



July 15, 2020

Lauren Alder Reid
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Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: RIN 1125-AA94 / EOIR Docket No. 18-00002

Dear Ms. Reid:

The Women's Refugee Commission ("WRC") writes to comment upon the joint notice of proposed rulemaking issued by the Department of Homeland Security and Department of Justice (the "Departments") on June 15, 2020, entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" (the "Proposed Rule").

The Proposed Rule would put in place an unprecedented array of new standards and requirements that will make asylum and withholding of removal unavailable to many applicants who face persecution for their beliefs, actions and identity, and who would previously have been eligible for relief. The result will be that many, including many women and children, will suffer persecution and death, even though our country's laws provide for relief. The Proposed Rule is contrary to our nation's laws, and a dramatic departure from its tradition as a place of refuge for those who are prosecuted for what they believe or simply who they are.

The limited duration of the comment period and the overwhelming scope of the proposed changes makes it impossible for WRC to respond fully to each aspect of the Proposed Rule. We therefore focus in these comments on the aspects of the Proposed Rule that will most directly and profoundly impact applicants fleeing gender-based violence or discrimination.

I. The Women's Refugee Commission and the Migrant Rights and Justice Program

The WRC is a non-profit organization that advocates for the rights of women, children, and youth fleeing violence and persecution. We are leading experts on the needs of refugee women and children and the policies and programs that can protect and empower them. The Migrant Rights and Justice (MRJ) Program focuses on the right to seek asylum in the United States and strives to

ensure that refugees, including women and children, are provided with humane reception in transit and in the United States, given access to legal protection, and protected from exposure to gender discrimination or gender-based violence.

Since 1996, the MRJ team has made numerous visits to the southwest border region, including along Mexico's northern border, as well as to immigration detention centers for adult women and families and to shelters housing unaccompanied children throughout the country. Based on the information that we collect on these visits and our analysis of the laws and policies relating to these issues, we advocate for improvements, including by meeting with government officials and service providers and by documenting our findings through fact sheets, reports, backgrounders, and other materials. We make recommendations to address identified or observed gaps or ways in which we believe the corresponding department or agency can improve its compliance with the relevant standards.

WRC's work and comment are informed directly by the experiences of detained women and the lawyers, social service providers, and others working to support them. For more than 20 years, WRC has interviewed hundreds of detained women seeking asylum in the United States whose cases we are confident would have been, or in some cases still might be, profoundly negatively impacted by the changes in the Proposed Rule.¹ WRC is gravely concerned that the Proposed Rule contravenes domestic and international law, and that it will place asylum and withholding of removal beyond the reach of essentially all applicants fleeing gender-based violence or discrimination. WRC urges the Departments to withdraw the Proposed Rule immediately.

WRC is also deeply concerned about the impact the Proposed Rule would have on the ability to seek asylum for those in immigration detention. There is an extensive body of evidence demonstrating the deeply harmful impact of immigration detention on individuals, including asylum seekers.² Detention is traumatizing, especially where a person has already experienced past trauma potentially impacting one's ability to recount one's case to an asylum officer or immigration judge.³ Detention also creates numerous obstacles to a fair immigration process, including an inability to access counsel, a lack of interpretation, immigration proceedings conducted by phone or video that impede the ability to fully make one's case for protection, an inability to obtain needed evidence. For example, WRC has visited multiple detention facilities where the spaces used for telephonic credible fear interviews are incredibly small, uncomfortable,

¹ Reports of our findings include: Women's Refugee Commission, *Prison For Survivors: The Detention of Women seeking Asylum in the United States*, (2017); Women's Refugee Commission, Lutheran Immigration and Refugee Service, and Kids in Need of Defense, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families*, (2017); Women's Refugee Commission and Lutheran Immigration and Refugee Service, *Locking Up Family Values, Again: A Report on the Renewed Practice of Family Immigration Detention*, (2014); Women's Refugee Commission, *Migrant Women and Children at Risk: In Custody in Arizona*, (2010); Women's Refugee Commission, *Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention*, (2010); Women's Refugee Commission, *Innocents in Jail: INS Moves Refugee Women From Krome to Turner Guilford Knight Correctional Center*, (2001); Women's Refugee Commission, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center*, (2000); and Women's Refugee Commission, *Liberty Denied: Women Seeking Asylum Imprisoned in the U.S.*, (1997).

² See Women's Refugee Commission, *Prison for Survivors*, fn. 53 (collecting sources documenting the harmful impact of immigration detention on asylum seekers).

³ See *id.* fn. 77, 78 (collecting sources discussing the mental health impacts of detention).

and often not able to ensure confidentiality, and has personally heard numerous reports of inadequate interpretation in the credible fear interview and in immigration court.⁴

In light of the abbreviated comment period, we will focus in these comments on the specific impact of the Proposed Rule on applicants fleeing gender discrimination or gender-based violence. But it is important to note at the outset the ways in which the Proposed Rule will dramatically restrict the ability of all applicants for asylum or withholding of removal to seek relief.

II. The Proposed Rule

The Proposed Rule is a multi-pronged attack on the institution of asylum that would dramatically restrict eligibility for relief. Among other things, the Proposed Rule:

- Imposes an increased burden on asylum seekers at the “credible fear” stage;⁵
- Empowers—and, in some situations, requires—Asylum Officers to make initial findings relevant to threshold question of eligibility, where those findings would previously have been made by an Immigration Judge;⁶
- Establishes a presumption that an Asylum Officer’s negative fear determination is not subject to Immigration Judge review unless an applicant affirmatively seeks review;⁷
- Expands Immigration Judges’ ability to summarily deny applications without a hearing;⁸
- Requires discretionary denials of asylum to applicants who, among other things, transit through other countries en route to the United States without applying for asylum or permanent legal status in those countries, and regardless of individual circumstances or barriers to applying for status in those countries.⁹

Each of these proposals, standing alone, creates a significant, unnecessary, and unlawful hurdle to the refugees most in need of aid. When taken together, the changes are a catastrophic curtailment of the scope of eligibility for relief both under our immigration laws and under the international agreements incorporated into domestic law by statute.¹⁰ And in the few cases where an applicant may still be able to demonstrate eligibility, the Proposed Rule expands the situations in which Immigration Judges must issue “discretionary” denials.

⁴ See Women’s Refugee Commission, *Prison for Survivors*, 23.

⁵ To be codified at 8 CFR 1003.42(f).

⁶ To be codified at 8 CFR 208.30; 8 CFR 1203.30; and 8 CFR 1003.42.

⁷ To be codified at 8 CFR 208.30(g); 8 CFR 1208.30(g)(2).

⁸ To be codified at 8 CFR 1208.13(e).

⁹ See Proposed Rule at 68–77.

¹⁰ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–40 (1987) (“If one thing is clear from the legislative history of the [Refugee Act of 1980], it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”); see also *id.* at fn. 22 (recognizing that the United Nations Handbook has “been widely considered useful [by courts] in giving content to the obligations that the Protocol establishes”).

We will leave it to other interested parties to set forth in more detail how these changes are contrary to law and how they will dramatically restrict the availability of relief for all applicants. Suffice it to say here that WRC joins with those organizations and individuals who are strongly objecting to these dramatic changes, and we urge that each of them be withdrawn because they are contrary to law and contrary to our nation's tradition as a place of refuge for those seeking to escape persecution.

III. Impact on Applicants Fleeing Gender-Based Violence or Discrimination

The Proposed Rule would dramatically limit the eligibility for asylum or withholding of removal for people fleeing gender-based violence or discrimination. These changes that will improperly limit eligibility fall into two broad categories.

First, the Proposed Rule would re-define the scope of eligibility for asylum, narrowing substantive definitions of the types of conduct that constitute cognizable persecution in ways that will exclude all or nearly all applicants fleeing gender-based violence or discrimination.

Second, in addition to those substantive changes, the Proposed Rule would alter the process of applying for asylum or withholding for removal in ways that would make it nearly impossible for those fleeing gender-based violence to demonstrate eligibility for relief.

A. Substantive Changes

An applicant for asylum or withholding of removal must demonstrate that she suffered, or will suffer, persecution on account of her race, religion, nationality, political opinion, or membership in a particular social group. In order to satisfy that standard, an applicant must show (1) that she suffered or is likely to suffer persecution (2) on account of (i.e., "nexus") (3) one of the protected grounds: race, religion, nationality, political opinion, or membership in a particular social group.

Both the Board of Immigration Appeals¹¹ and the United Nations High Commissioner for Refugees¹² have long recognized that asylum claims premised on gender-based persecution can satisfy this test. But through the Proposed Rule, the Departments now press their latest and most

¹¹ See *Matter of Acosta*, 19 I&N Dec. 211, 233 (B.I.A. 1985); *Mohammed v. Gonzales*, 400 F.3d 785, 796–98 (9th Cir. 2005) ("the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law"); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (finding that victim of female genital mutilation suffered persecution on account of a particular social group defined by her gender, noting "there is little question that genital mutilation occurs to a particular individual because she is female"); *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (noting that "females, or young girls of a particular clan, met [the Ninth Circuit's] definition of a particular social group").

¹² The UNHCR has taken the position that "sex" and "gender" are innate characteristics and, as a result, can form the basis for membership in a particular social group. The UNHCR has specifically stated that "women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of" the 1967 Protocol, to which the U.S. acceded in 1968 and upon which Congress modeled the Refugee Act of 1980. United Nations High Commissioner for Refugees, *UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender* (November 2016), 3. <https://www.unhcr.org/en-us/5822266c4.pdf>

serious attack on the right to asylum,¹³ seeking to re-define “persecution,” “nexus,” and what constitutes a “protected ground” so as to deny eligibility to victims of gender-based violence or discrimination.

1. Narrowed Definition of “Persecution” – 8 CFR 208.1(e); 8 CFR 1208.1(e)

The Proposed Rule would first narrow the types of harms that can constitute “persecution,” providing that “generalized harm that arises out of civil, criminal, or military strife in a country” does not constitute as persecution.

The Proposed Rule would thus act as a blanket denial of eligibility for applicants fleeing “generalized harm,” without allowing an Immigration Judge to engage in the required individualized inquiry. Under the Proposed Rule, an Immigration Judge’s hands will be tied: if the alleged persecution appears to consist of “generalized harm” arising out of civil, criminal, or military strife, that will be the end of the inquiry. This will have a tremendous impact on those fleeing gender-based violence, which occurs more frequently in times of unrest¹⁴ and is often used as a weapon of war and, therefore, may be characterized as “generalized” under the Proposed Rule.¹⁵ For instance, the Proposed Rule could be used to deny asylum for whole categories of applicants fleeing endemic violence directed against women in Central America by prohibiting consideration of such violence based on its connection to civil unrest.¹⁶ Adoption of the Proposed Rule would therefore deny eligibility for victims of such violence—predominantly women and children.

1. Narrowed “Nexus” Inquiry – 8 CFR 208.1(f); 8 CFR 1208.1(f)

The Proposed Rule next seeks to deny eligibility to those fleeing gender-based violence by narrowing the “nexus” inquiry, which assesses whether the harm suffered by an applicant was inflicted “on account of” a protected ground. The Proposed Rule appears to be specifically tailored

¹³ See e.g. Letter from Women’s Refugee Commission, to Cameron Quinn, Officer, DHS, and Joseph Cuffari, Insp. Gen. DHS (August 16, 2019), <https://www.womensrefugeecommission.org/research-resources/separation-of-families-via-the-migrant-protection-protocols/>; Women’s Refugee Commission, How the Trump Administration Caused the Humanitarian Crisis at the Border and What Congress and the Administration Can Do to Fix It (July 22, 2019), <https://www.womensrefugeecommission.org/research-resources/the-top-ways-that-the-trump-administration-caused-the-humanitarian-crisis-at-the-border-and-what-congress-and-the-administration-can-do-to-fix-it/>; Letter from Women’s Refugee Commission, to Debbie Seguin, Ass. Dir. ICE (November 6, 2018), <https://www.womensrefugeecommission.org/research-resources/comments-in-response-to-the-department-of-homeland-security-and-the-department-of-health-and-human-services-proposed-regulations-to-the-flores-settlement-agreement/> and Doris Meissner, Faye Hipsman & T. Alexander Aleinikoff, THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD, (2018).

¹⁴ Anna Mutavati & Maniza Zaman, Fighting the ‘shadow pandemic’ of violence against women & children during COVID-19, AFRICA RENEWAL (Apr. 27, 2020). <https://www.un.org/africarenewal/web-features/coronavirus/fighting-%E2%80%98shadow-pandemic%E2%80%99-violence-against-women-children-during-covid-19> (last visited Jul. 14, 2020).

¹⁵ See United Nations Secretary-General, CONFLICT RELATED SEXUAL VIOLENCE, S/2019/280, 5 (March 29, 2019).

¹⁶ See Anja Parish, *Gender-Based Violence against Women: Both Cause for Migration and Risk along the Journey*, MIGRATION POLICY INSTITUTE (Sept. 7, 2017). <https://www.migrationpolicy.org/article/gender-based-violence-against-women-both-cause-migration-and-risk-along-journey> (last visited Jul. 14, 2020).

to prevent any applicant fleeing gender-based violence or discrimination from demonstrating eligibility.

An applicant must currently demonstrate that her membership in one of the five protected grounds is “at least one central reason” for the persecution from which she flees.¹⁷ Moreover, the Immigration Judge must engage in a case-by-case analysis rather than relying on any blanket rules regarding when persecution qualifies as being “on account of” a protected ground.¹⁸

Under the Proposed Rule, however, the Departments “will not favorably adjudicate the claims of aliens who claim persecution based on . . . gender” or “interpersonal animus or retribution,” among other things. That is, the Proposed Rule would establish a general presumption that persecution “on account of” gender or interpersonal animus can *never* form the grounds for eligibility for asylum.

(a) *Gender*

By denying eligibility to applicants who suffer persecution “on account of” gender, the Proposed Rules would make asylum completely unavailable to those fleeing gender-based violence or discrimination, directly contradicting both current U.S. law¹⁹ and international practice.²⁰

As an initial matter, the Departments badly mischaracterize the only case cited in support of this broad and unprecedented proposal. The Departments cite *Niang v. Gonzales* for the proposition that persecution based on gender cannot be a basis for relief, quoting language from the opinion stating that “[t]here may be understandable concern in using gender as a group-defining characteristic” because “[o]ne may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there.”²¹ But the *Niang* court in fact ultimately reached the exact opposite conclusion, recognizing that there was “no reason why more than gender . . . would be required to identify a social group” and reasoning that, when presented with a claim of persecution on account of gender, the courts’ “focus . . . should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted.”²² Answering that question in the affirmative under the facts presented in that case, the *Niang* court granted asylum to the applicant. The Departments’ reliance on *Niang* is therefore deeply disingenuous, and the fact that the Departments could apparently find no other legal support for their unprecedented proposal speaks volumes.

¹⁷ H.R. 418, 109th Cong. §(a)(3)(b)(2005)

¹⁸ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 125-26 (D.D.C. 2018); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

¹⁹ *See e.g., Mohammed v. Gonzales*, 400 F.3d at (“the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law”); *Hassan v. Gonzales*, 484 F. 3d at 518 (finding that victim of female genital mutilation suffered persecution on account of a particular social group defined by her gender, noting “there is little question that genital mutilation occurs to a particular individual because she is female”); *Perdomo*, 611 F.3d at 667 (9th Cir. 2010) (noting that “females, or young girls of a particular clan, met [the Ninth Circuit’s] definition of a particular social group”).

²⁰ United Nations High Commissioner for Refugees, *UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender*.

²¹ *Niang v. Gonzales*, 422 F. 3d 1187, 1199 (10th Cir. 2005).

²² *Id.* at 1200.

The impact of this proposed change on those fleeing gender-based violence or discrimination could not be clearer: such claims will no longer form a basis for eligibility for asylum or withholding of removal. Instead, the Proposed Rule would act as a blanket denial of eligibility in situations where an applicant’s gender forms a central reason for their persecution, such as in connection with female genital mutilation and other similar practices.²³ Moreover, in light of the Supreme Court’s recent holding in *Bostock v. Clayton County* that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,”²⁴ the Proposed Rule could also be used by the Departments as a basis for a blanket denial of eligibility for all applicants fleeing persecution on account of sexual orientation or gender identity.

In short, the Departments’ proposal would inflict immediate, immeasurable harm to victims of gender-based violence or discrimination who would no longer be eligible for protection.

(b) *Interpersonal Animus*

The Proposed Rule would also prevent women who are victims of violence from obtaining relief in a second way; it imposes a blanket denial of eligibility on applicants fleeing violence directed at them based, in part, on interpersonal animus or retribution. Because many instances of gender-based violence or discrimination arise from disagreements regarding a woman’s place in society—and because such disagreements are often between individuals with a pre-existing relationship—interpersonal animus will often play some role in such claims.²⁵ As a result, a blanket exclusion of claims where the persecution appears to be “on account of” interpersonal animus would sweep in a broad array of situations that would otherwise form valid grounds for relief. For example, a woman fleeing gender-motivated violence in a domestic context where the state was unable or unwilling to intervene might have previously been eligible for protections, but the Proposed Rule would require that applicant to make a heightened showing that persecution she endured was *not* the result of interpersonal animus.

The Proposed Rule’s categorical denial would overlook the complexity of individual cases in ways that will uniquely prejudice those fleeing gender-based violence and discrimination.

2. Narrowed Definition of “Particular Social Group” – 8 CFR 208.1(c); 8 CFR 1208.1(c)

The Proposed Rule would also narrow the definition of “particular social group” a number of ways, two of which would limit the eligibility of applicants fleeing gender-based violence. First, the Proposed Rule would require a demonstration that a particular social group is “socially distinct.” Second, the Proposed Rule would eliminate eligibility based on “membership in a particular social group consisting of or defined by . . . interpersonal disputes . . . [or] private criminal acts of which governmental authorities were unaware or uninvolved.”

(a) *“Socially Distinct”*

²³ See *In re Kasinga*, 21 I. & N. Dec. 357 (BIA June 13, 1996).

²⁴ *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020).

²⁵ Talia Shiff, *Revisiting Immutability: Competing Frameworks for Adjudicating Asylum Claims Based on Membership in a Particular Social Group*, 53 U. MICH. J. L. REFORM 567 (2020) at 593-594.

Under the Proposed Rule, individuals seeking asylum on the basis of persecution on account of membership in a particular social group would be required to demonstrate that the claimed social group is “based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question.”²⁶ The Departments claim that this change simply “codif[ies] longstanding requirements.”²⁷ But the Departments also contradict themselves, recognizing that the definition of ‘particular social group’ has been the subject of considerable litigation and is a product of evolving case law” and claim that, without this change it will be “difficult for EOIR’s immigration judges and Board members, as well as DHS asylum officers, to uniformly apply the framework.”²⁸

The “particularity” and “socially distinct” requirements are the product of evolving case law and, indeed, have emerged only in the last 15 years.²⁹ But many courts have viewed the “socially distinct” requirement with skepticism—the Seventh Circuit, for instance, has refused to apply this requirement on several occasions.³⁰ The UNHCR likewise views immutable characteristics and social distinction as alternative avenues of demonstrating the existence of a “particular social group” requirement—not as factors that must both be satisfied in order to demonstrate eligibility.³¹ The Departments’ assertion that the Proposed Rule simply codifies longstanding requirements is, at best, misleading—that assertion glosses over the tremendous damage that the Proposed Rule would do to the complex case law concerning asylum eligibility based on membership in a particular social group. Courts that have grappled with these issues have sometimes viewed this requirement with skepticism, and many courts have endeavored to apply the “socially distinct” requirement with a sensitivity to the particular factual circumstances that each case presents, and have reached varying results. A blanket rule such as the proposed here would prevent courts from applying the law in a way that accounts for each applicant’s circumstances, and would harm those fleeing gender-based violence and discrimination in at least three distinct ways.

First, the requirement that applicants satisfy the “socially distinct” requirement imposes a significant practical burden on all applicants. Demonstrating social distinction can be immensely difficult; indeed, the Attorney General has previously derided an applicant’s attempt to satisfy this requirement by relying on a single article.³² Instead, it appears that an applicant will be required to consult multiple scholarly works and interview various members of society—a requirement that is all but impossible for applicants who are detained or who lack the assistance of counsel or extensive resources. For victims of gender-based violence or discrimination, demonstrating social distinction will often require proving that relevant laws are enforced ineffectively. This can be

²⁶ To be codified at 18 CFR 208.1(c).

²⁷ Proposed Rule at 53.

²⁸ Proposed Rule 52.

²⁹ See *Matter of C-A-*, 23 I&N Dec. 951, 957, 959-61 (B.I.A. 2006); *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (B.I.A. 2008); *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (B.I.A. 2008).

³⁰ *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2018) (“Whether the Board’s particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit.”); *N.L.A. v. Holder*, 744 F.3d 425, 438 (7th Cir. 2014); *Gatimi v. Holder*, 578 F.3d 611, 615-617 (7th Cir. 2009).

³¹ United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 9*, (October 2012). <https://www.unhcr.org/509136ca9.pdf> (“The two approaches—‘protected characteristics’ and ‘social perception’—to identifying ‘particular social groups’ [under the 1951 Convention] are alternative, not cumulative tests.”)

³² *Matter of A-B-*, 27 I.&N. Dec. 316, 336 fn.9 (A.G. 2018) (rejecting claim based on a “partial quotation from a news article eight years earlier” as a “conclusory assertion”).

difficult, as victims of gender-based violence may be reluctant to report abuse at all, often as a result of a victim’s fear either of retribution or of systemic cultural norms that discredit victims.³³ And for victims of state-perpetrated violence, the very officials with whom the Proposed Rule would require them to interact may, in fact, be their persecutor, and an attempt to comply with the Proposed Rule could put such victims at risk of additional violence. Victims of gender-based violence will therefore be prejudiced by the fact that their very victimization has deprived them of the evidence and tools they would need to make a demonstration of social distinction.

Second, whether a group is “socially distinct” is a necessarily subjective inquiry. Where different groups take different views of whether a group is “socially distinct,” application of this newly codified requirement will likely favor the interpretation of the louder and more powerful, overlooking the voices of the marginalized— even when that means prioritizing the view of an abuser of that of the abused.³⁴

Third, social distinction is particularly difficult to demonstrate when members belong to a large cross-section of society—such as is the case for nearly all applicants fleeing gender-based violence or discrimination.³⁵ The “socially distinct” status of such applicants flows, at least in part, from a shared experience rather than from demarcations based on race, religion, or class. This complexity is heightened by the dynamics of gender-based violence that may lead victims to mask their social distinction in order to avoid continued victimization but who nevertheless are members of a particular social group.³⁶

(b) Interpersonal Disputes or Private Criminal Acts “Of Which Governmental Authorities Were Unaware or Uninvolved”

The Proposed Rule also states that the Departments “will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by . . . interpersonal disputes . . . [or] private criminal acts of which governmental authorities were unaware or uninvolved.”³⁷ This provision presents two principal issues for applicants fleeing gender-based violence or discrimination.

First, the Proposed Rule would categorically deny eligibility to applicants belonging to social groups that are defined, at least in part, in relation to “interpersonal disputes” or “private criminal acts.” This is directly contrary to governing case law, which generally requires an individualized, “evidence-based inquiry as to whether the relevant society recognizes [the] proposed social group.”³⁸ Gender-based violence and discrimination often involve personal disputes and

³³ See *Matter of A-R-C-G-*, 26 I. & N. Dec 388, 394 (B.I.A. 2014); see also Phumzile Mlambo-Ngcuka, *Violence against women and girls: the shadow pandemic*, UN WOMEN, (Apr. 6, 2020), <https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>

³⁴ Emily C. Barry-Murphy & Max Stephenson Jr., *Recognizing and Confronting State Subjectivity in Asylum Adjudications*, 31 REFUGE 2, 5 (2015).

³⁵ Shiff at 593-594.

³⁶ See e.g. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 236-237 (B.I.A. 2014) (“[T]he fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive them of its protected status.”)

³⁷ To be codified at 8 CFR 208.1(c); 8 CFR 1208.1(c).

³⁸ *Pirir-Boc v. Holder*, 750 F.3d 1077, 1083-84 (9th Cir. 2014).

animosity or private criminal acts,³⁹ and the Proposed Rule’s general presumption against defining a particular social group in relation to such acts would uniquely and improperly burden applicants fleeing gender-based violence.

Second, the Proposed Rule’s carve-out for situations where governmental authorities were “unaware or uninvolved” of the violence or discrimination will make it extremely difficult for individuals to establish eligibility on the basis of persecution by private actors.⁴⁰ While both domestic and international law⁴¹ provide for eligibility where governmental actors are unable or unwilling to intervene, the Proposed Rule would flip that calculus, denying eligibility in any situation where the government is “unaware or uninvolved” in the persecution. The standard of “unable or unwilling” to intervene is especially important for gender-based violence. A recent UNHCR report found that sixty percent of the women interviewed made reports to authorities regarding attacks, sexual assaults, rapes, or threats, but all of these women reported receiving inadequate or no protection in response.⁴² The practical effect of this change would be to deny eligibility for essentially all persecution at the hands of private actors—since, by definition, the government is not involved in such persecution. This would almost certainly result in a denial of eligibility for victims of gender-based violence or discrimination, much of which is perpetrated without the direct involvement of governmental authorities.

3. Narrowed Definition of “Political Opinion” – 8 CFR 208.1(d); 8 CFR 1208.1(d)

The Proposed Rule also provides that the Departments will generally deny eligibility for persecution based on a political opinion that is defined “by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.”

This categorical requirement of “expressive behavior” will exclude essentially all applicants who suffer persecution for an *imputed* political opinion, which has long qualified as a protected political opinion, and which often applies to applicants fleeing gender-based violence or discrimination.⁴³ For instance, the Second Circuit recently remanded an asylum claim by an applicant who was beaten unconscious by suspected gang members after she resisted one gang member’s attempt to rape her, finding that the Immigration Judge had erred by not considering whether the applicants’ attackers had imputed an anti-patriarchy political opinion to her and whether that imputed opinion was a central reason for the attack.⁴⁴ The Proposed Rule would effectively codify that Immigration Judge’s error. Moreover, the Proposed Rule would also deny relief to those persecuted on account

³⁹ Shiff at 593-594.

⁴⁰ See Deborah E. Anker, LAW OF ASYLUM IN THE UNITED STATES, §5.49 (Thomson Reuters/West, 2020 ed.).

⁴¹ See, e.g., United Nations High Commissioner on Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶¶ 97-105 (1979, rev. 2019)

⁴² *Women on the Run*. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, (2015), 4.

⁴³ United Nations High Commissioner on Refugees, HANDBOOK ON PROCEDURES, ¶ 90; *De Brenner v. Ashcroft*, 388 F.3d 629, 635-36 (8th Cir. 2004).

⁴⁴ *Hernandez-Chacon v. Barr*, 948 F.3d 94, 104 (2d Cir. 2019).

of political opinions held by others—including the children of political activists who are targeted based on a persecutor’s belief that the children share the political opinion of their parents.

B. Procedural Changes

The Proposed Rule also contains a number of procedural changes that will disproportionately impact applicants fleeing gender-based violence. We focus here on several of procedural changes that will impose some of the most onerous burdens on such applicants.

1. Internal Relocation – 8 CFR 208.13(b)(3); 8 CFR 208.30(e); 8 CFR 1208.13(b)(3); 8 CFR 1208.30(e)

“Internal relocation” refers to the possibility that an applicant might be able to avoid persecution by relocating to another part of her country. Where internal relocation is found to be a reasonable option, the applicant is generally not eligible for asylum or withholding of removal. The Proposed Rule alters the procedure for assessing internal relocation in two key ways.

First, the Proposed Rules establish a new presumption that internal relocation would be reasonable where the persecutor is not a government or government-sponsored actor.⁴⁵ As a result, an applicant will not be eligible for relief unless she can affirmatively demonstrate that internal relocation would *not* be reasonable. Second, the Proposed Rule would require Asylum Officers conducting credible fear interviews to consider the potential applicability of internal relocation, presenting prospective applicants with an additional hurdle to overcome at an early stage.⁴⁶

The Departments appear to believe that this new burden on applicants is justified by some endemic problem with victims of non-governmental persecution receiving asylum protections when such applicants could have avoided persecution by simply relocating. But that position is completely contrary to reality: in fact, in many cases the majority of women and those fleeing gender-based violence *already* seek safety by attempting to relocate within their home countries but are nevertheless unable to escape persecution.⁴⁷

By ignoring that reality and requiring on applicants to demonstrate that internal relocation is unreasonable, the Proposed Rule would prejudice victims of gender-based violence—many of whom suffer at the hands of non-governmental actors. The requirement that Asylum Officers make findings regarding internal relocation at the credible fear stage means that many victims of gender-based violence will be denied eligibility at that early stage—long before they have an opportunity to be heard at a full hearing.

As the final nail in the coffin, the Proposed Rule also establishes a presumption that a negative fear determination by an Asylum Officer is *not* subject to review by an Immigration Judge unless the applicant affirmatively requests such review.⁴⁸ The Proposed Rule therefore blurs the line between the roles occupied by Asylum Officers and Immigration Judges in the asylum process. While Asylum Officers are tasked with acting as a first-level screen, Immigration Judges serve a

⁴⁵ To be codified at 8 CFR 208.13(b)(3); 8 CFR 1208.13(b)(3).

⁴⁶ To be codified at 8 CFR 208.30(e); 8 CFR 1208.30(e).

⁴⁷ *Women on the Run*, 5.

⁴⁸ To be codified at 8 CFR 208.30(g)(1); 8 CFR 1208.30(g)(2).

deliberative function, often conducting a full hearing before making any decision.⁴⁹ Inherent in their role as first-level reviewers of applications, Asylum Officers often lack the time or resources to conduct an adequate inquiry into all relevant aspects of an application, and denying review by an Immigration Judge will deprive an applicant of her only full opportunity to demonstrate her eligibility for relief.⁵⁰ Many applicants are likely to decline to affirmatively seek such review in light of a number of recognized factors, including psychological trauma from the experience of fleeing one's country,⁵¹ intimidation by the asylum process,⁵² and a lack of sophistication in asylum law.⁵³

The result would be a new asylum regime in which applicants fleeing gender-based violence are overwhelmingly likely to be found ineligible on the basis that they should relocate internally within their home countries—often without ever reaching an Immigration Judge.

2. Expanded Basis for a Finding of Frivolousness – 8 CFR 208.20; 8 CFR 1208.20

The Proposed Rule would also expand the circumstances in which an application can be labeled “frivolous,” which would render the applicant permanently ineligible for any form of immigration relief.⁵⁴ This expansion takes two primary forms: a broadened definition of the sorts of applications that qualify as frivolous, and the empowerment of Asylum Officers to make such findings.

(a) Expanded Definition

The current definition of “frivolousness” requires a finding that an applicant “knowingly” filed an application wherein “any of its material elements is deliberately fabricated.”⁵⁵ The Proposed Rule purports to “clarify” that standard so as to require either knowledge or willful blindness.⁵⁶ The Proposed Rule would also allow an application to be designated frivolous in a variety of new situations: if it (1) “contains a fabricated essential element”; (2) “is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence”; (3) is “filed without regard to the merits of the claim”; or (4) “is clearly foreclosed by applicable law.”⁵⁷

⁴⁹ Congressional Research Service, IMMIGRATION: U.S. ASYLUM POLICY, (2019), 20.

⁵⁰ See, e.g., Background on Judicial Review of Immigration Decisions, AMERICAN IMMIGRATION COUNCIL (June 1, 2013) <https://www.americanimmigrationcouncil.org/research/background-judicial-review-immigration-decisions#:~:text=Court%20review%20provides%20necessary%20oversight,person%20fears%20for%20his%20life>. (last visited July 14, 2020).

⁵¹ Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 461 (2016).

⁵² *Id.* at 464.

⁵³ Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J. L. REFORM 1001, 1002 (2015).

⁵⁴ 8 U.S.C. § 1158(d)(6)

⁵⁵ 8 CFR 208.20.

⁵⁶ To be codified at 8 CFR 208.20(a)(2).

⁵⁷ To be codified at 8 CFR 208.20(c).

The Proposed Rule will have an acute effect on applicants fleeing gender-based violence or discrimination—many of whom lack legal representation and are therefore likely to be seen to run afoul of by the procedural landmines introduced by the Departments, regardless of whether those landmines are consistent with the underpinnings of asylum law and policy. For instance, by eliminating the requirement that an applicant engage in “deliberate” fabrication and decreasing the required level of scienter, the Proposed Rule increases the likelihood that asylum applicants whose applications inadvertently include misleading information might be found to have filed a frivolous application. This is especially true for applicants who have suffered trauma, in light of the well-documented negative effects that trauma may have on an individual’s memory.⁵⁸

The expansion of “frivolousness” to include applications “filed without regard to the merits of the claim” or that are “clearly foreclosed by applicable law” would likewise endanger well-meaning applicants. Both new categories are ill-defined and present an obvious risk to *pro se* applicants. The Proposed Rule will have a profound chilling effect, deterring applicants from recounting their experiences of persecution for fear of additional punishment at the hands of U.S. immigration authorities. The Proposed Rule also makes it easier for adjudicators to dismiss the accounts of victims of traumatic experiences as being “without regard to the merits of the claim” wherever those accounts might involve any sort of inconsistencies. Moreover, applicants accused of crimes in their home country or subjected to persecution by governmental actors may be unable to collect the evidence that would now be required to substantiate their claims due, in large part, to a justified fear of reporting persecution to the same government authorities who inflicted the persecution in the first place. But even for applicants with counsel, the Proposed Rule threatens to impose a finding of frivolousness if they press their case too zealously—such as by offering novel or aggressive legal arguments.

(b) *Grant of Power to Asylum Officers*

In recognition of the weighty consequences of a finding of frivolousness, the current regime places the power to make that determination in the hands Immigration Judges and the Board of Immigration Appeals.⁵⁹ The Proposed Rule would alter that requirement, providing Asylum Officers with the power to make findings of frivolousness.⁶⁰

The Departments justify this devolution of authority as an attempt to “enhance the officers’ ability to identify and efficiently root out frivolous applications, and to deter the filing of such applications in the first place.”⁶¹ The Departments are therefore explicit: their goal is to ensure that more applicants are found to have filed frivolous applications and to use that risk to deter others, and they intend to do so by relying on Asylum Officers to make initial findings of frivolousness. Moreover, the fact that such findings are subject to *de novo* review belies the Departments’ assertion that the Proposed Rule would “better allocate limited resources and time and more expeditiously adjudicate meritorious asylum claims”⁶² The Departments offer no evidence that

⁵⁸ Jessica Chaudhary, *Memory and Its Implication for Asylum Decisions*, 6 J. HEALTH & BIOMEDICAL L. 37 (2010).

⁵⁹ See 8 CFR 208.20

⁶⁰ To be codified at 8 CFR 208.20(b).

⁶¹ Proposed Rule at 40.

⁶² Proposed Rule at 41.

frivolous or fraudulent asylum applications present any threat to the efficient operations of the asylum system.⁶³

3. Pretermission Without Hearing – 8 CFR 208.13; 8 CFR 1208.13

The Proposed Rule would also allow Immigration Judges to summarily deny asylum applications that fail to make a *prima facie* case of eligibility. Where Immigration Judges issue such summary denials, the applicant would not receive a hearing.

The expansion of the ability of Immigration Judges to summarily deny application without a hearing would prejudice applicants fleeing gender-based violence or discrimination—many of whom apply for asylum without legal counsel, and who do so while coping with the long-lasting trauma that comes with gender-based violence, the trauma caused by detention, and, often, while navigating related personal issues, such as custody and other family issues.

4. Decreased Confidentiality Protections – 8 CFR 208.6; 8 CFR 1208.6

Finally, the Proposed Rule would decrease the confidentiality protections applicable to asylum applications. Applications are currently “protected from disclosure,”⁶⁴ but the Proposed Rule would add a number of exceptions, including by permitting disclosure as part of a “federal criminal investigation, proceeding, or prosecution”⁶⁵ or to “deter, prevent, or ameliorate the effects of child abuse.”⁶⁶

Any weakening of the confidentiality protections for asylum applications will have a chilling effect on applicants fleeing gender-based violence or discrimination, whose applications are invariably premised on sensitive personal information that, if exposed, could subject applicants to further abuse, embarrassment, and ostracization. International standards stress the importance of confidentiality to create an environment of security and trust for asylum seekers,⁶⁷ but the Proposed Rule greatly increases the likelihood of disclosure—particularly in light of the fact that abusers commonly file false claims against their victims, either with law enforcement or in court.⁶⁸ The investigation of such claims may well trigger disclosure under the new exceptions.

Fear of the consequences of an abuser finding out about an asylum application could deter many victims of gender-based violence from attempting to seek protection from their abuse. And victims who do apply for asylum will find themselves on the horns of a dilemma: if they include the extremely personal and potentially harmful details of their claim—as they must, under the Proposed Rule, in order to make out a *prima facie* claim sufficient to survive summary denial and

⁶³ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 2014 fn. 13 (2020) (Sotomayor, J., dissenting) (“[T]he magnitude of asylum fraud has long been debated.”)

⁶⁴ See 8 CFR 208.6(b).

⁶⁵ To be codified at 8 CFR 208.6(d)(1)(ii); 8 CFR 1208.6(d)(1)(ii)

⁶⁶ To be codified at 8 CFR 208.6(d)(1)(iv); 8 CFR 1208.6(d)(1)(iv)

⁶⁷ See Frances Nicholson & Judith Kumin, A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS: HANDBOOK FOR PARLIAMENTARIANS, 159 (2017); Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 2-1.

⁶⁸ David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. FOR SOC. JUST 429, 443 (2016).

to avoid a claim of frivolousness—they must then accept the risk of future disclosure. The Proposed Rule presents those fleeing gender-based violence with a choice that is anathema to the goals of the asylum system and an insult to our national character.

IV. Conclusion

For all the reasons outlined above, it is the expert opinion of WRC that the Proposed Rule contradicts both governing U.S. law, U.S. obligations under international law, and the fundamental underpinnings of the U.S. asylum system. The Proposed Rule is nothing more than a naked effort to deny asylum to, among many others, essentially all victims of gender-based violence or discrimination—a practice that has been recognized for more than 30 years and is well-established in the international community. WRC therefore urges the Departments to rescind the Proposed Rule.

Sincerely,

/s/

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