HUMAN RIGHTS INITIATIVE OF NORTH TEXAS

via www.regulations.gov

July 15, 2020

Lauren Alder Reid
Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

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

Dear Ms. Reid:

I write on behalf of the Human Rights Initiative of North Texas in strong opposition to the Department of Justice and Department of Homeland Security's proposed rule to amend the procedures for asylum and withholding of removal and credible fear and reasonable fear review, published in the Federal Register on June 15, 2020.

The proposed rule is yet another attempt to build-up the Administration's real border wall: the expansive re-writing of our immigration laws to close the United States to people fleeing to our doors. The proposed changes are sweeping in their reach and in their cruelty.

Unsurprisingly, the proposal does not target asylum seekers fleeing religious persecution—in today's world, largely Christian people, fleeing persecution from non-Christian states. Meanwhile, it makes special targets of LGBTQIA people, women, and children. It targets people without the money or connections to fly directly to the United States. It targets people who are persecuted for their political opinions but who don't associate with a particular political party. It targets people who have escaped home before the death threats against them have become reality.

For years, the asylum system has required applicants to jump through a series of hoops. Changes under this Administration—including its transit bans, asylum cooperative agreements, expansion of metering, the Remain

in Mexico policy, and limitations on work authorization—have re-arranged those hoops into a complicated obstacle course. But with these proposed changes, there is little course even left to navigate.

Of course, that is this Administration's aim. For years, immigrants, refugees, and their attorneys have struggled with an immigration system divorced from the realities of what draws, drives, and forces people to the United States. This Administration's barrage of policies attacking and under-resourcing USCIS and our immigration courts were designed to bring that flawed system to a grinding halt. The standstill—the mounting applications—the perceived dysfunction—gives the Administration a seemingly reasonable justification to paper over what is really going on here: working to realize Steven Miller's white nationalist vision of America.

Human Rights Initiative of North Texas ("HRI") is a non-profit legal services agency that represents people fleeing humanitarian abuses from all over the world. Our clients include asylum seekers pursuing relief through both affirmative and defensive proceedings. Every day for nearly twenty years, HRI has represented children and adults who have fled horrifying abuse in their home countries for speaking up against government corruption, for practicing their faith, and for living their authentic lives.

For the reasons outlined in detail below, we strongly oppose the proposed changes.

I. THE PROPOSED CHANGES TO PARTICULAR SOCIAL GROUPS AND NEXUS WILL ELIMINATE ASYLUM FOR PEOPLE LIKE HRI CLIENTS.

One of the proposed rule's major modes of attack is by making "gender" an improper nexus for an asylum claim,[1] and creating a list of "disfavored" particular social groups that can receive protection.[2] From a practical standpoint, the changes attempt to eliminate asylum for women and girls fleeing persecution aimed at them because of their status as women in their countries, people fleeing persecution because of their gender identity and sexual orientation, and children fleeing persecution aimed at them because they have been abandoned and lack parental protection. Although these exclusions are clearly unlawful, their inclusion could foreclose legitimate claims.

For example, the exception could shut out legitimate asylum claims from people like:

- Diana,* who fled to the U.S. from El Salvador, where the police did nothing in response to her repeated reports of rapes and beatings by her partner, despite having a restraining order. She was granted asylum in 2017.

- Florence,* who fled to the U.S. from Uganda, where she was tortured by security forces after trying to flee from police who had infiltrated and forcibly broken up an LGBT pride event she attended. She was granted asylum in 2018.

- Zahrah,* who fled to the U.S. from Nigeria, where the police told her they could not assist or protect her from her husband, who had physically and sexually abused her and

molested two young girls in their home. She was granted asylum in 2019.

- Emilio,* who fled to the U.S. from Nicaragua at the age of 10, after living nearly his entire life without his parents in the custody of an abusive extended family member whose partner sexually assaulted him. He was granted asylum in 2017.

This proposal is especially harmful in conjunction with the proposed rule's attempt to bar evidence based on "cultural stereotypes."[3] Evidence about a country's culture is critical to make out any claim based on a particular social group. The applicant has the burden to prove that their membership in a particular social group motivated the persecutor to act. Because, as the Ninth Circuit has explained, "persecutors are hardly 'likely to submit declarations explaining exactly what motivated them to act,'" exclusion of "cultural stereotypes" evidence would likely prohibit applicants from submitting the country conditions materials necessary to prove their claims.[4]

In Zahrah's case, for example, evidence about the cultural systems of patriarchy and the subordinate status of women in her country helped to prove the motivations of the police, who consistently failed to intervene in preventing sexual violence. Likewise, in Florence's case, evidence about homophobia, harassment, and violence against LGBT people helped to prove the motivations of the security forces, who systemically engaged in excessive force and torture of LGBT people in her country. Without this evidence, Florence and Zahrah may not have been able to meet the burden required to prove their claims.

The proposed rule's attempt to eviscerate asylum protections for culturally distinct groups that are targeted in particular countries is contrary to long established law and must be withdrawn.

II. THE PROPOSED CHANGES TO POLITICAL OPINION WILL ELIMINATE ASYLUM FOR PEOPLE LIKE HRI'S CLIENTS.

Another of the proposed rule's major lines of attack is narrowing the types of claims that qualify as legitimate political opinion cases. The proposed rule tries to limit claims to only those where an asylum seeker "possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control" of a country.[5] This narrowing will eliminate legitimate asylum claims from people fleeing persecution in their home countries.

For example, the new definition could shut out legitimate asylum claims from people like:

- Alain,* who fled political persecution in the Democratic Republic of Congo, where he had been accused of being an enemy of the republic by the Special Services police. Alain was an entrepreneur who founded a company that provided security services to Western companies and foreign governments visiting the DRC. He had rejected candidates recommended by the police because they did not meet the necessary qualifications of the job, and had hired war refugees who were qualified. Because of his hiring decisions, the Special Services police referred him to a Judicial Police Officer for being an enemy of the state, he and his family began receiving death threats, and his family was attacked at their home. Alain decided he could not be safe in the DRC after he found out that an

NGO human rights activist was found murdered hours after raising Alain's complaint with a government official. Alain was granted asylum in 2011.

- Ester,* who fled political persecution in Burundi, where she was accused of political opposition to the nation's ruling party. She and her husband ran a hospitality business, and chose not to be involved in politics or a political party because they did not want to jeopardize any potential business relationships. She was threatened by a high-ranking military member with soldiers and guns for failing to financially support the ruling party with monthly payments. Although the repeated threats eventually caused her to pay the extortion, she was abducted from her home and tortured by the military. Ester was granted asylum in 2019.

Both Alain and Ester were targeted by their governments because they were accused of opposing the regimes in power. But neither possessed an idea or conviction in furtherance of a cause related to political control. Both were just trying to operate their businesses when they were accused of opposition political activity. Although their cases are clear examples of political persecution, the proposed rules could leave people just like them without protection.

III. THE PROPOSED CHANGES TO THE PERSECUTION STANDARD WILL ELIMINATE ASYLUM FOR PEOPLE LIKE HRI'S CLIENTS.

Additionally, by narrowing the definition of persecution, the proposed rule forces people to risk death and serious injury to qualify for asylum, even when the threats and actions taken against them create a serious risk they will be killed.[6] Specifically, the proposed rule tries to exclude "brief detentions," "threats with no actual effort to carry out the threats," and "property damage" as events that can demonstrate persecution. This "nonexhaustive" list of conduct is contrary to law and ignores the reality of how persecution is carried out by governments and the groups they are unable or unwilling to control.

First, detentions—even those that are brief—can be severe. For example, Ester,* who was abducted from her home, was only held for several hours in the night by the military. However, during those hours, she was beaten, sexually assaulted, and threatened with rape. She was only able to escape because someone in the building warned her that she would be soon killed, freed her, and directed her to an exit. It would be absurd to shut her out of the asylum process because her detention could be considered brief.

Second, threats can be legitimate even if someone escapes before they can be realized. Take, for example, our client Tinashe,* who fled political persecution in Zimbabwe after helping to organize an opposition political party over a period of years. He was arrested, he was repeatedly detained and questioned at the airport, he received threatening phone calls, and his wife was visited by men who said they planned to kill him because he was an enemy of the state. Tinashe knew that the party made good on its threats, so he and his family fled to the United States. Tinashe was granted asylum in 2019. It would be absurd to shut him out of the asylum process because his family was able to find safety before the government could make good on its threats.

Finally, property damage can be used as a method to threaten and/or persecute someone, as demonstrated by one of HRI's current clients who fled political persecution. After he went into hiding, government officials searched for him in his home; when they couldn't find him, they began demolishing his house while his children were inside. It would be absurd to shut him out of the asylum process because the persecution involved property damage.

Whether something constitutes persecution is a fact-specific question, based on an individual's experience. Categorically excluding certain types of conduct from the definition will force officers and judges to deny legitimate asylum claims. This is a cruel attempt to force someone to endure serious bodily harm before qualifying for asylum. Such a rule would contravene the purpose of asylum, which is to protect people from a well-founded fear of persecution.

IV. THE PROPOSED CHANGES TO THE FIRM RESETTLEMENT STANDARD WILL ELIMINATE ASYLUM FOR PEOPLE LIKE HRI'S CLIENTS.

The proposed rule also expands the "firm resettlement" bar,[7] which is a narrow exclusion designed to ensure that people who already have a country where they can safely live stay there. The proposed rule would significantly expand that bar, even if the country is not a safe place where the person can permanently live. The proposed rule would eliminate asylum for anyone who could have lived in a country through which they transited prior to arriving in the United States, regardless of whether they applied for or actually obtained status. It would also eliminate asylum for anyone who lived in another country for one year or more after departing their home country. This expansion ignores the reality of how people must flee their home countries and what relief is actually available to them.

For many people, transiting through a third country to reach the United States is necessary to reach safety. For example, Ester* was able to escape to the neighboring country of Rwanda with the help of a local NGO. While she was there, she received several threatening phone calls from people who knew she was in Rwanda and threatened to harm her there. She decided to flee to the United States because she was worried she would be hurt or killed. We don't know if she could have qualified for some status in Rwanda—but if she could have, she may have been barred from asylum because she of her time there, even though she could not have safely lived there.

The proposal is especially egregious in its application to unaccompanied children, who may have no practical access to obtaining status in a country through which they travel, even if they might technically qualify for some status there. Take, for example, the siblings Alma* and Josue,* who were granted asylum in 2017 after they independently decided to escape to the United States, fleeing a family member who had raped Alma and her cousins and who had threatened to kill both Alma and Josue for exposing him. At ages 11 and 13, they took the buses and walked the roads that strangers along the journey told them led to the border. It's a miracle they made it to the United States on their own. To bar them from asylum simply because they might have been able to qualify for status in one of the countries along their journey would be absurd.

Other people may be able to live in other countries longer than one year, but cannot stay indefinitely and risk persecution if they are barred from asylum in the United States. Roaa,* for example, is a Sudanese woman who was permanently injured by the female circumcision she

was forced to endure as a young girl. She and her husband moved to the Middle East in 2003, through a residency visa that was dependent on her husband's work. She had two daughters, who she repeatedly protected from circumcision by refusing to bring them on trips to Sudan and by making excuses to her husband and family. By 2013, she felt she was no longer able to protect her daughters from her husband and her family and escaped her husband on a vacation to the United States. Although Roaa was living in the Middle East outside of Sudan for over a year, she had no ability to stay permanently in the Middle East. Her only option would have been to return to Sudan, where her family could have taken her daughters to be circumcised. She was granted asylum in 2015. Under the changes in this proposed rule, she would have been ineligible for asylum in the United States, even though she had no way to live permanently in the Middle East.

V. THE PROPOSED CHANGES TO THE DISCRETION STANDARD WILL ELIMINATE ASYLUM FOR PEOPLE LIKE HRI'S CLIENTS.

Although asylum is a discretionary benefit, immigration judges have long understood that "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987). The proposed rule flies in the face of this long-established precedent, forcing immigration judges to consider a laundry list of irrelevant factors designed to further whittle away at the protection.[8] We address the three most egregious here: (1) denying asylum to people who have entered the United States without inspection; (2) denying asylum to anyone who spent 14 days in another country while traveling to the United States to seek asylum, or who transited through more than one country and did not apply for protection in one of those countries; and (3) denying asylum to someone who has not filed taxes.

First, allowing a judge to deny asylum simply because someone has entered the United States without inspection is a punitive measure that will punish people for their desperation. For example, to escape persecution, Diana* hired a smuggler to help her get from El Salvador to the United States. She wanted to claim asylum, but didn't know the process. She crossed the river and walked all night until she found a rancher who allowed her to use a phone to call relatives. She and her family member were stopped by border patrol and she was taken into immigration custody. Penalizing her for her method of entry—when her intention was always to seek asylum—would have punished her for her unfamiliarity with the system.

Second, allowing a judge to deny asylum simply because someone spent 14 days in another country en route to the United States punishes people simply because their journey to safety was too lengthy. This rule ignores the practical realities for many seeking safety in the United States. Take, for example, our client Kamal,* who fled from Sudan, where he had been tortured and threatened with death for speaking out against the government-controlled Janjaweed militia, President al-Bashir, and the Sudanese government. Kamal was able to escape Sudan by traveling to Egypt, which was particularly dangerous for Sudanese people at the time. He spent about a month and a half there trying to figure out how he could escape to find safety in Europe. Ultimately, he paid a smuggler $5,000 to help him obtain a visa to Mexico, where he had arranged for someone to assist him in obtaining travel documents to Europe. He made it to Mexico City, where his contact set him up to be mugged, leaving him without his passport and with little money remaining. An immigrant community in Mexico City temporarily took him in and, over the next two and a half months, helped raise enough money to get him to San Ysidro,

California, where he immediately surrendered to immigration officials. He was granted asylum in 2018. Even though he had no intention to stay in Egypt or Mexico—his time there was just to figure out how to reach permanent safety—his stays would have triggered the proposed bar. Kamal's journey was incredibly difficult, and the 14-day rule would have punished him for persevering through those challenges.

Similarly, denying asylum because someone traveled through other countries to reach the United States and did not apply for asylum in those countries places impractical and unnecessary constraints on asylums seekers. For some, the proximity of neighboring countries means that the persecutors they've fled from are still within reach. Nicaragua, El Salvador, Honduras, and Guatemala are part of a 4 Border Control Agreement, which permits the free movement of citizens throughout the region[9]—making it relatively easy for persecutors to find and follow someone who has fled. Diana,* who fled from El Salvador and traveled through Guatemala and Mexico to reach the U.S., did not feel safe until she was able to cross the border. Her partner was a powerful El Salvadorian business owner and smuggler with many connections in Guatemala. He had found her every time she had moved before—sometimes with the help of gang connections—and she was afraid that he would easily find her again there. She also feared for her safety in Mexico because of the dangerous conditions.

Mexico and the Northern Triangle countries through which asylum seekers may travel are also poorly equipped to meaningfully adjudicate their claims. In our experience, clients who have sought asylum during their journey to the U.S. have faced summary denials, despite their legitimate claims of persecution. One of HRI's clients, for example, sought asylum in five countries in South and Central America before finally reaching the U.S. to seek protection.

Like the firm resettlement bar, this is also especially harmful for unaccompanied children, who have no practical way to apply for asylum in the countries through which they transit. Emilio,* for example, traveled from Nicaragua at the age of 10 by plane to Guatemala and then by buses through Mexico with a coyote. Banning him from seeking asylum in the U.S. because he didn't apply to asylum in Guatemala or Mexico would be absurd.

Finally, allowing a judge to deny asylum because someone has failed to file taxes punishes people who are unfamiliar with the American system. Many new immigrants to the United States are unfamiliar with tax filing requirements, and asylum seekers who are forced to work in the informal economy because they are not eligible for work authorization are often unaware that they can file taxes using an ITIN. They should not be punished for their unfamiliarity with the U.S. system.

VI. IN COMBINATION WITH THE ISSUES OUTLINED ABOVE, THE PROPOSED PROCEDURAL CHANGES CREATE A SYSTEM RIGGED AGAINST A GRANT OF ASYLUM.

The changes we've discussed will each have serious effects, but in combination with the additional procedural changes proposed by the rule, the effects will be catastrophic. Together, the new standards for the credible fear interview,[10] pretermission,[11] and frivolousness[12] will make an asylum grant a near impossibility.

First, the changes to the credible fear process make it unlikely an asylum seeker will ever have the opportunity to file an asylum claim at all. The purpose of the existing credible fear standard, which errs on the side of giving asylum seekers a day in court, is to make sure that the U.S. does not accidentally deport people back to their death. The standard is especially important, given that very few asylum seekers have the opportunity to consult with immigration attorneys to discuss their claims before their credible fear interview. The proposed rule ignores this reality, turning the standard on its head. By raising the standard an asylum seeker must demonstrate at the credible fear interview, it gives asylum officers significant discretion to deny what could be legitimate claims.

Assuming a person even makes it through the credible fear process, the proposed rule would allow immigration judges to deny asylum claims without even allowing the asylum seeker a hearing and the opportunity to present evidence. Although seemingly small, this is a radical change that would allow judges to throw out asylum applications on their face. Many asylum seekers do not have lawyers and do not speak English fluently. Although they may have perfectly valid claims, they may not articulate them correctly on the application, or they may not mention facts or evidence critical to their claim. At HRI, we frequently represent asylum seekers with legitimate claims who were referred to immigration court because, without guidance from a lawyer, they did not pass their asylum interview. It is for this reason that immigration law has long held "the full examination of an applicant to be an essential aspect of the asylum adjudication process."[13] The proposed rule would allow a judge out throw out their application before they even see a courtroom.

Finally, even where a person makes it through the credible fear process and their application is not thrown out by the immigration judge, the proposed rule could convert good-faith asylum applications into "frivolous" applications—exposing applicants to one of the harshest bars in immigration law—simply because the claim lacks "merit" or is foreclosed by existing law. Immigration law is constantly changing: what is "existing law" one day can quickly change on another. Asylum applicants, many of whom are unrepresented and navigating the system pro se, should not be penalized for making a good faith claim of persecution. Similarly, asylum applicants should not be penalized for making novel arguments that aren't clearly established in existing law, even if an immigration judge later determines the legal argument lacks merit.

VII. CONCLUSION

Taken together, the changes outlined in the proposed rule propose the most significant evisceration of asylum protections we have seen in recent history. The proposal is callous rejection of the U.S.'s humanitarian obligations that jeopardizes the safety of people fleeing persecution throughout the world. Its provisions would put protection out of reach for people like HRI's clients described in this letter: people who have fled serious abuse in their home countries and are seeking refuge in the U.S.

We strongly oppose the changes laid out in the proposed rule and call on the Administration to withdraw them in their entirety.

For further information, please do not hesitate to reach me at kcohn@hrionline.org.

Respectfully,

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* Names changed for anonymity

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[1] Proposed 8 C.F.R. § 208.1(f)(viii).
[2] Proposed 8 C.F.R. § 208.1(c).
[3] Proposed 8 C.F.R. § 208.1(g).
[4] *Parussimova v.* Mukasey, 555 F.3d 734, 742 (9th Cir. 2009).
[5] Proposed 8 C.F.R. § 208.1(d).
[6] Proposed 8 C.F.R. § 208.1(e).
[7] Proposed 8 C.F.R. § 1208.15.
[8] Proposed 8 C.F.R. § 1208.13(d).
[9] *E.g.*, *Immigration Laws*, U.S. EMBASSY IN NICARAGUA, https://ni.usembassy.gov/u-s-citizen-services/citizenship-services/immigration-laws/.
[10] Proposed 8 C.F.R. § 1208.30(e)(1).
[11] Proposed 8 C.F.R. § 1208.13(e)(2).
[12] Proposed 8 C.F.R. § 208.20(c).
[13] *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).