay harm to survivors

The NPRM's final proposal amounts to an Orwellian insistence on the correctness of the regime. Under the proposal, immigration judges could *always* "rely on material provided by the Department of State, other Department of Justice offices, the Department of Homeland Security, or

---

[59] https://www.aila.org/infonet/eoir-records-relating-misconduct.

[60] The immigration judge in question has since been appointed to the BIA despite a long history of outrageous conduct toward respondents.

other U.S. government agencies," but could "rely on foreign government and non-governmental sources" only "if those sources are determined by the judge to be credible and probative." 85 Fed. Reg. at 59,699.

Evidence of country conditions is critical in asylum cases, including those involving survivors of gender-based violence. As explained above, asylum claims involving gender-based persecution are highly technical and require careful analysis. In-depth, specialized research by experts on gender-based violence can provide critical context for an applicant's claim and educate immigration judges who might have very limited knowledge of the topic. One judge made his ignorance plain during a client's testimony on the stand during her asylum hearing. When she became emotional while describing sensitive details about her trauma, he ordered her to: "Stop your hysterics, woman!" In a case like this, due process demands that an applicant have every opportunity to build the record for an appeal; there is no rational interest served by having a judge arbitrarily restrict it.

Often, a claim can turn on country conditions evidence, particularly when esoteric forms of persecution are involved or if other types of evidence don't exist. In the refugee context, UNHCR explains:

> information on practices in the country of origin may support a particular case. It is important to recognise that in relation to 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. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.[61]

Similarly, in addressing situations involving armed conflict, UNHCR notes that country reports "may not reflect the specific circumstances of women or of men, including the prevalence of gender-specific forms of harm, or take into account the changing composition and conduct of the actors involved."[62]

There is no basis for the distinction the NPRM would draw between U.S. government reports and other reports that provide this crucial type of evidence. Though we deeply wish things were otherwise, U.S. government sources are far from a gold standard—especially when it comes to materials relevant to immigration proceedings. For example, State Department reports have long shown biases. For many years, objective scholars have believed that "crosschecking [State Department] country reports against" the assessments of Amnesty International has been "necessary to remove a potential bias in favor of U.S. allies." Cingranelli & Richards, *The Cingranelli & Richards (CIRI) Human Rights Data Project*, Human Rights Quarterly 32/2, at 406 (2010).[63] As UNHCR has explained, general country reports also information "may be gender-biased to the extent

---

61 *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* ¶ 37.

62 *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions* ¶ 92.

63 www.jstor.org/stable/40783984.

that it is more likely to reflect male as opposed to female experiences," underscoring just how important reliable expert reports are.[64] In the context of claims brought by LGBTQI individuals, UNHCR also emphasizes that country conditions information "is often lacking," and this fact "should not automatically lead to the conclusion that the applicant's claim is unfounded or that there is no persecution" of such individuals in that country. And the lack of such information may even be attributable to stigmas and attacks on human rights reporters.[65]

Those problems have recently become more acute, particularly with respect to issues that face survivors of gender-based violence in other countries. Beginning in 2017, "State Department officials [were] ordered to pare back passages in a soon-to-be-released annual report on global human rights that traditionally discuss women's reproductive rights and discrimination." Nahal Toosi, *State Department report will trim language on women's rights, discrimination*, Politico (Feb. 21, 2018).[66] On average, "[m]entions of women's rights and issues" in country reports were declined by 32% from 2016 to 2017. Oxfam, *Sins of Omission: Women's and LGTBI rights reporting under the Trump administration* 4 (Nov. 1, 2018).[67] And the decreases were larger in countries that send larger numbers of asylum seekers to the United States and in countries where violence against women is more prevalent. *See id.* at 5. The report on El Salvador, for instance, showed a "50% decrease in reporting on women's issues and rights relative to a county with no asylum grantees." *Id.*

The information omitted is critical to asylum claims. The new reports, for instance, "omit[ ] crucial details about human rights abuses, particularly abuses by non-state actors." Tarah Demant, *A Critique of the US Department of State 2017 Country Reports on Human Rights Practices* (May 8, 2018).[68] The report on El Salvador, for instance, does not include any "discussion of how gangs force women and girls into what amounts to sex slavery." *Id.* And to take just one of many more examples, the report on Peru failed to "mention[ ] the almost total lack of judicial response to the vast majority of registered complaints." *Id.*

Moreover, the situation has not improved since 2017, as made clear by two new reports. A comprehensive review of the State Department reports for five countries in 2017, 2018, and 2019 has found that "most of the changes" made between 2016 and 2017 "were repeated in the subsequent reports." Asylum Research Centre, *Comparative Analysis: U.S. Department of State's Country Reports on Human Rights Practices (2016-2019)*, Summary at 8 (Oct. 2020).[69] And "the majority of

---

64 *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* ¶ 74.

65 *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* ¶ 66.

66 https://www.politico.com/story/2018/02/21/department-women-rights-abortion-420361.

67 https://assets.oxfamamerica.org/media/documents/Sins_of_Omission_April_2019.pdf.

68 https://medium.com/@amnestyusa/a-critique-of-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca.

69 The report is available in sections at https://asylumresearchcentre.org/publications/#ARC-reports. This comment incorporates, and places into the administrative record, all sections of the report.

issues omitted … related to those addressed in" the section on "Discrimination, Societal Abuses, and Trafficking in Persons," "in particular the subsections under *Women*." *Id.* The information omitted goes to the core of many types of gender-based asylum claims—information on "domestic violence and lack of reporting as well as cases being rarely brought to trial," "[c]ontinued practice of FGM[/C] in rural areas," "lack of state intervention in domestic violence cases," "the prevalence of rape and its underreporting," "sexual violence against women in military training camps," "legal restrictions on women's … rights," "continued violence inflicted on women by ISIS," "the underreporting of sexual and gender-based violence," a practice in which "family members, including women, are traded to settle disputes," and rape by police, among many other things. *Id.* at 8-9. Moreover, the reports also claim "improvements" in the situation in various countries "that were observed not to be consistent with the situation on the ground" (*id.* at 11), which is a kind way of saying that the reports include flat-out misinformation. And where the reports do disclose information about bad conditions, they now often baselessly cast implicit doubt on that information. *Id.* at 12-13.

The second new report demonstrates that the same kinds of differences exist between the 2016 country report on Honduras and the 2019 report on the same country. *See* CLINIC, *Department of State Country Report on Human Rights Practices: Honduras: Comparison Chart: 2016 and 2019* (Oct. 2020).[70] The 2016 report discusses the "serious and pervasive" problem of rape in Honduras; the 2019 report ignores the continued high incidence of rape and merely notes that it is outlawed. *Id.* at 9. Among many other changes, the 2019 report eliminates much discussion of discrimination against women; downplays the major problem of femicide; excuses the Honduran government's inability to protect its citizens; simply assumes the effectiveness of government programs, without any evidence or any analysis of the government's incentive to overstate that effectiveness; and repeatedly casts doubt on the experiences of those citizens. *See id.* at 2-13.

It is also worth noting that the State Department has claimed it removed information about gender-based violence from its reports because that information is "readily available from international organizations." Toosi, *supra*. The State Department, in other words, readily concedes that its reports are not comprehensive views of the issues that face survivors in other countries. For EOIR to treat them in any other way is perverse, arbitrary, and contrary to the evidence before the agency.

Other government reports have been subject to every bit as much political intervention as the State Department reports. Meddling by political appointees in the timing and content of DHS reports, including reports on countries that generate migrants, is commonplace. *See, e.g.*, Alex Ward, *What to make of the DHS whistleblower's shocking complaint*, Vox (Sept. 11, 2020);[71] Ken Dilanian, *DHS delayed intel reports on foreign powers trying to raise doubts about Biden, Trump health* (Sept. 2, 2020).[72] EOIR's own data releases have long been problematic and have lately included the "apparent reckless deletion of potentially irretrievable court records" on such "a scale that little faith can be placed in the factual accuracy of reports" the agency publishes. TRAC, *EOIR's Data Release on*

---

[70] https://cliniclegal.org/resources/asylum-and-refugee-law/clinic-department-state-shifts-human-rights-reports-comparison.

[71] https://www.vox.com/21429671/whistleblower-dhs-russia-interference-border-chad-wolf.

[72] https://www.nbcnews.com/politics/2020-election/dhs-has-delayed-intel-report-foreign-powers-trying-raise-doubts-n1239067.

Asylum So Deficient Public Should Not Rely on Accuracy of Court Records (June 3, 2020).[73] And given that political interference in the Department of Justice is also rife (*see, e.g.*, Jacqueline Thomson, *'Afraid of the President': Ex-Mueller Prosecutor to Testify to Political Interference in Roger Stone Sentencing Memo*, Law.com (June 23, 2020);[74] Quint Forgey, *Government watchdogs slam DOJ's opinion on whistleblower report*, Politico (Oct. 25, 2019)[75]), there is no basis for believing that reports originating from other DOJ components are presumptively reliable.

Against all of this evidence of political meddling and of crucial omissions in government reports, the NPRM offers nothing at all. It provides no evidence or argument to back its proposal that U.S. government reports, and U.S. government reports alone, should be treated as presumptively reliable—because no plausible justification for that rule exists. The NPRM is therefore arbitrary.

Nor does the NPRM provide any reason why reports produced by non-governmental organizations or international organizations should be presumed less credible. Rather, it asserts that such reports are "not necessarily" always "helpful." 85 Fed. Reg. at 59,695. And it backs that assertion solely with a court opinion holding that private reports, standing alone, do not constitute "condemn[ation] by the international community." *M.A. v. INS*, 899 F.2d 304, 312-13 (4th Cir. 1990) (en banc). In other words, the NPRM offers only speculative hedging backed by a single inapposite authority. That is arbitrary, and the NPRM's misreading of *M.A.* as relevant here underscores the point that pronouncements by the U.S. executive branch cannot be treated as presumptively trustworthy.

Finally, we note that the NPRM provides no guidance at all to immigration judges on what reports should be deemed "credible and probative." 85 Fed. Reg. at 59,699. That failure, too, renders the NPRM arbitrary in violation of the APA. The anti-respondent animus exhibited by many immigration judges (*see* Section III.C.1, *supra*) makes very likely that interpretation of this phrase will be inconsistent—and in some courtrooms, rarely if ever favorable to respondents. And there is no reason to think those disparities will not spill over into the decisions the NPRM would foist upon immigration judges, who are not experts in the conditions in other countries or in the analysis of social science reports.

---

73 https://trac.syr.edu/immigration/reports/611/.

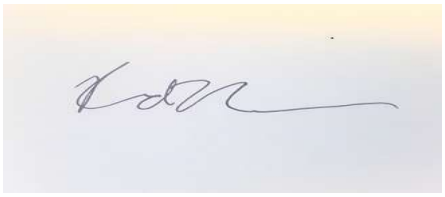
74 https://www.law.com/nationallawjournal/2020/06/23/afraid-of-the-president-ex-mueller-prosecutor-to-testify-of-political-interference-in-roger-stone-sentencing-memo/.

75 https://www.politico.com/news/2019/10/25/doj-opinion-whistleblower-report-057612.

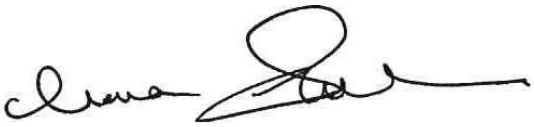
IV. Conclusion

The NPRM must be withdrawn in its entirety.

Sincerely,



Richard Caldarone
Litigation Counsel



Irena Sullivan
Senior Immigration Policy Counsel

/s/Julie Carpenter

Julie Carpenter
Senior Litigation Counsel