



July 15, 2020

Submitted via www.regulations.gov

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

Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW, Washington, DC 20503
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rule on Asylum, and Collection of Information, OMB Control Number 1615-0067

Dear Ms. Alder Reid:

Immigration Equality writes in strong opposition to the Department of Homeland Security (“DHS”) and the Department of Justice’s (“DOJ,” collectively with DHS, the “Agencies”) Notice of Proposed Rulemaking (“Proposed Rule”) on the Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94 / EOIR Dkt. No. 18-0002; A.G. Order No. 4714-2020, published in the Federal Register at 85 F.R. 36264 on June 15, 2020 (“Notice”).¹

The Proposed Rule guts the U.S. asylum system by rewriting asylum law without authorization from Congress and upending decades of legal precedent. In fact, the Proposed Rule reinterprets the definition of refugee in such a limited way that it would essentially eliminate asylum protection altogether. As a result, most asylum seekers, including the lesbian, gay, bisexual, transgender, intersex, queer (“LGBTQ”) and HIV-positive (together with LGBTQ, “LGBTQ/H”) refugees we serve, will be denied humanitarian protection in the U.S. Such a result is contrary to the U.S.’s obligations under domestic and international law to safeguard refugees seeking protection. Far from the “comprehensive solution” the Agencies seek in enacting this new regulation, the Proposed Rule will

¹ Where this comment includes linked material in footnotes, we request that the Agencies review the linked material in its entirety and consider it part of the record.



subject the LGBTQ/H community to unclear, unfair, and often unlawful standards with virtually no due process protections.

Moreover, the Proposed Rule will cause systemic chaos as stakeholders battle the regulations in federal court. In the meantime, the Proposed Rule will result in asylum seekers being wrongly returned to countries where their lives will be in grave danger. Not only is the Proposed Rule contrary to the statute and long-standing legal precedent, it is immoral. Accordingly, we urge the Agencies to withdraw the Proposed Rule in its entirety.

I. Immigration Equality

Immigration Equality is a national organization that advocates for LGBTQ/H immigrants. For 25 years, we have worked to secure safe haven and equality for immigrants facing persecution based on their sexual orientation, gender identity, or HIV status. To this end, we provide free legal services and advocacy through our in-house attorneys and nationwide network of pro bono partners. Through this program, we currently represent close to 650 LGBTQ/H individuals in affirmative and defensive proceedings for asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”). Immigration Equality’s asylum program has maintained a remarkable 97-99% success rate. In addition, Immigration Equality helps thousands of LGBTQ/H asylum seekers every year through the provision of pro se advice and materials, and via our online inquiry system and telephone hotline.

In addition, Immigration Equality offers assistance, support, and training to other attorneys on LGBTQ/H immigration issues, publishes a comprehensive manual on the preparation of asylum claims related to sexual orientation or gender identity, and has provided training on the adjudication of LGBTQ asylum cases to Asylum Officers within the Department of Homeland Security and Immigration Judges in New York.

II. LGBTQ/H People Are Persecuted Throughout the World Because of Their Sexual Orientation, Gender Identity, and HIV Status, and the Proposed Rule Will Likely Result in their Refoulment.

Mia² is an HIV-positive, transgender woman from Jamaica. At 16, Mia was gang raped. When Mia told their family what had happened, Mia was accused of “being gay” as a result of the rape and thrown out of the family home. Without a place to live, Mia was forced to live on the street in a storm drain with a group of homeless LGBTQ youth where they were routinely harassed, threatened, and beaten by homophobic community members and by the police. Mia witnessed one of their friends being brutally stabbed to death and three others being shot. Mia discovered they were HIV-positive when they were 18 years old. On one occasion when they went to seek treatment at a clinic, Mia was

² We have used pseudonyms throughout this comment and have also altered minor details of their accounts in order to preserve their confidentiality.

viciously attacked by a group of men who shouted homophobic slurs at them. Mia was seriously injured in the attack and needed stitches on their face and leg. Four of their fingers were left permanently disfigured. Mia eventually fled Jamaica and after an arduous journey arrived at the U.S./Mexico border. At the border, Mia was given a number and forced to wait in Mexico for over three months to request asylum. This process is known as “metering.” In Mexico, Mia was homeless for some time and suffered further persecution (including being attacked and robbed) on account of their gender identity. Mia eventually made it to the U.S. and was granted asylum.

Nakiesha, an engineer from Guinea, was 33 years old when she gave birth to her firstborn child, an intersex baby. She believed her child was a son, and tried to raise him away from her extended family because she knew they would not accept him. One day, one of Nakiesha’s female relatives changed the baby’s diaper and discovered his intersex identity. News spread quickly, and Nakiesha’s family declared the baby to be satanic and demanded that he be killed. They also informed Nakiesha that they would forcibly abort any new pregnancies she might have. When Nakiesha refused to murder her own son, her family deemed her to be satanic too and demanded her death as well. She fled to the U.S. where she applied for, and was granted, asylum.

Ariana, a 23-year old transgender asylum seeker from El Salvador, entered the U.S. without inspection after traveling through Mexico and Guatemala. While in El Salvador, she was harassed and repeatedly detained by police on false charges as a means of terrorizing her because of her gender identity. On one such occasion, the police falsely accused her of stealing money from a gas station. She was briefly detained at a police station where she was stripped naked and placed in a cell with approximately 100 men. As the police looked on and laughed, she was gang raped by other detained people. At no time did any of the officers intervene. Ariana was granted asylum in the U.S.

Nasir is a gay man from Mauritania who grew up knowing he was different. One day, his mother caught him alone with another man and told his uncles that he was gay. His uncles came to the house immediately, beat Nasir and threatened to call the police to handle “fa**ots like him.” Soon after, his family sent him to a madrassa (Islamic school) in a remote part of the country, to live under an Imam’s guidance and “re-learn the teachings of Islam.” If he didn’t cooperate, his uncles said they would call the police on him. Nasir knew he had no choice. In Mauritania, same sex relationships between men are punishable by stoning and Nasir knew that gay men were often “sent away” to be disappeared. Having little choice, he decided to go to the madrassa. He lived as a servant to the Imam and was beaten and humiliated in front of the other students regularly. Luckily, one day, he escaped and hitchhiked back to the city. When his uncles found out he was back, they kidnapped him and beat him severely. After this incident, Nasir knew he had to leave Mauritania or be killed so he fled to the U.S. where he was granted asylum.

These are stories of the refugees we serve. The horrific persecution described in their accounts epitomizes the experiences of many LGBTQ/H asylum seekers. Remarkably, after enduring unimaginable violence and abuse, and after winning asylum, these resilient refugees go on to be

significant contributors to American society, pursuing careers in business, education, healthcare, the arts, and activism, among others. America has long stood as a beacon of hope for LGBTQ/H refugees like these. But, tragically, under the Proposed Rule, it is likely that none of these refugees would be granted asylum. Instead, they would be deported back to their countries of origin to face physical assault, rape, and even murder on account of their LGBTQ/H identity.

LGBTQ/H people are persecuted around the globe for being who they are. In over eighty countries it is illegal or fundamentally unsafe to be LGBTQ.³ Such persecution takes many forms, including:

- **Criminal punishment.** Same-sex activity between consenting adults is subject to criminal punishment in approximately 70 countries.⁴ Of those, 31 carry a sentence of ten years or more in prison, and 12 countries allow the death penalty as a sentence. Twelve countries target gender identity through “cross-dressing” or “impersonation” laws.⁵ Moreover, these laws are not historical artifacts: for example, in 2019, Gabon adopted a *new* penal code that criminalizes consensual same-sex sexual acts.⁶
- **Social stigma.** Many countries have a pervasive culture of systemic anti-LGBTQ bias. In those places, LGBTQ status carries extreme social stigma. Many nations punish LGBTQ people by preventing them from participating in everyday life. LGBTQ people are shunned as vile, prevented from obtaining an education,⁷ refused employment, refused housing and healthcare, stripped of

³ See, e.g., Human Dignity Trust, *Map of Countries That Criminalize LGBT People* (last accessed July 2, 2020) <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation>.

⁴ See International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia: Global Legislation Overview*, at 48–52 (Dec. 2019), https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf.

⁵ Human Dignity Trust, *Map of Countries That Criminalise LGBT People* (last accessed July 2, 2020) <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation>.

⁶ ILGA, *State-Sponsored Homophobia*, at 10.

⁷ Advocates for Youth, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth in the Global South*, at 2 (last accessed July 2, 2020), <https://advocatesforyouth.org/wp-content/uploads/storage//advfy/documents/Factsheets/lesbian-gay-bisexual-and-transgender-youth-in-the-global-south.pdf> (A study in Bolivia found that 72% of transgender individuals abandoned their secondary school studies due to intense discrimination).

family or parental rights,⁸ and denied access to politics or power. Such remarkable, debilitating exclusion rises to the level of persecution.

- **Abuse and violence.** LGBTQ people are frequently subjected to abuse and violence throughout the world, including rape and sexual assault, physical abuse, and murder. For example, according to the United Nations High Commission for Human Rights, “88 percent of LGBTI asylum seekers from the Northern Triangle interviewed [] reported having suffered sexual and gender-based violence in their countries of origin.”⁹ This violence is often perpetrated by private actors, such as family and community members. In Iraq, gay men report severe beatings and death threats at the hands of their own family members.¹⁰ Moreover, such persecution routinely goes underreported. In Jamaica, attacks by mobs and the police target low-income LGBTQ people, forcing them into homelessness.¹¹ Violence is sometimes outside the reach of the state, and sometimes takes place where weak governments depend on allied armed groups to provide security.¹² That said, LGBTQ violence can sometimes occur at the direction of the police, as in Chechnya, where hundreds of individuals suspected to be LGBTQ have reportedly been detained and tortured by the police since 2017.¹³
- **No legal recourse.** LGBTQ people frequently cannot report private violence to the police in the countries where they experience persecution. Police officers and other authority figures are often the agents of persecution themselves, and LGBTQ people are terrified that going to the police will result in retaliation in the form of rape, beatings, or murder.¹⁴ Even if the police are not

⁸ United Nations General Assembly, *Report of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity*, 3-4 (July 17, 2019), https://undocs.org/A/74/181?fbclid=IwAR3xrYojctnW46K2HAFgf4ju4C_Wd-4xEzezVG_cyD3_foUOIlbhjuO3538 (LGBT students and the children of LGBT parents face taunts, physical and sexual violence, social isolation, and death threats).

⁹ See Amnesty International, *No Safe Place*, at 7 (2017), <https://www.amnesty.org/download/Documents/AMR0172582017ENGLISH.PDF>.

¹⁰ See Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa* (Apr. 16, 2018), <https://www.hrw.org/report/2018/04/16/audacity-adversity/lgbt-activism-middle-east-and-north-africa>.

¹¹ See Rebekah Kebede, *Jamaican LGBTQ youths escape persecution in city storm drains*, Reuters (Mar. 1, 2017), <https://www.reuters.com/article/us-jamaica-lgbt-homeless/jamaican-lgbtq-youths-escape-persecution-in-city-storm-drains-idUSKBN1685AY>.

¹² See Human Rights Watch, *Audacity in Adversity*.

¹³ Andrew E. Kramer, *Chechnya Renews Crackdown on Gay People, Rights Group Says*, N.Y. Times (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/world/europe/chechnya-gay-people-russia.html>.

¹⁴ See Ivette Feliciano & Zachary Green, *LGBTQ asylum seekers persecuted and home and in US custody*, PBS News Hour (Aug. 10, 2019) (“[O]ne night while doing outreach with sex workers in . . . San Salvador, she was beaten and

themselves the agents of persecution, they often harbor the same intolerant attitudes, viewing violence against LGBTQ people as justified. For this reason, for example, in Russia, police facing LGBTQ violence are “dismissive and reluctant to investigate effectively, often blaming victims for the attacks.”¹⁵ In El Salvador, “[o]nly 12 out of 109 LGBT+ murders recorded between December 2014 and March 2017 went to trial . . . and there has never been a successful conviction.”¹⁶ Last March, Uganda used the COVID-19 outbreak as a pretext to arrest 23 people living at an LGBT shelter.¹⁷ In October 2019, a mob in Uganda attacked 16 LGBTQ activists. After dispersing the mob, the police arrested the 16 LGBTQ individuals and subjected them to homophobic insults and forced anal examinations.¹⁸

- **Corrective rape and conversion therapy.** In many countries, LGBTQ people are subject to “corrective rape.” For example, in Jamaica, lesbians are raped under the belief that intercourse with a man will “cure” them of their sexual orientation.¹⁹ Likewise, many countries impose rape and torture under the guise of pseudoscientific “therapy.” In Ecuador, LGBTQ individuals are involuntarily detained in “corrective therapy” clinics, where they are beaten, locked in solitary confinement, and force-fed psychoactive drugs.²⁰ The International Rehabilitation Council for

shot in the shoulder by a group of gang members. . . . Police detained but eventually released the men with no charges. Castro says they knew she was the one who had complained, so they began to follow her and threaten her with death.”) <https://www.pbs.org/newshour/show/lgbtq-asylum-seekers-persecuted-at-home-and-in-u-s-custody>

- ¹⁵ See Human Rights Watch, *License to Harm: Violence and Harassment against LGBT People and Activists in Russia* (Dec. 15, 2014), <https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia>.
- ¹⁶ See Oscar Lopez, *Pressure mounts for El Salvador to investigate wave of LGBT+ killings*, Reuters (Nov. 21, 2019), <https://www.reuters.com/article/us-el-salvador-lgbt-murder-trfn/pressure-mounts-for-el-salvador-to-investigate-wave-of-lgbt-killings-idUSKBN1XW01G>.
- ¹⁷ See Neela Ghoshal, *Uganda LGBT Shelter Residents Arrested on COVID-19 Pretext*, Human Rights Watch (Apr. 3, 2020), <https://www.hrw.org/news/2020/04/03/uganda-lgbt-shelter-residents-arrested-covid-19-pretext>.
- ¹⁸ See Human Rights Watch, *Uganda: Stop Police Harassment of LGBT People* (Nov. 17, 2019), <https://www.hrw.org/news/2019/11/17/uganda-stop-police-harassment-lgbt-people>.
- ¹⁹ See *Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report*, submitted at 118th Session of Human Rights Committee in Geneva, at 5 (Sept. 2016), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JAM/INT_CCPR_CSS_JAM_25269_E.pdf.
- ²⁰ Anastasia Moloney, *Gays in Ecuador raped and beaten in rehab clinics to “cure” them*, Reuters (Feb. 8, 2018), <https://www.reuters.com/article/ecuador-lgbt-rights/feature-gays-in-ecuador-raped-and-beaten-in-rehab-clinics-to-cure-them-idUSL8N1P03QQ>.

Torture Victims reports that in Tunisia, Tajikistan, and Ukraine, conversion therapy or “corrective violence” is ordered by the state or the police.²¹

- **Abuse against HIV-positive individuals perceived to be LGBTQ.** Many countries impute LGBTQ status to HIV-positive individuals, assuming that HIV is a “gay disease.” This results in severe stigma and a lack of privacy, subjecting individuals to abuse. In addition to the types of abuse described above, individuals perceived to be LGBTQ are often subject to HIV tests as conditions for employment. This leads to serious public health concerns: research shows that perceptions and experiences of sexual stigma are associated with less access to HIV services and lower odds of viral suppression.²²

In sum, LGBTQ/H people are subjected to horrific persecution because of their sexual orientation, gender identity, and HIV status. Many such refugees fully embrace their identity before coming to the United States. Sadly, however, many others internalize feelings of shame and stigma about who they are, compounding their suffering. Thus, when they arrive in the United States, some are still learning to embrace their identity and may not be able to express it to immigration officials. Many also fear trusting authority figures with their deeply personal identities, especially if they experienced persecution at the hands of government actors in the past.

III. The Radical Changes to Asylum Law Under the Proposed Rule will Result in the Refoulment of LGBTQ/H Refugees in Contravention of Domestic and International Law.

The current immigration system often fails refugees, resulting in the return of LGBTQ/H asylum seekers to countries where they are abused, tortured, and killed.²³ Asylum seekers are routinely denied the most basic due process protections and many have no meaningful access to counsel to navigate the daunting labyrinth of U.S. immigration law – often in a language that they do not speak. Yet, instead of fixing this broken system, the Proposed Rule makes it much worse. Across 160 pages, it radically rewrites asylum law without authorization from Congress. Namely, the Proposed Rule substantially alters the substantive and procedural rules governing the adjudication of asylum, withholding of removal, and CAT applications, and redefines or codifies substantive concepts like nexus, particular social group, political opinion, and persecution *without Congressional authorization*. It further strips refugees of critical due process protections, raising the standards for

²¹ International Rehabilitation Council for Torture Victims, *It’s Torture Not Therapy: A Global Overview of Conversion Therapy*, at 15 (2020), https://irct.org/assets/uploads/pdf_20200513134339.pdf.

²² Avert, *Homophobia and HIV* (last accessed July 2, 2020) <https://www.avert.org/professionals/hiv-social-issues/homophobia>.

²³ See, e.g., Nelson Renteria, *Trans asylum-seeker killed after U.S. deportation back to El Salvador*, Reuters (Feb. 22, 2019), <https://www.reuters.com/article/us-usa-immigration-violence/trans-asylum-seeker-killed-after-u-s-deportation-back-to-el-salvador-idUSKCN1QC03L>.



credible and reasonable fear Interviews, allowing judges to pretermite asylum claims without hearings, and placing refugees in asylum-only or withholding-only proceedings thereby preventing them from raising certain defenses or pursuing other forms of relief.

Collectively, the Proposed Rule undermines the whole U.S. asylum system and runs contrary to the country's non-refoulement obligations under domestic and international law to refrain from returning refugees to places where their lives or freedom would be threatened on account of their protected status. It also blatantly flouts the will and intent of Congress when legislators created the humanitarian system in the United States.

a. The 30-day comment period is inadequate and unfair to affected parties.

The Agencies have provided a wholly insufficient 30-day timeframe to respond to what amounts to a complete overhaul of the U.S. asylum system. Given the scope of the Proposed Rule, published in the midst of an international pandemic no less, this truncated comment period fails to serve its intended purpose under the Administrative Procedures Act, namely: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72, 24-25 (D.D.C. June 30, 2020) (internal citations omitted).

Rewriting decades of legal precedent and upending the entire U.S. asylum system – where the consequences are literally life and death for refugees the U.S. is obligated to protect – is patently unfair and at the very least will result in an incomplete record. For this reason alone, the government should rescind the Proposed Rule.

Should the Agencies reissue the proposed regulations, they should grant the public at least 60 days to provide comprehensive comments. Because of the prejudicial 30-day public comment period, the below comments cannot address every problematic provision. But silence is not consent: the fact that we do not discuss a particular change does not mean we agree with it.

b. The Proposed Rule's particular social group provisions impose an unrealistic disclosure requirement on LGBTQ/H applicants.

Applicants for asylum and withholding of removal are legally required to demonstrate that the persecution they fear is on account of one of five protected characteristics: race, religion, nationality, membership in a particular social group ("PSG"), or political opinion. 8 U.S.C. § 1101(a)(42)(A). The purpose of the PSG category is to allow the refugee definition to encompass new and evolving groups subject to refugee protection. For this reason, courts and the United States Citizenship and Immigration Services have held that independent bases on which to establish membership in a PSG

include sexual orientation, gender identity, and HIV status. *See, e.g., Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (recognizing that transgender individuals are members of a particular social group); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (same for lesbians); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (same for “all alien homosexuals”); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (same for men imputed to be gay); *Matter of Toboso–Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (same for gay men); USCIS, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module*, at 15-17 (noting that HIV may also be a PSG).²⁴

The Proposed Rule seeks to codify nine exceptions to the PSG analysis that have no relationship to whether a PSG is cognizable. Proposed Rule §§ 208.1(c), 1208.1(c); Notice at 53–55. These exceptions eviscerate the case-by-case development of the PSG category, instead instructing adjudicators to categorically deny claims without engaging in the required analysis.

In addition, the Proposed Rule further requires that:

A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.

Proposed Rule §§ 208.1(c), 1208.1(c); Notice at 36291. This unprecedented bar would require applicants to immediately and clearly articulate every cognizable PSG before the Immigration Judge or forever lose the opportunity to present it, even on a motion to reopen where an applicant relied on ineffective counsel. The rule does not even allow an exception for reliance on notarios and other disreputable agents who hold themselves out as attorneys when they are not.

While this requirement would raise serious due process concerns for all asylum applicants, it poses particular barriers to LGBTQ/H asylum seekers. For those applicants, the Proposed Rule essentially gives applicants a single, fleeting opportunity to declare themselves. This provision is fundamentally at odds with how LGBTQ/H identity works for many asylum seekers and would result in the denial of meritorious LGBTQ/H asylum claims.

Coming to terms with LGBTQ/H identity is a process: First, many refugees come from repressive countries with governments and non-governmental institutions that ostracize and harm LGBTQ/H people. In these countries, even talking about LGBTQ/H identity can be life threatening.

²⁴ Available at:

<https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20N%20ative%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>.

Because of this, LGBTQ/H people may initially deny their own identity, and internalize anti-LGBTQ/H phobia. Often, it can take years to break through the shame and self-loathing that severe stigma causes.

The effect of this stigma is that individuals do not initially have the ability to express their LGBTQ/H status as a particular social group. Often, the asylum process is the first time applicants ever discuss their experiences.²⁵ And even then, often only after spending a substantial amount of time in the U.S., where they have had a much more positive and supportive experience. In reality, many LGBTQ/H refugees cannot, or will not, disclose their sexual orientation, gender identity, or HIV status to adjudicators or immigration officials until they receive assurances from legal counsel that it is safe to do so.

Furthermore, understanding one's sexual orientation or gender identity is a process that often takes place over a period of time. For example, a person assigned female at birth may first interpret their masculine attributes as an indication that they are lesbian or bisexual, and may only later come to understand that they are a transgender man. This does not mean that a person's identity is mutable—rather, it shows how unrealistic it can be for people with an evolving identity to label themselves in a way that places them in a particular social group at the moment they arrive in the U.S.

In addition, although the distinction between sexual orientation and gender identity is well established in the United States, common parlance in many countries and cultures does not utilize precise vocabulary or cultural constructs that recognize this distinction. As a result, in Immigration Equality's experience, many refugees either do not have any words that would be understood by immigration officials in the U.S. as denoting a specific LGBTQ identity or they use terms common in the U.S., but not in the same way such identities are understood by American adjudicators. For example, many transgender clients may use words identifying themselves as gay or homosexual because the vocabulary and cultural norms of their countries may not rigidly or sufficiently distinguish between gay and transgender identities.²⁶ Given this, the Proposed Rule would unfairly preclude relief for many people who may not be able to immediately articulate a PSG that accurately encompasses their identity.

²⁵ Cheney et al., *Living Outside the Gender Box in Mexico: Testimony of Transgender Mexican Asylum Seekers*, 107(10) *Am. J. Public Health* 1646, (Oct. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5607674>.

²⁶ See Kuper et al., *Exploring the Diversity of Gender and Sexual Orientation Identities in an Online Sample of Transgender Individuals*, 49 *J. SEX RESEARCH* at 246; Bockting & Coleman, *Developmental Stages of the Transgender Coming-Out Process* at 139, https://www.researchgate.net/publication/51529160_Exploring_the_Diversity_of_Gender_and_Sexual_Orientation_Identities_in_an_Online_Sample_of_Transgender_Individuals.

For example, Maria initially identified as a gay man growing up in El Salvador. But she always felt she was different from other men; she was very feminine and identified more with the female gender. While in El Salvador, she faced intense harassment at school from her classmates and was raped by her cousin in an attempt “to cure” her of being gay. In another attempt “to fix” her perceived sexual orientation, her family forced her to take psychiatric medications and to have sex with female sex workers. She fled to the U.S. and was ultimately granted asylum based on her status as a transgender woman. However, she only learned of “transgender” identity after spending time in the U.S. Even though Maria had always felt that she was a woman, upon arrival in the U.S. she would not have been able to immediately articulate her correct PSG, especially as a non-English speaker without an attorney. Now Marie lives freely, safely and proudly as a transgender woman. However, under the Proposed Rule, Maria likely would have been returned to her persecutors in El Salvador.

Lack of trust: Second, many LGBTQ/H refugees fleeing hostile countries may not feel comfortable immediately disclosing their status to authority figures. Disclosing one’s LGBTQ/H status may be fraught with denial and shame, particularly in a climate of social stigma and violence. In a hostile country, every single disclosure to an additional person—whether a family member, a doctor, a police officer, or an immigration official—poses the real possibility of further violence. Often, authority figures are themselves agents of persecution against others based on sexual orientation or gender identity. Given the trauma and shame associated with persecution on account of sexual orientation or gender identity, many refugees are unable or unwilling to immediately reveal their LGBTQ/H status. For example:

Isis is from Honduras. She always knew that she was a lesbian, however, due to the persecution she suffered at the hands of her family and community members because of her perceived sexual orientation, she was deeply closeted when she came to the U.S. She also suffered from Post-Traumatic Stress Disorder because of the persecution she endured. In Honduras, Isis was well aware of how LGBTQ/H people were persecuted by the police. Thus, when she arrived in the United States, she was terrified to let immigration officials know about her sexual orientation. This Proposed Rule would penalize traumatized refugees, like Isis, who are unable to immediately disclose their sexual orientation for fear of abuse.

Henry is an HIV-positive man from Ghana. When he was in his late teens, his older brother began to die of AIDS. It was readily apparent that his brother had AIDS because he was emaciated and had contracted skin lesions. Henry’s family felt shame and anger at the stigma their household experienced because of his older brother’s illness. One day, Henry went to his brother’s bedroom to check on him and found that his family had poisoned him to death. It was the same poison they used on feral dogs. They then buried his brother that same day with no funeral, and no one discussed the death. When Henry discovered that he was also HIV-positive, he fled to the U.S. He lived here for many years before he could come to terms with his HIV status. Only after extensive therapy and self-acceptance was he able to disclose his HIV status to an immigration official.



Immigration Equality also routinely hears from LGBTQ/H asylum seekers who were never informed by their attorneys that they could seek asylum on the basis of the gender identity, sexual orientation, or HIV status. Even worse, Immigration Equality has assisted asylum seekers who were specifically advised by an attorney *not* to claim asylum based on their LGBTQ/H identity even though they had a strong claim. The Proposed Rule would likely foreclose these refugees from obtaining relief, even where they were wrongly advised by counsel.

c. The “Nexus” exclusions could inadvertently bar LGBTQ/H asylum claims.

Under the INA, an asylum applicant must demonstrate that their protected ground is “at least one central reason” for their persecution or well-founded fear of persecution. 8 U.S.C. § 1158(b)(1)(B)(i). Contrary to the INA, the Proposed Rule advances eight blanket circumstances that the government would find insufficient to establish persecution on account of a protected ground. See Proposed Rule § 208.1(f)(1)(i)–(viii); Notice at 36292.²⁷

Substantively, the proposed nexus exclusions are so broadly drawn that they would radically confine the scope of PSG claims.

Personal animus or retribution. The Proposed Rule provides that “personal animus or retribution” would be an insufficient nexus to establish an act of persecution against an applicant. See Proposed Rule § 208.1(f)(1)(i); Notice at 36292. Yet an action motivated by anti-LGBTQ sentiment often turns on, and manifests as, personal animus. Personal animus is the motivation for almost all persecution. Presumably, if a persecutor did not have personal animus against someone, they would not subject them to persecution. Significantly, the Proposed Rule does not provide guidance on distinguishing “personal animus” from persecution on the basis of a protected characteristic, nor could it. This could foreclose many refugees who have endured horrific persecution because of their LGBTQ/H status from obtaining asylum despite their meritorious claims. For example:

Mikhail, a gay man from Russia, used an online dating app to meet another man for a date. Despite taking precautions to ensure the date was legitimate, Mikhail was kidnapped, and then taken back to his own apartment where several men stripped him naked, beat him, and tied him to a radiator. While he was restrained, the perpetrators continued to physically assault him while they ransacked his apartment and robbed him. Then, they forced him to transfer money to them via online banking. While Mikhail was still naked, bleeding from the physical assault, and tied to his radiator, the perpetrators took video footage of him where they forced him to state his full name, street address, and admit that he was “a fa**ot.” They took screenshots of his contacts and threatened to send the video to all of his contacts, employer, and post it online if he went to the police. When Mikhail later went to the hospital, and tried to report the incident to the police, the police mocked

²⁷ The Proposed Rule is also ambiguous about whether it would support claims based on any of the below *alongside* other motivations (*e.g.*, persecution on account of personal animus and membership in a particular social group).

him. They also told him that it was his fault that he was assaulted, and said that Russia would be better without people like him.

Danielle is a lesbian from Haiti. She tried to keep her sexual orientation secret from her friends and family as she feared she would be killed if they found out. One day, someone accessed her cell phone and printed pictures of her and her partner which were then posted throughout her neighborhood. Following this public outing, she was kidnapped, raped and tortured by a group of men who wanted to teach her a lesson for being a lesbian. She fled Haiti for her life.

Tariq is a transgender man from Egypt. In his twenties, he fell in love with a young woman named Najila, and the two developed a romantic and intimate relationship that lasted several years. Then, Najila's family discovered that the two were more than just friends, and beat Najila severely. Next, her male relatives locked Najila into the basement of their home. Tariq tried several times to help free her, including by calling the police, but the police told him "this is a family matter." Eventually, Tariq fled for his own life to the U.S, where he was granted asylum. Months later, Najila's mother snuck a phone into the basement so her daughter could have some communication with the outside world. Tariq and Najila reconnected and said goodbye. Because Najila is not allowed out of her home without a male escort at all times, she has never been able to leave Egypt.

All of these individuals, as well as Henry whose story is described above, clearly meet the definition of refugee, yet under the Proposed Rule none of them would likely be afforded relief since their persecution is both on account of their gender identity/sexual orientation/HIV-status *and* based on personal animus and retribution. However, persecution on account of a protected ground need only be one central reason for the persecution and mixed motives are not fatal to nexus. *See e.g., Matter of J—B—N—& S—M—, 24 I&N Dec. 208, 211 (BIA 2007).* None of the items on the Agencies' laundry list of exclusions, including the provision regarding personal animus, meaningfully address whether the persecution occurred on account of a protected ground. The Proposed Rule cannot simply override the statutory requirements by drawing up a wish list of the types of cases the Agencies wish to deny and call it law. Thus, the provisions cannot stand.

Interpersonal animus where others not targeted. The Proposed Rule would also exclude "interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue." *See Proposed Rule § 208.1(f)(1)(i); Notice at 63.* There is no basis in law to require a survivor of persecution show that *others* have been persecuted in order to satisfy that individual's asylum application.

The persecution of LGBTQ people is frequently and acutely personal, and regularly committed by private actors close to the applicant. Indeed, the applicant may be the first LGBTQ individual such persecutors believe they have ever encountered. An anti LGBTQ family member who has never

manifested animus against other LGBTQ individuals—again, *perhaps because they think they have never met another member of the community*—may specifically target the applicant with violence as a stand-in for animus against LGBTQ people in general. The Proposed Rule creates the perverse result in which a persecutor targeting one LGBTQ individual on account of that individual’s sexual orientation or gender identity is not enough on its own to establish an asylum claim.

For example, Samba is a gay man from Senegal. When he was discovered with a boyfriend, his father encouraged Samba’s brothers to brutally beat Samba with a wooden club in an attempt to make him “not gay anymore.” His father then forced Samba to marry a woman who divorced him shortly thereafter. When Samba was later seen with gay friends, his father had his brothers beat him again, leaving him bloodied, unconscious, and tied to a water pipe. Many hours later, his mother and his sister found him and cut him loose. In their desperation and urgency, the women accidentally sliced through the ropes and into Samba’s skin and he still bears the scars from this escape. With his mother’s help, Samba fled to the U.S., where he was granted asylum.

Muzaffar is a gay man from Uzbekistan who suffered severe persecution on account of his sexual orientation. When Muzaffar was 7 years old, his father caught him wearing make-up and his sister’s dress. As punishment, Muzaffar was locked in the basement for days. His father then sent him to a religious school where he was raped to teach him “a lesson.” As an adult, Muzaffar tried to set up a date with a man. When he showed up for the date, Muzaffar was confronted by several men who accused him of spreading homosexuality in Uzbekistan. They then raped him and sliced his stomach open with a knife, all the while calling him homophobic slurs.

Both of these instances of persecution were motivated by personal animus and quite possibly, Samba and Muzaffar’s family members may never have persecuted any other gay men. However, that does not negate the fact that both of the men were persecuted *on account of* their LGBTQ identity, which is all the law requires. Moreover, it seems that the men who entrapped and then raped Muzaffar may have done the same thing to others, however, how would Muzaffar discover or prove this without exposing himself to further persecution?

To demand a survivor of persecution know how a persecutor has treated other LGBTQ people would operate as a ludicrous bar to asylum. As a practical matter, it would generally be impossible for such a survivor to know all of the actions of their persecutor, much less take the time to collect evidence of such persecution before fleeing. This is just an attempt to cut off protection for asylum seekers who clearly qualify for protection under the statute and should not be countenanced.

Gender: The Proposed Rule’s inclusion of “gender” as a nexus exclusion is particularly troubling. Proposed Rule § 208.1(f)(1)(viii); Notice at 36292. Gender clearly meets the elements of a PSG under the standards of immutability, particularly, and social distinction accepted by the courts and even as codified under the new Proposed Rule. Notice at 36278, 36291. Moreover, while the Proposed Rule certainly does not deny that LGBTQ people constitute protected PSGs, there is a real



risk that adjudicators will misconstrue the gender bar to preclude gender identity and sexual orientation claims. Such uncertainty is inconsistent with the Proposed Rule’s stated justification to provide “clearer guidance” and “uniform application of the law.” Notice at 36278, 36282. Moreover, such a result finds no support in the INA and flies in the face of Congressional intent and long-standing precedent to protect asylum seekers who meet the definition of a refugee.

Immigration Equality with its pro bono partners has represented hundreds of transgender asylum seekers. These refugees have won their cases a remarkable 97-99% of the time. This is because transgender people unquestionably meet the definition of a refugee and qualify for asylum protection. If a gender bar were to categorically bar such individuals from asylum, it would be in blatant contradiction to the INA. Thus, if adjudicators wrongfully interpret this provision to bar gender identity asylum claims, it would result in the return of transgender people, like those below, to countries where their lives are in mortal danger.

Alexandra, a trans woman from Mexico, was kidnapped and repeatedly raped and tortured by gang members because of her gender identity after they spotted her wearing women’s clothing at a fundraiser she was organizing for children with leukemia. She was abused so severely that she had to undergo two rectal surgeries to repair her injuries.

Veronica is a transgender woman from Mexico, where she was abducted and raped by a criminal gang. When Veronica tried reporting the attack to the Mexican police, the police officer called her a homophobic slur and refused to help.

Anahita is a transgender woman from Honduras. In 2008, Anahita was walking home when a number of police officers in plain clothes approached her. They asked her where she was going. They took her to a remote area and raped her. They then put a gun to her head and told her that if she ever told anyone about the rape, they would kill her and her family.

Refusing asylum to these refugees would be contrary to long established law and violate the U.S.’s non-refoulment obligations. The result would be devastating for transgender refugees, including Immigration Equality clients, who face severe persecution around the world.

d. The Proposed Rule unlawfully restricts LGBTQ/H political opinion claims.

The Proposed Rule unduly narrows the scope of cognizable “political opinion” in a way that is inconsistent with existing law. The Proposed Rule would limit political opinions to ideals or convictions in support of a “discrete cause related to political control” of a state or unit thereof. Notice at 58; Proposed Rule 208.1(d), 1208.1(d). The Proposed Rule further explicitly rejects the notion that an asylum seeker’s expression of opposition to terrorist or gang organizations can qualify as a political opinion, unless the asylum seeker’s “expressive behavior” is “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.”

Applying this same reasoning to LGBTQ/H asylum seekers, the Proposed Rule could ostensibly eliminate all political opinion claims. Such a result is not supported by the statute and ignores decades of precedent, which does not limit the scope of cognizable political opinions. *See Manzur v. U.S. Dep’t of Homeland Sec.*, 494 F.3d 281, 294 (2d Cir. 2007) (“This Court has rejected an ‘impoverished view of what political opinions are[.]’”) (citations omitted).

As mentioned above, being openly LGBTQ is a criminal offense in approximately 70 countries. It is fundamentally unsafe in many more. Some countries impose the death penalty for engaging in same sex relationships. These laws are unjust and inhumane. Accordingly, the United Nations has recognized that living in defiance of an unjust or inhumane law can be a political act, “particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values.”²⁸ Any persecution that a person in such a case experiences is on account of political opinion. *See Pitcherskaia v. I.N.S.*, 118 F.3d 641, 648 (9th Cir. 1997) (Russian lesbian underwent electroshock “therapy” as punishment for protesting against state mistreatment of LGBT people). Many refugees have defied anti-LGBTQ law simply by living openly. For example:

Mohamad is a gay man from Egypt who attended a concert in Cairo by pro-LGBTQ band on tour. After the concert, he came to New York on vacation. While in New York, his picture was posted on Facebook and he was identified as someone who attended the concert holding a rainbow flag. Soon after, government agents went to his parents’ house, showed his parents the picture, and told them that their son would be arrested upon re-entering Egypt. Under the Proposed Rule, Mohamed’s expressive act of attending a concert and openly holding a rainbow flag in solidarity with the persecuted LGBTQ community in Egypt would get him barred from re-entering Egypt, but would not constitute a political opinion for purposes of asylum in the U.S.

Anton is a gay man from Russia who has suffered horrific persecution on account of his sexual orientation. While in the military, Anton was subjected to severe physical abuse on account of his sexual orientation, including an incident where his hand was bashed with a hammer. Due to the increasing abuse, Anton tried to commit suicide. After his suicide attempt, he was forcibly institutionalized by the Russian military “to cure” him of being gay. During his forced institutionalization, Anton was heavily medicated and was subjected to psychological torture. Anton’s existence as a gay man, living in defiance of community norms and being accused of “spreading gay

²⁸ Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ¶¶ 40, 50 (HCR/GIP/12/09) (Oct. 23, 2012), <http://www.unhcr.org/509136ca9.pdf>.

propaganda” resulted in the military persecuting him. Under the Proposed Rules, Anton would not be able to apply for asylum based on this political act.

Katya and Natasha are a lesbian couple from Russia. When they fell in love, they decided to move in together. Katya divorced her husband so she could be with Natasha. As a result, Katya and Natasha experienced abuse from Katya’s family and ex-husband. In fact, Katya’s ex-husband claimed she was an unfit parent for their children because she was a lesbian. As a result of being open about her relationship with Natasha, Katya risked running afoul of Russian’s homophobic laws and losing custody of her children. Under the Proposed Rule, Katya’s actions would not be recognized for what they were – an open act of resistance.

It appears that the limitations in the Proposed Rule would even extend to LGBTQ activism—conduct that is clearly understood as political in the U.S. Should an adjudicator find such activity is only “generalized disapproval” of LGBTQ people, the applicants would be unable to show that their “expressive behavior” is “related to efforts by the state to control” a non-governmental organization.²⁹ The confusing reference to “culture” could result in adjudicators conflating concepts and failing to recognize LGBTQ activism as political speech. Accordingly, even LGBTQ/H activists like those described below, would not have a qualifying “political opinion” to merit protection under the Proposed Rule.

Oleg is a gay man from Russia. Oleg and several of his friends were politically active and frequently attended demonstrations protesting Russia’s anti-propaganda laws that were adopted in 2013 criminalizing the provision of LGBTQ information to minors. In reality, this law was used by the police to criminalize the LGBTQ community and to target and attack LGBTQ individuals. Oleg and his friends held art exhibitions that positively depicted gay men and joined advocacy efforts to protest against the anti-propaganda laws. After attending several of these demonstrations, Oleg was identified and targeted by hate groups that publicized personal identifying information about Oleg and his LGBTQ activism online. Oleg knew of other activists who had been harmed after similar public outings. Oleg knew that his life was in danger and fled Russia.

Benjamin was an LGBTQ health rights activist in Nigeria. For several years, he worked to improve health outcomes for many people, including a focus on the rights of people living with HIV. During that time, he was threatened for his activism. When the Nigerian government passed a new anti LGBTQ law, persecution of human rights activists increased. Benjamin, fearing for his life, fled to the U.S. where he was granted asylum.

²⁹ The Proposed Rule’s footnote explaining that “expressive behavior” is “political activism” but not “acts of personal civic responsibility” is not reflected in the text of the proposed regulations. *Compare* Notice at 58 n.30, with Proposed Rule 208.1(d).

Dembe is a lesbian from Uganda, where same-sex sexual activity is illegal. Despite the danger to her life and safety, Dembe worked for an NGO organization that assisted gay men. Dembe was arrested by the Ugandan police on various occasions because of this advocacy. She fled Uganda in fearing for her safety and sought asylum in the U.S.

Under the Proposed Rule, it is likely that individuals who are attacked for their defiant conduct of living openly, or who are activists who are persecuted for publicly supporting LGBTQ rights, would not be considered to have a political opinion and would be denied relief on this ground.

e. **The Proposed Rule heightens the persecution standard ignoring the ways many LGBTQ/H refugees are harmed.**

Asylum law obligates the U.S. to protect individuals with a well-founded fear of persecution from being returned to harm. *See, e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987). The Proposed Rule provides a regulatory definition of persecution that imposes a heightened standard requiring that the threats be “exigent” and emphasizing that the harm be “extreme.” The Proposed Rule goes on to identify types of harm that would not generally constitute persecution, including: “repeated threats with no actions taken to carry out the threats,” “intermittent harassment, including brief detentions,” and “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.” Proposed Rule §§ 208.1(e), 1208.1(e). However, the Proposed Rule does not *define* “exigent” or “extreme,” and does not address cumulative harm. Moreover, the government does not give due consideration to the ways harm is experienced by different asylum seekers, such as LGBTQ/H people. Many of the circumstances the Proposed Rule seeks to exclude are the very ways in which LGBTQ/H people experience persecution.

Refugees should not have to wait until a persecutor carries out a threat. As the Sixth Circuit recently stated, “it cannot be that an applicant must wait until she is dead to show her government’s inability to control her persecutor.” *Juan Antonio v. Barr*, 959 F.3d 778, 794 (6th Cir. 2020). Yet the Proposed Rule nonsensically states that “repeated threats with no actual effort to carry out the threats” would not qualify as persecution. Proposed Rule §§ 208.1(e), 1208.1(e); Notice at 60–61. On the face of the Proposed Rule, applicants must expose themselves to risk of violence—up to and including death—in order to show they were persecuted. After being threatened, an asylum seeker should not be incentivized to wait until someone tries to murder them before fleeing for their life. This is an absurd result that undermines the very purpose of refugee protections.

The consequences for LGBTQ/H refugees would be grave if they waited for an “effort to carry out” a threat before fleeing. For example:

Leila is a bisexual woman from Bangladesh who was kicked out of school when her sexual orientation was discovered. Shortly thereafter, she spoke out against conservative Islamist groups

who were gaining power in Bangladesh. In retaliation for speaking out, she was publicly outed as bisexual. She and her parents immediately began receiving death threats. She could not go to the police because same-sex relations are illegal in Bangladesh and she might be arrested. She knew of other gay Bangladeshis who were outed on Facebook by conservative Islamist groups and subsequently brutally murdered. Accordingly, she fled Bangladesh and sought asylum in the U.S.

Yasir is a gay man from Yemen. While he tried to live his life deeply in the closet, he was nevertheless very publicly outed. Because Yemeni officials sentence gay men to death, he fled to the U.S. immediately under threat of arrest. As he had feared, the police then issued a warrant for Yasir's arrest. When he could not be found, he was tried for homosexuality in absentia and found to be guilty. Accordingly, the authorities issued a formal death sentence against Yasir.

If Leila and Yasir had waited for further efforts to be made to carry out the threats, they would likely be dead. Notably, these threats that LGBTQ claimants regularly face amount to persistent and conscious terror campaigns, which alone rise to the level of persecution.

“Intermittent harassment and brief detentions” can rise to the level of persecution. The Proposed Rule also states that persecution “does not include intermittent harassment, including brief detention.” Proposed Rule §§ 208.1(e), 1208.1(e); Notice at 61. However, detention itself can rise to the level of persecution.³⁰ Moreover, “intermittent” incidents can quickly become cumulative, amounting to persecution.³¹ There is nothing in the Proposed Rule acknowledging the clear rule that adjudicators must consider the cumulative effect of any such incidents.

Indeed, as discussed above, LGBTQ/H claimants are regularly terrorized and detained as a punishment for their sexual orientation, gender identity, and HIV status. For instance, Immigration Equality has worked with a number of asylum seekers from Cuba who report being repeatedly detained by police for several days at a time. During such detentions, it is common for police officers to abuse and threaten LGBTQ/H people with further violence and detention unless they change their sexual orientation and “act straight.” Such intermittent incidents viewed cumulatively serve to terrorize LGBTQ/H people and can certainly rise to the level of persecution.

³⁰ See *Haider v. Holder*, 595 F.3d 276, 286 (6th Cir. 2010) (“[T]he types of actions that might cross the line from harassments to persecution include [] detention [].”); *Beskovic v. Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006) (“The circumstances surrounding a petitioner’s arrest or detention require a case-by-case adjudication by the BIA.”); *Shi v. U.S. Atty. Gen.*, 707 F.3d 1131, 1237 (11th Cir. 2013) (detention rose to level of persecution); *Choezom v. Mukasey*, 300 F. App’x 79, 80 (2d Cir. 2008).

³¹ See *Herrera-Reyes v. Atty. Gen.*, 952 F.3d 101, 107 (3d Cir. 2020) (holding threats constitute persecution when “the cumulative effect of the threat and its corroboration presents a real threat to a petitioner’s life or freedom”). *Mejia v. U.S. Atty. Gen.*, 498 F.3d 1253, 1258 (11th Cir. 2007) (“In assessing past persecution we are required to consider the *cumulative* effect of the mistreatment the petitioners suffered.”) (emphasis added).

Applicants should not have to wait until persecutory laws are enforced against them to flee.

The Proposed Rule asserts that persecution does not include “laws or government policies that are unenforced or infrequently enforced” without “credible evidence that those laws or policies have been or would be applied to an applicant personally.” Proposed Rule §§ 208.1(e), 1208.1(e); Notice at 61–62. As an initial matter, the Proposed Rule fails to identify the type of “credible evidence” that would be acceptable.

Moreover, the Proposed Rule is inaccurate when it states that “the mere existence of potentially persecutory laws or policies is not enough to establish a well-founded fear of persecution.” Notice at 60. Under this reasoning, in countries where being LGBTQ carries the death penalty, the fact that LGBTQ people are “infrequently” executed would disqualify these laws as persecutory. As noted above, LGBTQ relationships are subject to criminal punishment in approximately 70 countries. Of those, 31 carry a sentence of ten years or more in prison, and 12 countries allow the death penalty as a sentence, including death by stoning. To state that such laws do not constitute persecution is morally reprehensible and makes a mockery of the U.S.’s commitment to humanitarian protection. Virtually all of LGBTQ refugees who come from countries where their identity is criminalized are terrorized by such laws. If any nation is prosecuting LGBTQ identity as a crime, regardless of the frequency of such actions, it is *per se* persecution.

In addition, the Proposed Rule ignores the well-recognized effect that persecutory laws have merely by being on the books. LGBTQ refugees understand this acutely: as discussed above, many countries have harsh anti-LGBTQ laws and policies. Persecutory laws dictate the scope of acceptable and unacceptable political and social behavior, and act as official endorsement for persecution against LGBTQ people, increasing the frequency and severity of mistreatment. As Human Rights Watch recognized, “[c]riminalizing sexual intimacy between men offers legal sanction to discrimination against sexual and gender minorities, and in the context of widespread homophobia, gives social sanction to prejudice and helps create a context in which hostility and violence is directed against LGBT people.”³² In short, persecutory laws create opportunities for persecutors to prey on a person the law proclaims to be a criminal, knowing that the law will not intervene. Thus, even when the government does not overtly enforce such laws, LGBTQ people are subject to violence, sexual abuse, and murder, not to mention, extortion, job loss, denial of access to healthcare, and loss of parental rights.

Whether or not the applicant can prove that the government is likely to enforce the law is beside the point; applicants would not be able to avail themselves of their country’s protection if they fear their own arrest in going to the police. INA 101(a)(42). We see the chilling effect such laws have on LGBTQ refugees’ ability to seek protection, for example:

³² Human Rights Watch, *Not Safe at Home*, at 10 (2014), https://www.hrw.org/sites/default/files/reports/jamaica1014_ForUpload_1.pdf.

Iskandar is a gay man who worked for the Lebanese government. In Lebanon, it is a crime to be gay. Iskander’s ex-partner threatened to out him to his family and to the government if Iskander did not pay him hush money. Iskander was unable to make the payments and decided that he could not risk being outed in Lebanon. Due to his position in the government he would be tortured and imprisoned if he were discovered to be gay. Additionally, given that his family is extremely religious, Iskander would likely be harmed, and even killed, by his own family. Because LGBTQ conduct is criminalized, he could not seek help.

Tushar is a gay man from India who was extremely closeted for fear of persecution at the hands of the police and community members. When Tushar mustered the courage to come out to his friends, they turned on him and raped him, while calling him homophobic slurs and telling him “since you are gay, you should enjoy this.” Tushar was unable to report this to the police at the time, because if he did, Tushar could have been subjected to 10 years of imprisonment.

Soraya is a lesbian from Iran who was extremely closeted. Soraya was sexually and physically abused by an ex-partner. The ex-partner also set Soraya’s car on fire. However, given that her ex-partner was a woman, Soraya could not report the abuse to the police. Had Soraya reported the abuse, she would have been outed, and would have been subjected to the death penalty.

Joseph is gay man from Nigeria where being gay is a crime, and in some states punishable by death. Joseph was outed at his workplace after he lost his phone and the security police who found it discovered intimate photos between himself and a partner. The police made copies of the photos and used them to extort money from Joseph in exchange for not arresting and outing him. They also made him sign a statement acknowledging that he was gay and had committed a crime. The demands for money kept increasing until Joseph could no longer meet the bribes to assure his safety. He then fled to the U.S.

In sum, the Proposed Rule should not ignore the persecutory effect of laws criminalizing LGBTQ conduct, even if infrequently enforced. To do so is to fail to recognize some of the most egregious ways in which LGBTQ refugees are persecuted for their sexual orientation and gender identity.

f. **The Proposed Rule would exclude evidence that asylum seekers need to support their claims.**

The Proposed Rule would bar consideration of evidence based on “cultural stereotypes.” This term is not defined. However, virtually all LGBTQ/H asylum applications rely on evidence of cultural attitudes toward LGBTQ/H people in their country of origin. This evidence is probative, relevant, and widely accepted as reliable by adjudicators. The Proposed Rule offers no rationale for why such

evidence should be excluded. Further, it is difficult to imagine how evidence about cultural attitudes towards LGBTQ/H people would not include some cultural stereotypes, especially where an LGBTQ/H asylum seeker must establish that their PSG meets the definitions of particularity and social distinction. For instance, Immigration Equality clients often provide country conditions evidence in the form of an index followed by reports and articles from governmental sources, NGOs and the news media.³³

It appears that submission of such materials may be prohibited under the Proposed Rule. However, such evidence is crucial to establishing the objective reasonableness of an asylum seeker's fear of persecution and to show why they cannot safely relocate to another part of their country. As a result, asylum seekers will be precluded from submitting materials that have long been accepted, and considered to be essential, by adjudicators.

g. The proposed discretionary factors are prejudicial and not discretionary.

In addition to meeting the legal standard, asylum seekers must merit a favorable exercise of discretion. See 9 U.S.C. § 1158(b)(1)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). Because “the danger of persecution should generally outweigh all but the most egregious of adverse factors,” discretionary factors “should not be considered in a way that the practical effect is to deny relief in virtually all cases.” *In re Pula*, 19 I. & N. 467, 473–74 (B.I.A. 1987). However, the Proposed Rule does precisely that. Breaking with over thirty years of case law, the Proposed Rule rejects long-established discretionary considerations such as ties to the United States, living conditions, safety, potential for long-term residency in a third country, and general humanitarian considerations. See *In re Pula*, 19 I. & N. at 473–74.

In their place are a set of twelve factors that severely curtail the discretion of adjudicators in granting asylum. Many of these factors have nothing to do with the merits of a claim, and would result in the denial of asylum for LGBTQ/H applicants with meritorious cases. The Proposed Rule also strips the exercise of discretion out of the hands of adjudicators, who are best equipped to weigh the totality of a person’s equities. As such, the provisions should be rescinded in their entirety.

Entry without inspection. The Proposed Rule instructs adjudicators to deny asylum to an applicant who enters the United States without inspection. This is in blatant violation of the INA, which provides that an applicant “who arrives in the United States (***whether or not at a designated port of arrival***), irrespective of such alien’s status, may apply for asylum.” 8 U.S.C. § 1158(a)(1) (emphasis added). The discretionary factor also runs contrary to established caselaw. Under *In re*

³³ ImmigrationEquality.org, Country Conditions Materials, El Salvador 2019 Country Conditions Index and Exhibits, <https://immigrationequality.org/wp-content/uploads/2020/06/EL-SALVADOR-2019-LGBT-Index-and-Compiled-articles.pdf>; Russia 2019 Country Conditions Index and Exhibits, <https://immigrationequality.org/wp-content/uploads/2020/06/Russia-2019-LGBT-Index-and-Exhibits.pdf>.

Pula the court found that manner of entry is a factor that “should not be considered in such a way that the practical effect is to deny relief in virtually all cases.” *In re Pula*, 19 I. & N. at 473–74. Yet this appears to be precisely what the Proposed Rule is designed to do.

Furthermore, the Proposed Rule’s narrow exception for entry without inspection “made in immediate flight from persecution or torture in a contiguous country” is so narrow that it is absurd. An applicant who enters via a port of entry may still be denied relief if the adjudicator interprets “immediate flight” restrictively. For example, an LGBTQ asylum seeker could be turned back while fleeing rapists, kidnappers, or would-be murderers if the flight was not deemed to be immediate enough. The Proposed Rule fails to explain why the immediacy of persecution is relevant to discretion.

Forcing LGBTQ asylum seekers to await permission to enter the United States is also untenable. The so called “Remain in Mexico” policy clearly illustrates this danger. Indeed, as documented in a report compiled by Human Rights First, and reported by our own clients, LGBTQ/H asylum seekers have faced threats, harassment, and physical violence in Mexico.³⁴ In short, they have good reason to enter the U.S. in order to avoid metering and/or placement into the Remain in Mexico program: they fear for their lives and safety. Indeed, as noted above, the INA protects such refugees by specifically providing that an applicant who enters without inspection may still apply for asylum. 8 U.S.C. § 1158(a)(1).

This arbitrary provision would result in the denial of asylum for many of the people Immigration Equality serves in our pro bono and pro se programs, who entered without inspection for fear of what could happen to them in Mexico. For instance:

Lili is a transgender woman from Central America. Throughout her life, Lili was severely abused and mistreated because of her gender identity and sexual orientation. Lili was gang raped on two separate occasions simply for being who she is. Lili fled her country of origin to find safety in the United States. She entered without inspection and was placed in immigration detention. Lili represented herself in front of an immigration court and won asylum.

Aiden is a gay man from Central America, who experienced severe abuse in this country of origin on account of his sexual orientation. As a child, Aiden was repeatedly raped by his adult cousin because Aiden was perceived as gay. As an adult, Aiden was victim of an attempted murder and gang violence due to his sexual orientation. Aiden crossed the border without permission to save his life.

³⁴ Human Rights First, *Publicly reported cases of violent attacks on individuals returned to Mexico under the “Migrant Protection Protocols”* (last visited 7.15.20), <https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks5.13.2020.pdf>.

The Proposed Rule would deprive Lili and Aiden of relief despite their meritorious claims simply because they did not enter the U.S. at a designated port of entry even as they were fleeing for their lives and were likely to be harmed in Mexico.

Failure to seek protection in country of transit. The Proposed Rule enforces three “layover rules” that punish refugees for traveling to the United States in search of asylum. Adjudicators are essentially instructed to deny cases if an asylum seeker passed through another country on the way to the U.S. and did not seek protection there, or if an applicant has stayed in a single country for more than 14 days.

Even if other nations had the capacity and resources to process asylum cases, which many do not, these rules make LGBTQ refugees unsafe. Many countries that are commonly transited are as dangerous for LGBTQ asylum seekers as their country of origin. For example, LGBTQ asylum seekers from South America often pass through many Central American nations on their way to the U.S. At the same time, the State Department reports that LGBTQ individuals in El Salvador,³⁵ Guatemala,³⁶

³⁵ Department of State, *2019 Country Reports on Human Rights Practices: El Salvador* § 6 <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/el-salvador/> (“Media reported killings of LGBTI community members in October and November. On October 27, Anahy Rivas, a 27-year-old transwoman, was killed after being assaulted and dragged behind a car. Jade Diaz, a transwoman who disappeared on November 6, was assaulted prior to her killing. Her body was found submerged in a river. On November 16, Manuel Pineda, known as Victoria, was beaten to death and her body left naked in the street in Francisco Menendez, Ahuachapan Department. Uncensored photographs of the body were circulated on social media.”).

³⁶ See Department of State, *2019 Country Reports on Human Rights Practices: Guatemala* § 6 <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/guatemala/> (“According to LGBTI activists, gay and transgender individuals often experienced police abuse. The local NGO National Network for Sexual Diversity and HIV and the Lambda Association reported that as of October, a total of 20 LGBTI persons had been killed, including several transgender individuals the NGOs believed were targeted due to their sexual orientation. Several were killed in their homes or at LGBTI spaces in Guatemala City. LGBTI groups claimed women experienced specific forms of discrimination, such as forced marriages and forced pregnancies through ‘corrective rape,’ although these incidents were rarely, if ever, reported to authorities. In addition, transgender individuals faced severe discrimination.”).

and Honduras³⁷ face social hostility,³⁸ employment and education discrimination, extortion, police and immigration agent abuse,³⁹ corrective rape, and murder. Most LGBTQ refugees cannot file for asylum in transit nations, nor is the length of their stay in such countries relevant to whether they are deserving of asylum in the U.S.

These provisions would impact nearly all of Immigration Equality's clients and could prevent them from obtaining protection when their cases otherwise clearly merit asylum. For example:

Gogol and Daniel are a gay couple who fled Georgia for the United States after experiencing persecution on account of their sexual orientation. In route to the U.S., they flew through Kiev, Ukraine. Under the Proposed Rule, since Gogol and Daniel did not apply for asylum protection in Ukraine, they would be precluded from applying for asylum in the United States. But Ukraine is a country where homophobia is rampant, and where they would be subjected to the same persecution that they faced in Georgia.

Carmen is a trans woman from Jamaica who fled severe persecution on account of her gender identity. In coming to the United States, she took a flight from Jamaica to Mexico City and then travelled by bus from Mexico City to Tijuana, where she presented herself at the U.S. Port of Entry. In Mexico, Carmen was physically assaulted on account of her gender identity. The police who came to the scene supported the attackers. Luckily, Carmen was able to escape. Under the Proposed Rule, Carmen would likely be denied asylum because she did not apply for asylum in Mexico before she requested asylum in the United States. This would have been futile in Mexico where she was persecuted because of her gender identity.

Requiring LGBTQ/H refugees to apply for asylum in a place where they will face persecution is nonsensical. In addition, the Proposed Rule would require refugees to prove—often without the help of an attorney, often while in detention facilities without access to the internet or educational resources—why a country of transit is *not* safe. Moreover, they will have to do so without resorting

³⁷ See Department of State, *2019 Country Reports on Human Rights Practices: Honduras* § 6 <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/honduras/> (“[S]ocial discrimination against LGBTI persons persisted, as did physical violence. Local media and LGBTI human rights NGOs reported an increase in the number of killings of LGBTI persons during the year. Impunity for such crimes was a problem, as was the impunity rate for all types of crime. According to the Violence Observatory, of the 317 cases since 2009 of hate crimes and violence against members of the LGBTI population, 92 percent had gone unpunished.”).

³⁸ Antonia Zapulla, *Forgotten twice: the untold story of LGBT refugees*, World Economic Forum, Jan.19, 2018, <https://www.weforum.org/agenda/2018/01/forgotten-twice-lgbt-refugees/>.

³⁹ Jose A. Del Real, *‘They Were Abusing Us the Whole Way’: A Tough Path for Gay and Trans Migrants*, The New York Times, July 11, 2018, <https://www.nytimes.com/2018/07/11/us/lgbt-migrants-abuse.html>.

to evidence of societal attitudes, which are now prohibited under the Proposed Rule. The net result will be the return of refugees with meritorious claims to countries where they will be persecuted.

Fraudulent documents. With limited exceptions, the Proposed Rule instructs adjudicators to deny asylum on the basis that a refugee used fraudulent documents to enter the U.S. However, if a refugee is fleeing for their life, obtaining official documents may not be possible. As such, case law for decades has understood the difference between a refugee who presents false documents to escape persecution and one who presents false documents to make a fake claim. See *In re Pula*, 19 I. & N. at 474; see also *Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007) (“When a petitioner who fears deportation to his country of origin uses false documentation or makes false statements to gain entry to a safe haven, that deception “does not detract from but supports his claim of fear of persecution.”) (quoting *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)). This provision would substantially restrict refugees’ ability to leave an unsafe situation, and result in the denial of many deserving asylum seekers without serving any legitimate government interest. Immigration Equality has witnessed this first hand, for instance:

Eduardo is a gay, HIV-positive man from Cuba who was persecuted on account of his sexual orientation, HIV-status, and political opinion. He arrived at the U.S.-Mexican border to apply for asylum but was forced to wait in Mexico pursuant to the metering policy. While in Mexico, Eduardo ran out of his HIV-medication and the Mexican authorities refused to renew his supply of the medication. Desperate and scared for his life, Eduardo asked for assistance from a man who introduced himself as an attorney specializing in humanitarian visas to the United States. Eduardo obtained a visa from this “attorney,” so he could enter the United States to apply for asylum and access HIV-medication. The visa turned out not to be valid. However, Eduardo had genuine fear for his life and a strong asylum claim, making it clear that his purpose for entering the United States was to escape persecution.

One year of unlawful presence—no exceptions. The Proposed Rule instructs adjudicators to deny asylum for an applicant who has accrued “more than one year of unlawful presence in the United States prior to filing an application for asylum.” This provision rewrites the INA entirely, which provides explicit exceptions to the one-year filing deadline for changed or extraordinary circumstances. See 8 U.S.C. 1158(a)(2)(D). The Agencies would be in radical contradiction to the INA if they issued a one-year discretionary denial of asylum seekers who met a one-year filing deadline exception.

Deadline exceptions are particularly important to LGBTQ/H asylum seekers, many of whom struggle to find acceptance in their identity for years after arriving in the United States. Many are terrified of coming out, or have fled violence because they were outed. Many others live with severe psychological trauma manifesting as post-traumatic stress disorder, anxiety, or severe depression. An applicant who enters the United States identifying as cisgender may begin to transition, and then develop a well-founded fear of persecution on the basis of their transgender identity. The process of

transitioning can take years,⁴⁰ and constitutes “changed circumstances” justifying an exception to the one-year bar. The same is true for refugees who discover they are HIV-positive after being in the United States. It would be absurd for these refugees to incur a discretionary denial because they did not seek asylum on the basis of an identity that they could not express during their first year in the United States. This would have a severe impact on LGBTQ/H refugees who often rely upon changed or extraordinary circumstances exception to the one-year filing deadline. For example:

Orlando is a genderqueer person from Honduras who came to the United States when they were around 8 years old. In Honduras, and as a child, Orlando was raped on account of their perceived sexual orientation. On their way to the United States, Orlando was raped again by someone in Mexico. In the United States, Orlando lived in a very homophobic household. Their stepfather regularly beat them because of their sexual orientation. Because of the constant abuse, Orlando lived with severe mental health issues. Orlando was finally able to leave their house when they started going to college. In college, Orlando began receiving therapy to manage their mental health conditions and was eventually able to come to terms with the LGBTQ identity and ultimately file for asylum. Under the Proposed Rule, because Orlando entered when they were 8 years old, they would not be denied asylum as a matter of discretion despite the fact that they were a minor when they entered the United States, and despite the fact that Orlando’s mental health conditions prevented them from filing an application for asylum until shortly after they turned eighteen.

Anita is a transgender woman from Syria who came to the United States when she was a child. In the United States, growing up in a very traditional family, Anita was not allowed to explore her gender identity. Stereotypical views and roles of gender were imposed upon her. She suppressed her gender identity and as a result lived with depression. When Anita was in her mid-thirties, she finally felt free to explore her gender identity and started to transition. Under the proposed rule, Anita would not be able to apply for asylum despite the fact that she had very recently discovered her gender identity and was finally able to express it.

Martin is a gay man from Ecuador who came to the United States in 2009. Martin had suffered horrific persecution on account of his sexual orientation in Ecuador. Because of the persecution, Martin lived with depression. In the United States, Martin was diagnosed with HIV in 2016. Because of the diagnosis, Martin’s experienced a serious depressive episode. He was unable to even get out of bed. Under the new rule, Martin would not be able to apply for asylum even though he had recently been diagnosed with HIV and even though his depression prevented him from filing an application for asylum soon after his diagnosis.

⁴⁰ The Conversation, LGBTQ caravan migrants may have to prove their gender or sexual identity at US border, Nov. 30, 2018, <https://theconversation.com/lgbtq-caravan-migrants-may-have-to-prove-their-gender-or-sexual-identity-at-us-border-107868>.

Similarly, Immigration Equality has represented hundreds of F and J student visa holders who come to the United States to further their education. Given their past experiences of anti-LGBTQ/H mistreatment, many take years to embrace their sexual orientation, gender identity, and HIV status. Many, if not most, of these student are not able to disclose their LGBTQ status in their first year of residence in the United States. They too would likely be foreclosed from asylum relief under the Proposed Rule regardless of the strength of their claim.

Under the Proposed Rule, all of these clients would likely be denied asylum despite their meritorious claims and valid exceptions to the one-year filing deadline.

h. The radical expansion of firm resettlement bar will return LGBTQ/H asylum seekers to harm.

The Proposed Rule radically and impermissibly expands the statutory firm resettlement bar. 8 U.S.C. 1158(b)(2)(A)(vi). Changing a definition that the government acknowledges has been the same for nearly 30 years, the Proposed Rule would find the circumstance below to be categorical bars to asylum eligibility:

- i. If an applicant *could* have resided in a country of transit, even if there is no pathway to permanent status, and even if he or she did not actually apply for any status at all.⁴¹ Notably, there is no exception if the country is unsafe for LGBTQ/H people.

As noted above in discussing the discretionary factors, this would lead to an absurd result. For example, a gay Saudi Arabian could be deemed firmly resettled if he had a layover in Kuwait, even though it is unsafe for LGBTQ people there. Similarly, a large number of LGBTQ people flee homophobic and transphobic persecution in Central and South American countries. These asylum seekers travel north to the U.S.-Mexicana border in order to seek protection in the U.S. On their way to the United States, LGBTQ asylum seekers pass through countries such as Guatemala, Honduras, and Mexico, all of which have been widely documented as fundamentally unsafe for LGBTQ people. Thus, it would be dangerous and futile to seek asylum in those countries, yet the Proposed Rule would require them to do so.

- ii. The applicant physically resided voluntarily, and without continuing to suffer persecution, in another country for a year or more, whether or not the country offered any immigration status (permanent or otherwise).⁴² There is no exception to this rule based on the asylum seekers inability to leave the third country, nor based on a fear of

⁴¹ Proposed Rule 208.15(a)(1); Notice at 79.

⁴² Proposed Rule 208.15(a)(2); Notice at 79.

remaining in the third country. Many LGBTQ/H asylum seekers in unsafe nations hide their identities in order to avoid persecution, but that should never be a requirement to seeking protection in the U.S.

This too would lead to an absurd result. For example, if a Colombian transgender woman lived closeted in Venezuela for 18 months under constant fear of being outed before traveling to the United States, she would be barred from asylum.

The government’s justifications for this Proposed Rule essentially boil down to: (1) there are other countries in the world, and (2) if refugees really feared persecution, they wouldn’t take their time to travel to the United States. *See* Notice at 79. These are scarcely credible and certainly do not justify denying meritorious asylum claims.

What’s more, if the government or adjudicator raises the issue of firm resettlement – without having to present any proof that firm resettlement is possible – the burden of proof then falls to the applicant to demonstrate that they could not obtain some immigration status in the third country. This would require LGBTQ/H asylum seekers to conduct research on the law in countries about which they may be completely ignorant and with which they do not share a common language. While this would pose an unreasonable burden on any asylum seeker, it will likely be an insurmountable burden on unrepresented and detained people resulting in wrongful asylum denials. For instance, Immigration Equality has assisted Russian LGBTQ asylum seekers who traveled to Mexico to apply for asylum at the U.S.-Mexican border. These asylum seekers typically speak little English and no Spanish. As a result, it would be impossible for them to research law and conditions in Mexico, *in Spanish*, in order to establish that it would be unsafe for them to resettle in Mexico. But under the Proposed Rule, this could be fatal to their asylum claims.

i. **The Proposed Rule imposes a standard for assessing the reasonableness of internal relocation that almost no asylum seeker can meet.**

The Proposed Rule imposes an arbitrary standard for assessing the reasonableness of internal relocation that virtually no refugee, including LGBTQ/H asylum seekers, can meet. Under existing regulations, adjudicators may consider numerous circumstances, including “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.” 8 C.F.R. § 208.13(b)(3). Ignoring these critical factors, the Proposed Rule purports to “streamline” relevant considerations for internal relocation, instituting a narrow inquiry under the guise of a totality-of-the-circumstances test.

For example, under the Proposed Rule, adjudicators must consider “the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.” Proposed Rule §§ 208.13(b)(3), 1208.13(b)(3); Notice at 66. The plain implication of this provision is that the mere fact

an asylum seeker was able to travel to the U.S. should show that internal relocation in their country of origin was reasonable. Critically, this provision ignores the fact that refugees flee their countries of origin because they do not believe that their government will protect them and believe they will be safe in the U.S. In reality, this could operate as a blanket ban on all asylum seekers.

The Proposed Rule also assumes that internal relocation is reasonable if the asylum seeker comes from a large country, or if the persecutor lacks “numerosity.” Proposed Rule §§ 208.13(b)(3), 1208.13(b)(3), 1208.16(b)(3); Notice at 66. This ignores the requirement that asylum adjudications be performed on a case-by-case basis. Moreover, it is patently wrong in the context of LGBTQ/H asylum seekers who routinely face persecution nationwide in the largest countries in the world. For example, LGBTQ/H refugees regularly flee from persecution in Russia, India, Brazil, Mexico, and Saudi Arabia, to name a few.

Further, the Proposed Rule would require asylum seekers who have already survived persecution to prove that they cannot reasonably relocate if the persecutor is deemed “non-governmental.” 8 CFR § 208.13(3)(iv); 8 CFR § 1208.13(3)(iv). The Proposed Rule then severely limits the definition of government officials to exclude officials and actions performed “absent evidence that the government sponsored the persecution.” This ignores the reality of LGBTQ/H asylum seekers do not have the luxury of investigating whether a particular government actor’s violent acts were “sponsored by the government” or not. It also ignores the fact that many nations exist with systemic anti-LGBTQ bias. When anti-LGBTQ violence is the norm, evidence of official government sponsorship of persecution is unlikely to exist.

At the same time, the Proposed Rule categorically *excludes* forms of evidence necessary to show why internal relocation would be unreasonable. Notice at 65, Proposed Rule §§ 208.1(g); 1208.1(g). As mentioned above, it is genuinely unclear how to distinguish impermissible evidence of “cultural stereotypes” from evidence of pervasive cultural bias in a country. The Proposed Rule calls into question well-established forms of evidence including social science and country conditions reports.

For LGBTQ/H applicants fleeing private actor persecution, it creates an impossible scenario. They would need to prove why no other part of the country was safe, *without* using evidence of cultural norms and persistent abuse, *and* without referencing their own individual experience. It is hard to conceive of any other evidence that would meet this burden.

j. The Proposed Rule heightens the standards for both reasonable and credible fear interviews which will result in LGBTQ/H applicants to be returned to harm.

The Proposed Rule unlawfully heightens the statutory standards for establishing a credible or reasonable fear of persecution making it more difficult for LGBTQ/H asylum seekers with meritorious claims to have those claims heard by a judge. When Congress originally added “expedited removal”

to the INA, it set the standard for a credible fear hearing intentionally low. That was to ensure that bona fide refugees would not be deported back to countries where they would be persecuted. Now, the government seeks to expand the use of expedited removal to cover even more asylum seekers while simultaneously making it substantially more difficult for those asylum seekers to pass a fear interview. Further, the Proposed Rule requires applicants to prove, during the interview, that they cannot internally relocate in their country of origin and that they are not subject to any of the complex asylum bars under the Proposed Rule. This would require asylum seekers to present evidence and undergo extensive questioning, sometimes hours after arriving in the U.S. and most likely prior to speaking with an attorney. This will result in bona fide refugees being deported without appearing before a judge.

Many LGBTQ/H refugees are profoundly traumatized, exhausted, terrified, unaware of the legal process, and subject to language and cultural barriers when they arrive at the border. They are often living with physical and psychological effects of their trauma. They do not have time to collect their thoughts, much less gather corroborative evidence to support highly fact-specific inquiries at an interview screening. Moreover, as discussed in detail in Section III.b above, many refugees already face unique obstacles in disclosing their status.

David is a gay man from Nicaragua, who was persecuted on account of his sexual orientation and political opinion. David was arrested and imprisoned by the Nicaraguan security forces. In prison, the members of the Nicaraguan police reputedly raped and physically abused David. Fortunately, David was able to escape from prison. He immediately traveled to the United States and asked for asylum. During his Credible Fear Interview, David was visibly distraught and broke down crying and struggled to articulate his fear of return, despite his strong claim for asylum. The Proposed Rule completely disregards the impact psychological trauma has on survivors of torture and abuse and he likely would have failed his credible fear interview.

In sum, this heightened standard will increase the risk of refoulement of LGBTQ/H refugees, who will then face severe harm and death. Congress set the standard deliberately low to avoid this result. The Proposed Rule should not make it more difficult for asylum seekers to access protection.

Moreover, those who pass their screenings will be referred into asylum/withholding only proceedings, preventing them from applying from any other survivor-based relief that could apply. Precluding LGBTQ/H people from pursuing others forms of relief to which they are entitled is wrong. Especially given the fact that many LGBTQ/H refugees wait for years for the adjudication of their claims. Immigration Equality has had clients who were the victims of trafficking or other crimes and thus eligible for relief under U or T visas, but the Proposed Rule would foreclose these forms of relief.

For instance, Eva is a transgender woman from Mexico. When she young, she was trafficked into the United States against her will and forced into sex work. Because of this, she was arrested and convicted of sex-work related crimes and was placed into removal proceedings. She was deemed

ineligible for asylum, but since she was trafficked into the U.S., she was granted a T visa. Today, Eva is an LGBTQ rights activist and a community leader. By foreclosing access to other forms of relief to asylum seekers, victims of violence and trafficking will be penalized and will be more likely to be returned to countries where they will face persecution.

k. LGBTQ/H asylum claims deserve factfinding and a hearing, not pretermission.

The Proposed Rule adds a paragraph that would enable Immigration Judges to fast-track the denial of an application for asylum, withholding of removal, or Convention Against Torture relief based solely on the I-589 application and the supporting evidence. 1208.13(e); Notice at 47–49. They will be able to do this on their own initiative or at the request of a DHS attorney, with limited opportunity from the applicant to rebut such a finding.

This Proposed Rule is profoundly harmful to the integrity of the U.S. asylum system. “Pretermission” will certainly be used, early and often. The DOJ has imposed performance quotas on Immigration Judges, tying their job security to how many claims they process.⁴³ As a result, Immigration Judges will be strongly incentivized to pretermit as many cases as possible.

However, fair and thorough adjudication of a humanitarian claim takes time, and every asylum seeker is entitled to their day in court. *See In re Fefe*, 20 I & N. 116, 118 (B.I.A. 1989) (“In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to the fairness and to the integrity of the asylum process itself.”) Refugees often suffer severe harm against insurmountable odds to travel to U.S. for safety. Denying human rights claims on the papers is a radical approach that would result in unprecedented refoulement.

Pretermission will fall on unrepresented or detained claimants, and will affect LGBTQ individuals in particular. As discussed above, LGBTQ individuals fleeing persecution may not (1) immediately identify as LGBTQ, (2) feel safe disclosing that they are LGBTQ, or (3) understand that their LGBTQ status provides a claim for asylum. Indeed, it is only often after a thorough examination that many LGBTQ refugees understand they have a claim at all. Dismissing these claims without any factual investigation is unconscionable.

l. The Proposed Rule would make Convention Against Torture Relief unavailable for most LGBTQ/H people with meritorious claims.

The Proposed Rule would amend the regulations implementing the Convention Against Torture severely limiting CAT relief. Under the Proposed Rule, in order to show that a public official

⁴³ See DOJ, Case Priorities and Immigration Court Performance Measures, Jan. 17, 2018, <https://www.justice.gov/eoir/page/file/1026721/download>.

inflicted, instigated, consented to, or acquiesced to torture, an applicant must show that the public official was acting “under color of law.” Notice at 83. Moreover, under the Proposed Rule, a public official will not be found to have acquiesced to torture unless the applicant shows that the public official deliberately avoided learning the truth and was “charged with preventing the activity as part of his or her legal duties and have failed to intervene.”

These are prejudicial requirements that would require an applicant to submit evidence of (1) whether a public official was on the job during the persecution, (2) the public official’s mental state, and (3) the public official’s job description. Any one of these would be insurmountable for a CAT applicant. But together, they effectively close off CAT relief altogether. To do so defies the clear intent of Congress when it made CAT available as a form of relief. Many LGBTQ people who have been granted relief under CAT could likely not meet the new standard despite having meritorious claims. For instance:

Sergio is a gay man from Cuba. The Cuban police frequently detain LGBTQ people solely because of their LGBTQ status. Typically, the person is not charged with or accused of any crimes. The only purpose of these detentions is to harass LGBTQ individuals. Sergio was subjected to such detentions on multiple occasions. During one of the detentions, the Cuban police sexually assaulted Sergio. He was released shortly after. He was never charged with any crime or presented with any documents explaining the reason for his detention. The Proposed Rule would likely make Sergio ineligible for CAT.

Miremba is a lesbian from Uganda. In Uganda, Miremba was arrested for being a lesbian and raped by the police twice while she was in custody. Miremba was able to escape from prison and flee to the United States. It would not be possible for Miremba to obtain the proof required by the Proposed Rule. Therefore, she would be disqualified from CAT, despite being subjected to torture by the Ugandan police.

Jaffar is a gay man from Uganda who suffered horrific torture at the hands of the police. The police came to his house, arrested him and his partner, and imprisoned them naked. In prison, Jaffar was forced to have sex with his partner in front of the other detained individuals and in front of the police, and the police poured urine on him. He was then taken to a different cell where he was constantly injected with some unknown drugs. Jaffar spent four months in this cell, where he was constantly beaten, without ever seeing a judge. Several years later, Jaffar was arrested again and was sexually assaulted by the police and tortured. Under the proposed rule, in order to qualify for CAT relief, Jaffar would have to prove that the officer was acting under the “color of law,” which likely would be an impossible task under the circumstances.

Returning such CAT applicants to countries where they will likely face torture violates U.S. obligations under the Convention Against Torture. Accordingly, the standards set forth in the Proposed Rule should be rejected.



m. Disclosure

The Proposed Rule allows for disclosure of information included in an asylum application under circumstances that are currently protected from disclosure. 8 CFR § 208.6; 8 CFR § 1208.6. Release of information can put LGBTQ/H asylum seekers at grave risk of harm. Gender identity, sexual orientation, and HIV status are deeply personal and often difficult to disclose and discuss. The disclosure provisions in the Proposed Rule will likely chill many LGBTQ/H asylum seekers from seeking relief they are entitled to.

n. It is unclear whether the Proposed Rule would operate retroactively.

Finally, it is not clear if Proposed Rule is intended to operate and apply retroactively. The costs and benefits⁴⁴ section of the Notice refers to an “expected decrease” in asylum grants, but does not say whether the thousands of pending cases are subject to the new rules or merely a benchmark from which to measure the “expected decrease.” Notice at 92-93. Likewise, only the frivolousness provisions become active after the Proposed Rule’s effective date, but the Notice does not expressly state if the remainder of the Proposed Rule applies to all pending cases.

Either way, retroactive effect would be unlawful and a grave mistake. The hundreds of thousands of asylum applications have a reliance interest in the state of the law as it stood when they applied. This reliance interest is further prejudiced by the 30-day comment period allotted by the Agencies, such that in 30 days, previously eligible applicants who have been waiting for years to have their claims adjudicated may find themselves ineligible without any warning. Given the sweeping scope of the Proposed Rule, and the short timeframe of the comment period, we urge the Agencies against retroactive application.

IV. Conclusion

For these reasons, the Agencies should immediately withdraw the Proposed Rule.

Thank you for the opportunity to submit comments on the Proposed Rule. Please do not hesitate to contact Bridget Crawford, Legal Director for Immigration Equality, at bcrawford@immigrationequality.org to obtain further information.

Sincerely,

Immigration Equality

⁴⁴ We also note that the costs and benefits section does not address the cost to the reputation of the United States, or the cost to us when we lose the talent, diversity, and innovation brought to us every day by asylees.