

Template Guidance: Proposed Rule Altering Procedures for Asylum, Withholding of Removal, and Fear Screenings

Thank you for helping Immigration Equality to fight the Trump administration's attacks on asylum. This document contains template comments with arguments in opposition to the Proposed Rule issued by the Department of Homeland Security (DHS) and the Department of Justice (DOJ) on June 15, 2020, entitled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (the "Proposed Rule"). The Proposed Rule radically changes the U.S. asylum system and would eliminate asylum for most refugees, including LGBTQ and HIV-positive people (LGBTQ/H). We encourage you to use this template as a resource in crafting unique comments about the impact of the Proposed Rule on LGBTQ/H asylum seekers. Special thanks to our partners at Kirkland & Ellis for their invaluable assistance in drafting these comments so quickly.

Important Details

- The Proposed Rule is available [here](#).
- Comments must be submitted by **July 15, 2020 at 11:59 PM EST**.
- Comments may be submitted online [here](#), by either copying/pasting your text into the "Comment" box or writing "see attached" and uploading a PDF file.¹

Using this template:

This template includes a number of substantive arguments tailored to address the impact of the Proposed Rule on LGBTQ/H asylum seekers. Because of the expansive nature of the Proposed Rule and the fact that the administration gave us only 30 days to respond to them, this template does not address every problem with the Proposed Rule. Rather, it targets some of the most egregious provisions that have a unique impact on LGBTQ/H people. It is designed so that you can select the arguments most relevant to your organization and adapt them to ensure your comment is unique.

¹ Commenters should be guided by the following administrative law principles:

- Commenters bear the burden of showing that any comment reflects a material issue that should be considered. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553–54 (1978); *see also Thompson v. Clark*, 741 F.2d 401, 408-09 (D.C. Cir. 1984) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)); *accord Petaluma FX Partners, LLC v. C.I.R.*, 792 F.3d 72, 81 (D.C. Cir. 2015).
- For purposes of preserving an issue for litigation, comments must be specific enough to provide the agency with meaningful notice of the issue. *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee*, 435 U.S. 519, 553 (1978)); *see generally Post-Acute Medical at Hammond, LLC v. Azar*, 311 F. Supp. 3d 176, 185 (D.D.C. 2018).
- To preserve an issue for litigation, the issue need only be adequately raised by one commenter. If an organization decides to bring a legal challenge on a particular issue, it need not have raised that issue itself, so long as some other organization discussed the issue in their comments. *See Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987); *Central New York Fair Business Ass'n. v. Jewell*, 2015 WL 1400384, at *10 (N.D.N.Y. 2015); *Northern Arapaho Tribe v. Burwell*, 118 F. Supp. 3d 1264, 1279 (D. Wyo. 2015).

Write in your own words:

The government must review all relevant information presented in the comments and must respond in some way to every comment they receive. If comments are too similar, the government may group them together and review them as one comment. In order to ensure your comment is reviewed, we encourage you to modify the sample comment to be reflective of your organization's experiences, the experiences of the community you work with, and any expertise you can bring to any particular section. Providing specific examples to document the harm of the Proposed Rule is very helpful. You should also not feel compelled to use any part of our template if you think it does not apply to your work or your experience.

Attach your research:

If you cite to research and supporting documents, we recommend that you include them as attachments so they become part of the administrative record. If you include links, specifically request that the Agencies read the linked material and incorporate it into the record.

Other Templates:

For other non-LGBTQ/H specific template comments, please visit [*Resources on the Proposed Rule*](#). The goal is to submit as many substantive comments as possible to make it clear that abolishing the asylum system through the Proposed Rule is cruel and in violation of the United States' obligations under law.

Template Comments

[Date]

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

We write on behalf of [Organization], in response 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”).²

The Proposed Rule eviscerates the U.S. asylum system and flouts the nation’s obligations under domestic and international law to safeguard refugees seeking humanitarian protection. Far from the “comprehensive solution” the Agencies seek in enacting this new regulation, the Proposed Rule will subject vulnerable asylum seekers to unclear, and sometimes unlawful, standards with virtually no due process protections. This will result in chaos as stakeholders battle the patently unfair and unlawful Proposed Rule in federal court. Tragically, the Proposed Rule will also result in asylum seekers being wrongly returned to countries where their lives will be in grave danger. Accordingly, we urge the Agencies to withdraw the Proposed Rule in its entirety.

I. Organization

[Insert paragraph describing your organization, why opposing the rule is important to your organization, and the expertise that your organization has on the issues raised here. Include data about the population you serve.]

² 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.

II. LGBTQ/H Asylum Seekers Are Persecuted Throughout the World Because of Their Sexual Orientation, Gender Identity, and HIV Status.

In over eighty countries it is illegal or fundamentally unsafe to be LGBTQ. LGBTQ and HIV-positive (together, “LGBTQ/H”) applicants experience persecution across the globe. Such persecution takes many forms, including:

[Insert section describing the types of persecution your clients as LGBTQ/H people face throughout the world. Consider including case examples or select from the topics below and consider revising to reflect your experience and including additional sources. Be sure to either include the source as an attachment or, if you provide a link, indicate that the Agencies should review the linked material and consider it part of the record as noted above in FN 1.]

- **Criminal punishment.** Same-sex activity between consenting adults is subject to criminal punishment in approximately 70 countries.³ 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.⁴ Moreover, these laws are not historical artifacts: for example, in 2019, Gabon adopted a new penal code that criminalizes consensual same-sex sexual acts.⁵
- **Social stigma.** Many countries have a pervasive culture of systemic anti-LGBTQ bias. In those countries, 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,⁶ refused employment, refused housing and healthcare, stripped of family or parental rights,⁷ and denied access to politics or power. Such remarkable exclusion rises to the level of persecution. In Brunei, for example, a woman was outed as a lesbian and then ostracized by her community. She lost everything. She was

³ 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

⁴ 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/>

⁵ ILGA, *State-Sponsored Homophobia*, at 10.

⁶ 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).

⁷ 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).

fired from her job, and an influential man blackmailed her into sex work. She stated to *The Telegraph* that she was “already living a prison sentence.”⁸

- **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 UNHCR, “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, producing homelessness.¹¹ As the State Department has noted, “[r]eluctance to report abuse—by women, children, lesbian, gay, bisexual, transgender, or intersex persons (LGBTI), and members of other groups—is, of course, often a factor in the underreporting of abuses.”¹² Violence is sometimes outside the reach of the state, and sometimes takes place where weak governments depend on allied armed groups to provide security.¹³ 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 2017.¹⁴
- **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.¹⁵ Even if the

⁸ Chloe Govan, *Brunei LGBT community living in fear despite sultan's death penalty reprieve*, *The Telegraph* (May 10, 2019), <https://www.telegraph.co.uk/news/2019/05/10/brunei-lgbt-community-living-fear-despite-sultans-death-penalty>.

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 *2019 Country Reports on Human Rights Practices*, Appendix A.

¹³ See Human Rights Watch, *Audacity in Adversity*

¹⁴ 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>.

¹⁵ 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 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

police are not 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.”¹⁶ In El Salvador, “[o]nly 12 out of 109 LGBTQ+ murders recorded between December 2014 and March 2017 went to trial . . . and there has never been a successful conviction.”¹⁷ Last March, Uganda used the COVID-19 outbreak as a pretext to arrest 23 people living at an LGBT shelter.¹⁸ 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.¹⁹

- **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.²⁰ 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.²¹ The International Rehabilitation Council for Torture Victims reports that in Tunisia, Tajikistan, and Ukraine, conversion therapy or “corrective violence” is ordered by the state or the police.²²
- **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

and threaten her with death.”) <https://www.pbs.org/newshour/show/lgbtq-asylum-seekers-persecuted-at-home-and-in-u-s-custody>

¹⁶ 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>.

¹⁷ See Oscar Lopez, *Pressure mounts for El Salvador to investigate wave of LGBTQ+ 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>.

¹⁸ 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>.

¹⁹ 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>

²⁰ 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

²¹ 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-idUSL8N1P03QO>

²² 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.

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.²³

In sum, many people who seek asylum in the United States are subjected to horrific persecution because of their sexual orientation, gender identity, and HIV status. Tragically, such refugees living in LGBTQ/H phobic countries sometimes 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 30-Day Comment Period Is Grossly Inadequate to Address the Proposed Radical Changes to Asylum Law.

The current immigration system often fails refugees, resulting in the return of countless LGBTQ/H asylum seekers to countries where they are abused, tortured, and killed.²⁴ 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. Moreover, the Proposed Rule runs contrary to the U.S.’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.

Exacerbating this, 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).

²³ Avert, *Homophobia and HIV* (last accessed July 2, 2020) <https://www.avert.org/professionals/hiv-social-issues/homophobia>.

²⁴ 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>.

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.

A. The Proposed Rule’s particular social group provisions impose an unrealistic disclosure requirement on LGBTQ 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).²⁵

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 55–56. This unprecedented bar would require applicants to immediately and clearly articulate every cognizable PSG before the Immigration

²⁵ Available at:

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

Judge or forever lose the opportunity to present it, even on a motion to reopen where an applicant relied on terrible advice from ineffective counsel.

While this requirement would raise serious due process concerns for all asylum applicants, it poses particular barriers to LGBTQ asylum seekers. For those applicants, the Proposed Rule essentially gives applicant's a single, momentary opportunity to declare themselves. This provision is fundamentally at odds with how LGBTQ identity works for a remarkably large number of asylum seekers.

Coming to terms with LGBTQ identity is a process: First, many refugees come from repressive countries with governments and non-governmental institutions that ostracize and harm LGBTQ people. In these countries, even talking about LGBTQ lives can be life threatening. Because of this, LGBTQ people may initially deny their own identity, and internalize anti-LGBTQ 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 have the opportunity to develop the ability to express it as a particular social group. Often, the asylum process is the first time applicants *ever* discuss their experiences.²⁶ 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.

Furthermore, understanding one's sexual orientation or gender identity is a process that may take 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 difficult 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 United States. This is an unrealistic and untenable burden for many LGBTQ asylum seekers.

[Add client stories that illustrate this issue.]

Lack of trust: Second, many LGBTQ refugees fleeing hostile countries may not feel comfortable immediately disclosing their status to authority figures. Disclosing one's LGBTQ 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 based on sexual orientation or gender identity. Given the trauma and shame associated with persecution on account of sexual orientation or gender identity, an applicant may be unable or unwilling to immediately reveal LGBTQ status.

²⁶ 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/>.

[Add client stories that illustrate this issue.]

B. 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 36281.²⁷

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 63. 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.

[Insert relevant example/client story re personal animus/retribution.]

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, *because they think they have never met another one*—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.

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).

[Insert relevant example/client story.]

Requiring a survivor of persecution to know how a persecutor has treated other LGBTQ people would operate as an effective bar. It would be manifestly unreasonable to require an individual applicant to prove that a persecutor has targeted or manifested animus against other LGBTQ individuals in order to show that the individual's own persecution was attributable to animus against their sexual orientation or gender identity. As a practical matter, it would often be impossible for such a survivor to know the past history of their persecutor, such that the applicant could ever prove this requirement.

Gender: The Proposed Rule's inclusion of "gender" as a nexus exclusion is particularly troubling. Proposed Rule § 208.1(f)(1)(viii); Notice at 64–65. Gender clearly meets the elements of a PSG under the standards of immutability, particularly, and social distinction accepted by the courts and as codified under the new Proposed Rule. 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 a result would be contrary to long established law and violate the U.S.'s non-refoulement obligations. The result would be devastating for LGBTQ refugees who, as discussed above, face severe persecution around the world.

C. 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 woman underwent electroshock “therapy” as punishment for protesting against state mistreatment of LGBT people).

Yet under the Proposed Rule, an adjudicator may conclude that a refugee defying an anti-LGBTQ law by living openly is not a “discrete cause related to political control.”

[Add facts showing that living openly is seen as a political statement.]

This would even extend to LGBTQ activism—conduct that is clearly understood as political in the United States. 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.

[Add facts showing that LGBTQ activism is seen as political speech.]

The result is that individuals who are attacked for their defiant conduct of living openly, or who are activists who are persecuted for publicly marching for LGBTQ rights, would not be considered to have a political opinion and would be denied relief on this ground.

D. 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 not 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” and “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 people. Many of the circumstances

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>.

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).

the Proposed Rule seeks to exclude are the very ways in which LGBTQ 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. Moreover, LGBTQ claimants regularly face threats that amount to persistent and conscious terror campaigns, which alone rise to the level of persecution.

[Insert relevant example/client story.]

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 claimants are regularly terrorized and detained as a punishment for their sexual orientation and gender identity. Many are forced to stay closeted or risk retaliation, imprisonment, and abuse, up to and including rape and homicide.

[Insert relevant example/client story.]

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

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).

or policies have been or would be applied to an applicant personally.” Proposed Rule §§ 208.1(e), 1208.1(e); Notice at 61–62.

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 same sex relationships carry the death penalty, the fact that LGBTQ people are “infrequently” stoned to death would disqualify these laws as persecutory. Such a result is morally reprehensible and makes a mockery of the U.S.’s commitment to humanitarian protection. 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 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. Finally, such laws permanently disenfranchise groups that the state views as disfavored, reducing their overall safety and stability in society.

Further, among other restrictions, the Proposed Rule explicitly directs adjudicators to not consider laws on the books that are “unenforced or infrequently enforced” unless the applicant can demonstrate the laws will specifically be enforced against them. This provision fails to take into account the chilling effect that such laws have. For example, an LGBT applicant may fear reporting a hate crime to the police because there are laws prohibiting LGBT activity in the country of origin. 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).

[Insert relevant example/client story and add facts showing effect of “unenforced” laws in other countries]

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

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

The Proposed Rule would bar consideration of evidence based on “cultural stereotypes.” This term is not defined, however, and 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.³³ This provision of the Proposed Rule would likely prevent LGBTQ/H asylum seekers from submitting crucial country conditions evidence necessary to establish their claim 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.

[Provide examples of the type of evidence included and why it is necessary. Consider including country conditions packets as examples. Be sure to link to them or include PDFs as part of your comments and indicate that the Agencies should review and incorporate them into the record. For sample LGBTQ country conditions materials that you can attach as examples to your submission, see Immigration Equalities website:
[https://immigrationequality.org/legal/legal-help/resources/country-conditions-index/.](https://immigrationequality.org/legal/legal-help/resources/country-conditions-index/)]

F. 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

³³ [insert sample country conditions submissions with Links to ImEq website]

caselaw. Under *In re 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. 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.

[Provide relevant examples/client stories, for example: In Mexico in 2018, armed men robbed and burned a shelter for transgender people from Central America who were waiting for permission to enter the U.S. to file asylum claims.³⁴]

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 and Honduras³⁷ face social

³⁴ See Aviva Stahl, *Shelter for LGBT migrants in Tijuana robbed and set on fire*, Women’s Media Center (May 11, 2018), <https://www.womensmediacenter.com/news-features/shelter-for-lgbt-migrants-in-tijuana-robbed-and-set-on-fire>.

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.”).

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

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.

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.

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 rewrites the INA, which explicitly 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 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

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>.

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>.

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.

[Add facts showing necessity of changed circumstances exception to HIV-positive applicants.]

G. 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:

- 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. **[Insert examples or relevant client stories. For example, a gay Saudi Arabian man could be deemed firmly resettled if he had a layover in a third country, even if that country is unsafe for LGBTQ people.]**
- 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 based on the asylum seekers inability to leave the third country, or based on fear of remaining in the third country. **[Insert examples or relevant client stories. 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.]**

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.

[Insert examples or relevant client stories.]

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

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

H. 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. [Insert relevant examples and case stories.]

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.

[Insert relevant examples or client stories.]

I. Unlawful, heightened standards for reasonable and credible fear interviews will cause LGBTQ/H applicants to be returned to persecution.

The Proposed Rule unlawfully heightens the statutory standards for establishing a credible or reasonable fear of persecution. Many LGBTQ/H applicants 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. Such individuals will not have time to collect their thoughts, let alone engage in the deliberate process of gathering corroborative evidence to support highly fact-specific inquiries at an interview screening.

As discussed above, LGBTQ asylum seekers already face unique obstacles in disclosing their status. This heightened standard will increase the already present risk and result of refoulement where they face severe harm and death.

Moreover, those who pass their screenings will be referred into asylum/withholding only proceedings, preventing them from applying for any other survivor-based relief that could apply (e.g., human trafficking, domestic violence). There is no governmental interest that justifies denying LGBTQ asylum seekers additional pathways to safety.

[Insert specific examples of the impact on clients.]

J. 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.

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

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 refolement.

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 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.

K. The Proposed Rule makes Convention Against Torture Relief unavailable for most LGBTQ/H people.

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

[Insert examples or relevant client stories.]

L. 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 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.

[Insert examples or relevant client stories.]

M. 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 implicate a reliance interest in the state of the law as it stands. This reliance interest is further prejudiced by the 30-day comment period allotted by the Agencies, such that in one swoop, previously eligible applicants may find themselves ineligible without any warning. Given the sweeping scope of the Proposed Rule, and the short timeframe, 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 [insert contact] at [insert email] to obtain further information.

Sincerely,

[add signature block]

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.