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725 17th Street NW
Washington, DC 20503
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

July 15, 2020

RE: RIN 1125-AA94/EOIR Docket No. 18-0002; A.G. Order No. 4714-2020; OMB Control Number 1615-0067; Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

Dear Assistant Director Reid:

HIAS and ADL (the Anti-Defamation League) jointly submit this comment in opposition to the Department of Justice's (DOJ, Executive Office for Immigration Review) and Department of Homeland Security's (DHS, United States Citizenship and Immigration Services) **Joint Notice of Proposed Rulemaking on Changes to Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (Rule)**.

The issuance of the Rule comes on the heels of the Administration's last three years of efforts to dismantle the U.S. asylum system. From attempts to ban people who entered the United States between Ports of Entry (POE), to banning individuals who transited through more than one country *en route* to the United States, gaining access to the U.S. asylum system has become exceedingly fraught with challenges. Perhaps there are no people who have felt these changes more acutely than the more than 65,000¹ individuals and families who, as a result of the Migration Protection Protocols (MPP), are now forced to languish in squalor in dangerous towns on the Mexico side of the border while their cases wind their way through the backlogged U.S.

¹ TRAC Immigration. (n.d.). "Details on MPP (Remain in Mexico) Deportation Proceedings." (n.d.). Retrieved July 2020, from <https://trac.syr.edu/phptools/immigration/mpp/>

immigration court system. The same could also be said of the more than 42,500² people who were turned away or promptly expelled from the U.S./Mexico border, on average in less than two hours, since the dawn of COVID-19.³

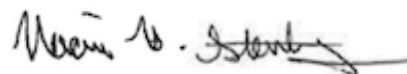
This Rule essentially takes many of the most egregious changes to the U.S. asylum system from the last three years, adds upon them, and when taken together, could effectively eliminate asylum eligibility for almost everyone who seeks it. We are particularly concerned about the proposed changes to basic refugee protection principles, many of which have been the cornerstone of U.S. and international refugee policy since the end of World War II. For example, changing the definition of “persecution,” and altering what “particular social group” means, would fundamentally gut longstanding U.S. refugee policy.

These exhaustive proposed regulations will punish people who are doing nothing more than exerting their legal right to seek protection in the United States. If implemented, access to the U.S. asylum system will be so limited as to render it essentially meaningless. For the reasons detailed in the comments that follow, DOJ and DHS should withdraw the entire Rule, and instead dedicate their efforts to advancing policies that respect the rights of individuals to seek asylum.

Please do not hesitate to contact us with questions or for further information.



Karen Levit, Esq.
National Civil Rights Counsel, ADL



Naomi Steinberg
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² U.S. Customs and Border Protection (n.d.). “Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions.” Retrieved July 2020, from <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>

³ Ibid.



**DETAILED COMMENTS in opposition to 8 CFR Parts 1003, 1208, and 1235
[RIN 1125-AA94/EOIR Docket No. 18-0002; A.G. Order No. 4714-2020] OMB Control
Number 1615-0067; Comments in Opposition to Proposed Rulemaking: Procedures for
Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review**

Our organizations, HIAS and ADL (the Anti-Defamation League), submit this comment urging the Department of Justice (DOJ) and Department of Homeland Security (DHS) to withdraw the Rule in its entirety.

HIAS, the American Jewish community's refugee organization, was founded in 1881. For much of our history, we assisted Jewish refugees. However, as the nature of refugee flows and crises changed, so did our work. We now work in 16 countries, with refugees, asylum seekers and other forcibly displaced people, of all faiths, from around the world. We also partner with the U.S. federal government, as well as 17 local organizations, and vast networks of community supporters, in welcoming resettled refugees to the United States.

HIAS also seeks to secure various forms of humanitarian relief for the clients we serve in the New York and Washington, DC metro areas. Our clients include asylum seekers, as well as abused and neglected children, and survivors of human trafficking and other violent crimes. Many of our clients are children and women who were forced to flee gang violence, as well as LGBTQ individuals whose governments refused to protect them. In addition, HIAS serves asylum seekers on both sides of the U.S./Mexico border. Through our robust pro bono program, and with the assistance of our four offices in Mexico, we provide legal support services to asylum seekers stuck in MPP and refer cases to our legal fellows on the U.S. side of the border in California and Texas, as well as pro bono attorneys across the country.

ADL is a leading anti-hate organization founded in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment to all. We are rooted in a community that has experienced the plight of living as refugees throughout its history. ADL has advocated for fair and humane immigration policy since our founding and has been a leader in exposing anti-immigrant and anti-refugee hate that has poisoned our nation's debate.

We write today to oppose the Department of Homeland Security U.S. Citizenship and Immigration Services (USCIS) and the Department of Justice Executive Office for Immigration Review (EOIR) *Notice of Proposed Rulemaking on the changes to Procedures for Asylum and Withholding of Removal, Credible Fear, and Reasonable Fear Review*.

We are unable to comment on every proposed change in this sweeping Notice of Proposed Rulemaking, which covers a broad range of topics. The absence of discussion herein of a specific change to the law does not indicate agreement with that change. We oppose these regulations in their entirety and call upon DOJ and DHS to withdraw them.

We Object to the Agencies Only Allowing 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (“Notice”) and Refusing Requests for an Extension to Allow at Least 60 Days to Respond

Per the Administrative Procedure Act (APA), typically, the public is given 30-60 days to review and provide comments for proposed rules. For particularly complex rules, such as the one that is the subject of our comment, agencies can allow for 180 days, or more, for comment.⁴ However, with no provided justification, this time the public was only given 30 days to submit comments. The abbreviated comment period does not meet the purpose outlined in the APA, which primarily is (1) “to ensure that agency regulations are tested via exposure to diverse public comments; (2) to ensure fairness to affected parties; and, (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”⁵

⁴ The Office of the Federal Register. (n.d.) “A Guide to the Rulemaking Process.” Retrieved July 2020, from https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf

⁵ *Capital Area Immigrants’ Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72, 24-25 (D.D.C. June 30, 2020).

As discussed in detail below, the effect of the proposed regulations will be to completely eviscerate asylum protections in the United States. These regulatory changes would rewrite the laws adopted by Congress, undermine our international treaty obligations, and would be the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). The Notice is over 160 pages long, more than 60 pages of which are the proposed regulations themselves. These regulations largely consist of dense, technical language and sweeping new restrictions that have the power to send the most vulnerable people back to countries where they may face persecution, torture, or death. Any one of the sections of these regulations, on its own, would warrant 60 days for the public to thoroughly absorb the magnitude of the changes it proposes, perform research on the existing rule and its interpretation, and respond thoughtfully. Instead, the agencies have allowed a mere 30 days to respond to multiple, unrelated changes to the asylum rules, issued in a single, mammoth document.

It would be wrong for the government to allow such a short time period for the public to comment on changes this extensive and varied under any circumstances, let alone when the stakes are as high as they are with this Rule. Furthermore, U.S. borders are already essentially closed to asylum seekers under the guise of the COVID-19 pandemic. There is no necessity to rush through a Rule that seeks to shut down the U.S. asylum system. Due to the gravity of the Rule, and the lack of adherence to the APA, we ask the Departments to rescind it. If that does not happen, at a minimum, we ask that the Departments extend the comment period for an additional 30 days. If that also does not happen, HIAS and ADL emphasize that our comment does not represent the extent of our analysis, and it should not be construed as being supportive of any part of the Rule.

We Strongly Object to the Substance of the Proposed Rule and Urge the Administration to Rescind it in its Entirety

Although we strongly object to the agency's unreasonable 30-day timeframe for comment submission, we feel compelled to submit this comment because the proposed regulations will utterly obliterate existing asylum protections. These regulations will leave a larger percentage of those fleeing harm in a permanent state of limbo if they are even able to meet the higher legal

standard to qualify for withholding of removal under INA § 241(b)(3). This, the best-case scenario, will nonetheless lead to permanent family separations since withholding of removal leaves no avenue to petition for derivative beneficiaries. In a country that has, since 1980, made a codified commitment to make asylum accessible, this is an unacceptable outcome.

United States Asylum Law Has Already Strayed Far From Our Obligations Under International Treaties, Returning to This Country’s Shameful History of Turning Away Displaced People

ADL and HIAS are mindful that Jews have a long history of displacement throughout the world. Many Jewish American families first came to this country as refugees and asylum seekers. We are also acutely aware of what happens when the United States flatly denies asylum to displaced persons without consideration for the harm they may face once turned away from this country’s protection, for the incident of the *St. Louis* is burned into our collective memory.

In 1939, the German ship *St. Louis* sailed for Cuba carrying 937 passengers. Almost all of them were Jews fleeing Nazi Germany. Most of the Jewish passengers had applied for U.S. visas and were planning to stay in Cuba only until they could enter the United States. However, political conditions in Cuba changed abruptly just before the ship sailed and only 28 passengers were actually admitted by the Cuban government. The remaining 908 passengers (one died in transit) were left in limbo – unable to disembark and be admitted to Cuba and terrified of turning back. The *St. Louis* was ordered out of Cuban waters on June 2, 1939 and sailed so close to Miami that passengers could see its lights. Some of them cabled President Franklin D. Roosevelt asking for refuge. He never responded. Instead, the State Department sent a passenger a telegram stating that passengers must “await their turns on the [visa] waiting list and qualify for and obtain immigration visas before they may be admissible into the United States.”⁶

The asylum seekers aboard the *St. Louis* had no choice but to return to Europe. Notably, they did not return to Germany. Jewish organizations were able to negotiate with four European governments to secure entry visas for the passengers. Germany invaded Western Europe in May

⁶ United States Holocaust Memorial Museum, Holocaust Encyclopedia. (n.d.). “Voyage of the St. Louis,” Retrieved July 2020 from, <https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis>.

1940, trapping 532 former *St. Louis* passengers. About half – 254 people – were murdered in the Holocaust.⁷

Since that fateful decision, the United States joined countries around the world in affirming that the global community could not allow forced displacement crises like that precipitated by World War II to happen again, and committed to respecting the rights of those seeking safety. Part of this process included agreement upon the recognized definition of who a refugee is and what States' obligations to refugees are. The United States is a signatory to the 1967 *Protocol Relating to the Status of Refugees*,⁸ which binds parties to the United Nations *Convention Relating to the Status of Refugees* (“Refugee Convention”).⁹ This obligates the U.S. to comply with the principle of *non-refoulement* – an asylum seeker cannot be sent to another territory or state where they fear threats to their life or freedom on protected grounds. Although the Refugee Convention allows signatory states to exclude and/or expel asylum seekers, this is only permitted in limited circumstances.

Under the Refugee Convention, a person can only be excluded and/or expelled if that person, “having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”¹⁰ This is only meant to be applied in “extreme cases” in which the particularly serious crime committed is a “capital crime or a very grave punishable act.”¹¹ The United Nations High Commissioner for Refugees (UNHCR) has further elucidated what qualifies as a particularly serious crime. To be considered a particularly serious crime, the crime “must belong to the gravest category” and be limited “to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum.”¹² Even if an asylum seeker has been convicted of a particularly

⁷ *Id.*

⁸ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

⁹ Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954.

¹⁰ *Id.* at art. 33(2).

¹¹ U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* 2, U.N. Doc. HCR/IP/Eng/REV. ¶ 154-55, (1979, reissued 2019).

¹² U.N. High Commissioner for Refugees (UNHCR), *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 7 (July 2007), <http://www.unhcr.org/enus/576d237f7.pdf>.

serious crime, an adjudicator considering whether an individual should be barred from protection for that conviction must conduct an individualized analysis and consider any mitigating factors.¹³

It was not until 1980 that the United States asylum system was codified in statute through the Refugee Act.¹⁴ Along with other measures designed to bring the U.S. domestic legal code into compliance with the Refugee Convention, the Refugee Act adopts the internationally accepted definition of “refugee” and the five recognized grounds upon which refugee claims are based. HIAS and ADL fear that ultimately the Rule would force individuals who meet the historically and globally accepted refugee definition to return to the countries from which they fled. This would be in direct contravention of the United States’ obligation to comply with the principle of *non-refoulement*.

The Rule’s Proposed Changes to Credible Fear Interviews Undermine Their Very Purpose

The credible fear interview is meant to be a first step towards asylum, not a barrier. Credible fear interviews are preliminary screenings for people who are subject to expedited removal proceedings at or near the border. Currently, anyone subject to expedited removal must prove to an asylum officer that they have a “credible fear” of persecution in their country of origin. “Credible fear” is intended to be a low bar - a screening tool. Those who pass this low bar can then proceed with their claim for asylum or any other applicable form of immigration relief in front of an immigration judge.

The Trump Administration has already expanded “expedited removal” away from the borders to allow immigration agents to pick up any person, anywhere in the country, and deport them without judicial review - unless that person can convince the immigration agent that they are a citizen or have some lawful status in the United States. In September 2019, a D.C. District Court judge issued a preliminary nationwide injunction temporarily stopping the Administration from expanding the application of expedited removal in this way.¹⁵ However, a federal court of

¹³ *Id.* at ¶ 10-11; U.N. High Commissioner for Refugees, *The Nationality, Immigration and Asylum Act 2002: UNHCR Comments on the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004*, 4 (2004).

¹⁴ National Archives Foundation. (n.d.). “Refugee Act of 1980.” Retrieved July 2020, from <https://www.archivesfoundation.org/documents/refugee-act-1980/>

¹⁵ *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019).

appeals recently lifted the injunction, clearing the way for the Administration to move forward with this brutal exercise.¹⁶

It is against this backdrop that the Rule seeks to change the standard for credible fear interviews, making it harder for asylum seekers to have their request for asylum considered by an immigration judge. The standard for the credible fear interview is that an asylum seeker would face a “significant possibility” that they could establish in a hearing before an immigration judge that they have been persecuted, or have a well-founded fear of persecution or harm, on account of one of the five grounds upon which refugee claims are based. This bar is intentionally set low so that those with valid asylum claims will not be deported before they can make their case. This proposed rule redefines the “significant possibility” standard to mean “a substantial and realistic possibility of succeeding.” This higher standard is in direct contradiction to the language that Congress set forth at INA Section 235(b)(1)(B)(v) and is therefore *ultra vires*. As in many other sections (including redefining persecution, discussed below), here the Rule oversteps the rightful bounds of the Administration’s authority. This proposed change will also make it easier for immigration agents to deny asylum without a hearing – a development with significant due process implications.

This change to the credible fear standard is just one example of how the Rule aims to upend the asylum system by making it nearly impossible for applicants to qualify. A more stringent definition of “credible fear” at an early stage when applicants are often detained and rarely represented by counsel all but guarantees an increase in the number of denials at this crucial phase. Yet this is just one early obstacle that the Rule puts in the path of the asylum seeker. Those who do make it past their credible fear interviews still have to convince an immigration judge that they have grounds for asylum protection.

The Rule Significantly Restricts Particular Social Group Claims-(8 CFR § 208.1(c); 8 CFR § 1208.1(c))

One of the Rule’s most expansive proposed changes is the tightening of the “particular social group” (PSG) ground for asylum protection. As defined in the Refugee Act of 1980 and the 1951

¹⁶ *Make the Rd. N.Y. v. Wolf*, No. 19-5298, 2020 U.S. App. LEXIS 19460 (D.C. Cir. June 23, 2020).

Convention, a refugee is “any person who is outside of his country of nationality, and who is unable or unwilling to return to such country because of persecution or a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group.”¹⁷ According to the *United Nations High Commissioner for Refugees (UNHCR) Guidelines on International Protection*, “The term membership in a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”¹⁸

However, rather than adhering to the original intent behind the PSG ground, the Rule introduces a litany of the types of asylum claims that will categorically no longer meet the newly restricted PSG parameters and would require DHS and DOJ to “not favorably” adjudicate claims based on (but not limited to) the following:¹⁹

- Past or present involvement in criminal activity
- Presence in a country with generalized violence or a high crime rate
- The attempted recruitment of the applicant by criminal, terrorist, or persecutory groups
- Targeting of the applicant for criminal activity for financial gain, based on perceptions of wealth
- Interpersonal disputes of which governmental authorities were unaware or uninvolved
- Private criminal acts of which governmental authorities were unaware or uninvolved

Even from the most cursory examination of this list, it is clear that the proposed PSG changes target asylum seekers from the Northern Triangle countries of El Salvador, Honduras, and Guatemala, countries in which generalized violence is widespread and criminal gangs control significant amounts of territory. At this time last year, 75% of all Customs and Border Protection (CBP) apprehensions were of people from Northern Triangle countries.²⁰

¹⁷ See INA 101(a)(42), 8 U.S.C. 1101(a)(42); see also INA 208(b)(1)(A) and 241(b)(3)(A), 8 U.S.C. 1158(b)(1)(A) and 1231(b)(3)(A).

¹⁸ The U.N. Refugee Agency. (n.d.). “Guidelines on International Protection.” Retrieved July, 2020, from <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>

¹⁹ Proposed Rule §5(B)(2)(C)(1); Notice at 50.

²⁰ Nowrasteh, A. (2019, June 07). “1.3 Percent of All Central Americans in the Northern Triangle Were Apprehended by Border Patrol This Fiscal Year – So Far.” Retrieved July 2020, from

In addition to severely curtailing the flexibility of this category from a substantive perspective, there are also significant procedural challenges to the new, proposed interpretation of PSG. For example, the Rule states that, “A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.”²¹

This provision would require asylum seekers to immediately and precisely state the details of their PSG claims, and if they are unable to do so, they will not be able to present those claims moving forward in their appeals process. This is particularly damning for the estimated 84% of detained immigrants who do not have access to legal representation,²² and for LGBTQ asylum seekers, in particular, for whom telling their stories to authority figures has historically been an extremely risky proposition. Due to these due process concerns, an asylum seeker could be forcibly returned to their country of origin, because without competent legal assistance, they are unable to articulate, in English, the many intricacies of their PSG claims in such a way that they would meet these extremely complicated legal requirements.

We are also concerned about the proposed drastic changes to PSG as a ground for asylum claims because of the impact these changes would have on LGBTQ asylum seekers. Since 1991, the U.S. has recognized that persecution based on one’s sexual orientation can form a legally cognizable asylum claim, and for more than a decade, HIAS has provided specialized mental health and legal support services to LGBTQ refugees and asylum seekers. In many countries, LGBTQ individuals are unable to report to the police the violence that they experience because police are often the perpetrators of violence themselves.²³ In addition, legal and criminal justice systems in the region do not protect LGBTQ people. For example, in El Salvador, “only 12 out

<https://www.cato.org/blog/13-percent-all-central-americans-northern-triangle-were-apprehended-border-patrol-fiscal-year>

²¹ Proposed Rule §§ 208.1(c), 1208.1(c); Notice at 55–56.

²² Nájuez, D. (2018, August 22). Without legal representation, migrants face long odds on immigration, asylum claims. Retrieved July 2020, from <https://www.azcentral.com/story/news/politics/immigration/2018/08/15/without-lawyer-asylum-seekers-face-long-odds/850625002/>

²³ Feliciano, I., & Green, Z. (2019). *LGBTQ asylum seekers persecuted at home and in U.S. custody* [Video file]. Retrieved 2020, from <https://www.pbs.org/newshour/show/lgbtq-asylum-seekers-persecuted-at-home-and-in-u-s-custody>

of 109 LGBTQ murders between December 2014 and March 2017 went to trial...and there has never been a successful conviction.”²⁴

According to the *Sixth Snapshot on Violence and Protection in North of Central America*, an initiative of the REDLAC Regional Protection Group, led by the Norwegian Refugee Council, seeking safety in another country is sometimes the only available option for LGBTQ individuals. An estimated 88% of LGBTQ asylum seekers from the Northern Triangle have experienced sexual and gender-based violence in their communities.²⁵

The Rule’s restrictions for “[p]rivate criminal acts of which governmental authorities were unaware or uninvolved,” and “past or present criminal activity” will leave many LGBTQ asylum seekers vulnerable to unjust denials of their cases. The Rule could strip away access to asylum for people who are fleeing persecution, or fear persecution, at the hands of private actors, even where government forces permit private actors to persecute this community with impunity. Essentially, if an LGBTQ individual is not directly harmed by their government, the Rule says that they are not eligible for asylum because the persecution from which they suffer is merely “private acts.” This is an outrageous and devastating revision, because while the violent acts that target LGBTQ individuals sometimes occur behind closed doors, they are not “private” acts. They are an extension of historical persecution of LGBTQ individuals, deeply entrenched in these societies and continuously upheld by governments and justice systems. LGBTQ individuals are at risk because of immutable characteristics that they cannot change, nor should they be expected to; and, it is these very characteristics that fall beyond the norms of what their families and governments deem acceptable. Systemic and entrenched homophobia and transphobia results in persecution based on individuals’ fundamental identities, and these new PSG restrictions would remove a lifesaving pathway to safety for those who need it the most. From its extensive work with LGBTQ refugees, HIAS understands that this would be a crippling development for LGBTQ people, many of whom flee because of the violence that they

²⁴ Lopez, O. (2019, November 22). “Pressure mounts for El Salvador to investigate wave of LGBT+ killings.” Retrieved July 2020, from <https://www.reuters.com/article/us-el-salvador-lgbt-murder-trfn/pressure-mounts-for-el-salvador-to-investigate-wave-of-lgbt-killings-idUSKBN1XW01G>

²⁵ Norwegian Refugee Council. "The impact of violence on LGBTI people in the North of Central America, September 2019 - Guatemala." (2019, November 15). Retrieved July 15, 2020, from <https://reliefweb.int/report/guatemala/impact-violence-lgbti-people-north-central-america-september-2019>

experience at the hands of relatives and community members. These provisions would nullify the legal standards upon which LGBTQ asylum seekers have previously been granted asylum in the United States.²⁶

A Laundry List of Anti-Asylum Provisions: Changing What “Nexus” Means-8 CFR § 208.1(f); 8 CFR § 1208.1(f)

LGBTQ asylum seekers, as well as all others, would also be negatively affected by the proposals included in the “Nexus” section of the Rule. The Immigration and Nationality Act (INA) codifies that asylum applicants must show that their claim is based on a protected ground that is “at least one central reason” for their persecution or well-founded fear of persecution.²⁷ Ignoring Congressional intent clearly written into the INA, the Rule proposes a series of situations in which an applicant would categorically fail to establish that the persecution they suffered or fear is on account of, has a nexus to, a protected ground.²⁸

The Rule is clear in its intention to nullify protection for survivors of gender-based violence, whose asylum claims must establish that the harm they suffered or fear is “on account of” a protected ground, and not exacted for other reasons. This nexus argument is not limited to gender-based asylum claims though. The Rule states that asylum claims will also fail if they are based on “interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged PSG in addition to the member who has raised the claim at issue.”²⁹ Violence that targets LGBTQ people or women (due to their gender) is frequently based in part on personal animus, but such persecution is also largely based in deeply entrenched social norms. Ignoring the greater sociopolitical context, one could presume that personal animus is at the root of almost all forms of persecution. In addition, there is quite simply no U.S. law or international treaty that states that someone who has been persecuted, or is afraid of being persecuted, must show that other people have also been persecuted in order to receive asylum. It is an unreasonable standard to expect that an asylum seeker should have to be

²⁶ Cory, C. (2019). “The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities.” *Georgetown Journal of Gender and Law*, XX:577. Retrieved July 2020, from <https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2019/05/CONNOR-CORY.pdf>

²⁷ 8 U.S.C. § 1158(b)(1)(B)(i)

²⁸ See Proposed Rule § 208.1(f)(1)(i)–(viii); Notice at 36281.

²⁹ See Proposed Rule § 208.1(f)(1)(i); Notice at 63.

able to document that their persecutor has also targeted other similarly situated people or has a proven animus against them. Furthermore, if an LGBTQ individual is savagely beaten because of their identity, for example, but the attackers have not attacked other LGTBQ people before, then the asylum seeker's claim could be denied due to a lack of nexus to a protected ground.

Other claims based on "pernicious cultural stereotypes," such as *machismo*, will also likely be denied under the new Rule. The danger in provisions like these are very clear to service providers, like HIAS, that have experience working with LGBTQ refugees. For example, HIAS interviewed LGBTQ refugees and asylum seekers in Chad, Kenya, South Africa and Uganda for its report, "*Triple Jeopardy: Protecting At-Risk Refugee Survivors of Sexual and Gender-Based Violence.*" One of the service providers with whom HIAS spoke clearly articulated the problem this rule will present for LGBTQ asylum seekers when she said, "Anybody who doesn't conform to society's idea of what it means to be female, what it means to be male; anybody who challenges society's understanding of masculinity, gender; anybody who transgresses that runs the risk of being violated and puts themselves in harm's way."³⁰

The same is true of LGBTQ asylum seekers from the Northern Triangle, where "heteronormativity" is the accepted social standard. For example, in Honduras, 88% of the populations believes that homosexuality is immoral, and in Guatemala, the President himself declared that "no one is obligated to accept non-heterosexual conducts(s) and practices as normal."³¹ Furthermore, the gangs that control vast swaths of territories in all three Northern Triangle countries are well-known for their obvious displays of *machismo*. LGBTQ individuals face higher chances of falling victim to gang violence, and in some particularly galling cases, their persecution has taken the form of torture, mutilation, and homophobic messages scrawled across their bodies.³²

Anti-Asylum Measures Under the Guise of "Discretion"- 8 CFR § 208.13; 8 CFR § 1208.13

³⁰ HIAS. "Triple Jeopardy: Protecting At-Risk Refugee Survivors of Sexual and Gender-Based Violence." (n.d.) Retrieved July 2020, from https://www.hias.org/sites/default/files/hias_-_triple_jeopardy_-_full_report.pdf

³¹ Norwegian Refugee Council. "The impact of violence on LGBTI people in the North of Central America, September 2019 - Guatemala." (2019, November 15). Retrieved July 15, 2020, from <https://reliefweb.int/report/guatemala/impact-violence-lgbti-people-north-central-america-september-2019>

³² Ibid.

The Rule does not just tamper with well-recognized legal refugee protection standards and definitions. It also attempts to invalidate decades of case law and court rulings that underscore the unique situations of asylum seekers and the importance of adjudicators using discretion with the review of each case.³³ In the case of *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987), the court found that “the danger of persecution should generally outweigh all but the most egregious of adverse factors.” Ignoring these rulings, the Rule would limit adjudicators’ ability to use their discretion while deciding complex asylum cases.

A primary example of the new discretionary guidelines is that an asylum seeker who tries to, or is able to, enter the United States between Ports of Entry (POE) could be denied protection from persecution based solely on how they entered the United States. Adjudicators would be required to consider crossing between POEs as a “significant adverse factor,” and would be encouraged to deny asylum to these asylum seekers. DHS and DOJ included this provision despite an August 2019 decision in the Federal District Court for the District of Columbia finding that the Trump Administration policy categorically denying asylum to people who entered the U.S. between POEs was illegal. In the decision, District Judge Randolph Moss stated, “Aliens have a statutory right to seek asylum regardless of whether they enter the United States at a designated port of entry, and defendants may not extinguish that statutory right by regulation or proclamation.”³⁴

The Rule also says that asylum seekers who spend at least 14 days in another country (or countries) in transit to the United States could be denied asylum on a discretionary basis. It is no coincidence that the application of these rules, in tandem, could result in the discretionary denial of asylum for most asylum seekers who cross through Mexico in their journey to the United States. Due to the “metering” lists³⁵ at POEs that force asylum seekers to wait for weeks or months to formally file an asylum claim, asylum seekers will now be in the untenable situation of either waiting in Mexico for well over 14 days, or attempting to enter the U.S. between POEs. It is also worth noting that many asylum seekers who make the difficult choice to enter the U.S. between POEs are not doing so with the intention of evading authorities, but rather, out of

³³ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423, (1987).

³⁴ Alvarez, P. (2019, August 02). “Trump asylum ban is illegal, federal judge rules.” Retrieved July 2020, from <https://www.cnn.com/2019/08/02/politics/trump-asylum-ban-ruling/index.html>

³⁵ Currently on hold due to COVID-19

desperation, fleeing dangerous circumstances. Recent trends indicate that most asylum seekers promptly seek out Customs and Border Protection (CBP) agents once in the United States.³⁶

The 1951 Refugee Convention, the 1967 Protocol, and the Refugee Act of 1980 are unequivocal in their assertion that individuals have the right to request asylum protection at POEs or after entering their destination country.³⁷ Article 31 of the Refugee Convention states that “The contracting States shall not impose penalties on account of their illegal entry or presence on refugees who, coming directly from a territory where their life or freedom was threatened...or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”³⁸

This principle was underscored by the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), of which the United States is a member, when it stated that asylum seekers “should not be penalized or exposed to any unfavorable treatment” because of their “unlawful” presence in a country.³⁹ In addition, the Refugee Act states that, “Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival...), irrespective of such alien’s status, may apply for asylum. Furthermore, longstanding U.S. case law illustrates the same principle. In *Matter of Pula*, the Board of Immigration Appeals held that the way an asylum seeker enters the United States “should not be considered in such a way that the practical effect is to deny relief in virtually all cases.”⁴⁰

This foundational protection principle is meant to guarantee that people who have a credible fear of persecution in their countries of origin are not forcibly returned or denied the opportunity to make their asylum claims based on the circumstances of their fleeing to safety. Ultimately, it is not up to any administration to decide if a persecuted individual is allowed to access the U.S.

³⁶ Anderson, S. (2019, March 07). “What The Latest Border Statistics Really Mean.” Retrieved July 2020, from <https://www.forbes.com/sites/stuartanderson/2019/03/07/what-the-latest-border-statistics-really-mean/>

³⁷ 8 U.S.C. § 1158(a)(1)

³⁸ Goodwin-Gill, G. (2001). “Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection.” Retrieved July 2020, from <https://www.unhcr.org/3bcfdf164.pdf>

³⁹ UNHCR Executive Committee. (1981, October 21). “Protection of Asylum-Seekers in Situations of Large-Scale Influx.” Retrieved July 2020, from <https://www.unhcr.org/en-us/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html>

⁴⁰ *Matter of Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987).

asylum system. That right has been articulated by international bodies, affirmed by the U.S. government, and protected in U.S. law by Congress.⁴¹

The Rule Defies Case Law by Redefining Persecution to Preclude a Fact-Specific Analysis

The Proposed Rule would restrict asylum eligibility by establishing a strictly regulatory definition of “persecution” that precludes fact-specific analysis - a legal first in our asylum system. This would run contrary to the very nature of seeking asylum, which is premised on the specific facts of how one has been or may be harmed in the land which one fled.

Under this Rule’s new definition, “persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization the government was unable or unwilling to control.” Further, persecution would now need to include “actions so severe that they constitute an exigent threat,” but would not include “generalized harm that arises out of civil, criminal or military strife . . . intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; of non-severe economic harm or property damage.” Finally, the Rule asserts that “the existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.” This strict, regulatory definition of persecution is at odds with the reality that asylum cases are inherently fact-specific; it will inevitably result in the erroneous and unjust denial of protection to bona fide asylum seekers. Despite this significant departure from current practice and inevitable change in outcome, the Rule provides no rationale for the decision.

Moreover, there is a substantive body of case law that directly contradicts this proposed definition of “persecution.” To address just one portion of the definition, there is a near-consensus finding that threats can rise to the level of persecution when accompanied by some

⁴¹ See, e.g., Federal Defendant’s Reply Brief in Support of Motion for Summary Judgment and Dismissal for Lack of Jurisdiction, cited in *Munyua v. United States*, 2005 U.S. Dist. LEXIS 11499, at *16–19 (N.D. Cal. Jan. 10, 2005) (“[D]efendant acknowledges that [the immigration officers] did not have the discretion to ignore a clear expression of fear of return or to coerce an alien into withdrawing an application for admission.”).

evidence that the threat is serious and credible. For example, Celso Chavarria, a native of Guatemala, applied for asylum and withholding of removal based on threats arising from his witnessing two young women being attacked in Guatemala City by what he believed were paramilitary forces. He rendered assistance to the two women and an article subsequently appeared in the newspaper, from which he learned that the women belonged to a human rights organization that opposes the government, the National Coordination of Widows of Guatemala (“CONAVIGUA”). Subsequent to the article appearing in the paper, a paramilitary vehicle parked near his home. Later, he was robbed at gunpoint and told that “if we ever see you again, you're not going to even live to tell the story.”⁴² The Third Circuit ruled that this threat rose to the level of persecution “because it was both highly imminent, concrete and menacing and Chavarria suffered harm from it. In addition, the threat was carried out on account of an imputed political opinion that Chavarria was supportive of the CONAVIGUA movement.”⁴³

Other courts have similarly found that threats can rise to the level of persecution. The First Circuit has found that “credible, specific threats can amount to persecution if they are severe enough.”⁴⁴ In the Second Circuit, “‘unfulfilled’ threats alone generally do not rise to the level of persecution,” but an applicant can meet the threshold of demonstrating persecution if they can provide “objective evidence that the threat was so ‘imminent or concrete,’ or ‘so menacing’ as itself to cause ‘actual suffering or harm.’”⁴⁵ The Sixth Circuit has similarly ruled that physical abuse is not an absolute requirement for a finding of persecution and that threats alone can be sufficient for such a finding if they are “of a most immediate and menacing nature.”⁴⁶ The Seventh Circuit has established a clear test for determining whether threats are sufficient to rise to the level of persecution: “credible threats of imminent death or grave physical harm can indeed be sufficient to amount to past persecution, provided they are credible, imminent and severe.”⁴⁷ The Eight Circuit has held that even one incident of a threat might be sufficient for a finding of persecution: “We have never held that a specific, credible, and immediate threat of death on account of political opinion is outside the definition of ‘persecution,’ just because it

⁴² *Chavarria v. Gonzalez*, 446 F.3d 508, 513 (3d Cir. 2006).

⁴³ *Id.* at 520.

⁴⁴ *Javed v. Holder*, 715 F.3d 391, 395-96 (1st Cir. 2013).

⁴⁵ *Scarlett v. Barr*, 957 F.3d 316, 328 (2d Cir. 2020)(internal citations omitted).

⁴⁶ *Antonio v. Barr*, 959 F.3d 778, 793 (6th Cir. 2020), quoting *Boykov v. INS*, 109 F.3d 413, 416 (7th Cir. 1997).

⁴⁷ *N.L.A. v. Holder*, 744 F.3d 425, 431 (7th Cir. 2014).

occurs during a single incident. We consistently have defined persecution to include ‘the infliction or threat of death’ on account of a factor enumerated in the statute, without any suggestion of a ‘pattern and practice’ requirement.”⁴⁸ Moreover, in that same case, the court emphasized the importance of a fact-specific analysis in determining which threats of death amount to persecution and which do not:

It may be that not all alleged threats of death necessarily amount to persecution. The situation may be different, for example, where a factfinder concludes that threats are exaggerated, non-specific, or lacking in immediacy, or where there is insufficient evidence that the threats are based on a ground enumerated in the statute. But by requiring the petitioners to show a “pattern and practice of mistreatment” in a case that does involve an alleged specific threat of imminent death based on political opinion, we believe that the immigration judge applied an impermissible definition of “persecution.”⁴⁹

Finally, the Tenth Circuit has found that, while threats alone are usually not sufficient to establish persecution, they can be “when they are so immediate and menacing as to cause significant suffering or harm in themselves [and] unfulfilled threats are still properly considered in determining whether a petitioner has a reasonable fear of future persecution.”⁵⁰ A regulatory definition of persecution that precludes “threats with no actual effort to carry out the threats” would fly in the face of clearly-established case law throughout the nation and deny the reality that asylum cases always hinge on a fact-specific analysis.

The Consequences of a Frivolity Finding Cannot Be Taken Lightly, Yet the Rule Proposes to Lower the Bar for Such a Finding

The INA has long imposed grave consequences for an applicant when an immigration judge determines that an asylum application is “frivolous”: not only is the application automatically denied, but that individual is then rendered *permanently* ineligible to receive asylum benefits. INA § 208(d)(6). The Board of Immigration Appeals (BIA), an administrative body that decides appeals of decisions made by immigration judges, has established a four-part test for a finding of frivolity. Such a finding can only be entered if: 1) the applicant has received notice of the

⁴⁸ *Corado v. Ashcroft*, 384 F.3d 945, 947 (8th Cir. 2004)(internal citations omitted).

⁴⁹ *Id.* at 947-48.

⁵⁰ *Vatulev v. Ashcroft*, 354 F.3d 1207, 1210 (10th Cir. 2003).

consequences of the finding; 2) the Judge has found the frivolity was knowing; 3) a material element of the claim was deliberately fabricated; and 4) the applicant has been given a sufficient opportunity to account for discrepancies or implausibilities in the claim.⁵¹

The Rule proposes to do away with these safeguards and substantially lowers the bar for immigration judges to find that applications are frivolous. This would open a broad swath of asylum seekers to summary denials and leave them subject to the whims of adjudicators, with significant consequences. The Rule would remove the existing requirements that a fabrication be “deliberate” and “material” in favor of a substitute that is long, vague, and likely to spur legal battles; encourage adjudicators to enter a finding of frivolity for applications submitted “without regards to the merit” or “clearly foreclosed by applicable law;” and strike the requirement that asylum seekers be provided an opportunity to explain any discrepancy or inconsistency in their submissions or arguments. The end result of these vague and punitive grounds for frivolity findings will be that asylum seekers have their cases deemed frivolous regardless of their actual merit, a substantial cause for concern on due process grounds.

Conclusion

The very premise of this Rule is faulty. The administration cannot overturn U.S. law and decades of case law simply by issuing a regulation. If implemented, the Rule would mark the downfall of the U.S. asylum system without authorization from Congress.

The changes that the Rule would reap upon the U.S. asylum system are illegal, and underlying that illegality is a core affront to our shared values as Jewish and American organizations, to “welcome the stranger” and respect due process and human rights.

Due to the sweeping nature of the Rule, it is easy to forget what these changes would mean to actual people. Each asylum denial that will result from the implementation of these regulations represents the story of an individual and a family, including individuals like S.F.F., an asylum seeker with whom HIAS works in Texas. Under the new Rule, she could be wholly unable to find safety in the United States.

⁵¹ *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007).

S.F.F. is from El Salvador. Over a period of several decades, the father of her three children viciously abused her. She is now in immigration detention in Texas. The Rule states that “in general,” DHS will “not favorably adjudicate the claims of [noncitizens] who claim persecution based on, “among other things, ‘gender.’”⁵² Her asylum claim is largely based on the persecution she suffered at the hands of her ex-partner due to her gender, and the Salvadoran government’s failure to protect women like her from domestic violence. In addition, because interpretation of the Rule would require the denial of cases in which “interpersonal disputes of which governmental authorities were unaware or uninvolved,” and “private criminal acts of which governmental authorities were unaware or uninvolved,” two additional significant barriers for women who flee from domestic violence, S.F.F.’s claim could be barred altogether.

In addition to the core of her asylum claim, S.F.F. was kidnapped by cartel members as she crossed from Mexico into the United States and was then raped by the cartel as in-kind payment for her passage. Regardless of these horrific circumstances, the Rule would mandate that an immigration judge consider denying asylum to S.F.F. and others like her because she entered the U.S. between official POEs. As stated above, even though it is enshrined in U.S. law that it is legal to seek asylum no matter how one enters the country, under the new rule, S.F.F. could be denied asylum because of how she arrived in the United States.

When all of its provisions are taken together, the Rule would demolish the U.S. asylum system and the hopes of people like S.F.F. to rebuild their lives in safety, free from persecution. HIAS and ADL recommend that DHS and DOJ immediately rescind the Rule in its entirety and adhere to the U.S. law and international treaties that have formed the foundation for our country’s refugee protection system for decades.

⁵² Proposed Rule § 208.1(f)(1)(viii); Notice at 64–65.