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July 15, 2020

Via https://www.regulations.gov
& Federal Express

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

Re: Comments on Joint Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (June 15, 2020)

Department of Homeland Security (RIN 1615–AC42); Department of Justice, Executive Office for Immigration (EOIR Docket No. 18–0002; A.G. Order No. 4714–2020; RIN 1125–AA94)

Dear Ms. Reid:

We represent the National Citizen and Immigration Services Council 119 ("Council 119"), and we write on its behalf to provide comments on the above-referenced proposal by the Department of Justice ("DOJ") and Department of Homeland Security ("DHS") seeking to amend the rules governing asylum and withholding of removal as well as credible fear and reasonable fear determinations (the "Proposed Regulation"). As detailed below, Council 119 opposes the Proposed Regulation in its entirety.[1] It also objects to the inappropriately short 30-day comment period on a proposal that would so fundamentally alter the existing legal standards for asylum eligibility and protection of refugees in this country.

I. Executive Summary

The commitment to provide safe haven to persecuted people is etched into our nation's identity. That commitment is perhaps best reflected in the sonnet enshrined at the pedestal of the colossal sculpture sitting in New York Harbor that has welcomed many generations of Americans: "*Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift*

[1] This comment does not address every concern that Council 119 has with respect to the Proposed Regulation, but focuses on a few of the most problematic provisions.

my lamp beside the golden door!" Four hundred years ago with the arrival of the Pilgrims—America's first refugees—the promise of safety and an opportunity to build a permanent life without persecution remains a part of our nation's moral fabric. This promise has been reinforced by our nation's laws, which, over the course of several decades, have established a standardized and agile system for identifying, vetting, and protecting refugees. That system endured for decades across multiple administrations, ensuring that refugees would not be returned to territories where they would be persecuted or tortured.

The cornerstone of that system are the requirements set forth in the 1951 Convention Related to the Status of Refugees (the "1951 Convention") and the 1994 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the "CAT"). Together, these treaties and the statutes designed to implement them prohibit our country from penalizing refugees for their illegal entry or stay in the country and returning refugees to territories where they may be tortured or their lives or freedoms would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.

But, in the last three years, the Executive Branch of our government has sought to turn the asylum system on its head. The most extreme in a recent series of draconian changes to the American asylum process, the Proposed Regulation dismantles our carefully crafted system of vetting asylum claims, and with it, America's position as a global leader in refugee protection.

Specifically, the Proposed Regulation, among other things, seeks to: (i) change the definition of persecution to render our country noncompliant with our international treaty obligations and to deny protection to many refugees who are deserving of protection here; (ii) nearly eliminate all valid asylum claims where the applicant was persecuted for a political opinion that is not explicitly tied to a specific cause related to "political control of a state or a unit thereof," even in cases where the government itself persecuted the applicant; (iii) alter the well-defined criteria adjudicators consider in determining whether internal relocation in the country that the fled and where they were persecuted is a reasonable option; (iv) expand the definition of a "frivolous" asylum application and lower the standard for making a finding of frivolousness to punish asylum seekers who are not fully familiar with the nuances of the highly complex body of federal immigration law; (v) require asylum decision-makers to consider adverse factors that are contrary to the plain terms of the governing statutes and our nation's international treaty obligations; (vi) allow immigration judges to effectively deny asylum applications without ever allowing the individual their day in court; and (vii) change the standard of proof in credible fear screenings as well as withholding of removal and deferral of removal proceedings under the CAT to impose significant additional barriers for the asylum seeker.

The Proposed Regulation thus represents a sweeping assault on the American asylum system. If implemented, it would effectively vitiate our law designed to give protection to the persecuted and have devastating consequences for thousands of people who deserve refuge in our country. In doing so, the Proposed Regulation would also render our country noncompliant

with its international treaty obligations and violate statutory immigration law, which does not grant the Executive Branch the power to make the types of wholesale changes reflected in the Proposed Regulation.

Council 119's members are steadfast in their commitment to serving our country by continuing its proud tradition as a refuge for the persecuted while ensuring the safety and security of American citizens. The Proposed Regulation betrays this tradition and would force Council 119's members to take actions that would violate their oath to uphold our nation's immigration laws as adopted by Congress. Accordingly, for the reasons set forth herein, Council 119 urges DOJ and DHS to immediately rescind the Proposed Regulation and instead focus their efforts on advancing policies that ensure that people who need refugee protection can find safety in the United States.

II. Council 119's Interest in the Proposed Regulation

Council 119 is a labor organization that represents the interests of approximately 14,500 bargaining unit employees of United States Citizenship and Immigration Services ("USCIS") throughout the United States and abroad. Council 119's members are federal employees who are responsible for, among other things, adjudicating affirmative asylum claims, processing refugees overseas, performing "credible fear" and "reasonable fear" screenings, and providing relief for survivors of human trafficking and those who assist law enforcement.

Council 119 has a special interest in the Proposed Regulation because its members are at the forefront of interviewing and adjudicating the claims of individuals seeking asylum in the United States. Council 119's members have first-hand knowledge as to how the proposed rules will impact asylum adjudications and pre-screening operations, as well as how they comport with international and domestic laws concerning due process for asylum seekers and the protection of refugees.

This comment relies solely upon information that is publicly available, and it does not rely on any information that is law enforcement sensitive, classified, or protected under the Privacy Act of 1974. It represents only the views of Council 119 on behalf of its members and does not represent the views of USCIS or USCIS employees in their official capacities.

III. The Proposed Regulation Undermines Our Nation's Longstanding Commitment of Providing Safe Haven to the Persecuted

The Proposed Regulation seeks to eviscerate the longstanding protections afforded to refugees by our country. Those protections have their founding in the era that pre-dates the establishment of the United States. Indeed, our country's roots sprouted from the footsteps of Pilgrims onto a Massachusetts shore in November 1620.[2] Fleeing religious persecution in their

[2] *See* William Bradford, *Of Plymouth Plantation* (Harold Paget ed. 2006).

native England and exiled to Holland, the Pilgrims journeyed across the Atlantic to make their permanent home in what would become the United States.[3] Their arrival etched into the nation's identity the promise that it would serve as a safe haven for the persecuted.

The mid-19th century brought millions more refugees to America's doorstep.[4] Between 1847 and 1851, an estimated two million Irish fled starvation and disease wrought by the Great Famine, with 840,000 passing through the port of New York and many more arriving by way of Canada.[5] During the same period, German political refugees fleeing reactionary reprisals in the wake of the 1848 Revolution came to America seeking freedom of thought and expression.[6]

Our nation's treatment of refugees, however, is not unblemished, as demonstrated by American policy toward Jewish refugees during World War II.[7] Although the United States accepted approximately 250,000 refugees fleeing Nazi persecution prior to the country's entry into World War II, it refused to accept more as Nazi Germany increased its atrocities.[8] American indifference to refugees fleeing German aggression is perhaps best reflected in the United States' denial of entry in 1939 to the *St. Louis*, an ocean liner carrying 907 German-Jewish refugees stranded off the coast of Miami.[9] The ship returned to Europe where many of its occupants met their fate—254 would die in the Holocaust.[10]

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[3] Jeremy Dupertuis Bangs, Strangers and Pilgrims, Travellers and Sojourners: Leiden and the Foundations of Plymouth Plantation, vii, 7, 605, 614, 630 (2009).

[4] While U.S. policy during the 19th century did not draw a distinction between immigrants and refugees, historians have characterized groups whose emigration during this period was motivated by persecution, oppression, or natural disaster as refugees. *See* Philip A. Holman, *Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook* 3, 5 (David W. Haines ed., 1996).

[5] Timothy J. Meagher, *The Columbia Guide to Irish American History* 77 (2005). *See generally* William A. Spray, et al., *Fleeing the Famine, North America and Irish Refugees*, 1845-1851 (Margaret M. Mulrooney ed., 2003). Many historians refer to these Irish migrants as refugees because their plight had roots in British colonial repression and conditions of serfdom. *See, e.g.*, Meagher, at 66-71 (discussing various historians' assignment of culpability for the famine's devastation to British colonial rule).

[6] *See generally* Adolf Eduard Zucker, The Forty-Eighters: Political Refugees of the German Revolution of 1848 (1967).

[7] Richard Breitman & Alan M. Kraut, American Refugee Policy and European Jewry, 1933-1945, 1-10 (1988).

[8] Holman, *supra* note 4, at 5 (citing Congressional Research Service 1991:556).

[9] The American Jewish Joint Distribution Committee, Minutes of the Meeting of the Executive Committee (June 5, 1939), *available at* https://archives.jdc.org/wp-content/uploads/2018/06/stlouis_minutesjune-5-1939.pdf.

[10] *Id.*

In many ways, our nation's refugee policy since World War II has sought to rectify our wartime humanitarian failures. Immediately after the war, the United States played a leading role in the formation and funding of international aid organizations such as the United Nations International Children's Emergency Fund and the World Food Programme, both of which provide support for refugees and displaced persons.[11] In response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Harry S. Truman directed the issuance of 40,000 visas to resettle the survivors in the United States.[12] Congress also took action by enacting the Displaced Persons Act of 1948, which allowed for the admission of 415,000 displaced persons by the end of 1952.[13]

American compassion toward refugees following World War II was not limited to Holocaust survivors. In 1953, Congress enacted the Refugee Relief Act, which, along with its amendments, authorized the admission of 214,000 refugees, including escapees from Communist-dominated countries.[14] The Refugee-Escapee Act that followed in 1957 allowed for the resettlement of "refugee-escapees," persons fleeing persecution in Communist or Middle Eastern countries.[15] In the next three decades, the United States welcomed refugees escaping violence, conflict, persecution, or natural disaster, at times in waves of hundreds of thousands, from the Azores,[16] Cuba, Southeast Asia, Eastern Europe, the Soviet Union, and Afghanistan.[17]

The United States also began to undertake international treaty obligations related to resettlement of refugees who set foot on American soil. In 1968, the United States ratified the 1967 Protocol Relating to the Status of Refugees, a treaty drafted by the U.N. High Commissioner for Refugees ("UNHCR").[18] Through the 1967 Protocol, the United States became bound by the substantive provisions of an earlier treaty, the 1951 Convention,[19] agreeing that it would not: (i) discriminate against refugees on the basis of race, religion, or nationality;

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[11] *See* Maggie Black, The Children and the Nations: The Story of Unicef, 25-35 (1986); Bryan L. McDonald, *Food Power: The Rise and Fall of the Postwar American Food System* 143 (2017).

[12] *See* Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door 1945-Present* 4-6 (1986).

[13] Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Holman, *supra* note 4, at 5.

[14] Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; Holman, *supra* note 4, at 5.

[15] Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; Holman, *supra* note 4, at 6.

[16] Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* 107-15 (2008).

[17] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy /our-history/refugee-timeline.

[18] U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

[19] Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int'l L. 1, 1 n.1 (1997).

(ii) penalize refugees for their illegal entry or stay in the country; or (iii) engage in "refoulement"—to "expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion."[20] The United States reaffirmed its commitment to non-refoulement with its ratification in 1994 of the CAT.[21] Article 3(1) of the CAT provides: "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[22]

Embracing its role as a global leader in refugee protection, the United States has effectuated these international commitments by developing a sophisticated system for vetting claims for asylum. Beginning in 1972, the Immigration and Naturalization Service (the "INS") used existing procedures, such as parole, stays of deportation, and adjustment of status, to allow foreign nationals who feared persecution in their homeland to remain in the country.[23] The Refugee Act of 1980 created the first statutory basis for asylum in the United States[24] and codified the 1951 Convention's principle of non-refoulement.[25] Then, in 1990, the INS established an Asylum Corps, comprised of professional asylum officers trained in international law and having access to information on international human rights.[26] This specialized training allows asylum officers to more accurately and efficiently assess asylum claims. Recognizing the value of this approach, Congress authorized funding to double the number of asylum officers in 1994.[27] The asylum program was further modified in 1995 and 1996 to allow asylum officers to process expedited removal of persons who cannot demonstrate a credible fear of persecution. *See* 8 U.S.C. § 1225(b)(1)(B)(iii).

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[20] *Id*. at 2.

[21] *See* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

[22] *Id.*

[23] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

[24] The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Tom K. Wong, *The Politics of Immigration: Partisanship, Demographic Change, and American National Identity* 52-53 (2017).

[25] *Compare* U.N. Convention Relating to the Status of Refugees art. 33(1), 189 U.N.T.S. 137, *with* 8 U.S.C. § 1231(b)(3)(A).

[26] Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 Am. U. Int'l L. Rev. & Pol'y 43 (1994); *see also* 8 C.F.R. § 208.1(b); *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

[27] Steven Greenhouse, *U.S. Moves to Halt Abuses in Political Asylum Program*, N.Y. Times, Dec. 3, 1994, p. 8.

Since the creation of USCIS in 2003, the responsibility for maintaining an asylum system in accordance with international and domestic law has rested with USCIS's Asylum Division, which reviews claims of three categories of asylum-seekers: (1) those not in removal proceedings who affirmatively apply for asylum, referred to as the "affirmative" asylum process; (2) those subject to expedited removal who indicate an intention to apply for asylum or a fear of return to their home country; and (3) those who have already been ordered removed or convicted of certain crimes but express a fear of return to their home country. In the first instance, the Division is tasked with adjudicating "affirmative" asylum applications. In the second instance, the Division determines whether the individual has a "credible fear" of persecution or torture. *See* 8 U.S.C. § 1225(b)(1)(B); *see also* 8 C.F.R. §§ 208.30, 235.3. If the Division so determines, the individual may apply for asylum or withholding of removal as a defense to removal in a formal removal proceeding before an immigration judge. In the third instance, the Division must determine whether an individual who has already been ordered removed or convicted of certain crimes but expresses a fear of return to the removal country has a "reasonable fear" of persecution or torture in that country. *See* 8 C.F.R. §§ 238.1, 241.8, 208.31. If the Division determines as such, the individual is referred to an immigration judge for withholding-only proceedings, in which the individual may seek withholding of removal under INA § 241(b)(3) (codified as 8 U.S.C. § 1231(b)(3)), or withholding of removal under regulations implementing CAT obligations. This agile process strikes an appropriate balance between offering protection to qualified asylum seekers, enforcing applicable laws, addressing national security concerns, and combatting fraud and abuse.

American leadership in refugee protection and the effectiveness of our processes for dealing with displaced people are perhaps best reflected in the sheer number of refugees—nearly 5 million representing well over 70 nationalities[28]—successfully absorbed into the United States since World War II. Forging new lives out of turmoil and trauma, refugees have contributed much to the fabric of American life and are integral to our success as a nation of immigrants.

Today, the world is in the throes of a migration crisis that is unprecedented in its scale.[29] In 2018, there were 70.8 million individuals forcibly displaced from their homes.[30] This displacement spans the globe, from the Middle East to Africa to Asia to Central America—the latter being a region that has a legacy of violence and fragile institutions resulting in part from the civil wars of the 1980s.[31] Now, perhaps more than ever, America needs to continue its

[28] David W. Haines, *Safe Haven? A History of Refugees in America* 4 (2010).

[29] *See* UNHCR, *Global Trends: Forced Displacement in 2018* [hereinafter "*Global Trends*"] at 4 (June 20, 2019), *available at* https://www.unhcr.org/globaltrends2018/.

[30] *Id.* at 2.

[31] *Id*. at 2-3, 7.

longstanding commitment to offering protection, freedom, and opportunity to the vulnerable and persecuted.[32]

Despite the pressing need to afford protection to refugees fleeing violence and persecution, America's refugee resettlement and asylum systems are under siege. Over the last three years, our Executive Branch has implemented a barrage of measures whose impact and intent are to dismantle the pillars of our defining role as a refuge for the world's persecuted, its "huddled masses yearning to breathe free."[33] After temporarily suspending the U.S. Refugee Admissions Program altogether at the start of 2017,[34] the Administration has increasingly slashed the number of refugees who can be resettled in the country each year—from 50,000 in Fiscal Year 2017 (a decrease of more than 50% from 2016) to 45,000 in Fiscal Year 2018, 30,000 in Fiscal Year 2019, and 18,000 in Fiscal Year 2020[35]—and has actually admitted far fewer.[36]

At our southern border, America's asylum system has fared no better. Last year, the Administration promulgated and implemented what it euphemistically referred to as the "Migrant Protection Protocols,"[37] which require asylum seekers to remain in Mexico pending adjudication of their asylum application, often under life-threatening conditions and without access to legal and supportive services.[38] The same year, the Administration implemented the "Third Country Transit Bar," a rule categorically denying asylum to almost anyone crossing into

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[32] *See* Examining the Syrian Humanitarian Crisis From the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep't of Homeland Security), http://docs.house.gov/meetings/.

[33] Emma Lazarus, *The New Colossus*, Nov. 2, 1883.

[34] *See* Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States (Mar. 6, 2017) (discussing E.O. 13769 of Jan. 27, 2017), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/.

[35] Michael D. Shear and Zolan Kanno-Youngs, *U.S. Cuts Refugee Program Again, Placing Cap at 18,000 People*, N.Y. Times, Sep. 27, 2019 at A16.

[36] For example, "[j]ust 22,491 refugees were resettled in the U.S. in fiscal year 2018, roughly half the 45,000 cap." Deborah Amos, *2018 Was Year of Drastic Cuts to U.S. Refugee Admissions*, NPR, *available at* https://www.npr.org, Dec. 27, 2018.

[37] Dep't of Homeland Sec., Press Release, Migrant Protection Protocols (Jan. 24, 2019), *available at* https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[38] The risks faced by migrants under MPP have been well documented. *See, e.g.*, Human Rights First, *Report: Orders From Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, Oct. 2019; Jonathan Blitzer, *How the U.S. Asylum System is Keeping Migrants at Risk in Mexico*, The New Yorker, Oct. 1, 2019.

the United States through the southern border without first having applied for and been denied asylum in any country through which they transited.[39] Lastly, it also began to implement the so-called Asylum Cooperative Agreements with the Northern Triangle countries of Guatemala, Honduras, and El Salvador. Under these agreements, rather than have their asylum claims heard, refugees from the Northern Triangle countries are permanently removed to other Northern Triangle countries—which are themselves some of the most dangerous countries on earth and are the source of large numbers of refugees.

The Proposed Regulation is perhaps the most extreme of these measures to date. As detailed below, it seeks to upend a carefully crafted asylum system and to nightmarishly pervert its purpose from protection to punishment for those seeking refuge in our country. Where it once sought to identify and welcome those with meritorious claims of persecution under international law, it now seeks to erect indiscriminate, callous, and unlawful barriers.

IV. Comments on Specific Provisions of the Proposed Regulation

Council 119 provides the following comments on certain specific provisions of the Proposed Regulation that are particularly egregious. By limiting its comments on these provisions, Council 119 does not endorse other aspects of the Proposed Regulation, which Council 119 objects to in its entirety.

A. Redefinition of "Persecution"

Under the 1951 Convention, an applicant for asylum must establish persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Although persecution is not specifically defined in the 1951 Convention or statutory law implementing it, courts have held that "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution."[40] This definition is consistent with that developed by the UNHCR in its Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.[41] Indeed, the definition developed by U.S. courts is designed to align our country with its international treaty obligations under the 1951 Convention.[42]

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[39] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829-45 (Jul. 16, 2019) (codified at 28 C.F.R. Pt. 208).

[40] *See, e.g.*, *Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983).

[41] UNHCR, The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979), HCR/1P/Eng./Rev.2, paragraph 51.

[42] *Cf. Grace v. Whitaker*, 344 F. Supp. 3d 96, 106 (D.D.C. 2018) ("The "motivation for the enactment of the Refugee Act was the United Nations Protocol Relating to the Status of Refugees to which the United

The Proposed Regulation defines persecution as an extreme concept of severe legal harm that does not include: (i) every instance of harm that arises generally out of civil, criminal, or military strife in a country; (ii) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional; (iii) intermittent harassment, including brief detentions; (iv) repeated threats with no actions taken to carry out the threats; (v) non-severe economic harm or property damage; or (vi) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.[43]

This narrow definition is deliberately designed to deny asylum applicants the protections that are required by law in at least two fundamental ways.

First, by expressly excluding certain types of harms from the definition of persecution, the Proposed Regulation also seeks to abrogate well-established case law—developed in consultation with pronouncements from international human rights bodies—that individual instances of harm that individually may not rise to the severity of persecution can nonetheless constitute persecution when considered cumulatively in the totality of the circumstances. Thus, according to lesson plans prepared by the USCIS directorate known as Refugee, Asylum and International Operations ("RAIO"), which are publicly available:[44] "The federal courts, as well as the BIA [the Board of Immigration Appeals], have held that cumulative instances of harm, considered in totality, may constitute persecution on account of a protected characteristic, so long as the discrete instances of harm were each inflicted on account of a protected characteristic. You should evaluate the entire scope of harm experienced and feared by the applicant to determine if he or she was persecuted and fears persecution."[45] There is no valid basis for the Proposed Regulation to exclude these types of harm from the definition of persecution.

States had been bound since 1968. Congress was clear that its intent in promulgating the Refugee Act was to bring the United States' domestic laws in line with the Protocol. The BIA has also recognized that Congress' intent in enacting the Refugee Act was to align domestic refugee law with the United States' obligations under the Protocol, to give statutory meaning to our national commitment to human rights and humanitarian concerns, and to afford a generous standard for protection in cases of doubt.") (citations and internal quotations omitted).

[43] 85 Fed. Reg. 115, 36280-1.

[44] USCIS, Electronic Reading Room, https://www.uscis.gov/about-us/electronic-reading-room.

[45] RAIO Lesson Plan on Persecution (citing *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998); *Matter of O-Z-& I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998); cf. *Mihalev v. Ashcroft*, 388 F.3d 722, 728 (9th Cir. 2004)).

Second, the Proposed Regulation's exclusion of repeated threats from the definition of persecution is fundamentally at odds with the definition of the phrase that has been developed by U.S. courts throughout the years in consultation with pronouncements of international human rights bodies, such as UNHCR.

Under existing law, the general elements of persecution are severity of harm, motivation (also commonly referred to as nexus), persecutor, and location. To establish harm, the applicant must establish suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the persecutor seeks to overcome.[46] However, a "punitive" or "malignant" intent is not required for harm to constitute persecution.[47] Thus, persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.[48] Additionally, persecution encompasses more than physical harm or the threat of physical harm so long as the harm inflicted or feared rises to the level of persecution.[49] Harm can be non-physical in nature, but if non-physical, it must include "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[50]

Importantly, serious threats alone may constitute persecution even if the applicant was never physically harmed.[51] Indeed, the 1951 Convention expressly acknowledges that threats can constitute persecution: "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be ***threatened*** on account of his race, religion, nationality, membership of a particular social group or political opinion."[52] In other words, the concept of threats being sufficient to constitute persecution has been at the core of the international refugee protection regime since its modern

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[46] See *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), modified by *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).

[47] See *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

[48] See *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

[49] See *Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007)

[50] See *Matter of T-Z-*, 24 I&N Dec. at 171, citing *Matter of Laipenieks*, 18 I&I Dec. 433, 457 (BIA 1983), rev'd *by Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985); *see also INS v. Stevic*, 467 U.S. 407, 428 fn. 22 (1984); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985); *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000).

[51] See *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by *Salazar-Paucar v. INS*, 290 F.3d 964 (9th Cir. 2002); *see also Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014).

[52] 1951 Convention, Art. 33 (emphasis added).

inception. That notion was reaffirmed in the CAT, to which our country is a signatory.[53] Accordingly, the RAIO direct asylum and refugee officers to consider, in accordance with the 1951 Convention and case law from federal courts of appeal, the following issues when evaluating whether a threat is serious enough to rise to the level of persecution: has the persecutor attempted to act on the threat;[54] is the nature of the threat itself indicative of its seriousness;[55] has the persecutor harmed or attempted to harm the applicant in other ways;[56] has the persecutor attacked, harassed, or threatened the applicant's family;[57] has the persecutor carried out threats issued to others similarly situated to the applicant;[58] and did the applicant suffer emotional or psychological harm as a result of the threat(s).

Psychological harm alone can rise to the level of persecution. According to the RAIO lesson plan, "you should always consider evidence, including the applicant's testimony, that the events he or she experienced caused psychological harm. Psychological harm alone may rise to the level of persecution. . . . Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.[59] Additionally, under the CAT, severe mental harm alone may be sufficient to constitute torture.[60]

Accordingly, there is simply no valid basis for the Proposed Regulation to exclude repeated threats from the definition of persecution if there are no actions taken to carry out the threats. The inclusion of repeated threats in the existing definition of persecution has been

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[53] The definition of torture used for CAT analysis is found in 18 U.S.C. §2430 which defines "severe pain or suffering" in the context of torture as "the intentional infliction or **threatened** infliction of severe physical pain or suffering;" or "the administration or application, or **threatened** administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." (Emphasis added).

[54] See *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (death threats alone may constitute persecution)

[55] *See Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998) (three letters within three months containing death threats constituted persecution).

[56] *See Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1257-58 (11th Cir. 2007)

[57] *See Sangha v. INS*, 103 F.3d 1482, 1486-87 (9th Cir. 1997); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Sanchez Jimenez v.U.S.Atty Gen.* 492 F.3d 1223, 1233 (11th Cir. 2007)

[58] *See Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998).

[59] RAIO Lesson Plan on Persecution (citing *Ouk v. Gonzales*, 464 F.3d 108, 111 (1st Cir.2006) ("a finding of past persecution might rest on a showing of psychological harm"); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir.2004) ("Persecution may be emotional or psychological, as well as physical.")).

[60] *See* 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465; and 8 C.F.R. § 208.18.

understood by Council 119's members to be required by international law, and their exclusion would render our country noncompliant with its international treaty obligations. Moreover, the Proposed Regulation's requirement that the asylum seeker demonstrate actions to carry out the threats makes no sense; asylum seekers should not have to endure physical harm or death for themselves or their family in order to prove persecution. It would be akin to having to drown to prove that you are not a witch. That is part of our past that is best left behind.

B. Political Opinion

The Proposed Regulation defines political opinion as one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof.[61] It states that the Attorney General will not favorably adjudicate claims of persecution on account of a political opinion defined solely 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.[62]

Again, this change seeks to upend decades' worth of case law interpreting the political opinion element of the 1951 Convention without any valid basis. As the RAIO lesson plan notes, "expression of a political opinion should not be viewed only in the narrow sense of participation in a political party or the political process. The meaning of political opinion in the refugee definition "should be understood in the broad sense, to incorporate . . . any opinion on any matter in which the machinery of state, government and police may be engaged."[63] Decades of case law establish that the meaning of "political opinion" in the context of the refugee definition extends far beyond the "furtherance of a discrete cause related to political control of a state or a unit thereof" and includes such opinions or views as feminism;[64] activities to protect or establish the right to association (such as union membership), workers' rights, or other civil liberties;[65] participation in certain student groups;[66] participation in community improvement

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[61] 85 Fed. Reg. 115, 36279-80.

[62] *Id.* at 36280.

[63] RAIO Lesson Plan, Nexus and the Protected Grounds (quoting Guy Goodwin-Gill, The Refugee in International Law 30 (1983)).

[64] *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

[65] *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1993); *Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988).

[66] *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1993); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990).

organizations or cooperatives, or movements for land reform;[67] and exposure of government human rights abuses.[68]

Moreover, as the RAIO lesson plan states, "there may well be cases where refusal to join a gang is an element of a cognizable political opinion claim. To show that violence inflicted by gang members has a nexus to the applicant's actual or imputed political opinion, an applicant needs evidence that he or she was politically or ideologically opposed to the gang's particular ideals or to gangs in general (or that the gang believes this) and not merely that he or she did not want to be personally involved in or had an aversion to specific activities of the particular gang. Even if the applicant shows that he or she possesses an anti-gang political opinion, the applicant must show that the gang targeted him or her on account of that political opinion, and not merely to grow its ranks or to increase its wealth."[69] An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is "unable or unwilling" to control the entity doing the harm.[70]

The RAIO lesson plan provides several examples of cases in which an individual can establish a nexus on account of political opinion at the hands of a non-state actor, including the following:

> A Pakistani "special police officer" began receiving threatening letters and phone calls after, in the course of his official duties, he began going to mosques and social spaces to encourage citizens to oppose the Taliban. The immigration judge found that he was targeted because of his work as a police officer and, therefore, he had not established a nexus to a protected ground, and the BIA affirmed the immigration judge's decision. The First Circuit Court of Appeals vacated and remanded the case, holding that the fact that the applicant expressed the political views for which he was targeted while on duty did not preclude him from establishing the requisite nexus.[71]

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[67] *See, e.g.*, *Zamora-Morel v. INS*, 905 F.2d 833 (5th Cir. 1990); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998).

[68] *Gao v. Gonzales*, 407 F.3d 146, 153 (3d Cir. 2005).

[69] *Id.* (citing *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008), abrogated by *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009)).

[70] *See Faruk v, Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007).

[71] *See Khattak v. Holder*, 704 F.3d 197, 204–05 (1st Cir. 2013).

Under the Proposed Regulation, this type of applicant would not be entitled to any relief even though he was persecuted because of his political opinion. Simply put, there is no valid basis for such a fundamental change to asylum law. The change appears only to be driven by the Administration's steadfast opposition to affording asylum protection to individuals and families fleeing violence in the Northern Triangle countries of Honduras, Guatemala, and El Salvador, and not any legitimate concerns that may warrant curtailment of protections required by our international treaty obligations.

C. Internal Relocation

Under existing regulations, an applicant for asylum or statutory withholding of removal who could avoid persecution by internally relocating to another part of his or her country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and who can reasonably be expected to do so, may not be granted these forms of protection.[72] The regulations further prescribe a non-exhaustive list of factors for adjudicators to consider in making internal relocation determinations and delineate burdens of proof in various related situations.[73]

According to DOJ and DHS commentary on the Proposed Regulation, the current regulations regarding internal relocation inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate. For instance, according to the agencies, some factors—e.g., administrative, economic, or judicial infrastructure—do not have a clear relevance in assessing the reasonableness of internal relocation in many cases, while others insufficiently appreciate as a general matter that asylum applicants have often already relocated hundreds or thousands of miles to the United States regardless of such factors. Thus, the Proposed Regulation purports to propose "a more streamlined presentation" of the most relevant factors for adjudicators to consider in determining whether internal relocation is a reasonable option.

But the agencies' claims are in blatant violation of the guidance provided by UNHCR, the international body entrusted with the authoritative interpretation of the 1951 Convention. The UNHCR's guidelines, upon which the interpretation of internal relocation in U.S. asylum law is based, require a wholistic analysis of the relocation inquiry. Specifically, under the UNHCR guidance, the assessment of whether there is a relocation possibility requires two main sets of analyses, undertaken on the basis of answers to the following sets of questions:

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[72] 8 C.F.R §208.13(b)(1)(i)(B), (2)(ii), §1208.13(b)(1)(i)(B), (2)(ii) (asylum); 8 C.F.R §208.16(b)(1)(i)(B), (2), §1208.16(b)(1)(i)(B), (2) (statutory withholding); *but see Capital Area Immigrants' Rights Coalition et al. v. Trump*, 2020 WL 3542481 (D.D.C. June 30, 2020).

[73] 8 C.F.R §208.13(b)(1)(ii), (3), §1208.13(b)(1)(ii), (3); 8 C.F.R §208.16(b)(1)(ii), (3), §1208.16(b)(i)(ii), (3).

I. The Relevance Analysis

a) Is the area of relocation practically, safely, and legally accessible to the individual? If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.

b) Is the agent of persecution the State? National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.

c) Is the agent of persecution a non-State agent? Where there is a risk that the non-State actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.

d) Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation.

II. The Reasonableness Analysis

a) Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.[74]

Thus, contrary to the Proposed Regulation, the quality of a person's life if he or she were to internally relocate is relevant to reasonableness. The Proposed Regulation conflates the two-step process by simply assessing the first step of whether a person can internally relocate and ignoring the necessary second step of assessing reasonableness. Moreover, the distance a person has traveled to seek refuge is wholly irrelevant to the adjudication of his or her claim and should have no bearing whatsoever on the analysis regarding internal relocation. Just because a person

[74] *See* United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*. HCR/GIP/03/04 (23 July 2003), available at: https://www.refworld.org/pdfid/3f2791a44.pdf [accessed June 30, 2020].

has made a long and arduous journey full of hardship does not mean that that person would be fine suffering more and enduring more hardship to internally relocate to another part of their home country. This is a logical fallacy—a red herring.

D. Frivolous Applications

As the law stands now, applicants must "knowingly" fabricate evidence in an asylum application for it to be deemed frivolous.[75] The current regulatory scheme also provides that "an asylum application is frivolous if any of its material elements is deliberately fabricated."[76] The BIA has stated that a deliberate fabrication requires "a knowing and intentional misrepresentation of the truth."[77] The existing regulation also has a number of procedural safeguards in place to ensure the integrity of the finding, including the requirements of: (i) notice to the noncitizen of the consequences of filing a frivolous application; (ii) a specific finding by the immigration judge or the Board that the noncitizen knowingly filed a frivolous application; (iii) sufficient evidence in the record to support the finding that a material element of the asylum application was deliberately fabricated; and (iv) an indication that the noncitizen has been afforded sufficient opportunity to account for any discrepancies or implausible aspects of the claim.[78]

The Proposed Regulation makes several fundamental changes to making a finding of frivolousness, which subjects applicants to devastating consequences of INA § 208(d)(6).

First, it seeks to supposedly "clarify" that the term "knowingly" means "actual knowledge of the frivolousness ***or willful blindness***" (emphasis added).[79] Adding "willful blindness" to the meaning of such word goes against a plain reading of the statute, prior BIA precedent, and a common understanding of the term "knowingly." Black's Law Dictionary defines the term "knowingly" as, "[w]ith knowledge; consciously; intelligently."[80] Moreover, the rationale for requiring actual knowledge of frivolousness includes the fact that frivolous findings have huge and devastating consequences. If an immigration judge determines that an application is frivolous, the applicant becomes permanently ineligible for any future immigration benefits.[81]

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[75] INA § 208(d)(6).

[76] 8 C.F.R. § 1208.20.

[77] *Matter of Y-L-*, 24 I&N Dec. 151, 156 (BIA 2007).

[78] *Id.* at 155.

[79] 85 Fed. Reg. 115, 36273-77, 36295 (DHS rules), 36303-04 (DOJ rules).

[80] Black's Law Dictionary Free Online Legal Dictionary (2nd ed.), https://thelawdictionary.org/knowingly/ (last accessed July 7, 2020).

[81] *See* INA § 208(d)(6).

Second, in what is perhaps the most troubling aspect of the proposed change to the rule on frivolous applications, the expanded definition would include applications that are "clearly foreclosed by applicable law" or filed "without regard to the merits of the claim."[82] This expanded definition is both incredibly vague and virtually impossible for an applicant to determine at the time of filing, particularly for applicants who are unrepresented. Any application that is ultimately unsuccessful could be construed as frivolous, given the constantly changing landscape of asylum law. Attorneys are already prohibited from filing applications that have no legal merit by applicable ethical guidelines and regulations, and they do face consequences for doing so.[83] However, expanding the definition of "frivolous" to include these broad categories only serves to punish *pro se* applicants for their lack of understanding of U.S. immigration laws and processes, which are extraordinarily complex. Many of these claims are also filed on behalf of individuals who are the victims of human traffickers or unscrupulous *notarios* who seek to take advantage of the applicant's vulnerability and lack of familiarity with U.S. laws, culture, language, and other factors. Many such individuals may actually have a valid asylum claim but are never asked about their reasons for leaving their home countries or whether they would be harmed if sent back. Such vulnerable individuals should not be punished for their lack of understanding of our asylum laws or their misplaced trust in unethical actors.

The inability to avoid the draconian consequences of a frivolous finding under the expanded definition also violates the principles of due process and the right to file for asylum codified in the INA.[84] Under the guise of providing a "safety-valve" provision,[85] the notice of proposed rulemaking states:

> [I]n order to ameliorate the consequences of knowingly filing a frivolous application in appropriate cases, the Departments propose a mechanism that would allow certain aliens to withdraw, with prejudice, their applications by disclaiming the applications; accepting an order of voluntary departure for a period of no more than 30 days; withdrawing, also with prejudice, all other applications for relief or protection; and waiving any rights to file an appeal, motion to reopen, and motion to reconsider.[86]

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[82] 85 Fed. Reg. 115, 36295 (DHS rules), 36304 (DOJ rules).

[83] *See* 8 C.F.R. § 1003.102; ABA Model Rule (MR) 3.1 (Meritorious Claims and Contentions), 3.3 (Candor to the Tribunal).

[84] *See* INA § 208(a)(1).

[85] 85 Fed. Reg. 115, 36277, n.25.

[86] 85 Fed. Reg. 115, 36277.

Far from being a safety-valve, these conditions, which an applicant would be required to accept in order to avoid a finding of frivolousness, are just as severe as those found in INA § 208(d)(6). The Proposed Regulation effectively requires that an applicant be coerced into giving up any claim to remain in the United States ***with prejudice*** or risk being permanently rendered ineligible for any immigration benefit in the future. As a practical matter, this would force applicants into an unfair choice between filing a claim that may potentially be deemed frivolous, if it is ultimately unsuccessful, and having to give up all claims to remain in the United States, or not applying at all.

Third, as if lowering the standard for making frivolous findings and expanding the definition of frivolous were not cruel enough, the Proposed Regulation also eliminates the existing procedural safeguards set out in the regulations requiring that an applicant be given an opportunity to account for any discrepancies or implausible aspects of the claim.

Fourth, the Proposed Regulation, if promulgated, would also—for the first time—allow asylum officers to deem affirmative applications to be frivolous for the first time. Currently, these determinations can only be made by immigration judges.[87] Moreover, the purpose of allowing asylum officers to make frivolous findings is unclear and unsupported. Under the Proposed Regulation, the consequences of INA § 208(d)(6) would not attach "unless an immigration judge or the BIA subsequently makes a finding of frivolousness upon *de novo* review of the application . . . ."[88] Therefore, the asylum officer's finding would have no practical effect. In addition, because of the frivolous finding, the immigration judge would no longer be conducting a true *de novo* review of the application, as the adjudication would be tainted by the asylum officer's prior determination of frivolousness.

In an attempt to explain the necessity of allowing asylum officers to make their own determinations of frivolousness, the notice of proposed rulemaking states:

> The proposed amendments to the regulations would give asylum officers a valuable and more targeted mechanism for handling frivolous asylum applications. As noted above, when referring cases to the immigration courts based on negative credibility determinations, asylum officers may flag issues related to frivolousness for immigration judges to consider, but they cannot refer frivolous cases or deny applications solely on that basis. Allowing asylum officers to refer or deny frivolous cases solely on that basis would strengthen USCIS's ability to root out frivolous applications more efficiently, deter frivolous filings, and ultimately reduce the number of frivolous applications in the asylum system.

[87] 8 C.F.R. § 1208.20.

[88] 85 Fed. Reg. 115, 36275.

> These amendments would help the Departments better allocate limited resources and time and more expeditiously adjudicate meritorious asylum claims. Moreover, under this proposed rule, if an asylum officer identifies indicators of frivolousness in an asylum application, the asylum officer would focus more during the interview on matters that may be frivolous. And an immigration judge who receives an asylum application with a frivolousness finding by an asylum officer would have a more robust and developed written record focused on frivolous material elements to help inform his or her ultimate decision. Thus, an asylum officer's finding that an application is frivolous would help improve the efficiency and integrity of the overall adjudicatory process.[89]

It is not at all clear how this new procedure would actually improve or streamline the adjudication process. Asylum officers are already expected to evaluate applications for indicators of fraud, make determinations as to an applicant's overall credibility, and evaluate the reliability of evidence. Any of these factors, if the basis of an underlying decision to refer an application to the immigration court, must be explored on the record, regardless of whether these issues would ultimately result in a frivolous finding. Asylum officers are also trained to adjudicate the legal merits of a claim and may refer a case that is foreclosed by applicable law on the basis of ineligibility. Therefore, it is unclear how allowing asylum officers to make frivolous findings would actually result in a "more robust and developed written record" once the case goes before an immigration judge. Requiring asylum officers to make their own determinations of frivolousness would therefore require a greater investment of time and resources for no practical effect.

Moreover, the Proposed Regulation does not provide any information on how the new procedures will be applied operationally at the asylum officer level, stating only that "USCIS would not be required to provide opportunities for applicants to address discrepancies or implausible aspects of their claims in all cases when the asylum officer determines that sufficient opportunity was afforded to the alien."[90]

Finally, the Proposed Regulation also confuses the issues of credibility and frivolousness, falsely asserting that asylum officers are already trained to make determinations of frivolousness. The notice of proposed rulemaking states that asylum officers "receive extensive training on spotting indicators of frivolousness, fraud, and credibility concerns" and that frivolous

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[89] 85 Fed. Reg. 115, 36275.

[90] *Id.*

applications are generally handled as negative credibility determinations under current practice.[91] While asylum officers are trained on how to make credibility determinations—a very nuanced determination that is based on the totality of the circumstances in each case—credibility concerns are not the same as frivolous filings.

E. Discretion

Under existing law, asylum is a discretionary relief, and a noncitizen who demonstrates that he or she qualifies as a refugee must also demonstrate that he or she deserves asylum as a matter of discretion.[92] In other words, eligibility for asylum is not an automatic entitlement. Rather, after demonstrating statutory and regulatory eligibility, the noncitizen must further meet the burden of showing that the Attorney General or the Secretary of Homeland Security should exercise discretion to grant asylum.[93]

The Proposed Regulation instructs decision makers to consider the following significant adverse discretionary factors, subject to narrowly drawn exceptions: (i) a noncitizen's unlawful entry or unlawful attempted entry into the United States; (ii) the failure of a noncitizen to apply for protection from persecution or torture in at least one country outside the noncitizen's country of citizenship, nationality, or last lawful habitual residence through which the noncitizen transited before entering the United States; (iii) and a noncitizen's use of fraudulent documents to enter the United States, unless the noncitizen arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.[94] The Proposed Regulation further categorically excludes from a favorable exercise of discretion any individual who immediately prior to his arrival in the United States or en route to the United States from the noncitizen's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country, or transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States.[95] These exclusions do not apply if the individual demonstrates that such third country was not party to the 1951 Convention or the 1967 Protocol, that the individual is a victim of a severe form of trafficking in persons, or that the individual applied for protection from persecution or torture in such a country and received a final judgement denying the individual such protection.[96] Lastly, the Proposed Regulation categorically excludes from a favorable exercise of discretion any

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[91] *Id.*

[92] *See* INA § 208(b)(1)(A).

[93] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

[94] 85 Fed. Reg. 115, 36282-3.

[95] *Id.* at 36283.

[96] *Id.* at 36284.

individual who accrued more than one year of unlawful presence in the United States prior to filing an application for asylum.[97]

The aforementioned provisions are designed to subvert the will of Congress clearly expressed in the Refugee Act of 1980. They do so by imposing new obstacles into the discretionary component of asylum considerations with the express purpose of denying protection to refugees who otherwise meet all eligibility criteria and would merit a favorable exercise of discretion. The Refugee Act of 1980 provides that "the Attorney General shall establish a procedure ***for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status***, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).[98] Section 208(a) of the INA similarly provides, that "***[a]ny*** 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*** and including an alien who is brought to the United States after having been interdicted in international or United States waters), ***irrespective of such alien's status***, may apply for asylum." (Emphasis added.)

By commanding the Attorney General to establish asylum procedures for ***any*** foreign nationals or stateless persons physically present in the United States or at a land border or port of entry ***without regard to status***, Congress clearly excluded considerations of the kinds enumerated in the above-referenced provisions of the Proposed Regulation as outside the purview of the discretionary component of asylum relief. Instead, the primary focus of an asylum adjudication is intended to be whether an individual meets the definition of a refugee, with due consideration given as to whether the individual is subject to the limited statutory restrictions on applying for asylum at INA § 208(a)(2) or statutory bars to a grant of asylum at INA § 208(b)(2)(A).

With respect to the above-referenced provision related to the accrual of unlawful presence, the Proposed Regulation also attempts to override the exceptions Congress established to the one-year filing deadline at INA § 208(a)(2)(D) by failing to account for extraordinary circumstances related to the delay in applying for asylum or changed circumstances materially affecting an individual's eligibility for asylum.

Further, the proposed adverse discretionary factors related to an individual's failure to apply for protection from persecution or torture in a third country attempt to supersede the parameters Congress established for finding when an individual is able to receive protection in a safe third country. These provisions have been proposed without regard to whether the country or countries in question provide "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection" or whether a bilateral or multilateral agreement is in

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[97] *Id.*

[98] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, Sec. 208 (March 17, 1980) (emphasis added).

place between the United States and such country or countries pursuant to which an asylum seeker may be removed.[99] Similarly, these provisions also attempt to supersede the firm resettlement bar to asylum established by Congress at INA § 208(b)(2)(A)(vi), as they make no attempt to ascertain whether an individual was in fact firmly resettled in another country.[100]

In their commentary, DOJ and DHS state "that the failure to seek asylum or refugee protection in at least one country through which an alien transited while en route to the United States may reflect an increased likelihood that the alien is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection."[101] But the agencies offer no evidence to support this belief.[102] Additionally, the agencies rely heavily on *Matter of Pula*,[103] to support their argument for the provisions of the Proposed Regulation related to an individual's application for protection from persecution or torture in a third country, but conspicuously fail to note that *Matter of Pula* has been superseded by Congress' enactment of the firm resettlement bar.[104]

Additionally, the imposition of these additional burdens on individuals who are not nationals of contiguous countries or who do not arrive in the United States via direct flight from their country of nationality or last habitual residence would place the United States in violation of Article 3 ("Non-Discrimination") of the 1951 Refugee Convention, by which the United States is bound by incorporation into the 1967 Protocol: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." By exercising discretion in asylum claims by considering as a significant adverse factor

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[99] INA § 208(a)(2)(A).

[100] The U.S. Court of Appeals for the Ninth Circuit recently found an Interim Final Rule with nearly identical provisions as those at issue here to be not in accordance with law and in excess of statutory limitations, as well as arbitrary and capricious, and affirmed a district court's preliminary injunction of that rule. *East Bay Sanctuary Covenant v. Barr*, No. 19-16487, Dkt. No. 113-1 (9th Cir. July 6, 2020). The Ninth Circuit's reasoning applies to the corresponding provisions of this Proposed Regulation, too.

[101] *See* 15 Fed. Reg. 115, 36283. The Ninth Circuit recently rejected a similar argument. *See East Bay City Covenant v. Barr,* Case No. 19-16487 (9th Cir. July 6, 2020).

[102] *See, e.g., Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986) ("[F]ailure to apply for asylum in any of the countries through which [a noncitizen] passed or in which he worked prior to his arrival in the United States does not provide a valid basis for questioning the validity of his persecution claims.").

[103] 19 I&N Dec. 467 (BIA 1987), superseded by statute as stated in *East Bay Sanctuary Covenant v. Barr*, Case No. 19-16487 (9th Cir. July 6, 2020).

[104] *See also Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1987) ("The immigration judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country."). Here, none of the supposed "adverse factors" added by the Proposed Regulation speak to an "alien's undesirability as a permanent resident."

an individual's failure to apply for protection from persecution or torture in a third country in the manner detailed in the provisions of the Proposed Regulation quoted above, the United States would be discriminating against refugees based on country of origin. Such practices are clearly prohibited under the 1951 Refugee Convention and thus outside the lawful authority of the Secretary of Homeland Security or the Attorney General to implement.

F. Pretermission of Applications

The pretermission authority set forth in the Proposed Regulation is yet another attack on our asylum system.[105] Under existing law, an applicant for asylum and withholding must take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct.[106] In addition, a hearing is required on an asylum application to resolve factual issues in dispute.[107] The Proposed Regulation seeks to allow immigration judges, upon motion by DHS or *sua sponte*, to pretermit and deny an application for asylum, withholding of removal, or relief under the CAT if the noncitizen has not established in the application itself a *prima facie* claim for relief. This change would have the effect of denying protection to many who deserve it.

Specifically, by allowing immigration judges to pretermit asylum applications, the Proposed Regulation will have an adverse and discriminatory effect on *pro se* asylum applicants. Most asylum-seekers do not speak English fluently and are unfamiliar with the language, legal requirements, process, and evidence necessary to survive a motion to pretermit based on relevant pleading standards. Many also file asylum applications *pro se* in order to meet the one-year filing deadline and later seek out an attorney to prepare them and represent them before an immigration judge. Thus, at the time they file their applications, many *pro se* applicants with valid asylum claims are often simply incapable of properly filling out the relevant paperwork, which, under the Proposed Regulation, could result in pretermission of their applications.

Moreover, in allowing for pretermission of asylum cases, the Proposed Regulation assumes that there is uniformity in asylum law as to the *prima facie* elements of a valid asylum claim. That is simply not true. U.S. immigration law is extraordinarily complex, with each federal jurisdiction containing its own variation as to the prima facie requirements of a valid asylum claim. Because asylum seekers often move around the country—either when in ICE custody or through voluntary relocation—an asylum application filed during their first interaction with federal agents may set forth a *prima facie* case for asylum in the jurisdiction of interaction, but may not meet the criteria when it is considered by a judge in a different jurisdiction.

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[105] *See* 85 Fed. Reg. 115, 36277.

[106] *Id.*, *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989).

[107] 8 C.F.R. §1240.11(c)(3).

Additionally, the pretermission authority is not (as claimed) a proper mechanism for reducing the backlog in DOJ's Executive Office of Immigration Review ("EOIR").[108] The increase in the backlog is a direct result of steps—or missteps—of the Administration. First, the backlog has increased because of constantly changing regulations and related litigation, which has led to confusion and has increased the time it takes to process cases. Second, the backlog results from EOIR's recent change in policy to not administratively close cases for applicants who have other applications pending before the USCIS (such as an I-130 petition to relocate a family member).[109] And third, the shift in ICE's enforcement efforts—apprehending people for small infractions, misdemeanors—rather than focusing on aggravated felonies as before represents a failure to exercise prosecutorial discretion in a reasonable and prudent manner and has significantly increased the number of cases in the administrative removal and reinstatement pipeline. In other words, the backlog in the EOIR that the Administration seeks to reduce through the Proposed Regulation is due largely to its own inept or deliberate actions in administering the asylum system, and it should not be used as a basis to implement a draconian policy.

Even more significantly, although pretermission may appear to increase efficiency on the front end, it will make the overall system less efficient because many asylum seekers whose cases are pretermitted (and particularly those who will be able to obtain counsel) will likely file an appeal to the Board of Immigration Appeals ("BIA"). It is likely that the BIA will remand many cases back to the immigration judges for a full hearing to gather evidence, as the BIA cannot do that itself, since it is an appellate body without the ability to gather factual evidence. Thus, instead of spending time on a full hearing during the front end of the process, EOIR will likely end up spending additional time and resources on a paper-based adjudication, an appeal and remand, and *then* a full hearing. This will not create efficiency; it will only add unnecessary cost, time, and burden on both the applicants for asylum and the asylum system as a whole.

Lastly, the pretermission authority in the Proposed Regulation appears to be specifically and cynically designed to increase denial of asylum to refugees from the Northern Triangle countries of Honduras, Guatemala, and El Salvador for political reasons. Over the last three years, the Administration has repeatedly asserted—through rhetoric and changes to regulations—its authority to deny protection to individuals and families fleeing violence in the Northern Triangle. Indeed, Attorney General William Barr and his predecessor Jeff Sessions have cherry-picked cases pending before immigration judges and the BIA to adjudicate them in ways that

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[108] The EOIR was created in 1983 through an internal DOJ reorganization which combined the BIA with the immigration judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the DHS). The primary mission of the EOIR is to conduct immigration court proceedings, appellate reviews, and administrative hearings under delegated authority from the Attorney General.

[109] *See Matter of CASTRO-TUM*, 27 I&N Dec. 271 (A.G. 2018).

serve the Administration's political objectives. Thus, Council 119 has reason to be extremely concerned that the pretermission authority will be used by the Attorney General to short-circuit applications of refugees from the Northern Triangle. If the Administration does not recognize the dangerous conditions in the countries of the Northern Triangle—and has even entered into a cooperative agreement with them—how can a refugee from those countries hope to make out a *prima facie* case upon arrival at the border?

G. Standard of Proof in Credible Fear Screening

The Proposed Regulation seeks to amend existing regulations to raise the standard of proof in credible fear proceedings.[110] Under the Proposed Regulation, the standard of proof in the credible fear process for statutory withholding of removal and protection under the CAT regulations would be raised from a "significant possibility" that the noncitizen can establish eligibility for such relief or protection to a heightened "reasonable possibility."[111] The Proposed Regulation also adds a requirement for asylum officers conducting such screenings to consider the possibility of whether an individual could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and whether, under all circumstances, it would be reasonable to expect the applicant to do so.[112] In addition, the Proposed Regulation adds a requirement for asylum officers to consider the applicability of any bars to withholding of removal.[113]

The continued application of the "significant possibility" standard is necessary to ensure that our country does not return an arriving noncitizen to persecution. By raising the standard of proof applied during screening, the Proposed Regulation all but guarantees that the United States will violate the *non-refoulement* obligations under the 1951 Convention by denying those claiming a well-founded fear of persecution the opportunity to establish their eligibility for relief in a full and fair hearing before an immigration judge.

Additionally, by applying different standards of proof in asylum and withholding of removal screenings to individuals in expedited removal, the Proposed Regulation will frustrate Congress' intent in establishing the expedited removal process. That is so because the proposed changes will result in a failure to quickly identify potentially meritorious claims to withholding of removal and to resolve frivolous claims with dispatch. DOJ and DHS admit as much in their discussion of these proposed provisions, writing, "In some cases, asylum officers would need to spend additional time eliciting more detailed testimony from aliens to account for the higher standard of proof." Inexplicably, the agencies then conclude without evidence that "the overall

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[110] *See* 85 Fed. Reg. 115, 36268.

[111] *Id.*

[112] *See* 85 Fed. Reg. 115, 36272.

[113] *Id.*

impact on the time asylum officers spend making screening determinations would be minimal." To the contrary, the Proposed Regulation would not only increase the time asylum officers spend eliciting more detailed testimony, but also will increase the time they will spend preparing written analyses applying different legal standards, as well time spent on associated administrative tasks.

DOJ and DHS argue in their discussion of the proposed provisions that because individuals must meet the "more likely than not" standard to merit withholding of removal under INA § 241(b)(3), rather than the lower "reasonable possibility" (well-founded fear) standard applicable to asylum, it is appropriate to apply a higher standard of proof to the screening of withholding of removal claims. However, this conclusion is flawed because the Proposed Regulation demands that newly arrived individuals unfamiliar with the U.S. legal system meet the same standard of proof in the screening context for withholding of removal as they would be given in a full hearing to meet in the asylum context. Congress rightly recognized that it would be unreasonable to expect an asylum applicant to meet the reasonable possibility standard in the expedited removal context and mandated the application of the lowest standard of proof used in immigration proceedings to asylum screenings. The same consideration applies to individuals who may be eligible for withholding of removal. That is so because requiring individuals to meet the reasonable possibility standard in the expedited removal context will result in the denial of a fair process for these individuals to demonstrate they merit an opportunity to prove their eligibility for withholding of removal in a full and fair hearing.

DOJ and DHS attempt in their discussion of the Proposed Regulation to draw a false equivalence between the application of the "reasonable possibility" standard in withholding of removal screenings in the reasonable fear context and their proposed application of that standard in the expedited removal context. However, this discussion misses the mark because it neglects to make important distinctions between individuals subject to the reasonable fear process and those subject to expedited removal. First, individuals receiving reasonable fear interviews bear more culpability vis-à-vis violating U.S. law because they have already either have been previously removed and are subject to a reinstatement or have been convicted of an aggravated felony and are the subject an existing Final Administrative Removal Order ("FARO"). By contrast, individuals subject to expedited removal are either complying with U.S. law by presenting themselves at a designated port of entry or requesting asylum while physically present in the United States, as is their right under INA § 208(a). Second, individuals receiving reasonable fear interviews already have familiarity with the U.S. legal system, having already been through a process resulting in a conviction for an aggravated felony or a FARO. By contrast, individuals subject to expedited removal have spent limited or no time in the United States and are unfamiliar with this country's legal system. In consideration of these differences, Congress rightly insisted that the lower significant possibility standard be applied to asylum applicants subject to expedited removal. The same logic compels the conclusion that DOJ and DHS should continue to apply that standard to withholding of removal screenings in the expedited removal context as well.

Lastly, requiring asylum officers (i) to consider the possibility of whether an individual could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, whether under all circumstances, it would be reasonable to expect the applicant to do so, and (ii) to consider the applicability of any bars to withholding of removal, is inappropriate and beyond the scope of the screening function. Such considerations are properly left to an immigration judge to explore in a full merits hearing. Moreover, adding these requirements will necessarily cause asylum officers to spend even more time on these claims. Requiring officers to consider the applicability of bars to withholding of removal further compounds this result. These outcomes ensure that the expedited removal process will be further complicated and delayed.[114]

V. Conclusion

Council 119's members are duty bound to protect vulnerable asylum seekers from persecution or torture. However, under the Proposed Regulation, they would face a conflict between the directives of their departmental leaders to follow the new rules and adherence to our nation's legal and moral commitment to not return refugees to territories where they will face persecution. Asylum officers should not be forced to honor rules that are fundamentally contrary to the moral fabric of our nation and our international treaty and statutory obligations. For the foregoing reasons above, Council 119 opposes the Proposed Regulation.

Very truly yours,

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cc: Danielle Spooner, President, National Citizenship and Immigration Services Council 119

Michael A. Knowles, Special Representative, National Citizenship and Immigration Services Council 11

[114] The Proposed Regulation raises the standard of proof applicable to screenings for withholding of removal and deferral of removal under the CAT from the significant possibility standard to the reasonable possibility standard. It also adds a requirement for asylum officers conducting such screenings to consider the possibility of whether an individual could relocate to another part of the country of removal where he or she is not likely to be tortured. These changes are problematic for same the reasons as the changes proposed to credible fear screenings.